Wyoming Law Journal

Volume 4 | Number 4 Article 10

December 2019

The Tax Sale Purchaser's Law

Joseph R. Geraud

THE TAX SALE PURCHASER'S LIEN

The final step in the procedure to enforce the collection of delinquent property taxes is the county's statutory right to sell the property in satisfaction of its lien for taxes. The efficiency of the procedure is necessarily dependent upon the attractiveness of the purchase to potential bidders. The revenue needs of the government must be met through the statutory proceedings purporting to provide an adequate tax collection machinery. However, an historically strict construction by the courts of statutes providing for the forfeiture of property to the state for delinquent taxes has done much to protect the delinquent owner's interests to the detriment of the purchaser, thus making such sales unattractive. As a result, it has been the task of the legislature to enact detailed statutes to express its true intent. The most recent of such legislation in Wyoming are the statutes providing for a lien which a purchaser of delinquent tax lands may enforce as a means of gaining reimbursement for amounts expended in regard to the land.[1]

A brief review of the status of the purchased at a tax sale is perhaps necessary to understand the need of the lien. In *Brewer v. Folsom Bros.*[2] the Wyoming Supreme Court denied the right of a holder of a void tax title to be reimbursed for the purchase price and subsequent taxes paid on the property in an independent action against the owner of the land who had succeeded in regaining possession of the property sold for taxes in an earlier action. The court ably summarized the common law rule that a tax purchaser buys under the rule of caveat emptor and would get nothing unless he got the land itself, for if a tax sale was void, the payment of the tax stood on the footing of a voluntary payment. Only by statutory authorization could it be held that the purchaser acquired a lien for the taxes paid. Subrogation to any lien of the county was said to be clearly within the realm of the legislature, which had not provided for such a lien as other states had. On rehearing,[3] the attention of the court was called to statutes[4] which subrogate a tax sale purchaser to the right of the county against the debtor taxpayer as in the case of any title acquired by a purchaser at an execution sale which proves to be void. It was recognized that if a purchaser in good faith at a judicial sale, void by reason of defect in the proceedings, has obtained possession of the property, he will be entitled to retain such possession until he has been reimbursed; and not only when the suit by the original owner is to recover in equity, but also when it is one in ejectment, or a similar proceeding. However, the failure to set up such rights in the ejectment suit was held to be a bar to recovery in a later suit. Similarly barred was recovery for improvements on the land while the purchaser was in possession of the property. The occupying claimant law[5] was held to give the purchaser a right of retention only, and the right to reimbursement for improvements was lost when not claimed and possession of the property lost. Such a result was based on the premise that such a claim may be waived by the person in possession at the time of the suit asking affirmative relief. In the absence of finding a waiver, the

1. Wyo. Comp. Stats. secs. 32-1801 to 32-1809.
2. 43 Wyo. 433, 5 P.(2d) 283 (1931).
3. Brewer v. Folsom Bros., 43 Wyo. 517, 8 P.(2d) 517.
4. Wyo. Comp. Stats. 1945 secs. 3-3239 and 3-4240.
5. Wyo. Comp. Stats. 1945 secs. 3-7007 to 3-7009.

rule is well settled[6] that the owner of real property in the equitable actions to remove a cloud, quiet title, restrain issuance of a tax deed, cancel a tax certificate, set aside a tax bill, and to determine title, as against a purchaser at an invalid tax sale, must reimburse the purchaser for the amount of taxes paid, as a condition precedent to obtaining the affirmative relief sought. The rule is based upon the maxim that "he who seeks equity must do equity," and of course presupposes that the taxes were valid.[7]

From the purchaser's point of view, the *Folsom* decision made tax titles even less attractive in that the purchaser's only protection was restricted to a right of retention of possession to be enforced to gain reimbursement. However, two years after the decision it was nullified by the passage of statutes[8] granting a lien to the purchaser at a tax sale to insure reimbursement. Section 32-1809, Wyo. Comp. Stat. 1945, provides that if the holder of a tax deed is defeated in an action by the original owner of the land sold, the successful claimant shall be adjudged to pay the holder of the tax deed the amount of all taxes paid as well as costs of acquiring the deed with interest on the total amount. The amount is to be paid before the successful claimant is given affirmative relief or let into possession and it is made a lien against the land. Thus, failure to retain possession or failure to claim timely a right to reimbursement by the purchaser will not operate to the latter's detriment. Instead, it would seem that it is for the courts to automatically secure the tax purchaser's right to reimbursement when defeated in an action for recovery of land brought by the original owner.[9]

Inasmuch as Section 32-1809 applies only when affirmative relief is asked against the holder of a tax deed, Section 32-1808 grants a lien to the holder of a tax deed which has been discovered or adjudged to be invalid for any cause for which the purchaser has no legal right of recovery from the county. Thus, if the purchaser's title is found to be invalid in a proceeding in which affirmative relief is not asked as against the purchaser, he will still have a lien to secure reimbursement. Perhaps a discovery of an invalid title would be a situation in which it was found that an assessment roll for a particular year was defective and invalid. As to enforcing such a lien, Section 32-1808 merely provides that it should be enforceable, but reference should be made to Section 32-1801 which apparently duplicates the provisions of 32-1808 and 32-1809 and further provides a specific method of enforcing the lien. A more detailed discussion of Section 32-1801 will appear later.

The provisions of 32-1808 would seem to indicate that if no recovery can be had from the county by the purchaser or his assigns upon the discovery of the title's invalidity, a lien would arise which would be enforceable against the land. However, such an interpretation is subject to the limitations pointed out by Black in his work on tax titles, "If the circumstances were such that the owner never was under obligation to pay the sum charged to him, so that no enforceable lien

6. 86 A.L.R. 1208; see Brewer v. Kulien, 42 Wyo. 314, 321, 294 Pac. 777, 778 (1930).
7. Huber v. Delong, 54 Wyo. 240, 252, 91 P.(2d) 53 (1939). ("It may be conceded that if the sale is made when there are no taxes unpaid, the purchaser acquires no right to reimbursement.")
8. Laws 1933, ch. 76, secs. 1 and 2; Wyo. Comp. Stats. 1945 secs. 32-1808 and 32-1809.
9. Black, Tax Titles, sec. 467 (2d. Ed. 1893).

attached in favor of the state, it seems too plain for argument that no statute can place the purchaser in the position of holding a valid lien on the land. Hence, if the tax was vicious in its inception, because laid for an unlawful purpose, or for other reasons, there is and can be no lien for the purchaser of the illusory title."[10] The Wyoming court has recognized that if the sale is made when there are no taxes unpaid, the purchaser acquires no right to reimbursement.[11] Nor could a lien arise if the land were not subject to taxation or if the description were so imperfect as to fail entirely to identify the land intended to be sold.[12] In such a situation the state does usually reimburse the purchaser.[13]

Although Wyoming has provided for reimbursement of the purchaser by the county when the land was unlawfully sold,[14] from the standpoint of the tax sale purchaser a gap appears in the legislation purporting to protect his investment. In *County Commissioners v. Brewer*[15] the statute allowing reimbursement from the county was held to not apply to a purchaser of a tax title at resale from the county. Since such a holder of a void tax title cannot recover from the county, he would seemingly be within the provisions of Section 32-1808 and have a lien upon lands which had been sold through no fault of the owner. But as pointed out previously[16] the purchaser cannot have a lien upon lands unlawfully sold. In such a situation reimbursement should be had from the county, for to not allow reimbursement from the county would result only in benefit to the county since it could retain taxes unlawfully collected. No reference was made to the statutes providing for the purchaser's lien in determining the construction of the statute as applied to purchasers at resale and their right to redemption from the county with the result that no correlation was made of the purchaser's rights. Furthermore, the court indicated[17] that the statute authorized in a proper case a recovery by the purchaser of the redemption money paid to the county treasurer to the extent of the amount for which the land was sold for delinquent taxes. But such a construction of the statute giving a right to reimbursement to the purchaser from the county assumes that the original owner of the property would be under an obligation to redeem and pay the redemption money to the county, which the purchaser would have a claim to. Seemingly the statute applies to a case in which the property owner would not be obligated to redeem because the tax was unlawful or no taxes were unpaid, and neither the county nor the purchaser could have a lien for the unpaid taxes;[18] hence, there would be no redemption money. To further substantiate its decision the court said, "That the county in such a case should be required to refund the exceptionally high interest exacted upon redemption and also costs, as well as the principal sum for which the land was sold, in our judg-

10. Id. at sec. 469.
11. Huber v. Delong, supra note 7.
12. Black, op. cit. supra, note 9, sec. 469; see Street v. Bd. of Com'rs, 180 Okl. 177, 68 P.(2d) 514 (1937); Electrolytic Copper Co. v. Rambler Consol. Mines, 34 Wyo. 304, 311, 243 Pac. 126, 128 (1926).
13. 77 A.L.R. 824; Black, sec. 477.
14. Wyo. Comp. Stats. 1945 sec. 32-1625.
15. 50 Wyo. 419, 62 P.(2d) 685 (1936).
16. See note 10 supra.
17. 50 Wyo. at 438, 62 P.(2d) at 691.
18. See note 10 supra.

ment may not reasonably be sustained."[19] However, the same amount would have to be paid by the county to the original tax purchaser if the title proved invalid and the same objection could be made. Denying reimbursement to the purchaser at resale is certainly not consistent with the court's theory that "a purchaser from the holder of a tax title is entitled to the same rights as the original holder of such title."[20] Another reason advanced for denying reimbursement was that at resale by the county there is no restriction upon the amount for which the property may be sold, thus the county may be forced to repay more than the purchaser paid at the sale. In construing a similar statute the Nebraska court said[21] that the statute provided for repaying the purchaser money he has paid, with interest and costs, and applied the construction in awarding reimbursement to the fourth purchaser of a tax title. The maxim "he who seeks equity must do equity" has been applied to limit the amount of reimbursement to what was actually paid by the purchaser at a resale,[22] recognizing that a purchaser will normally pay less than the amount of taxes due. The action, arising under statutes similar to 32-1808 and 32-1809, did not pertain to refund from the county, but the seeking out of what the court thought was the legislature's true intention illustrates an approach which could be applied under Wyoming statutes. A comparable view is that if there is a statutory provision for refund, the rule of caveat emptor is not applicable.[23] A recent dissent to the Oklahoma rule not allowing a purchaser at resale to obtain a refund from the county favored overruling the court's previous decisions on the basis that the refund from the county "simply means the amount for which the property was sold to the purchaser, whether more or less than the amounts due on the tax liability. I think the statute was intended to abrogate the common law rule of caveat emptor as to purchasers at resales as well as to holders of certificate tax deeds. The previous decisions defeat the intention of the legislature and in measure continues the mischief sought to be avoided, by making it hazardous to purchase tax titles, thereby chilling tax resales, and materially reducing the public revenues that would otherwise be collected."[24] The reasoning of the dissent is in fact the rule followed in Nebraska, the basic premise being that through statutes, which are similar to Wyoming's, the legislature intended to promote tax sales by providing that in no event should a purchaser at a tax sale lose his money. He either gets a refund from the county or a lien upon the land of the delinquent taxpayer.[25]

So although the Wyoming court has recognized[26] the desire of the legislature that the purchaser at a tax sale be assured of reimbursement from the owner of the land for amounts expended, as indicated by passage of statutes providing for the subrogation of the purchaser to the county's lien, it has declined to extend protection on the basis of present laws to the purchaser who acquires no lien at a resale which proves to be void and seeks to gain reimbursement from the county. In

19. Supra note 15 at 439, 62 P.(2d) at 692.
20. Barlow v. Lonabaugh, 61 Wyo. 118, 156 P.(2d) 289, 298 (1945).
21. See Wilson v. Butler County, 26 Neb. 676, 42 N.W. 891 (1889); Spaulding v. State, 61 Neb. 267, 85 N.W. 82 (1901).
22. Coughlin v. City of Peirere, 66 S. D. 523, 286 N.W. 877 (1939).
23. Shea v. Owyhee County, 66 Idaho 159, 156 P.(2d) 331 (1945).
24. Howerton v. Board of Com'rs, 191 Okl. 169, 127 P.(2d) 173, 176 (1942).
25. Grant v. Bartholomew, 57 Neb. 673, 78 N.W. 314, 319 (1899).
26. See note 20 supra.

view of such a judicial construction it would seem that new legislation would be proper to fill the gap in present laws aimed at making tax titles more merchantable.

In addition to the statutes discussed heretofore securing the right of reimbursement to tax sale purchasers, a new proceeding was enacted in 1935 for gaining title to lands sold for delinquent taxes.[27] In some respects Section 32-1801[28] is a reenactment of Sections 32-1808 and 32-1809 in that all three sections give the purchaser a lien for all taxes paid on the land plus interest and costs. However, the lien of 32-1801 is broader in that it includes the value of all improvements placed on the land by the purchaser, thus nullifying the effect of the prior ruling of the court[29] that the tax purchaser lost his right to reimbursement for such improvements if he lost possession of the land. A similar statute was enacted pertaining to purchasers at a sale held for the satisfaction of drainage district tax liens,[30] but the discussion ensuing will not include the latter proceeding.

The procedure set out by the 1935 law is expressly made cumulative to the prior rights of a purchaser at a tax sale to acquire a deed upon the expiration of the redemption period.[31] Rather than apply for a deed, the purchaser may foreclose his lien four years after the date of sale as he would foreclose a mortgage. His lien is superior to any other lien, except junior tax sales or subsequent taxes, and attaches to the land. Every person having an interest in the land, as shown by the records of the county clerk and ex-officio register of deeds, is to be made a party to the proceedings. The decree entered by the court may contain an order of sale directed to the sheriff.[32] Upon confirmation of the sale by the court, the sheriff is to execute a deed as nearly as may be as in the cases of mortgage foreclosure, conveying to the purchaser of said property, his heirs and assigns, all the right and title, estate, claim and interest of all parties to the action in the land.[33] The proceeds of the sale are to be applied first to the payment of all costs, including attorney fees to the lienholder's attorney; second, to the payment of the sums due the lienholder; third, the balance to any prior owners or to the county sinking fund if no claimant appears.[34]

Perhaps the chief significance to be attached to the procedure is the probable change in judicial attitude toward tax titles, and the obtaining of a valid title by the purchaser at such a sale. Under the old tax sale procedure, the foreclosure of the owner's interest is accomplished by a strictly ministerial following of statutes with the supposedly delinquent taxpayer not having any judicial hearing. To protect his interests the courts demanded strict compliance with statutes with the result that almost any irregularity resulted in upsetting the tax deed. But under the new procedure the owner has his day in court so that there is no necessity for ordinarily invoking the rule of strict construction as his rights will be securely guarded by courts competent to afford him every protection that the law guaran-

27. Wyo. Laws 1935, ch. 84, sec. 1 to 7; Laws 1937, ch. 84, sec. 1.
28. The new procedure appears in Wyo. Comp. Stats. 1945 in secs. 32-1801 to 32-1807.
29. See notes 2 and 5 supra.
30. Wyo. Laws 1943, ch. 72, secs. 1 to 7; Wyo. Comp. Stats. 1945 secs. 71-2201 to 71-2207.
31. Wyo. Comp. Stats. 1945 sec. 32-1807.
32. Id. sec. 32-1801.
33. Id. sec. 32-1803.
34. Id. sec. 32-1804.

tees.[35] Inasmuch as the proceeding is similar to a quiet title action, the purchaser's chain of title would show a foreclosure of prior interests as being the source of title instead of the old dubious county tax deed subject to attack. The view has been expressed that the basic concept of statutes on tax foreclosures is that the foreclosure of a tax lien would be treated in the same manner as the foreclosure of a mortgage lien, or of a mechanic's lien.[36] Thus if a decree foreclosing a tax lien is to have the same dignity as a decree foreclosing any other lien, then, on collateral attack, it must stand against all objections based on defects in foreclosure except those defects going to the jurisdiction of the court. A suggested test as to what provisions of the statutes are jurisdictional is that, if the complaining party was denied a substantial right which would have been granted him had the statute been strictly followed, then the statutory requirement is jurisdictional; but if the defect itself did not affect the complaining party, it is not fatal to the jurisdiction of the foreclosure court.[37] Such a test would prevent a delinquent taxpayer from overturninng a tax title on the basis of an irregularity that in no way caused his tax delinquency or in no way caused his failure to defend successfully in the foreclosure suit.

To the extent that the foreclosure proceedings produce a valid title it would seem that tax resales of the land would be facilitated and the costs of the foreclosure compensated, especially in the case of county holding many delinquent certificates. The county may join all owners of real estate covered by its sale certificates as defendants[38] in one foreclosure action. The purchaser of delinquent land at the foreclosure sale or resale from the county would then be relieved of the costs of a quiet title action to perfect his tax title. Such a valid title should certainly serve as an inducement to the purchaser and result in placing the lands once again on the tax rolls. However, the advantages of the foreclosure to the individual lien-holder are not as apparent. If the desire of the lien-holder is to obtain title to the land, the securing of a tax deed followed by a quiet title action would seem to be more certain. Although the lien holder may bid at the foreclosure sale, he would have no assurance of being able to bid the property in. Furthermore, the period of redemption is extended up to the time of confirmation of the sale by the court, thus making it possible for the prior owner to redeem at a later date than under the old procedure. But if the lienholder is interested only in regaining his investment plus the attractive interest rate, he need only rely on his lien guaranteeing such reimbursement. So it would appear that the foreclosure procedure will be little used once the county issues a certificate of sale to individual purchasers.

The lien upon which foreclosure may be had is given to the holder of a tax deed as well as the holder of a certificate of purchase. But merger would seemingly operate to recognize only the title of the purchaser, for it would be truly an anomaly in our law to have a situation in which the holder of a lien also holds

35. See Haskins v. Dwight, 690 Or. 558, 139 Pac. 922, 925 (1914); Brown v. Bonoughli, 111 Tex. 275, 232 S.W. 490 (1921). (Sales under decrees foreclosing tax liens are not subject to the rule of strict construction).
36. See Linn County v. Rozelle, 177 Or. 245, 255, 162 P.(2d) 150, 155 (1945).
37. See Miller v. Henerson, 50 Wash. 200, 96 Pac. 1053 (1908); Frederick v. Douglas County, 176 Or. 54, 155 P.(2d) 925 (1945).
38. Wyo. Comp. Stat. 1945 sec. 32-1802.

title to the land subject to the lien. However, reference is made in Section 32-1801 to the enforcement of the foreclosure proceeding in an action in which the lien-holder is made a defendant. Such a provision may perhaps be construed as intending to make the foreclosure proceeding applicable to the situation which Section 32-1809 originally pertained to. That is, a situation in which the holder of tax deed is made defendant and it is adjudged that the deed is void; then, instead of making it necessary for such a defendant to bring a separate action to enforce the lien arising by virtue of the invalidity of the void tax deed, if the foreclosure procedure would be desirable for some reason, it could be enforced in the same action in which the title was adjudged to be void. If the lien can then be said to be the subject of foreclosure only when the tax title is void, it would follow that the holder of a tax title would have to allege and prove his title is invalid before being granted a foreclosure. Such a conclusion has been announced by courts of other jurisdiction in holdings that when a tax deed conveys title, the lien is satisfied;[39] that if a sale was made on foreclosure of the tax title holder's alleged lien it would only be of the interest of the owner from whom title was acquired, and that interest having ceased to exist, there would be nothing to sell under the foreclosure proceedings, and the enforcement of the tax lien would be an idle act and would only tend to cloud the title;[40] and if one brings an action to foreclose the lien after receiving title, he has the burden to show that such deed was ineffectual to convey the title as a mere admission of invalidity is not sufficient.[41] Nebraska has circumvented such holdings by a recent statute specifically providing that the holder of a tax title may surrender the same in court and then proceed to foreclose his lien. Whether or not such legislation would be advantageous in Wyoming is a question that will be answered only when the courts have an opportunity to determine the issue.

JOSEPH R. GERAUD.

39. Reichert v. McCool, 92 Ind. App. 406, 169 N.E. 86 (1929); Scott v. Federal Land Bank of Louisville, 92 Ind. App. 570, 162 N.E. 237 (1931); Board of Drainage Com'rs v. Alexander, 235 Ky. 689, 32 S.W. (2d) 22 (1930).
40. Halversen v. Pacific County, 22 Wash. (2d) 532, 156 P.(2d) 907, 911-912 (1945).
41. Burkhardt v. Millikan, 75 Ind. App. 708, 130 N.E. 837 (1921).
42. Rev. Stat. of Neb. 1943 sec. 77-1902.