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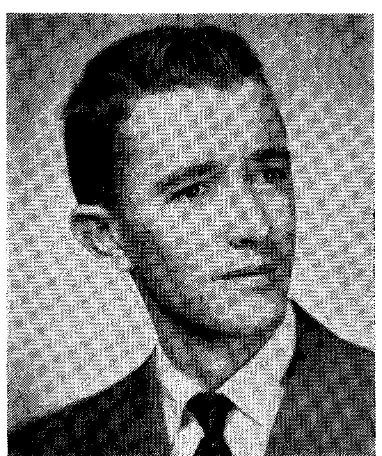
THE EFFECT OF TAX TITLES UPON EASEMENTS AND RESTRICTIONS UPON THE USE OF LAND IN COLORADO

By WILLIAM E. KENWORTHY



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In view of the great number of titles in Colorado which have at one time or another passed through a tax sale, it is not surprising to find the question occasionally arising as to the effect of a tax title upon various interests. Specifically, questions involving easements, restrictive covenants and equitable servitudes (sometimes called negative easements) involve a good deal of uncertainty. It seems to be generally assumed that such interests are extinguished by a tax title. Whether that assumption is valid is the question presented here. It is hoped that this article may help to provide an approach to a solution of that question.

I. EFFECT OF A TAX DEED TO THE DOMINANT ESTATE

It is well settled that the owner of land under a tax title may enforce all appurtenant servitudes and easements which existed prior to the tax sale.[1] In Colorado the statute regarding treasurer's deeds clearly seems to ordain that the purchaser of a tax title may enforce any rights which the previous owner possessed. That statute states:

> The deed shall be signed by the treasurer in his official capacity and when so signed shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed and also all right, title, interest and claim of the state and county thereto.[2]

[1] 11 Am. Law of Property, sec. 9.40; 168 A.L.R. 529.

[2] 1953 C.R.S. 137-10-37; see also Pyles v. Portland Gold Mining Co., 76 Colo. 598, 233 Pac. 618 (1925).

II. Effect of a Tax Deed to the Servient Estate

A. IN GENERAL

Analytically there would seem to be no sound basis for a distinction between the effect of a tax deed upon the benefit or upon the burden of a land use restriction. Yet the courts display a definite split of authority as to whether a grantee under a tax deed takes the land subject to restrictions. An implicit premise in the decisions on this subject may be a policy against the running of the burden of covenants.[3] In passing it should be noted that this is a policy which has found statutory sanction in Colorado.[4]

Other policy considerations play a part in the decisions as well. On one hand there are those who regard the security of titles as the Holy Grail of all attorneys. On the other hand others state that the question involved here is whether one person shall be deprived of property rights because another failed to pay his taxes. This had led some courts to say that to allow tax titles to extinguish the rights in question would be a deprivation of property without due process of law.[5]

There are at least two major factors upon which the decisions on this subject rest. The first of these is whether the tax sale is a proceeding *in personam* or *in rem.* If the proceeding is *in personam,* the grantee of a tax deed acquires a derivative title. Hence he takes the land subject to all burdens and restrictions enforceable against the previous owner.[6]

Where the tax foreclosure is a proceeding *in rem,* a new title to the property is created. It is well settled in Colorado that a tax deed initiates a new title.[7] However, this does not solve the problem, for even in those jurisdictions following the new title theory

[3] Restatement of Property (1944), div. V, pt. III, Introductory Note; II Am. Law of Property, sec. 9.14; compare Sims, "The Law of Real Covenants," 30 Corn. L. Q. 1.

[4] 1953 C.R.S. 118-8-1 and 3.

[5] Alvin v. Johnson, 241 Minn. 257, 63 N.W. 2nd 22 (1954); Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914); Crawford v. Senosky, 128 Ore. 229, 274 Pac. 306 (1929).

[6] II Am. Law of Property, sec. 9.40.

[7] McDermott v. Bent Co. Irr. Dist., 130 Colo. 44, 272 P. 2nd 995 (1954); Henrylyn Irr. Dist. v. Patterson, 65 Colo. 385, 176 Pac. 493 (1918); Morris v. Grauberger, 59 Colo. 164, 147 Pac. 674 (1915); Foster v. Clark, 21 Colo. App. 192, 121 Pac. 130 (1912), Wells v. Brown, 23 Colo. App. 190, 128 Pac. 869 (1913); Gibson v. Bragg, 24 Colo. App. 463, 135 Pac. 119 (1913); Sherman v. Greeley Building & Loan Ass'n., 66 Colo. 288, 181 Pac. 975 (1919).

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there is conflict in the decisions.[8]

The more modern approach places emphasis on the basis of assessment. If land is assessed with regard to any enhanced or depreciated value because of easements or use restrictions, then such interests are unaffected by a tax deed.[9] On the other hand, where the tax is assessed against the realty without regard to separate estates, such interests are extinguished.

There is Colorado authority for such a view in the case of *Mitchell v. Espinosa*,[10] which though not strictly in point deals with an analogous problem. It was there held that where there had been no valid assessment of severed mineral interests, a tax deed could not affect the rights of the mineral owners. The principle was broadly stated that a valid assessment is essential to a valid treasurer's deed. However, in deciding the case, the Court laid stress upon the fact that by the terms of the statute severed mineral interests are separately assessable. In contrast 1953 *C.R.S.* 137-1-15 provides:

> For the purposes of taxation it shall make no difference that the possession, use or ownership of any such property is qualified, limited, not the subject of alienation, or the subject of levy or distraint separately for the particular tax derivable therefrom.

B. EASEMENTS

The argument might be made that the above statute applies to appurtenant easements as well as to mere restrictions on use. Similar statutes have been construed in that manner.[11] Nevertheless it must be remembered that appurtenant easements are more tangible property interests than mere restrictions. In many instances an easement may approach ownership of the fee for all practical purposes, e.g. railroad rights of way, easements for a canal. Consequently, it has been held that easements are interests in land within the meaning of the Statute of Frauds.[12] Therefore it is suggested that easements, at least those which as a practical matter can be separately assessed, may come within the doctrine of *Mitchell v. Espinosa*.[13]

There is one Colorado case on this subject which has been the subject of varying interpretations.[14] The plaintiff was seeking relief against the closing of an alley to his ingress and egress. The alley in question had never been conveyed to the city; consequently the land had been taxed and conveyed by treasurer's deed to the defendant. The trial court's judgment for the defendant

[8] An extensive annotation on the subject may be found at 168 A.L.R. 529. Subsequently the following cases have held that easements are not extinguished by a tax deed: Alvin v. Johnson, 241 Minn. 257, 63 N.W. 2nd 22 (1954); Engel v. Catucci, 91 U.S. App. D.C. 54, 197 F. 2nd 597 (1952); Evans v. City of Jackson, 201 Miss. 14, 28 So. 2nd 249 (1946). Contra: Kern v. Schaar, 338 Mich. 637, 62 N.W. 2nd 614 (1954); Douthett v. Walkotten, 335 Mich. 612, 56 N.W. 2nd 399 (1953).

[9] Engel v. Catucci, 197 F. 2nd 597 (1952), and cases cited therein.

[10] 125 Colo. 267, 243 P. 2nd 412 (1952); Johnson v. McLaughlin, 125 Colo. 298, 242 P. 2nd 812 (1952).

[11] Wolfson v. Heins, 149 Fla. 499, 6 So. 2nd 858 (1942); Hill v. Williams, 104 Md. 595, 65 A. 413 (1906).

[12] Stewart v. Stevens, 10 Colo. 440, 15 Pac. 786 (1887); Workman v. Stephenson, 26 Colo. App. 342 (1914).

[13] Supra, note 9.

[14] Smith v. Griffin, 14 Colo. 429, 27 Pac. 905 (1890).

was affirmed by the Supreme Court.

From the result of the case and certain language contained in it, some authorities feel that the case is authority for the proposition that a tax title extinguishes an easement. Specifically they refer to the statement at page 430 that if appellant (the former owner) was trying to close the alley and a purchaser from him of a lot in the block was objecting, appellant would be estopped from interfering with the use of the alley. Therefore, it is said by some, because the land passed through a tax sale, the easement was destroyed. It is submitted that this view is fallacious in that it fails to distinguish between the refusal to create an easement by estoppel and the destruction of an existing easement by a tax title.

The actual holding of the case, as stated at 168 *A.L.R.* 535 is that no easement ever existed in the alley. At page 430 the court said:

> The title passed to Mrs. Griffin under her tax deed; and, *unless subject to an easement,* she acquired the right to fence and use it in accordance with the dictates of her private interest. (emphasis supplied.)

Thereafter the court proceeded to hold that: (1) No estoppel against Mrs. Griffin existed; (2) No easement by express grant was made; (3) No prescriptive right had been acquired; (4) No case was made for a way of necessity. Thus the court seems to have assumed that a tax sale would not extinguish an existing

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easement; then it held that an easement had never existed. It is obvious that most of the opinion would have been unnecessary if the court had decided that a treasurer's deed extinguishes an easement. If anything, the case stands for the proposition that an easement survives.

A peculiar situation arose in a recent case in North Dakota where it was held that a tax title destroys a subsequently established prescriptive easement.[15] It was disclosed that the adverse user would have ripened into a prescriptive easement sometime between 1908 and 1938. The treasurer's deed was not issued until 1938, but it was held that the title thus acquired related back to 1909, the date of the earliest unpaid assessment. This was held to prevent the acquisition of a prescriptive right since a "new title" had been created. It was also recognized by the court that, "Only the interest properly assessed can be sold at a tax sale."

The trend of the later decisions seems to be toward the position that tax titles do not extinguish existing easements appurtenant.[16] These cases and the policy expressed in them have led to the adoption in the Restatement of Property of the rule that easements appurtenant are not extinguished.[17] It is felt that even though easements are not separately assessed, an assessment based upon actual value must reflect their existence by lower values on the servient estate and higher values on the dominant estate. Logic would require that this principle be limited to those easements which would be reasonably apparent to an assessor.

Finally it should be noted that the reasoning fails when applied to easements in gross. In such instances there is no dominant estate which can be assessed to reflect the value of the easement. Consequently easements in gross probably would be extinguished by a tax title.[18]

C. EQUITABLE SERVITUDES

If the basis of assessment theory is to be followed, several difficulties will be encountered in Colorado in determining the basis of assessment. As previously noted, 1953 *C.R.S.* 137-1-15 states that for purposes of taxation it shall make no difference that the use of property is qualified or limited. Yet 1953 *C.R.S.* 137-1-2 provides that "All taxable property . . . shall be assessed at its full cash value." The fact that there are restrictions upon the use of land is certain to be reflected in its market value. It might therefore be said that restrictions on the use of land are reflected in the basis of assessment—full cash value. Certain cases have followed that line of reasoning.[19]

Further complications are caused by the Colorado rule that

[15] Conlin v. Metzger, 77 N.D. 620, 44 N.W. 2nd 617 (1950).

[16] See note 7. Alvin v. Johnson, 241 Minn. 257, 63 N.W. 2nd 22, and Engel v. Catucci, 197 F. 2nd 597, are particularly well considered cases with extensive citation of authorities.

[17] Restatement of Property, sec. 509 (2).

[18] Restatement of Property, sec. 509 (1); Hunt v. Boston, 183 Mass. 303, 67 N.E. 244 (1903); cf. Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 351, 40 A.L.R. 1516 (1924).

[19] Crawford v. Senosky, 128 Ore. 229, 274 Pac. 306 (1929); Alamogordo Improv. Co. v. Prendergast, 43 N.M. 245, 91 P. 2nd 428, 122 A.L.R. 1277 (1939); Schlafly v. Baumann, 341 Mo. 755, 108 S.W. 2nd 363 (1937). The same contention was specifically rejected in Nedderman v. Des Moines, 221 Iowa 1352, 268 N.W. 36 (1936).

restrictions on the use of property are not an estate or interest in land.[20] The difficulty of holding that rights which are not interests or estates in land may be included in the basis of assessment for real estate taxes is readily apparent. On the other hand one wonders how the sale of land for taxes can affect rights which are not realty. Of the other states following this view only Washington seems to have considered the effect of tax titles on land use restrictions.[21] The decisions in the Washington cases are based upon a peculiar statute relating to tax liens in holding that a tax title extinguishes all prior interests.[22] Probably the statement that restrictions on the use of land are not estates or interests therein should be restricted to cases involving the Statute of Frauds where it originated. Its application to the present question leads nowhere.

Considerations of public policy also play a role in the decisions on this subject. It has been said that restrictive covenants and servitudes in subdivisions enhance the value of the land, and that to destroy this servitude would be to diminish the assessed valuation of the surrounding lots. The following premise is that tax sales should not have the effect of reducing the assessed valuation in the community.[23] In *Hayes v. Gibbs* the court said:

> We do not believe that the legislature intended, nor do the holdings of this court lend color to the theory, that tax lien foreclosures and sales should decrease the value of the realty holdings of citizens by destroying restrictions on the use of real estate mutually beneficial to individual citizens in increasing the value of such holdings and the state in increasing its revenue from taxation.

However these decisions are probably inapplicable in Colorado in view of the policy expressed in both statutes and cases favoring the free and unrestricted use of land.[24]

[20] Thornton v. Schobe, 79 Colo. 25, 243 Pac. 617 (1926).
[21] Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 194 Pac. 536 (1920), held that an equitable servitude was enforceable even though oral.
[22] Messett v. Cowell, 194 Wash. 646, 79 P. 2nd 337 (1938); Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911).
[23] Schlafly v. Baumann, 341 Mo. 755, 108 S.W. 2nd 363 (1937); Northwestern Improv. Co. v. Lowry, 104 Mont. 289, 66 P. 2nd 792, 110 A.L.R. 605 (1937); Alamogordo Improv. Co. v. Prendergast, 43 N.M. 245, 91 P. 2nd 428, 122 A.L.R. 1277 (1939); Hayes v. Gibbs, 110 Utah 54, 169 P. 2nd 781, 168 A.L.R. 513 (1946); Restatement of Property, sec. 567.
[24] 1953 C.R.S. 118-1-1 and 3; Flaks v. Wichman, 128 Colo. 45, 260 P. 2nd 737 (1953).

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D. CONDITIONS SUBSEQUENT AND POSSIBILITIES OF REVERTER

All that has been previously said with regard to equitable servitudes is equally applicable to rights reserved exclusively in the grantor and his heirs. However, there is a distinction between these interests which makes it possible to say with a degree of certainty that rights reserved in the grantor are extinguishable by a tax title.

In *Alamogordo Improv. Co. v. Hennessee*[25] it was held that under the New Mexico statutes a tax deed created a new title which extinguished a possibility of reverter. In holding that an equitable servitude was not extinguished by a tax title the Montana court stated that the New Mexico case was correct but not in point.[26] The distinction was confirmed two years later by the Supreme Court of New Mexico when it was confronted with an identical restriction phrased as an equitable servitude.[27] It was stated that the Hennessee case properly held that a reversionary interest was destroyed by a tax title but that the decision was not controlling where rights enforceable in equity were involved. Equitable servitudes were then held to survive a tax sale.

The rationale of these decisions is not clearly stated, but there would appear to be a clear distinction between the effect of a tax title upon the rights of parties in the chain of title and of those whose only link is a common grantor. In addition the cases may be analyzed on the same basis that easements in gross and easements appurtenant are distinguished. With reversionary interests there is no parcel of land to which the right can be said to be appurtenant so as to increase its assessed valuation. But equitable servitudes are rights running with certain parcels of land and will thereby affect assessments.

E. CONCLUSION

Thus this discourse nears its end having proven little more than that its writer doesn't know any answers. For those desiring an answer, it can be found in the *Denver and Colorado Bar Association Title Standards, No. 47.* It is stated there that, "Such a tax deed extinguishes any restrictive covenants existing prior to the tax deed." With due regard for the Title Standards Committee it is suggested that under the present state of the law such a positive assertion may not be justified.

[25] 40 N.M. 162, 56 P. 2nd 1127 (1936).
[26] Northwestern Improv. Co. v. Lowry, 104 Mont. 289, 66 P. 2nd 792, 110 A.L.R. 605 (1937).
[27] Alamogordo Improv. Co. v. Prendergast, 43 N.M. 245, 91 P. 2nd 428, 122 A.L.R. 1277 (1939).

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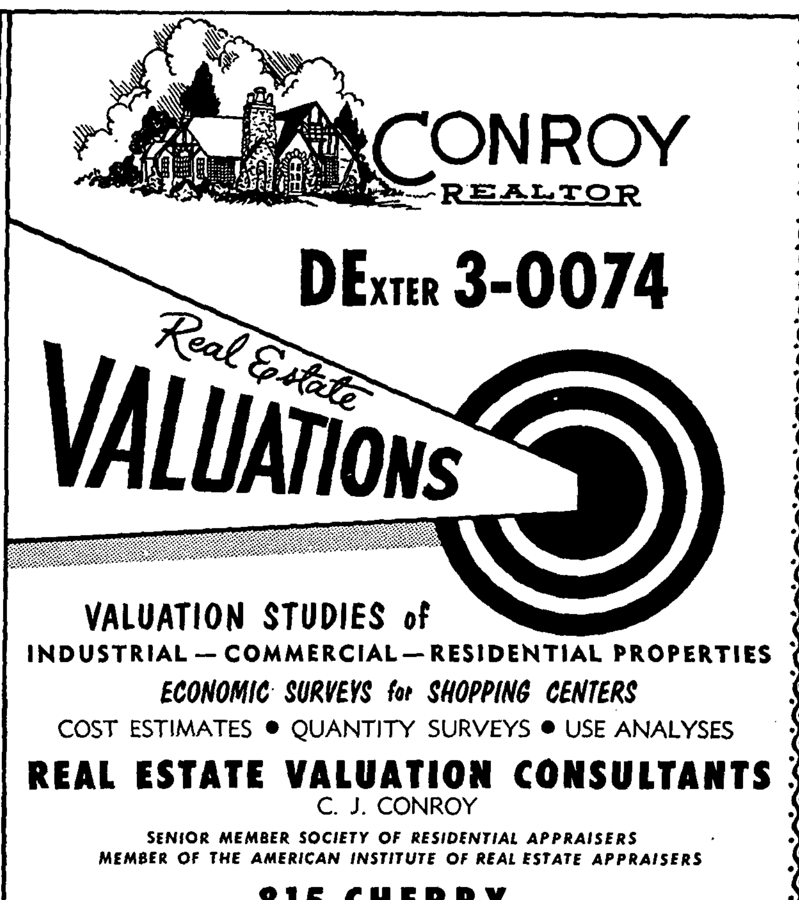

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