NEW JERSEY COURT OF ERRORS AND APPEALS.

AUGUST L. LACOMBE, *Complainant-Respondent,* *and* HILDA H. HEADLEY and HAROLD W. HEADLEY, *Defendants-Appellants,*	*On Appeal from the Court of Chancery.*

BRIEF FOR THE COMPLAINANT.

The complainant filed a bill to quiet title to premises consisting of two lots purchased by him at a tax sale under the Tax Adjustment Act (P. L. 1898, p. 442, Compiled Statutes, Vol. 4, p. 5251). The premises are situated on the northerly side of Welland avenue, Irvington, Essex County, New Jersey, as described in complainant's Bill of Complaint. The complainant purchased the lots at the tax sale, aforesaid, held on the eleventh day of February, 1909, and on the thirteenth day of September, 1909, received a deed conveying said premises from Albert E. Webb, Tax Collector of the Town of Irvington.

Subsequently, William F. Headley attempted to obtain title to these same lots by a deed from the former owners, Ida Tichenor, *et als.*, heirs of Alfred Tichenor.

This deed was dated May 28th, 1914, and recorded August 12th, 1914. William F. Headley and Etta M. Headley, his wife, on October 19th, 1914, conveyed the premises in question to Hilda H. Headley, wife of Harold W. Headley, who now claims title to said premises.

I.

A Tax Collector's deed, given to a purchaser at a tax sale, under the Tax Adjustment Act (P. L. 1898, p. 442, Compiled Statutes, Vol. 4, p. 5246) is not invalid as against a bona fide purchaser from the prior owner, without notice, whose deed is first recorded, the Tax Collector's deed not being within the purview of Section 54 of the act concerning conveyances (2 Compiled Statutes, 1553).

Section 54 of the Conveyance Act provides that every deed or instrument of the nature or description set forth in the 21st Section of this act, shall, until duly recorded, be void as against all subsequent *bona fide* purchasers for value, not having notice thereof, whose deed shall have first been duly recorded.

The act under which the sale to August L. Lacombe took place provides for the adjustment of the tax by commissioners, confirmation of their report by the Circuit Court, the sale of lands by public advertisement. Each stage of the proceeding is conducted with the utmost publicity. Section 6 of the act (4 Compiled Statutes, 525) provides that after the sale, the Collector shall execute and deliver to the purchaser a certificate of sale; Section 7, that any person having an estate in or lien upon the lands may, at any time up to the expiration of six months from the date of the certificate of sale, redeem the lands; Section 8, that if the lands have not been redeemed within six months the Collector of Taxes, at the expiration of said six months, upon the surrender of the certificate, shall execute under the seal of the town, attested by the Clerk of said town, and proved according to law, and deliver to the purchaser a deed of conveyance for said lands, in fee simple, absolute, free and discharged from

any estate in or lien upon the same, in favor of any person made a party to the proceeding. The deed is made presumptive evidence of the title in the grantee. After the sale the purchaser becomes the equitable owner of the property, subject only to the right of any person interested to redeem within a period of six months. He is entitled to immediate possession.

Section 11 (4 Compiled Statutes, 5253), upon the expiration of the six months' period the right of redemption of the prior owner is cut off, and the prior owner has no further interest in the property.

II.

Upon the expiration of the six months' period the right of redemption of the prior owner is cut off and the prior owner has no further interest in the property, and therefore cannot make a valid deed of conveyance.

After the time of the redemption has expired, all right, title and interest of the former owner ceases, and during that time the only one capable of making a valid deed is the Collector of Taxes, the former owner having been, by the tax adjustment proceedings, deprived of any rights in the premises. It is, therefore, quite obvious that having been deprived of the title, no deed could be executed conveying premises formerly owned by them, and the defendants-appellants could in no way obtain any better title than the former owners had, and the fact that the defendants-appellants' deed was recorded could in no way perfect their title. The rights of the prior owner are not cut off by the delivery of the deed by the Tax Collector, but by the sale under the statute, plus the expiration of the period provided for redemption.

III.

Recording of a deed given by a Tax Collector by virtue of the authority given by the Tax Adjustment Act, is not necessary in order to give notice to a subsequent purchaser for a valuable consideration.

As hereinbefore stated, all of the provisions of the Tax Adjustment Act of 1898 were complied with, which fact was conceded by the defendants-appellants, and there was no attempt at the hearing to upset in any manner the proceedings under the Tax Adjustment Act. In fact, it is quite evident that William F. Headley, who purchased the lots originally from the heirs of Alfred Tichenor, was present at the sale. On page 23 of the State of the Case, August L. Lacombe testified as follows:

> "Q Where did this sale take place at which you purchased these lots? A Town Collector's office.
> Q Town of Irvington? A Yes.
> Q Was Mr. Headley there at that time? A He was.
> Q This Mr. Headley? A Yes.
> Q Where was he? A Stood right alongside of me.
> Q And did you buy those two lots at that time? A I bought those two lots."

And also on page 13 of the case, August L. Lacombe, the complainant, testified as follows:

> "Q And what possession did you take of them; what evidence of possession did you make? A We put up a fence and used them in my business in contracting; keeping wagons and ashes and stones and stuff like that on it.

Q Those lots are near your house, are they? A Right back of my place.

Q Are you still using the lots? A Yes.

Q Do your wagons have your name on? A Yes.

Q (*By the Court.*) When did you put the fence up? A Why, some time after the spring of 1909.

Q (*By the Court.*) But how long after the spring of 1909? A Well, I don't just know the day, whenever our men were at leisure.

Q (*By the Court.*) Was it in the year 1909? A Yes."

And on cross examination Mr. Lacombe stated that this was the state of affairs up to the date of the hearing.

In *Glorieux* v. *Lightpipe,* 88 N. J. L., 199, in considering the language of Section 53, held that the words "subsequent purchaser" referred to subsequent purchasers of the same land. The defendants-appellants were not subsequent purchasers, and could not be considered as such, due entirely to the fact that the right to convey was only in the Collector of Taxes of the Town of Irvington, the former owners having been entirely deprived of their title by the proceedings under the Tax Adjustment Act, and it is to be assumed that the words in Section 54, "subsequent purchaser," must be confined to subsequent purchasers of the same land and of the same grantor, and that the grantor must, at the time of the making of the deed to the subsequent purchaser, have the right to make such conveyance, assuming the prior unrecorded deed to be void.

There is nothing in the Adjustment Act which required that there should be inserted in the deed given by the Tax Collector the name of the prior owner. If it were

not for the use in some county of the Luck Index System, a prospective purchaser, to obtain notice of the Tax Collector's deeds, would be obliged to examine every tax collector's deed recorded, an intolerable burden. If record is to be of no substantial value, it is hard to imagine why it should be required, although it is quite apparent why it should be permitted for the purpose of perpetuating evidence and making a copy of the record evidential, this being the initial purpose of the Registry Acts.

It was not until 1820 (Sec. 10 of the Act of 1821, p. 747) that an alphabetical index was provided for (Nixon's Digest, Title Conveyances, p. 144, Sec. 21); it was not until then that sheriff's deeds and deeds executed by other officers were referred to in any wise; that section provided that there should be an index, in case the deed be made by a sheriff, the name of the sheriff, and the name of the defendant or defendants mentioned in the execution, and if by executor or administrator, the name of such executor or administrator, and the testator or intestate, and if by attorney or attorneys, the name of such attorney or attorneys, and his or their constituents, and if by commissioners under a law of this State, or appointed by order of any of the courts of this State, the name of such commissioners and the name of the person whose estate has been conveyed.

No provision has been made for an alphabetical index with respect to tax collector's deeds. It was not until 1864 (P. L. 1864, p. 498), that provision was made requiring that sheriff's deeds should be executed in such manner as they might be recorded. That section provided for the familiar affidavit as to the method of sale, and that upon the conveyance being approved by the Court, it might be recorded as if duly acknowledged, and

further that such conveyance or the record thereof, or a certified copy of the record, should be evidence of a good and valid sale, and the conveyance of said land and real estate, as if the same had been reported to and approved by the Court in pursuance of whose decree, judgment, execution or order the same was made.

It would appear as if the Legislature had intended that tax deeds should be within the purview of the statute providing for recording deeds; it would have, as most other States have, provided for a certain length of time in which such deeds might be recorded.

In the General Tax Act of 1903, there is a distinct provision for the record of certificates of tax sales, etc. There is no such provision in the Tax Adjustment Act. It is, therefore, logical reasoning that tax collector's deeds are not within the purview of the 54th Section of the statute, as hereinbefore stated; that even assuming it to be void, the prior owner still has no right to convey; his rights are cut off, not by the delivery of the deed, but by operation of law.

It is, therefore, respectfully contended, that the heirs of the Tichenor estate had lost their interest and their right of conveyance by the proceedings under the Tax Adjustment Act, and that by no method of reasoning could the deed made to William F. Headley convey any title to him, and he, therefore, could transfer no title to Hilda H. Headley and Harold W. Headley, defendants-appellants.

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New Jersey Court of Errors and Appeals

Between,

AUGUST L. LACOMBE,
Complainant-Respondent,
and
HILDA H. HEADLEY AND HAROLD W. HEADLEY,
Defendants-Appellants.

On Appeal from the Court of Chancery.

Brief of Counsel for Hilda H. Headley and Harold W. Headley, Defendants-Appellants

This is a bill to quiet title brought by August L. Lacombe, who claims to be a purchaser of two lots at a tax sale under the Tax Adjustment Act, P. L., 1898, page 442, Comp. Stat. Vol. 4, page 5251. Premises in question being unimproved property fifty feet front and rear by one hundred feet deep, situate on the northerly line of Welland avenue and beginning two hundred and fifty feet northwest from Chester avenue, and extending to a point three hundred feet northwest from Chester avenue, in the Town of Irvington, Essex County, New Jersey.

August L. Lacombe purchased said premises February 11, 1909, from the Tax Collector of the Town of Irvington, receiving a certificate of sale. On September 13, 1909, complainant-respondent surrendered his certificate and received a deed duly executed and acknowledged by the said collector, in which, premises in question are described as lots Numbers 32, 33 Block No. 350. Complainant-respondent has not recorded his tax deed.

It was admitted that William F. Headley held the record title to said premises on October 19, 1914.

By deed bearing date October 19, 1914, William F. Headley and Etta M. Headley, his wife, conveyed premises in question to Hilda H. Headley wife of the defendant-appellant Harold W. Headlay which deed was duly acknowledged and recorded on the same day in Book G. 55 of Deeds for Essex County, on pages 25 etc.

The defendant-appellant, Hilda H. Headley was a *bona fide* purchaser of the premises in question for value without notice of any deed or claim of the complainant-rospondent, and her deed was filed of record before the tax deed under which complainant-respondent claims title.

I

THE TAX COLLECTOR'S DEED TO LACOMBE IS VOID AS AGAINST HILDA H. HEADLEY, IN THAT HER DEED IS AN INSTRUMENT UNDER SEAL RECITING A GOOD AND VALUABLE CONSIDERATION, DULY ACKNOWLEDGED AND RECORDED PRIOR TO THE TAX COLLECTOR'S DEED TO COMPLAINANT-RESPONDENT.

P. L. 1898, Chap. 193, Sec. 8, Page 450, provides that the tax collector's deed shall be proved according to law. This brings the tax collector's deed in question directly within the meaning and scope of Section 21 of the Conveyance Act, P. L. 1898, page 670.

Section 54 of the Conveyance Act, P. L. 1898, page 670, provides that every deed or instrument of the nature or description set forth in the twenty-first section of this act shall until duly recorded, be void as against all subsequent *bona fide* purchasers for value, not having notice thereof whose deed shall have first been duly recorded.

II

THE TAX COLLECTOR'S DEED TO LACOMBE WAS VOID AS AGAINST WILLIAM F. HEADLEY.

It was admitted that William F. Headley purchased premises in question in fee from the tax collector for taxes for the year 1907 sold in 1909, taxes 1910 sold in 1911, and for taxes 1911 sold in 1912. After the expiration of the time for redemption under said tax certificate William F. Headley obtained a good and sufficient deed for the premises in question from those holding record title and paid a good and valuable consideration for the same, which deed was recorded prior to the tax deed to Lacombe.

Lawyers Report Annotated Book 22, page 256—Note on Sale by Record owner—"There seems to be no question but that if the one having record title sells the land to a stranger, who pays the purchase money to him without notice of the claim of the true owner, this purchaser will acquire a good title."

In *Wendell* vs. *Van Rensselaer,* 1 Johns Ch. 344, 1 L. Ed., 165: "Before the passage of the recording acts, a grantee who concealed his deed from the world and left the grantor in possession, permitting him to deal with the property as his own, would not be permitted to assert title as against subsequent grantees." 2 Colo. App., 271. *First National Bank* vs. *Cawfell.*

In *Clement's Executors* vs. *Bartlett,* 33 N. J. Eq., page 43, Chancellor Runyon held that: "The State is bound by the statute providing for the registration or recording of mortgages for real estate," and says, page 46:

> "Unless the claim of the State can be maintained on the ground of Governmental prerogative, it is obviously insupportable. It cannot be maintained on that ground * * *. The

act under consideration makes no reservation or exception in favor of the State. Its terms are general and sweeping * * *. The State itself by the statute, in effect, declared to Clement when he took his mortgage, that if any unregistered or unrecorded mortgage, of which he had no actual notice, existed on the property, it would be void and of no effect against that which he proposed to take thereon."

Losey and Hoagland vs. *Simpson, Estell* and others, Stockton's Reports, Vol. 3, pages 246-249, we find:

"But, by the very language of the statute, the deed from Adams to Kanouse is void and of no effect against the subsequent deed from Adams to Simpson, because it was not recorded at or before the time of record of the subsequent deed. The whole object of the registry acts is to protect subsequent purchasers and encumbrancers against previous conveyances which are not recorded. The title upon the record is the purchaser's protection, and when he has traced a title down to an individual, out of whom the record does not carry it, the registry acts make that title the purchaser's protection." This decision is quoted and approved in 29 E. 338, at page 344.

In *Coleman* vs. *Barklew*, 27 N. J. L., 357, Chief Justice Green, states:

"Nor is the defendant entitled to any straining of the principles of law for his protection. If he suffered any prejudice it was occasioned by his own latches and negligence in not recording his title.

"The statute declares that every deed or conveyance shall be void and of no effect

> against a subsequent judgment creditor or *bona fide* purchaser, or mortgagee for a valuable consideration, not having notice thereof; upon the face of the documentary title the plaintiff is entitled to recover unless the defendant establishes the fact of notice. The burden of proof is upon him."

In *Hodge's Executors* vs. *Amerman,* 40 E., 99, page 106, Vice-Chancellor Van Fleet says:

> "This suit is the direct result of the negligence of their ancestor. He omitted to do what the security of his title required him to do and this suit is the direct consequence of that omission."

There are no exceptions or provisos in the Conveyance Act which might include a deed of conveyance given by a town collector of taxes and if exceptions were made in favor of deeds given by collectors, sheriffs, special masters or others acting by court authority, such exceptions would take from titles to land that security which this statute is intended to give.

In *Holmes* vs. *Stout,* 10 N. J. E., 419, at page 425, Chief Justice Green says:

> "To destroy the title acquired by prior registry, it is necessary that a party should have notice of a prior subsisting outstanding title. It is not enough that he has notice that a prior deed had been executed, if the notice conveys also the information that the title is not in existence. The ground upon which the title is acquired by a prior registry of a deed is lost in case of notice to the second grantee of the existence of the prior conveyance, is that it is a fraud in the second grantee to take a deed knowing or having reason to suspect the existence of the prior title."

And on page 427, quoting Chief Justice Parsons, in *Norcrosse* vs. *Wedging,* 2 Mass., 508, Chief Justice Green continues:

> "The provision of the statute for registering conveyances is to prevent fraud by giving notoriety to alienations."

III

THE UNRECORDED DEED OF CONVEYANCE GIVEN BY THE TOWN COLLECTOR OF TAXES TO COMPLAINANT COULD HAVE BEEN RECORDED AND IF RECORDED WOULD HAVE BEEN NOTICE.

Section 8 of the Tax Adjustment Act of 1898, page 450, provides:

> "If said lands have not been redeemed within six months from the date of the certificate of sale, the collector of taxes, at the expiration of said six months, upon the surrender of the certificate, shall execute, under the seal of the town, township, borough or other municipality, attested by the clerk of the said town, township, borough, or other municipality, and proved according to law, and deliver to such purchaser, his heirs or assigns, a deed of conveyance for said lands in fee simple, absolute, free, and discharged from any estate in or lien upon the same in favor of any person made a party to the proceedings hereinabove provided for, which deed shall not be subject to attack in any collateral proceeding, and shall be presumptive evidence of title in the grantee therein named in all courts and places and in any proceedings or actions to be by such grantee, his heirs and assigns, taken, prosecuted or defended for the recovery of the posses-

sion of the lands so sold as aforesaid, or in the establishment or defense of his or her title under such deed."

Chapter 193, Laws 1898, Sec. 16, excepts the right of any *bona fide* purchaser, whose purchase was made subsequent to the expiration of the lien of taxes subsisting at the time of the making of such purchase.

"A deed given under the provisions of this act (1898, page 442), approved May, 1898, must be recorded in compliance with the Conveyance Act which was approved June 14, 1898, and any part of the Tax Adjustment Act inconsistent with the Conveyance Act was repealed thereby."

Taxes become a lien on property only by force of express legislation, *Linn* vs. *O'Neill,* 25 Atl., 273; *Johnson* vs. *Van Horn,* 45 N. J. L., 136; *Barkley* vs. *Elizabeth,* 41 N. J. L., 518.

Laws 1909, page 247, provides: "It shall be the duty of the county clerk or register of deeds with whom such deed or instrument is filed for record, within five days thereafter, to present an abstract of such deed or instrument to such assessor or other custodian as aforesaid, who shall properly note and record the change." Compiled Statutes of N. J., page 5089, under 9 B, taxes and assessments.

As against one who becomes a purchaser or mortgagee of lands in this State after the first day of February in any year, without notice that taxes levied on the land in previous years were unpaid, such taxes have ceased to be a lien; *Robinson* vs. *Hurlick,* 51 At., 493; also P. L. 1903 at page 46 (5131 Compiled Statutes) delinquent taxes are to be filed on or before the first day of February of the next year in county clerk's office which record constitutes notice for two years only.

The deed in question contained the names of all parties in interest and was signed and proved by the tax collector. "Sale of property after the ad-

justment of the taxes removes the tax lien upon surrender of the certificate and acceptance of deed." *Fernyhough* vs. *Rockwell,* 31 S. D., 75; 139 N. W., 790. The purchaser relies on his deed and is in no better position than as if he received a deed from the prior owners. The deed must be properly proved and recorded, otherwise it is void as against a subsequent *bona fide* purchaser for value who shall first record his deed.

Ellis vs. *Smith,* 10 Ga., 253; *Wildell Lumber Co.* vs. *Turk, et als,* 75 W. Va., 26, 83 S. E., 83.

The provision that the deed shall be proved according to law is obviously to bring the tax collector's deed within the scope of section 21 of the Conveyance Act above set forth which was passed after this act and necessitates the recording of the tax deed under section 5 of the Conveyance Act.

Section 21 above set forth included tax collector's deeds for it includes all deeds affecting lands, and adds:

> "All other instruments that may have been heretofore or may be hereafter directed by any statute to be acknowledged or proved and recorded."

No other provision or place for recorded deeds from collectors, sheriffs, special masters, or others selling under authority of a court, is contained in either the Tax or Conveyance Act.

It is general practice to record such deeds according to the provision of Section 21.

Section 47 of the Conveyances Act makes the deed, if recorded, notice for it stipulates that clerks or registers shall provide index books to contain the names of the several grantors and that in case the sale is made "by any officer or person appointed or directed to sell and convey by any court of this State, the names of such commissioner, officer or person, and the person whose estate has been conveyed" shall appear in the grant or index.

IV

BY VIRTUE OF THE TOWN COLLECTOR'S DEED, TITLE PASSED FROM THE TICHENOR HEIRS TO COMPLAINANT BUT TITLE WAS NOT VESTED IN THE TOWN COLLECTOR. WHEN THE DEED WAS GIVEN THE CERTIFICATE OF SALE WAS SURRENDERED AND TAXES MARKED PAID THE SAME AS IF THE OWNERS HAD REDEEMED THE PROPERTY.

Complainant's deed, offered in evidence, states that it was given under the Tax Act of 1898, as the result of a sale by the collector for unpaid taxes.

Section 9 of the Tax Act of 1898 specifically provides the method by which the town may acquire title, and complainant does not contend that the town first bought the land under this section and then sold it to him. He claims to have been the original purchaser.

Title remained in the Tichenors at the time of the sale and for six months thereafter, for Section 7 of the Tax Act of 1898 provides for privileges of redemption to anyone in interest for a period of six months from the date of sale.

Title passed to complainant at the expiration of the six months period for Section 8 of the Tax Act of 1898 provides that in case the premises are not redeemed "at the expiration of said six months" a deed shall be given to the purchaser, upon the surrender of the certificate of sale.

The interests of the town collector in the property are shown in Section 12 of the 1898 Tax Act which provides:

> "All moneys received upon sales, in pursuance of this act, shall be held by the collector of the town, township, borough, or other

municipality until the expiration of the time for redemption herein provided for, and thereupon the surplus, if any, remaining in any case, after deducting the amount of the taxes, assessments, interest, costs, and disbursements, dues to the town, township, borough, or other municipality, shall be paid over by the collector to the clerk of the Circuit Court of the county, subject to the further order of said Circuit Court." (P. L. 1898, page 452.)

V

THE PURCHASER AT THE TAX SALE STANDS IN NO BETTER POSITION THAN IF HE WERE A PURCHASER FROM THE LANDOWNER AND IF HE FAILS TO RECORD HIS DEED BEFORE A *BONA FIDE* PURCHASER FOR VALUE RECORDS HIS DEED HE LOSES WHATEVER TITLE HE MAY HAVE ACQUIRED AT THE TAX SALE. Taken from

Maddox vs. *Arthur,* 122 Ga., 671.

The court considered the Tichenors strangers to the title because they had lost their interest by a court decree and illustrated by stating that a sheriff's deed need not be recorded because the parties, cut off by foreclosure, became strangers to the title. Appellants would respectfully point out that a sheriff's deed based on a mortgage foreclusure would be discovered by means of the mortgage on the records. If the mortgage were not recorded it would be expressly included in Section 54 of the Conveyance Act above set forth and hence would be void against a *bona fide* purchaser for value without notice.

Fernybough vs. *Rockwell,* Feb. 10, 1913, S. D. 139 N. W. 790: A tax deed was given in 1897 and not recorded until 1911. In 1907 respondent obtained a deed from the record owner, as in the present case, had the title searched and found property was in record owner's name to whom the property was assessed and the tax bills made out. *Held,* that the holder of tax deeds in order to have protected his rights, should have recorded his deed and the loss must rest on him by whose negligence it was caused. Recites 3 Vt. 10; 7 Conn. 505; 9 Mo. 878; (78 Miss. 585—29 South, 403); 52 Atl. 1010.

Sinters vs. *Barber,* 29 S. O., 403; 78 Miss., 585.

Act provides for filing tax deeds but does not provide that a failure to file shall avoid deed. *Held,* void as against purchaser without having actual notice of tax deed.

17 Cyc. 1347, recordation (executors) where purchasers at execution sales do not record deed such deed is void as to subsequent *bona fide* purchasers of the property (note 48 and 49 and cases cited).

HAROLD W. HEADLEY,

Of Counsel for Defendants-Appellants Hilda H. Headley and Harold W. Headley.