C.A. No. 107593

NOVA SCOTIA COURT OF APPEAL

Chipman, Jones and Roscoe, JJ.A.

Cite as: Nova Scotia (Attorney General) v. McInnes, 1995 NSCA 93

BETWEEN:	
ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province of Nova Scotia and the DIRECTOR OF ASSESSMENT	Alex M. Cameron for the Appellants
Appellants	
- and -	
FRANK ARNOLD MACINNES, MYLES CURTIS MACINNES, and J.P. MACINNES TRUCKING LIMITED and THE MUNICIPALITY OF THE COUNTY OF INVERNESS	Alan V. Parish and William L. Mahody for the Respondents, MacInneses
Respondents	Peter A. McInroy for the Respondent, Municipality
	Appeal Heard: March 27, 1995
	Judgment Delivered: May 16, 1995

THE COURT: The appeal is allowed as per reasons for judgment of Chipman, J.A.; Jones and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the Attorney General of Nova Scotia and the Director of Assessment from a judgment in the Supreme Court finding the Province and the Director ultimately liable for damages sustained by purchasers at a tax sale held by the

respondent County. The purchasers were the MacInnes respondents. This tax sale was previously found by this Court to be invalid and inoperative to pass title in the lands purported to be conveyed pursuant thereto; **MacInnes et al. v. Burton et al.** (1992), 116 N.S.R. (2d) 273.

In 1984, John William MacQueen conveyed nine acres of property in Whycocomagh, Inverness County, to John E. Burton and Darrell R. Burton of Sydney Mines, Nova Scotia. On the following day, the Burtons conveyed the property to John E. Burton, Darrell R. Burton, Blair D. Burton and Sheldon J. Burton. This property was on the Trans Canada Highway. MacQueen had obtained it in 1947 and in 1960, he conveyed a one acre portion thereof to his father, which his father reconveyed to him in 1967. This one acre portion was described, as is common in many older conveyances, by reference to physical features on the ground. When MacQueen conveyed the property to the Burtons, a modern form of description appended as Schedule "A" was employed to embrace all nine acres. A statutory declaration deposed to by MacQueen and his wife and recorded on the same date as the recording of the deed to the Burtons referred to the modern description in Schedule "A" and the old description of the one acre lot in Schedule "B" thereto, stating that the latter was a part of the lands described in Schedule "A".

There was a residence located on the one acre lot and the remaining eight acres were used by the Burtons as a seasonal trailer park.

When the two properties were owned by John William MacQueen and his father, there was a separate municipal assessment by the County for each parcel. After the two parcels returned to common ownership in 1967, two separate assessments continued to be maintained on the County's Assessment Roll.

Effective January 1, 1976, amendments to the **Assessment Act,** (S.N.S. 1975, c. 75, s. 12) placed the responsibility of carrying out real property assessments upon the Director through the Minister of Municipal Affairs. Only the responsibility for

assessment was transferred to the Province by this legislation. The responsibility of rating and collecting property taxes remained with the municipalities.

Following the acquisition by the Burtons of the two properties under one description in 1984, the two separate assessments continued to be maintained as previously. The one acre portion was assessed as residential property and the remainder was assessed as commercial property.

The Assessment Roll for the year 1985 and subsequent years described the two separate assessments to the Burtons in Whycocomagh under a column "Location/Description". The residential assessment was Account No. 122971496 (496):

LAND DWELL BK. 81 P. 351
Re John L. MacQueen
BK. 52/714 BK. 226/493/ 226/502

The Commercial Assessment No. 02971488 (488) was described:

Two lots 10 acrs. BK. 103 P. 243
Re Land and Trailer Site
BK. 52/714, BK. 226/493 226/502

The book and page references were to instruments recorded at the Registry of Deeds in Port Hood. BK. 81, P. 351 referred to the conveyance to John William MacQueen by his father containing the one acre parcel. BK. 52/714 referred to a conveyance in 1947 from Catherine MacKinnon to John William MacQueen. The description was in an older form, and concluded with the statement that the property conveyed comprised ten acres more or less. BK. 226/493 referred to the 1984 conveyance from MacQueen to John and Darrell Burton, and BK. 226/502 referred to the deed from John and Darrell Burton to all the Burtons. The description in these two deeds is the modern description encompassing the entire nine acres. BK. 103, P. 243 refers to a partial release of a mortgage from Industrial Development Bank to John William MacQueen et ux, dated August 30, 1971. The land released is described as containing 1.22 acres, more or less. This is a property on the opposite side of the road

from the property at issue.

In addition to the residental and commercial assessments, a business occupancy assessment also applied to the commercial property, making a total of three assessment accounts with respect to the nine acre property of the Burtons on the Trans Canada Highway.

In mid January of each year after 1984 the Director sent three Notices of Assessment to the Burtons at their address in Sydney which had been provided to the County. The County billed the Burtons for taxes on each of the three assessments and the Burtons paid them. In 1987, the Burtons appealed the assessments to the Regional Assessment Appeal Court and were successful in obtaining reductions in each.

In 1984, the Burtons changed their address respecting the residential assessment to Whycocomagh Post Office, B0E 3M0.

After September 15, 1986, the Burtons fell behind in payment of their property taxes.

It was the County's practice to commence tax sale proceedings after arrears in tax accounts were outstanding for two years. The County caused its computer to generate a list of accounts showing taxes in arrears for two years. It forwarded letters to the deliquent taxpayers appearing on the list, warning that tax sale proceedings would be taken after sixty days unless arrears were paid. The letters were sent by registered mail. After the expiration of sixty days, accounts still in arrears were forwarded to the County's solicitor for search preliminary to a tax sale. Included among such accounts were those where registered letters were returned undelivered.

On March 1, 1989 the County sent notices to the Burtons advising that their property would be sold unless accumulated tax arrears were paid within sixty days. Such notices were sent by registered mail as required by s. 141 of the **Act**. The notice respecting the commercial account 488 was sent to the Burtons at their Sydney

address. It demanded payment of $2,246.31 respecting 1987 and 1988 tax years. The notice respecting the residential account 496 was sent to the Burtons by registered mail at their Whycocomagh address. It contained a demand for payment of $1,270.00 with respect to the 1987 and 1988 tax years. Thus the total owing on the two accounts was $3,516.31.

The notice sent to Whycocomagh relating to the residential account did not

reach the Burtons. It was returned by the post office to the County and placed in a file among 25 or 30 such letters that were returned.

In August, 1989 the Burtons paid $1,500.00 on the commercial account and as a result tax sale proceedings were not taken respecting that account. In November, 1989 the Burtons paid a further $2,100.00 on account of taxes. The County allocated $303.00 of this amount to the business occupancy account and the balance to the commercial account 488. The residential account 496 still remained in arrears and apart from the registered letter which was returned, the County made no further effort to notify the Burtons.

After the County forwarded a search request to its solicitor respecting the residential account, the solicitor secured from the office of the Registry of Deeds the description of the property referred to on the Assessment Roll. In this case, the solicitors took not the description in BK. 81, P. 351 which appeared on the top line in the Roll, but the last book and page description - 226/502 - the modern nine acre description embodying <u>both</u> assessments. Upon receipt of confirmation of this book and page reference, the County carried out the sale of this parcel.

As taxes on the residential account remained unpaid, the County held the tax sale on February 1, 1990 at Port Hood. Prior thereo, advertisements duly published referred to the property to be sold:

> "ACCOUNT NUMBER 12/2971496
> LAND at Whycocomagh assessed to John E. Burton, Blair Burton, Darrell R. Burton and Sheldon Burton.

Tax, Interest, Costs	$2,045.98
Advertising	$ 94.00
TOTAL:	$2,130.98"

The increased amount of taxes reflects the accrual of taxes for the year 1989 which had also not been paid.

The respondent Frank MacInnes is a lifelong resident of Whycocomagh with an intimate knowledge of the community. In January, 1990 he read the notice of tax sale in the newspaper and became interested. He knew the property well, and assumed that the description referred to the entire lot which was then used by the Burtons mostly as a trailer park. He knew of no other property owned by them in the area. With this information and assumption, he attended the tax sale. He made no inquiries as to exactly what land was being sold. There was only one other bidder on this property and MacInnes was successful in buying it for $3,000.00. He thought he was bidding on the 9-acre piece of land. He testified that he thought it was worth about $20,000 to $40,000 to him and his brother and the trucking company which they jointly owned. He also suggested that the market price would be between $80,000 and $100,000.

MacInnes was furnished with a Certificate of Sale for taxes which was issued in the name of the respondent J. P. MacInnes Trucking Limited. The certificate stated that the description of the land sold was contained in the deed to the four Burtons from John and Darrell Burton in BK. 226, P. 502.

On March 4, 1991, after the statutory one year redemption period had elapsed, MacInnes secured from the County a tax deed conveying the property to J. P. MacInnes Trucking Limited. The description of the property was that contained in the deed at BK. 226, P. 502 - the entire nine acre parcel.

When the MacInnes respondents tried to take possession of the property,

the Burtons refused to give it up. As the trial judge said:

> "Several skirmishes took place which involved changing of locks, breaking locks and visits with members of the R.C.M.P."

The MacInnes respondents took the position that they had a valid tax deed to the property. The Burtons took the position that they had paid their taxes and challenged the right of the MacInnes respondents to the property. Indeed, the Burtons had paid sufficient taxes on the commercial assessment to avoid a tax sale of the property covered by that account, but not on the account respecting the one acre lot. They were never aware of the tax sale until after the MacInnes respondents attempted to take possession of the entire nine acre lot.

The MacInnes respondents commenced an action against the Burtons for possession which was tried before Saunders, J. in the Supreme Court. He found that the respondents MacInnes were entitled to possession as against the Burtons. See **MacInnes et al. v. Burton et al.** (1991), 110 N.S.R. (2d) 380.

The decision of Saunders, J. was reversed by this Court. Hallett, J.A. writing for the Court held that the County did not have the right to dispose of the property separately assessed in the commercial account 496 on which there were insufficient tax arrears to permit a sale. See **MacInnes v. Burton** (1992), 116 N.S.R. (2d) 273. The result was that the land was returned to the Burtons.

The MacInnes respondents commenced this action against the County on October 2, 1992, claiming general damages and the following special damages:

Purchase price paid to the respondent Municipality	$ 3,000.00
Legal fees for title search, deed registration, etc.	$ 414.44
Legal fees in connection with action against the Burtons and the appeal.	$39,385.82

Cost of survey and plan of the Whycocomagh property.	$ 1,498.00
Insurance premiums paid on property	$ 2,196.00
Costs to change locks	$ 414.51
Long Distance Telephone Charges and other miscellaneous expenses	$ 2,000.00

On May 3, 1993, the County issued an Originating Notice (Third Party) against the Director and the Attorney General. The basis of the third party claim was that the Director was, under the provisions of the **Assessment Act** responsible **inter alia** for the determination of the assessment of the property of the Burtons in Whycocomagh and had prepared an Assessment Roll for the County for the years 1987, 1988 and 1989 showing the three separate accounts. The County claimed that the Director erred in carrying out the duties prescribed under the **Assessment Act**, by maintaining incorrect and inaccurate records and setting up three separate accounts rather than assigning one assessment to the entire property.

The matter was tried in the Supreme Court at Port Hood on May 16, 17 and 18, 1994.

The trial judge initially dealt with submissions by the County and the appellants that the action and third party proceedings were barred by limitation periods set out in s. 150 of the **Municipal Act** and in sections 95 and 175 of the **Assessment Act**. He ruled that the proceedings were not so barred, and that in any event he would grant relief under s. 3 of the **Limitation of Actions Act**. The trial judge found that the County was negligent in selling the trailer park and was liable to the MacInnes respondents for the first six items claimed as special damages. As to the third item - the cost of the unsuccessful litigation against the Burtons - he observed that embarking upon the litigation to enforce the claim to the property was a prudent move. He ordered that the MacInnes respondents should have their solicitor/client costs for such litigation

taxed before the taxing master. The other five items were allowed as claimed. The final item in the list of special damages was not addressed.

With respect to the third party claim, the trial judge referred to the duties placed upon the Director in preparing the Assessment Roll. He referred to s. 137(1) of the **Assessment Act** requiring the Director to review the schedule prepared by the County showing lots upon which taxes remained unpaid. He held that the Director was directly responsible for the confusion which ultimately lead to the sale of the Burton lands by the County. The Director had a duty to provide accurate information to the County which was not done. He had an opportunity to correct any inaccuracy on the schedule prepared and forwarded by the treasurer. He did not do so, and based on the "defective information", the County instituted the tax sale which was set aside. The County was entitled to full indemnification from the appellants respecting its liability to the MacInnes respondents.

As to costs, the trial judge ordered that the same "shall be costs of the cause" and that the appellants should indemnify the County with respect to these. No order was taken out and this directive with respect to costs has not been clarified.

In addition to the appeal by the Director and the Attorney General placing liability in issue, the County has cross-appealed on the limitation issue and filed a notice of contention respecting its liability to the MacInnes respondents and seeking costs of the trial.

The issues raised on this appeal are:

(1) whether the claims are barred by the limitation provisions in the **Municipal Act** and the **Assessment Act**;

(2) whether the County is liable to the MacInnes respondents and to what exent;

(3) whether the appellants must indemnify the County for any liability

found against it.

Issue One

In my opinion, it is not necessary to embark upon a consideration of the limitation provisions relied on or to address the arguments made before us as to when the cause of action arose within the meaning of the various provisions. The first issue is resolved if the trial judge did not err in his conclusion that even if the claims were barred, relief should be granted under s. 3 of the **Limitation of Actions Act**.

Section 3(2) of the **Statute of Limitations**, R.S.N.S. 1989, c. 258 provides:

> "3 (2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person."

In s. 3 the term "action" is defined:

> "3 (1) In this Section,
>
> (a) "action" means an action of a type mentioned in subsection (1) of Section 2;"

Section 2(1) of the **Statute of Limitations** lists six categories of actions, the fifth of which is:

. . .

> " (e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution

> and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;"

Subsection (4) of s. 3 of the **Statute of Limitations** lists factors to be considered by the court in determining whether a defence based on time limitation should be disallowed.

The trial judge concluded that this proceeding fell within s. 2 of the **Statute of Limitations** and exercised his discretion to disallow the limitation defences raised both by the appellants and by the County. In my opinion, these proceedings do fall within s. 2(1)(e) of the **Statute of Limitations** set out above, being in contract or in negligence or both against the County and in negligence against the appellants.

This Court has held that the Crown in Nova Scotia is subject to s. 3 of the **Statute of Limitations**. See **Attorney General of Nova Scotia v. Neary** (C.A. No. 104801, unreported)).

Counsel have not seriously challenged the discretion of the trial judge to disallow the limitation defences. No manifest injustice or material error of law has been shown. I would not disturb the decision of the trial judge in this respect.

Issue Two

1. Liability in Contract and in Tort

The County (and also the appellants) maintain that the MacInnes respondents have no recourse either in tort or contract, having attended the sale without making an independent investigation as to what land was being sold and having taken a tax deed without covenants. The position is that they took their chances and are caught by the principle of **caveat emptor**.

In **Redican v. Nesbitt**, [1924] S.C.R. 35 at 144, Duff, J. wrote:

> "If the conveyance has been actually executed by all the

> necessary parties and the purchaser is evicted by a title to which the convenants do not extend, he cannot recover the purchase money either at law or in equity.
>
> The principle appears to be that, save in exceptional cases to which will be made, the maxim **caveat emptor** applies and that the purchaser, if he wishes to protect himself in respect of the absence of title or defect in the title or in the quantity or quality of the estate, must do so by covenants in the conveyance. The rule does not apply where there is error in substantialibus, where, for example, it turns out that the vendee has purchased his own property . . ."
>
> (emphasis added)

And at p. 146, Duff, J. stated:

> "The whole point is: at which stage does **caveat emptor** apply?
>
> The vendee may rely after completion upon warranty, contractual conditions, error in substantialibus or fraud."
>
> (emphasis added)

The appellant has directed us to an interesting article by G. H. L. Fridman "Error in Substantialibus: A Canadian Comedy of Errors" (1978), 56 Can. Bar. Rev. 603. The author makes a case for saying that Canadian courts have gone a long way to bringing under this umbrella a number of transactions that would not justify the granting of rescission at common law or equity. The earlier cases justifying rescission of an executed contract were those falling under the doctrine of common mistake where the consideration was **res extincta** or **res sua**, or where there was a "fundamental erroneous assumption". Fridman said at p. 609:

> "What appears to have happened is this. In the absence of fraud, only mistake would invalidate a contract. Equity would permit rescission: but this could not be done, after the **Seddon** and **Angel** cases, where the contract had been executed. Mistake was confined to cases of **res extincta, res sua**, and 'fundamental erroneous assumption'. Any **other** mistakes would not suffice. So, somehow, the law had to enlarge upon the scope and content of operative mistake, so as to allow rescission of an executed contract, on the basis of mistake, where the mistake did not come within the original scope of the doctrine. Thus, the notion of error **in**

> **substantialibus** was conceived. At some point of time, which I would suggest was when Duff J. wrote his judgment in **Redican v. Nesbitt**, although it might have been earlier, the original Scots doctrine of error in substances or substantials, also called error **in substantialibus** by Lord Selborne, as seen earlier, became pressed into service as the instrument by which this enlargement of the common law doctrine of mistake could be effected, so as to bring about the desired result with respect to the equitable power to rescind contracts."

Fridman concludes at p. 625:

> "Where Canadian courts went wrong, if I may respectfully make such a suggestion, is when they adopted an approach to certain problems of mistake that was not supported by the common law, but purported to express that approach as a part of the common law. To do this, Canadian courts were compelled to engage in certain illogical 'leaps' in their reasoning: and to apply concepts and ideas out of context. There may be good reasons for seeking to qualify the strict common law of mistake. There may be good reasons for wanting to mitigate the rigours of the law by some more gentle, amenable equitable doctrine that would permit a court to relieve a party from an unconscionable, unprofitable bargain, entered into under a misapprehension, and to release him from a situation which would otherwise prove to be to his detriment. It is unfortunate that this should have been achieved by the invention of an anomalous doctrine such as that of error **in substantialibus**."

Assuming that Fridman's view is correct, since the sale here is void and inoperable to pass even the taxpayer's title, the consideration was **res extincta** or the equivalent of it.

So, under the rubric of mutual mistake, I would class this as a sale of nothing. It is the equivalent of a total failure of consideration. The appellant's submission that the MacInnes respondents could not even get their money back was not put forth with a great deal of conviction and is inconsistent with common sense and anybody's sense of justice. There is a remedy in contract available to the MacInnis respondents against the County.

Moreover, if the County were negligent in the manner in which it carried out the sale, I am of the opinion that there was concurrent liability of tort for such

negligence to the MacInnes respondents.

In **Crestpark Realty Limited v. Riggins, et al.** (1975), 21 N.S.R. (2d) 298 (N.S.S.C.T.D.), Morrison, J. dealt with the liability upon the City of Dartmouth towards a purchaser at a tax sale which was held void. The City had wrongly imposed a levy upon the land sold and was therefore not entitled under the provisions of the relevant legislation to sell it at the sale. Morrison, J. said at p. 318:

> "In my opinion there is a heavy duty on a city when it sells the land of an individual citizen. The municipality must use the greatest care in such a sale and observe every particular and ensure that a valid lien exists against the land that is being sold."

After finding that the sale took place due to an error on the part of the City's servants or agents in failing to comply with the relevant provisions of the **Dartmouth City Charter**, Morrison, J. held that the sale was void and must be set aside. He then addressed the liability of the City to the purchaser of the sale at p. 319:

> "To this extent the City of Dartmouth must be held to be negligent and, in the circumstances, must, of course, make proper restitution to the plaintiff company for the price paid for the property, together with all incidental and necessary expenses."

In **MacDonald v. MacLean** (1981), 48 N.S.R. (2d) 141, this Court referred to the statement of Morrison, J. in **Crestpark, supra**, at p. 318 quoted above. See also **Moore and Armsworthy v. Wheadon** (1993), 126 N.S.R. (2d) 47 at p. 52 (N.S.S.C.T.D.). It must, of course, be kept in mind that since the 1975 amendments to the **Act** the duties respecting the assessment and preparation of the Roll have been transferred from the municipality to the Director. Thus, the responsibility for a defective sale may be divided between that which falls upon those responsible for the assessment component and that which falls upon those responsible for the rating and sale component.

The appellants submit that there is no liability to the MacInnes

respondents who attended a tax sale, did not investigate the property or the title and took a deed without covenants. To such a person it is said that no duty is owed. Morrison, J. obviously disagreed with this and so do I.

The appellant states that to the extent that **Crestpark** stands for the proposition that the mere sale of a defective interest in land amounts to actionable negligence the decision must be considered as wrongly decided. I agree that the mere sale of a defective interest in land is not of itself sufficient to amount to actionable negligence. The surrounding circumstances must be examined.

What the appellant is really raising here is the question whether the County can be liable in tort as well as in contract.

The principle of concurrent liability and tort in contract is now widely recognized as being of general application, not merely confined to the common callings or professional negligence. This appears to have been taken for granted by Morrison J. when he decided **Crestpark** in 1975. Since the decision of the Supreme Court of Canada in **Central Trust Co. v. Rafuse and Cordon** (1986), 75 N.S.R. (2d) 109 the position is I think well settled.

The statements of law by LeDain J. in **Rafuse**, supra, particularly at pp. 139-140 relating to concurrent liability are applicable here.

The County is governed by the general principles of tort liability in its relationship to the MacInnis respondents as the holder of a tax sale to that member of the public who buys thereat. Such buyer relies on the seller to comply with the requirements necessary to make the sale valid to transfer to taxpayer's interest in the land being sold. The relationship between such a seller and such a buyer is of sufficient proximity to give rise to a duty in tort. The seller can reasonably foresee damage to the buyer if the sale is not carried out according to law.

The sale itself, merely by reason of the absence of covenants respecting

the title, has no terms express or implied which would exclude liability for negligence in the manner in which such sale is conducted.

There can be concurrent liability in tort if there was negligence on the part of the County.

In the instant case, the tax sale to the MacInnes respondents was held to to be void. Hallett, J.A. said in **MacInnes v. Burton, supra**, at p. 276:

> "The lands assessed as account 496 were duly advertised. At the sale on February 1, 1990, the municipality sold, not only the lands assessed separately as account no. 496 but also the eight acres, more or less, of trailer park land which was assessed separately as account no. 488 on which the taxes were not in arrears. The respondents purchased all the appellants' lands for $3,000. Mr. John Burton in his affidavit filed in the proceedings stated that the appellants had an investment of approximately $200,000 in the home and the trailer park.
>
> The appellants did not redeem the property within the year as permitted by the **Act**. There was evidence at trial that they did not know the lands had been sold for arrears of taxes. The respondents obtained a deed from the municipality of the entire property, both the residential property and the trailer park property.
>
> The municipality had no right to sell the trailer park property for arrears of taxes on the residential property.
>
> Although one hardly need any authority for concluding that a sale, under such circumstances, must be set aside I would refer to **Manning, Assessment and Rating** (Toronto: Canada Law Book Company, 1962), p. 542, where it is stated:
>
> > 'The inclusion in a particular sale and deed under the same warrant of lands liable to assessment and sale with land not so liable (the assessment being void by reason of the irregularity) vitiates the sale, nor can a sale of lands in one parcel which by the **Act** could only be assessed legally in two parcels be sustained, and similarly the sale of two parcels for the aggregrate arrears on both is illegal.'
>
> In view of my conclusion that the appeal ought to be allowed there is no need to deal with the issue of whether or not the learned trial judge erred in deciding the appellants were

> given proper notice of the pending sale of their lands for arrears of taxes. Suffice to say, there are serious issues raised as to the procedures of the municipality in this instance."

There is no doubt that the set-up of these two accounts on the Assessment Roll had the potential to create confusion. Account 496 refers primarily to the one acre lot in that the book and page reference on the first line contains that description. However, the two book and page references under the description of the account refer to the nine acre portion. The account which was not in arrears, 488, refers in its first line to a lot across the road having no connection with the property at issue. The last two deed references are identical to the last two references in the residential account, relating in each case to nine acres.

When lands are to be sold for unpaid taxes, the treasurer of the municipality is required by s. 135(1) of the **Act** to prepare a schedule thereof and by s. 136 to furnish the Director with a copy thereof. The Director is then required by s. 137 to check the schedule:

> "137 (1) The Director shall carefully examine and correct the schedule and, where any transfer of title of a property has taken place within or since the period for which taxes are indicated to be in arrears, he shall enter on the schedule in red ink the name of the person to whom the property was assessed at the time the taxes were incurred and the name of subsequent and present owner or owners.
>
> (2) If his records show any mortgage or other encumbrance, he shall also enter that in red ink on the schedule.
>
> (3) The lists so corrected shall be signed by the Director and returned to the treasurer."

The trial judge found that the Director failed to avail himself of the opportunity created by the checking process to correct any inaccuracy in the schedule.

However, the duty of a municipality in making sure that it is selling the property which is subject to sale for arrears of taxes, is not lessened under the

provisions of the legislation:

> "138 (1) The making of incorrect entries by the Director on the schedule shall not operate to prevent the sale of land under this Act or to affect the validity of any proceedings taken for the sale as aforesaid and every sale of land under this Act in any such case shall be as valid and effective as if the title to and encumbrances affecting it had been fully and correctly set forth by the Director.
>
> (2) Notwithstanding the foregoing, the treasurer shall make diligent inquiries as to the ownership of and encumbrances affecting any such lot of land and names of the present owner and encumbrancers so as to serve each of them with the notice and information required by Section 140."

A careful examination of the residential account of the Burtons would reveal serious discrepancies which should in turn lead a prudent person to check the commercial account of the Burtons which follows next on the Assessment Roll.

Notwithstanding the errors made by the Director in the description of the properties in the Assessment Roll (about which I shall say more) the County could, by examination of the two accounts, 488 and 496, have determined that it had no right to sell the trailer park property. The arrears of taxes were on the property covered by account 496. A review of both accounts makes it clear that this embraces the one acre lot described in the deed in BK. 81 at P. 351 at the most. The County failed to carry out the heavy duty referred to by Morrison, J. that falls upon a municipality when it sells lands of a citizen under tax sale. It must use the greatest of care in such a sale and observe every particular to insure that a valid lien exists against the land that is being sold. The treasurer is required by s. 138(2) of the **Act** to make diligent inquiries as to the ownership of the land. That was not done here. The mere reliance on the last description in the Roll falls far short of a diligent inquiry.

I agree with the trial judge when he said:

> "Of course there was negligence in that the Municipality proceeded to sell a nine acre trailer park rather than the small residential lot described in account 02971496."

The County was negligent, not only in failing to carry out specific provisions of the **Act** but generally in failing to exercise reasonable care in ascertaining that the trailer park could be sold for arrears of taxes under account 496. It is not appropriate to characterize this negligence merely as a breach of statutory duty. Proof of breach of provisions in a statute affords evidence of negligence which may be considered along with other evidence.

In **Her Majesty the Queen v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205 Dickson, J. said at p. 225:

> "For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.
>
> It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, *i.e.* principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant."

The County did not take reasonable care in carrying out the sale. It could foresee in such circumstances that the buyer would not only throw away his purchase money but that various incidental expenses in connection with the purchase would be incurred.

2. Contributory Negligence

Both the appellants and the County urge that the MacInnis respondents were contributorily negligent in that they made no investigation of the title prior to bidding at the sale. This position is closely related to their assertion that the MacInnis respondents are caught by the principle **caveat emptor**.

I agree that the MacInnis respondents were taking their chances on the

matter of title. However, they were entitled to rely on the County to carry out its duties under the **Act** respecting the conduct of the sale. I have already indicated that the absence of covenants respecting the title does not exclude liability for the manner in which the sale is carried out. It was reasonable for the MacInnis respondents to assume that this would be done properly so that they would secure whatever interest the taxpayer had in the property. I reject the argument based on contrbutory negligence.

3. Damages

Although the County is liable in both contract and tort, it is not likely that the damage consequences would be substantially different under either head of liability. The modern trend is generally to consider liability for breach of contract and negligence as coextensive. Waddams, **The Law of Damages**, 2nd edition, 1994 said at p. 14-36:

> ". . . It would appear, therefore, that, though the tests in contract and in tort are framed in different language, both tests are so flexible that it is very difficult to predict differences in results in actual cases on the basis of which test is applied. In **Kienzle v. Stringer**, Zuber J.A. said 'It is, I think, apparent that neither of these tests [in contract and tort] is a measure of precision and I number myself among those who are unable to see any real difference between them.'
>
> . . . In **Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.**, the Supreme Court of Canada indicated that it favoured a single rule for the contractual and tortious liability, but a rule flexible enought to take into account the voluntary element in contractual relationships. Estey J. said:
>
> > 'We therefore approach the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms express or implied of the contractual arrangement relating to damages recoverable on breach.'

> This view seems particularly desirable in light of the many recent cases holding that causes of action may be stated alternatively as contractual or tortious. It would be most inconvenient in such cases for the measure of damages to vary according to the name chosen for the action. What Greer L.J. said in 1934 has even more force today: 'In my judgment, where the wrong complained of may be stated either in tort or in contract, the same rules as to damages must be applied.'"

In **Crestpark, supra**, Morrison, J. held that as a result of the negligence in carrying out the invalid tax sale, the City of Dartmouth must make restitution to the buyer for the price paid "together with all incidental and necessary expenses". I agree that this is generally the correct approach to damages for negligence resulting in an invalid tax sale.

The appellants' Notice of Appeal placed damages in issue before us. The extent of the damages for which the appellants or the County could be liable for negligence was addressed in argument.

In my opinion, the reasoning of Morrison, J. in **Crestpark, supra**, supports the trial judge's finding that the County was liable to return the purchase price of $3,000.00, as well as the following items of special damages:

Legal fees for title search, deed registration, etc.	$ 414.44
Cost of survey and plan of the Whycocomagh property.	$1,498.00
Insurance premiums paid on property.	$2,196.00
Costs to change locks.	$ 414.51

I reject the appellant's submission that the MacInnis respondents should have mitigated damages by seeking rectification of the deed. In the first place, the confusing state of the Assessment Roll does not warrant the conclusion that the County could even safely sell the one acre portion. In the second place, it appears that the

intention clearly was to sell the entire nine acres. Frank MacInnis testified that that is what he thought he was buying. The certificate of sale described the **res vendita** by reference to the nine acre parcel. The doctrine of rectification has no application here.

Much less clear is the liability of the County to reimburse the MacInnes respondents for the legal fees in connection with the action against the Burtons and the appeal to this Court, which the trial judge held should be taxed on the solicitor/client basis.

Waddams**, supra**, at pp. 14-24 comments on the subject of remoteness of damages:

> "In **Re Polemis** where a plank carelessly dropped into the hold of a ship struck a spark that ignited gasoline vapour and destroyed the ship, it was held that the negligent defendant was liable for all direct loss caused by his tort even though the loss was an unforeseeable consequence of his conduct. However, in the **Wagon Mound**, an Australian appeal to the Privy Council, it was held that foreseeability was to be adopted as the controlling test to govern the extent of liability as well as the existence of it. The latter decision has been followed in England and in Canada, and problems of remoteness are now dealt with in the framework of foreseeability. The Privy Council evidently considered that the adoption of the test of foreseeability made an important change in the direction of simplicity and justice. The board thought that a test of foreseeability would be simpler to apply than the complex and artificial doctrines of causation that were necessary to determine whether an injury was direct, and they thought it obviously unjust to hold a defendant liable for consequences that could not have been foreseen. Twenty years later, however, it seems doubtful whether the test of foreseeability is any simpler to apply than the test it replaced, and the justice of excusing a defendant for the direct (but unforeseeable) consequences of the negligent conduct is, in any case, far from self-evident. This last point is illustrated by an examination of actual applications of the **Wagon Mound** principle. As will be seen from the following paragraphs, the courts have considered that justice requires the imposition of liability on defendants in many cases where it might have been supposed that the **Wagon Mound** principle would afford an excuse. In consequence the change in the law effected by the **Wagon Mound** have proved to be much less drastic than was first supposed."

In **McGregor on Damages**, 15 Edition, (Sweet & Maxwell Limited 1988), the author at p. 137 after referring to the **Wagon Mound** comments that it may seem that the test of causation is no longer an appropriate one for problems of remoteness and that foreseeability has taken over as a new criterion. The author goes on to comment that causation has not been totally superseded although it has taken a back seat place to foreseeability.

It is, however, appropriate as a general rule to apply the foreseeability test unless the circumstances of the case warrant a different approach to the resolution of remoteness.

In my opinion, had the MacInnes respondents made careful inquiry before commencing action against the Burtons, they would have determined that the County had no authority to sell the trailer park lands. An examination of the two accounts set out in the Assessment Roll and the municipality's receipts from the Burtons would have confirmed, as already stated by Hallett, J.A.:

> "The municipality had no right to sell the trailer park property for arrears of taxes on the residential property."

It was not reasonable for the MacInnes respondents, upon their claim to the property being challenged, to have embarked upon the litigation against the Burtons when a true state of affairs could be discovered upon reasonable investigation. Such litigation rested on a foundation as weak as the defective sale procedures of the County here. An examination of the Assessment Roll would have uncovered the confusion. It would have then been clear that the County did not have the right to sell the trailer park property. The embarkation upon this litigation was not a foreseeable result of the County's negligence in conducting the sale. To put it another way, the expenses of the litigation on which they embarked were "too remote".

In **Crestpark, supra**, Morrison, J. said at p. 319:

> "I must bear in mind the verdict of the jury which made the

> finding of fact that the plaintiff company had knowledge and was aware that a dwelling-house was being constructed on the land in question. It therefore seems to me that this finding of fact having been made, that the plaintiff company being aware of this most pertinent fact, it had a duty to mitigate its damages. There is no evidence before me to indicate that the plaintiff did take any legal steps to mitigate its loss or damages, and there is considerable evidence before me to indicate that the contrary is true that the plaintiff company deliberately avoided taking any steps to mitigate its loss. The plaintiff company by its actions actually aggravated its loss."

While the facts here are not the same as those in **Crestpark, supra**, the general principle enunciated by Morrison, J. applies. It was not reasonable for the MacInnes respondents to engage in litigation against the Burtons where the invalidity of the tax sale was so clear, as Hallett, J.A. has determined. See **Aulenback v. Aulenback** (1949), 2 D.L.R. 365, **Scott v. Smith** (1980), 36 N.S.R. (2d) at 590. Testing the matter by an analysis based on a duty to mitigate, the MacInnes respondents should have mitigated their damages by looking immediately to the County and/or the appellants. The steps taken by the MacInnes respondents by way of litigation against the Burtons were not reasonable steps in mitigation. The expenses thereby incurred can be excluded by taking this approach, as well as by an analysis with reference to remoteness of damages.

Issue Three

The trial judge held that the appellants must fully indemnify the County respecting its liability to the MacInnes respondents. The trial judge's reasoning for requiring the appellants to do so was:

> "In my view, the Director of Assessment was directly responsible for the confusion which ultimately lead to the sale of Burton lands by the Municipality of Inverness. The Director had a duty to provide accurate assessment information to the Municipality which he did not do in this case. The Director was given a 'second chance' to correct any inaccuracy on the Schedule prepared by the Municipal Treasurer - which he did not do. Based upon this defective information, the Municipality initiated the tax sale which was

> set aside by the Court of Appeal. The Municipality is entitled to full indemnification from the Director of Assessment for any losses, damages and costs for which it is primarily liable - and that includes all of the claim of the plaintiffs outlined above."

Proceedings against the appellants are governed by the **Proceedings Against The Crown Act**. Generally, subject to that **Act** the Crown is liable for the torts of its officers or agents and is liable in tort under any statute or regulation or by-law made thereunder.

The appellants do not dispute that the **Proceedings Against The Crown Act** is applicable, or that its provisions have been complied with, or that the Director is an officer or agent of the Crown. The appellants do contend that the MacInnes respondents were owed no duty, that the Director complied with the **Act** and was otherwise not negligent and that if there was liability to the MacInnes respondents it was on the part of the County.

The County submitted that the Director had no authority to establish two separate assessment accounts for the nine acre property of the Burtons. It is not necessary to answer that question because it is not the fact that there were two accounts that led to the defective sale. What caused the difficulty were the confusing references in account 496 (and indeed in both accounts) to more than one property and to the same property in each account. There was clearly a breach by the Director of the duty imposed by s. 18 of the **Act** to identify taxpayers and their property, its extent, amount and nature. Failure to do so is what set the stage for the trouble here. There was a real danger that should one of the two accounts fall into arrears and a tax sale take place that property other than that intended to be charged by the relevant account would be sold. This, of course, is exactly what happened. I adopt the characterization of these records by counsel for the County as "chaotic".

Added to the confusion created and maintained by the Director was the

mistake of the County in uncritically selecting the last description (the nine acre parcel) in account 496 as the property to be sold to satisfy the residential account.

Finally, the Director failed to carry out the review mandated by s. 137 of the **Act**, as the trial judge has found.

I do not accept the view of the trial judge that the appellants should bear all of the responsibility. The negligence of the County and the Director were each a **causa causans** of the loss. The mere fact that one is later in time than the other does not justify drawing such a clear line as to invoke the doctrine of last clear chance. All of the errors operated together to bring about the unhappy result. There was negligence by both the Director and the County which continued to operate, bringing about the loss. It is not possible in my opinion to establish different degrees of fault and I would apportion the fault of these parties equally.

The County's liability to the MacInnes respondents should be reduced to $7,522.95, plus pre-judgment interest as fixed by the trial judge at 7% on the purchase monies and 5% on the other amounts from the time that they were incurred. Since no order was taken out following the decision of the trial judge, I would order that such pre-judgment interest runs until the date of the order of this Court. The appellants are liable to indemnify the County for 50% of the amounts for which it is liable.

I would therefore allow the appeal by reducing the award of damages accordingly and ordering the appellants to indemnify the County to the extent of 50% of its liability.

As to costs, I would award costs to the MacInnes respondents against the County for the trial by applying Scale 3 to the amount involved, plus disbursements. The MacInnes respondents should receive no costs of this appeal.

The County should recover from the appellants one-half of the costs they are required to pay the MacInnes respondents respecting the trial, plus one-half of the

County's trial costs fixed by application of Scale 3 to the amount involved and one-half of the County's disbursements. The County should have no costs of this appeal.

The appellants should recover the costs of this appeal from the County in the amount of 40% of their trial costs as fixed by the application of Scale 3 to the amount involved, together with disbursements.

Chipman, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.