Chicago-Kent Law Review

Volume 51 | Issue 3 Article 3

January 1975

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EQUITABLE RELIEF, COLLATERAL ATTACK AND THE ILLINOIS TAX DEED

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> Tax deeds issued pursuant to this Section are incontestable except by appeal from the order of the court directing the County Clerk to issue the tax deed.[1]

With this language, the General Assembly has favored the Illinois tax title holder with defenses which are virtually immune to attack. Once a final order for tax deed has been entered, the deed issued and recorded and title conveyed to a bona fide purchaser, neither the formidable forces of equity nor all the powers of the press with the weight of public opinion have been able to prevail against them.

Many lawyers are unaware of the full impact of the issuance, recordation and transfer into the hands of a bona fide purchaser of tax titles issued since the addition of the foregoing language to the Revenue Act in 1951. Prior to that time an Illinois tax deed was so shaky and uncertain a title as to be, in most cases little more than a cloud on title.[2]

Because tax titles had been of such little urgency in the past, property owners and their legal representatives had acquired the habit of paying scant attention to the tax delinquencies and consequent tax deeds until such time as it became advantageous to convey or mortgage the property at which time the outstanding tax titles could either be paid off and reconveyed,[3] or fought off and voided.[4]

The 1930s and 1940s witnessed an alarming increase in the rate of tax delinquency, due to the depression and to the laxity of the en-

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1. ILL. REV. STAT., ch. 120, § 747 (1973).

2. *See* Gage v. Parker, 178 Ill. 455, 53 N.E. 317 (1889); Simpson v. Adkins, 386 Ill. 64, 53 N.E.2d 979 (1944); Gage v. Bani, 141 U.S. 344 (1891); Gage v. Kaufman, 133 U.S. 471 (1890).

3. *See* ILL. REV. STAT., ch. 120, §§ 736, 737, 738 (1973).

4. *See* Jackson v. Glos, 243 Ill. 280, 90 N.E. 717 (1909); Warshawsky v. Glos, 251 Ill. 377, 96 N.E. 248 (1911).

forcement provisions of the revenue laws. The legislature reacted in the early 1950s with new provisions requiring tax deeds to be issued only pursuant to order of court, after hearing, and making such tax deeds immune from collateral attack and directing the courts to construe the new provisions liberally so that tax deeds would convey merchantable title.[5]

The new teeth in the revenue laws steadily chewed away the delinquency rate to the extent that the current rate of delinquency is negligible, even in Cook County.[6] This new efficiency was not achieved without causing some hardships and apparent inequities.

TAX COLLECTION AND ENFORCEMENT MECHANISMS

With the exception of a recently enacted, peculiar collection procedure currently applicable only to Cook County,[7] taxes on real property are payable annually in two equal installments,[8] the first of which becomes delinquent in May or June (unless the bills are mailed late) and the second installment become delinquent after September 1 each year.[9] After the September delinquency date, a delinquent list is prepared and published by the county collector together with a notice that he intends to apply to the circuit court for a judgment in the amount of the delinquent taxes plus accumulated interest and costs, requesting an order of court directing him to sell the tax delinquent property in satisfaction of the judgment unless the taxes are paid prior to such sale. This publication of notice is the process which gives the court jurisdiction to enter judgment against the property for the tax delinquency. Since no in personam jurisdiction is sought, no summons or other form of process is required.[10] A hearing is subsequently held on the collector's application for judgment at which time the court hears taxpayers' objections to the entry of judgment and order of sale and it is in these proceedings that disposition is made of all assessor's objections,

5. *See* ILL. REV. STAT., ch. 120, §§ 744, 747 (1973).

6. Tax delinquency in Cook County is well under 1% currently.

7. The 1973 general taxes in Cook County are payable in two unequal installments, a first estimated installment based on 50% of the taxes for prior year and due on March 1, 1974, and a final installment based on the total 1973 tax less the amount already billed on the estimated first installment. The final installment is due August 1, 1974. *See* P.A. 78-864, approved September 15, 1973.

8. ILL. REV. STAT., ch. 120, § 675 (1973).

9. For details as to delinquency dates in various classes of counties, *see* ILL. REV. STAT., ch. 120, § 705 (1973).

10. *See* People v. Anderson, 411 Ill. 252, 103 N.E.2d 629 (1952) and cases therein cited.

taxpayers' objections and tax protests.[11] The court enters judgment as to all taxes which remain delinquent and fixes a date for the commencement of the sale. The sale is conducted by the county collector and county clerk jointly and includes all parcels on which the taxes remain unpaid as of the date on which the parcel is offered for sale. In some counties, the entire sale is held on one day, while in a county like Cook, it may extend over a period of two months.[12] Although it is not jurisdictional, the statute[13] requires the collector to send a notice to the party in whose name the taxes were assessed, by registered or certified mail, at least 15 days before the date of application for judgment, notifying him of the date of application for judgment and commencement of the sale and furnishing a description of the property.

The sale itself is a curious type of auction. The property is not struck off to the highest bidder but rather, the successful bidder simply pays the amount of the tax delinquency with interest and penalty due as of the date of sale. If there is any competitive bidding between tax buyers, the successful bidder is the one who accepts the smallest rate of penalty per six-month period on the amount of sale in the event that the owner or some interested party chooses to make a redemption during the redemption period. The maximum penalty bid is twelve percent per six months or part thereof and the minimum is zero.[14] In counties other than Cook, the amount of the judgment includes all tax delinquencies so that the successful bidder is issued a certificate of sale. In Cook County, only the current delinquency is included in the judgment so that the successful bidder must then search the tax records and pay up and include in his sale such other taxes as may have been delinquent on the property as of the date of his successful bid.[15] If the annual tax sale fails by reason of the unwillingness of persons to bid on the property, it is forfeited to the State of Illinois. Forfeitures are subject to separate penalty provisions, enforcement procedures and "over-the-counter" sales.[16]

11. ILL. REV. STAT., ch. 120, § 716 (1973).

12. The Annual Tax Sale in Cook County in 1973 included 9,927 parcels. The sale began on December 10, 1973 and ended on February 4, 1974.

13. ILL. REV. STAT., ch. 120, § 711 (1973).

14. ILL. REV. STAT., ch. 120, § 734 (1973).

15. These procedures are fully explained in ILL. REV. STAT., ch. 120, § 728 (1973), as is the successful bidder's failure to comply with these requirements.

16. The county clerk may issue a Certificate of Sale of Forfeited Property "over-the-counter" at any time, so long as he sends a notice by registered or certified mail to the party in whose name the taxes were last assessed, notifying him that, unless the forfeited taxes are redeemed within 30 days, the property will be sold to satisfy said for-

The period of redemption from tax sales is two years from the date of sale, which period can be extended by the certificate holder up to a total of three years so long as he extends during an existing redemption period.[17] During the first nineteen months of the redemption period, the certificate holder is not required to take any positive action. However, many certificate holders engage in the practice of sending informal notices of sale to interested parties by mail in order to induce redemption before they incur the expenses of petitions in court, publication, attorney's fees and attempted personal service of the required statutory notices.[18] The overwhelming majority of tax sales are redeemed during the period of redemption,[19] but each year, some small percentage of delinquent property owners fail to redeem, thus setting the stage for tax deed proceedings.

Within the last five months of the redemption period the certificate holder files a petition for tax deed in the circuit court after which, he proceeds to attempt compliance with the diligence and notice serving requirements of Sections 263 and 266 of the Revenue Act.[20] The prescribed notices must be personally served on occupants, owners and parties interested in the property if they can, upon due diligence, be located in the county where the property is located. Those who cannot be so located are to be served by registered or certified mail, return receipt requested, at their last known address, if any, and also served by publication along with the "unknown owners and parties interested" in the property. The publication must be made three times in a newspaper of general circulation in the county where the property is located and must be made not more than five nor less than three months prior to the date when the period of redemption expires. The notices personally served and those served by registered or certified mail must be effected during that same time period. During the same time period, the petitioner must also deliver to the clerk of the circuit court a list of the names and addresses of the owners and the occupants of the prop-

feited taxes. For a detailed explanation, *see* ILL. REV. STAT., ch. 120, §§ 697, 727, 734, 753 and 756 (1973).

17. *See* ILL. REV. STAT., ch. 120, § 744 (1973).

18. Where tax sales are redeemed, the certificate holder is not reimbursed for attorney's fees, the cost of investigation to locate interested parties or the cost of personally serving such parties. These costs are incurred between 3 and 5 months prior to the expiration of the redemption period. Hence, if an owner intends to redeem from the sale, the tax purchaser would prefer he do so before the notice serving period commences.

19. Of the almost 10,000 parcels sold annually in Cook County, less than 500 ripen into tax deeds.

20. ILL. REV. STAT., ch. 120, §§ 744, 747 (1973).

erty and sufficient copies of similar notices which are to be sent to such owners and occupants by the clerk of the court by registered or certified mail, return receipt requested.

After the period of redemption expires, the certificate holder files application for a tax deed in the same proceeding where the petition was filed. The county clerk certifies on the application that the property has not been redeemed and the petitioner alleges that he has complied with all of the requirements of the law and is entitled to a tax deed.

The matter is set for hearing at which time the petitioner is required to prove four essential facts: (1) that all taxes and special assessments which became due and payable since his purchase have been paid; (2) that all forfeitures and sales which occurred after his purchase have been redeemed; (3) that the notices required by law have all been given; and (4) that he has complied with all other requirements of the law and is thus entitled to a tax deed. The court is required to "insist on strict compliance with the requirements of Section 263" of the Revenue Act and must be furnished a report of proceedings of the evidence received on the application for deed. This report must be filed and made a part of the court record.

After filing the report of proceedings, the court may enter an order directing the county clerk to execute the tax deed. The deed is then issued and recorded but the court retains jurisdiction of the matter for purposes of issuing such other writs as may be necessary to put the new titleholder into peaceful possession of his newly acquired property. This becomes important as to tax deeds issued on improved property which may be in possession of the former owner or his tenants. In such cases, the court may issue a writ of assistance directing the sheriff to put the tax deed grantee into possession.

Defenses in the Tax Deed Proceeding

The defenses which can be made to prevent the entry of an order for the issuance of a tax deed, or to have an order for tax deed vacated within the thirty-day motion period after the entry of such order are abundant and relatively simple. Prior to the expiration of the motion period, the court can hear defenses relating to jurisdictional defects occurring in connection with the original judgment and order of sale as well as defenses relating to the failure of the certificate holder to

comply with any of the requirements of Section 263 of the Revenue Act.[21]

In raising *any* defenses to the entry of an order for the issuance of a tax deed, it would be well for the attorney to remember that he will not be afforded a hearing until *after* the period of redemption has expired so that, in the event that his defense is not successful, he will be unable to effect a redemption to preserve his client's property. The 1970 tax reform legislation includes a remedy for this problem. An amendment to 253 of the Revenue Act[22] now permits an interested party to make a "redemption under protest" with the county clerk, which redemption will only become operative if the redeemer makes no defense to the entry of the order for tax deed or if his defense to the entry of such order is unsuccessful. In either event, the redemption will then take effect and the property will not be lost.

Jurisdictional defects occurring in connection with the original judgment and order of sale have been raised in some cases. In *Nix v. Smith*[23] the following jurisdictional defects were raised:

(a) In the published notice (the process upon which the tax sale judgment was entered), the description of the property was fatally defective;

(b) There was no precept[24] as required by Section 239 of the Revenue Act;[25]

(c) The judgment and order of sale was not entered in the collector's tax judgment, sale, redemption and forfeiture record as required by Section 232 of the Revenue Act.[26]

In that proceeding the foregoing defects were raised via a separate collateral suit to quiet title, the plaintiff alleging his right to do so was based on his inability to raise those defects as defenses in the proceeding for tax deed. The court held that such objections could and should have been raised as defenses to the entry of an order for issuance of a tax deed and therefore, the collateral quiet title suit did not lie.

A wealth of defenses can be found in the many highly technical demands made of the tax certificate holder in Section 263 of the Revenue Act. As stated above, Section 266 directs the court to *insist on*

21. ILL. REV. STAT., ch. 120, § 744 (1973).
22. ILL. REV. STAT., ch. 120, § 734 (1973).
23. 32 Ill. 2d 465, 207 N.E.2d 460 (1965).
24. The precept is a legal process whereby the court authorizes the county collector to sell the property in satisfaction of the tax judgment.
25. ILL. REV. STAT., ch. 120, § 720 (1973).
26. ILL. REV. STAT., ch. 120, § 713 (1973).

strict compliance with the requirements of Section 263. The bulk of the defenses to be found in non-compliance with the requirements of Section 263 will naturally relate to the question of diligence, the content of the notice, the time of service, the mode of service and who is or is not a "party interested." However, a lawyer seeking to prevent the entry of an order for issuance of a tax deed or to have such an order vacated on motion, for non-compliance with the requirements of Section 263, is limited only by his own imagination and his ability to ferret out even the most technical of flaws in his opponent's preparations.

After the entry of an order for tax deed and the expiration of the thirty-day motion period thereafter, none of the foregoing avenues of defense are available to a party seeking to have the order for tax deed vacated.

There are only two methods by which a final order for issuance of a tax deed can be attacked. The first is by direct appeal from the court order itself. The second is to be found in the following language of Section 266 of the Revenue Act:

> [H]owever, relief from such order may be had under Section 72 of the Civil Practice Act,[27] approved June 23, 1933, as heretofore and hereafter amended, in the same manner, upon the same grounds and to the same extent as may be had under that Section with regard to final orders, judgments and decrees in other proceedings.

The single most important decision in this area is *Urban v. Lois, Inc.*[28] in which the court gave the following clear and concise statement of the law:

> We turn first to the basic question of jurisdiction and the office of Section 72. We think it clear that the entire tax sale proceeding is one *in rem* rather than *in personam* . . . . It is the jurisdiction over the land itself, acquired in the original application for judgment and order of sale that gives the county court the power to act. . . . Once acquired the county court retains jurisdiction to make all necessary findings and enter all necessary orders supplemental to the original tax sale . . . . Such order could thereafter be attacked only by direct appeal or by appropriate proceedings under Section 72 of the Civil Practice Act.[29]

The court further explained what it meant by an "appropriate proceeding under Section 72" when it said:

27. ILL. REV. STAT., ch. 110, § 72 (1973).
28. 29 Ill. 2d 542, 194 N.E.2d 294 (1963).
29. *Id.* at 546, 194 N.E.2d at 296.

> It has been well established in tax deed proceedings that Section 72 cannot be used to relitigate any issue already passed on by the trial court, in the absence of fraud.[30]

In subsequent cases the court was confronted with the more sophisticated question of what constitutes sufficient fraud to give the court the power to reopen an order for tax deed. The court settled the question once and for all in the case of *Dahlke v. Hawthorne, Lane and Co.*[31] with the following pronouncement:

> We have repeatedly held that in a tax deed proceeding Section 72 of the Civil Practice Act may not, in the absence of fraud, be used to again put in issue questions previously passed upon by the trial court; such prior determination being conclusive on all parties and immune from collateral attack . . . . Fraud implies a wrongful intent—an act calculated to deceive.[32]

With the *Dahlke* decision, the evolutionary process seems to have been completed. It establishes that a tax deed proceeding cannot be collaterally attacked and that any attempt to vacate or set aside a final order for the issuance of a tax deed must be either by a direct appeal or by proceedings under Section 72 of the Civil Practice Act. This latter alternative must, however, establish proof of wrongful intent or a pattern of deception[33] in order that one may successfully attack the tax deed.

Upon a showing, to the satisfaction of the court, that there has been sufficient fraud to set aside the order for issuance of the tax deed, there remains yet another hurdle. Subsection 5 of Section 72 of the Civil Practice Act reads as follows:

> Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order, judgment or decree pursuant to the provisions of this section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order, judgment or decree but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order, judgment or decree.

Thus, if a bona fide purchaser has intervened by acquiring the property prior to the filing of the petition under Section 72, the court is unable to vacate the order for tax deed. The property is forever

30. *Id.* at 548, 194 N.E.2d at 297.
31. 36 Ill. 2d 241, 222 N.E.2d 465 (1967).
32. *Id.* at 244, 222 N.E.2d at 466.
33. *See* Zeve v. Levy, 37 Ill. 2d 404, 226 N.E.2d 620 (1968).

lost, but relief under Section 72 is yet available. In the case of *People ex rel. Wright v. Doe*[34] the court said:

> Thus, even if there were a conclusive adjudication that the property is held by a bona fide purchaser, that would afford no ground for dismissing the petition. If the petitioner were found entitled to relief against Interstate Bond Company, it should be possible for the court to frame its order in such a manner as to afford relief against the original holder of the tax deed, while protecting the rights of a bona fide purchaser.[35]

In the *Wright* case, the plaintiff had sought to collaterally attack a tax deed by petition under Section 72 of the Civil Practice Act after the property had been conveyed to an alleged bona fide purchaser. When the defense was made that the Section 72 petition was barred by the intervention of the bona fide purchaser, the trial court dismissed the petition. On appeal, the Supreme Court reversed giving the foregoing reasons. Since this remedy is available, the same reasoning would seem to operate as a bar to a separate collateral attack in equity where fraud is involved. Normally, equity takes jurisdiction of matters where fraud is involved but where, as here, there is an adequate remedy at law (under Section 72) a separate bill in equity will not lie.

Many lawyers are troubled by the fact that very valuable pieces of property can be lost to tax buyers for a very small fraction of their value. It is possible to acquire a tax deed for only one year's tax delinquency, indeed, for one installment of a special assessment warrant. In some cases the value of the property lost may be several hundred times the amount necessary to redeem from the tax sale. The reasons why owners, mortagees and other interested parties fail to redeem from such tax sales vary widely. Some are tragic, being due to severe physical or mental disability for extended periods. In other cases the landowner may well have taken the advice of "barber shop" lawyers.

In recognition of the fact that it is sometimes the case that property is lost for taxes without fault on the part of the owner, the 1970 legislature included in its tax reform package a completely novel provision, embodied in Section 247a of the Revenue Act,[36] which provides an indemnity fund for reimbursement of any owner who sustains loss or damage by reason of the issuance of a tax deed pursuant to Sections

34. 26 Ill. 2d 446, 187 N.E.2d 222 (1963).
35. *Id.* at 454, 187 N.E.2d at 226.
36. ILL. REV. STAT., ch. 120, § 728a (1973).

266 or 266a[37] "without fault or negligence of his own." Lawyers who represent clients who have lost their property might well look into the possibility of recovery from this indemnity fund if a Section 72 petition will not lie. On occasion lawyers, whose sense of justice will not accept the fact that equity must stand by and permit an owner to lose his property for a tax delinquency which is but a small fraction of the value, will attempt to induce equity to take jurisdiction in a collateral proceeding on an unjust enrichment theory. These cases usually take the form of a bill to quiet title or to impress a constructive trust on the tax title. In the case of *Stanley v. The Bank of Marion*,[38] where the property sold involved the home of the taxpayers, the sale included only one year's tax delinquency and the taxpayers had themselves paid all taxes which became due and payable subsequent to the sale, the court said:

> It is, of course, unfortunate that appellees have suffered the loss of their property because of one year delinquent taxes. It is clear, however, they were fully informed of the sale and were afforded every opportunity to redeem or defend. Having failed to do so, they are in no position to collaterally attack the original tax proceedings.[39]

Although that decision took the form of a Section 72 petition rather than a separate suit in equity, it is illustrative of the attitude of the court toward unjust enrichment defenses to tax deed petitions.

On more than one occasion lawyers have turned to the federal courts for relief after having exhausted all statutory and constitutional sources in Illinois. Two of these federal attacks found their way to the United States Supreme Court. The first of these was *Balthazar v. Mari, Ltd.*,[40] a case originally heard by a three-judge panel in the Northern District of Illinois, Eastern Division.

The plaintiffs in that case claimed that when their property was sold at a tax sale, they were deprived of due process of law as guaranteed by the Fourteenth Amendment. They asserted that tax delinquent real property cannot be sold by the state to a private purchaser at a tax sale unless there is provision for unrestricted public bidding based on the value of the property. Relying on federal condemnation cases, they also maintained that they were deprived of "just compensation" for their property.

37. ILL. REV. STAT., ch. 120, §§ 747, 747a (1973).
38. 23 Ill. 2d 414, 178 N.E.2d 367 (1962).
39. *Id.* at 420, 178 N.E.2d at 370.
40. 301 F. Supp. 103 (N.D. Ill. 1969).

The district court summarily waved away the "just compensation" theory simply by stating that the condemnation cases were inapplicable; that, rather than taking private property for a public purpose, Illinois is collecting taxes which were admittedly overdue. The court explained at length the Illinois tax collection and enforcement processes and compared them to some other systems. They recognized that the two-year redemption period gave owners who did not intend to redeem from tax sales ample opportunity to sell the property during that two-year period and thus recover the surplus value of their land. They found delinquent landowners in Illinois to have been given adequate notices and concluded that the Illinois legislation was constitutional. An appeal was taken to the United States Supreme Court[41] which affirmed without handing down an opinion.

Thereafter, in the case of *Catoor v. Blair*,[42] the same issues were raised in a class action, also heard by a three-judge panel in the Northern District of Illinois, Eastern Division. The court there held that notices and an opportunity for a landowner to either pay or object to his real estate taxes, as provided for in the Illinois tax deed statute, are constitutionally adequate when weighed against the legitimate interest of the State in collecting its taxes, and owners are not deprived of their Fourteenth Amendment rights of due process and equal protection. Again an appeal was taken to the United States Supreme Court[43] and they affirmed, handing down no written opinion.

CONCLUSION

Tax deed proceedings are of a highly technical nature and the courts are required to hold tax deed petitioners to strict compliance with the statutory prerequisites to the issuance of an order for tax deed. Thus, lawyers who would defend against entry of an order for issuance of a tax deed or would move to vacate such an order within the motion period after its entry have a wide variety of possible technical defects from which they can construct defenses. However, when no action has been taken until after an order for issuance of a tax deed has become final, defenses are limited to either a direct appeal or a petition under Section 72 of the Civil Practice Act, the latter being available only if the essential elements of fraud can be alleged and proved. This involves clear proof of an intent to defraud or demonstration of a clear

41. 396 U.S. 114 (1969).
42. 358 F. Supp. 815 (N.D. Ill. 1973).
43. 414 U.S. 990 (1973).

pattern of deception. It should also be remembered that, if the property is in the hands of a bona fide purchaser prior to the filing of the Section 72 petition, relief is limited to monetary damages against the party who committed the fraud.

Furthermore, lawyers who would spend their clients' resources attempting to persuade the courts to afford additional remedies are well advised to note the following language of the *Balthazar* opinion:

> Unfortunately, the Illinois system severely penalizes all real estate owners who fail to redeem. The total forfeiture seems extremely harsh when overdue taxes amount to only two or three percent of the property's value. *But oppressive statutes must be tempered by the legislature, not the courts.*[44]

44. 301 F. Supp. at 106 (emphasis added).

CHICAGO-KENT LAW REVIEW

ILLINOIS INSTITUTE OF TECHNOLOGY
CHICAGO-KENT COLLEGE OF LAW

PUBLISHED BY THE STUDENTS OF THE
ILLINOIS INSTITUTE OF TECHNOLOGY/CHICAGO-KENT COLLEGE OF LAW
10 N. FRANKLIN STREET, CHICAGO, ILLINOIS 60606

VOLUME 51 | 1975 | NUMBER 3