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EFFECT OF TAX DEEDS ON EASEMENTS APPURTENANT AND RIGHTS OF WAY

GEORGE KLOEK*

A FEW YEARS ago in Pennsylvania an attorney purchased a tax deed covering a piece of property over which a company had constructed a pipe line. After the period of redemption had expired, the owner wrote the company and informed them that if they wished to retain their easement they could do so by paying \$50,000. In a few days he increased this figure to \$100,000 and then to \$150,000. He then wrote the company, informing them that he would add \$100 to the last amount for each day they delayed in accepting his offer. Still getting no action out of the company, he began to dig under the pipe line so as to undermine it. He then notified the company that if they did not meet his demands he would break the pipe. The oil company secured a preliminary injunction restraining the owner from further endangering their plant, and the latter brought an action of ejectment. The lower court held for the plaintiff, but, happily for the pipe-line company, the supreme court reversed the decision,¹ holding that the purchaser of the tax deed had taken the property subject to the easement. While the state of Pennsylvania, by statute,² gives pipe-line companies the right of eminent domain, not all of our states give them such rights, and in the latter jurisdictions a decision holding that the easement was extinguished by the tax deed would have been very serious to such companies.

The problem of the effect of tax deeds on easements and rights of way takes on added importance in the present decade because of several factors. One of these is the growth of public utilities, which are now building most of their lines over private property rather than, as

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¹ *Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 124 A. 351 (1924).

² Purdon's 1936 Penn. Stat., Ch. 15, § 2031.

formerly, confining their lines to the public highways. Another factor is the present economic cycle, which makes the cultivation of much of our land so unprofitable and the holding of it for speculative purposes so burdensome that much property is being abandoned and later sold for taxes or taken over by the taxing bodies.

Also to be considered is the present strain on all branches of government imposed by the large expenditures of public moneys to offset unemployment, and, in the desperate need for new sources of revenue, it is imperative that all tax-delinquent land be put back on the tax roll. In order to encourage the purchase of such lands, it will be necessary to make such a purchase as attractive as possible. Naturally, if the state can offer this land free from all liens and encumbrances of any nature, the property will stand a better chance of securing a buyer than it would if the property remains subject to certain prior and adverse interests. There should, then, be a growing tendency toward declaring a tax deed a new title free and clear of any outstanding interest or lien. Strangely, only one state—Washington—has covered by statute the effect of a tax deed on certain types of easements.

NATURE OF RIGHTS OF WAY

In this discussion the terms "easements" and "rights of way" will be used more or less interchangeably. That a right of way is a mere easement has often been stated.³ In fact, most of the so-called right-of-way grants taken by various utilities recite that the grant covers a right of way and easement. Although a court of New Jersey has stated that an easement for a pipe line is not an easement

³ Anderson v. Willson, 48 Cal. App. 289, 191 P. 1016 (1920), which held, "technically a right of way is an easement"; Central Ill. Coal Mining Co. v. Illinois Power Co., 249 Ill. App. 199 (1928); Mannix v. Powell Co., 60 Mont. 510, 199 P. 914 (1921), which held that a right of way was an easement, nothing more; McGhee v. Wilson, 111 Ala. 615, 20 So. 619 (1896); Shaw v. Proffitt, 57 Ore. 192, 109 P. 584 (1910).

because there is no dominant estate and that the right of way is an "unnamed interest or estate in land in the nature of an easement but subordinate to the fee,"⁴ a Pennsylvania court has held the right of way of a pipe line company to be an easement appurtenant, with the pumping station as the dominant tenement.⁵ The contention in the latter case seems to be more logical. Just as a private easement of way will permit A to cross over the land of B with his goods to any given destination, so also does a utility employ the right of way as a path across the servient estate over which to carry gas, oil, electrical power, or messages. Certainly a power station or a telephone exchange could be pictured as a dominant tenement without greatly extending one's imagination.

A possible objection to this theory might arise where a right of way had already been secured but the dominant tenement had not yet been chosen or established. We would then have a situation of a servient estate without a dominant estate. There is also, possibly, a technical difference between the ordinary utility rights of way and the usual easement in that the owner of an easement of way has merely the right to pass over the property, while in the case of the rights of way of utilities there is usually an exclusive right to construct and maintain on the servient tenement certain plants, pipes, or lines, which are free from molestation by the owner of the land. In other words, the utility has exclusive right to as much of the property as is actually occupied by its fixtures. Nevertheless, the discussion below should be applicable, because, although the foregoing differences exist between easements and rights of way and the latter may not be considered to be technically easements, they are both such

⁴ *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492, 66 A. 427 (1907).

⁵ *Tide-Water Pipe Co. v. Bell*, 280 Pa. 104, 124 A. 351 (1924). Massachusetts has held that right of way and easement are the same. *Hazen v. Boston & Maine Ry.*, 68 Mass. (2 Gray) 574 (1854); *Conn. Valley St. Ry. v. Northampton*, 213 Mass. 54, 99 N. E. 516 (1912).

interests in the land as would survive or fall with the tax sale of the servient tenement.

THEORIES AS TO THE EFFECT OF TAX DEEDS

In determining the effect of a tax deed on easements, one might assume that if the tax is a personal debt of the owner—that is, if the owner is taxed proportionately to his holdings—the logical conclusion should be that, in the event of a sale for the non-payment of this debt, only the interest of the debtor would pass to the buyer, just as in the case of a sale on execution. But if the tax is not regarded as the obligation of the owner, but is regarded as assessed against the land regardless of ownership, then, on sale for nonpayment of taxes, all interests in the land would be affected and the clear title to the land would pass to the purchaser. If statutes clearly made this distinction, the problem would be a simple one.

In many cases, however, it is only through the construction placed on the statute by the courts that the statute may be put into the proper category. A statute may tax the land but, for convenience in collecting, provide that notice shall be given to the registered owner. Such a statute would fall into the latter group. A statute may say that all land is subject to tax but provide, as a method of collection, an action of debt against the owner, with satisfaction to be taken from the personal property of the owner, and provide only in case he has no personal property for the judgment to be satisfied from the land. Such a statute would fall in the prior group. Other statutes do not disclose so clearly on what theory liability is imposed, since they merely provide the method of enforcement without designating either the owner or the land as the subject of the tax.

As to the effect of the methods of taxation upon easements, Thompson, in his treatise on abstracts and titles,⁶

⁶ George W. Thompson, *A Practical Treatise on Abstracts and Titles* (2d ed., The Bobbs-Merrill Co., Indianapolis, Ind. 1930), p. 867, sec. 683.

says:

Where the statute makes the lien for taxes a first claim on the property, superior and paramount to any and all claims and liens whatsoever, and the sale was had in conformity with all the statutory requirements, so as to invest the purchaser with the fee simple title to the land, even the claims of homestead and the inchoate right of dower will be divested. Under this rule an easement granted by the owner to a third person will be extinguished by a sale of the servient estate for the nonpayment of taxes.

An annotater⁷ has stated generally:

If the tax is levied upon the real estate without regard to the various interests that may have been carved out of it, then in principle a sale of the land for taxes should pass a fee simple to the purchaser relieved of all easements. If, on the other hand, the tax is levied merely on the servient estate, then a sale of the land for taxes should pass merely the servient estate; that is, the land subject to the easement.

The court of Washington, in expressing its opinion on this subject, places the burden of saving easements from the effect of tax deeds squarely upon the owner thereof by stating in *Tamblin v. Crowley*,⁸ "We are unable to see why it is not as necessary to pay taxes upon land in order to save private easement right therein as it is necessary to pay taxes upon land to save any other private right therein, when the land is not exempt from taxation."

In Illinois three methods for collection of taxes are provided: (a) by action of debt against the owner,⁹ (b) by judgment against the land and sale pursuant thereto,¹⁰ and (c) by foreclosure of the tax lien after forfeiture.¹¹ The first method would appear to make the tax a debt of the individual, but the second method appears to regard the land as the debtor. The only sensible conclusion to draw, then, is that in Illinois the owner and the land are severally liable for the taxes. If this is true, what would

⁷ Note, 40 A. L. R. 1523.

⁸ 99 Wash. 133, 168 P. 982 (1917).

⁹ Ill. Rev. Stat. 1937, Ch. 120, § 215.

¹⁰ *Ibid.*, §§ 179 et seq.

¹¹ *Ibid.*, § 238.

pass to a purchaser would appear to depend on the procedure adopted. If the sale is on execution in satisfaction of the judgment on the personal debt, then the buyer would get the owner's interest—a derivative title which would be the same as that formerly held by the taxable party and subject to the same encumbrances. If the sale is pursuant to judgment against the land—the whole of the land being described on the tax rolls—it should pass a new, clear title from the sovereign which would result in the extinction of all the old titles. But if the land were described on the tax rolls as excepting a right of way, the judgment would be against the land minus the right of way. Likewise, if the easement were separately scheduled, either with or without the dominant estate, it would appear to be free from the danger of extinguishment by tax sale.

The third method is yet to be considered—by foreclosure of the tax lien, which, by statute,¹² is declared to be superior to all other liens and encumbrances. A lien is defined by Bouvier's Law Dictionary as "a hold or claim which one person has upon the property of another as a security for some debt or charge." Therefore the tax lien could be said to be security for payment of the owner's debt. In foreclosure of this lien, therefore, only the title of the debtor should be affected. It is true that the owner's title might be subject to other liens or charges, which, although prior in point of time, are inferior to the tax lien, but the most that could be affected by any lien would be the largest estate the owner has when he pays off and removes all the encumbrances which, by law, he may. Now an easement should be distinguished from liens and encumbrances which the land owner may remove. The easement cannot be removed by the owner of the servient tenement without consent of the owner of the dominant tenement. The word "encumbrance," as used in the statute, could be taken to mean

¹² Ibid.

removable charges. Hence, if the foreclosure is to enforce a right or charge against the person, it could follow that an easement would not be affected by the sale on foreclosure.

The foregoing distinctions are not, however, drawn by any Illinois case—they are mere deductions of the writer. No cases are to be found of sale on execution following a debt action against the owner. But where the second procedure is used, the courts are explicit that the buyer gets a clear and unencumbered title,¹³ although these cases did not require a decision as to what effect the sale has on easements. While it has been stated in the case of foreclosure of tax lien that the buyer takes a title free of prior encumbrances, the cases have not involved land subject to an easement which is contended to have been extinguished. The court in such cases has not tried to distinguish the effect of the procedure in foreclosure of lien from that in the case of a judgment against the land.¹⁴ Perhaps this can be explained on the ground that

¹³ *Atkins v. Hinman*, 7 Ill. 437 (1845), where the court said on p. 449: "The judgment [for unpaid taxes] is against the land and not against a particular individual. The land itself is sold and not a particular interest in it. If the land was subject to taxation . . . then, the whole legal and equitable estate is vested in the purchaser. A new and perfect title is established. This results from the paramount authority of the State to levy taxes on property within its limits and coerce the payment by subjecting the property to sale. It is one of the necessary and inherent rights of the sovereign power. This case, therefore, is not like the one of a sale under an ordinary judgment, where the purchaser only succeeds to the title, which the debtor had at the recovery of the judgment." *Cooper v. Corbin*, 105 Ill. 224 (1883), held that taxes on real estate, are a lien or charge upon the land itself and if property is sold for taxes title will pass regardless of any incumbrance resting thereon, whether such incumbrances are created before or after the lien has attached. *Miller v. Cook*, 135 Ill. 190, 25 N. E. 756 (1890), held that a "tax title is hostile to every other interest in the land"—in this case a mortgage. *Woitynek v. Franken*, 300 Ill. 418, 133 N. E. 235 (1921), held that a tax deed conveyed property in fee simple. *South Chicago Brewing Co. v. Taylor*, 205 Ill. 132, 68 N. E. 732 (1903), held "In the case of a sale for taxes, all the estates, legal and equitable, in the land are sold, and the title is a new one in the purchaser, derived from the State." In *McConnell v. Jones*, 332 Ill. 620, 164 N. E. 186 (1928), the court said, "Taxes levied upon real estate become a charge upon the land itself and if not paid the land may be sold for the taxes due thereon, and the title will pass regardless of any incumbrances resting upon the land."

¹⁴ *Clark v. Zaleski*, 253 Ill. 63, 97 N. E. 272 (1911), where court held that the taxes on real estate are "expressly made 'a prior and first lien on all such

the lien is to be regarded as security not only for the debt of the title holder but also for the debt of the land itself. If this is true, the lien extends not merely to the interest of the title holder but to every interest therein. It would follow, if this theory is correct, that the purchaser of a tax deed after foreclosure of the tax lien would take free and clear of all former interests in the land, easements included. This, of course, is upon condition that the interested parties have been given the notice they are entitled to under the Illinois Constitution. Likewise, what was said above regarding separation of the easement for assessment independent of the servient estate should apply here. If the interest in land represented by the easement is excluded from the servient estate for tax purposes, the tax lien on the servient estate can not reach it, since the lien attaches only to the interest of the debtor—in this case the servient estate itself, excluding the easement. Because the holder of a tax title in Illinois usually cannot show strict compliance with the law, a tax title has rarely been thought of in this state as anything more than a perpetual lien which cannot be foreclosed. Therefore, it is improbable that the holder of a tax title could reach the position where he could interfere with an easement.

A review of the various state statutes and decisions indicates that this subject can apparently be treated under the following general outline:

- I. States where the statute provides for the tax as being against the property or in rem.
 - (a) Effect of tax deed on an easement where the

real property, superior to all other liens and encumbrances,' and when such lien is foreclosed and a sale is had thereunder in pursuance of a valid decree . . . such proceeding constitutes a new and independent title, free and clear from all previous titles and claims, of every kind and character." *People v. Evans*, 262 Ill. 235, 104 N. E. 646 at 648 (1914), held that the lien for taxes is "paramount to all rights, titles, claims, or interests, whenever and however acquired." See also *Drainage Com'rs of Town of Havana v. Mansfield*, 348 Ill. 50, 180 N. E. 630 (1932).

- easement is not taxed nor taken into consideration in assessing the tax.
- (b) Effect where the easement is separately taxed as property.
 - (c) Effect where the tax is assessed against the dominant tenement, including the easement.
- II. States where the statute provides for a tax against the individual because of ownership of land.
- (a) Where proceedings for collections are in personam.
 - (b) Where proceedings are in rem.
- III. States that have by statute exempted rights of way from the effect of tax deeds.

STATES PROVIDING THAT TAX IS IN REM

In states of this group the tax is levied against the land without regard to the various interests that may have been carved out of the land. A point to be noted here is that some states in this group, while holding that the tax is in rem and against the land, apparently assess the owner and send out tax bills to him. This procedure does not change the nature of the tax but is simply a means employed in order to remind the owner that a tax is due, thus expediting the collection of the tax.

Twenty-one states do not tax easements nor take them into consideration in assessing the tax. In some of these, the courts have ruled directly upon the question of the effect of tax deeds on easements, while others have only intimated the nature of the title which the purchaser secures from such a deed. In the latter cases, we can only draw the conclusion that, generally speaking, the easement would be extinguished by the sale of the servient estate for taxes. This is on the theory that the tax deed is a new title from the sovereign, theoretically free from prior encumbrances, liens, or easements.

Some states, as shown below, have provided by statute

that the new tax deed shall have priority over attachments, liens, and encumbrances of any nature. In such cases the term "encumbrances," unless the court has otherwise indicated, shall be considered to include easements and rights of way.

The decisions of Arkansas have been consistent in holding that a tax sale vests not only the interest of the former owner but the interests of all others in the land, so as to give the purchaser a new, unencumbered title.¹⁵ These opinions are in conformity with the state statute,¹⁶ which provides that a sale for taxes is in rem and hence bars all interested parties. The statute makes an exception in the case of mineral rights,¹⁷ which are separately taxable; so the mineral rights are unaffected by the sale of the corpus for taxes.¹⁸ It is probable that the same rule could be applied to cases of the usual type of utility rights of way that have been scheduled for taxes. All other easements, liens, and encumbrances, however, should be extinguished by the sale.

In the case of *Stuart v. Stephanus*,¹⁹ the Florida court stated:

It [a tax title] is not a derivative title, nor is it in privity with the former record title. It is not merely the sum of all the existing titles but . . . a new title in the nature of an independent and paramount grant by the sovereign authority made in the exercise of its power to compel a proportionate contribution toward the expense of the government by levying a tax against the property and coercing its payment by subjecting the property to sale in default of payment. A sale of the property by the sovereign in the exercise of that power operates upon the land itself and not upon the title by which it had theretofore been held.

¹⁵ *McWhirter v. Roberts*, 40 Ark. 283 (1883), which holds that tax deed extinguishes inchoate right of dower; *Osceola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S. W. 609 (1907), affirmed in 94 Ark. 183, 126 S. W. 380 (1910); *Biscoe v. Coulter*, 18 Ark. 423 (1857); *Merrick & Fenno v. Hutt*, 15 Ark. 331 (1854).

¹⁶ 1937 Ark. Stat., § 13771.

¹⁷ *Crawford & Moses' Dig.*, sec. 9856.

¹⁸ *State v. Arkansas Fuel Oil Co.*, 179 Ark. 848, 18 S. W. (2d) 906 (1929); *Clark v. Dennis*, 172 Ark. 1096, 291 S. W. 807 (1927).

¹⁹ 94 Fla. 1087, 114 So. 767 (1927).

And this decision appears squarely in line with the previous Florida decisions.²⁰

The early Georgia case of *Verdery v. Dotterer*²¹ in 1882 held that the taxation of real property was in rem. This case was followed in 1886 by *Kile v. Fleming*²² and in 1888 by *Cross v. Taylor*,²³ both of which appear to hold that tax proceedings were in personam and that the purchaser obtains merely the title of the former owner. Later, in the case of *Bennett v. Southern Pine Company*,²⁴ the court swung back to the Verdery case. This has been followed in later cases.²⁵ The present statute merely provides that the lien for taxes is superior to all other liens.²⁶

The statutes of Idaho²⁷ provide that a tax deed "conveys to the grantee the absolute title to the land described therein, free of all encumbrances except mortgages of record to the holders of which notice has not been sent . . . and except any lien for taxes which may have attached subsequently to the assessment." It appears from this that any interest in the land, other than mortgages, would be extinguished whether or not the owner of such interest had notice of the sale. This appears to be supported by earlier cases.²⁸ In an opinion by the attorney general of that state, however, it is intimated that easements of telephone companies are to be treated as real property and can be sold for non-payment of taxes.²⁹ Apparently,

²⁰ *Hecht v. Wilson*, 10 Fla. 421, 144 So. 886 (1932), 145 So. 250 (1933); *City of Sandford v. Dial*, 104 Fla. 1, 142 So. 233 (1932); *Dean v. Kane*, 106 Fla. 814, 143 So. 656 (1932).

²¹ 69 Ga. 194 (1882).

²² 78 Ga. 1 (1886).

²³ 81 Ga. 86, 6 S. E. 179 (1888).

²⁴ 123 Ga. 618, 51 S. E. 654 (1905).

²⁵ *Beckam v. Lindsey*, 22 Ga. App. 174, 95 S. E. 745 (1918); *Elrod v. Owensboro Wagon Co.*, 128 Ga. 361, 57 S. E. 712 (1907).

²⁶ 1933 Georgia Code, § 92-5708. Sec. 92-7404 provides that defendant in executions issued by tax collectors for taxes shall have the privilege of pointing out the property upon which to levy.

²⁷ Idaho Code Ann. 1932, Ch. 61, § 1032.

²⁸ *Heffner v. Ketchen*, 50 Ida. 435, 296 P. 768 (1931); *Andrews v. North Side Canal Co.*, 52 Ida. 117, 12 P. (2d) 263 (1932); *Smith v. City of Nampa*, 57 Ida. 736, 68 P. (2d) 344 (1937).

²⁹ Opinion of Attorney General No. 120, Jan. 27, 1930, cited in Idaho C. C. H. Corp. Tax Service, ¶ 2011.3.

then, certain rights of way are contemplated to be separately assessed and would not, therefore, be affected by the sale for taxes of the servient tenement.

The state of Illinois, which, in the case of judgment and sale of the land for unpaid taxes, comes within this group, has been discussed heretofore.

Iowa has consistently held that a tax deed is a new title, on the theory that all property is held subject to the duty to pay taxes which the sovereignty imposes and a sale for such taxes destroys all prior titles and interests in the land.³⁰ This is consistent with the Iowa statute,³¹ which provides that a tax deed shall vest in the purchaser all the right, title, interest, and estate of the former owner as well as that of state and county. It is also in line with the very recent case of *Nedderman v. City of Des Moines*,³² where the court held that the purchaser at a tax sale took realty free from a covenant imposed in the previous chain of title prohibiting the use of the realty for commercial purposes. In the latter case, the defendant contended that the assessor should have taken into consideration the depreciation in value of a servient tenement and the increased value of the dominant where the latter benefited by an easement or restrictive covenant imposed on the servient tenement. However, the court could find no evidence that the assessor had done so. Nevertheless, here was an attempt to bring this state in line with the

³⁰ *Crum v. Cotting*, 22 Iowa 411 (1867); *Lucas v. Purdy*, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. (N. S.) 1294 (1909); *Iowa Securities Co. v. Barrett*, 210 Iowa 53, 230 N. W. 528 (1930); *Peterborough Savings Bank v. Des Moines Savings Bank*, 110 Iowa 519, 81 N. W. 786 (1900); *Ferguson v. Aitken*, 220 Iowa 1154, 263 N. W. 850 (1935); *Means v. City of Boone*, 214 Iowa 948, 241 N. W. 671 (1932); *Woods v. Schwartz*, 212 Iowa 462, 236 N. W. 491 (1931). The United States Supreme Court in *Hefner v. Northwestern Mut. L. Ins. Co.*, 123 U. S. 747, 9 S. Ct. 337, 31 L. Ed. 309 (1887), in interpreting the Iowa statute also held that the purchaser obtained a complete and new title which "extinguishes all prior titles and incumbrances of private persons and all equities arising out of them."

³¹ Code of Iowa 1935, Ch. 349, § 7286.

³² 221 Iowa 1352, 268 N. W. 36 (1936). In *Willcuts v. Rollins*, 85 Iowa 247, 52 N. W. 199 (1892), the court stated: "A tax title is not a derivative title. If valid, it is a breaking up of all other titles, and is antagonistic to all other claims to the land."

New York rule of *Jackson v. Smith*.⁸³

The statutes of Kansas provide that a tax deed "shall vest in the grantee an absolute estate in fee simple in such lands, subject, however, to all unpaid taxes and charges which are a lien thereon."⁸⁴ This seems to have been applied in all the decisions⁸⁵ in that state, which have held to the unaltered theory that the sale of land for taxes is a proceeding in rem, vesting in the grantee a new, unencumbered title from the sovereign. In this statute the word "charges" is not considered as employed in the general meaning of that term but is interpreted rather as covering such fees and penalties as may have accumulated with the unpaid taxes.

The statutes of Maine provide that there shall be a lien to secure the payment of all taxes assessed on real estate and that it shall take precedence over all other claims on said real estate and interests and shall continue in force until such taxes are paid.⁸⁶ Another section outlining the collection of such taxes provides that, eight months after taxes have been committed to him for collection, the collector may record a certificate which is in the nature of a mortgage and which has "priority over all other mortgages, liens, attachments, and encumbrances of any nature. . . ." ⁸⁷ Upon the foreclosure of this certificate, the owner, apparently, is vested with a new title from the sovereignty, free of all prior claims or encumbrances. There are apparently no cases in point.

In Maryland, in the case of *Hill v. Williams*,⁸⁸ a parcel of land was laid out into lots. Adjoining three lots was

⁸³ 138 N. Y. S. 654 (1912), to be discussed hereafter.

⁸⁴ Gen. Stats. of Kansas 1935, Ch. 79, § 2501.

⁸⁵ Board of Regents of the Kansas State Agricultural College v. Linscott, 30 Kan. 240, 1 P. 81 (1883); *McFadden v. Goff*, 32 Kan. 415, 4 P. 841 (1884); *Harris v. Curran*, 32 Kan. 580, 4 P. 1044 (1884); *Kerr v. Hoskinson*, 5 Kan. App. 193, 47 P. 172 (1896); *Douglas v. Lowell*, 64 Kan. 533, 67 P. 1106 (1902); *Girard Trust Co. v. Jones*, 81 Kan. 753, 106 P. 1052 (1910); *Jinkiaway v. Ford*, 93 Kan. 797, 145 P. 885 (1915); *Van Doren v. Wolf*, 112 Kan. 380, 211 P. 144 (1922).

⁸⁶ Rev. Stat. of Maine 1930, Ch. 13, § 3.

⁸⁷ Laws of Maine 1933, Ch. 244, § 2.

⁸⁸ 104 Md. 595, 65 A. 413 at 414 (1906).

a strip of land which was dedicated to the use of the abutting property owners as an alleyway. The three lots had been sold after the alley was assessed against the former owner. The alley was ultimately sold for taxes. The court, in construing the effect of the tax sale on the easement in the alley, stated:

It [the alley] therefore continued to be taxable after the creation of the easement just as it had been before, and, if the taxes were not paid it was liable to be sold, even though by such a sale the easement would be destroyed, because the purchaser at a tax sale . . . is clothed with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all titles and incumbrances of private persons and all equities arising out of them.

Incidentally, this court interpreted the word "incumbrances" as covering easements.

In *Consolidated Gas Company of Baltimore v. Mayor of Baltimore*,³⁹ the occupancy of a street by a gas company was held to be an easement and taxable as real estate. These decisions are in line with others which hold that the purchaser of a tax title obtains a new and complete title,⁴⁰ and they have apparently construed the statute⁴¹ as applying to easements as well as liens. It is the writer's understanding that Maryland now makes a nominal assessment for the right of way of certain utilities. That easements or rights of way of communication companies are taxable was also recognized in the case of *Postal Telegraph Cable Company v. County Commissioners of Hartford County*.⁴² However, where taxes are actually paid on the easement itself, the latter should not be cut off by tax sale of the servient tenement.

³⁹ 101 Md. 541, 61 A. 532 (1905). See also *United Ry. & Electric Co. of Baltimore v. Mayor of Baltimore et al.*, 111 Md. 264, 73 A. 633 (1909).

⁴⁰ *Textor v. Shipley*, 86 Md. 424, 38 A. 932 (1897); *McMahon v. Crean*, 109 Md. 652, 71 A. 995 (1909); *Wagner v. Goodrich*, 148 Md. 318, 129 A. 364 (1925), which holds that tax deed is paramount; *Winter v. O'Neill*, 155 Md. 624, 142 A. 263 (1928); *Thompson v. Henderson*, 155 Md. 665, 142 A. 525 (1928).

⁴¹ Ann. Code of Md. 1924, Art. 91, §§ 58-73, which provide that purchaser gets new and complete title in land.

⁴² 131 Md. 96, 101 A. 600 (1917).

Massachusetts is another state which, both by statute⁴³ and by decisions,⁴⁴ has consistently held that taxes are against the land and that the purchaser of a tax deed secures a new and unencumbered title. *Hamilton Manufacturing Company v. City of Lowell*⁴⁵ held one maintaining a wall by virtue of an easement on property of another was not liable for taxes on land underneath the wall. In the case of *Flax-Pond Water Company v. City of Lynn*,⁴⁶ the court indicated that easements should be assessed separate from the servient estate, and said:

It is the policy of the legislation of the commonwealth that all valuable property should be taxable in some form. . . . Assuming that the plaintiff's title was only to an easement . . . still one who is entitled to an easement of this character . . . and who is in enjoyment of this right . . . is to be deemed as in possession of the real estate, for the purpose of taxation, within the meaning of the statute. . . . As the value of the structures [placed under the easement] might far exceed the value of the fee, subject to the easement, it is plain to see that it might be more proper and just to assess the tax to the plaintiff, rather than to the owner of the fee of the soil, provided this was allowable under the statute.

However, as there appears to be no indication that Massachusetts in actual practice does assess easements to their separate owners, it is included in this category rather than with those states that do tax easements separately.

In Minnesota, in the case of *State v. Camp*,⁴⁷ the court stated:

⁴³ 1933 Annotated Statutes, Ch. 60, § 64, which provides that title conveyed by tax deed shall be absolute after foreclosure of right of redemption.

⁴⁴ *McLoud v. Mackie*, 175 Mass. 355, 56 N. E. 714 (1900); *Langley v. Chapin*, 134 Mass. 83 (1883); *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244 (1903); *Weeks v. Grace*, 194 Mass. 296, 80 N. E. 220 (1907); *Isbell v. Greylock Mills*, 231 Mass. 233, 120 N. E. 446 (1918); *Saftel v. Newton Savings Bank*, 254 Mass. 516, 150 N. E. 433 (1926); *Crocker-McElwain Co. v. Board of Assessors of Holyoke*, 5 N. E. (2d) 558 (Mass., 1937).

⁴⁵ 185 Mass. 114, 69 N. E. 1080 (1904).

⁴⁶ 147 Mass. 31, 16 N. E. 742 (1888).

⁴⁷ 79 Minn. 343, 82 N. W. 645 (1900). See also *Wass v. Smith*, 34 Minn. 304, 25 N. W. 605 (1885); *Windom v. Schappel*, 39 Minn. 35, 38 N. W. 757 (1888); *Oakland Cemetery Ass'n v. Board of Com'rs of Ramsey County*, 98 Minn. 404, 108 N. W. 857 (1906), which held that a tax deed bars all other titles of record and imports an absolute title as against the world. *Aff'd on rehearing*, 109 N. E. 237.

Tax liens take priority in the reverse order of other liens. As to all other liens, the first in order of time is, *prima facie*, superior to those of a later date. In the case of tax liens, however, the "last shall be first and the first last." The general and universal rule is that in proceedings in rem to enforce the payment of taxes, the last tax levied and sought to be enforced is superior and paramount to the lien of all prior taxes, claims, or titles. If a tax title be valid in law and in equity, it operates to effectually clear the title to the land covered by it of all prior liens, claims, or titles, however acquired or obtained.

Apparently, then, the purchaser of a tax deed obtains a new, complete, and independent title from the sovereignty. This seems to be in conformity with the present statutes.⁴⁸

While the decisions of the court of Mississippi have held, inconsistently, both that the purchaser of a tax deed secures only the title of the former owner⁴⁹ and that he obtains a complete, new title,⁵⁰ the present statute provides that taxes shall bind the property and be entitled to preference over all judgments, executions, encumbrances, or liens whensoever created, and all taxes assessed shall be a lien upon and bind the property assessed.⁵¹ Apparently, then, disregarding the decisions and looking at the statute alone, which was amended in its present form in 1938, and construing an easement as an encumbrance, the purchaser would take free of any prior easement on the premises.

The 1929 Nebraska statutes⁵² provide that the tax deed

⁴⁸ Mason's Minn. Stat. 1927, § 2130, provides that purchaser gets property free from "any claim, lien, or incumbrance, except such right, title, interest, lien, or incumbrance as such owner may be legally or equitably bound to protect against such sale." Mason's Minn. Stat., 1937 Supp., § 2139-15, provides that where land is forfeited to the state for non-payment of taxes and the state sells to an individual, the individual gets a conveyance which has the same force and effect as a patent from state.

⁴⁹ *Dunn v. Winston*, 31 Miss. 135 (1856); *Caston v. Pine Lumber Co.*, 110 Miss. 165, 69 So. 668 (1915); *Caruthers v. McLaren*, 56 Miss. 371 (1879).

⁵⁰ *Paxton v. Valley Land Co.*, 68 Miss. 739, 10 So. 77 (1891); *Patterson v. Langston*, 69 Miss. 400, 11 So. 932 (1892). See also *Howie v. Panola-Quitman Drain. Dist.*, 168 Miss. 387, 151 So. 154 (1933).

⁵¹ Miss. Code Ann. 1930, Ch. 61, § 3120.

⁵² Neb. Comp. Stat. 1929, Ch. 77, §§ 2026, 2141; Laws of Neb. 1937, § 77-2039 provides that tax deed shall pass title to the purchaser free and clear of all liens of every nature whatsoever and the interest of all persons over whom the court had jurisdiction.

conveys title in fee simple, subject to unpaid taxes and assessments thereon. The various decisions in that state have uniformly held that the purchaser of the tax deed gets a new and unencumbered title.⁵³

In 1937, in the case of *Lothrop v. Southern Pacific Company*,⁵⁴ the Federal court held that the purchaser of real property at a tax sale in Nevada took it subject to any condition limiting or affecting the owner's title at the time the assessment was levied. On March 26, 1937, the state passed a statute providing that such tax deeds convey to the purchaser the absolute title of the property described therein free of all encumbrances, except any lien for any taxes or assessments.⁵⁵ The statute, therefore, seems to abrogate the effect of the foregoing decision and makes the action one in rem, thereby shutting off all prior rights or equities in the property.

In the New Mexico case of *Alamogordo Improvement Company v. Hennessee*,⁵⁶ the plaintiff real estate company sold land, inserting in the deed a clause stating that no intoxicating liquors were to be sold on the property, the penalty for so doing being that "this deed shall become null and void and all right, title and interest in and to the premises hereby conveyed shall revert to the first party." The property was sold for taxes, and, in a suit to recover the land because liquor had been sold on the premises, the court held that taxes are a lien on the property taxed and that "a suit to foreclose a tax lien is 'a suit in rem against said property . . . and in personam against all persons' appearing on the tax roll" and therefore the purchaser under the tax deed obtained a perfect and complete title in fee simple free and clear of all liens and encumbrances.

⁵³ *Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686 (1893); *Topliff v. Richardson*, 76 Neb. 114, 107 N. W. 114 (1906); *Leigh v. Green*, 64 Neb. 533, 90 N. W. 255 (1902), affirmed, 193 U. S. 79, 24 S. Ct. 390, 48 L. Ed. 623 (1904).

⁵⁴ 17 F. Supp. 947 (1937).

⁵⁵ Stats. of Nev. 1937, Ch. 192, § 41.

⁵⁶ 40 N. M. 162, 56 P. (2d) 1127 (1936). See also dissenting opinion in *Cavender v. Phillips*, 41 N. M. 235, 67 P. (2d) 250 (1937).

The court, in so holding, stated that the tax was against the real estate itself and that the proceedings employed to obtain the delinquent taxes were in rem, a two-fold reason for holding that a new, independent title resulted. This seems to be in line with their present statute.⁵⁷

One early North Carolina case held that the purchaser of a tax deed secured merely the title of the former owner,⁵⁸ but in the more recent case of *Muddy Creek Drainage Commission v. Epley*⁵⁹ the court held that the lien of taxes on realty is in rem and not in personam and that the land to which it attaches is the sole security for the satisfaction thereof. The latter case is in line with the Federal case of *Cummings v. Cummings*,⁶⁰ which held that an action to collect taxes was in rem and that the purchaser obtained the entire estate, but appears to be out of line with the present statute,⁶¹ which provides that "personal property of the taxpayer shall be levied upon and shall be sold for the satisfaction of his taxes before resorting to his real estate. . . ." This statute seems to indicate another in-personam method of collecting taxes. If, in pursuance thereof, only the interest of the taxable owner were sold, any prior easement on the property would not be affected by such sale.

A 1913 statute⁶² of North Dakota provides that "taxes upon real property are . . . made a perpetual paramount lien thereupon against all persons and bodies corporate, except the United States and the state. . . ." Another statute⁶³ sets forth that a tax deed "shall vest in the said purchaser, his heirs or assigns, an absolute estate in fee

⁵⁷ "Such deed shall vest in the grantee, his heirs, successors and assigns, a perfect and complete title to the premises free and clear of all liens and encumbrances. . . ." *New Mex. Supp.* 1938, § 141-747.

⁵⁸ *Ex parte Macay*, 84 N. C. 64 (1881).

⁵⁹ 190 N. C. 672, 130 S. E. 497 (1925).

⁶⁰ 91 F. 602 (1899).

⁶¹ N. C. Ann. Code 1931, § 8006.

⁶² *Comp. Laws of N. D.* 1913, § 2186.

⁶³ *Ibid.*, § 2206.

simple in such land. . . ." A decision⁶⁴ interpreting these sections held that there was no privity between the holder of the fee and one claiming a tax title upon the land and that a tax deed is the breaking up of all former titles, resulting, apparently, in a new, unencumbered title in the grantee.

The general laws of Rhode Island⁶⁵ provide that a tax deed shall "vest in the purchaser . . . all the estate, right and title the owner thereof had in and to such real estate at the time said tax was assessed, free from any interest or incumbrance thereon of any person to whom the notice required by the provisions of this chapter shall have been given. . . ." Another statute⁶⁶ provides that a "town or city may sell said real estate to the person, firm, association, or corporation making the offer of purchase and give its deed which shall vest in said purchaser a complete title to said property free from all encumbrances and claims of any person, firm, association or corporation." The language of these two statutes, coupled with the decision of *In re Crafts*,⁶⁷ indicates that a tax deed would divest all prior rights and title in the property sold.

In *People's Bank v. Mears*⁶⁸ the court of South Dakota held that the purchaser under a tax deed secured a fee simple title, and in the case of *Warren v. Blackman*,⁶⁹ decided in 1933, it was held that a tax deed extinguishes prior encumbrances. The state statutes⁷⁰ provide that "such deed shall vest in the grantee an absolute estate in fee simple in such real property, subject, however, to all claims which the state may have therein for taxes, liens, or incumbrances."

⁶⁴ *Baird v. Stubbins*, 58 N. D. 351, 226 N. W. 529, 65 A. L. R. 1009 (1929), approved in dictum by *Peterson v. Reishus*, 66 N. D. 436, 266 N. W. 417 (1936).

⁶⁵ Gen. Laws of R. I. 1923, § 877.

⁶⁶ R. I. Acts & Resolves, May, 1935, Ch. 2259, § 46.

⁶⁷ 41 R. I. 63, 102 A. 753 (1918).

⁶⁸ 14 S. D. 578, 86 N. W. 634 (1901).

⁶⁹ 62 S. D. 26, 250 N. W. 681 (1933).

⁷⁰ Comp. Laws of S. D. 1929, § 6804.

In the case of *Hanson v. Burriss*,⁷¹ the court of Utah in 1935 held that where the county has received a tax deed and has then sold it, the purchasers of such tax deed take "new and complete title in land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them." This case has been followed in *Utah Oil Refining Company v. Millard County Drainage District No. 4*.⁷² These decisions clearly indicate the action to be one in rem, which would cut off prior easements.

The decisions⁷³ in Wisconsin are consistent in holding that the purchaser under a tax deed gets a fee simple title, new and unencumbered. The statute⁷⁴ in point provides that the tax deed "shall vest in the grantee an absolute estate in fee simple in such lands subject, however, to all unpaid taxes and charges which are a lien thereon, and to redemption. . . ." Apparently the action is in rem, and prior encumbrances would fall with the tax deed.

Whether or not an easement or right of way is taxable separate and apart from the servient tenement is controversial. *Corpus Juris*⁷⁵ states:

Incorporeal hereditaments, easements, and other rights in land,

⁷¹ 86 Utah 424, 46 P. (2d) 400 (1935).

⁷² 90 Utah 67, 50 P. (2d) 774 (1935). Note that while § 80-10-43 of Utah Rev. Stat. 1933 provides that the sheriff "shall execute . . . a deed conveying to such purchaser all the right, title and interest of each and all the parties [to the foreclosure]," § 80-10-46 provides that such foreclosure shall not deprive any county of any other method or means provided for the collection of enforcement of any such taxes, but shall be deemed and construed as providing an additional or cumulative remedy for the collection of general taxes levied and assessed against the real estate in such county. This seems to indicate that the action might be considered as in personam, as it is intimated that the taxing bodies may look further than just to the land itself for the collection of the taxes thereon.

⁷³ *Eaton v. North*, 29 Wis. 75 (1871); *Delaplaine v. Cook*, 7 Wis. 44 (1856); *Sayles v. Davis*, 22 Wis. 225 (1867); *Jarvis v. Peck*, 19 Wis. 74 (1865); *Truesdell v. Rhodes*, 26 Wis. 215 (1870); *Cole v. Van Ostrand*, 131 Wis. 232, 110 N. W. 84 (1907); *Pereles v. Meyer*, 213 Wis. 232, 251 N. W. 255 (1933).

⁷⁴ Wis. Stats. 1937, § 75.14.

⁷⁵ 61 C. J. 190, ¶ 153, citing *Town of Whitefield v. Town of Dalton*, 80 N. H. 93, 112 A. 907 (1921).

as distinguished from ownership of the soil, may possess value and are therefore taxable if the legislature so determines, but not otherwise; and it is ordinarily held that such special rights or interests in lands owned by another are not to be regarded as real estate or as separately taxable to the persons exercising or enjoying the same.⁷⁶ But when an easement is carved out of one estate for the benefit of another, the market value of the servient estate is lessened, and that of the dominant estate increased, by the value of the easement, and the respective tenements should be assessed accordingly.

Such a rule has already been expressed in New York⁷⁷ and in other states, but in such instances the tax is levied against the entire dominant estate and not separately against the easement. However, certain states have ruled that easements may be directly assessed. In the states where the easements are so assessed, they would be unaffected by the tax sale of the servient estate. As to the easements which may not be separately assessed, one can only conjecture as to how the state would hold if the servient estate were sold at a tax sale. However, if it is the intention of the state that all easements be assessed, the failure of the taxing bodies to assess the easements might mean either that the assessing bodies were negligent or that the easements were considered as of no value, and the easement would not fall with a tax sale. If, however, the statutes contemplate that only certain types of easements or rights of way be taxable, the others would stand or fall with the tax sale according to the character of the title secured by the purchaser at such sale. Five states have held easements to be separately assessable. In Louisiana the statute⁷⁸ provides that a tax deed shall "operate as a cancellation of all liens and privileges, as well as of conventional and judicial mortgages, recorded against the property sold, except the liens and privileges for taxes and paving and other assessments due the state

⁷⁶ *Stansell v. Amer. Rad. Co.*, 163 Mich. 528, 128 N. W. 789 (1910); *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958 (1890); *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 78 N. W. 1032 (1899).

⁷⁷ *Jackson v. Smith*, 138 N. Y. S. 654 (1912).

⁷⁸ *Dart*, La. Gen. Stat. 1932, § 8490.

or any political subdivision thereof. . . ." An early Louisiana decision,⁷⁹ in ruling upon a similar statute, declared that the purchaser under such sale secured a new and independent title from the sovereign, divested of all prior claims to and in the property. Two recent cases,⁸⁰ however, have held that the statute should be construed to mean that only conventional and judicial mortgages are cut off by a tax sale and that it would not divest a vendor's lien. While the present statute seems to be silent as to the nature of the title which would result if there were no bidders at a tax sale and the land were adjudicated to the state, an older statute⁸¹ provides that in such event the property, if unredeemed, passes "free of all mortgages, liens, privileges, and encumbrances, whatsoever, excepting all city and municipal taxes." Still another statute⁸² provides that roadbeds, roads of transportation, telephone companies, and telegraph companies are taxable.

The earlier Montana cases held that the purchaser of a tax deed obtained an unencumbered new title which extinguished all liens not expressly excepted.⁸³ This is in line with its present statute.⁸⁴ As late as 1931, in the case of *Richardson v. Lloyd*,⁸⁵ the state held that the purchaser under a tax sale would get a deed which extinguished all prior titles. In this case, however, the court referred to liens as being extinguished. The court ruled directly on the question of easements in the recent case of *North-*

⁷⁹ Fitzpatrick v. Leake, 29 La. Ann. 794, 21 So. 597 (1897).

⁸⁰ Conservative Homestead Ass'n v. Conery, 169 La. 573, 125 So. 621 (1929), rehearing denied (1930); McKellar v. Dixie Investment Co., 159 So. 195 (La., 1935).

⁸¹ § 5, act. No. 80, (1888). See 5 Tulane L. Rev. 116 (1930).

⁸² Dart, La. Gen. Stat. 1932, § 8370.

⁸³ State ex rel. Malott v. Board of Comm. of Cascade County, 89 Mont. 37, 296 P. 1 (1931); State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 P. 638 (1928); Northern Pac. Ry. Co. v. Musselshell County, 74 Mont. 81, 238 P. 872 (1925).

⁸⁴ Mont. Rev. Code 1935, § 2215.

⁸⁵ 90 Mont. 127, 300 P. 254 (1931).

western Improvement Company v. Lowry,⁸⁶ when it stated that it was possible under the law of that state to carve out of the same land separate estates which are separately assessed for the purpose of taxation. And in the earlier case of *Hale v. Jefferson County*,⁸⁷ the court, in speaking of water rights appurtenant, said,

So situated and used, the value of this species of property enters as an element into the value of the corpus or principal estate to which it is attached or appurtenant, and bears its proportionate burden of taxation by the added taxable value which it gives to the principal estate.

Apparently, then, Montana contemplates that an easement, if taxed, is taxable with the dominant estate and does not fall with the servient estate.

In 1845, in the case of *Smith v. Messer*,⁸⁸ the court of New Hampshire held that no title could pass except a fee simple and that all interested in the land are delinquent if the taxes are not seasonably paid; and in the later case of *Eastman v. Thayer*⁸⁹ the court held that the purchaser obtained a new and complete title. However, the later cases, which are based on new statutes,⁹⁰ all indicate that the purchaser under a tax deed would take subject to an easement. In *Town of Salem v. Sperber*,⁹¹ the court held that the purchaser took subject to a mortgage. There are two recent cases which hold that easements are assessable

⁸⁶ 104 Mont. 289, 66 P. (2d) 792 (1937); *Superior Coal Co. v. Musselshell County*, 98 Mont. 501, 41 P. (2d) 14 (1935); *British-American Oil Prod. Co. v. Board of Equalization*, 101 Mont. 293, 54 P. (2d) 129 (1936), aff'd 299 U. S. 159, 81 L. Ed. 95 (1936).

⁸⁷ 39 Mont. 137, 101 P. 973 (1909).

⁸⁸ 17 N. H. 420.

⁸⁹ 60 N. H. 408 (1880).

⁹⁰ Pub. Laws N. H. 1926, Ch. 66, § 25, provides that a tax sale shall be void as to all mortgagees who are not given notice within thirty days of said sales. Ch. 66, § 17, provides that real estate of every person or corporation shall be holden for all taxes assessed against the owner thereof and that all real estate to whomsoever assessed shall be holden for all taxes thereon. Ch. 66, § 32, provides that each person interested with any other in the land may pay his proportion of the tax, and the residue only shall be sold, or he may redeem his share of the land, when sold, by paying his proportion of the tax, cost, and interest. Ch. 66, § 38, as to what is real estate, provides, "Any separate interest in land . . . shall be taken to be real estate within the meaning of this chapter."

⁹¹ 189 A. 865 (N. H., 1937).

apart from the servient estate, but the court indicated that it may be necessary for the owner of the servient estate to notify the selectmen that the value of his property has been diminished by an easement and thus give the taxing body an opportunity to assess the easement against the owner thereof.⁹²

In 1930, in the case of *State Mortgage Corporation v. Magee*,⁹³ the Texas court held:

The proceeding in a tax suit brought under the delinquent tax act is one in rem, and the object and purpose of the act is to enable the state to condemn, seize, and sell all lands upon which taxes are due and unpaid. All parties owning or claiming any interest in the property are required to be made parties to the suit and to be served with citation, and when this has been done a judgment establishing and foreclosing the state's lien upon the property is conclusive against all persons who are parties to the suit and have been served with citation, whether they are named in the judgment or not.

In previous suits⁹⁴ holding that the purchaser did not get a complete title, it was decided in each instance that the purchaser failed to obtain such complete title because he had not made all the claimants parties to the suit. That it was contemplated that the purchaser would secure a better title than the former owner was decided in the earlier case of *Patton v. Minor*.⁹⁵ In 1937, however, in the case of *City of Fort Worth v. Southwestern Bell Telephone Company*,⁹⁶ the court held that an easement in the city's streets was taxable. This appears to be in line with

⁹² Bellows Falls Canal Co. v. Town of Walpole, 76 N. H. 384, 83 A. 95 (1912); Newmarket Mfg. Co. v. Town of Nottingham, 86 N. H. 321, 168 A. 892 (1933), which held that water rights are taxable to the owner thereof though he does not own fee in underlying and supporting land. But see Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Town of Gilford, 64 N. H. 337, 10 A. 849 (1887), which held that an easement should be taxed as a part of the dominant tenement.

⁹³ 27 S. W. (2d) 864 (Tex. Civ. App., 1930), quoting from *Ball v. Carroll*, 42 Tex. Civ. App. 323, 92 S. W. 1023 (1906).

⁹⁴ *Yenda v. Wheeler*, 9 Tex. 408 (1853); *Wheeler v. Yenda*, 11 Tex. 562 (1854); *Sanchez v. Hillyer-Deutsch-Jarrett Co.*, 27 S. W. (2d) 634 (Tex. Civ. App., 1930); *Griggs v. Montgomery*, 22 S. W. (2d) 688 (Tex. Civ. App., 1929); *Ball v. Carroll*, supra, n. 93.

⁹⁵ 103 Tex. 176, 125 S. W. 6 (1910).

⁹⁶ 80 F. (2d) 972 (1936).

an opinion of the attorney general of that state,⁹⁷ in which he concludes that a permit granting a power company the right to build a dam creates an easement and is such an interest in land as to be subject to taxation. An easement, then, being separately taxable, would be unaffected by a tax sale of the servient estate.

In Wyoming there appear to be no reported decisions pertaining to the character of the title secured by the purchase of a tax deed, and the statute⁹⁸ merely states that the tax deed shall recite that the county treasurer does "grant, bargain and sell . . . subject, however, to all the rights of redemption provided by law." However, in view of a statute⁹⁹ which requires that pipe-line companies list rights of way for assessment, the conclusion may be drawn that the state contemplates that rights of way are to be separately assessed and would exist after a tax sale of the servient estate.

In addition to the above, as elsewhere brought out, the states of Arkansas, Idaho, Maryland, Massachusetts, South Carolina, and Oregon have, to a limited degree, assessed certain easements separately or have indicated that it might be proper to do so.

In some states, the tax is assessed against the dominant tenement with the easement included. To illustrate this, let us suppose that A and B own adjoining parcels of land and that A's land is too arid for cultivation. He secures the right to run water from a reservoir located on C's land across the land of B and onto his own. Naturally his land would become fertile, and the value thereof, for assessment purposes, would increase because of this easement. The best argument against this theory is to be found in the Canadian case of *Reach Company v. Crossland*,¹⁰⁰ where the court said:

⁹⁷ Attorney General to County Auditor, May 19, 1932, cited in Texas C. C. H. Corp. Tax Service, ¶ 2011.1.

⁹⁸ Wyo. Rev. Stat. 1933, § 115-2337.

⁹⁹ Wyo. Rev. Stat. 1931, § 115-1601.

¹⁰⁰ 43 Ont. L. Rep. 209 at 212 (1918).

A right of way appurtenant . . . is an interest in land not entitled to escape taxation, and must be assessed as a separate interest in land or be included in the assessment of the land. Whatever is assessable under the provisions of the Assessment Act is saleable for arrears of taxes; but a right of way appurtenant cannot be transferred by tax-deed apart from the dominant tenement. It exists solely for the benefit of the dominant tenement, and apart therefrom has no existence. Thus, not being saleable as a separate interest, it is not as such assessable. Nor is it covered by the assessment of the dominant tenement. . . . A right of way appurtenant is not physically a part of the dominant tenement, but an easement which proceeds out of other land. The taxes in respect to the dominant tenement do not become a lien on the servient tenement or any interest therein. Therefore, assessment of the dominant tenement does not constitute assessment also of an easement appurtenant thereto. There remains but one other possible means, for taxation purposes, of reaching such an interest in land, namely, by assessment of the servient tenement; and in my opinion, the assessment of the servient tenement creates a charge on every interest in the land itself.

Another fault with the theory that the dominant tenement should be assessed at a value including the easement is that it would not always be assessed by the proper taxing body. Suppose the servient tenement were in one state and the dominant tenement were in another state. In such a case, while the easement might be of considerable value, the former state would be unable to reach it by taxation. However, Cooley has stated, "The servient estate must be assessed at its value subject to the easements and the dominant estate at its value with the easements."¹⁰¹

In the case of *Lever v. Grant*,¹⁰² the court of Michigan held that a tax deed of a servient estate destroyed an easement therein. Later, in the case of *Stansell v.*

¹⁰¹ Cooley, *The Law of Taxation* (4th ed., Chicago, Ill.), III, § 1155.

¹⁰² 139 Mich. 273, 102 N. W. 848 (1905). See also B. M. Thompson, "Taxation of Easements," 8 Mich. L. Rev. 361, where the writer maintains that the *Lever* case was in error and that to destroy an easement by tax sale of the servient estate is to take property without due process of law.

*American Radiator Company*¹⁰³ the court reversed itself, holding that easements are assessed with the dominant tenement. This being the case, the sale of the servient estate, naturally, would not destroy the easement. While the other decisions,¹⁰⁴ with one possible exception,¹⁰⁵ hold quite consistently that the tax deed is a new and complete title, it is felt that the decision of the Stansell case would be the ruling in Michigan. The statute¹⁰⁶ provides that a tax deed conveys an absolute title in land, subject only to taxes assessed and levied on such lands subsequent to the taxes for which the lands were bid off. According to one authority,¹⁰⁷ easements are now treated as personal property in Michigan.

The recent Missouri case of *Schlafly v. Baumann*¹⁰⁸ involved the purchase at a tax sale of property on which building restrictions had been created by a prior deed. The court said that to hold that a tax deed would extinguish this restriction would result in the court blowing hot and cold at the same time; for were the tax deed to be in the nature of a new title from the sovereignty, selling the property free of the building restriction would make it less valuable and would reduce the value of adjacent property, with the resulting effect of a lower assessment in the future, which in turn would decrease the amount of taxes that could be collected. The fallacy in this argument is that freeing property of a building

¹⁰³ 163 Mich. 528, 128 N. W. 789 (1910). This decision was based on § 3825 of the Mich. Compiled Statutes, which provides, "For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon, and all appurtenances thereto . . ." An easement was considered as an appurtenance to the land.

¹⁰⁴ *Lacey v. Davis*, 4 Mich. 140, 16 Am. Dec. 524 (1856); *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672 (1883); *Robbins v. Barron*, 32 Mich. 36 (1875), which held that a tax deed cut off all liens and encumbrances including homestead and dower; *Smith v. Williams*, 44 Mich. 240, 6 N. W. 662 (1880); *Toolan v. Longyear*, 144 Mich. 55, 107 N. W. 699 (1906), aff'd 209 U. S. 414, 28 S. Ct. 506, 52 L. Ed. 859 (1908); *Petition of Auditor General*, 204 Mich. 442, 170 N. W. 549 (1918).

¹⁰⁵ *Boucher v. Trembley*, 140 Mich. 352, 103 N. W. 819 (1905).

¹⁰⁶ Mich. Ann. Stats. 1931, § 7.117.

¹⁰⁷ Mich. C. C. H. Corp. Tax Service, ¶ 8001.

¹⁰⁸ 108 S. W. (2d) 363 (Mo., 1937).

restriction often makes the property more valuable. Much property stands vacant and unimproved simply because the restrictions as to the type of buildings permitted to be constructed make it unprofitable to build. In this case, however, the court holds that only the servient estate passes. In *State ex rel. Koeln v. West Cabanne Improvement Company*,¹⁰⁹ the court held that an easement is assessed to the dominant tenement and, therefore, is not extinguished by a tax sale. There have also been some decisions that have held that the easement is not extinguished because the purchaser secures only such title as was vendible before acknowledgment of sheriff's deed.¹¹⁰

The earlier New Jersey cases held that an easement would not be extinguished by a tax sale because the purchaser obtained only the title of the former owner.¹¹¹ In 1937, in the case of *Metropolitan Life Insurance Company v. McGurk*,¹¹² the court fell in line with the New York rule by holding that a tax sale of the servient tene-

¹⁰⁹ 278 Mo. 310, 213 S. W. 25 (1919).

¹¹⁰ *Norman's Land & Mfg. Co. v. Hunter*, 270 Mo. 62, 193 S. W. 19 (1917); *Millner v. Shipley*, 94 Mo. 106, 7 S. W. 175 (1888); *Wheelen v. Weever*, 93 Mo. 430, 6 S. W. 220 (1887); *Rambo v. Campbell*, 8 Mo. App. 581-2 memo. (1880); *Jasper County v. Wadlow*, 82 Mo. 172 (1884); *Harrison Machine Works v. Bowers*, 200 Mo. 219, 98 S. W. 770 (1906). Several Missouri decisions hold that if tax sale is pursuant to a judgment, the purchaser acquires only the same rights as would a purchaser of land sold under execution. *Wilcox v. Phillips*, 260 Mo. 664, 169 S. W. 55 (1914), and *Rothenberger v. Garrett*, 224 Mo. 191, 123 S. W. 574 (1909), and therefore would get only the title of the former owner.

In the case of *Commercial Trust Co. v. Syndicate Lot Co.*, 208 Mo. App. 261, 235 S. W. 150 (1921), the court held that lien of the state for taxes is paramount to all other liens. However, since liens are not deducted in the assessment of the property affected this would have no effect on decisions relating to easements. The Missouri statute merely provides that a tax deed conveys "a title in fee to such purchaser of the real estate therein named, and shall be prima facie evidence of title. . . ." Mo. Rev. Stat. 1929, § 9958. However, Mo. Ann. Supp. 1937, § 9954 (a) provides that "nothing herein contained shall operate to the prejudice of any owner not in default and whose interest in the tract or lot of land is not encumbered by the certificate of purchase, nor shall it prejudice the rights of any occupant of any tract or lot of land not liable to pay taxes thereon. . . ."

¹¹¹ *Morrow v. Dows*, 28 N. J. Eq. 459 (1877); *Blackwell v. Pidcock*, 43 N. J. L. 165 (1881); *Hopper v. Executors of Malleston*, 16 N. J. Eq. 382 (1863).

¹¹² 15 N. J. Misc. 572, 193 A. 696 (1937).

ment did not extinguish an easement of record attached to the dominant tenement, since the value of the easement was included in the assessment of the dominant estate and the assessment of the servient tenement omitted the value of the easement. This is in accord with the earlier decision of *Ehren Realty Company v. Magna Charta Building and Loan Association of Newark*,¹¹³ which held that, when an easement is carved out of one property for the benefit of another, the market value of the dominant estate is increased by the value of the easement, and the respective tenements should be assessed accordingly. The tax sale of the servient tenement and the expiration of the redemption period does not extinguish a right of way appurtenant to the adjoining property.

In the New York case of *Jackson v. Smith*¹¹⁴ the court, in discussing the nature of the title secured under a tax sale, distinguished between the owner's taking free of liens and his taking free of easements by stating that, in the assessment of property, no deduction is made for liens against the land, while deductions should be made in the case of easements.

The state of New York has ruled on this subject more often than any other state, and their decisions have been consistent in holding that a tax sale does not destroy prior easements.¹¹⁵ The decision of *Jackson v. Smith*, already mentioned, and the later case of *Tax Lien Company of New York v. Schultz*¹¹⁶ have generally been ac-

¹¹³ 120 N. J. Eq. 136, 184 A. 203 (1936).

¹¹⁴ 138 N. Y. S. 654 (1912).

¹¹⁵ *Blenis v. Utica Knitting Co.*, 130 N. Y. S. 740 (1911), aff'd, 134 N. Y. S. 1126 (1912); *Poetzsch v. Mayer*, 189 N. Y. S. 695 (1921); *Smith v. Mayor of New York*, 68 N. Y. 552 (1877); *Harris v. Curtis*, 124 N. Y. S. 263 (1910), aff'd, 211 N. Y. 573, 105 N. E. 1085 (1914); *People ex rel. Adirondack Power & Light Corp. v. Durey*, 213 N. Y. S. 623 (1925). From the cases of *Eisenhut v. Marion De Vries, Inc.*, 269 N. Y. S. 483 (1934), and *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455 (1890), a different holding might be inferred, for these cases state that the purchaser obtained a complete and new title, which was not limited to that possessed by the former owner. These cases, however, were based on a statute of 1889 which is no longer in effect.

¹¹⁶ 213 N. Y. 9, 106 N. E. 751 (1914).

cepted as authority by all other states holding likewise. New York is apparently the only state that makes a point of the question of whether the easement was secured before or after the assessment of the taxes in question.¹¹⁷

In 1907, Oregon passed a statute¹¹⁸ copied from the Washington statute, making all taxes a lien on real property. A subsequent decision¹¹⁹ held that the construction placed on the Washington act by the court of that state would be followed in Oregon. However, in 1920, the court of Oregon disregarded the Washington rule of *Hanson v. Carr*,¹²⁰ which had held that a tax sale extinguished easements, and, in the case of *Crawford v. Senosky*,¹²¹ followed the New York rule of *Tax Lien Company of New York v. Schultz*,¹²² holding that, where land which was restricted to certain uses was sold for taxes, the purchaser did not take title free and clear of building restrictions. This was in line with earlier decisions.¹²³ However, another statute¹²⁴ provides that rights of ways of certain transmission companies are separately assessable and taxable. This should strengthen the contention that easements are not intended to be cut off by sale of the servient tenement.

STATES PROVIDING THAT THE TAX IS AGAINST THE INDIVIDUAL BECAUSE OF OWNERSHIP OF LAND

Where the proceedings for collection are in personam, the state looks to the owner rather than to the land itself for the tax. If the land is ultimately sold for taxes, the purchaser secures only a derivative title, that of the party against whom the tax was assessed. Naturally, there

¹¹⁷ Ibid.

¹¹⁸ Ore. Ann. Code 1930, Vol. 5, Ch. 69, § 722.

¹¹⁹ *Hoskins v. Dwight*, 69 Ore. 558, 139 P. 922 (1914).

¹²⁰ 66 Wash. 81, 118 P. 927 (1911).

¹²¹ 128 Ore. 229, 274 P. 306 (1929).

¹²² 213 N. Y. 9, 106 N. E. 751 (1914).

¹²³ *Middleton v. Moore*, 43 Ore. 357, 73 P. 16 (1903); *Ferguson v. Kaboth*, 43 Ore. 414, 73 P. 200 (1903); *Johnson v. White*, 60 Ore. 611, 119 P. 769 (1912); *Stitt v. Stringham*, 55 Ore. 89, 105 P. 252 (1909).

¹²⁴ Ore. Ann. Code 1930, Vol. 3, Ch. 69, § 406.

having been no assessment against the owner of the easement, the latter is not extinguished by the tax sale of the servient estate. Sixteen states have followed this theory of taxation.

The court of Alabama in 1848 in the case of *Dyer v. Branch Bank at Mobile*¹²⁵ held that the action of the sale of land for delinquent taxes is in personam and that the purchaser took the title of the former owner. However, in the case of *Jones v. Randle*,¹²⁶ the court said that the *Dyer* case was wrong, that the action was an action in rem, and, therefore, the purchaser obtained a new and complete title free of encumbrances. But after the *Jones* case was decided, a statute was enacted¹²⁷ which re-established the rule of the *Dyer* case.

Arizona does not appear to have any reported cases dealing with tax deeds. However the statutes provide that where the county treasurer conveys premises by deed to a tax purchaser "parties whose rights to redeem are foreclosed therein, shall have no further right, title, or interest in such real property, either in law or in equity. . . ."¹²⁸ Apparently the law refers to the title of the taxable person, and the purchaser, therefore, would take a derivative title, subject to the easements that were attached prior to the tax sale.

In the case of *Smith v. Smith*¹²⁹ the California court held that, where a private alley was purchased by tax deed, the purchaser took title subject to an easement existing for abutting owners. This is in accord with nu-

¹²⁵ 14 Ala. 622 (1848). See also *Gunter v. Townsend*, 202 Ala. 160, 79 So. 644 (1918).

¹²⁶ 68 Ala. 258 (1880).

¹²⁷ Ala. Code of 1928, § 3123, which provides that tax deed shall convey only interest of state and is without warranty or covenant of any kind.

¹²⁸ Arizona Rev. Code, Supp. 1934, § 3065z20. See also 1928 Ariz. Rev. Code, § 3157, which provides that the commission shall assess all the property, franchises, and intangible values of telephone and telegraph companies in that state. From the general wording, it might be inferred that right-of-way values are included and that the easements of such companies would not be lost by reason of tax sale of the servient estates.

¹²⁹ 21 Cal. App. 378, 131 P. 890 (1913).

merous other decisions¹⁸⁰ which, save for one early exception,¹⁸¹ have uniformly held that the purchaser under a tax deed secures only the title of the former owner. However, the present statutes of California provide, "title to the lands described therein will vest absolutely in the grantee thereof, subject to any lien for special assessments which shall have heretofore attached."¹⁸² Whether this statute will have the effect of changing the law as laid down in *Smith v. Smith* can only be determined by subsequent decisions.

While in Colorado there seems to be no case directly in point, yet in the case of *Smith v. Griffin*,¹⁸³ where there was no easement involved, the court, nevertheless, indicated that the purchaser would have taken only the title subject to an easement by saying, "The title passed to Mrs. Griffin under her tax deed; and, unless subject to an easement, she acquired the right to fence and use it in accordance with the dictates of her private interest." Although the Colorado statute makes taxes a perpetual lien with priority over all other liens,¹⁸⁴ it is doubted that the courts would go so far as to regard easements as liens coming within the statute. With the exception of the *Griffin* case and one other case,¹⁸⁵ the Colorado courts have consistently held that a tax deed conveys a new, original, unencumbered title,¹⁸⁶ but it is believed that in all these cases the courts mean that the title would be unencumbered by any lien exclusive of easements.

¹⁸⁰ *Syme v. Warden*, 114 Cal. App. 707, 300 P. 863 (1931); *Dorn v. Baker*, 96 Cal. 206, 31 P. 37 (1892); *Langstaff v. Mitchell*, 119 Cal. App. 407, 6 P. (2d) 546 (1931). See also *Usher v. Henkel*, 205 Cal. 413, 271 P. 494 (1928).

¹⁸¹ *Anderson v. Ryder*, 46 Cal. 134 (1873).

¹⁸² *Deering* 1931 Pol. Code, Secs. 3897a, 3897b, amended generally 1933.

¹⁸³ 14 Colo. 429, 23 P. 905 (1890).

¹⁸⁴ 1921 Compiled Laws, § 7179. § 7426 provides as to tax deeds that they "shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, interest and claim of the state and county thereto. . . ."

¹⁸⁵ *Dyke v. Whyte*, 17 Colo. 296, 29 P. 128 (1892).

¹⁸⁶ *Henrylyn Irr. Dist. v. Patterson*, 65 Colo. 385, 176 P. 493 (1918); *Gibson v. Bragg*, 24 Colo. App. 463, 135 P. 119 (1913); *Sherman v. Greeley Bldg. & Loan Assn.*, 66 Colo. 288, 181 P. 975 (1919).

In the state of Connecticut the statutes provide three distinct, concomitant remedies or methods for the collection of taxes: first, demand and levy,¹³⁷ and sale under tax levy;¹³⁸ second, tax lien¹³⁹ and foreclosure of such lien;¹⁴⁰ and third, action as for recovery of a debt.¹⁴¹ Although the statute states that the deed resulting from a tax levy is "prima facie evidence of a valid and unincumbered title in the grantee,"¹⁴² yet it has been held in the case of a foreclosure under a tax lien that it works a transfer of the title from the foreclosed to the foreclosing party.¹⁴³ Taking the provisions of the statutes and the decisions together, it appears that the tax is imposed in personam, and the purchaser at a tax sale secures merely the derivative title of the former owner.

A very recent Delaware case¹⁴⁴ involving a tax deed and the statute¹⁴⁵ both intimate that the purchaser of such deed takes merely the title of the taxable person and hence takes subject to any easement.

In the case of *Thompson v. McCorkle*¹⁴⁶ the Indiana court held that title acquired by tax deed is not title from the sovereign, and the purchaser acquires only the interest of him in whose name the property was listed for taxation and who alone can be regarded as legally delinquent. This seems to be in conformity with the other decisions¹⁴⁷ as well as with the present statute.¹⁴⁸

¹³⁷ Gen. Stats. of Conn. 1930, § 1225.

¹³⁸ *Ibid.*, § 1226.

¹³⁹ *Ibid.*, § 1233.

¹⁴⁰ *Ibid.*, § 1242. See *Bridgeport v. Equitable Title & Mtge. Co.*, 106 Conn. 542, 138 A. 452 (1927).

¹⁴¹ *Ibid.*, § 1231. See *Town of Cromwell v. Savage*, 85 Conn. 376, 82 A. 972 (1912).

¹⁴² Gen. Stats. of Conn. 1930, § 1229.

¹⁴³ *Cole v. Rice*, 74 Conn. 680, 51 A. 1083 (1902).

¹⁴⁴ *Penienskice v. Short*, 194 A. 409 (Del., 1937).

¹⁴⁵ Rev. Code of Del. 1935, § 1445.

¹⁴⁶ 136 Ind. 484, 34 N. E. 813 (1893), 36 N. E. 211 (1894).

¹⁴⁷ *Indianapolis v. City Bond Co.*, 42 Ind. App. 470, 84 N. E. 20 (1908); *State ex rel. McKenzie v. Casteel*, 110 Ind. 174, 11 N. E. 219 (1887), held that there is no warranty in tax sales and that the doctrine of caveat emptor applies. But see *First Nat. Bank v. Hendricks*, 134 Ind. 361, 33 N. E. 110, 34 N. E. 218 (1893).

¹⁴⁸ *Burns Ind. Stats. Ann.* 1933, Ch. 64, § 2401, which provides that tax

All of the reported cases¹⁴⁹ in Kentucky following the provisions of the statute¹⁵⁰ hold that the purchaser under the tax deed gets only the title of the former owner and hence takes subject to all encumbrances to which the prior title was subject.

Several very early Ohio decisions, apparently based on a statute of 1822, held that the purchaser obtained merely title of the former owner.¹⁵¹ Since then, the decisions have been uniform in holding that the grantee of a tax deed takes a new unencumbered title.¹⁵² However, changes in the statute made effective October 14, 1931, have provided that a tax deed "shall be prima facie evidence of title in the purchaser, his heirs or assigns,"¹⁵³ and in the case of lands forfeited to the state for non-payment of taxes shall vest in the state "all the right, title, claim, and interest of the former owner or owners thereof. . . ."¹⁵⁴ Apparently, then, the taxes will, in the future, be construed to be in personam, and the purchaser will take only the title of the former owner.

In the Oklahoma case of *Swan v. Kuehner*¹⁵⁵ the court held that a tax title breaks up all previous titles, and in

deed "shall vest in the grantee an absolute estate in fee simple, subject, however, to all the claims which the state may have thereon for taxes, or liens, or encumbrances."

¹⁴⁹ *Anderson v. Daugherty*, 169 Ky. 308, 183 S. W. 545 (1916); *Hall v. Hall*, 174 Ky. 356, 192 S. W. 76 (1917); *Chapman v. Aldridge*, 228 Ky. 538, 15 S. W. (2d) 454 (1929); *Jackson v. Claypool*, 179 Ky. 662, 201 S. W. 2, (1918); *Smith v. Young*, 178 Ky. 376, 198 S. W. 1166 (1917); *Rogers v. McAlister*, 151 Ky. 488, 152 S. W. 571 (1918); *Oldhams v. Jones, Mosely, & Co.*, 44 Ky. 458 (1845); *Drane v. Graves*, 261 Ky. 787, 88 S. W. (2d) 927 (1935).

¹⁵⁰ Baldwin's 1936 Statutes, §§ 3001, 3004, 4154.

¹⁵¹ *Rennik v. Wallace*, 8 Ohio 539 (1838); *Bouton v. Lord & Hathaway*, 10 Ohio St. 453 (1859). But see *Jones v. Devore*, 8 Ohio St. 430 (1858).

¹⁵² *Gwynne v. Niswanger*, 15 Ohio 367 (1846), 20 Ohio 556 (1851), held that a tax title from its very nature has nothing to do with the previous chain of title—does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deed. *Kahle v. Nisley*, 74 Ohio St. 328, 78 N. E. 526 (1906); *Lessee of Stuart v. Parish*, 6 Ohio 477 (1834); *Security Trust Co. v. Root*, 72 Ohio St. 535, 74 N. E. 1077 (1905); *Cech v. Schultz*, 132 Ohio St. 353, 7 N. E. (2d) 557 (1937).

¹⁵³ Page's Ann. Ohio Gen. Code, Supp. 1926-35, § 5762.

¹⁵⁴ *Ibid.*, § 5744.

¹⁵⁵ 157 Okla. 37, 10 P. (2d) 707 (1931).

the case of *Taylor v. Lawrence*¹⁵⁶ it stated that the purchaser at a valid tax resale from the state procures title from the government which is free and clear. In *Price v. Salisbury*¹⁵⁷ the grantee under a tax deed was declared to be vested of a title in fee simple. As recently as 1937, in the case of *McNaughton v. Beattie*,¹⁵⁸ the court held that a resale tax deed did not convey mineral rights in land although the surface and mineral rights were in the same person. An earlier case, *Meriwether v. Lovett*,¹⁵⁹ had held that a tax deed did not convey mineral rights where they were separately owned and a production tax was paid by the owner of the mineral rights. A recent statute¹⁶⁰ provides that tax deeds shall not cut off covenants running with the land which limit the use of the property, the type, character, and location of buildings, or the character, race, or nationality of owners, nor do such deeds cut off covenants against nuisances and similar restrictions.

Although the Swan and Taylor cases have not been expressly overruled, the tendency of the court in the *McNaughton* case to recognize an ownership of an interest in land which would not be affected by the tax deed, taken together with the statute protecting restrictions, is an indication that an easement of a right of way would be protected, especially if the owner of the easement paid some kind of tax related to the use of the easement even though it be not a real estate tax.

As early as 1865 it was held in Pennsylvania that land which was laid out as an alley by adjoining lot owners was not affected by a treasurer's deed in a tax proceeding affecting one of the lots.¹⁶¹ And in 1873 it was held that a building restriction was not destroyed by a sale of

¹⁵⁶ 176 Okla. 75, 54 P. (2d) 634 (1936).

¹⁵⁷ 41 Okla. 416, 138 P. 1024, L. R. A. 1917D 520 (1914).

¹⁵⁸ 181 Okla. 603, 75 P. (2d) 400 (1937), rehearing den. (1938).

¹⁵⁹ 166 Okla. 73, 26 P. (2d) 200 (1933).

¹⁶⁰ Session Laws of Okla. 1936-1937, Ch. 45, §§ 1, 2.

¹⁶¹ *Hall v. McCaughey*, 51 Pa. (1 P. F. Smith) 43 (1865).

the land for taxes.¹⁶² This rule was apparently changed in several later Pennsylvania decisions that held that the purchaser obtained a new and unencumbered title,¹⁶³ but the case of *Tide-Water Pipe Company v. Bell*¹⁶⁴ and another recent case¹⁶⁵ seem to indicate that the earlier view has been readopted. Prior to 1844, taxes on seated lands were a charge on the owner merely on the theory that there was on such lands enough personalty which could be seized and sold to pay the taxes, while taxes on unseated lands were a charge on the land. This was changed by statute in 1844 so that seated lands could be sold if sufficient personal property could not be found to pay the taxes.¹⁶⁶

The statutes now provide that purchasers of a tax deed to seated lands secure a deed in fee simple to the property,¹⁶⁷ while purchasers at a tax sale of unseated lands secure "all the estate and interest therein, that the real owner or owners thereof had at the time of such sale."¹⁶⁸

The case of *Interstate Building and Loan Association v. Waters*,¹⁶⁹ decided in South Carolina in 1897, held that the purchaser takes property discharged of all liens. However, as liens are not such an interest in land as to affect the assessments generally and as the court made no other reference as to the breaking up of any other interest in the property, it may well be inferred that such tax sale would not extinguish a prior easement. This contention is substantiated by the case of *Shell v. Duncan*,¹⁷⁰ in which the court held that a tax sale does

¹⁶² Lesley v. Morris, 9 Phila. 110 (1873).

¹⁶³ Kunes v. McCloskey, 115 Pa. St. 461, 9 A. 83 (1887); Caul v. Spring, 42 Pa. (2 Watts) 390 (1834); Greensboro Ferry Co. v. New Geneva Ferry Co., 34 Pa. Co. Ct. R. 33 (1907).

¹⁶⁴ 280 Pa. St. 104, 124 A. 351, 40 A. L. R. 1516 (1924).

¹⁶⁵ Gordon v. City of Harrisburg, 314 Pa. 70, 171 A. 277 (1934).

¹⁶⁶ Pottsville Lumber Co. v. Wells, 157 Pa. St. 5, 27 A. 408 (1893).

¹⁶⁷ Purdon's Penn. Stat. 1936, Tit. 72, § 5791n.

¹⁶⁸ Ibid., Tit. 72, § 6044.

¹⁶⁹ 50 S. C. 459, 27 S. E. 948 (1897).

¹⁷⁰ 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821 (1889).

not cut off the right of dower, and in *Johnson v. Jones*,¹⁷¹ where the court held that personalty must be exhausted in collecting taxes before resort is made to realty. This would indicate that the action of enforcing the collection of taxes is an action in personam and not in rem, and therefore an easement would not be extinguished. The present statute¹⁷² provides that rights of way of railroad, telegraph, and like companies shall be treated as personal property for the purposes of taxation. Another section of the statute¹⁷³ provides that the fee holder, as distinguished from the land itself, is liable for the taxes.

All the cases in Tennessee relating to tax deeds have held that the purchaser takes only the title of the former owner, and hence takes subject to all prior claims and liens.¹⁷⁴ This seems to be in conformity with the present statutes.¹⁷⁵

In the early Vermont cases of *Sheafe v. Wait*¹⁷⁶ and *Willard v. Strong*¹⁷⁷ it was held that the purchaser of land under a tax sale secured only the title of the former owner. A few years later, in the case of *Brown v. Austin*,¹⁷⁸ the court said that the statute looked to the land and not the owner and therefore the action to collect taxes was in rem. While a present statute¹⁷⁹ provides that "taxes shall be a first lien [upon real estate], under-

¹⁷¹ 72 S. C. 270, 51 S. E. 805 (1905).

¹⁷² Code of S. C. 1932, § 2635.

¹⁷³ *Ibid.*, § 2567. See also § 2855 and notes thereunder.

¹⁷⁴ *City of Nashville v. Cowan & Brien*, 10 Lea (78 Tenn.) 209 (1882); *Stovall v. Austin*, 16 Lea (84 Tenn.) 700 (1886); *Ferguson v. Quinn*, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688 (1896); *Anderson v. Post*, 38 S. W. 283 (Tenn., 1896); *Cardwell v. Crumley*, 35 S. W. 767 (Tenn., 1895).

¹⁷⁵ *Williams' Tenn. Code 1934*, §§ 1565-1613. However, § 1609 provides that "a tax deed of conveyance shall be an assurance of perfect title to the purchaser of said land, and no conveyance shall be invalidated in any court . . . and no other objection . . . to the sale or the title thereunder shall avail in any controversy involving them." However, the writer believes that in the latter statute the objection in question refers to questions as to procedural defects in securing the tax deed and not to other interests in the land, such as easements.

¹⁷⁶ 30 Vt. 735 (1858).

¹⁷⁷ 14 Vt. 532 (1842).

¹⁷⁸ 41 Vt. 262 (1868).

¹⁷⁹ *Pub. Laws of Vt. 1933*, § 825.

lying all mortgages, attachments, liens, or other incumbrances thereon," another statute¹⁸⁰ provides that "when the collector cannot find personal estate of a tax payer . . . he may extend his warrant on any land in the state owned by such person." This strongly indicates that the action is now in personam.

The Virginia Code of 1936¹⁸¹ provides that the purchaser of a tax deed gets such title as was vested in the party assessed. With the exception of a lone decision in 1902,¹⁸² which holds that should the purchaser take a tax deed subject to liens against the taxable party it would destroy the power of taxation which should be in the sovereignty, the decisions have quite generally held that the grantee under a tax deed obtains nothing more than the prior owner had.¹⁸³

In 1910 the court of West Virginia, in *State v. Mathews*,¹⁸⁴ held that the effect of the statute relating to the sale of land for taxes was to create a new and independent title, free from all other claims and interests, not dependent on any other title, and which did not come through the owner, claimant, or any other person. In the case of *State v. Sponaule*¹⁸⁵ and other decisions¹⁸⁶

¹⁸⁰ *Ibid.*, § 805.

¹⁸¹ Va. Code of 1936, § 2488.

¹⁸² *Stevenson v. Henkle*, 100 Va. 591, 42 S. E. 672 (1902).

¹⁸³ *Gates & Park v. Lawson*, 32 Gratt. (73 Va.) 12 (1879); *Virginia & W. Va. Coal Co. v. Charles*, 251 F. 83 (1917); *Roller v. Catlett*, 118 Va. 185, 86 S. E. 909 (1915); *Ashbrook v. Bailey*, 116 Va. 10, 81 S. E. 64 (1914); *Giles Iron Co. v. Epling*, 135 Va. 74, 115 S. E. 534 (1922); *Dennis v. Robertson*, 123 Va. 456, 96 S. E. 802 (1918); *Thomas v. Jones*, 94 Va. 756, 27 S. E. 813 (1897).

¹⁸⁴ 68 W. Va. 89, 69 S. E. 644 (1910). See also *State v. Harman*, 57 W. Va. 447, 50 S. E. 828 (1905), which held that purchaser of tax deed secured a new title, and *Kendall v. Scott*, 48 W. Va. 251, 37 S. E. 531 (1900).

¹⁸⁵ 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727 (1898).

¹⁸⁶ *McGhee v. Sampsel*, 47 W. Va. 352, 34 S. E. 815 (1899); *Cain v. Fisher*, 57 W. Va. 492, 50 S. E. 752 (1905); *Kanawha Valley Bank v. Wilson*, 29 W. Va. 645, 2 S. E. 768 (1887); *Smith v. Lewis*, 2 W. Va. (Hagans) 39 (1867); *Summers v. County of Kanawha*, 26 W. Va. 159 (1885). In the latter case, however, the court follows with statement (p. 172): "And if, at the time of such sale, the lands sold be under a mortgage or deed of trust, or there be any other lien or encumbrance thereon,

the West Virginia court has held that the purchaser obtains only the title of the former owner. Even where the state takes title to the land which is tax delinquent, it takes only the title of the former owner.¹⁸⁷ But in *Mylius v. Raine-Andrew Lumber Company*¹⁸⁸ the court held that the statute was limited to that against which the assessment was made and the taxes laid. And in *State v. Black Band Consolidated Coal Company*¹⁸⁹ it was held that a tax deed did not necessarily carry everything from surface to the center of the earth and a tax deed would not extinguish an oil and gas lease on which the lessee separately paid taxes. But whatever doubt may have existed from the above as to the nature of a title secured by means of a tax deed in this state, it is now settled by the present statute,¹⁹⁰ which provides that the purchaser of a tax deed shall obtain "such right, title, and interest in and to such real estate, as was vested in the person or persons charged with the taxes thereon. . . ."

There may be a few states where the tax is against the individual but the action to sell the property for taxes is a proceeding in rem, but in the various reported decisions the word "proceeding" has generally been so carelessly employed that it is difficult to determine whether the court meant that the tax was to be considered in rem or that the ultimate action of selling the property in order to raise the taxes was in rem. Where such a case exists, however, it can only be conjectured whether or not the easement would fall with the tax sale of the servient tenement.

and the mortgagee, trustee, cestui que trust, or person holding any such lien or encumbrance shall fail to redeem the same . . . all the right, title and interest of such mortgagee, trustee, cestui que trust, and of the person holding any such lien or encumbrance on the land so sold, and not redeemed, shall pass to, and be vested in such purchaser, and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance."

¹⁸⁷ *Neal v. Wilson*, 79 W. Va. 482, 92 S. E. 136 (1917).

¹⁸⁸ 69 W. Va. 346, 71 S. E. 404 (1911).

¹⁸⁹ 113 W. Va. 872, 169 S. E. 614 (1933).

¹⁹⁰ West Va. Code 1932, § 820.

STATUTORY EXEMPTION OF RIGHTS OF WAY FROM THE
EFFECT OF TAX DEEDS

The state of Washington has consistently held that an easement is extinguished by the sale of the land for taxes. In the celebrated case of *Hanson v. Carr*,¹⁹¹ the court ruled that a strip of land thirty feet wide across the entire property which had been conveyed for an easement of way was lost when the property was sold for taxes. Its decision was based on its statute.¹⁹² Prior to the act of 1890, taxes in Washington were considered to be assessed in personam,¹⁹³ but since that time taxes have been held to be assessed in rem.¹⁹⁴ However, in 1929 the state passed an act which provides that certain easements of public service corporations shall be taxed as personal property,¹⁹⁵ that real estate subject to any such easement shall be assessed and taxed as real estate subject to such easement,¹⁹⁶ and further that "when any such real estate is sold for delinquent taxes thereon it shall be sold subject to such easement, and the purchaser at any such tax sale shall acquire no title to such easement or the property constructed upon or occupying the same."¹⁹⁷

GENERAL CONCLUSIONS AND SUGGESTIONS

In the states following the New York rule of *Jackson v. Smith* to the effect that the easement is assessed with the dominant tenement, and in those states that hold the assessment is in personam and that a tax title is a deriva-

¹⁹¹ 66 Wash. 81, 118 P. 927 (1911).

¹⁹² Rem. & Bal. Code, § 9230, which is now Remington's Revised Stat. of Wash. 1933, § 11260.

¹⁹³ McDonald v. Hannah, 51 F. 73 (1892), and 59 F. 977 (1894).

¹⁹⁴ Woodward v. Taylor, 33 Wash. 1, 73 P. 785 (1903); Gustavson v. Dwyer, 78 Wash. 336, 139 P. 194 (1914); Sparks v. Standard Lumber Co., 92 Wash. 584, 159 P. 812 (1916); Wilson v. Korte, 91 Wash. 30, 157 P. 47 (1916); Bassett v. City of Spokane, 98 Wash. 654, 168 P. 478 (1917); Tamblin v. Crowley, 99 Wash. 133, 168 P. 982 (1917); Colby v. Himes, 171 Wash. 83, 17 P. (2d) 606 (1932); Nearhoff v. Rucker, 156 Wash. 621, 287 P. 658 (1930).

¹⁹⁵ Remington's Rev. Stat. of Wash. 1933, § 11188.

¹⁹⁶ Ibid., § 11189.

¹⁹⁷ Ibid., § 11190.

tive title, the easement seems secure from the effect of tax deeds. In states such as Iowa and New Mexico, the easement, apparently, cannot survive a tax deed. In the states that have no cases in point but where the decisions have held that a tax deed creates a new title from the sovereignty, there is always the opportunity of showing that, as a matter of fact, the easement is taxed with the dominant tenement. However, there is still a possibility that such an argument would not convince the court. In such event, the consequences would be quite serious, for if a utility company having a right of way did not have the right of eminent domain in the state involved, it would either have to pay exorbitant prices to the property owners or forfeit their rights in the land, a costly procedure in either event. Especially is this true in the case of pipe-line companies that do not have the general powers of condemnation that are generally accorded to power and communication utilities. Here it would appear to be highly advisable for utilities to make a nominal return to the assessor for their rights of way. In some states, where certain utilities make a return to the state for all the property in that state in lieu of being taxed separately by the various county and other taxing bodies, it might be well to show that the return covers also their right of way. This would enable the utility, whose right of way might later be questioned on the basis of a tax deed, to defend on the grounds of double taxation. This is suggested in those states that have not previously held that an easement could not be separately assessed. This precaution would cost but little and would be inexpensive insurance for a valuable right, *abundans cautela non nocet*.

Again, the statutes of Texas,¹⁹⁸ Georgia,¹⁹⁹ and possibly other states provide that, upon request of the owner, the officer may offer to sell smaller tracts of land and to

¹⁹⁸ Vernon's Ann. Tex. Stat. 1925, Tit. 122, art. 7328.

¹⁹⁹ Ga. Code 1933, § 92-7404.

sell only so many of these tracts as is necessary to pay the delinquent taxes. In such cases the owner of the easement might petition that the property first be sold subject to the easement, and if the amount of the back taxes were then bid, the easement would be saved. If this request were refused, the party could then request the court to first sell such portion of the property as is not affected by the easement.

In view of the above lack of uniformity it would seem highly desirable that the various states cover this situation by statute. There are several methods that might be followed:

- (1) Sell the property at the tax sale subject to the easement.
- (2) In cases where the easement is confined to a definite strip or portion of the property, sell all the property except such strip or portion of land and permit the owner of the easement to pay a pro rata tax on so much of the land as he may enjoy under his rights of way grant.
- (3) Tax easements separately.
- (4) Exempt easements from the effect of tax deeds as the state of Washington has done with respect to rights of way of public service utilities.

One authority,²⁰⁰ in speaking of the taxation of franchises, has suggested that they be taxed as a unity with the structures placed upon the land by the utility, contending that without the franchise the plant would be so much firewood and have no value. This might be applied to easements, but the objection, readily apparent, would be that it would result in combining the personalty tax of the plant with one on the interest in realty.

To the writer the plan of exempting, by statute, the effect of tax deeds on easements and rights of way would offer the best solution to the problem. It removes from

²⁰⁰ *People v. State Board of Tax Com'rs*, 174 N. Y. 417, 67 N. E. 69 (1903).

the party or utility owning the easement the duty of seeing that the tax on the servient tenement is paid. This statute, of course, would be needed only in those states where the easements would be included as part of the servient tenement and where the tax is in rem, for, as above outlined, the easement in all other cases would be beyond the pale of the tax deed. Nor would the taxing body, in the final analysis, be losing any revenue, because they would be benefitting by the increased value of the plant built on the property by virtue of the easement which, without the easement, would have only a negligible salvage value.