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C. E. Hacklander

VALIDITY OF TAX TITLES IN ILLINOIS

C. E. HACKLANDER[1]

BUT for the fact that the term "folklore" has been largely pre-empted of late by certain gentlemen writing about economic problems and about each other,[2] a more descriptive word than "validity" might have been used in the title to this article. Instead, the term used must be explained as a theoretical legal possibility, and its practical justification remain a challenging windmill to some Don Quixote of the Illinois bar, if such there be. Encouragement he may receive from sober pronouncements of the Illinois Supreme Court, of which the following is typical:

> A tax deed is effective at the time it is executed. If the proceedings have been regular it conveys the title in fee simple and the grantee may maintain ejectment for the possession of the premises.[3]

He may derive further encouragement from perusing the statutes dealing with these matters—at least, until he permits his eyes to wander over the annotations appended thereto. There it is believed he will not find a single case decided under the present statute in which an Illinois tax title has been affirmatively established. He may then, perhaps, glance back to the quotations above and somewhat meditatively underscore the language "if the proceedings have been regular." It is the condition contained in these words, says a writer of a half century ago,[4] that "points us to the battle-field whereon lie mangled and dead nearly all the tax titles that ever dared to show their faces in the court-room."

Inasmuch as the process of selling land for taxes was unknown to the common law, and derives its authority solely from constitution and statute, it may not be inappropriate to give brief attention to the history of such provisions in Illinois.

The Constitution of 1818 makes no reference to tax sales, but contains a single provision requiring ad valorem taxation.[5]

[1] Member of Illinois Bar; alumnus of Chicago-Kent College of Law.

[2] Sidney Hook, "The Folklore of Capitalism. The Politician's Handbook—A Review," 5 U. of Chi. L. Rev. 341 (1938); Thurman Arnold, "The Folklore of Mr. Hook—A Reply," ibid., 349; Sidney Hook, "Neither Myth nor Power—A Rejoinder," ibid., 354.

[3] Woitynek v. Franken, 300 Ill. 418 at 421, 133 N.E. 235 (1921).

[4] Robert S. Blackwell, A Practical Treatise on the Power to Sell Land for the Non-Payment of Taxes (5th ed. by Frank Parsons, Little, Brown and Co., Boston, 1889), p. 2, § 1.

[5] Art. VIII, § 20: "That the mode of levying a tax shall be by valuation, so that

The statute of 1827 sets forth a comparatively simple system for handling tax sales:

> If any person after having been called upon by the sheriff to pay his tax, shall neglect or refuse to pay the same for the period of twenty days after such notice, the sheriff shall proceed to advertise such portion of such person's taxable property as he shall deem sufficient, on the court house door, and in three other of the most public places in the county, giving in such advertisement fifteen days' notice of the time and place of sale, and particularly describing the property to be sold; at the time and place appointed, unless the taxes and costs shall have been previously paid, the sheriff shall proceed to sell said property, or so much of it as will bring the amount of tax and costs.[6]

For the purpose of securing a liberal construction of this statute subsequent amendments were adopted, the most important of which was one adopted in 1829, which provided:

> It shall not be necessary for any purchaser of lands, so sold for taxes, to obtain, keep, or produce any advertisement of the sale thereof, but his deed from the auditor of public accounts shall be evidence of the regularity and legality of the sale, until the contrary shall be made to appear: *Provided, however,* that no exceptions shall be taken to any such deed, but such as shall apply to the real merits of the case, and are consistent with a liberal and fair interpretation of the intentions of the legislature.[7]

The opinions construing and applying these early statutes present a struggle between strict and liberal construction. It is interesting to note this conflict exemplified in two opinions of the same justice, Scates. In *Vance* v. *Schuyler,*[8] he uses this language: "The provision [amendment of 1829, *supra*] has repealed that rule of strict construction, applied to the exercise of naked powers uncoupled with an interest, in relation to this sale. . . ." Just one year later, in *Bestor* v. *Powell,*[9] he prefaces a statement with this concessive language: "I know that the rule of strict construction applies to the exercise of these naked powers. . . ." Upon the whole the period may be considered as one characterized by a "liberal and fair view,"[10] and one in which in general the courts heeded the almost prophetic warning of Justice Scates[11] against encumbering the rules of construction with "too many and nice distinctions, else it will be found im-

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every person shall pay a tax in proportion to the value of the property he or she has in his or her possession."

6 Gale's Stat. 1839, p. 566, § 24.
7 Ibid., p. 572, § 9.
8 6 Ill. (1 Gilm.) 160 at 162 (1844).
9 7 Ill. (2 Gilm.) 119 at 128 (1845).
10 Vance v. Schuyler, 6 Ill. (1 Gilm.) 160 at 162 (1844).
11 Bestor v. Powell, 7 Ill. (2 Gilm.) 119 at 128 (1845).

practicable ever to carry into effect the plain intentions of the lawgiver; and they are a sale of the lands to raise the taxes and secure the revenue when the owner neglects payment."

Of twelve opinions found in the Supreme Court of Illinois during the period,[12] half were decided in favor of,[13] and half against,[14] the holder of the tax title. As against four decisions holding that the mere production of the auditor's deed was not sufficient to make prima facie title,[15] an equal number held that it was.[16] Of the remaining four decisions, one allows correction of a tax deed by a succeeding auditor,[17] one denies the right to correct a misprinted date of an advertisement,[18] one sustains a tax deed as against several "nice" technical objections,[19] and the last[20] reverses for improper exclusion of evidence tending to show noncompliance with the statute.[21]

Although the Supreme Court decisions during this period were somewhat conflicting and limited, the fact that the public at large regarded tax titles quite seriously may well be inferred from the action of the people in writing into the Constitution of 1848 a specific procedure designed to protect property owners

12 I.e., 1818-1848.

13 Maxcy v. Clabaugh, 6 Ill. (1 Gilm.) 26 (1844); Vance v. Schuyler, 6 Ill. (1 Gilm.) 160 (1844); Graves v. Bruen, 6 Ill. (1 Gilm.) 167 (1844); Messinger v. Germain, 6 Ill. (1 Gilm.) 631 (1844); Bestor v. Powell, 7 Ill. (2 Gilm.) 119 (1845); Lusk v. Harber, 8 Ill. (3 Gilm.) 158 (1846).

14 Garrett v. Doe ex dem. Wiggins, 2 Ill. (1 Scam.) 335 (1837); Fitch v. Pinckard, 5 Ill. (4 Scam.) 69 (1842); Doe ex dem. Hill v. Leonard, 5 Ill. (4 Scam.) 140 (1842); Hinman v. Pope, 6 Ill. (1 Gilm.) 131 (1844); Doe ex dem. Wiley v. Bean, 6 Ill. (1 Gilm.) 302 (1844); Job v. Tebbetts, 10 Ill. (5 Gilm.) 376 (1848).

15 Garrett v. Doe ex dem. Wiggins, 2 Ill. (1 Scam.) 335 (1837); Doe ex dem. Hill v. Leonard, 5 Ill. (4 Scam.) 140 (1842); Hinman v. Pope, 6 Ill. (1 Gilm.) 131 (1844); Doe ex dem. Wiley v. Bean, 6 Ill. (1 Gilm.) 302 (1844).

16 Vance v. Schuyler, 6 Ill. (1 Gilm.) 160 (1844); Graves v. Bruen, 6 Ill. (1 Gilm.) 167 (1844); Messinger v. Germain, 6 Ill. (1 Gilm.) 631 (1844); Lusk v. Harber, 8 Ill. (3 Gilm.) 158 (1846).

17 Maxcy v. Clabaugh, 6 Ill. (1 Gilm.) 26 (1844). The deed had erroneously stated that the property was sold for taxes for 1833; it had been corrected to read "1834."

18 Fitch v. Pinckard, 5 Ill. (4 Scam.) 69 (1842), held that parol evidence, to show that publication was properly made despite error in date appearing in advertisement itself, was properly excluded.

19 Bestor v. Powell, 7 Ill. (2 Gilm.) 119 (1845).

20 Job v. Tebbetts, 10 Ill. (5 Gilm.) 376 (1848).

21 It is to be noted that two of the foregoing decisions (Vance v. Schuyler; Lusk v. Harber) favoring the holder of the tax title are based in part at least upon the weakness of the title of the other party. All of the twelve cases cited are actions in ejectment except one, Maxcy v. Clabaugh, which takes the form of an action of debt under a statute for cutting timber.

with respect to tax sales.[22] Provision is made in considerable detail for the type of notice to be given, the manner of service thereof, and the form of affidavit for a tax deed.[23] Blackwell states that this is "the first instance where the people in the exercise of their inherent sovereignty have undertaken to legislate upon the subject of tax titles."[24]

The provision of the Constitution of 1870 relating to tax sales is as follows:

> The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the general assembly shall provide by law for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: *Provided,* that occupants shall in all cases be served with personal notice before the time of redemption expires.[25]

The revenue act of 1872 gives effect to such provisions, and it is from such act, through constant additions and changes by way of amendment,[26] that the revenue act of today has evolved. For

22 Art. IX, § 4; "Hereafter, no purchaser of any land or town lot, at any sale of lands or town lots for taxes due either to this state or any county, or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or town lot so purchased until he or she shall have complied with the following conditions, to-wit: Such purchaser shall serve, or cause to be served, a written notice of such purchase on every person in possession of such land or town lot, three months before the expiration of the time of redemption on such sale; in which notice he shall state when he purchased the land or town lot, the description of the land or lot he purchased, and when the time of redemption will expire. In like manner he shall serve on the person or persons in whose name or names such land or lot is taxed, a similar written notice, if such person or persons shall reside in the county where such land or lot shall be situated; and in the event that the person or persons in whose name or names the land or lot is taxed do not reside in the county, such purchaser shall publish such notice in some newspaper printed in such county. . . ." Every such purchaser, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of this section, stating particularly the facts relied on as such compliance . . . [provision for filing affidavit] and which record or affidavit shall be prima facie evidence that such notice has been given. Any person swearing falsely in such affidavit shall be deemed guilty of perjury, and punished accordingly. . . ."

23 These provisions, with some changes and considerable elaboration, are still retained—many of them verbatim—in our present revenue act. Ill. Rev. Stat. 1937, Ch. 120, § 202 et seq.

24 Op. cit., note 4 supra, p. 610, § 686.

25 Art. IX, § 5.

26 Important amendments were adopted in the meetings of the General Assembly in 1873, 1874, 1879, 1881, 1885, 1895, 1903, 1911, 1913, 1917, 1919, 1921, 1923, 1929, 1930, 1933, 1935, and 1937.

convenience in the present treatment, tax procedure may be divided into three general stages: first, proceedings prior to application for judgment; second, application for judgment, precept, and sale; and third, proceedings subsequent to sale.

Objections Based on Proceedings Prior to Application for Judgment

Objections based on errors in levy, assessment, and early collection procedure, are, of course, in no sense peculiar to the law of tax titles. They are more frequently raised in connection with other proceedings; and in fact the legislature has sought to eliminate them with respect to tax deeds by treating the judgment of sale by the county court as conclusive. One of the principal provisions[27] designed to accomplish this purpose is as follows:

> And any judgment for the sale of real estate for delinquent taxes rendered after the passage of this Act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment or decree, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions, the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in the cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment. . . .

In view of the foregoing and of similar provisions,[28] this class of objections has become of comparatively little importance. However, it must not be supposed that such objections have been entirely obviated. Some of them still survive—those which are recognized as relating to mandatory requirements, which condition the jurisdiction of the court to enter judgment at all. The foregoing provisions do not dispense with the requirement that the tax deed be "founded on a valid judgment."[29] The judgment

[27] Ill. Rev. Stat. 1937, Ch. 120, § 210; Laws 1879, p. 252, § 1.

[28] E.g., " . . . no assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof. . . . " Ill. Rev. Stat. 1937, Ch. 120, § 179; Laws 1873-74, p. 51, § 1.

[29] Gage v. Lightburn, 93 Ill. 248 at 252 (1879).

has been held invalid where no appropriation ordinance has been passed;[30] where the underlying tax levy was made under an invalid certificate;[31] where there is no "legal liability or obligation to pay the tax for which the land . . . was sold";[32] and where the assessor has been late in returning his assessment book and the tax was not "levied by the proper persons."[33]

Application for Judgment, Precept, and Sale

The first of the preliminary requirements peculiar to a sale for taxes, as distinguished from the validity of the tax itself, is that of advertisement of the delinquent list and notice of application for judgment and sale. The statute provides in part as follows:

> At any time after the first day of September next after all of such delinquent taxes on lands and lots shall have become due in any year, or next after any taxes are paid under protest in any year, the collector shall publish an advertisement, giving notice of the intended application for judgment for sale of such delinquent lands and lots, and for judgment fixing the correct amount of any tax paid under protest in a newspaper [mode of selecting paper]. . . . Said advertisement shall be once published at least ten days previous to the day on which judgment is to be prayed, and shall contain a list of the delinquent lands and lots upon which the taxes or any part thereof, remain due and unpaid, . . . the names of owners, if known, the total amount due thereon, and the year or years for which the same are due; also, a list of the lands and lots upon which taxes shall have been paid under protest, the amounts so paid thereon, and the names of the persons paying the same. Such collector shall give notice that he will apply to the County Court on a specified day for judgment against said lands and lots for said taxes, and costs, and for an order to sell said lands and lots for the satisfaction thereof, and for a judgment fixing the correct amount of any tax paid under protest; and shall also give notice that on the.....[blank appears in original] Monday next succeeding the date of application all the lands and lots for the sale of which an

[30] Riverside Co. v. Howell, 113 Ill. 256 (1885). In this case, in response to the argument that the tax judgment should be conclusive against collateral attack, Justice Sheldon distinguishes confirmation of special assessment proceedings made conclusive by statute. It is to be noted also in connection with this case that "when a part of the tax for which sale of real estate is made, is illegal, the sale is void." Ibid., p. 262.

[31] Gage v. Lightburn, 93 Ill. 248 (1879).

[32] Wilmerton v. Phillips, 103 Ill. 78 at 81 (1882). Here, extension against real property of personal property tax assessed in township where no personal property was owned.

[33] Gage v. Nichols, 112 Ill. 269 (1884). Bill to remove cloud. A reversal was had because of failure of decree to condition relief upon reimbursement. Seemingly, invalidity of tax deed was simply assumed. The court said, "The objections urged not to go to the substantial justice of the taxes, but are aimed at certain alleged irregularities."

order shall be made, will be exposed to public sale at the building where the County Court is held in said county, for the amount of taxes, and costs due thereon; and the advertisement published according to the provisions of this section shall be deemed to be sufficient notice of the intended application for judgment and of the sale of lands and lots under the order of said court or for judgment fixing the correct amount of any tax paid under protest. . . .[34]

Inasmuch as the advertisement and proof thereof are the process by which the court obtains jurisdiction, the provisions of the statute must be followed literally.[35] Thus, it is held that failure to advertise the land invalidates the sale;[36] as does advertisement under a description which does not sufficiently identify the property.[37]

Section 176 provides that the collector, at least five days before the application for judgment, shall transcribe into a book known as "the tax, judgment, sale, redemption, and forfeiture record" the list of delinquent properties, and other prescribed information. This is also known as the delinquent list, although that title is applied also to the advertising list provided for in section 170. The attitude maintained by the courts toward these lists is that indicated in an early case[38] as follows:

To give the court jurisdiction, it is essential that the collector should make a report, and give notice of the application for judgment, substantially, as required by the statute. The report and notice, are the foundation of the whole proceeding, and without them, the court could have no authority to enter judgment; and although the deed is itself prima facie evidence, that the proper notice was given and report made, yet when the party, as was done in this case, gives the notice and report, in evidence, the prima facie case, made by the deed, will be destroyed, if either is essentially defective.

The statute provides,[39] with some elaborate qualifications that application for judgment and order of sale "shall be made during the month of September." A fair amount of leeway is allowed the collector in the provision that, "if for any cause the

34 Ill. Rev. Stat. 1937, Ch. 120, § 170.

35 People ex rel. Thaxton v. Coal Belt Electric Ry. Co., 311 Ill. 29, 142 N.E. 495 (1924); City of Moline v. C. B. & Q. R. Co., 262 Ill. 52, 104 N.E. 204 (1914); People ex rel. Bestold v. Toluca State Bank, 327 Ill. 638, 159 N.E. 240 (1927).

36 Langlois v. Stewart, 156 Ill. 609, 41 N.E. 177 (1895).

37 Pickering v. Lomax, 120 Ill. 289, 297, 11 N.E. 175 (1887). The description was: "except 12$^{64}/_{100}$ acres in the southeast corner of sub-lot 1, lot 1, in north section Robinson's reserve." The judgment was rendered against "sub-lot 1, lot 1, in Robinson's reserve, except 12$^{64}/_{100}$ acres in the southeast corner."

38 Spellman v. Curtenius, 12 Ill. 409 at 413 (1851).

39 Ill. Rev. Stat. 1937, Ch. 120, § 173.

collector is prevented from advertising and obtaining judgment during the month of September, it shall be held to be legal to obtain judgment at any time thereafter." However, some difficulty may arise from delay which the statute apparently does not foresee. The advertisement for judgment and sale must state the day upon which the property will be offered for sale. Hence, if there is delay in obtaining judgment, such delay may, and in actual practice probably would, be sufficient to carry the actual taking of judgment past the time scheduled for the sale. Although the Supreme Court has held that judgment may be taken at a term subsequent to that at which application was made,[40] in several early cases it held that a sale made on a day other than that specified was void, and would not support a tax title.[41] While it is true that these cases were decided under a somewhat different statute, yet, inasmuch as the question does not appear to have been discussed in recent cases, it would seem that the delay ordinarily incident to disposing of objections and entering judgment would cast a serious cloud upon the tax titles based upon such proceedings.

On the day on which judgment is asked, the collector is required to report to the clerk those items which have been paid, and with his assistance compare and correct the list and make an affidavit of the correctness thereof.[42] It was early held in *People ex rel. Miller* v. *Otis*,[43] that this section and section 176, providing for compiling the delinquent list, confer upon the court jurisdiction to give judgment, and that therefore substantial compliance with the statute is jurisdictional. The substantial requirements, for noncompliance with which judgment was held properly refused by the county court, were the failure to state the assessed valuation of the property in the delinquent list and the failure to make the affidavit thereto. While the substantiality of the failure to state the valuation seems not to have been questioned, subsequent cases have held the affidavit not to be jurisdictional.[44] Seemingly the theory of these cases is that the

[40] People ex rel. O'Connell v. Noonan, 276 Ill. 430, 114 N.E. 928 (1916, reh. den. 1917); Illinois Cent. R. Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N.E. 609 (1901).

[41] Hardin v. Crate, 60 Ill. 215 (1871); Essington v. Neill, 21 Ill. 139 (1859); Hope v. Sawyer, 14 Ill. 254 (1852).

[42] Ill. Rev. Stat. 1937, Ch. 120, § 178. [43] 74 Ill. 384 (1874).

[44] Wabash Ry. Co. v. People, 138 Ill. 316, 28 N.E. 57 (1891); Chicago & N. W. Ry. Co. v. People ex rel. McKee, 174 Ill. 80, 59 N.E. 1057 (1898); People ex rel. Young v. Prust, 219 Ill. 116. 76 N.E. 68 (1905).

defaulting tax-payer has no interest in the question of whether the affidavit is made or not, because it is merely evidentiary, and he may show, in defense of an application for judgment, that the tax has in fact been paid. Cases still more recent than these have held the affidavit to be jurisdictional[45] and the case of *People ex rel. Brockamp* v. *Chicago & Illinois Midland Railway Company*,[46] has directly challenged the holdings of these cases, seemingly overruled them, and restored the doctrine of the Otis case holding the affidavit jurisdictional. It is to be noted that none of these cases deals with tax titles, but all involve appeals from the county court in proceedings for judgment against the land. The application of the stricter rule to a case involving a tax title would be consonant with the general attitude of the courts.

The provision[47] for the entry of judgment and order of sale is as follows:

> The court shall examine said list, and if defense (specifying in writing, the particular cause of objection) be offered by any person interested in any of said lands or lots, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. The court shall give judgment for such taxes and special assessments and penalties as shall appear to be due . . . and the court shall direct the clerk to make out and enter an order for the sale of such real property against which judgment is given, which shall be substantially in the following form: . . . [The form of judgment then follows.]

The proceeding is one strictly in rem,[48] the published notice serves as process,[49] and the delinquent list constitutes the declaration.[50] The collector's return of the delinquent list, and the

[45] People ex rel. Hewitt v. C., L. & C. Ry. Co., 256 Ill. 280, 100 N.E. 208 (1912); People ex rel. Hewitt v. I. C. R.R. Co., 256 Ill. 416, 100 N.E. 251 (1912); People ex rel. Hewitt v. C., I. & S. R.R. Co., 256 Ill. 443, 100 N.E. 253 (1912); People ex rel. Hewitt v. K. & S. R.R. Co., 256 Ill. 453, 100 N.E. 211 (1912). While these cases involve different sections of the statute, the affidavit required is the same, and they would seem to be authoritative. They are so regarded by the Supreme Court in People ex rel. Brockamp v. C. & I. M. Ry. Co., 260 Ill. 624, 103 N.E. 621 (1913).

[46] 260 Ill. 624, 625, 103 N.E. 621 (1913).

[47] Ill. Rev. Stat. 1937, Ch. 120, § 179 .

[48] People ex rel. Astle v. C. & E. I. Ry. Co., 315 Ill. 536, 146 N.E. 440 (1925); People ex rel. Ream v. Dragstran, 100 Ill. 286 (1881); Pidgeon v. People, 36 Ill. 249 (1864).

[49] People ex rel. Bestold v. Toluca State Bank, 327 Ill. 638, 159 N.E. 240 (1927); Fortman v. Ruggles, 58 Ill. 207 (1871); People v. Coal Belt Electric Ry. Co., 311 Ill. 29, 142 N.E. 495 (1924).

[50] Wiggins Ferry Co. v. People ex rel. Weber, 101 Ill. 446 (1882); People v. Coal Belt Electric Ry. Co., 311 Ill. 29, 142 N.E. 495 (1924); People ex rel. Bestold v. Toluca State Bank, 327 Ill. 638, 159 N.E. 240 (1927).

filing of the same, with the statutory notice and proof of publication constitutes a prima facie case, and the burden of proving an irregularity falls upon the objector.[51] Although it would seem that, these jurisdictional elements being present, the judgment would be res judicata, and not subject to collateral attack, either by the holder of a tax deed or anyone else, it is not in general so regarded by the Illinois courts. It is true, of course, that the cases allowing collateral attack justify on the ground of lack of jurisdiction of the county court.[52] It is submitted, however, that this is little more than verbiage, especially in view of the fact that the jurisdictional defects do not have to do with the person, and yet it is held that a tax-payer who appears, objects, and is overruled, is precluded by the judgment.[53]

In the case of special assessments certainly, and possibly in the case of general taxes, the burden of establishing appearance and estoppel is upon the person relying on the judgment. In *Gage* v. *Nichols*[54] the court said:

> It is also conceded that in respect to judgments for taxes not affected by the amendment, the owner of land who did not appear and file objections thereto may collaterally object to the judgment, and that only such owner is estopped by the judgment as appeared and objected to the rendition of the judgment. It is manifest there can in no case be an estoppel without the conditions which work the estoppel affirmatively appear. . . .
>
> The question here is one of the burden of proof, and the *onus probandi* was upon the appellant to establish the affirmative facts to show that

[51] People ex rel. Akin v. Southern Gem Co., 332 Ill. 370, 163 N.E. 825 (1928); People ex rel. Olmsted v. James Milliken University, 331 Ill. 559, 163 N.E. 313 (1928); People ex rel. Harper v. Irvin, 325 Ill. 497, 156 N.E. 292 (1927); also a host of cases in accord cited in Smith-Hurd Ann. Stat., Ch. 120, § 179, n. 88.

[52] Elmwood Cemetery Co. v. People, 204 Ill. 468, 68 N.E. 500 (1903); Glos v. Woodard, 202 Ill. 480, 67 N.E. 3 (1903); Gage v. Bailey, 102 Ill. 11 (1881); Gage v. Lyons, 138 Ill. 590, 28 N.E. 832 (1891); Belleville Nail Co. v. People ex rel. Weber, 98 Ill. 399 (1880). These cases may be said to rest in part also upon the exception contained in section 210: " . . . shall estop all parties from raising any objection thereto . . . except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment. . . ." Cf. People v. Miller, 339 Ill. 573, 171 N.E. 672 (1930), for an excellent discussion of the whole matter—a discussion which may be misleading, however, unless particular note is taken of the fact that the proceeding is one in equity to foreclose a tax lien under section 238 of Chapter 120, and neither an appeal from proceedings for sale in the county court, nor one involving a tax title. The position of the court is that all of the foregoing cases can be relegated to the exception of section 210, and that they are not inconsistent with the ordinary operation of the doctrine of res judicata with respect to judgment and order of sale by the county court.

[53] Miller v. Cook, 135 Ill. 190, 25 N.E. 756, 10 L.R.A. 292 (1890); Frew v. Taylor, 106 Ill. 159 (1883); Neff v. Smyth, 111 Ill. 100 (1884).

[54] 135 Ill. 128 at 134, 25 N.E. 672 (1890).

appellee was estopped by the tax judgment, and not upon the latter to prove the negative of that proposition.

Sale of Delinquent Lands

On the day advertised for sale, the county clerk is required to check, certify, and enter upon record the delinquent list upon which judgment has been entered.[55] This certification, termed the "precept," serves as the process for sale in lieu of execution, and is absolutely necessary to a valid sale.[56] In *Ames* v. *Sankey*,[57] the attitude of the courts is tersely stated:

> Where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such provision is mandatory. . . . This rule applies to that which stands in the place of process and performs its office. . . . In this case, there was no attested certificate, and, therefore, no process, under which the officer making the sale was authorized to act. Hence the sale, and the certificates issued to the purchaser, were void. [The omissions are citations of cases.]

This certificate must be made on the day advertised for the sale.[58] If made on the day judgment was rendered, or on any day either before or after that advertised for sale, the sale is void.[59] It is perhaps safe to say that more tax titles have been invalidated because of errors either in making or dating this certificate than upon any other single ground. The justification offered for such a strict rule is that "a certificate made on" one date "might or might not recite facts existing on" another date, "but we cannot indulge any presumption that it did."[60] It may be asked what harm could possibly result to the property owner by reason of such discrepancy. Certainly the only change in the "facts" of the certificate would be payment of the taxes. Surely no harm could result, since even if the error were not discovered within the two years before a deed could issue, and such a deed did issue, such

55 Ill. Rev. Stat. 1937, Ch. 120, § 182.

56 Gage v. Kaufman, 133 U. S. 471, 10 S. St. 406, 33 L.Ed. 725 (1890); Glos v. Mulcahy, 210 Ill. 639, 71 N.E. 629 (1904); Glos v. Randolph, 138 Ill. 268, 27 N.E. 941 (1891); Ames v. Sankey, 128 Ill. 523, 21 N.E. 579 (1889); Ogden v. Bemis, 125 Ill. 105, 17 N.E. 55 (1888).

57 128 Ill. 523 at 526, 21 N.E. 579 (1889).

58 Kepley v. Scully, 185 Ill. 52, 57 N.E. 187 (1900); Coombs v. People, 198 Ill. 586, 64 N.E. 1056 (1902); Glos v. Hanford, 212 Ill. 261, 72 N.E. 439 (1904); Glos v. McKerlie, 212 Ill. 632, 72 N.E. 700 (1904); Kepley v. Fouke, 187 Ill. 162, 58 N.E. 303 (1900); Glos v. Ault, 221 Ill. 562, 77 N.E. 939 (1906); McCraney v. Glos, 222 Ill. 628, 78 N.E. 921 (1906).

59 Glos v. Gleason, 209 Ill. 517, 70 N.E. 1045 (1904); Judson v. Glos, 249 Ill. 82, 94 N.E. 112 (1911).

60 Kepley v. Fouke, 187 Ill. 162 at 164, 58 N.E. 303 (1900).

deed would be at best prima facie evidence "that the taxes... were not paid at any time before sale,"[61] which presumption could readily be rebutted if untrue. Perhaps the true reason for the rule is that it is merely an application of an even more general rule candidly stated by the court in *McCraney* v. *Glos*[62] as follows:

> ... but it is a general rule, and one well understood, that in a proceeding for the collection of taxes, *where the owner may be deprived of his property,* the requirements of the statute must be strictly followed. [Italics supplied.]

In addition to specifying the time and place of sale, the statute provides that the collector shall "proceed to offer for sale, separately and in consecutive order, each tract of land or town or city lot in the said list on which the taxes, special assessments, interest or costs have not been paid. . . ."[63] Although sale in consecutive order is mandatory, it has been held that where the collector has one list delinquent for general taxes and another list delinquent for special assessments, the statute is not violated by selling the lands delinquent for special assessment in each town before selling lands delinquent for general taxes in the same towns.[64] Where sales of lands against which judgments have been rendered at the same term have been continued through several months, such sales have been regarded as one sale and within the statute.[65]

Under the present statute[66] the basis of bidding at the sale is the percentage of penalty which the buyer will accept; the maximum permissible penalty is twelve per cent. Under the Act of 1871[67] and until 1895[68] the basis of bidding was "the least quantity" of the tract, to be taken off the east edge thereof, for which the buyer would pay the taxes on the entire tract. The change was doubtless brought about by the absurd turn the bidding had taken under the former method. Practical men interested in buying property at tax sales had long since come to realize the futility of attemping to perfect a tax title, but bought rather with a view to obtaining the heavy penalties incident to redemption, or, in some instances, particularly with respect to unimproved property, where the amount of the taxes was negligible,

61 Ill. Rev. Stat. 1937, Ch. 120, § 210.
62 222 Ill. 628 at 630, 78 N.E. 921 (1906).
63 Ill. Rev. Stat. 1937, Ch. 120, § 187.
64 Drake v. Ogden, 128 Ill. 603, 21 N.E. 511 (1889).
65 Gage v. Parker, 103 Ill. 528 (1882).
66 Ill. Rev. Stat. 1937, Ch. 120, § 188.
67 Laws 1871-72, p. 49, § 202.
68 Laws 1895, p. 298, § 1.

with a view to exacting a profit for release of the tax deed. Both for the purpose of inducing owners to redeem and avoid a tax sale in the former case, and for the purpose of securing a maximum price in the latter, the value of a tax deed lay almost solely in its nuisance value. Hence, the quantum of land purchased became comparatively unimportant, and in the face of keen competition it became the custom to pay the taxes in return for the east vigintillionth of the lot. In one case,[69] the tax buyer purchased "the east vigintillionth of a vigintillionth of the east 1/64 inch" of a lot. The tax buyer and his wife then executed a trust deed purporting to convey as security all of their interest in the entire lot. The court held that this deed did constitute a cloud on the title, although implying that in the absence of the trust deed, or if the trust deed had set out the extent of their interest, there would not even have been a cloud. In two subsequent cases[70] the court held that title to the "east one vigintillionth" of a lot did not constitute a cloud, but that where, as in one of the cases,[71] the owner prayed for removal as a cloud, such relief must be conditioned upon reimbursement.

The nuisance value of such tax titles was substantial, especially before they were held not to constitute clouds. Such values were greatly enhanced by some of the tactics employed, such as conveying a portion of the tax title to one or more relatives, or the execution of trust deeds, or both. Attorneys attempting to make title by an agreed date frequently found it necessary to pay a substantial profit to the holder of the tax title for quit-claim deeds from him and his various grantees. Even when time was not of the essence, attorneys frequently found it less expensive to settle than to fight a chancery suit to the Supreme Court. The reports of that court over a period of years are eloquent evidence that the attorney attempting to clear title was frequently confronted with that alternative.

Proceedings Subsequent to Sale

The Illinois Constitution entitles the owner of property sold for taxes to at least two years in which to redeem.[72] The statute

69 Glos v. Furman, 164 Ill. 585, 45 N.E. 1019 (1897).

70 Petty v. Beers, 224 Ill. 129, 79 N.E. 704 (1906); Jackson v. Glos, 243 Ill. 280, 90 N.E. 717 (1909).

71 Jackson v. Glos, supra, n. 70.

72 Art. IX, § 5.

allows redemption for at least two years and until the actual issuance of a tax deed.[73] If redemption is made within two years, the owner must pay the county clerk the amount for which the property was sold, plus the amount of the penalty bid for each six months or part thereof which has elapsed since the sale.[74] Thus, the total penalties may aggregate 48 per cent if sold for the maximum penalty and redeemed after eighteen months. If redemption is made after two years, the owner must pay in addition 6 per cent thereafter, "advertising fees and five dollars costs."[75] The person redeeming is also required to repay all taxes and special assessments accruing and paid by the tax buyer after the sale, with 7 per cent penalty thereon.

One of the most treacherous shoals to be crossed by one who would perfect a tax title is that of serving notice of the expiration of the period of redemption. The Constitution of 1870[76] leaves the type of notice to the discretion of the legislature with respect to all parties except "occupants"; they are required to "be served with personal notice before the time of redemption expires." There are three classes of persons to whom the statute[77] requires notice to be given: (1) occupants,[78] (2) persons in whose name taxed or especially assessed, and (3) owners or parties interested.[79] Those in the first class must be served; those in the other two classes if they can upon diligent inquiry be found in the county.[80]

If no one is in occupancy *and* the person in whose name the

73 Ill. Rev. Stat. 1937, Ch. 120, § 196.

74 I.e., twice the penalty if redeemed during the second six months, three times, if redeemed during the third six months, etc. Cf. also Ill. Rev. Stat. 1937, Ch. 120, § 197, extending the time of redemption if the tax buyer fails to keep subsequent taxes paid.

75 Minors, idiots, and insane persons have a year after the removal of their respective disabilities within which to redeem. They must pay interest at 10 per cent per annum upon both the amount of the sale and penalties after the elapse of two years. Ill. Rev. Stat. 1937, Ch. 120, § 196.

76 Art. IX, § 5. 77 Ill. Rev. Stat. 1937, Ch. 120, § 202.

78 ". . . every person in actual possession or occupancy of such land or lot . . . "

79 ". . . the owners of or parties interested in said land or lot, including trustees or mortgagees of record. . . ." The last six words were added in 1911. Laws 1911, p. 486. Previously the courts had held that a mortgagee was not a party interested. Glos v. Evanston Building & Loan Ass'n, 186 Ill. 586, 58 N.E. 374 (1900); Smyth v. Neff, 123 Ill. 310, 17 N.E. 702 (1888), a very curious holding in view of the fact that it is the land that is sold and not simply the interest of the taxpayer.

80 Notice must be given at least three months before the expiration of the time of redemption.

property was taxed cannot be found; *or* if the owners and parties interested cannot be found, notice must be given by publication.[81]

The giving of notice in strict compliance with the foregoing provisions is absolutely essential to a valid tax deed.[82] That notice has been given as prescribed must be made to appear unequivocally, and will not be aided by inference.[83] Thus, service on an employee of the owner does not constitute service on the owner;[84] nor does service upon the husband of the owner, unless it be affirmatively shown that the wife was actually present at the time.[85] Likewise, service upon one member of a firm does not constitute notice to other members.[86]

The court has held, however, that the provisions dealing with notice must be "reasonably" construed.[87] As compared with the strictness of the court in passing upon the mode of service, its decisions with respect to the parties entitled to notice are almost liberal. Thus, the terms "possession" and "occupancy" are said to be used in their ordinary sense, no distinction between them being intended;[88] nor is it necessary to serve notice on parties in "constructive possession."[89] Is a person who has been permitted to stack hay on the land in occupancy? Or a person who piles wood upon it? The court has held that neither need be served as an occupant.[90] Suppose an adjoining owner fence in a part of the land; he is held not to be an occupant.[91] Moreover, notice is not required to be given to parties acquiring an interest during the three months preceding the expiration of the time of redemption.[92]

81 Publication must be made three times, the first, not more than five, and the last, not less than three months before expiration of the time of redemption.

82 Gage v. Bani, 141 U.S. 344, 12 S. Ct. 22, 35 L.Ed. 776 (1891); McConnell v. Jones, 332 Ill. 620, 164 N.E. 186 (1928); City of Chicago v. Collin, 316 Ill. 104, 146 N.E. 741 (1925); People v. Banks, 294 Ill. 464, 128 N.E. 576 (1920); Clark v. Zaleski, 253 Ill. 63, 97 N.E. 272 (1911); Palmer v. Riddle, 180 Ill. 461, 54 N.E. 227 (1899); Bailey v. Smith, 178 Ill. 72, 52 N.E. 948 (1899); Gage v. Bailey, 115 Ill. 646, 4 N.E. 777 (1886).

83 People v. Banks, 272 Ill. 502, 112 N.E. 269 (1916).

84 Gage v. Schmidt, 104 Ill. 106 (1881).

85 Cotes v. Rohrbeck, 139 Ill. 532, 28 N.E. 1110 (1891).

86 Gage v. Reid, 118 Ill. 35, 7 N.E. 127 (1886); Hughes v. Carne, 135 Ill. 519, 26 N.E. 517 (1891).

87 Wright v. Glos, 264 Ill. 261, 106 N.E. 200 (1914).

88 Combs v. Goff, 127 Ill. 431, 20 N.E. 9 (1889).

89 Taylor v. Wright, 121 Ill. 455, 13 N.E. 529 (1887).

90 Drake v. Ogden, 128 Ill. 603, 21 N.E. 511 (1889); Hammond v. Carter, 155 Ill. 579, 40 N.E. 1019 (1895).

91 Hammond v. Carter, 155 Ill. 579, 40 N.E. 1019 (1895). 92 Ibid.

A most liberal attitude is indicated in the construction of the terms "or parties interested." Prior to the amendment of 1911, the statute did not specifically include mortgagees within the term.[93] The court in *Smyth* v. *Neff*,[94] decided that, as the statute then stood, the tax purchaser could not know from any direction given to whom he was expected to give the notice required other than to the owner and that, therefore, the provision must be regarded as meaning the same as it would if the words "or parties interested" had been omitted.

There seem to be no particular problems peculiar to this section in connection with publication. There is, however, a very interesting problem which must be solved before resorting to publication[95]—the question of what constitutes "diligent inquiry." The term has been construed to mean "what a business man or anyone else actually seeking to find a person residing at a given place would understand them to mean if he sent an employee to find and serve personal notice on the occupant."[96] It is clear that search merely within the county is insufficient. The inquiry must be diligent without respect to county lines, although the fact sought to be ascertained by such inquiry is whether or not the person can be "found within the county."[97] Further reference is made to the practical treatment of this problem hereafter in connection with the making of the affidavit required.

The notice, whether sent personally or by publication, must state: (1) when the lot or land was purchased, (2) in whose name it was taxed, (3) the description of the land, (4) for what year it was taxed or specially assessed, and (5) when the time for redemption will expire.[98]

The first requirement, the date of sale, seems to have presented no difficulty in any of the cases. A question regarding the second point was raised in *Taylor* v. *Wright*,[99] which involved

[93] Cf. note 79, supra. [94] 123 Ill. 310, 17 N.E. 702 (1888).

[95] The diligent inquiry may not be postponed until after the notice has been published. Burton v. Perry, 146 Ill. 71, 34 N.E. 60 (1893).

[96] Wright v. Glos, 264 Ill. 261, 264, 106 N.E. 200 (1914). The court went on to apply the test enunciated to the facts of the case before it: "No employer of common sense would think that diligent inquiry had been made if his employee stated that he could not find the occupant of the house whose name was in the city directory when he had only gone there Saturday and could not find him in."

[97] Glos. v. Boettcher, 193 Ill. 534, 61 N.E. 1017 (1901); Van Matre v. Sankey, 148 Ill. 536, 36 N.E. 628, 23 L.R.A. 665, 39 Am. St. Rep. 196 (1893).

[98] Ill. Rev. Stat. 1937, Ch. 120, § 202. [99] 121 Ill. 455, 463, 13 N.E. 529 (1887).

inter alia the sufficiency of notice which failed to state "in whose name" the property "was taxed," but simply stated: "To whom assessed. . . James Mix." The court deemed the two "equivalent in meaning." It has not been necessary in order to invalidate a tax title to go so far as to determine whether the statute means the name used by the assessor when the quadrennial assessment is made, the name to which an original assessment may have been later changed by reason of a change in ownership, the name used on the collector's books, or that to which it has been changed by insertion of the name of the person who last paid the taxes. The same question presents itself with respect to special assessments, that is, whether or not the language is to be interpreted to mean the name of the person summoned as owner at the time of the confirmation of the assessment, or the person or persons named by reason of changes in the ownership of the property, or because of payment made by some other party. The third requirement of notice, likewise, presents little problem. While the courts have not hesitated to invalidate for a misdescription of the land,[100] they have held that more than one tract may be included in the same notice,[101] and that such minor errors as the use of the word "lot" instead of "block" will not invalidate.[102]

With respect to the fourth point, "for what year taxed or specially assessed," the holders of tax titles have not fared so well. A great number of such titles have been invalidated because of the failure of the notice to disclose whether the sale had been for taxes or for special assessment, a common error having been to state that the sale was "for the taxes, special assessments, interest, and costs."[103]

Although it would seem a fairly easy matter, after having stated the date of sale, to state correctly the date of expiration of redemption two years hence, the holders of tax titles have seemingly found difficulty in doing so consistently. Their tax

[100] Esker v. Heffernan, 159 Ill. 38, 41 N.E. 1113 (1895). Here the land was described as being in section 1, rather than in section 19.

[101] Drake v. Ogden, 128 Ill. 603, 21 N.E. 511 (1889); Hammond v. Carter, 155 Ill. 579, 40 N.E. 1019 (1895).

[102] Garrick v. Chamberlain, 97 Ill. 620 (1880).

[103] Gage v. Bani, 141 U.S. 344, 12 S.Ct. 22, 35 L.Ed. 776 (1891); Harrell v. Enterprise Sav. Bank, 183 Ill. 538, 56 N.E. 63 (1899); Bailey v. Smith, 178 Ill. 72, 52 N.E. 948 (1899); Gage v. DuPuy, 137 Ill. 652, 24 N.E. 541 (1890), affirmed on rehearing, 137 Ill. 652, 26 N.E. 386 (1890); Gage v. Davis, 129 Ill. 236, 21 N.E. 788 (1889); Stillwell v. Brammell, 124 Ill. 338, 16 N.E. 226 (1888); Gage v. Waterman, 121 Ill. 115, 13 N.E. 543 (1887).

deeds have been invalidated because the notice stated the time of expiration as being the same as that of the sale,[104] because they have placed the time too early,[105] and because they have placed it too late.[106] An extremely hard case, involving perhaps a too technical decision, is that of *Gage* v. *Davis*.[107] In that case the sale took place November 3, 1873; the notice stated that the time of redemption would expire on November 3, 1875. It happened that the latter date was a Sunday, so that redemption might still have been made on November 4. It is not surprising that the decision invalidating the tax title was "Per Curiam," despite the fact that the notice contained another error—the statement that the lot was sold "for taxes and special assessments."

After having complied with the foregoing requirements, the purchaser or his assignee must make an affidavit that he has done so, "stating particularly the facts relied upon as such compliance."[108] He is not entitled to a deed until he makes such affidavit, the purpose thereof being to furnish a record of certain facts and give the officer whose duty it is to issue such deed a basis for his action.[109] Here, again, the affidavit is jurisdictional, and failure to execute it properly will invalidate the tax deed. The statute makes the affidavit prima facie evidence of the giving of notice and provides that the making of a false affidavit shall render the affiant guilty of perjury.

A study of the statute and of the various decisions would seem to indicate that the affidavit for a tax deed should include three types of allegations: (1) the basic facts of the sale, (2) the inquiry made for the purpose of giving notice and facts thereby disclosed, and (3) the service of the notice itself.[110]

(1) A statement of the basic facts of the sale—where, when, by whom, and to whom the sale was made; an accurate descrip-

104 Wilson v. McKenna, 52 Ill. 43 (1869).

105 Gage v. Bailey, 100 Ill. 530 (1881).

106 Brophy v. Harding, 137 Ill. 621, 27 N.E. 523 (1891), reh. den. 137 Ill. 621, 34 N.E. 253 (1891); Benefield v. Albert, 132 Ill. 665, 24 N.E. 634 (1890); Wisner v. Chamberlin, 117 Ill. 568, 7 N.E. 68 (1886).

107 129 Ill. 236, 21 N.E. 788, 16 Am. St. Rep. 260 (1889).

108 Ill. Rev. Stat. 1937. Ch. 120, § 203.

109 Clark v. Zaleski, 253 Ill. 63, 97 N.E. 272 (1911).

110 McConnell v. Jones, 332 Ill. 620, 164 N.E. 186 (1928); City of Chicago v. Collin, 316 Ill. 104, 146 N.E. 741 (1925); Wilson v. Glos, 266 Ill. 392, 107 N.E. 630, Ann. Cas. 1916B 539 (1914); Palmer v. Riddle, 180 Ill. 461, 54 N.E. 227 (1899); Palmer v. Frank, 169 Ill. 90, 48 N.E. 426 (1897).

tion of the property; precisely for what taxes or assessments sold; the person in whose name taxed; and the expiration of the time of redemption—is necessary in order to show by affidavit that the notice given was proper, inasmuch as the affidavit alone must furnish a basis for the issuance of a deed.[111]

(2) The inquiry made and the facts thereby disclosed must be set forth in order to indicate compliance with the requirement of notice. For example, unless the affidavit states that notice was actually served upon the occupants, affiant must state as fact that no one was in actual possession or occupancy.[112] It is necessary that the affidavit disclose *particular facts* relied upon.[113] These facts must be stated with such precision and particularity that perjury can be predicated on such statements, if false.[114]

In view of the exacting construction given the requirement of "diligent inquiry," as discussed earlier, it would seem necessary to state specifically the occasions upon which the affiant visited the premises, the examination and inquiries made on such visits, and the results thereof; an examination of the records of the county recorder for the purpose of determining the owner and parties interested, and the fruits of such search; and a detailed account of all the steps taken to locate the owner or parties interested, including the names of persons of whom inquiry was made, the places visited, the conversations had, with dates, along with a search made in the local directory or telephone directory, with the results.

(3) The statement of the serving of notice is obviously required by statute. The detail with which it must be stated has perhaps been amplified by the courts. The statement that the purchaser "caused to be served" the notice, is insufficient.[115] The affidavit must show who served the notice, in what manner it was served, when it was served, and whether it was written or printed, or partly written and partly printed.[116] An affidavit stating that

111 Clark v. Zaleski, 253 Ill. 63, 97 N.E. 272 (1911); Hughes v. Carne, 135 Ill. 519, 26 N.E. 517 (1891).

112 Taylor v. Wright, 121 Ill. 455, 13 N.E. 529 (1887).

113 Wallahan v. Ingersoll, 117 Ill. 123, 7 N.E. 519 (1886).

114 Wilson v. Glos, 266 Ill. 392, 107 N.E. 630, Ann. Cas. 1916B 539 (1914).

115 Glos v. Gould, 182 Ill. 512, 55 N.E. 369 (1899).

116 Brickey v. English, 129 Ill. 646, 22 N.E. 854 (1889); Davis v. Gossnell, 113 Ill. 121 (1885); Price v. England, 109 Ill. 394 (1884).

"the land was taxed or specially assessed in the names of Robert Hervey and Robert Henry," and that notice was served "on said Robert Hervey and Robert Henry, by handing the same to and leaving the same with Robert Hervey personally" was held fatally defective for failure to show service on Robert Henry.[117] Where service has been made in whole or in part by publication that fact should be stated in detail, with dates of publication and names of newspapers. At all events, the substance of the notice should be included in the affidavit, and an exact copy attached and incorporated by reference.

The affidavit must, of course, state whether the affiant is acting for himself or as an agent for the purchaser or his assignee, since such affidavit is required to be made by the purchaser, his assignee, or an agent acting on behalf of one of them, and such fact cannot be supplied by parol evidence.[118]

Upon the giving of notice and making of affidavit as prescribed, and after two years from the date of sale, the holder of the certificate of purchase may produce the same before the county clerk, and receive from a deed,[119] the form of which is prescribed by statute.[120] Such deed, however, must be taken out and recorded within a year from the expiration of the time of redemption, or the certificate and deed, if any, will be absolutely null, except that the time during which a holder is prevented from obtaining a deed by order of court, or by refusal of the clerk to issue it, shall be excluded in computing the year's time.[121] Such deed, when obtained, is made prima facie evidence of the following facts:

> First—That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law. Second—That the taxes or special assessments were not paid at any time before sale. Third—That the real estate conveyed had not been redeemed from the sale at the date of the deed. Fourth—That the real estate was advertised for sale in the manner and for the length of time required by law. Fifth—That the real estate was sold for taxes or special assessments as stated in the deed. Sixth—That the grantee in the deed was the purchaser or assignee of the purchaser. Seventh—That the sale was conducted in the manner required by law.[122]

117 Gage v. Hervey, 111 Ill. 305 (1884).
118 Perry v. Bowman, 151 Ill. 25, 37 N.E. 680 (1894); Taylor v. Wright, 121 Ill. 455, 13 N.E. 529 (1887).
119 Ill. Rev. Stat. 1937, Ch. 120, § 205.
120 Ibid., § 207.
121 Ibid., § 211.
122 Ibid., § 210.

Mode of Testing Titles and Reimbursements

Under the early law of Illinois the action of ejectment was not only the common means, but practically the only means of testing the validity of tax titles.[123] Until 1870 the Supreme Court seems to have taken rather definitely the position that courts of equity were not available for such purposes, because the remedy at law was adequate and the question of legal title exclusively one of legal cognizance.[124] In that year, however, the court reversed both its decision and its reasoning,[125] and the courts have since consistently held that tax titles may be removed as clouds,[126] with the exception of the vigintillionth deeds, which in later cases were held not to constitute clouds at all.[127] The present day attitude is fairly well indicated by the following language from *Plenderleith* v. *Glos*:

> The basis of the right to maintain a bill in equity to set aside a tax deed as a cloud on title is proof of title to the premises in the complainant. Unless such proof is made the complainant cannot be heard to complain that there was a cloud on the title or to ask to have it removed. Proof of title is essential to the relief sought by appellee here. . . . The removal of tax deeds as clouds on title is permitted in two classes of cases under our law. The first is when the complainant is in possession of the lands under claim of ownership, and the second is when he claims to be the owner and the lands are unimproved and unoccupied. . . . The complainant in such a bill is not required to prove title with the same strictness as in an action of ejectment, but where he is in lawful possession, claiming in good faith to be the owner under a deed conveying the property to him, such possession and claim will be received as a substitute for proof of actual ownership.[128]

123 Cf. note 21, supra.

124 "A court of equity will not inquire into or determine whether a tax sale has been regular, or whether the sale is valid, merely to determine whether it is a cloud on the legal title, and to enjoin the holder from asserting it. It is the province of a court of law to try its validity. If valid, it constitutes a legal, and not an equitable right. If worthless, a complete defence may be made in that forum, in which we must leave the parties to litigate that title." Hamilton v. Quimby, 46 Ill. 90, 98 (1867). See also Springer v. Rosette, 47 Ill. 223 (1868).

125 Gage v. Rohrback, 56 Ill. 262 at 266 (1870). Without citing any case or other authority, the court said: "It is urged that a bill quia timet will not lie in such a case, because the remedy at law is complete. The same may be said in general of bills of this character. Defendant in error [complainant] is in possession, and might no doubt, if sued, successfully defend against such a title. But should he be required to wait until plaintiff shall see proper to bring ejectment, with this cloud hanging over his title? Courts of equity have determined that persons in possession need not wait, but may proceed to have the cloud removed. . . ."

126 Farrar v. Payne, 73 Ill. 82 (1874); Ames v. Sankey, 128 Ill. 523, 21 N.E. 579 (1889); Smith v. Prall, 133 Ill. 308, 24 N.E. 521 (1890).

127 Petty v. Beers, 224 Ill. 129, 79 N.E. 704 (1906); Jackson v. Glos, 243 Ill. 280, 90 N.E. 717 (1909). But see Glos. v. Furman, 164 Ill. 585, 45 N.E. 1019 (1897).

128 329 Ill. 382, 385, 160 N.E. 745 (1928).

It follows, of course, that the validity of tax titles may in general be tested in equitable proceedings other than those brought ostensibly and primarily to remove a cloud, for example, burnt record proceedings,[129] partition proceedings,[130] and proceedings for Torrens registration.[131] While there is some question with respect to removal of tax titles in mortgage foreclosure proceedings, it is clear that where such a title is removed as a cloud, reimbursement must be made.[132] Since the passage of the Civil Practice Act,[133] there should be no serious question with respect to the propriety of such removal.

The courts of equity, while taking jurisdiction of proceedings to set aside tax titles, have consistently taken the position that the complainant, seeking equity, must do equity by reimbursing the holder of the tax title for the money expended. There is perhaps no principle with respect to tax titles better settled than this.[134] The legislature has made it an integral part of the statute and not only conditioned relief against tax titles upon such reimbursement, but prescribes the exact amount and extent thereof.[135] A consideration of the history of this statutory requirement, however, leads one to wonder whether the legislature was motivated primarily by a desire to see equity done to the tax buyers, or by the pre-eminently practical consideration of how the revenues might best be collected. Earlier statutes,[136] conditioning the right to question tax titles at all upon payment of all taxes and special assessments to date, were invalidated upon the sweeping ground that the effect was "to compel a man to buy justice."[137] If there be a difference, other than of degree, between such a statute and the present provisions conditioning

129 Glos v. Kelly, 212 Ill. 314, 72 N.E. 378 (1904); Gage v. Thompson, 161 Ill. 403, 43 N.E. 1062 (1896).

130 Manson v. Berkman, 356 Ill. 20, 190 N.E. 77 (1934).

131 Gage v. Consumers' Elec. Light Co., 194 Ill. 30, 64 N.E. 653 (1901); Jackson v. Glos, 243 Ill. 280, 90 N.E. 717 (1909).

132 McConnell v. Jones, 332 Ill. 620, 164 N.E. 186 (1928).

133 Ill. Rev. Stat. 1937, Ch. 110, §§ 148, 149, 168. Cf. Bobzien v. Schwartz, 289 Ill. App. 299, 7 N.E. (2d) 362 (1937).

134 Dalmbert v. Glos, 309 Ill. 617, 141 N.E. 372 (1923); Kuhn v. Glos, 257 Ill. 289, 100 N.E. 1003 (1913); Glos v. Woodard, 202 Ill. 480, 67 N.E. 3 (1903).

135 Ill. Rev. Stat. 1937, Ch. 120, § 210.

136 " . . . but no person shall be permitted to question the title acquired by a sheriff's deed, without first showing . . . that all taxes due upon the land have been paid by such person, or the person under whom he claims title as aforesaid." Laws 1839, p. 18, § 43.

137 Wilson v. McKenna, 52 Ill. 43 at 48 (1869). See also, Reed v. Tyler, 56 Ill. 288 at 292 (1870).

justice on reimbursement, it must lie in the fact that in the former situation the condition of relief was payment to a third party, the State, whereas in the latter situation the payment is to be made to the person against whom relief is sought. Upon this basis one might perhaps reconcile the provision of 1933 requiring the payment of 75 per cent of the tax claimed, as a condition to objecting to the tax.[138]

The courts have been reluctant to apply the principle of reimbursement to ejectment or eminent domain proceedings, even under the mandate of the statute. As amended in 1885 the statute simply provided:

> Provided, that any judgment or decree of court, setting aside any tax deed procured under this act, shall provide that the claimant shall pay to the party holding such tax deed all taxes . . . before such claimant shall have the benefit of such judgment or decree.[139]

The courts held the provision inapplicable to ejectment suits and eminent domain proceedings on the ground that "the judgments or decrees, referred to . . . are judgments or decrees, rendered in proceedings, which have for their object the setting aside of tax deeds, procured under the Revenue Act."[140] In 1919 the statute was amended to require reimbursement as a condition to a "final judgment or decree . . . in any case either at law or in equity or in proceedings under the Eminent Domain Act ."[141]

Although, as indicated, reimbursement is in general required as a condition to invalidating a tax title, it has been held not to be necessary if the property is exempt from taxation,[142] or where

138 Ill. Rev. Stat. 1937, Ch. 120, § 179; Laws 1933, p. 912, § 1.

139 Laws 1885, p. 234, § 224.

140 Riverside Co. v. Townshend, 120 Ill. 9 at 14, 9 N.E. 65 (1886). The court continues: "It is not the proper office of a judgment in ejectment to set aside a tax deed. By adopting the proviso in question, the legislature merely intended to provide, that, wherever, in any proceeding, properly instituted for that purpose, a tax deed should be set aside, the judgment or decree, directing it to be done, should require the claimant to pay, to the holder of the deed, whatever such holder had disbursed for taxes and costs, and whatever the law awarded him, as penalties. It was not the design of this amendment to change the action of ejectment into a chancery proceeding, nor to confer any new or enlarged jurisdiction upon courts of law." See also Glos v. Patterson, 195 Ill. 530, 63 N.E. 272 (1902). For eminent domain proceedings, see Chicago v. Pick, 251 Ill. 594, 96 N.E. 539 (1911); O'Connell v. Sanford, 255 Ill. 49, 99 N.E. 74 (1912); Sanitary Dist. of Chicago v. Murphy, 261 Ill. 269, 103 N.E. 1001 (1913), reh. den. (1914).

141 Laws 1919, p. 762. Constitutionality sustained, Chicago v. Collin, 302 Ill. 270, 134 N.E. 751 (1922).

142 Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928).

the tax title has been taken out after the expiration of the statutory time therefor,[143] or where the taxes were paid under a proper description and the sale made under an improper one,[144] or in any case where the owner has actually paid the tax.[145] Moreover, reimbursement has been held not to be necessary where a defective tax title is set aside by a court of bankruptcy.[146]

In 1909 the legislature provided a mode for compelling reconveyance of tax titles under certain circumstances, and upon condition of reimbursement. Such reconveyance can be required when the grantee of the tax deed has not obtained possession and has not instituted proceedings to gain possession within a year from the issuance of deed; or where the grantee has failed to pay taxes or special assessments for seven consecutive years thereafter. Seemingly penalties need not be paid, but only the amount expended with interest and certain statutory fees and costs.[147] Refusal to reconvey after proper tender is punishable by fine,[148] and the county court is empowered to cause a reconveyance.[149] Although this provision is on the statute books, little recourse seems to have been had to it.

Conclusion

The last tax title affirmatively established by ejectment in Illinois was that in *Hammond* v. *Carter*[150] in 1895, a case even then unique for its liberality and the reasonableness of the construction given the statute. Certainly the courts have come to feel that the question before them in such cases is not one of the validity of tax titles, but rather one with respect to the grounds upon which they should be invalidated. The reconveyancing provisions just mentioned, and the change with respect to the mode of bidding, that is, selling all of the property for the lowest penalty, rather than merely enough of the property to raise the taxes, can hardly be interpreted other than as a frank admission on the part of the legislature that the holder of a tax title gets merely a cloud on the title to the property. It has

143 Kelle v. Egan, 256 Ill. 45, 99 N.E. 859 (1912).
144 La Salle Varnish Co. v. Glos, 254 Ill. 326, 98 N.E. 538 (1912).
145 Glos v. Shedd, 218 Ill. 209, 75 N.E. 887 (1905); Ely v. Brown, 183 Ill. 575, 56 N.E. 181 (1899).
146 In re Ogden Apartment Bldg. Corp., 90 F. (2d) 712 (C.C.A. 7th, 1937).
147 Ill. Rev. Stat. 1937, Ch. 120, § 411.
148 Ibid., § 412.
149 Ibid., § 413.
150 155 Ill. 579, 40 N.E. 1019 (1895).

been aptly said that a tax title is simply a mortgage which never outlaws and can never be foreclosed.

It may be supposed that the business of buying taxes is a highly profitable one. There may have been such a time. Today, however, when most urban property, even though unimproved, has been loaded with special assessments, the amount of money necessary to purchase taxes and keep subsequent taxes paid is large. Practically speaking, the business cannot be carried on without assistance from banking institutions, and today such assistance is not forthcoming. With the reduction of the maximum penalties from 50 to 24 per cent per year, with only ordinary interest thereafter, and in view of the necessity of additional investment in subsequent taxes and assessments, the average rate of return on total investment is quite low—especially when compared for example with the interest rate obtainable under the Small Loans Act, i.e., 30 to 36 per cent. Add this consideration to the highly speculative nature of tax buying—the not too remote possibility of losing both principal and interest—and it is not difficult to understand why tax buyers have become virtually nonexistent. Inquiry discloses that, with but occasional exceptions, no one is buying taxes today purely for investment purposes. Nearly all the parcels being purchased are bought by mortgagees for the purpose of protecting their investments by insuring merchantable title in the event of foreclosure.

However, taxes must be collected if government is to go on. There is on the statute books provision for foreclosure of the tax lien in a court of equity by the various taxing bodies after forfeiture and two years' tax default.[151] To date little use has been made of this provision, although municipalities are now beginning to turn to it in desperation.[152] Whether or not the general large-scale recourse to this provision, which seems inevitable as the only solution to the present tax dilemma, will bring with it a change of attitude on the part of the courts—an attitude similar to that which it has developed toward tax foreclosures in the county court—only time can tell. The only alternative is some

151 Ill. Rev. Stat. 1937, Ch. 120, § 238.

152 Chicago Daily Tribune, Jan. 5, 1939, p. 5: "Suits asking the foreclosure sale of twenty additional parcels of real estate on which more than $110,000 in back taxes is due have been filed in Superior Court by State's Attorney Courtney's office. Similar suits against fifty-four other properties on which taxes for the years from 1928 to 1936 are delinquent have been filed in the last month."

type of legislative relief[153] through the medium of simplifying and lending finality to the procedure for tax sales in the county court, and a realization that the blind protection of property owners who will not pay taxes is afforded not primarily at the expense of tax buyers, but rather at the expense of other property owners who are thereby required to pay a constantly increasing rate of tax, and at the expense of school teachers and other public employees who find the various municipalities unable to meet their payments.

153 Chicago Daily Tribune, Feb. 9, 1939, p. 11: "Legislative action was proposed today to break the tax delinquency jam which burdens local governments and property owners who pay their taxes. Bills to provide a clear title to purchasers of tax delinquent property were introduced in the senate."