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Tax Sales and Non-Possessory Interests in Real Estate

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Comments

TAX SALES AND NON-POSSESSORY INTERESTS IN REAL ESTATE

A conflict between an individual's rights and governmental necessity may arise when real property is sold to collect delinquent taxes. Usually, the party who has a present right of possession has the primary responsibility for paying the tax[1] and rightfully bears the loss; but other parties may own non-possessory interests in the property. According to basic principles of jurisprudence, these non-possessory interests should be preserved. Their owners have not been remiss in any obligations owing to the sovereign, and are not responsible for taxes. Yet, if left intact, these non-possessory interests could diminish the saleable value of the property to the point where the government would not be able to realize the taxes owed by sale of the property. This Comment will analyze this conflict and review how it has been resolved in various jurisdictions. Specifically, the fate of future interests, mineral rights, easements and restrictive covenants in land which is sold for taxes will be examined.[2] On the basis of this analysis an explanation will be offered for the different treatment of these non-possessory interests by the courts.

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1. Real estate is generally assessed in the name of the "owner"; he is determined from the real estate records. *E.g.*, CAL. REV. & TAX. CODE §§ 405, 441 (West 1956); ILL. ANN. STAT. ch. 120, § 586 (Smith-Hurd 1954); N.Y. REAL PROP. TAX. § 500 (McKinney 1960); PA. STAT. ANN. tit. 72, §§ 5453. 605 (1950); VA. CODE ANN. §§ 58-796, 58-797 (1950).

2. The rights of the mortgagee in land sold for taxes are also non-possessory, but will not be dealt with in this Comment since their relation to the debtor-creditor aspects of the mortgage situation raise questions primarily related to debtor-creditor law.

GENERAL PRINCIPLES

There are two basic principles which have been applied to resolve our issue. When the non-possessory interest is a future estate, the courts decide the effect of the tax sale according to the nature of the action.[3] If it is an *in rem* action, the tax sale vests the purchaser with a new and complete title.[4] If the action is in personam, the interest which passes is derived from and equal to the interest of the individual in whose name and property was assessed.[5] An illustration of this principle is found in *Wingate v. Parnell*.[6] The individual against whom the tax was assessed owned both a life estate and the reversion. A majority held that the statute directing the sale of land to collect the delinquent tax created an *in rem* action which destroyed all interests and estates in the land. The purchaser at the tax sale therefore took both the life estate and the reversion.[7] The dissent[8] felt that the statute created an *in personam* action. Nevertheless, the minority concurred in the result. If the action was *in personam*, the derivative title thus created would pass all the interest of the one assessed with the taxes, which here was the life estate and the reversion.[9]

Thus the problem becomes one of determining the nature of the action. This in turn depends upon the statute authorizing the tax sale.[10] The best indication of whether the action is *in rem* or *in personam* is the statutory description of the type of title to be granted to the tax sale purchaser.

In most states the purchaser is given a new title, complete and perfect, cutting off all other interests.[11] Therefore, the action

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3. 3 AMERICAN LAW OF PROPERTY § 13.20 (Casner ed. 1952); 85 C.J.S. *Taxation* § 897 (1954).

4. 3 AMERICAN LAW OF PROPERTY § 13.20 (Casner ed. 1952); 85 C.J.S. *Taxation* § 905 (1954); Hefner v. North Western Life Ins. Co., 123 U.S. 747, 751 (1887).

5. 3 AMERICAN LAW OF PROPERTY § 13.20 (Casner ed. 1952); 85 C.J.S. *Taxation* § 905 (1954); Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U.S. 375, 381 (1904).

6. 214 S.C. 540, 53 S.E.2d 653 (1946).

7. *Id.* at 541, 53 S.E.2d at 655.

8. *Id.* at 542, 53 S.E.2d at 655.

9. *Id.* at 542, 53 S.E.2d at 655.

10. The procedure by which land is sold for taxes may take several forms. The most common is foreclosure of a lien on the land, this lien attaching when the taxes are unpaid for a specified period of time. The foreclosure may be either by court action or administrative action. The land may also be "sold" to the taxing body for the amount of taxes owing, then re-sold to a private party. Or the land may be forfeited to the state, and then sold.

11. The only states where such a title is not given to the tax-sale purchaser are: Alaska, ALASKA STAT. § 34.25.080; Connecticut, CONN. GEN.

is *in rem.*[12] The state has power to convey a complete and perfect title by virtue of sovereignty over the lands within its boundaries.[13] The underlying theory is rarely explicitly stated. It appears that the state obtains the right to exercise its power of sovereignty when the landowner defaults in his obligation to pay taxes. It should also be noted that even where the state issues a "new and complete" title the statute may exempt certain interests from its effect.[14]

Where the statute provides that the tax sale passes only the interest of the one in whose name the land is assessed, the action is *in personam.*[15] The tax title is said to be "derived" from title of the defaulting owner and thus only his interest passes to the purchaser. The tax title is also said to be derivative if the tax is levied upon the individual rather than a specific *res* owned by the individual, since the action is necessarily *in personam* against the individual.[16] Finally, where *any* property may be sold to satisfy the tax owing, rather than a particular parcel of real estate, the action may be viewed as *in personam.*[17]

The general rule with regard to mineral rights, easements, and restrictive covenants, is that their fate at a tax sale depends upon the nature of the tax assessment.[18] If the tax is levied upon

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STAT. § 12-157 (1958); Delaware, DEL. CODE ANN. tit. 9 §§ 8726, 8760, 8767 (1963); Vermont, VT. STAT. ANN. tit. 32 § 25263 (1967); Virginia, VA. CODE ANN. § 58-1064 (1950). The wording used to give the tax-sale purchaser a new and complete title varies. *E.g.*, FLA. STAT. ANN. § 194.53 (1958) (all "right title and interest" in the land extinguished by a tax deed); IND. ANN. STAT. § 64.2278 (1961) ("fee simple absolute, free of all liens and encumbrances"); KY. REV. STAT. ANN. § 91.540 (1963) ("fee simple title shall vest absolutely"); MASS. GEN. LAWS ANN. ch. 60 § 64 (1966) ("absolute title").

12. *See, e.g.*, People v. Lucas, 55 Cal. 2d 564, 360 P.2d 321, 11 Cal. Rptr. 745 (1961); Nichols v. Hoehn, 8 Misc. 2d 780, 171 N.Y.S.2d 734 (Sup. Ct. Chautauqua Co. 1957); Lowery v. Garfield County, 122 Mon. 571, 208 P.2d 478 (1949).

13. Hefner v. Northwestern Life Ins. Co., 123 U.S. 74 7 (1887); Helvey v. Sax, 38 Cal. 2d 21, 237 P.2d 264 (1951); Crocker-McElwain Co. v. Board of Assessors, 296 Mass. 338, 5 N.E.2d 558 (1937).

14. *E.g.*, ALA. CODE tit. 51 § 276 (1958) (remainders and reversions excepted). IDAHO CODE ANN. § 63-1139 (1962) (excepts interests of unnotified mortgagee); PA. STAT. ANN. tit. 72 § 5971 (1968) (security interests).

15. 3 AMERICAN LAW OF PROPERTY § 13.20 (Casner ed. 1952); 84 C.J.S. *Taxation* § 905 (1956); White v. Portland, 67 Conn. 272, 34 A 1022 (1896); Ashbrook v. Bailey, 116 Va. 227, 81 S.E. 64 (1914).

16. 3 AMERICAN LAW OF PROPERTY § 13.20 (Casner ed. 1952). The point is well illustrated by a pair of Georgia cases. In Dixon v. Evans, 222 Ga. 133, 149 S.E.2d 124 (1966) it was held that where the taxes were assessed the life tenant *as an individual* the effect of tax sale is to give purchaser a derivative title. But in Townsend v. McIntosh, 205 Ga. 643, 54 S.E.2d 592 (1949), it was held that where the assessment was against the *property* sold at the tax sale, both the life estate and the remainder passed.

17. Dixon v. Evans, 222 Ga. 133, 149 S.E.2d 124 (1966); Crotwell v. Whitney, 229 S.C. 213, 92 S.E.2d 473 (1956).

18. 2 AMERICAN LAW OF PROPERTY §§ 8.104, 8.103, 9.40 (Casner ed. 1952); RESTATEMENT OF PROPERTY § 509 (1948); Annot., 168 A.L.R. 513 (1947); New York State Natural Gas Corp. v. Swan-Finch Development Corp., 173 F. Supp. 184 (W.D. Pa. 1962).

the entire property, without regard to any interests or rights which would diminish the value of the property, then easements, restrictive covenants, and mineral rights are destroyed.[19] Where, however, the tax levied takes into account the reduction in property value caused by the existence of these rights, the non-possessory rights are saved.[20] Determining whether an assessment considers easements, covenants, and mineral rights is relatively simple. The statutes are generally explicit as to what the assessment includes.[21]

The theory underlying these statutory effects is that the tax sale can only convey that portion of the property upon which the tax was levied.[22] The easements and similar interests are viewed as being "carved out" of the estate for tax purposes where the statute requires that they be subtracted from the value upon which the assessment is based.[23] Therefore, the tax sale cannot convey that which was not subject to taxation. When these interests are not "carved out" in levying the tax, they are held to be taxed as part of the property, and are also conveyed at a tax sale.[24]

There are several exceptions to these two general principles, which will be examined below. Basically, however, courts look to the nature of the tax sale action to determine the fate of future interests, and to the nature of the assessment to determine the fate of mineral rights, easements, and restrictive covenants.

Future Interests

The vast majority of tax sale statutes create actions against the *res*. The majority rule in the few cases which have considered the question is that rights of entry for conditions broken, possibilities of reverter, reversions, remainders and executory interests

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19. See note 18 *supra*.
20. See note 18 *supra*.
21. *See, e.g.*, Cal. Rev. and Tax Code § 602 (West 1956) (possessory interests assessed); Ill. Ann. Stat. ch. 120 § 501 (Smith-Hurd 1954) (property valued at its fair cash value; depreciation occasioned by public easements is considered; mine or quarry value considered); N.Y. Real Prop. Tax § 502 (McKinney 1960) (assessment on full value of property); Pa. Stat. Ann. tit. 72, §§ 5020-402, 5453.602 (1968) (property assessed at actual fair market value); Va. Code Ann. §§ 58-802 (assessed at fair market value), 58-774 (mineral rights separately assessed).
22. Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914) is the leading case espousing this theory. *See, e.g.*, Annot., 168 A.L.R. 529 (1947); Alvin v. Johnson, 241 Minn. 257, 63 N.W.2d 22 (1954); Belott v. State, 45 Misc. 2d 1067, 259 N.Y.S.2d 379 (Ct. Cl. 1965).
23. See note 22 *supra*. Where the assessment is for "fair market value" or the like, the assumption is that the easement or restriction reduces the fair market value.
24. Wolfson v. Heins, 149 Fla. 499, 6 So. 2d 858 (1942) (contains an

are extinguished by a tax sale.[25] As stated by Justice Holmes in *Langley v. Chapin*:[26]

> There can be no doubt that the [tax] lien binds the land; and as the lien depends upon the sale for its efficacy, there is the strongest reason for believing that the sale was intended by the statute to go behind all interests.[27]

It should be noted, however, that reversions (and remainders) are at times saved from *in rem* tax sales by statute.[28] Part of the reason for special legislative treatment of these interests is that they follow estates of limited duration. If the remainder is vested and the reversion follows an estate certain to end, they will definitely become possessory. Thus, their destruction at a tax sale would often result in a real loss to their owners. Possibilities of reverter, rights of entry for condition broken and executory interests, on the other hand, are not certain to become possessory in most cases. Their loss at a tax sale is usually the loss of a potentiality only.

In addition, there are other factors concerning remainders which have caused the courts to give them special treatment in the absence of legislative grace. The relationship between a life tenant and the remainderman consists both of legal duties flowing from the former to the latter, and a natural hostility of interest.[29] These considerations coupled with the common use of remainders in estate plans, have raised the question of the fate of remainders at a tax sale with relative frequency. In several jurisdictions the courts have managed to save remainder interests despite an *in rem* tax sale.

In Missouri, Kentucky and North Carolina courts have held that a remainderman must be a party to the *in rem* action of a tax sale in order for the remainder to be destroyed.[30] The statutes under which these cases were decided do not call for this result. The procedure provided by these statutes is that delinquent taxes become a lien on the land, paramount to all other interests, and this lien is judically foreclosed after a redemption period. If the remainderman is not joined in the foreclosure action, the remainder

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excellent statement of the problem); Brown v. Olmsted, 49 Wash. 2d 210, 299 P.2d 564 (1956).

25. Cummings v. Cummings, 91 F. 602 (W.D.N.C. 1899) (remainders and reversion); Thorington v. Montgomery, 88 Ala. 548, 7 So. 363 (1889) (remainder); Slaughter v. Fitzgerald, 66 Ohio App. 53, 31 N.E.2d 744 (Ct. App. 1941); Langley v. Chapin, 134 Mass. 82 (1883) (right of entry for condition broken; Holmes, J.); Alamogordo Improvement Co. v. Hennessee, 40 N.M. 162, 56 P.2d 1127 (1936) (possibility of reverter); Wingate v. Parnell, 214 S.C. 540, 53 S.E.2d 653 (1949) (reversion).

26. 134 Mass. 82 (1883).

27. *Id.* at 86.

28. *See, e.g.*, ALA. CODE tit. 51 § 276 (1958).

29. *See generally* SIMES AND A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1654-1656, 1658-1663, 1693, 1699 (2d ed. 1956).

30. *See, e.g.*, Chapman v. Aldridge, 228 Ky. 538, 15 S.W.2d 454 (1929); Folvey v. Hicks, 315 Mo. 442, 286 S.W. 385 (1926); Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

is preserved.[31] These courts apparently thought it important enough to protect remainder interests to justify the requirement that the remaindermen be in court when their rights in the property are foreclosed. If made a party, the most likely step for the remainderman to take would be to pay the tax owing, which would then give him the life estate.[32]

Two early federal court cases, *Hellrigle v. Ould*[33] and *Williams v. Hedrick*,[34] saved remainders from an *in rem* tax sale proceeding. They held that if the life estate is sufficient in value to satisfy delinquent taxes, the remainder does not pass at the sale. The logic of this position, as expressed in *Williams*, is that even though the proceeding is against the *res*, it is possible, by "actual or legal intendment" to so foreclose the tax lien that only one or certain estates in the land are used to satisfy the lien.[35] But the purchaser at the tax sale may not be informed until after the fact of this "legal intendment." Also, the court in both these cases was concerned with remaindermen whose interests were of record but who were not joined in the action. These factors may limit the applicability of these cases.

Judicial efforts to save remainders from *in rem* tax sale proceedings is, of course, a minority position. The majority rule follows the general principles: if the action is *in rem* the remainder is destroyed; if the action is *in personam* against the life tenant, it is not.[36]

There are, however, certain protections offered to owners of all types of future interests in property which is sold for taxes. These safeguards are found principally in the tax sale procedures. First, the owner of a future interest is notified of the action against the property, either actually, by personal service, if the interest is of record, or constructively, by publication, if the interest is not of record.[37] This is necessary to satisfy the notice requirement of due process,[38] which if not complied with would make the taking of

31. 228 Ky. at 541, 15 S.W.2d at 456; 315 Mo. at 445, 256 S.W. at 388; 232 N.C. at 581, 61 S.E.2d at 719.
32. Jinkiaway v. Ford, 93 Kan. 197, 145 P. 885 (1915).
33. 11 Fed. Cas. 1060, 4 Cranch 72 (1830).
34. 96 F. 657 (7th Cir. 1899).
35. *Id.* at 660.
36. See note 25 *supra* and accompanying text.
37. *See, e.g.*, CAL. REV. & TAX CODE § 370 (West 1956); ILL. ANN. STAT. ch. 120, §§ 706, 711 (Smith-Heyrd 1954); N.Y. REAL PROP. TAX § 926 (McKinn 1960); PA. STAT. ANN. tit. 72, § 5860.308 (1968); VA. CODE ANN. § 58-1030 (1950).
38. Paddell v. New York, 211 U.S. 446 (1908); Longyear v. Toolan, 209 U.S. 414 (1908); Castillo v. McConnico, 168 U.S. 674 (1897).

the property unconstitutional. Once notified, the owner of the future interest may join the suit as a defendant. If there is no valid defense, certain states permit the owner of a less than freehold estate to redeem his interest by paying a pro-rata share of the taxes owing.[39] Some states give the owner of the future interest the right to redeem the whole in order to protect his interest.[40] Note that these two protections would be available even if the party did not receive actual notice of the commencement of tax sale proceedings. The statutes universally provide for some sort of redemption period after the land is attached or taken for delinquent taxes.[41]

A further concern in this area is the possibility that the holder of the present estate will attempt to achieve complete ownership by defaulting on taxes and collusively re-acquiring ownership after a tax sale has destroyed the future interest. Obviously, the courts cannot permit such an abuse. The only cases where the problem has arisen have involved life estates, and the courts have foiled the life tenant by relying on his duty to pay taxes.[42] They then apply the equitable rule that the law will regard as done that which ought to be done. The life tenant's re-acquisition of the property is in fulfillment of his duty to pay taxes.[43]

Of these protections afforded a future interest, the one most likely to be used is that of redeeming the entire property. If this right is not provided or exercised, the holder of the future interest can always purchase the property outright at the tax sale. Both of these remedies force a future interest holder to attempt what he may not be able or willing to do. Perhaps the most equitable resolution is found in those few statutes which permit redemption of the future interest. But even here, if the future interest is contingent, the party redeeming it would be forced to gamble on its eventually becoming possessory.

Why do the majority of courts and legislatures treat future interests so harshly in this situation? It appears principally due to a desire to obtain maximum revenues for the government. The existence of a future interest which will or may cut short possessory rights is too likely to reduce the amount which a sale of the

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39. ARIZ. REV. STAT. ANN. § 42-426 (1956), as applied in Allied American Inv. Co. v. Pettit, 65 Ariz. 283, 17 P.2d 437 (1947); COLO. REV. STAT. ANN. § 137-18-14 (1963); DEL. CODE ANN. tit. 9, § 8773 (1953); W. VA. CODE ANN. § 11a-5-9 (1966).

40. N.C. GEN. STAT. § 105-410 (1965); WYO. STAT. ANN. § 39-153 (1957).

41. *See, e.g.*, N.Y. REAL PROP. TAX § 1010 (McKinney 1960); PA. STAT. ANN. tit. 72, § 5860.501 (1968).

42. I AMERICAN LAW OF PROPERTY § 219 (Casner ed. 1952). This duty exists to the extent that the gross income of the property is sufficient to cover taxes and other expenses to which the life tenant is obligated.

43. *See, e.g.*, Higgenbottom v. Harper, 206 Ark. 210, 174 S.W.2d 668 (1944); Solis v. Williams, 205 Mass. 350, 91 N.E. 148 (1910); Zaring v. Lomax, 53 N.M. 273, 206 P.2d 478 (1949).

property would yield. It may also prevent the sale of the property altogether, since anyone who purchased it would be investing in a limited venture. When weighed against this possible loss of governmental revenues, the rights of owners of future interests are simply not important enough to warrant much protection.[44]

Mineral Rights

Mineral rights as well as the rights to timber involve a privilege to enter upon the land to exercise rights of removal. Therefore, their legal status is similar to that of an easement, and is inextricably bound up with the legal status of the land. But before the question of whether they pass with the land at a tax sale can arise, they must be separated from the surface estate, usually by a grant or reservation.[45]

As noted above, courts determine whether mineral rights pass at a tax sale on the basis of the tax assessment.[46] The question then is whether the mineral estate is assessed separately from the surface estate; if not, the rights to the minerals pass at the tax sale.[47] Until the surface estate and the interests in subsurface materials are taxed separately they will be treated as one in selling the property to collect the tax.

In this area, the policy of protecting the revenues of government is again at work. Unless the mineral rights are themselves producing revenues they are not permitted to impede the government's collection of tax revenues owing from the land. This result, however, is usually not too harsh. If the mineral rights are valuable they usually will be severed and separately assessed. But in states such as Oklahoma, where an interest in minerals is not separately assessed unless there is actual production, the result will be harsh to one who has purchased such rights but not yet

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44. The same policy and reasoning has been applied to inchoate dower rights, which resemble future interests in that they are present, non-possessory interests in real estate which have a potential of becoming possessory. Cobb v. Shore, 183 F.2d 980 (D.C. Cir. 1950); Lucas v. Purdy, 142 Ia. 559, 120 N.W. 1063 (1909).

45. 58 C.J.S. *Mines and Minerals* §§ 151-52, 155-56 (1948). Until separated from ownership of the surface, they are treated as part of the total property rights of the surface owner.

46. See p. 476 *supra*.

47. Pashley v. United States, 156 F. Supp. 737 (Ct. Cl. 1957); Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952); Dorman v. Minnich, 336 S.W.2d 500 (Mo. 1960). If they are separately assessed, they do not pass at the tax sale, even if owned by the owner of the surface estate. Dilworth v. Fortier, 354 P.2d 1091 (Okla. 1960); Mitcham v. Bowers, 188 P.2d 363 (Okla. 1947).

begun production.[48] This result is even more extreme in jurisdictions such as Florida and Iowa. There the majority rule is applied even though there is no provision for separate assessment.[49] Yet, regardless of the procedure as to assessments of such rights, other areas of the law recognize these interests as being separate from the surface estate.

Easements and Restrictive Covenants

As noted, the standard used when concerned with easements and restrictive covenants which create rights in land sold for taxes, is the nature of the tax levy. When the assessment of the land considers the existence of such rights the courts find that these rights lessen the value of a servient estate.[50] It is only this "lessened" estate which is subject to sale for taxes.[51] The state never views the whole property as a source of tax revenue. Therefore, the state should not look to the property when trying to collect delinquent taxes. The easement or restriction is viewed as part of the land which it benefits, that is, the dominant estate. Because the easement is (theoretically) taxed as part of this estate at a tax sale of the dominant estate, the restriction or easement should pass with it.[52] Some courts have buttressed this reasoning by declaring that it would be unfair to the owners of the dominant estates to force them to pay taxes owing on the servient estate in order to protect their interests.[53]

On these grounds courts have saved easements for rights of way, light and air, power and telegraph lines, as well as water rights.[54] This has been done without regard to whether the statute refers to the nature of the title taken by the tax sale purchaser.[55]

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48. State v. Southland Royalty Co., 204 Okla. 284, 230 P.2d 471 (1951); Three-In-One Oil and Gas Co. v. Bradshaw, 192 Okla. 1309, 135 P.2d 992 (1943). These cases held that the mineral interest passed with the surface estate at the tax sale. *But see* Milliron Oil Co. v. Connaghan, 76 Wyo. 310, 302 P.2d 256 (1956), where in similar circumstances it was held that the mineral interest did not pass.

49. Lee v. Carpenter, 132 So. 2d 433 (Fla. 1961); Polk County v. Bosham, 234 Ia. 225, 12 N.W.2d 157 (1943).

50. See note 22 *supra*.

51. See note 22 *supra*. *See, e.g.*, Bickel v. Texas Gas Transmission Corp., 336 S.W.2d 345 (Ky. Ct. App. 1945); Ehren Realty Co. v. Magna Charta Building & Loan Assoc., 120 N.J. Eq. 136, 184 A. 203 (1936); Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 A. 51 (1924).

52. Alvin v. Johnson, 241 Minn. 257, 63 N.W.2d 22 (1954); *cf.* Ross v. Francko, 139 Ohio St. 395, 40 N.E.2d 664 (1942) (basis for tax sale same as basis of taxation); Restatement of Property § 509 comment *d* at 3102 (1949).

53. Schlafly v. Baumann, 341 Mo. 755, 108 S.W.2d 363 (1937); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937); Alamogordo Improvement Co. v. Prendergast, 43 N.W. 245, 91 P.2d 428 (1939).

54. Annot., 168 A.L.R. 529 (1947) and cases cited therein.

55. *See, e.g.*, Alvin v. Johnson, 241 Minn. 257, 63 N.W.2d 22 (1954); Gerbig v. Zumpano, 13 Misc. 2d 357, 177 N.Y.S.2d 969 (1958); Ross v. Franko, 139 Ohio St. 395, 40 N.E.2d 664 (1942).

But some statutes specifically provide that easements are not destroyed by the tax title. In such a case, the statute would prevail.[56]

Where, however, the statute provides that the tax is to be levied on the entire real estate, without regard to the existence of easements or covenants, they are destroyed by the tax sale.[57] The theory is that it would be too burdensome for the state to have to search out all easements and other rights affecting the land,[58] especially those which have been acquired prescriptively and are not of record. If the assessors ignore an easement in evaluating the land, the court will ignore it in ordering its sale for taxes owing.[59]

Where a restrictive covenant is involved the nature of the interest causes some courts to be even more considerate than they are of easements. Restrictive covenants prevent the holder of the possessory interest from doing what he otherwise would have the right to do with his land. Usually, such a restriction concerns location and characteristics of buildings, or the use of the land. When the issue of their fate at a tax sale arises, the courts, in addition to applying the general rule used in easements, consider the effect on the value of surrounding property if they are destroyed.[60] Thus, in *Northwestern Improvement Co. v. Lowry*,[61] a restrictive covenant limiting the land to residential use was held not to be destroyed by a tax sale. The property was located in a tract which had been reserved for residential purposes by means of similar restrictions in all of the deeds from the original grantee. Although the statute provided for assessment of land without regard to such interests, the court held that the destruction of this restriction, and the consequent use of the land for other than residential purposes, would diminish the value of all the lots in the tract. This result would diminish the tax revenues of the state, as well as cause financial loss to the owner of these lots.[62] This seems to be a

56. CAL. REV. & TAX CODE § 3712(d) (West 1956); KAN. STAT. ANN. § 79-2804 (1968); MD. ANN. CODE art. 81, § 112 (1957).

57. *E.g.*, Nedderman v. Des Moines, 221 Ia. 1352, 268 N.W. 36 (1936); Magnolia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P.2d 133 (1947); Jackson v. Ashley, 189 Miss. 818, 919 So. 91 (1940); see cases cited note 24 *supra*.

58. *In re* Hunt, 34 Ont. L. Rep. 256, 24 D.L.R. 590 (1915). *See also* cases cited note 24 *supra*.

59. See cases cited note 57 *supra*.

60. Schlafly v. Baumann, 341 Mo. 755, 108 S.W.2d 363 (1937); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P.2d 792 (1937); Alamogordo Improvement Co. v. Prendergast, 43 N.W. 245, 91 P.2d 428 (1939).

61. 104 Mont. 289, 66 P.2d 792 (1937).

62. *Id.* at 292, 66 P.2d at 794.

broad application of the policy protecting the state's revenues. It considers not only the revenue produced by the land in question, but also future revenues to be produced by taxes on the neighboring property.

A Conflict and a Conclusion

There is, then, a difference in the basic approach to tax sales with regard to different types of non-possessory interests in real estate. Does this present a conflict? Or, is there something in the nature of these interests which should cause them to be treated differently at a tax sale? The first thing to be emphasized is that there is a great difference. Most actions against real property to collect taxes are *in rem*. Also, most tax assessments do not take account of the effect on the value of land of easements and restrictive covenants. Most future interests are therefore destroyed at a tax sale and most easements are saved. The difference is further emphasized by hypothecating what the results would be if the standards were reversed. An *in rem* action would destroy easements, since the courts using this standard ignore the different interests existing in the property. If the assessment statute is the standard, however, most future interests would still be destroyed, because what is assessed is the value of full ownership, not the value of the present possessory interest.[63]

Two older Arizona cases throw clearer light on the conflict in this area. *Alamogordo Improvement Co. v. Hennessee*[64] and *Alamogordo Improvement Co. v. Prendergast*[65] were suits by the same party to enjoin a tax sale. A possibility of reverter[66] and restrictive covenant, respectively, were threatened with extinction. Both the future interest and the covenant were placed in all deeds given by the plaintiff improvement company to the lots in a tract. They were alternative means of insuring that alcoholic beverages would be sold in only one block of the tract. In *Hennessee*, the issue concerned the fate of the possibility of reverter. The court adhered to the rule that an *in rem* action extinguishes all interests.[67] *Prendergast* concerned the restrictive covenant. The court said that since the "negative easement" created by the covenant was carved out of the estate and its value not included in the assessment, it could not be included in what was sold to collect the taxes.[68] Thus, we have diametrically opposed legal treatment of two interests, which from the point of view of the

63. See note 21 *supra*.
64. 40 N.W. 162, 56 P.2d 1127 (1936).
65. 43 N.W. 245, 91 P.2d 428 (1939).
66. The court said the interest involved a possibility of reverter. Actually, it was a right of entry for condition broken, but this would have no effect on the decision. 40 N.W. at 163, 56 P.2d at 1127.
67. *Id.* at 164, 56 P.2d at 1129.
68. 43 N.W. at 249, 91 P.2d at 431.

tax-sale purchaser, were identical.

With the conflict thus in focus, examination of the nature of these interests would be helpful. A future interest operates to divide the periods of possessory rights in the land, fully ending preceding possessory interests. An easement, or restrictive covenant and a right in minerals restricts the physical enjoyment of the land by the possessory owner. The owner cannot use the property in any manner which interferes with rights created by these interests. This is the key distinction made by the courts. The future interest is so great a threat to a purchaser at a tax sale that it would seriously impair the possibility of obtaining taxes owed. An easement, mineral right or covenant also lessens the estate; but the bulk of the rights to the land are free. More importantly, these rights do not interfere with the owner's free determination to give up ownership at any time. Thus, they are a much smaller obstacle to obtaining the taxes owed at a tax sale.

The courts' first objective is to insure that the state gets its revenues. This is tempered by the desire to protect those interests in the property which are jeopardized by failure of the possessory owner to pay taxes. In balancing these policies, the courts prefer to save the interests which least effect the collection of revenues. Furthermore, future interests often are not likely to become possessory, and are thus of little value. Where they are likely to become possessory, it may be seen that the courts will try to protect them. Easements, and similar interests, on the other hand, are present interests, and therefore of much greater present value. Also, they are a useful device in ordering relationships between owners of land and others. The same cannot be said of future interests. It is the balancing of these factors, therefore, which leads to the majority rule in this area. And here, as elsewhere in the law, logic is the handmaiden of policy.

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