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In Rem Tax Forclosure in Erie County—Inviolable Title?

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IN REM TAX FORECLOSURE IN ERIE COUNTY—INVIOLABLE TITLE?

Introduction

In 1939, the New York State Legislature enacted the UNIFORM DELINQUENT TAX ENFORCEMENT ACT.[1] Superseding the provisions of any special, general, or local law, the Act was designed to afford any tax district which chose to elect its provisions a new mode of collecting unpaid property taxes by foreclosure proceedings.[2] A tax district was defined to include any county, city, town, village, or school district, having power to enforce the collection of taxes on real property by tax sale.[3]

To methods of foreclosure were offered: (A) foreclosure of a tax lien as in an action to foreclose a mortgage;[4] (B) foreclosure of a tax lien by an action *in rem*.[5] Either method, or both methods, could be elected by any tax district.[6] The election was to be expressed by filing a certificate to that effect in the office of the county clerk in which the tax district is situated.[7]

Erie County elected both methods,[8] and filed a certificate to that effect in the Erie County Clerk's Office in 1942. The scope of this comment is limited to the second method of foreclosing tax liens, *i. e.*, by foreclosure *in rem*.

Constitutionality

The Constitutions of the United States[9] and of New York State[10] declare that no person shall be deprived of his property without due process of law. There is no precise definition of due process; in substance, its fundamental requirement is that the person whose interests are being affected through litigation be

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1. Laws of 1939, c. 962, § 2.
2. TAX LAW § 162.
3. *Id.* § 162 (2) a.
4. *Id.* Art. 7-A, Title 2.
5. *Id.* Art. 7-A, Title 3.
6. *Id.* § 162.
7. *Id.* § 162.
8. ERIE COUNTY TAX ACT, Art. 9, Art. 11.
9. U. S. CONST. AMEND. XIV.
10. N. Y. CONST. Art. I, § 6.

given reasonable notice of the proceeding and an opportunity to appear and be heard.[11] The Constitution was never intended to perpetuate any particular method.[12] A State legislature, in its discretion, may prescribe any manner of notice, as long as the fundamental requirement of reasonableness is preserved.[13] What is reasonable notice must, by necessity, be adjudged in light of the circumstances of the particular case and the practical affairs of men.[14]

Tax foreclosure sales are not unique. The establishment of a Sovereign creates a right to procure the revenue necessary to sustain itself in discharging its sovereign duties. Taxation of real property is a ready and ancient source of revenue. Owners of property within the State have knowledge of an annual property tax, and of their duty to pay it. The State, to carry on its necessary functions, requires some necessary guarantee for performing this duty. Foreclosure of the tax is the most effective guarantee, but foreclosure in personam is too costly to be practical. The State legislature has realized this imposing obstacle, and has devised a more expedient and economical substitute, the *in rem* foreclosure. Charged with knowledge of the laws of the State, the owner of property is presumed to know that failure to pay his annual property tax will subject his land to the risk of an *in rem* foreclosure. This presumed knowledge, coupled with the annual obligation to pay his property tax, places a duty of *inquiry* upon the owner, a duty that is greater than the normal interest a person has in the welfare of his real possessions.

In the light of this burden of inquiry, service by publication, as prescribed by the New York and Erie County Act, has been held to satisfy the due process requirements of the New York Constitution, and to constitute reasonable notice of the proceedings.[15]

There has been no *express* United States Supreme Court decision sustaining the provision for notice in the New York law as meeting the due process requirements of the United States Constitution. However, the absence of an *express* decision, it is submitted, does not warrant a rational doubt of the constitution-

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11. *Milliken v. Meyer,* 311 U. S. 457 (1940).

12. *City of Utica v. Proite,* 178 Misc. 925, 36 N. Y. S. 2d 79 (Sup. Ct. 1941); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950).

13. *Mullane v. Central Hanover Bank & Trust Co., supra* n. 12.

14. *Ballar v. Hunter,* 204 U. S. 241 (1906).

15. *City of Utica v. Proite, supra* n. 12; *City of Buffalo v. Hawkes,* 226 App. Div. 48, 236 N. Y. Supp. 89 (4th Dep't 1929), *aff'd,* 251 N. Y. 588, 168 N. E. 438 (1929).

ality. In *Delavan Home and Land Co. v. Erie County*,[16] the question of constitutionality was appealed, by right, to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question, citing decisions in which they had sustained *in rem* acts from other states. It is submitted that the dismissal of the appeal by the United States Supreme Court amounted to an implied affirmance of the New York and Erie County Act. The inference is irrebutable in the light of decisions of the Supreme Court sustaining as constitutional the *in rem* laws of other States[17]—substantially similar to the Erie County Act—on precisely the same grounds as indicated above. Accordingly, the inviolability of an *in rem* title in Erie County is rationally secure from due process attack.

Infants and Incompetents

The interests of infants and incompetents have traditionally (at common law, and now by statute) been protected by the courts. The reason for this protection is public policy—infants and incompetents are not responsible to their own interests. When the law does permit them to be sued in personam, it secures their interests by requiring that service be made upon the infant's guardian and upon the incompetent's committee.[18] Consequently, it might appear that in an *in rem* foreclosure, where service is by publication, the interests of infants and incompetents are slighted, because no provision for service is contained which would bring notice of the proceedings to the attention of those in whom the guardianship and protection of the infant's and incompetent's interests are lodged. But the appearance is deceiving.

Ownership of land entails obligations, one of which is the payment of an annual property tax. If the infant or incompetent has enough capacity to own and manage land himself, then he is obliged to pay taxes, and competent to realize the consequence of default. If the land is managed by a guardian or committee, because of the inability of the infant or incompetent to care for it, then the guardian or committee is charged with the duty of meeting the yearly levy, and similarly charged with knowledge of the consequence of default in payment.

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16. 188 Misc. 299, 67 N. Y S. 2d 829 (Sup. Ct. 1945), *aff'd*, 294 N. Y. 847, 62 N. E. 2d 396 (1945), *app. dismissed*, 325 U. S. 681 (1945).

17. Nebraska: *Leigh v. Green*, 193 U. S. 79 (1904); Washington: *Ontario Land Co. v. Yordy*, 212 U. S. 152 (1908); Minnesota: *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526 (1895); Michigan: *Longyear v. Toolan*, 209 U. S. 414 (1907); Arkansas: *Ballar v. Hunter*, *supra* n. 14.

18. NEW YORK CIV. PRAC. ACT §§225, 226.

A strong policy argument also exists. The success of collecting delinquent taxes by *in rem* foreclosure is intricately dependent on the ability of the County to convey a strong title. A title that was imperfect as to infants or incompetents would be frail indeed. But regardless of which policy might seem more paramount, the New York Law[19] and the Erie County Act[20] both state that an *in rem* foreclosure shall terminate the rights and equities of infants and incompetents. The provision was upheld in *Lynbrook Gardens v. Ullman.*[21]

Soldiers and Sailors

The SOLDIERS' AND SAILORS' CIVIL RELIEF ACT was enacted by Congress in 1940.[22] Its purpose was to strengthen the emergency effort by suspending enforcement of civil liabilities of persons in the military service of the United States so as to enable such persons to devote their entire energies to the needs of the nation. Section 525 of the Act states that "the period of military service shall not . . . be included in computing any period . . . provided by a law for the redemption of real property sold . . . to enforce any . . . tax . . ." Another section 560, states that where delinquent tax foreclosure proceedings had been consummated, by leave of court, against real property owned and occupied for "dwelling, professional, business, or agricultural purposes . . ." by a person in military service, the serviceman might bring an action to redeem his foreclosed property at any time not later than six months after discharge. Both sections have been upheld as constitutional.[23] Reading §525, which speaks of *any* foreclosure, *in pari materia* with §560, which specifies only foreclosures of "dwelling, professional, business, or agricultural property," it might appear that the application of the general language of §525 was intended to be limited to the specific dwelling, professional, business, or agricultural purposes particularized in §560. If that construction were true, then at least some *in rem* titles—*i. e.*, property foreclosed for delinquent taxes which was owned by a serviceman for other than dwelling, professional, business, or agricultural uses—would be immune from the Act. But the opposite is true. The sections were read "with an eye friendly to those who dropped their affairs to answer their

19. § 165-h (6).

20. Art 11, § 11-19.0.

21. 179 Misc. 132, 36 N. Y. S. 2d 888 (Sup. Ct. 1942).

22. 54 STAT. 1178, 50 U. S. C. App. § 501 (1940).

23. *U. S. v. Alberts,* 59 F. Supp. 298 (E. D. Wash. 1945); *La Maistre v. Leffers,* 333 U. S. 1 (1948).

country's call . . ." by the Supreme Court in *La Maistre v. Leffers*.[24] Consequently, §525 permits a discharged serviceman to recover *any* of his property from a good faith purchaser by redeeming it within the time allowed for redemption, excluding his time in service. Section 560 grants a returned serviceman six months after discharge within which to start action to redeem any property which he has occupied for dwelling, professional, business, or agricultural purposes, and which was sold for delinquent taxes to a good faith purchaser. The inviolability of an *in rem* title in Erie County is perceptibly shaken by the effect of the FEDERAL SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, for it permits a watchful discharged serviceman to recover his property from an unsuspecting purchaser years after it was sold for delinquent taxes.

Irregularities and Defects

The procedural steps in foreclosing a delinquent tax by an *in rem* action are somewhat involved. Lists are prepared, affidavits made and filed, indexing done, publication, posting, mailing, and more affidavits made and filed. A problem arises as to what effect the omission or mistake as to any of these involved procedural steps has on the inviolability of an *in rem* title in Erie County.

It should be remembered that an *in rem* title rests on a judgment. The judgment of a court is valid where the court has jurisdiction over the person or property involved in the litigation, and jurisdiction over the subject matter. If either is lacking, the judgment is void and can generally be collaterally attacked.[25] Under the Erie County Act, jurisdiction is not needed over the person of the owner because the action is directed against the property, *i. e.*, the property is the defendant.

Jurisdiction over the property is had by reason of its location within the County of Erie. But a prerequisite for valid jurisdiction over the property is that notice be given to the owner.[26] Notice by publication is sufficient.[27] Because notice is a prerequisite to obtaining jurisdiction over the property, a purchaser at an *in rem* foreclosure sale should ascertain whether the technical requirements of publication and posting have been complied with to the letter of the statute.[28]

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24. 333 U. S. 1, 6 (1948).

25. *Hunt v. Hunt*, 72 N. Y. 217 (1878).

26. *Windsor v. McVeigh*, 93 U. S. 274 (1876).

27. See discussion, *supra*, and cases collected in n. 17.

28. See *Hogg v. Allen*, 196 Misc. 265, 92 N. Y. S. 2d 866 (Sup. Ct. 1949).

Jurisdiction over the subject matter requires that the court have the statutory or constitutional power to hear the abstract question involved in the proceedings.[29] If the proceeding were held in the County Court of Erie County, jurisdiction over the subject matter would exist, for it is expressly conferred by statute.[30] But like all statutory causes of action, a problem of construction arises as to whether literal compliance with the technical provision is an essential prerequisite to the court's power over the subject matter *(i. e.,* mandatory), or merely a prerequisite to the right of the plaintiff to maintain the action *(i. e.,* directory).[31] The consequences are deeply significant. If literal compliance with the technical provisions is mandatory, then any mistake or omission is a jurisdictional defect, which renders the judgment a nullity. But if literal compliance is only directory, then a mistake or omission is only an irregularity, which is merged in the judgment, and if not corrected by appeal, becomes *res judicata.*

With respect to the solution of this problem, as with any question of statutory construction, the primary consideration is that of determining legislative intent. The statute itself contains some express statements of intent.[32] Judicial decision has added others.[33]

Perhaps the best guide to assist in interpreting the legislative intent in the *in rem* situation is *common sense, i. e.,* essential requirements should be mandatory, incidental requirements should be directory.[34] But the task of construction grows more difficult when dealing with the statutory requirement that foreclosure can be commenced against property on which "taxes are in default". The general rule in the United States is that delinquency is directory.[35] The reason advanced to sustain the construction is

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29. *Hunt v. Hunt, supra* n. 25.

30. Tax Law § 165-a (1) c.

31. 3 SUTHERLAND, STATUTORY CONSTRUCTION (3d. ed. 1943) § 5801 *et seq.*

32. All provisions with respect to procedure requiring acts to be done within specified times, except provisions with respect to notice, are directory, TAX LAW § 166-q; failure to mail tax bills is directory, TAX LAW § 166-c; the inadvertent failure of collecting officer to include in the list is directory, TAX LAW § 165-a.

33. Publication for 49 days is mandatory, *Village of Pleasantville v. Gross,* 272 App. Div. 932, 71 N. Y. S. 2d 100 (2d Dep't 1947), *aff'd,* 297 N. Y. 767, 77 N. E. 2d N. E. 2d 787 (1947); filing of resolution of election is directory, *Hogg v. Allen, supra* n. 28.

34. SUTHERLAND, *op. cit. supra* n. 31, § 5813; *Fauntleroy v. Lum,* 210 U. S. 230 (1907).

35. *Gaylord v. Scarff,* 6 Iowa 179 (1858); *Kneeland v. Wood,* 117 Mich. 174, 75 N. W. 461 (1898); *Rogers v. Dent,* 292 Mo. 576, 239 S. W. 1079 (1922); *Chauncey v. Wass,* 35 Minn. 1, 25 N. W. 457 (1886).

that any other interpretation would take from a judgment the conclusiveness which public policy says shall be given it. Hence, the judgment constitutes *res judicata* as to the fact that taxes are in default. This is the general rule.

New York has held otherwise. In *Lynbrook Gardens v. Ullman*,[36] the court stated that it was the legislative intent that delinquency was necessary to give the court jurisdiction. The reason advanced to sustain this construction was that where the owner had in fact paid his tax, he might justly conclude he was in no legal peril of having his land sold for delinquency, and consequently could not be charged with duty of looking to newspapers and searching lists. The reasoning is more apposite if applied to defective jurisdiction over the *property*, rather than to defective jurisdiction over the *subject matter*.

Statute of Limitations

To repeat, irregularities in the tax foreclosure proceeding are not a basis for collateral attack, because of *res judicata*. But where the omission or mistake is adjudged jurisdictional, is the purchaser's title always open to subsequent attack? If it were, an Erie County *in rem* title would be very shaky indeed. Presumably to avoid this weakness, the State Legislature added an amendment to the TAX LAW in 1948[37] which states that no action can be maintained to upset a tax sale deed after two years from the date of record of that deed. The language of the amendment seems to manifest a clear and definite legislative intent,—that jurisdictional defects, whether over the property, or the subject matter, as a ground for collateral attack, are lost by recording the tax foreclosure deed, and the expiration of a two year period of limitation. There have been no adjudications sustaining this amendment. However, a legislature *may* legally enact a statute of limitations which will thereafter bar the assertion of any right to question jurisdictional defects.[38]

Conclusion

It is submitted that the provision for notice by publication contained in the Erie County Tax Act is constitutional; that the

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36. *Supra* n. 21.

37. § 165-h (7).

38. *Marx v. Hawthorn*, 148 U. S. 172 (1893); query, would such a statute sever the right of a non-delinquent owner to contest the in rem sale? The writers feel it would not: delinquency is necessary in order to create a duty of inquiry. For the same reason that the absence of this duty renders publication in rem void, so would it invalidate the running of a statute of limitations. Knowledge or reason to know is a prerequisite to due process, whether by publication, or by recording a deed. *Cf. Matter of City of New York*, 212 N. Y. 538, 106 N. E. 631 (1914).

rights of infants and incompetents are severed by the foreclosure sale; that a purchaser at a County sale acquires a title which is protected by *res judicata* from irregularities; that jurisdictional defects, generally, are not grounds for upsetting the purchasers' title if the deed is recorded and the two year statutory period has expired; but that the Soldiers' and Sailors' Civil Relief Act permits a returned serviceman to redeem his foreclosed property if he acts promptly.

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MUNICIPAL TAXPAYERS AND STANDING TO SUE

Introduction

It is in the area of public law that one encounters the popular impatience with a judicial attitude which requires, not only a defined controversy, but also a plaintiff legally interested in its outcome. It is proposed in this comment to examine one part of the general problem of standing to sue, a part in which this popular impatience has perhaps made itself felt, and the courts have relaxed their traditional standards.

The specific problem to be considered herein is, in an action against a municipal corporation or its agents, what standing to sue has a plaintiff solely by virtue of the fact that he is a taxpayer? This is the initial query in all taxpayers' suits, which have been defined as follows:

> Taxpayers' suits are actions by one or more taxpayers acting not alone as individuals but as representatives of the other taxpayers, to prevent acts which will injure the taxpayers and which are *ultra vires* or unauthorized, i. e., suits to vindicate the public and common right to have the public funds and property preserved from spoliation by public officers and devoted only to public uses; and also suits on behalf of the municipal corporation.[1]

It is evident that a taxpayer's bill is a class bill, filed in the common interest of all taxpayers of the municipality,[2] so that plaintiff has no private interest entitling him to sue. If he possesses such a concern, it is not a taxpayer's action. Accordingly, if a

1. 18 McQuillian, Municipal Corporations (3rd ed. 1950), 3.

2. *Schlanger v. West Berwick Borough*, 261 Pa. 605, 104 Atl. 764 (1918).