Revenue and Taxation - Collection of Delinquent Real Estate Taxes - Legislating Protection of the Delinquent Property Owner in an Era of Super-Marketable Tax Titles

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A message from God Almighty. God said yesterday and today to me, "tell that man that want to take your house—that I God gave you the house and he cannot take it. Again I am telling you I God gave you the house and the man cannot take it."1

In such words is the solace of their authoress, a seventy-eight year old Chicago recluse who believes she is a nun, and who has been adjudged by a court psychiatrist as overtly psychotic and incompetent to manage her affairs.2 Yet these words are perhaps the only source of salvation for this elderly owner of a three-story building, threatened with loss of that building due to nonpayment of real estate taxes. It is unlikely she could save her land via redemption, the available legal recourse, since her sole means of support is a $35.00 per month Social Security allotment.3 Such a situation is not atypical of the trauma experienced by the aged and infirm in Illinois, who seised of property which has oftentimes come to them other than through their own purchase, fail to comprehend the liability imposed upon them by the levy of state realty taxes. Statutory notices, whether actually or constructively served, are unheeded; ultimately a foreclosure results, vesting title in a "tax purchaser" who may have paid a small fraction of the value of the property in exchange for his now-clear title and concomitant right of immediate possession. If the premises are occupied, the tax purchaser, now seised of the real estate in fee simple, has the option of evicting the unsuspecting tax-delinquent, or, as has been the occasional practice in Chicago, of giving the occupant the choice of remaining in possession as a tenant and paying rent or repurchasing the tax-sold property at market value.4 In one reported case a tax purchaser of property having a tax delinquency over a period of four years totaling $640.00, offered the former owner and occupant, a sixty-two year old recluse with limited comprehension, the option of remaining as a tenant.

2. Id.
3. Id.
at $70.00 per month rent or of repurchasing his former property for $7,500.\(^5\)

The aforementioned examples and other similar instances were denounced by Chicago newspapers in a 1969 exposé,\(^6\) attacking both the practices of the particular tax purchaser common to these transactions, and questioning the justice of the tax sale provisions of the Illinois Revenue Act of 1939.\(^7\) Concurrently, bills amending the Illinois Revenue Act and proposing a change which would greatly mitigate the result of the above examples, were unsuccessfully promulgated in both houses of the Illinois General Assembly.\(^8\)

The “tax sale” provisions of the Illinois Revenue Act have general counterparts in almost every American jurisdiction.\(^9\) Though they represent only one of many methods in which ad valorem real property taxes may be collected,\(^10\) their use is widespread chiefly because they provide an efficient and speedy means of producing revenue, with relatively little administrative expense. The tax sale provisions of the Illinois Revenue Act, the changes proposed in the 1969 Illinois General Assembly, a survey of comparable legislation in other states, and the prudence of changing the Illinois real estate tax sale collection system in light of its explicated purpose are the subjects\(^11\) considered in an analysis of this aspect of the Revenue Act. This analysis shall be conducted in light of two competing interests: the state's desire to collect in an efficient manner all overdue real estate taxes,\(^12\) and the interest of an individual in the property he owns.\(^13\)


7. ILL. REV. STAT. ch. 120, § 482, et seq. (1967).


9. The statutes in Delaware, Georgia and Alaska do not contain tax sale provisions as a means of state revenue collection.

10. Other methods include an ordinary action to collect taxes, resulting in an in personam judgment and levy against the taxpayer, distraint of personal property, in rem attachment, and the like. See BLACK ON TAX TITLE § 150, at 189 (1893); Commentary, Iowa Tax System, 23 I.C.A. 73, 86-87 (1965); Harbert, Tax Foreclosures and Tax Titles, 1952 ILL. L. F. 209, 210.

11. The scope of this paper excludes the procedure for collection of locally-levied special assessments, a procedure which is frequently parallel to or equivalent with annual tax collection methods.


13. See, e.g., MONSEN, MODERN AMERICAN CAPITALISM—IDEOLOGIES AND ISSUES 18-20 (1963); LOCKE, A SECOND TREATISE ON CIVIL GOVERNMENT c.5 (Everyman's ed. 1924); COPLESTON, A HISTORY OF PHILOSOPHY 133 (1964).
CONSTITUTIONAL SANCTION

The power of the state to levy and collect ad valorem property taxes originates in article IX of the Illinois Constitution. The state is therein empowered to sell real estate for the nonpayment of taxes, provided that owners of and other persons interested in such real estate are accorded at least two years in which to redeem the property from sale. Also, the law requires reasonable notice of sale to be given such owners and interested parties. In the Illinois constitutional convention convening during 1970 the "Revenue Article"—article IX—is expected to undergo radical change; change which, it is hoped, will tend to obviate some of the difficulties of the present Illinois revenue collection system hereinafter discussed. Nonetheless, the Illinois system as presently extant has survived a recent challenge under the federal "due process" clause, wherein plaintiffs alleged that a real estate tax collection system which divests one of ownership of property while denying him remuneration of the value of the property less the tax due is a deprivation of property without due process of law. The three-judge district court in this case, Balthazar v. Mari, Ltd., responded:

The Illinois legislation is constitutional since delinquent landowners, including the plaintiffs, are adequately notified of their tax deficiencies and of any tax sale or foreclosure. Unfortunately, the Illinois system severely penalizes all real estate owners who fail to redeem. The total forfeiture seems extremely harsh when overdue taxes amount to only two or three per cent of the property's value. But oppressive statutes must be tempered by the legislation, not the courts.

PRE-SALE

Real estate taxes in Illinois are payable in two equal installments per

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14. Ill. Const. art. 9, § 1 provides: "The general assembly shall provide such revenue as may be needful by levying a tax, by evaluation, so that every person and corporation shall pay a tax in proportion to the value of . . . property . . . ."
15. Ill. Const. art. 9, § 4.
16. Ill. Const. art. 9, § 5.
17. Id. Occupants must in all cases be served personally prior to expiration of the redemption period.
20. Id. at 106.
annum, which become delinquent respectively on June 1 and September 1 of each year. After September 1 of the year in which the tax becomes delinquent, the county collector publishes a list of tax-delinquent real estate in the county; accompanying such list is a notice that the collector will apply to the court on a specified day for judgment against the real estate listed, in the amount of taxes and costs and for an order authorizing him to sell such real estate on a specified subsequent date in satisfaction of the judgment. During the following October, the county collector must file with the circuit court all applications for judgment and orders directing sales. The court must hear and determine all applications within thirty days of the date prayed for the rendering of judgment. This application for judgment is purely an in rem proceeding to enforce the statutory lien of real estate taxes against the res. Consequently, no in personam service of process is required, for the statutory requirement of publication of the delinquent tax list satisfies all requirements of notice of the application proceeding. The court then reviews the applications for judgment; in so doing it is empowered to hear any defense to the entry of judgment offered by any interested party, and to make a summary adjudication as to the validity of the defense. However, no party may enter a defense unless he files with the court proof that he has paid the disputed tax, albeit under protest. In the event the defense is stricken or no defense is filed, the court then enters judgment for the taxes found to be due, and directs the issuance of an order of sale, fixing as the date of sale the date prayed for in the application.

22. Ill. Rev. Stat. ch. 120, § 705 (Supp. 1969). Note that in counties having a population of 500,000 or more, the due dates are May 1 and September 1, id. 23. Ill. Rev. Stat. ch. 120, § 706 (Supp. 1969). See also Ill. Rev. Stat. ch. 120, § 709 (1967) for requirements as to the contents of the notice.
26. Ill. Rev. Stat. ch. 120, § 697 (1967) provides as such.
28. The Illinois Supreme Court has repeatedly so held: People v. Anderson, 411 Ill. 252, 103 N.E.2d 629 (1952); People v. C. & I. Ry., 386 Ill. 239, 53 N.E.2d 921 (1944); People v. Coal Belt Electric Ry., 311 Ill. 29, 142 N.E. 495 (1924); Smythe v. People, 219 Ill. 76, 76 N.E. 82 (1905).
date of sale, the taxpayer or any interested party may pay the taxes adjudged due, plus costs, and have the property withdrawn from sale.\textsuperscript{32}

Thus, a real estate taxpayer whose second installment became delinquent on September 1, of a given year might, theoretically, have a judgment for taxes and order of sale entered against the property before the end of the year, having received no notice, but for the publication of the notice of application. The first time the taxpayer is required to be served in an individual capacity with any notice whatsoever is five days in advance of the sale date. The county collector is required to send a notice by mail to the known owner, or the most recent taxpayer of record on the property, at least five days before sale; such notice states the fact that application was made for judgment and order of sale, the date of sale, and the specific property to be sold.\textsuperscript{33}

SALE

On the date of sale, the county collector offers each tract of tax-delinquent property for bidding;\textsuperscript{34} the prospective "tax purchasers" do not bid on the value of the property, however. A tax purchaser pays only the amount of the delinquent tax judgment plus costs; if there is a redemption by the property owner, the tax purchaser is entitled to full reimbursement for the taxes and costs he has paid,\textsuperscript{35} plus a penalty not to exceed the rate of twenty-four per cent per annum of the amount paid out by the tax purchaser.\textsuperscript{36} It is this penalty upon which the prospective purchasers bid; the person who offers to pay the amount due on each tract for the least percentage penalty is the successful bidder—ergo the tax purchaser.\textsuperscript{37} Thus, prospective purchasers "bid down" the penalty rate, starting at twenty-four per cent per annum and decreasing theoretically to zero, if the bidding is competitive. In point of fact, the average sale rate was approximately thirteen per cent per annum\textsuperscript{38} in 1969. If there are no bidders on a given tract, the real estate is "forfeited to the state" rather than "sold" for taxes.\textsuperscript{39}

\textsuperscript{32} ILL. REV. STAT. ch. 120, § 714 (1967); ILL. REV. STAT. ch. 120, § 715 (Supp. 1969).
\textsuperscript{33} ILL. REV. STAT. ch. 120, § 711 (1967).
\textsuperscript{34} See ILL. REV. STAT. ch. 120, § 724 (1967).
\textsuperscript{35} ILL. REV. STAT. ch. 120, § 734 (Supp. 1969).
\textsuperscript{36} ILL. REV. STAT. ch. 120, § 734 (Supp. 1969).
\textsuperscript{37} ILL. REV. STAT. ch. 120, § 726 (1967).
\textsuperscript{39} ILL. REV. STAT. ch. 120, § 727 (Supp. 1969). The statutory procedure for forfeited property is somewhat variant. It would not be of any value to elaborate on forfeiture procedures; hence they are excluded from the scope of this paper. See ILL. REV. STAT. ch. 120, §§ 753-56 (1967).
POST SALE AND REDEMPTION

The successful bidder at the tax sale, having paid the delinquent taxes, is issued a certificate of purchase, which indicates the amount of taxes paid and the penalty percentage to which the holder is entitled, and which is fully assignable via endorsement. To preserve his rights, the tax purchaser must prevent the property from being resold during the period of redemption; he does so by paying the taxes assessed during the period. Otherwise, a sale of a subsequent year’s taxes confers a right in the subsequent tax purchaser superior to that of the previous purchaser. The “period of redemption” refers to that period of time during which a person holding a redeemable interest in the land may pay the delinquent taxes plus costs, subsequent years’ taxes paid by the tax purchaser, interest, and the penalty bid, and recoup title to the property free of the encumbrance resulting from delinquent taxes. The period of redemption in Illinois is two years from the date of sale, plus as much of the third year after sale as expires before the tax purchaser takes action to perfect his tax title. Since the tax purchaser may be unprepared to seek perfection of tax title at the expiration of the redemption period, he will agree to an extension of the period of redemption and may extend the redemption period into the third year after sale. If he is not ready to seek perfection of his tax title and the redemption period is not or may no longer be extended, he loses the right to perfect his inchoate tax title.

Of the money paid in by the redemptor, a reimbursement of all that the tax purchaser has paid out plus his penalty bid is made to the tax purchaser. Thus, a purchaser at a tax sale has a dual incentive: having

40. ILL. REV. STAT. ch. 120, § 729 (1967).
41. ILL. REV. STAT. ch. 120, § 747 (Supp. 1969).
42. ILL. REV. STAT. ch. 120, § 747 (Supp. 1969). See generally Harbert, supra note 10.
43. “As a general rule, any person may redeem land from a tax sale who has an interest in the land which would be affected by the maturing of the tax title in the purchaser.” BLACK, supra note 10, at 451. This general statement is by no means easily applied; Illinois courts have long struggled with the question of what interest is sufficient to entitle the interested party to redeem. See, e.g., County Treasurer v. First Nat. Bank, 87 Ill. App. 2d 133, 230 N.E.2d 571 (1967); Application of County Treasurer, 63 Ill. App. 2d 135, 211 N.E.2d 127 (1965); Weiner v. Jobst, 22 Ill. 2d 11, 174 N.E.2d 561 (1961). See also Comment, 73 DICK. L. REV. 474 (1969).
45. ILL. REV. STAT. ch. 120, § 734 (Supp. 1969).
46. ILL. REV. STAT. ch. 120, § 744 (Supp. 1969).
47. ILL. REV. STAT. ch. 120, § 752 (Supp. 1969).
48. ILL. REV. STAT. ch. 120, § 734 (Supp. 1969).
paid the delinquent taxes, and waited two years, he might, in the absence of redemption, perfect his tax title, thereby receiving good title to property in exchange for what may be a small fraction of its actual worth; in the alternative, if redemption is made, the tax purchaser receives as much as a thirteen to twenty-four per cent per annum return on his investment.\footnote{49}

**PERFECTING TAX TITLE IN THE TAX PURCHASER**

As a consequence of the tax sale, the tax purchaser has a statutory right in the property. This right cannot properly be described as a tax lien, because the payment of the tax by the tax purchaser extinguishes the statutory lien\footnote{50} of delinquent taxes.\footnote{51} Nor is the right that of a subrogee to the position of the state vis-à-vis the originally assessed taxpayer.\footnote{52} This statutory right is therefore best described as an imperfect, or inchoate, tax title. Assuming no redemption is made during the redemption period, the tax purchaser then has the opportunity to perfect his inchoate tax title. He does so by taking the following measures: (1) He must serve\footnote{53} the possessor, the most recent record taxpayer, and all persons interested of record in the property with a notice that he, the tax purchaser, has paid the delinquent taxes on the subject realty for a given year,\footnote{54} and that he has filed a petition for the issuance of a tax deed.\footnote{55} This notice must be served three to five months in advance of expiration of the extended or unextended redemption period.\footnote{56} (2) He may then petition the circuit court for the issuance of a tax deed, alleging pro forma that he is the valid tax purchaser or assign, and that no redemption has occurred.\footnote{57} This petition must also be filed three to five months in advance of expiration of the period of redemption. If the period thereafter expires and no redemption is made, the court orders the issuance of a tax deed, provided all tax liability accruing against the property after the date of sale

\footnote{49} Supra note 38.  
\footnote{50} Ill. Rev. Stat. ch. 120, § 697 (Supp. 1969).  
\footnote{51} See, e.g., People v. Ogden, 195 Ill. App. 563 (1915).  
\footnote{52} Id.  
\footnote{53} Ill. Rev. Stat. ch. 120, § 744 (Supp. 1969). If the identity of the owner or most recent record taxpayer can be ascertained, but the property is vacant, service by registered mail at the last known address is acceptable. If such parties cannot be ascertained on diligent inquiry, publication alone suffices.  
\footnote{54} Ill. Rev. Stat. ch. 120, § 744 (Supp. 1969).  
\footnote{56} Actually, the notice of tax sale and notice of petition filing are separately required, the first by Ill. Rev. Stat. ch. 120, § 744 (Supp. 1969), the latter by Ill. Rev. Stat. ch. 120, § 747 (Supp. 1969). However, the statute allows combining the notices, Ill. Rev. Stat. ch. 120, § 747 (Supp. 1969), and this is the common practice.  
has been satisfied. The court's function is therefore ministerial, but for the determination of the sufficiency of service of the above notice. "[T]he court shall insist on strict proof of notice, and, in the event due diligence is claimed, shall inquire into the facts of diligence . . . .” The tax deed is not only prima facie evidence of the propriety of the tax foreclosure proceedings, but confers title in the grantee free of all claims, except those of parties to easements, covenants running with the land, and public rights of way. The order directing the issuance of a tax deed is appealable to the state supreme court; relief after thirty days from the date of issuance of such order is also allowed under the Illinois Civil Practice Act provisions for such relief from all final judgments and decrees.

Within the three year redemption period, the taxpayer thus receives only one actual notice, which must be served three to five months prior to the expiration of the redemption period. This notice is the second of the two notices which the taxpayer receives pursuant to delinquent taxes on his real estate, the first notice being the aforesaid notice of application for judgment and order of sale. Failure to heed this second notice is fatal to retaining title in the taxpayer, since he is neither party to the application for judgment nor to the petition for issuance of a tax deed.

**HOUSE BILL 2569**

In April 1969, two bills amending the Revenue Act originated in the Illinois General Assembly, one in each house. The senate bill was subsequently withdrawn in favor of the house bill, H. B. 2569, which proposed the following reforms in the Illinois system:

(1) *An additional requirement of notice to the real estate owner as a prerequisite to the filing of a petition for tax deed.* In addition to the notice of tax sale and filing of petition for tax deed which the tax purchaser must serve three to five months prior to the expiration of the redemption period, the county clerk would be required to serve a notice to occupants, the most recent record taxpayer, and all persons interested of

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64. Supra note 8.
record in the subject property, within three months after the date of sale.\textsuperscript{66} This notice would be of a prescribed form, containing the following admonition: "If you do not pay the amount due for taxes, interest, and penalties . . . you may lose this property forever!"\textsuperscript{67} The effect of this amendment is twofold: first, it provides an additional notice, containing a conspicuous, simply-phrased and meaningful warning to the owner. In contrast, the form of notice of sale and filing of petition for deed now used would not be as likely to alert the unwary or uneducated reader.\textsuperscript{68} Secondly, it places upon the county clerk, a presumably disinterested party, the duty of apprising the taxpayer of his opportunity to redeem. Under the existing system where the tax purchaser is strongly desirous of obtaining the property, his interest militates against a redemption; an unscrupulous tax purchaser might therefore exercise much less than diligence in attempting to locate the owner or owners, in order that he may be allowed to serve such notice by publication.

If no person is in possession or occupancy of such real estate, or if the person in whose name the same was last assessed for general taxes, upon diligent inquiry, cannot be found in the county, or if such owners of or parties interested in such


\textsuperscript{67} Id.

\textsuperscript{68} Currently, there is no statutory prescription as to the language which must be contained in the notice. Therefore, but for the necessary elements of the notice, ILL. REV. STAT. ch. 120, §§ 744, 747 (Supp. 1969), any other language is left to the whim of the tax purchaser, or to the employee of the local legal bulletin who prepares such notice for publication. The following is an example of such a notice:

"NOTICE

TO: [taxpayer] . . .

Take notice that on May 21, 1965, Dennis R. Kelley, pursuant to a Judgment for Sale entered in January term of the Circuit Court of Cook County for Judgment for Sale of Real Estate for delinquent taxes for the year 1963 and in conformity with Section 272 of the Revenue Act of 1939, as amended, purchased the following described forfeited real estate: [legal description]. That there was included in said Judgment for Sale for which said real estate was sold, the general taxes for the year 1963. The purchaser also paid or redeemed, according to law the general taxes for the year(s) . . .

That the time of redemption from said sale, as extended, will expire on March 23, 1969.

You and each of you are further notified that unless redemption is made from sale within the time allowed by law, the undersigned will on the 25th day of March, 1969, at the hour of 10:00 a.m. or as soon thereafter as his petition may be heard, appear before his Honor Judge H. G. Comerford, or such other Judge as shall be sitting in his place and stead, and apply for an order on said petition, directing that a tax deed conveying said real estate issue to the undersigned and that a writ of assistance issue to put the undersigned into possession of said real estate . . . ."

Chicago Daily Law Bulletin, November 20, 1967, at 7. This is hardly likely to alert anybody other than an attorney.
real estate, . . . upon diligent inquiry, cannot be found in the county, then such purchaser or his assignee shall publish such notice, as to [such parties] . . . .

Notwithstanding the statutory mandate that the court "shall insist on strict proof of notice and . . . shall inquire into the facts of diligence," an owner who has been fraudulently denied service of the tax purchaser's notice is at a distinct disadvantage once a tax deed has issued. If the owner collaterally attacks the order directing the issuance of a tax deed, he must prove not only that he had not been served with notice, but that the failure of the tax purchaser to serve him was fraudulent. Therefore, in practical effect, the tax purchaser need only convince the court hearing the petition that there has been compliance with the notice requirements; having so proven, the tax purchaser is protected by the aforesaid requirement that fraud be proven, as well as by the prima facie presumptions raised by the tax deed itself as to the propriety of the proceedings. This protection accorded to the tax purchaser originated in the Illinois legislature's change of policy as to real estate tax deeds in 1951; greater emphasis was placed on the validity of tax deeds, over the interest of the original owner, in the hope that tax titles would become more marketable. The amendment proposed by H.B. 2569 in no way controverts this purpose. It merely places an additional onus on the county clerk, insuring that a forgetful but able taxpayer is in fact notified of the tax delinquency.

(2) The method of perfecting inchoate tax title in a tax purchaser other than a public body, viz. a municipality, the state, or other "taxing body." In lieu of filing a petition for a tax deed, the tax purchaser would petition the court for a "public tax deed sale", in the event the redemption period expires and no redemption is made, the court, after hearing the petition and determining that all requirements of notice have been met, directs the county clerk to hold a public sale, rather than to issue a tax deed. At such sale, any person may bid; the bids at this sale are

bids of a dollar-price, which the bidder pays in exchange for a deed to
the property. The tax purchaser may bid at this sale, and may take as a
credit against his bid the amount of penalty to which he is entitled. This
credit is the price at which the bidding begins; if the tax purchaser bids
this amount and no other parties bid in at the tax deed sale, then the
procedure is exactly the same as occurs under the existing law. The tax
purchaser would still realize his "windfall," having acquired valid clear
title to the property in exchange only for the payments of delinquent taxes
and costs. However, if other parties bid in at the tax deed sale, the result
is different from that of the present system; if the tax purchaser desires the
property badly enough to bid competitively, and outbids his opponents,
he still gets the advantage of the taxes and costs he has paid out plus the
value of the penalty bid in the form of a credit against his bid at this tax
deed sale. In the event the tax purchaser is outbid at the tax deed sale,
he would receive the same rebate he receives under the law as extant—
the amount of the taxes and costs paid out plus the penalty bid. In any
event, any excess over the amount of taxes, costs and penalty, whether
bid by the tax purchaser or another party at the tax deed sale, would be
rebated to the original owner or owners of the tax delinquent property.
Failure of the tax purchaser to bid at the tax deed sale, in the absence
of any other bidding, or failure of the purchaser to petition the court for a
tax deed sale, would, as today, forever bar the tax purchaser from per-
fecting his inchoate tax title. 76 Thus, while leaving unchanged the method
of acquiring inchoate tax title, viz. the "bid-down" system, H.B. 2569
seeks to change only the method of perfecting tax title by making the tax
deed a commodity offered at a public sale, rather than a near-automatic
consequence of a tax purchase, absent redemption. In so doing, H.B.
2569 greatly limits one of the two incentives of the tax purchaser—that
of "windfall" acquisition of the property. The interest incentive re-
mains unchanged, for the tax purchaser is still able to realize the value
of his penalty bid. It has been cogently argued that the "windfall" incentive
should be ameliorated, in light of the gross injustice it causes as weighed
against its allegedly slight attraction value:

The forfeiture [windfall] provision simply does not provide the basic incentive for
speculators to buy tax certificates. The primary incentive is the high interest rates.
Uncontested evidence presented to the Special Committee indicated that in 1967, the
last year for which data is available, most tax delinquent property was redeemed
by the owners. In Cook County [wherein lies Chicago] out of 13,000 tax cer-
tificates sold, all but 130 were redeemed by the homeowners. Thus, in 99% of the
cases, the interest penalty rather than the forfeiture of the realty provided the
investment incentive. 77

76. Id., amending ILL. REV. STAT. ch. 120, § 752 (Supp. 1969).
77. Supra note 38.
H.B. 2569 was nonetheless rejected by the Illinois General Assembly after four readings. After three readings, an amendment, and a “do pass” recommendation by the House Committee on County and Township Affairs, the bill was passed in the House of Representatives. It was not to survive in the Senate, however; after a first reading, the Senate Committee on Municipal Corporations accorded a “do not pass” recommendation to the bill, whereupon it was tabled. Thus, a bill under consideration for over one and one-half months in the House, lived in the Senate a life of three days.

COMPARATIVE TAX SALE SYSTEMS

The lien of delinquent real estate taxes on the subject property has no precedent in the common law; its origin is chiefly statutory. Consequently, the development of a specie of tax foreclosure has taken diverse forms. The distinctions between these forms are, prima facie, mere procedural niceties; hence, they are and appear to have been in many instances relegated to a summary consideration in state legislatures. However, these procedural distinctions have, as has been illustrated, serious substantive ramifications, which ramifications strongly suggest that future tax sale proposals receive careful consideration, in light of the competing interests of the state and the taxpayer.

The system so summarily dismissed by the Illinois Senate is currently effective in almost exact duplicate in Florida, and substantially similar statutes exist to date in three other American jurisdictions. The present Illinois system has counterparts in six states. Other jurisdictions employ different systems, some totally diverse and some bearing characteristics

78. Supra note 65.
79. Supra note 65.
80. Supra note 65.
83. Washington, Kentucky and North Carolina. See infra notes 87-89.
84. Arizona, Colorado, Minnesota, North Dakota, New Jersey and South Dakota. See infra notes 111-16.
common to either or both of the two systems heretofore outlined. In positing distinguishing characteristics whereby the various tax sale procedures can be categorized, one need make two determinations: how inchoate tax title is conferred, and how such inchoate title is perfected. Distinctions might also be drawn as to the type and number of notices required to be served upon the owner-taxpayer, as well as to the length of redemption period; however, for the purpose of this note, the two former considerations shall constitute the criteria whereby categorical boundaries are laid. Thus established, the two main categories of tax sale procedures are as follows: (1) The "two-sale system" which includes the procedure promulgated in H.B. 2569, whereby inchoate tax title is acquired by a purchaser at preliminary "tax" or "tax lien" sale, and perfected tax title is acquired through a second sale, a "tax deed" sale, held after the expiration of the redemption period. Universally, the second sale is a public sale to the highest bidder for cash. However, divergencies in the tax lien sale result in certain sub-categories to be later enumerated. (2) The "one-sale system" has four subclassifications: (a) the "Illinois bid-down" sale, wherein the one sale confers inchoate tax title in the party who agrees to pay taxes and costs and to receive the lowest rate of interest as a return, the tax title being perfected semi-automatically in the tax purchaser absent redemption; (b) the "public auction sale," wherein the highest bidder for cash receives inchoate tax title and an exclusive right to perfection thereof, absent redemption; (c) the "tax-sale-no-bid-down," wherein inchoate title and exclusive right to perfection are conveyed to the person who will pay the taxes and costs due on the land in exchange for the smallest divided or, in some states, undivided, interest thereof, and (d) the "automatic sale to the state," whereby taxes which remain delinquent on a given date are automatically "sold" to the state (i.e., the state foregoes receipt of its taxes until the expiration of the redemption period, whereafter it may sell the land at public sale to defer tax expenses, or otherwise dispose of or use the property as it sees fit).

THE TWO-SALE SYSTEM

Those states employing the two-sale tax system are Florida, Washington, Kentucky and North Carolina. In Florida, as in H.B. 2569,

85. "[H]ere the term 'highest bidder' means the one who will pay the tax for the least quantity of land." Black on Tax Titles § 262, at 326 (1893).
inchoate tax title is conferred via a bid-down tax sale:
The land shall be struck off to the person who will pay the tax, interest, costs and charges and will demand the lowest rate of interest for the first year, not in excess of the maximum rate allowed by law.  

Because the interest rate bid only applies to the first year for which taxes are delinquent, and interest then compounds at eight per cent per annum for subsequent years prior to redemption, the amount required for redemption does not become as prohibitive as does the amount to redeem in Illinois. If there has been no redemption after two years from the date of sale, the tax purchaser files an application for a tax deed sale with the court clerk. The clerk is then required to publish a notification of sale and to serve the taxpayer with a similar notification. Thus, as in H.B. 2569, the burden of notifying the delinquent taxpayer of his last chance to avert loss of his property falls to a public official, not to the tax purchaser. The tax deed sale is at public auction, to the highest bidder for cash; the tax purchaser is credited for the amount paid out plus the interest at the rate bid for the first year, and at eight per cent for subsequent years, pursuant to the tax sale. Any surplus bid at the tax deed sale is held for the benefit of the now-former owner. Only North Carolina provides that the tax lien sale must be public, with competitive bidding among prospective tax purchasers. Any excess over the amount of delinquent taxes due is payable immediately to the property owner. However, after the public tax lien sale is held, no provision is made for redemption by the property owner. Therefore, his right to redemption is presumably cut off by the tax lien sale. After six months from the date of sale, and prior to the expiration of the statute of limitations for such action, the tax purchaser perfects his title by bringing an action to foreclose his tax lien, an action in the nature of a mortgage foreclosure. A decree of foreclosure includes an order of sale at public

As in a mortgage foreclosure, the tax purchaser must account to the former owner for any excess over the amount of his lien, viz. his cash bid at the tax deed sale plus interest; however, the tax purchaser may also bid in at the sale and credit the amount of his lien to his bid. Thus, whereas the taxpayer has virtually no redemption rights in North Carolina, the tax purchaser has no interest incentive to induce him to pay the taxes. Kentucky and Washington provide that the tax lien sale shall be only for the amount of taxes due plus costs. If there is more than one prospective purchaser, Kentucky applies the rule of "first-come, first-served," while the Washington statute stands mute on the point. After expiration of the redemption period the tax purchaser commences an action to foreclose a tax lien, culminating in a public sale to the highest bidder for cash, any excess bid over the taxes due being refundable to the taxpayer. How efficiently the "first-come, first-served" rule operates in practical effect is conjectural, as is the procedure followed in Washington when there are many prospective tax purchasers. Note that in both systems the interest incentive is ignored.

If Florida's experience with its two-sale practice is at all instructive, it constitutes a glowing endorsement of the system. Referring to the Florida tax sale law, one author has noted:

This statute was designed to create a marketable title to lands against which tax proceedings were [previously] necessary because of nonpayment of taxes. . . . At this point we need only state that the law has been well received by the people of this state; that it is fair and just to the delinquent taxpayer; and that it has eliminated

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103. See generally C.J.S. Mortgages § 792, at 1518 (1949).
108. It appears that the Washington statute, Wash. Rev. Code Ann. § 84.64.010 (1962), which provides for sale of the tax lien via a certificate of delinquency, really operates as a one-sale system: “[D]iscussion with various tax collecting officials indicates that the law providing for sales of certificates of delinquency to individuals is regarded as a 'dead letter.' Such certificates are rarely sold. In a study of tax delinquency of rural real estate in seven Washington counties, it was discovered that during five years, 1928-32, such tax liens were sold on less than 10 per cent of the delinquent acreage. In the years since 1933 it appears that almost no certificates have been sold to individuals.” Eldridge, Property Tax Collection Procedure in Washington, 17 Wash. L. Rev. 123, 135 (1942). One might expect a more frequent use of the tax lien sale to have produced amendatory clarification of the statute.
a backlog of delinquent taxes, thereby producing an appreciation in the value of all lands subject to taxation.\textsuperscript{109}

Yet the same author has cautioned that a "tender consideration for the delinquent taxpayer," causing a modification of the Florida system would be "a distinctly backward step that will not be for the economic good of the citizen."\textsuperscript{110} Thus, the Florida system, as does H.B. 2569, appears to strike a balance of interests: the delinquent taxpayer, though still subject to a summary divestment of title, is accorded the right to the proceeds from a sale of his land at public auction upon his failure to redeem; the state still may entice tax purchasers with the lure of an inflated return on their investments upon redemption or sale to another bidder, as well as the still existent possibility of a windfall acquisition of the property absent competing bidders.

**THE ONE-SALE SYSTEM**

The majority of states convey tax title via a single sale. This sale is a sale of the tax lien rather than perfected title; perfection is generally a ministerial, semi-automatic procedure, although there are exceptions. Arizona,\textsuperscript{111} Colorado,\textsuperscript{112} Minnesota,\textsuperscript{113} North Dakota,\textsuperscript{114} New Jersey\textsuperscript{115} and South Dakota\textsuperscript{116} utilize a form most closely similar to that of Illinois, all utilizing the common characteristic of a single sale conferring unperfected tax title upon the party who agrees to pay the delinquency at the lowest rate of percentage return on the moneys paid.\textsuperscript{117} Arizona and North Dakota have more extensive provisions for a priori notice to the taxpayer than does Illinois; the Arizona statute provides that the taxpayer shall first be mailed a notice of delinquent taxes,\textsuperscript{118} while both Arizona and North Dakota provide for a mailing of notice of proposed sale\textsuperscript{119} in advance of publication of the delinquent tax list.\textsuperscript{120} In New Jersey\textsuperscript{121}


\textsuperscript{110} Thompson, *supra* note 109.


\textsuperscript{114} N.D. Cent. Code §§ 57-24-01, et seq. (1960).


\textsuperscript{116} S.D. Comp. Laws §§ 10-23-2, et seq. (1967).


and Colorado, notice of tax sale requirements are similar to those of Illinois, while South Dakota and Minnesota pay the least deference to the tax delinquent, making no provision for mailed notice of the tax sale. In these states, publication of the delinquent tax list is conclusive as notice upon the taxpayer for all purposes. Of the seven states utilizing the Illinois bid-down system, Colorado, New Jersey, North Dakota and South Dakota provide for perfunctory perfection of title; Illinois, Arizona and Minnesota require, at least ostensibly, that proof sufficient to satisfy a court or adjudicative administrative body be adduced that the taxpayer was duly notified of the expiration of the redemption period.

The second form of single sale system to be discussed is that which is in use by a plurality of American jurisdictions. Twenty-one states and the District of Columbia enforce the lien of real estate taxes via a "public sale," viz. single sale of inchoate tax title and the exclusive right to perfection thereof at public auction to the highest bidder for cash. Certain jurisdictions provide expressly that any surplus realized at such sale over the amount of tax indebtedness shall be held for the benefit of the tax-delinquent. Others impliedly incorporate this provision by defining the tax lien sale as one in the nature of a mortgage foreclosure.

129. HAWAII REV. LAWS § 246-56 (1969); ME. REV. STAT. ANN. tit. 36, § 943 (1964); OHIO REV. CODE ANN. § 5721.18 (Page 1954).
a characteristic of which is that the foreclosing mortgagee must account to the debtor for any surplus received over the amount of indebtedness. Pennsylvania and Tennessee explicitly make provision as to how the funds paid in at sale are to be allocated within the public office, but do not account for the situation wherein the proceeds of sale exceed taxes and costs. It could well be the case that this problem has never arisen. Connecticut, Rhode Island, Montana, New York, New Hampshire, Massachusetts, Maryland, Vermont and Virginia codes are mute on the point. In Louisiana, prior to 1954, the tax-delinquent was entitled to the proceeds of sale after taxes, costs and collateral tax obligations of the taxpayer had been liquidated by the proceeds of the tax lien sale; however, in 1954 the legislature, in changing the priority of disposition of the proceeds of the tax sale, deleted the provision according surplus proceeds to the taxpayer.

The states which fail to provide disposition of surplus proceeds to the owner would seem to embrace the worst of all possible worlds; neither the owner nor the state is fully benefited. The state is denied the important interest incentive which is obtained in the bid-down sale, and the owner is deprived of his property as summarily as he is in the Illinois bid-down system. Indeed, the owner is accorded even worse treatment than in the Illinois system; not only is the owner denied an opportunity to remuneration in part compensation for loss of his land, but the state, by distributing surpluses into the general fund, realizes the value of the property in excess of the lien. Although the state's failure to provide an interest incentive may be mitigated by the ability to receive a more lucrative return from the sale of tax-delinquent property, disbursement into a general fund does not aid the state in retiring tax-delinquent property from its rolls and placing such property back into the stream of commerce where it can be gainfully used and improved. The constitutionality of a tax sale statute which denies the owner the right to surplus proceeds bears not only on the validity of the statutes in the states referred to above, but also affects the Illinois bid-down system. One anomaly among the states in this category is notable. The tax sale in Texas confers perfected tax title in the
highest bidder.¹³⁵ No redemption from this sale is permitted, so long as a private party is the tax purchaser.¹³⁶ Consequently, the procedure prerequisite to a judicial order of sale is more rigorous. Although characterized as an in rem proceeding,¹³⁷ the application for tax sale must occasion service of process upon all record owners and persons otherwise interested of record, as in ordinary foreclosure suits.¹³⁸ Although this requirement is not jurisdictional, it may serve the interests of the tax-delinquent owner to a greater degree than does the opportunity to redeem from sale, especially when the owner is not made aware of this “opportunity” until shortly before its expiration.

The third specie of single sale system is characteristically defined in the most cryptic of statutory language. This method of sale, adopted in seven states,¹³⁹ is a sale of inchoate tax title to the person offering to pay the taxes and costs in exchange for title to the smallest portion of tax-delinquent real estate, i.e., a “tax sale without bid-down.” The prospective tax purchasers ostensibly bid down the fraction of the interest of ownership, divided in some instances¹⁴⁰ and undivided in others,¹⁴¹ which they will accept as consideration for their payment of delinquent taxes and costs. At first perusal, this system appears most cumbersome; rather than operating to re-insert the property in toto into the stream of commerce, the system replaces the delinquent tax encumbrance with yet a heavier burden, viz. the de facto encumbrance of a plethora of de minimis titleholders, seised of divided or undivided shares, each of which is diminished in value with every successive tax sale. Presumptively, this does not operate in the state’s interest; nor does it provide any special enticement to tax purchasers. In view of these ramifications, and of the more attractive alternatives to this system of tax sale, one is tempted to ask whether this system is really carried into execution as prescribed. Certain indica-

tions that this is not actually the current practice are present in two states. Missouri law, although providing for sale of the tax lien to the person who will pay the taxes in exchange for the smallest portion of the tax-delinquent property, also contains a provision that surpluses received at the tax sale shall be held by the county collector, subject to the claim of the delinquent owner. Presumably, there is no surplusage if the prospective purchasers bid down the quantity of ownership they are willing to accept in exchange for payment of taxes and costs; only a single liquidated sum is paid in. This inconsistency implies that if no person is willing to accept a fractional interest, it is the practice of Missouri to convey the tax lien via a public sale to the highest bidder for cash. Michigan explicitly embraces a hybrid system, combining the tax sale without bid-down with a public sale for cash as the alternative:

Each parcel described in the decree shall be separately exposed to sale . . . and the sale shall be made to the person paying the full amount charged against such parcel, and accepting a conveyance of the smallest undivided fee simple interest therein. . . . If no person will pay the several taxes and charges and take a conveyance of less than the entire thereof, then the whole parcel shall be offered and sold.

With the unlikelihood that many speculators will bid in on sales of fractional interests in conventionally subdivided property, the effect of the tax sale without bid-down seems nugatory, the actual sale being either public, as is indicated above, or a forfeiture to the state. Yet, lest state legislatures be unjustly faulted for maintaining antiquity in their laws, one state, Wisconsin, appears to adhere strictly to the tax sale, no-bid-down principle. Wisconsin not only contains a provision for such a sale, but further provides guidelines whereby division of the property shall be made pursuant to the tax sale.

In those states where the tax sale without bid-down system has become a fiction due to the inability to procure bidders on fractional interests, the method by which the property is disposed of is likely either a public sale to the highest bidder for cash, or an automatic sale to the state; in either event, it behooves legislators in these states to redraft the tax sale legislation.

The final form of single-sale system currently in use in American jurisdictions places the greatest burden on the state. Inchoate tax title is automatically sold to the state, or an extension thereof, by operation of law. The state therefore foregoes its right to payment of taxes until ex-

piration of the redemption period and functions as the custodian of the rights of the owner, in that the state must render the requisite proof and notices to the owner. Eight western states are presently utilizing this system.\textsuperscript{147} In California, there is first a sale to the state of all delinquent taxes by operation of law.\textsuperscript{148} After five years, absent redemption, the property is deeded to the state\textsuperscript{140} upon giving of notice to the owner.\textsuperscript{150} The deed to the state vests the following rights in the state: the right to lease out the property, subject to the right of redemption which must be included as a condition subsequent to the lease agreement;\textsuperscript{161} the right to retain title to the property in the state and foreclose the right of the owner to redeem via an action to quiet title;\textsuperscript{162} in which the owner, occupants and parties interested of record must be served with process,\textsuperscript{163} and in which a default decree is prohibited;\textsuperscript{164} and the right to sell the tax-deeded property via public auction,\textsuperscript{165} or privately on application of a prospective purchaser,\textsuperscript{166} the sale operating to terminate the owner’s right to redemption.\textsuperscript{157} When proceeds are realized from the lease or sale of tax-deeded property, the California statute provides for allocation of the proceeds between the state and its various political subdivisions.\textsuperscript{158} No provision is made, however, for surplusage distribution to the owner. Nonetheless, the taxpayer’s rights are given the best possible a priori protection in the California system, while the state bears the burden of a five year delay in collection of its delinquent taxes. California is characteristic of seven of the eight western states utilizing the automatic forfeiture system. The only anomaly exists under Nevada law, whereby, after sale of inchoate tax title to the state by operation of law, the state may, before

\textsuperscript{147} CAL. REV. & TAX CODE § 3436 (West Supp. 1968-69); IDAHO CODE ANN. § 63-1114 (1948); KAN. GEN. STAT. ANN. § 79-2306 (1964); NEV. REV. STAT. ch. 371, § 361.570 (1968); N.M. STAT. ANN. 72-8-5 (1961); OKLA. STAT. ANN. tit. 68, § 24313 (1966); ORE. REV. STAT. § 312.100 (1967); UTAH CODE ANN. § 59-10-33 (1963).

\textsuperscript{148} CAL. REV. & TAX CODE § 3436 (West Supp. 1968-69). The sale is held 21-35 days after publication of the delinquent tax list, CAL. REV. & TAX CODE § 3351 (West 1956).

\textsuperscript{149} CAL. REV. & TAX CODE § 3511 (West 1956).

\textsuperscript{150} CAL. REV. & TAX CODE §§ 3354, 3355, 3358 (West 1956).

\textsuperscript{151} CAL. REV. & TAX CODE §§ 3651, 3653, 3656 (West 1956). A criticism might be made that this would discourage lessees, and could be improved by a requirement in lieu of a termination clause in the lease, that the tenant-lessee attorn to the redemptor.

\textsuperscript{152} CAL. REV. & TAX CODE §§ 3594, 3605, 3614.5 (West 1956).

\textsuperscript{153} CAL. REV. & TAX CODE § 3597 (West 1956).

\textsuperscript{154} CAL. REV. & TAX CODE § 3603 (West 1956).

\textsuperscript{155} CAL. REV. & TAX CODE § 3693 (West 1956).

\textsuperscript{156} CAL. REV. & TAX CODE § 3696 (West 1956).

\textsuperscript{157} CAL. REV. & TAX CODE § 3707 (West 1956).

\textsuperscript{158} CAL. REV. & TAX CODE §§ 3718-3724 (West 1956).
the expiration of the redemption period, sell such title to a private pur-
chaser at private sale.159 In Nevada, therefore, the sale to the state could
function as a guide for a practice of private sales of tax title.

The automatic forfeiture system still utilized by the states referred to
above seems to be the antithesis of the other tax sale systems. Significant
is the fact that the states using this system of tax collection are located
exclusively to the west, where the presumption was at one time that land
was still sufficiently available for development, such that realty tax col-
lection systems could still accord maximum protection to delinquent own-
ers. Thus, the following statement of legislative policy is still viable:

It is hereby declared that it is the intention of this act to provide a method whereby
persons who have lost title to property through sale of the same to the state for
delinquent taxes may repurchase such property and recover the title thereto without
undue hardship and whereby the state and its subdivisions may receive their proper
revenue; and to the accomplishment of these intentions [this] act is to be liberally
construed.160

Contrast this statement with the explicated statutory policy of the other
categories of tax sales, favoring marketability of tax title and thus di-
minishing the rights of the property owner:

In view of the paramount necessity of providing regular tax income for the State,
county and municipal governments, particularly for school purposes; and in view of
the fact that tax delinquency, aside from being a burden on the taxpayers of the
State, seriously impairs the rendering of these essential services; and in view of the
further fact that delinquent land, with its attendant problems made acute by
the events of the past decade, not only constitutes a public liability, but also repre-
sents a failure on the part of delinquent private owners to bear a fair share of the
costs of government; now, therefore, the legislature declares that its purpose in
the enactment of the following article . . . is threefold: First, to provide for the
speedy and expeditious enforcement of the tax claims of the State . . . ; second, to
provide for the transfer of delinquent lands to those more responsive to, or better
able to bear, the duties of citizenship . . . ; and third, in furtherance of the policy
favoring the security of land titles, to establish an efficient procedure that will quickly
and finally dispose of all claims of the delinquent former owner and secure to the
new owner the full benefit of his purchase.161

Such a massive apologia suggests that the state commits tax delinquent
owners to punishment by breaking upon the wheel, rather than by selling
their property.162

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162. Breaking upon the wheel is defined as a method of execution “by which
the Criminals run through ten thousand of the most exquisite Agonies, as there are
Moments in the several hours and days during the unconceivable Torture of their
bruised, broken, and disjointed Limbs . . . .” 1 RADZINOWICZ, A HISTORY OF
ENGLISH CRIMINAL LAW 237 (1948).
CONCLUSION—HOW SHALL THE DELINQUENT TAXPAYER BE PROTECTED?

The era of a priori protection of the taxpayer at the cost of the state is apparently waning. The automatic forfeiture states can be expected to follow the same evolutionary paths as did their counterparts, with the inevitable increase in population and urbanization causing the state to lose its ability to bear the burden of foregoing its realization of realty revenue for periods of one to five years. Traditional protections of the taxpayer have not adequately served his interests, or preserved any of the states' interests. This is true because the remedy contemplated by these protections is the nullification of the tax sale. But nullification does not liquidate the tax lien; thus the state is unsatisfied because its revenue remains uncollected and the taxpayer is in no better position if he cannot pay the taxes, because the land simply must be resold, giving rise to further administrative expense.

A cogent tax collection system should be predicated upon two assumptions: (1) Certain persons, such as our self-deified recluse, can no longer, due to some form of incapacity, bear the liability of taxes, and should therefore be exempt; and (2) where taxes are delinquent, sold, and unredeemed by those people who remain accountable therefor, the tax-delinquent owner or owners should lose their property without recourse. Using this second proposition as a working assumption, legislators should not seek to avoid a tax sale for irregularity but should: (a) Impose upon public officials—not private tax purchasers—the rigorous duty of keeping the taxpayer well informed of his delinquency and its consequent occurrences, sanctioned not by the nugatory threat of nullification of the sale, but rather by specific statutory prescription of procedures which must be followed, as well as accountability to the tax-delinquent owner for official misconduct; and (b) provide a method whereby the delinquent taxpayer in the event of all tax sales has an opportunity to realize the net of the fair market value of his property minus the lien of taxes, penalty and costs, as proceeds of the tax lien or tax deed sale. The Florida system emulates these ideals to the greatest extent as has been thus far demonstrated. By providing a bid-down tax lien sale, it preserves to the tax purchaser the interest incentive of which the Illinois legislature is so zealously protective. By providing a subsequent public sale to the highest bidder, it preserves the interest of the taxpayer-owner to the extent of the value of his land in excess of the lien, as was originally the objective of the single public sale. Moreover, it allows the tax purchaser to realize the lucrative interest rate either as a credit on his bid at the public sale,

163. See generally annots. 97 A.L.R. 842 (1934); 147 A.L.R. 1141 (1943); 104 A.L.R. 823 (1936); 84 A.L.R. 324 (1932); 4 A.L.R.2d 575 (1948).
or as cash proceeds, if the tax purchaser does not wish to bid competitively. Certainly, the Florida system appears as the most ingenious and progressive tax sale system utilized to date. That a state legislature considering tax reform should pay strict heed to the provisions of the Florida system is obvious. However, whether a state can be made to embrace the above assumptions is also a viable issue, as well as is the question of the extent to which jurisdictions have already moved toward protection of the delinquent taxpayer.

The first assumption—i.e., the exclusion of disabled persons from tax liability—has found its way into reality tax collection laws to only a limited extent. At least one-fourth of American jurisdictions provide that a party under a legal disability at the time of the tax sale may redeem at any time within one to two years after the cessation of the disabling condition. This is not the best of provisions; the taxpayer receives a de minimis advantage, one of which he is not likely to avail himself. Moreover, the use of legal capacity as a criterion excludes the poor, old age pensioners, and those of marginally subnormal intelligence, from the protected class. Nor is the state's interest served; the marketability of tax title is threatened by the contingency of redemption at any time. Two states have promulgated other alternatives. Prior to 1951, a disabled taxpayer in Illinois could redeem from tax sale at any time before the expiration of one year following the cessation of disability; that provision was repealed in 1951, with no alternative consent to the disabled being enacted until the 1969 session of the Illinois General Assembly. At that session, the legislature gingerly moved to protect the rights of the disabled taxpayers. As a result, effective 1970, if a person sixty-five years of age or over owns tax-delinquent real estate either by himself or jointly with his spouse, and resides therein with his spouse, such person, upon proper application is entitled to a $1,500 reduction in his property assessment valuation. This represents to a slight degree the attitude dictated by the first presumption, i.e., to provide in personam relief to the disabled delinquent taxpayer, and to let him keep his land, rather than sell a non-marketable interest in the land. Connecticut has embraced this principle


168. The relief is minimal, but the attitude it reflects may be important for the future.
to an even lesser extent:

When any person committed to jail by the collector for the nonpayment of any tax is poor and unable to pay it, he may apply to take the poor debtor's oath . . . and, if he is admitted to take such oath, the community shall pay such collector the . . . tax.169

A more liberal policy toward consents to the indigent and disabled would cause the state to forego sale on comparatively few parcels; yet the benefit to the taxpayer, by comparison, is enormous.

The second assumption above, viz. that if the land is to be sold, let it be sold without recourse, and the two sub-assumptions thereunder have found slight recognition. Only one-third of the American jurisdictions impose the duty of notice-serving upon a public official, rather than or in addition to the adversely interested tax purchaser.170 Acceptance of the second sub-assumption has been the subject of controversy; should or must the states accord to the delinquent taxpayer-owner an opportunity to receive surplus funds produced by a tax deed sale? Is a tax-delinquent owner entitled to the opportunity to receive the surplus proceeds of a public sale of the property for cash? This question has been totally denied consideration in the courts, save in the aforementioned Balthazar case.

The question of entitlement to surplus proceeds has only arisen in state courts where the tax purchaser was a public body, pursuant either to forfeiture or bidding-in by such public body. The courts have been unanimous in holding that where the tax purchaser is a public body, and said tax purchaser has perfected its inchoate title, any resale by the tax purchaser of its perfected tax title vests no right to proceeds in the delinquent owner.171 These cases miss the point; the question raised in these

170. This includes the automatic sale-to-the-state jurisdictions, where the tax purchaser is a public body, see supra note 147. Other states so providing include those requiring that perfection may only be sought in a quasi in rem foreclosure action, whereby the owner must be served with process by a public official, the sheriff: LA. REV. STAT. ANN. § 47:2228 (1952); MD. ANN. CODE art. 81 § 100 (Supp. 1968); MASS. ANN. LAWS ch. 60, § 65 (1958); N.C. GEN. STAT. § 105-387 (d) (1965). Others merely provide, as does H.B. 2569, that the public official must serve a notice of expiration of the redemption period: ARIZ. REV. STAT. ANN. § 42-456 (1956); FLA. STAT. ANN. § 194.16 (1957); COLO. REV. STAT. ANN. § 137-9-28 (1967); IND. ANN. STAT. § 64-2280 (Supp. 1969); Mich. STAT. ANN. § 7.119 (2) (1960); N.Y. REAL PROP. TAX § 1014 (McKinney 1960); N.D. CENT. CODE § 57-27-02 (1960); W. VA. CODE ANN. § 11A-3-23 (1966); WASH. REV. CODE ANN. § 84.64.030 (1962).
cases is whether a public tax purchaser has any lesser rights than a private tax purchaser, once inchoate tax title is perfected. In all these cases, the proceeds were not produced until after tax title was perfected. But the true question involves entitlement to proceeds produced before or upon perfection of tax title, i.e., at a tax lien sale (inchoate) or a tax deed sale (perfected). Such a question naturally goes to the validity of the statute, whereas the cases here referred to presume such validity.

The contention that a system is unconstitutional if it does not provide the owner with the opportunity to receive surplus proceeds before or upon perfection, has been raised to date only in *Balthazar*.

The Balthazars claim that when their property was sold at a tax sale, they were deprived of due process of law, as guaranteed by the Fourteenth Amendment. Plaintiffs assert that tax delinquent real property cannot be sold by the state to a private purchaser at a tax sale unless there is a provision for unrestricted public bidding based on the real estate's value . . . .

Plaintiffs’ insistence on a public sale of the real property for cash is predicated on the premise that such a sale gives the owner an opportunity to recover the value of his property even though he cannot redeem, so long as there is competitive bidding. Thus, plaintiff contended:

*The* Court has consistently upheld the power to confiscate property to pay delinquent taxes but only where there is an opportunity for the delinquent debtor to recover the value of his property that exceeds the debt, even if it becomes too late for him to redeem the property itself . . . .

Under Illinois law there is no means whatsoever for a delinquent owner who cannot redeem to obtain the surplus value of his property . . . .

The United States District Court denied this contention, holding that the owner is accorded due process of law by virtue of his right to redeem, even though he has no opportunity to realize surplus proceeds from sale. The touchstone of the court’s rationale was *Nelson v. New York*, wherein the United States Supreme Court refused to invalidate a tax lien foreclosure procedure in which the state had retained the surplus proceeds of a public sale. *Balthazar* is currently pending before the Supreme Court; the appellants’ basic contention is that *Nelson* is inapposite because that court took cognizance of the delinquent owner’s right to intercede in the foreclosure proceeding, to assert that his property has a

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173. Id. at 4a-5a.


175. *Supra* note 172.
value substantially in excess of the lien, and to obtain the surplus proceeds of the sale.\textsuperscript{176}

But we do not have here a statute which absolutely precludes an owner from obtaining the proceeds of a judicial sale. In \textit{New York v. Chapman Docks Co.} . . . an owner filed a timely answer in a foreclosure proceeding, asserting his property had a value . . . exceeding the tax due. The Appellate Division construed . . . the statute to mean that upon proof of this allegation a separate sale should be directed so that the owner might receive the surplus. What the City of New York has done is to foreclose real property . . . and, in absence of timely action to redeem or to recover any surplus, retain . . . the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners . . . .\textsuperscript{177}

This excerpt of the \textit{Nelson} decision strongly indicates that the Court did take cognizance of the owner's right to intercede, and of the \textit{New York v. Chapman Docks Co.};\textsuperscript{178} appellants' contention in \textit{Balthazar} would thus appear to have merit.

But distinguishing \textit{Nelson} from \textit{Balthazar} is not dispositive of the problem; it does not resolve whether the denial of surplus proceeds is a deprivation of due process. Although the Court has in the past reviewed and validated state tax sale statutes which deny surplus proceeds to the owner,\textsuperscript{179} it has only squarely faced the question of the validity of a statute which denies the right to surplus proceeds, in light of the fifth amendment, on two occasions. In \textit{United States v. Taylor},\textsuperscript{180} the Court reviewed a sale of real property to collect a direct tax levied by the United States upon its citizens, apportioned among the states and territories.\textsuperscript{181} The property had been sold to a private purchaser for $3,000, to liquidate a tax lien in the amount of $70.50,\textsuperscript{182} and the former owner sued in the Court of Claims to recover the excess. The Court found, as a matter of statutory construction, that plaintiff was entitled to the surplus.

We find nothing in the provisions of the Act of 1862 . . . which takes from the owner of the land the right accorded him by the Act of 1861, of applying for and receiving from the Treasury the surplus proceeds of the sale, nor anything inconsistent with that right . . . .

The Statute . . . was an Act for the collection of taxes in insurrectionary districts. It was not a confiscation act . . . .\textsuperscript{183}

\textit{Taylor}, because couched in terms of statutory construction, sets no real

\textsuperscript{176} \textit{Supra} note 173, at 6.
\textsuperscript{177} \textit{Nelson} v. \textit{New York}, \textit{supra} note 174, at 110 (emphasis supplied).
\textsuperscript{178} 1 App. Div. 2d 895, 149 N.Y.S.2d 679 (1956).
\textsuperscript{179} \textit{See}, e.g., \textit{Kentucky Union} v. \textit{Kentucky}, 219 U.S. 140 (1911); \textit{King v. Mullins}, 171 U.S. 404 (1898); \textit{Slater v. Maxwell}, 73 U.S. 268 (1867).
\textsuperscript{180} 104 U.S. 216 (1881).
\textsuperscript{181} Act of August 5, 1861, 12 Stat. 292.
\textsuperscript{182} \textit{United States v. Taylor}, \textit{supra} note 180, at 217.
\textsuperscript{183} \textit{Supra} note 180, at 219-20.
constitutional precedent. However, in *United States v. Lawton*, the Court moved closer to a constitutional consideration. In *Lawton*, realty was sold by the United States under the same act involved in *Taylor*. The amount of the lien was approximately $170, and the United States, bidding in at the sale, became the successful tax purchaser for the sum of $1,100. The plaintiff, a remainderman, applied to the Treasury Department for surplus proceeds of the tax sale.

The present case differs from the *Taylor* Case only in this, that the land was in this case bought in by the tax commissioners for the United States and no money was paid on the sale. The land in the present case having been struck off for and bid in for the United States at the sum of $1,100, we are of opinion that the surplus of that sum, beyond the $170.50 tax, penalty, interest and costs, must be regarded as being in the Treasury of the United States, under the provisions of the Act of 1861, for the use of the owner, in like manner as if it were received from a third person.

It would appear that, as in *Taylor*, *Lawton* was a matter strictly of statutory construction, not of constitutionality, but for the further assertion of the Court:

It can make no difference that the United States acquired the property by bidding. To withhold the surplus from the owner, would be to violate the 5th Amendment to the Constitution, and to deprive him of his property without due process of law or to take his property for public use without just compensation.

Although the "just compensation" assertion is questionable, this opinion is the closest the Court has ever come to considering a delinquent owner's right to surplus proceeds under the fifth amendment.

With these great conflicts to be resolved, the Court should, in 1970, re-examine *Nelson*, *Lawton*, and *Taylor*. If the fifth amendment has truly been incorporated within the fourteenth as applicable to the states,

184. 110 U.S. 146 (1884).
185. Id. at 148, 149.
186. Id. at 149. Note that this presents an issue specifically concerning future-interest holders. The due process ramifications of tax sales as to these parties is contained in Comment, 73 Dick. L. Rev. 474 (1969).
187. Id. at 150.
188. See supra note 19.
then Lawton should be overruled, Balthazar reversed, and the Illinois bid-down system invalidated.190

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190. The fifth amendment "due process" clause was applied to the states in a non-criminal context in that body of cases which promulgated the "substantive due process" doctrine, whereby the due process clause was used as a hatchet to excise state legislation, e.g., Nebbia v. New York, 291 U.S. 502 (1934); New York State Ice Co. v. Liebmann, 285 U.S. 262 (1932). However, the substantive due process approach was never applied to ad valorem property tax statutes. These statutes have been appraised under the interstate commerce clause, e.g., Nashville V. & St. L. Ry. v. Browning, 310 U.S. 362 (1940); Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), but as applied to real estate, this approach is irrelevant. The closest factual analogy to a challenge to a state ad valorem real property tax challenge are those cases wherein the "petty larceny of police power" is exposed: the cases applying the proscription against taking without just compensation, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226 (1897). It has been argued, supra note 19, that a tax levy is not taking for a public use. This argument requires stringent analysis, in view of Berman v. Parker, 348 U.S. 26 (1954); United States v. Welch, 327 U.S. 546 (1946); City v. Vester, 281 U.S. 439 (1930).