How to Perfect Tax Titles

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HOW TO PERFECT TAX TITLES*

The general property tax constitutes the main source of income of our local governing bodies. Since 1930, this source has been made precarious by the increase of tax delinquency. Any method by which these delinquent taxes can be collected, or any means by which the taxing body can convert the property into money if it is forced to seize the land, would be of great benefit to nearly all taxing districts.

Our main discussion will center around this problem—how can a taxing body which has seized property for taxes obtain a marketable title? We are searching for a method of perfecting a tax title which will be as simple, inexpensive, and expeditious as is possible, realizing always that our test must be pragmatic, viz., is our title acceptable in the marketplace and will title insurance companies issue a policy on it?

There are five parts to our consideration of the problem.

(1) A brief sketch of the background of tax delinquency.
(2) A description of the method of acquiring tax titles.
(3) The various methods by which a tax title might be perfected.

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Note: The author wishes to express his appreciation to Eugene R. Hurley, Esq., special counsel to Nassau County, for his helpful assistance in the preparation of this article. Mr. Hurley was most generous in the sharing of his time and the fruits of his vast experience in tax matters. Of course, the author assumes full responsibility for whatever mistakes of fact, or errors of interpretation this article may contain.
(4) A survey of the counties of New York State to determine how each county solves the problem of perfecting its tax titles.

(5) A summary and conclusion.

Most of the suggested solutions for this problem are based on the experiences of Nassau County. This county was particularly plagued by tax delinquencies with a consequent accumulation of tax titles, and has been outstandingly successful in its handling of the situation. The principles, however, are equally applicable to any taxing body.

BACKGROUND OF THE PROBLEM

The historical method for a government's raising money is by a tax on the land or the products thereof. Up to about 1910, New York State derived most of its income from a general property tax. These collections were usually made by the county treasurer, but it was his duty to return a specified sum to the state comptroller. Apparently, this method of collecting a tax is as old as mankind because very similar systems were utilized by the Romans and Persians. Under these governments, each district was responsible for a certain amount of revenue and all the difficulties of collecting were placed on the shoulders of the local governor.

Since 1910, New York State has depended less and less upon land taxes. In 1927 a statute was passed specifying that even in the forest reserve counties all tax sales should be handled by the county treasurer.\(^1\) This marked the end of any large scale participation by the state in either the proceeds or the enforcement of property taxes. There still remains an "armory and Supreme Court tax" which is incorporated by each county in its tax bill and remitted to the State Department of Taxation and Finance. This tax is so inconsequential, amounting to but a few cents, that it might be described as "vestigial."

The reasons why the state government has abandoned this type of tax are not hard to find. Land no longer occupies the dominant position that it did in earlier times. When food, shelter, and clothing were derived by each family almost directly from the earth, everybody had to own land in order to live. Stuart Chase estimates that in 1790 a farmer derived about 90 per cent of his needs from his own farm while today he derives about 10 per cent. If this change has taken place in the position of the farmer, the man most dependent on the land, how much more is it true of the average citizen.

As our commercial life developed, other forms of taxation became available and the state, as the stronger body, adopted them for its own use. With the increase in franchise taxes, income taxes, gasoline taxes, etc., the state was able to obtain sufficient revenue without resorting to the difficult and inadequate general property tax. This method of taxation, however, represents the local government’s chief source of income.

At the present time the relation between the county and the state has been reversed. At the beginning of the era, the county assisted in supporting the state by handling the land tax. Now the county receives much of its support from the state and a large percentage of the expense of the average county is met by state funds.

Tax delinquency. From a quantitative point of view, tax delinquencies have not been very great for the past two or three years. Delinquency is generally confined to vacant land, which in Nassau County amounts to about 25 per cent of the tax roll. Even if a large number of this group failed to meet their taxes, the percentage of the total tax roll would not be large. In most areas it might amount to about two to three per cent.

However, if delinquencies continue, this constant and chronic state of functioning under an unbalanced budget has most harmful effects. Any municipality, since it possesses no power to coin money, cannot continue to operate if its debts mount too high. The total amount of delinquency need not be large to bring about most disastrous results. Let
us examine more closely the effect on county governments of unchecked tax delinquencies.

The usual method of preparing the county budget is to estimate the expenses for the coming year, subtract state aid and certain miscellaneous minor items of income, and arrive at the amount which must be raised by a general property tax. This sum is then divided by the total assessed value of all the properties in the area and the tax rate is determined. Some communities, because of political considerations, have a uniform tax rate and the variable figure in these areas is the assessment, but the total effect is much the same. In the past there was no thought of reserves for deficiencies. In fact, uniform budget laws in a few states made this procedure practically impossible.²

When taxes are not paid, the results are almost immediately apparent. Because of the preponderance of fixed and quasi-fixed charges, there is a relatively small margin in any municipal budget for the underspending of appropriations to meet sudden shrinkages in income.³ Hence a deficit occurs and borrowing follows, using as security the anticipated income for the succeeding year. The next budget will have the additional expense of this new debt, while the property available for taxation has been reduced. Consequently, the rate for each taxpayer will be higher. If tax delinquencies continue, it follows that the rate will continue upward, the county will become less attractive to home owners, borrowings will increase, and the whole financial structure of the taxing body is in danger of toppling.

This problem of tax delinquency is not limited to a particular part of the country. A few years ago conditions reached such a stage that forty-five states passed laws which tried to make the plight of the delinquent as pleasing as possible.⁴ Unfortunately, nearly all state actions were without distinction as to the real needs of the taxpayers and ranged from minor extension of the time delinquency begins,

² Bird, Extent and Distribution of Urban Tax Delinquency, 3 Law & Contemp. Prob. 337.
³ Id. at 338.
⁴ Smith, Recent Legislative Indulgences to Delinquent Taxpayers, 3 Law & Contemp. Prob. 370.
through easy payments, to actual compromise of the amount due. Of course, many indulgences were granted by local taxing bodies, too, but in general, they have been more restrained in their good will than the legislatures. Furthermore, most of the local plans have been designed by county treasurers and tax collectors in close touch with the situation and there were attempts to make distinctions between the various types of delinquencies.\(^6\)

These indulgences were made necessary by the tremendous delinquencies of the depression years, but the problem in a less spectacular form still exists. Everywhere taxing bodies are confronted with the question, "How can we force the payment of back taxes?" The usual method is by the tax sale, i.e., the selling of the property, or a lien against it, to the general public. But there is often a shortage of tax sale buyers. In fact, sixteen states reported that buyers were practically non-existent in recent years.\(^6\) When this situation exists, the taxing body has to take title for itself and the problem is not solved. The deed delivered under the general tax law after a valid sale gives title in fee, but tax titles are generally considered unmarketable. As a result, there has accumulated in the tax offices, a great number of parcels of land which are out of the market, and having ceased to be taxable, no longer contribute to the expense of government.\(^7\)

It is the disposing of this accumulation of good, but unmarketable titles, that taxing bodies must accomplish. A cheap, efficient method of perfecting their tax titles would solve this difficulty. Titles must be marketable in order to have the widest possible number of purchasers. All land has value, but if it has value to only a limited number of buyers, the chances of obtaining an adequate price is much less. The object is not to sell to tax specialists, but to people who are interested in improving the land and retaining it. Thus the property is not only returned to the tax roll, but

\(^6\) Id. at 372.
\(^6\) Allen, Collection of Taxes by Recourse to the Property, 3 LAW & CONTEMP. PROB. 397.
\(^7\) Fairchild, Economic Aspects of Land Titles, 22 CORN. L. Q. 229.
there is every likelihood that tax collection will be assured in the future.

Title must be perfected to insure saleability. The intrinsic value of the land remains the same whether the title is simply good or whether it is marketable. But in the former case, the chances of converting the land into cash are greatly reduced. Indeed, it might be said that the effect on saleability is almost total.

Counties like Nassau, Westchester, and Suffolk have had a particularly high rate of tax delinquency because of the large numbers of unimproved parcels in these counties. These vacant lands produce neither income nor services and were bought at inflated values for speculative purposes. There is a greater tendency on the part of owners of this type of property to be negligent in paying taxes. Furthermore, this tendency is accelerated by other factors. Usually development property is taxed at a higher rate because the non-resident owners have little opportunity to object. Furthermore, the purchase price of the land has some influence on the assessment and since the land is generally overpriced, the assessment is far above equivalent acreage in the area.

**METHOD OF ACQUIRING TAX TITLES**

The method by which a person may obtain a tax title is by purchasing it at a tax sale. The General Tax Law provides that the county treasurer has a right to sell lands on which the taxes have been unpaid for six months after the first of February following the year of the levy. In the cases of Orange and Sullivan counties the tax must be unpaid for one year. Interest is to be charged the delinquent taxpayer at the rate of ten per cent a year. A list, containing the name of the owner as shown on the assessment roll, a brief description of the real estate, and the total amount of unpaid taxes, shall be published in two newspapers for six weeks prior to the sale. This is a sale of the actual property in question and not of a lien on the land.

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9 Tax Law § 150.
10 Id. § 151.
11 Id. § 150.
The right to sell tax liens upon the real estate of the owner is permitted only when the legislature grants such powers to the taxing body in express terms. Nassau County received this express right when its Administrative Code was enacted by the legislature. This Code also provides for the method of advertising and holding the sale, and prescribes a penalty of ten per cent for each six months. This is not the same as an interest rate, for it becomes due on the first day of each six-month period.

If a lien is sold against the property, the purchaser must foreclose to obtain title. If the land itself is sold the tax deed is automatically issued by the county treasurer after the period of redemption has elapsed. In Nassau County, however, the tax sale buyer is permitted to pursue either course. In recent years, the buyer has nearly always demanded a tax deed.

The tax sale. The actual sale, which is just the reverse of the usual auction in its manner of bidding, is rather interesting to the onlooker.

In advance of the auction, those interested in buying study the list of delinquent properties with great care. There are various tests and devices that are used by the experienced tax sale buyer to determine whether he should buy this or that particular piece of property. An extended discussion of these techniques is outside the scope of our present study, but a few rules of thumb might be revealing. These rules are particularly necessary now since gas rationing has made it almost impossible to go out and actually inspect the property.

The assessment roll is first examined to determine whether the land is improved. If it is, there is a strong probability that the owner will redeem it, and a bid is justified. An inspection of the delinquent taxes as published in the newspaper sometimes serves this same purpose, for if

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12 In re Ueck's Estate, 286 N. Y. 1, 35 N. E. (2d) 624 (1941).
13 Administrative Code § 5-24.0.
14 Id. §§ 5-33.0 to 5-39.0.
15 Id. §§ 5-40.0.
16 Id. §§ 5-58.0 to 5-67.0 (covering foreclosure) and §§ 5-51.1 and 5-51.2 (right to a tax deed).
17 For reasons for this choice, see Foreclosure, pp. 14 and 15 infra.
the amount is large for that area, it is assumed that there must be a house on the land. A quick check of the tax records will reveal that some of the properties are delinquent only in county taxes, or only in school taxes, or perhaps for only one-half a year. In such cases, it is quite probable that the delinquency is just an oversight and the owner will redeem. In nearly every instance, the object of the buyer is to get his money back plus the interest or penalty. He is very seldom, if ever, interested in buying property.

When a piece of property is offered by the auctioneer, the bidding commences with someone offering "ten." This means that the buyer will pay the delinquent taxes and will try to collect them from the owner of the property plus ten per cent for each year the taxes continue to remain unpaid. In Nassau County, of course, the ten per cent is a penalty and accumulates at the beginning of each six-month period. In other words, the buyer is paying what was owed the county and is to be paid a certain percentage for advancing his own money and doing the work of collection. However, there are other bidders at the sale and if they believe that the owner might eventually pay the taxes, they try to obtain it for themselves. They do this by offering to accept lower rates of interest. So the bidding proceeds from ten, to nine, to eight, until it might finally reach "flat," which indicates that the buyer expects no interest on his money. In the latter case, the buyer usually has some right with respect to the property, either as mortgagee, judgment creditor, etc., and he is trying to protect this right.

This feature of competitive bidding is necessary to attract buyers, but it introduces a rather unfair element into the situation. Some taxpayers have to pay a ten per cent penalty while others, whose property is more productive or more desirable, have only to pay two or three per cent. But an interest rate of ten per cent is necessary to attract the investors. Rockland County had a penalty rate of ten per cent and was most successful in its sale of tax liens and in obtaining redemptions through the threat of sale. The following year it cut the interest from ten to seven per cent.

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18 See note 15 supra.
because of the political unpopularity of the old rate. It offered $500,000 worth of tax liens for sale and sold only $7,000.\textsuperscript{19}

Private tax sale buyers have been criticized and some writers think they should be entirely eliminated. They are described as "unscrupulous," "loan sharks," and "Shylocks," and undoubtedly some of these maledictions are justified.\textsuperscript{20} But the tax lien investors do perform a service to the county. Of course they supply immediate funds, but in addition their presence provides a strong incentive to property holders to pay their taxes.\textsuperscript{21}

The sale of his property, or a lien against it, on a tax sale does not deprive the delinquent owner of his title. He still has his period of redemption. The term "redemption" refers to the right of the original owner to demand a reconveyance. This privilege is usually extended to the owner, the owner of a part interest, or any person with a legal interest such as the mortgagee.\textsuperscript{22} In Nassau County this period of redemption is two years.

There are a great many parcels which no buyer is willing to purchase, with the result that the county must needs take them. Of course, it too has the right to collect with penalty and interest, but most of the properties which seemed to have any conceivable chance of being redeemed have been taken by the private buyers.

Just what does a buyer at the above described sale get for his money? He obtains a title to the property. The county treasurer in selling for taxes, sells a new and independent title to the property.\textsuperscript{23} The title so sold is no part of, or in any way derived from or dependent upon other titles or liens existing in the property, or limited by them.

\textsuperscript{19} Rodney, \textit{The Tax Lien Investors' Relation to the Collection of Delinquent Taxes}, 3 L\textsuperscript{\textregistered}W & CONTEMP. PROB. 432.
\textsuperscript{21} Rodney, \textit{op. cit. supra} note 19, at 432.
\textsuperscript{22} Hunter, \textit{Legal Provisions Affecting Real Estate Tax Delinquency Tax Sales}, \textit{Bulletin} No. 48, \textit{Bureau of Business Research}, University of Illinois.
In Nassau County the right purchased by the buyer is to receive his money with penalties, or in default thereof after two years to obtain a treasurer's deed of the property, or to foreclose and receive a referee's deed. The purchaser is given the right to pay any taxes affecting the premises, and add the amounts so paid to the tax lien, receiving additional penalties on such amounts.

Therefore, it may be seen that although the sale is often referred to as a "tax lien" sale it is more than that for the buyer obtains a title. This title is subject to being defeated by the owner's paying delinquent taxes, so it is sometimes called an "inchoate title." This title becomes absolute after the serving of the proper notice on all those interested in the property (twenty-one months after the sale in Nassau County) and their failure to pay within the two-year period. At the expiration of that period, the treasurer will issue a deed and the buyer at the tax sale has now a tax deed and is the owner of some property.

Tax titles. But the holder of a tax title is in an unenviable position. Such titles have always been viewed by the layman and attorney alike with extreme suspicion. Chatters has pointed out:

A tax deed issued at the expiration of the statutory redemption period of a tax certificate with no judicial process involved is a poor instrument in the eyes of land title examiners and courts of law.

The former owner is divested of his title through a statutory proceeding and it is most strictly construed. The reason for this strictness of the courts and something of the background of tax titles is admirably set forth in an old Michigan case, Auditor General v. Sparrow:

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24 Administrative Code § 5-50.0.
25 Id. §§ 5-53.0.
26 Id. § 5-54.0.
27 Id. § 5-49.0.
28 Id. §§ 5-24.0, subd. 4. "The term 'sale of tax lien' includes sale of real property affected by such tax lien."
29 In re Ueck, supra note 23; Town of Amherst v. County of Erie, 260 N. Y. 361, 375, 183 N. E. 851 (1933).
30 For a full discussion see Fairchild, op. cit. supra note 20, at 61 et seq.
31 116 Mich. 574, 74 N. W. 881 (1898).
Under the laws of many of the states, including our own, it has been the practice to enforce the payment of delinquent taxes upon land by a sale of a portion or the whole of the land taxed; resulting usually in the sale of delinquent lands for a small fraction of their value. So obnoxious was this that the courts of these states with practical unanimity have refused to sustain these titles unless the proceedings were in all respects legal. The tax laws were intricate and the many steps required in the assessment, levy, return, advertisement, and sale, involved official action of so many persons and clerical work so great in detail, that it was seldom that the tax proceedings were perfect and it was for many years the common understanding that tax deeds were uniformly void.

The taxes which create the lien are enforced contributions, not based upon the personal consent of the owner and the sale for these taxes is by an administrative officer who sells something he does not own. Consequently, the courts have stated that the basis for this sale must be found in the statutes and unless the statute is followed in every detail, there is no valid sale.32

Up to about twenty-five years ago, the courts were so assiduous in finding errors in the tax sale that it was generally accepted, even by the buyers themselves, that a tax title was not good. At common law a tax deed did not ipso facto transfer the title of the owner. Its recitals bound no one and it created no estoppel upon the former owner. There was no presumption, when a tax deed was produced, that the facts upon which it was based had any existence.33

In the past three decades there has been a change in this viewpoint. The public policy of the state has dictated that the levies of taxes upon real estate be enforceable in terms of good title and the Court of Appeals has upheld the validity of such titles in emphatic terms.34 In one case, the court took pains to point out:

The regularity of all proceedings leading up to the tax sale was either conclusively or presumptively established by the presentation of the tax deed.35

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32 Baker, Legal Aspects of Tax Delinquency, 28 ILL. L. Rev. 162.
33 BLACKWELL, TAX TITLES 430.
This was a complete reversal of the older theory.

Now, therefore, a tax deed is generally regarded as transferring good title, but not a marketable one. No court would specifically order a buyer to take a tax title because there is a great possibility that the former owner might discover some jurisdictional defect and deprive the buyer of his land. The courts have uniformly held that to compel the purchaser to take under such circumstances would be inequitable.

A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title which will enable him to hold his land free from probable claim by another . . . . If it may be fairly questioned, specific performance will be refused.36

The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding title was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser’s title would remain . . . (and) this situation, existing, the purchaser should be discharged.37

For much the same reasons, attorneys and title insurance companies do not consider such titles marketable.

Until a lawsuit is brought and terminated successfully in favor of the tax deed holder, these tax titles cannot be readily sold. But who will bring this action? The original owner, mortgagee, occupant, or lienor may not be interested at the moment, or the whereabouts of these people may be unknown. In nearly every case, the action must be brought by the holder of the tax title.

But what action is available? It cannot be ejectment, or trespass since the land is not occupied by the former owner, or by anyone. Moreover, each parcel would require a separate action. One immediately thinks of the action to determine claims to real property provided by Article 15 of the Real Property Law. Such an action would be almost exactly

37 Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905 (1885).
what we need, were it not for the fact that a plaintiff is required to be in possession for at least one year prior to its commencement. The delay of a year after the delivery of the tax deed is a serious objection in itself to the use of such action and, of course, increases the cost of the premises by interest and taxes for another year. This defect was appreciated by the Law Revision Commission and on their recommendation the article was amended in 1943. Section 500 of the Real Property Law now permits a municipality owning a tax deed to bring an action at any time. If judicial interpretation is favorable, this statute should be of great help to municipalities in perfecting tax titles. But the problems raised by serving the summons would still remain.

Let us now consider the relative advantages and disadvantages of the various methods available for perfecting title.

**Methods of Perfecting a Tax Title**

At the outset, it should be made plain that the handling of all the aspects of delinquent taxes is a complicated one. It involves problems of accounting and general office management and requires sound planning with careful control. First, the records must reveal delinquency easily and readily, and then there must be a co-ordinated follow up. The machinery for notifying and interviewing delinquents, and of making, approving, and collecting installment contracts for redemption require complete and accurate records and demand a great deal of work. Many municipalities have not developed the proper departmental organization, and it is management, rather than legal difficulties, that blocks them in their attempts to solve delinquency.

The problem that concerns us—the perfecting of title to delinquent properties and making them generally marketable and insurable—is of fundamental importance, but it is but part of the complete picture. And, even after the county has obtained a marketable title, there is the matter of disposing of the properties. The county must sell them at auc-

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38 L. 1943, c. 561, § 1, effective Sept. 1, 1943.
39 See discussion under "summons", p. 26 infra.
tion or private sale and must handle the mortgages and installment contracts resulting therefrom, and this, too, is a problem of administration and management.

Foreclosure. The usual method by which a tax lien becomes a tax deed is by a foreclosure proceeding. The method is practically the same as in foreclosing a mortgage and is subject to all the criticisms leveled at this type of action. Mortgage foreclosures have been severely and justly denounced as expensive, slow, and cumbersome. Yet mortgages are single loans of substantial amounts. Tax liens on vacant land are generally but a few dollars, or even a fraction of a dollar, each year. Here the difficulties are such as to make a foreclosure in these circumstances most impractical.

Foreclosure in tax cases is not a new idea, but it is a thoroughly exploded one. Its most serious defects were not glaringly apparent in such a place as New York City where it has been the sole method available since the formation of the greater city. Here the liens have been of such substantial amounts and the premises affected of such value that the inefficiency and cost of the foreclosure proceeding could be disregarded. At the present time, however, foreclosure has proved too expensive for even New York City and delinquencies, with no one interested in the tax liens, have grown to alarming proportions. If these conditions exist when property is valuable, it ineluctably follows that no county which has a large number of small liens can use foreclosure. Indeed, in those areas where this is the only method available, no action of any kind is taken, and the taxes are allowed to accumulate.

To foreclose a lien it is necessary to plead its amount. Both the complaint, the referee’s report and judgment must contain, in some detail, at least the amounts of all these taxes and at least once, the method of their calculation. Where the law permits the inclusion of the holdings of various individuals in one action, the individual interest of each defendant must be separately set forth. When we consider

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40 The average cost of 22,576 completed mortgage foreclosures in Queens was $546.54. Fairchild, op. cit. supra note 20, at 229.
that in certain of the actions brought by Nassau County, there were upwards of 800 defendants and about 4,000 lots, the impracticability of conducting such an action is obvious. Had the county employed the foreclosure method, the complaint alone, using ordinary typewriting paper, would have weighed about twenty-five pounds. The cost of paper alone for the 800 complaints would have been staggering.

Since 1919, Nassau County's Tax Law provided for foreclosure, and the method was given a pretty thorough test. The judicial sales themselves proved a farce, as always. The method did preserve the right of redemption up to the date of sale and fixed the charges which could legally be made by the holder of the tax lien. But its expense and delay caused its general abandonment by about 1930.

Partition. The difficulties with foreclosure lead to the use of partition actions in which, as is well known, every possible question of title may be determined. The following quotation bears this out:

This court is committed to the view that a person claiming as tenant in common, even though not in actual possession, may now maintain a suit for partition in which all actions of title affecting the entire property may be tried and adjudicated with the same effect as was formerly the practice in actions of ejectment. C. P. A. 1074; Weston v. Stoddard, 137 N. Y. 119; Satterlee v. Kobbe, 173 N. Y. 91, 95; Brown v. Feek, 204 N. Y. 238.

In addition, sections of the Civil Practice Act provide that an infant defendant, or anyone suffering a legal disability, may reopen certain cases within one year, and that a judgment may be reopened within seven years where service is by publication, but these sections specifically except partition cases. Since some of the actions were against infants, and many used service by publication, this exception was important. A partition action may be maintained without even being in possession, much less for a period of a year as in the old Article 15 of the Real Property Law.

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41 For an interesting and complete summary of this situation, see Fairchild, Tax Titles in New York, 8 Brooklyn L. Rev. 61 et seq.
42 Administrative Code §§ 5-58 to 5-67.
44 C. P. A. § 217.
45 See p. 19 supra.
The use of this action does involve the necessity of creating a tenancy in common in the tax title by the simple expedient of conveying an undivided interest to some nominee. As the real object of the action is the determination of questions of title, and not partition or sale, the action need be maintained only to the point of obtaining a judgment against the possible adverse claimants, which judgment is final as to them.46

All people who might possibly be interested in the property are joined with the tenant in common as defendants. The complaint makes an appropriate but general allegation that their claims have been effectively extinguished by the delivery of the tax deed. After that judgment, which is final as to the adverse parties, the tenants in common convey, one to the other, and the title is marketable as well as good. Of course, as many parcels may be included in a single action as is considered advisable, regardless of the fact that the claims of the adverse defendants extend to but a single parcel.

The County of Nassau, which has used this type of action almost exclusively, has had almost 4,000 lots and more than 800 defendants in one action. The using of partition actions to perfect title first came before the Court of Appeals in McCoun v. Pierrepont47 in 1921 and the court accepted it as a proper means of trying a title. It became increasingly popular about 1926, and has been used in Nassau County, and to a great extent in Suffolk, since about 1930.

The right of the county to maintain the action was upheld in Nassau County v. Linzer.48 The court said that if the county were an individual or a private corporation, it could maintain the partition action as a tenant in common, but an amendment to the Nassau County Tax Act, gave the county the same rights as any purchaser when it purchases liens at its own tax sale. This section specifically authorizes the county to so purchase, to take deeds, and to perform all other acts to perfect the title of real estate acquired. Fur-

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46 Brown v. Feek, 204 N. Y. 238, 97 N. E. 526 (1912).
48 165 Misc. 909, 3 N. Y. S. (2d) 327 (1938).
thermore, "it can transfer or convey any interest in such land necessary to facilitate the perfection of the title thereto."

Partition has proven itself to be a practical, fairly economical, and reasonably easy method of perfecting titles. It could be improved to make it quicker, easier, and cheaper and this is what has been accomplished by Article 7B of the Tax Law which we will discuss later.

**Summons.** The greatest drawback in the use of the partition action was the difficulty in serving the summons. With hundreds of defendants, the service, even when the person could easily be reached, was slow and expensive. The plaintiff's information concerning the whereabouts of the defendant is, at best, meagre since it is derived almost exclusively from the tax collector or county clerk's records. Many of the owners of development lots will be found to reside in large cities, situated at the other end of the state. If he lives in an apartment house, the difficulties of service may be greatly increased. Mistakes in identity, too, are not impossible.

The law provides for service of the summons by publication when the plaintiff is unable, with due diligence, to make personal service. Such publication is accompanied by mailing, where the defendant's address is known, whether within or without the state. So decided are its advantages over personal service in the case of actions affecting interests in real estate, that any well informed attorney greatly prefers its use.

To obtain such an order, some effort must be made to personally serve the summons, and an affidavit must be prepared describing the effort. If the judge is satisfied from a reading thereof that the defendant cannot be personally served, the order is validly granted. The reasonableness of the judge's belief is not open to question. The only requirement is that the court be satisfied that due diligence has

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49 In Fairchild's article in 22 Cornell Law Quarterly at page 233 (referring to partition suits) the author states that the expense "running into hundreds of dollars forbids their use in clearing titles in lands of small value." With this statement we disagree. If there are not more than two lots and no more than two defendants, in Nassau County the price to a private tax sale buyer to perfect his title is seventy-five dollars. Special counsel for the county receives a fee of three dollars for each lot.
been followed in attempting to serve the defendant. In every action brought by the County of Nassau several hundred defendants were served by publication. It may be confidently stated that to an attorney of experience the task of making satisfactory investigations and affidavits for orders of publication is not an unduly formidable one. But examiners for title insurance companies seem to be always doubtful of the legal sufficiency of the affidavits on which the order for publication depends. As a result there is, and generally is bound to be, a tremendous waste of effort and expense.

**Article 7B.** In an effort to effect certain improvements in its method of perfecting titles, Nassau County succeeded in having the legislature add Article 7B to the General Tax Law of the state. This article was passed in 1939 and provided substantially as follows:

It permitted one to bring an action to determine a claim to real property under Article 15 of the Real Property Law without pleading or proving possession for one year. This action could be maintained by one who holds only a certificate of tax sale, and not a deed, provided the period allowed by law for redemption has expired. The certificate will be treated as if it were a conveyance. Some municipalities sell only tax liens which must be enforced by foreclosure, others sell leaseholds of varying terms. Still others sell the land itself. No matter what the nature of the tax sale, the action to perfect title is available.

To protect the right of the former owner, the right of redemption was allowed up until the granting of the final judgment.

It was in the serving of the summons that Article 7B makes its greatest contribution to increasing the efficiency of the action to perfect title. An order of publication was to be signed when the complaint was verified and affidavits showed the following facts:

That deponent searched and inspected the record in the offices of the County Clerk or Registrar, the County Treasurer or Receiver of Taxes, and Surrogate of the county wherein the action was brought.
The last address of each defendant as shown by the above records.

Whether the property affected by the action is improved or vacant, occupied or unoccupied, and if occupied the name of the occupant, if the deponent has been able to learn such name.

The order for service by publication must direct that such service be published in two newspapers of the county for two successive weeks. It must also direct that copies of the summons, complaint and order be mailed to the last known address of the defendant.

This article made no fundamental changes in the matter of foreclosing tax liens. It was an improvement on, and an extension of, a method already widely and successfully practiced. Titles resulting from a final judgment under this article found a ready acceptance in the real estate market and were insured by the title insurance companies. But there was a certain amount of hard work necessary to bring one of these actions. Because of the thousands of pieces of property involved, title searches, preparing individual summons and complaints, etc., required a trained and efficient organization. Many municipalities felt this work to be onerous and unduly expensive and they set about developing a proceeding which would perfect title in a much easier manner. Their ideas are embodied in the amended Article 7A of the General Tax Law which was passed at about the same time as 7B.

Article 7A. In 1935 a Model Tax Collection Law was issued by the National Municipal League.50 Although this plan involved a return to the old theory of foreclosure, there were variations and improvements in method which made the whole process extremely simple. This simplicity, however, does not extend to the article itself for it contains about nine hundred closely printed lines, compared to about 240 lines for the old and complex law. Let us proceed to a more detailed consideration of the act itself as well as of the advantages that should result from its application.

The third title of this article sets forth the so-called

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50 24 NAT. MUNIC. REV., No. 5, supplement.
foreclosure in rem, an entirely new procedure.\textsuperscript{51} This is available only to municipalities (Article 7B, on the other hand, is available to any holder of tax deed) and the tax liens must be at least four years old. The procedure is against the land and not the owner. There is no personal judgment. It vests title in fee in the foreclosing land district. No title searches are required. No summons and complaint need be served personally. There are no referee's or filing fees. The foreclosure of delinquent taxes by a foreclosure in rem has been upheld by the U. S. Supreme Court as constitutional and not violative of due process in actions involving laws of Washington, Nebraska, and Minnesota.\textsuperscript{52}

The tax collector prepares a list of all property on which taxes are delinquent.\textsuperscript{53} Each parcel is numbered serially and contains: a description of the property; name of last known owner as shown on assessment roll; amount of tax and the interest and penalty rates. Certified copies of this list must be filed in the county clerk's office, in attorney for tax district's office and in the office of the collecting officer of any other tax district having the right to assess any of the parcels.

The filing in the office of the county clerk has the same effect as the filing of individual \textit{lis pendens}, i.e., if there were 4,000 parcels, it would constitute individual notice of action and a complaint. Mere filing does not cut off the owner's rights, he is given another and final chance.

After filing the list, a public notice of foreclosure (but not the list of the properties) is published for six weeks in two newspapers. It is notice to all the world that the list of delinquent taxes have been filed and that all persons having, or claiming an interest, may examine the list at the county clerk's office.

To further protect the owner, the collecting officer is required to mail a copy of the public foreclosure notice to

\textsuperscript{51} This discussion of Article 7A is adapted from \textit{Property Taxes}, a Symposium of the Tax Policy League, pp. 363 ff.


\textsuperscript{53} \textit{TAX LAW} § 165.
each property owner on the list. A mortgagee or lienor may file a notice with the collecting officer asking that he be mailed any notice required under the statute.

The final judgment directs the collecting officer to prepare, execute, and record the deed conveying title to the parcels concerned. Upon execution of the deed, the foreclosing district is seized of an estate in fee simple absolute and all persons, including the state, infants, incompetents, and non-residents are forever foreclosed of all their right, title, and interest, and equity of redemption in the property.

Article 7A authorizes the court to direct the making of the conveyances and hence the title is based on a judicial decree which contains findings of fact based upon proof that there has been compliance with the proceedings of the statute. According to its sponsors, this gives marketable title since it is not subject to attack because of procedural defects.

Comment. The people who brought about the passage of Article 7A were seeking a way to create a marketable title cheaply and quickly. It is an admirable objective, but the method reveals a lack of contact with reality. It is extremely doubtful if any title company would be sufficiently impressed by the decree to insure the title. This type of title would be very similar to Torrens titles which also depend upon a judicial decree. Torrens titles are good and marketable, but they are not generally accepted by the public. As a result, such titles encounter as much sales resistance as if they were actually defective.

The law of property is peculiarly the product of history and custom. Surrounding it are prejudices which are deeply rooted. Any changes in them must be slowly and carefully made. Too drastic an alteration is very apt to prove abortive.

Present status of Article 7A. The attorneys from the interested municipalities were eager to have the Court of Appeals rule upon the title which resulted from the *in rem* tax foreclosure proceeding. Various difficulties delayed their test case and it was not until March, 1942 that the case of
Lynbrook Gardens, Inc. v. Bernard C. Ullman was commenced.

This was an action for the specific performance of two separate contracts wherein the plaintiff agreed to sell and the defendant agreed to buy two parcels of real property. The plaintiff obtained title through mesne conveyances from the Village of Lynbrook which in turn obtained its title under the in rem tax foreclosure proceeding (Article 7A). Defendant moved for judgment on the pleadings contending that the said statute is unconstitutional in that it attempts to deprive a person of property without due process of law.

There were two causes of action alleged in the complaint. The first is predicated upon a contract in which the plaintiff agreed to convey a fee simple title provided some or all of taxes were due and unpaid at the time the village foreclosed the lien. The second is based on a contract in which plaintiff agreed to convey a fee simple title even if all the taxes had been duly paid at the time the village foreclosed the lien.

Even though these premises were assessed to an "unknown" owner the court had no trouble in dismissing the defense of unconstitutionality citing New York cases to this effect. The court directed a verdict for the plaintiff so far as the first cause of action was concerned.

As to the second cause of action the court pointed out that it was most unfair that a man should lose his property merely because the recording officer forgot to record his paying of his taxes. Plaintiff contended that the statute is carefully drawn to rest the jurisdiction upon the appearance of things and a taxing district may proceed with the in rem foreclosure "whenever it shall appear that a tax district owns a tax lien which has been due and unpaid for at least four years." The court disagreed and held that if a man pays his taxes, he is under no duty to inspect the lists at the county clerk's office to see whether his property is being offered for sale. The court which rendered the judgment in the tax foreclosure proceeding had acquired no jurisdiction over the property in the second cause of action because

it attempted to apply the statute to a situation to which it had no application.55 Judgment for defendant on the second cause of action.

The Appellate Division affirmed this decision but gave the plaintiff leave to appeal. At the present time (November, 1943), the case is still before the Court of Appeals.

If a proceeding is taken under Article 7B and a personal judgment is entered against all the defendants, it can not be reopened. There would be no possibility that a taxpayer could later appear and prove that he had in fact paid his taxes even though such payment was not revealed by the records of the taxing body. But under Article 7A it would seem that there is at least this possibility of a claim adverse to the tax title, and hence the marketability of the title is reduced to zero. It would appear that the decision of the Supreme Court in the Lynbrook Gardens case is eminently fair and in accordance with equitable principles. The Court of Appeals probably will not reverse the decision. In the meantime, the simple, but rather radical article 7A, cannot be used by municipalities.

Survey of Method of Perfecting Tax Titles in the Counties of New York State

Of course, all the methods that have been mentioned for perfecting tax titles are available to each county of New York State. Therefore, it seemed appropriate to find out how each county approached this problem. Which of these methods was most widely used? Does the method followed by a particular county meet its needs? To determine the answer to these points a letter and questionnaire was sent to the fifty counties of the state which have county attorneys.

An effort was made to keep the letter and the questions as brief as possible to insure a larger return. Over 72 per cent of the county attorneys replied and a large number wrote letters explaining in some detail their reaction to the problem. This percentage of replies was most satisfactory, particularly since the letters were sent during the vaca-

tion periods. It might be assumed that those counties which did not respond had no interest in the problem and probably had no procedure for perfecting their tax titles.

Results of the questionnaire. This survey revealed that the problem of tax delinquency is not of pressing importance in many of the upstate counties. In most instances the land is improved and productive and the owners are quite prompt in meeting their tax obligations.

About 55 per cent of the counties of the state have no procedure at all for perfecting tax titles. After the county treasurer issues a deed to the county, the county tries to sell the land, leaving to the purchaser the problem of making the title marketable. Since the number of parcels of property involved is not great, private buyers can often be found. If no buyers are available, then the county simply omits these pieces from the assessment roll with no apparent ill effects. It is possible to pursue this policy because such an infinitely small percentage of the taxable property is kept off the roll.

About 45 per cent of the counties do perfect their tax titles. Approximately one-half of this group use the foreclosure method. A few of these voiced dissatisfaction with foreclosure but they used it because they were most familiar with it and because they perfected the titles of only the more valuable pieces of property.

Approximately 25 per cent of the counties had an appreciation of the problem and felt the need for an inexpensive and quick method of perfecting title. Some of these were quite concerned and referred to the problem as “one of the most difficult that confronts our Board of Supervisors.”

Article 7B of the Tax Law was used by about 15 per cent of the counties and they were quite pleased with its functioning.

About 9 per cent stated that they were following the course of article 7A through the courts and if the title resulting from this article were upheld, they intended to use this method of perfecting title.
The following table summarizes the information supplied by the questionnaire:

<table>
<thead>
<tr>
<th>Method of Perfecting Title</th>
<th>Number of Counties Using Method</th>
<th>Percentage of Counties Using Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>No method</td>
<td>20</td>
<td>55</td>
</tr>
<tr>
<td>Foreclosure</td>
<td>8</td>
<td>22</td>
</tr>
<tr>
<td>7B of Tax Law</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Waiting for 7A</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>36</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

*Comment.* The counties which include the larger cities are more or less satisfied with the foreclosure method of perfecting title. In any county which has a fairly large amount of delinquency and which has accumulated a number of tax titles, article 7B is favored although some of them are waiting for a judicial upholding of article 7A.

For most of the counties of the state delinquency of tax payments is not a grave problem. Therefore, they have few tax titles, and what few they have are readily sold.

**Summary and Conclusions**

*Summary.* Continued and persistent delinquency in the payment of land taxes creates many financial problems for the county. To enforce its right to collect these taxes, the county is given the right to sell the land for payment of taxes. In many cases this remedy is only partially successful because there are no buyers for the land. As a result, counties become the owners of many pieces of property which are thus removed from the tax roll.

Counties are interested in selling these lands so that they can again be taxed. However, in order to secure the widest market for these properties, it is necessary that the taxing body offer a title that is acceptable to the public generally and to title companies in particular. The tax title which the county holds does not have a ready acceptance and many prospective buyers are inhibited because of the suspicion with which this type of title is viewed. In order to
increase the number of possible purchasers, it is necessary for a county to take some further legal action to perfect this title.

The traditional method of perfecting a tax title is by foreclosure. This method is expensive and cumbersome and is only justified when the property affected is of great value. It is true that foreclosure is an effective device for cutting off all lienors, but it is not suited for those counties which possess a large number of parcels, each of which is of small value.

In an effort to meet some of the objections to foreclosure, the partition action was developed. It was necessary to create a tenancy in common, but after that it was possible to try all questions of title in one action even though hundreds of defendants might be involved. After the claims of all parties were adjudicated, the case was concluded and it was not necessary to proceed to the sale.

The partition method was moderately satisfactory, but it had one great drawback in that all parties to the action had to be served personally. The extreme number of the defendants and the meagre information about their addresses, raised many difficulties. Before an order for service by publication could be obtained, a diligent effort to personally serve was necessary and this effort consumed time and money. Article 7B of the Tax Law was designed to meet this difficulty and it greatly simplified the giving of notice to the defendants. It made no radical change in method and hence wherever it has been used, the titles resulting therefrom have been freely accepted in the community.

Under article 7B it is possible for a taxing body or an individual owning a tax deed, to obtain an order for service by publication by filing affidavits showing the names and addresses of each defendant as shown by the record of the county clerk, and also setting forth the name of the occupant, if any. The summons and complaint are to be published for only two weeks and are to be mailed to the last known address of each defendant. This method of perfecting title is used by about 15 per cent of the counties of New York State.

Article 7A of the Tax Law introduced an entirely new
"in rem" procedure which sought to obtain a good title by acting against the land rather than any person. In 1939 this article was enacted by the legislature, but it was not until 1942 that a case was brought to determine the marketability of the title resulting from this procedure. The lower courts have held that there is at least one defect in the title, viz., the former owner may have actually paid his taxes, even though the taxing bodies' records did not reveal this fact, and his interest cannot be extinguished by an in rem proceeding. The Court of Appeals has not yet rendered a final decision in this matter.

Conclusions. About one-quarter of the counties of New York State and a large number of municipal taxing bodies suffer from tax delinquency. In recent years this delinquency has not been large, but its continuance creates innumerable budget problems. To more readily dispose of the property seized for taxes, the county should have a simple method of perfecting the tax title.

This article has discussed the various methods of obtaining a marketable title. The cheapest and easiest one is that provided by Article 7A of the Tax Law, but it is highly probable that the Court of Appeals will not uphold the title resulting therefrom. Even if the title derived from the in rem foreclosure proceeding were certified by the court, there is still doubt whether these titles would be acceptable to title insurance companies. These titles bear a marked resemblance to Torrens titles which have very seldom been accepted for insurance.

It would seem that the most effective action available to the county is that authorized under Article 7B of the Tax Law. Of course, the bringing of this type of action involves a great deal of detailed work—an extremely large number of title searches, clerical work of preparing and mailing hundreds of summons and complaints, etc. However, with experience, the whole process can be readily co-ordinated and the resulting title is universally accepted. This method, then, is the one which has been found most effective in practice. Indeed, it has proved so efficient that many people permit their property to go through a tax sale
and a 7B proceeding in order to obtain a cheap form of title insurance.

The vexatious problem of tax delinquency and its accompanying difficulty of perfecting land titles can, at the present time, be best handled by a well organized county government and an experienced attorney proceeding under Article 7B of the Tax Law.

CHARLES L. SAVAGE.