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## The Assessment and Taxation of Easements

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# COMMENTS

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## THE ASSESSMENT AND TAXATION OF EASEMENTS

A sells a plot of ground to B, reserving in the grant an easement of way across B's property. B becomes delinquent in the payment of his taxes on the property and allows it to go by tax foreclosure. C purchases the property at the tax foreclosure sale and now attempts to keep A from using the right of way, asserting that the title he derived from the tax sale has cut off A's right of easement. The resulting problem has received varied treatment in the different jurisdictions of this country. The apparent conflict in the decisions can be partially explained by differences in the taxing statutes of the respective states.<sup>1</sup>

In those states where the proceedings for the collection of real property taxes are *in personam*, *i. e.*, where the state looks to the owner rather than to the land itself for the payment of the tax,<sup>2</sup> the solution is relatively simple. If the land is ultimately sold for taxes, the purchaser at the sale secures only a derivative title, that of the person against whom the tax was assessed. There having been no assessment against the owner of the easement, that interest is not extinguished by the tax sale of the servient estate.<sup>3</sup>

In those jurisdictions whose statutes provide for an *in rem* procedure of collection, *i. e.*, where the state looks to the land for the payment of the tax, no personal liability of the owner being involved, the solution is more difficult and various results are reached. Several states in this group do not tax easements nor take them into consideration when assessing the tax.<sup>4</sup> The rule generally in these states is that the tax sale extinguishes the easement on the theory that the tax deed is a new title from the sovereign free from prior incumbrances, liens or easements.<sup>5</sup> These courts justify their results on grounds of policy<sup>6</sup> and statutory construction.<sup>7</sup>

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<sup>1</sup> Notes (1924) 40 A. L. R. 1523; Kloek, *Effect of Tax Deeds on Easements and Rights of Way* (1937) 16 CHI-KENT L. REV. 328.

<sup>2</sup> The statutes of 16 states seem to indicate that the tax collecting procedure is *in personam*. Ala., Ariz., Cal. Colo., Conn., Del., Ind., Ky., Ohio, Okla., Penn., S. C., Tenn., Vt., Va., W. Va. This list is taken from Kloek, *supra* note 1.

<sup>3</sup> Dyer v. Branch Bank at Mobile, 14 Ala. 622 (1848). See ALA. CODE 1928 § 3123.

<sup>4</sup> There are 21 states in this group. Ark., Fla., Ga., Idaho, Ill., Iowa, Kan., Me., Md., Mass., Minn., Miss., Neb., Nev., N. M., N. C., N. D., R. I., S. D., Utah, Wis. This list is taken from Kloek, *supra* note 1.

<sup>5</sup> *Nedderman v. Des Moines*, 221 Iowa 1352, 268 N. W. 36 (1936); *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906); *Alamogordo Improvement Co. v. Hennessee*, 40 N. M. 162, 56 P. (2d) 1127 (1936) (tax sale conveyed land free of a restriction on the sale of liquor on the premises).

<sup>6</sup> "It is not compatible with public convenience and the prompt collection of revenue for the state to trace out all the subdivided or qualified property interests that may be held in realty, and seek to hold the various owners responsible. Its policy is to assess the fee-simple value of the land to the holder of the possession where its real owner is not apparent or accessible, leaving the parties interested to adjust

The courts of other states have ruled that the easement is assessable separate and apart from the servient estate. Where there is such an assessment the easement is not affected by the tax sale of the servient tenement.<sup>8</sup>

A third group of states that employ the *in rem* machinery for the collection of real property taxes holds that the tax is assessed against the dominant tenement with the easement included. A tax sale of the servient estate does not cut off the easement.<sup>9</sup> These decisions are grounded on policy<sup>10</sup> and statutory construction.<sup>11</sup> *Tax Lien Co. of N. Y. v. Schultze*<sup>12</sup> aptly illustrates the reason for assessing the easement with the dominant estate.

"When an easement is carved out of one property for the benefit of another, the market value of the servient estate is thereby lessened, and that of the dominant increased practically by just the value of the easement; the respective tenements should therefore be assessed accordingly . . ."

This rule appears to be applicable whenever the assessment is based on the "value" of the property. An easement furnishing means of ingress and egress to an otherwise inaccessible dominant tenement would undoubtedly increase the value of that tenement. It is a factor that must necessarily be considered by the assessor if he is to ascertain the fair value of the property.

the proportions of liability between themselves." *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906).

<sup>7</sup>Typical statutes in these jurisdictions are represented by GEN. STAT. OF KANS. 1935, c. 79, § 2501 (" . . . tax deed shall vest in the grantee an absolute estate in fee simple . . .") and MASON'S MINN. STAT. 1927 § 2130, which provides that the purchaser gets the property free from "any claim, lien, or encumbrance . . ." *Hill v. Williams*, 104 Md. 595, 65 Atl. 413 (1906) interpreted a Md. statute holding the word "incumbrance" to include "easements."

<sup>8</sup>*Conservative Homestead Assoc. v. Conery*, 169 La. 573, 125 So. 621 (1929) rehearing denied (1930); *Northwestern Improvement Co. v. Lowry*, 104 Mont. 289, 66 P. (2d) 792 (1937); *Bellow Falls Canal Co. v. Town of Walpole*, 76 N. H. 384, 83 Atl. 95 (1912) (PUB. LAWS OF N. H. 1926 c. 66, § 38 provides "any separate interest in land . . . shall be taken to be real estate . . ."); *City of Fort Worth v. Southwestern Bell Tele. Co.*, 80 F. (2d) 972, (C. C. A. 5th, 1936); Wyoming has no cases but Wyo. REV. STAT. 1933, § 115-2337 seems to indicate that it would fall into line with this group of states.

<sup>9</sup>*Stansell v. American Radiator Co.*, 163 Mich. 528, 128 N. W. 789 (1910); *State ex rel. Koeln v. West Cabanne Improvement Co.*, 278 Mo. 310, 213 S. W. 25 (1919); *Ehren Realty Co. v. Magna Charta Bldg. & Loan Assoc. of Newark*, 120 N. J. Eq. 136, 184 Atl. 203 (1936); *Jackson v. Smith*, 153 App. Div. 724, 138 N. Y. Supp. 654 (1912), *aff'd.*, 213 N. Y. 630, 107 N. E. 1079 (1914); *Crawford v. Senosky*, 128 Ore. 229, 274 Pac. 306 (1929).

<sup>10</sup>*Schafly v. Baumann*, 341 Mo. 755, 108 S. W. (2d) 363 (1937) said that selling of the property free from the building restriction would make the adjacent property less valuable for taxation purposes.

<sup>11</sup>*Stansell v. American Radiator Co.*, 163 Mich. 528, 128 N. W. 789 (1910). This decision was based on COMP. LAWS OF MICH. 1929 § 3390: "For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon, and appurtenances thereto . . ." An easement was considered an appurtenance to the land. See REM. REV. STAT. § 11108.

<sup>12</sup>213 N. Y. 9, 106 N. E. 751, L. R. A. 1915D, 1115, Ann. Cas. 1916C, 636 (1914).

The Washington statute<sup>13</sup> provides that "value" shall be the basis for assessment. Nevertheless the Washington court has not reached the result dictated by the *New York* case above. The cases have repeatedly held that the statute prescribing the tax lien<sup>14</sup> provides for an *in rem* procedure for collection of real property taxes and that the tax sale of the servient tenement extinguishes the incorporeal hereditaments of the dominant tenement.<sup>15</sup> In holding that the tax title does initiate a new title freed from all prior interests, the court has relied on REM. REV. STAT. § 11260:

"All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien on the real estate on which they may hereafter be imposed or assessed, which liens shall include all charges and expenses of and concerning the said taxes which, by the provisions of this act, are directed to be made. The said lien shall have priority to and shall be fully paid and satisfied *before any recognizance, mortgage, judgment, debt, obligation or responsibility* to or with which said real property may become charged or liable."

Should not easements and other incorporeal hereditaments be distinguished from "recognizance, judgment, debt, obligation or responsibility . . ." ? The incorporeal hereditaments cannot be removed by the owner of the servient tenement as he could those encumbrances enumerated in the statute. Those encumbrances referred to in the statute could be taken to mean removable charges. Hence, if the foreclosure is to take precedence over only those specifically mentioned charges, it could be logically argued that it was not intended to take precedence over incorporeal hereditaments.

The Washington statute does not require the construction given to it and may be distinguished from the statutes in those jurisdictions<sup>16</sup> that specifically state that the purchaser at the tax foreclosure sale receives an "absolute title." *Hanson v. Carr*,<sup>17</sup> the first Washington case to rely on this statute to strike down an easement because of the tax sale of the servient estate, went farther than the necessities of the facts required. It appeared from the report that the easement was granted in 1892 and that the taxes were delinquent from 1890 to 1895. Part of the delinquency on which the tax lien was based had accrued prior to the grant of the easement. There was no need to rely on the statute to find that the tax lien for the delinquent taxes from 1890 to 1892 was prior to the subsequent grant of the easement. Subsequent Washington cases have strongly relied on this decision for their authority.

It therefore seems as if the Washington court should seek further

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<sup>13</sup> REM. REV. STAT. § 11135, "All property shall be assessed at 50 per cent of its true and fair value in money . . ."

<sup>14</sup> REM. REV. STAT. § 11260.

<sup>15</sup> *Harmon v. Gould*, 1 Wn. (2d) 1, 94 P. (2d) 749 (1939); *Messett v. Cowell*, 194 Wash. 646, 79 P. (2d) 337 (1938); *Tamblin v. Crowley*, 99 Wash. 133, 168 Pac. 982 (1917); *Wilson v. Korte*, 91 Wash. 30, 157 Pac. 47 (1916); *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194 (1914); *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927 (1911).

<sup>16</sup> See Note 7, *supra*.

<sup>17</sup> 66 Wash. 81, 118 Pac. 927 (1911).

support than this statute to justify its decisions. The method of assessing these interests should be the essential factor to be considered in deciding whether or not such an interest is cut off by the tax sale of the servient estate. Whether the easement should be assessed separately, or included with the dominant estate, or disregarded entirely has received little consideration from the Washington court. *Harmon v. Gould*,<sup>18</sup> in a gratuitous statement, said that the collection of taxes would be seriously hindered if the taxing authority be required to examine each tract of land for possible easements based on prescriptive or other claims not of record. The practical difficulties that the court seems to fear are more apparent than real. Any accurate determination of the value of real property must necessarily take into consideration these appurtenances. Whether or not they may be observed by the naked eye is not the true test. The effect on the value of the property is apparent, even though the easement is not.<sup>19</sup>

An examination of the Washington statutes does not reveal any specific method to be followed in assessing these interests. However, REM. REV. STAT. § 11108 offers a clue.

"The term 'real property,' for the purposes of taxation, shall be held and construed to mean and include the land itself, whether laid out in town lots or otherwise, and all buildings, structures or improvements or other fixtures of whatsoever kind thereon . . . and all rights and privileges thereto belonging or in any wise appertaining . . .; and all property which the law defines or the courts may interpret to be real property under the letter, spirit, intent and meaning of the law for the purposes of taxation."

This language seems to indicate that incorporeal hereditaments appurtenant to the dominant tenement should be assessed and taxed to that owner and not to the owner of the servient tenement.<sup>20</sup> If so a tax sale of the servient tenement should not affect the easement because it is assessed to the dominant tenement. The Washington cases have not considered the effect this statute might have on the method of assessment used.

Other statutes providing that certain easements of public service corporations are to be preserved in the event of a tax sale of the servient tenement<sup>21</sup> may or may not be an indication of legislative intent that private easements are not to be cut off by the sale of the servient tenement for taxes.

As a direct result of the adoption of the Washington rule in regards to the effect of a tax sale of the servient tenement, the owner of the dominant tenement is confronted with the difficult problem of protecting his appurtenances when the owner of the servient tenement

<sup>18</sup> 1 Wn. (2d) 1, 94 P. (2d) 749 (1939).

<sup>19</sup> *Tax Lien Co. of N. Y. v. Schultze*, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915D, 1115, Ann. Cas. 1916C, 636 (1914) (involving easements of light, air and access.).

<sup>20</sup> *Crawford v. Senosky*, 128 Ore. 229, 274 Pac. 306 (1929), (relying on ORE. ANN. CODE 1930, Vol. 5, c. 69 § 722, which was copied from the Washington Property Tax Code, held that building restrictions were not cut off by a tax sale).

<sup>21</sup> See Note 29, *infra*.

becomes delinquent in his tax payments. *Tamblin v. Crowley*<sup>22</sup> suggested that the easement would be protected if the owner of the dominant tenement paid all the taxes of the servient estate. The unfairness of such a solution is apparent. This suggestion must also be qualified in light of the dictum in *Messett v. Colwell*.<sup>23</sup> In that case the servient tenement was burdened with a restrictive use. After that estate had been sold at a tax sale, the owner of the dominant tenement attempted to enforce the restriction. In answer to the purchaser's contention that the owner of the dominant tenement could have protected himself by paying all the taxes, the court said that he had "no taxable interest in the property."

Whether the owner of the dominant tenement could protect his easement by recording is a matter of conjecture. It might be inferred from *Harmon v. Gould*<sup>24</sup> that recording would furnish the requisite protection. If the easement is disregarded in the assessment of the dominant estate it should make no difference that the interest has been recorded insofar as it is subject to be cut off by a tax sale of the servient tenement. The court may have meant that recordation would compel the assessor to assess the easement to the dominant tenement thereby, under the normal result in such cases, precluding the owner of the servient tenement from jeopardizing that interest by failing to pay his taxes. *Wilson v. Korte*<sup>25</sup> seems to eliminate that solution by a holding that "both the record and possessory title are absolutely destroyed by such foreclosure."

The cases<sup>26</sup> have also indicated that the owner of the easement might avail himself of REM. REV. STAT. § 11264:

"Any person desiring to pay taxes upon any *part or parts* of real property heretofore or hereafter assessed as one parcel, or tract may do so by applying to the County Assessor, who must carefully investigate and ascertain the relative or proportionate value said part bears to the whole tract assessed, on which basis the assessment must be divided, and the Assessor shall forthwith certify such proportionate value to the County Treasurer . . ."

There is no question about the right of "segregation" insofar as an owner of an undivided interest in the property is concerned.<sup>27</sup> The basis for the court's reliance on this statute seems to be an early case<sup>28</sup> in which the court ordered a reduction of taxes in favor of the owner of the real estate on a showing that two acres of the land assessed to him were part of a railroad right of way. It does not appear in the facts

<sup>22</sup> "We are unable to see why it is not as necessary to pay taxes on the land in order to save a private easement therein as it is necessary to pay taxes on land to save any other private right therein." 99 Wash. 133, 168 Pac. 982 (1917).

<sup>23</sup> 194 Wash. 646, 79 P. (2d) 337 (1938).

<sup>24</sup> 1 Wn. (2d) 1, 94 P. (2d) 749 (1939) (It would hinder taxing authorities if they were required to examine all possible easements based on prescriptive and other claims not of record).

<sup>25</sup> 91 Wash. 30, 157 Pac. 47 (1916).

<sup>26</sup> *Harmon v. Gould*, 1 Wn. (2d) 1, 94 P. (2d) 749 (1939); *Tamblin v. Crowley*, 99 Wash. 133, 168 Pac. 982 (1917); *Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927 (1911); *Ops. Att'y Gen. (Wash.)* 1927-1928, p. 852.

<sup>27</sup> *State ex rel. McClaine v. Reed*, 29 Wash. 383, 69 Pac. 1096 (1902).

<sup>28</sup> *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391 (1902).

whether this right of way was merely an easement or whether the railroad owned the two acres in fee simple. There was nothing in the report to show that the court expressly relied on this statute. The language of the statute does not necessarily indicate that the owner of an incorporeal hereditament as distinguished from an owner of an undivided interest would be given the benefit of "segregation."

Although the Washington Property Tax Code provides for an *in rem* procedure for the collection of real property taxes, it does not necessarily follow that a tax sale of the servient tenement must extinguish the incorporeal hereditaments of the dominant tenement. The method of assessing those interests should be the controlling factor in whatever result is reached. In any event, the series of decisions in Washington have created an urgent need for some satisfactory method by which the owner of the dominant tenement can protect these interests.

In view of the vagueness of the statutory requirements for a method of assessing incorporeal hereditaments; the absence of specific statutory remedies by which the owner of the dominant tenement may protect his interests when the owner of the servient tenement defaults in the payment of his taxes; and the added uncertainty of his position as a result of the Washington court's decisions, the legislature should amend the present statutes to provide specifically for a method of assessing incorporeal hereditaments, and to provide specifically for remedies available to the owner of the dominant tenement so that he may be able to forecast with some degree of accuracy the steps he must take to preserve those interests. A satisfactory solution would be reached by extending the pertinent provisions of the statutes<sup>29</sup> relating to easements of public service corporations to all easements. The servient tenement would then be assessed and taxed as real estate subject to such an easement, and a purchaser at the tax sale would take the real estate subject to that easement.

SNYDER JED KING.

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<sup>29</sup> REM. REV. STAT. § 11188 (certain easements of public service corporations shall be taxed as personalty.); REM. REV. STAT. § 11189 (real estate subject to any such easement shall be assessed and taxed as real estate subject to such easement.); REM. REV. STAT. § 11190 ("... when any such realty is sold for delinquent taxes thereon it shall be sold subject to such easement and the purchaser at any such tax sale shall acquire no title to such easement or the property constructed upon or occupying the same . . .").