Revision of Delinquent Real Estate Tax Enforcement Procedure in Wisconsin

C. Stanley Perry

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol29/iss1/3
The purpose of this article is to discuss rather briefly the apparent need for some kind of simplification of the procedure necessary in the enforcement of the collection of delinquent taxes levied on real estate in Wisconsin and to outline the main points of two presently pending proposals for effecting such simplification.

**Existing Enforcement Procedure**

As a background for the discussion, a brief review of the existing procedure is in order. Collection of delinquent taxes is enforced by sale of the tax delinquent land. The tax sale certificate issued as a result of such sale, gives the owner thereof the right to apply, after the lapse of five years, for a tax deed to the tax delinquent land. It has been

---

*LL.B., Marquette University. Member Wisconsin Bar. Associated with District Attorney's office (Milwaukee County) past twenty years. Presently is first assistant corporation counsel.

¹ Wis. Stat. (1943) 75.12, 75.36.
held that the tax is collected when the land is sold at tax sale, since the
result of such sale is the granting of a first lien on the land. This con-
clusion was probably truer in the days of the private tax sale buyer.
However, today, when all but approximately 10 of the 71 Wisconsin
counties purchase tax delinquent lands at the annual tax sale, it is
apparent that much remains to be done before actual realization of the
money, represented by the tax, is accomplished. Such additional effort
includes acquiring title to the land by a valid tax deed and thereafter
perfecting such tax deed title so as to obtain a good, merchantable title
to the land. Such enforcement in Wisconsin, except where tax sale
certificate is privately owned and held, is a duty of the county govern-
ment. The city of Milwaukee, with respect to its own city taxes, has the
same authority as a county. It is the only city of the state possessing
this particular authority.

The county tax sale is held in October of each year after public ad-
vertisement of such sale has been given. At such sale, all lands against
which taxes levied on the preceding year's tax roll remain delinquent,
are sold to the highest bidder. Paradoxically, the "highest" bidder is
the one who will take the least portion of the delinquent parcel for the
amount of the delinquent tax plus interest. In the heydey of the private
tax buyer and in the case of valuable properties, this rule sometimes
resulted in spirited bidding ending with the successful bidder securing
little more than a cloud upon the landowner's title. However, for the
past five years, most of the Wisconsin counties, including Milwaukee
County, have purchased all tax delinquent lands at the annual tax sale.
This practice has arisen because experience has demonstrated that the
county may as well collect the delinquent interest on lands which will
be redeemed, since it is compelled to buy up lands in which no private
buyer is interested and wherein enforcement of collection will mean
taking of tax title. Formerly it was the practice to issue individual tax
sale certificates describing each parcel of tax delinquent land. In 1937
the law was amended to permit of what is known as the master tax
certificate. This device permits the county treasurer to group all of
the delinquent taxes of a certain type in a taxing district in one state-
ment or master certificate. Should it become necessary to segregate
a single parcel, a separate tax sale certificate may be issued and the
fact thereof noted on the master certificate.

The purchaser of the tax sale certificate has secured what amounts
to a first lien against the land, superior in effective power to all prior
liens, except possibly United States government tax liens. If the land

---

2 Pereles v. Milwaukee, 213 Wis. 232, 236, 251 N.W. 255 (1933).
3 Wis. Stat. (1943) Sec. 74.43(3).
4 Wis. Stat. (1943) Sec. 74.33.
5 Wis. Stat. (1943) Sec. 74.46(1).
is not redeemed within five years from the date of the tax sale, the owner of the tax sale certificate may apply for a tax deed. Not every person may redeem delinquent taxes. That privilege is reserved to those persons who have some legal interest in the delinquent land. To redeem, one must pay the face or original amount of the tax plus interest at the rate of .8 of one per cent per month or fraction thereof from January 1 preceding the date of the tax sale, plus notice fees, if notice of application for tax deed has been served and a copy of such notice filed with the county treasurer. Such redemption may be made in installments upon proper application for such privilege. When a delinquent parcel of land has not been redeemed within the five-year period, the owner of the tax lien causes a search to be made of the title and an investigation to be made as to possible occupancy of the premises. Notice of application for tax deed may be served, commencing on the first day after the five-year redemption period has elapsed. Such notice must be served upon at least one of the owners of record; if the land is mortgaged, upon at least one of the mortgagees of record; and if the land is improved and the building is actually occupied for residence or business purposes, one of such occupants must be served. Finally if, within the six months preceding service of notice, the land has been occupied and used for agricultural purposes for 30 days, such occupant must be given notice of the application for tax deed. The notice of application gives a warning to the property owner that he has a final three-months grace period in which to make redemption and that unless such redemption is so made, the applicant will apply for a tax deed to the land. A notice may be given by registered mail, requiring the receipt of the addressee only, or as a summons in circuit court is served, or if neither of these methods is available, by publication.

Failure of redemption within the three-months period permits the holder of the tax sales certificate to take tax title to the land by applying to the county clerk for a tax deed. Such application must be accompanied by the tax certificate upon which the deed is to be based and by proof that the notice of application for tax deed has been given as required by statute. If such application is made within six years of the date of the tax certificate, where such certificate is privately owned, or within 15 years from such date, where tax certificate is municipally owned, the county clerk prepares, executes and delivers a tax deed, wherein the state of Wisconsin and the local county convey tax title to the applicant. Upon receipt of the deed, it must be recorded in the

---

6 Wis. Stat. (1943) Sec. 75.01. Also see Eaton v. North, 25 Wis. 514.
7 Wis. Stat. (1943) Sec. 75.12.
8 Wis. Stat. (1943) Sec. 75.36.
9 Wis. Stat. (1943) Sec. 75.20.
office of the register of deeds of such county in order to stop the right of redemption. In this connection, it is interesting to note that our Supreme Court has held that the term “recorded” as here used, does not mean merely passing the deed through the recorder’s window but the act of the recorder in entering the fact of such deed upon the property tract index in his office.¹⁰

When a valid tax deed has been taken and recorded, the lien of tax sale certificates dated prior to the date of the certificate on which the tax deed was taken become worthless.¹¹ Such certificates are of no further value except for inter-municipal accounting as between the county and the taxing district in which the land is situated. Similarly a valid tax deed voids all other liens against the land dated prior to the date of the tax deed except liens of the United States and liens of tax sale certificates dated after the date of the tax certificate upon which the tax deed is based, and except for the redemption rights of minors and incompetents in certain cases. Assuming that no rights of minors and incompetents are involved, we now have a situation where the county has obtained title to tax delinquent land. However, such title is not as yet merchantable. A tax deed properly taken conveys to the grantee an absolute estate in fee simple.¹² Nevertheless, title examiners will not approve of such title unless (a) judgment has been entered in a bar former owner action brought pursuant to Wis. Stat. Sec. 75.39; or (b) the tax deed grantee has assumed and maintained three years of exclusive possession after recording of the tax deed. In either of the foregoing cases, proof that minors and incompetents have no interest in the lands is required. Thus it appears that before the county can actually realize the amount of money represented in the original tax levy, plus delinquent interest, by means of a re-sale of such tax deed land and particularly should the county have an opportunity to re-sell within the three-year period immediately subsequent to recording of the tax deed, it is necessary to commence a bar former owner action. In such action, any person who has an apparent interest in the lands stemming from a transaction dated prior to the date of the tax deed, is named as a party-defendant.¹³ The action is like a mortgage foreclosure except that there is no further period of redemption. The parties-defendant in such action may raise any defense available such as, for example, that the tax, in fact, has been paid or that the land was exempt from assessment. When the time for appeal from the judgment has expired, title is absolute in the plaintiff insofar as all defendants and persons claiming under them are concerned.

¹³ Wis Stats. (1943) Sec. 75.39 to 75.52.
As hereinabove noted, the entire procedure of taking a tax deed is subject to a special exception with respect to the rights of minors and incompetents. Tax deeds may be taken against lands in which minors have an interest. However, in such case, the minor may redeem his interest in the land at any time before his twenty-second birthday. So also with insane incompetents. The incompetent's interest persists until failure by him to redeem within one-year after his restoration to competency or until his death. Lawyers are aware that this manifestation of solicitude for the rights of minors and incompetents prevails throughout the Wisconsin law. However, the legislature has heretofore taken one step toward equalizing the status of minors and incompetents with that of normal tax delinquents. If lands of a minor or an incompetent are sold for taxes for five or more consecutive years after his interest accrues, and if the total amount of such delinquent taxes with interest equals the assessed value of the lands, then an action to foreclose the delinquent tax certificates may be commenced and prosecuted in the same manner that a mortgage is foreclosed. This, of course, means that the defendants have the usual additional period of redemption which is given in a mortgage foreclosure. Obviously, this is a clumsy and rather time-consuming remedy. Moreover, the factual prerequisite of equality of assessed value and delinquent tax burden rarely occurs.

The foregoing is a very brief summary of the procedure involved in enforcing collection of delinquent taxes by taking title to the land. Obviously, this procedure requires careful attention to a great many details. Much paper work is involved. Those in charge of Milwaukee County's tax enforcement program find that even after careful study and streamlining of procedure, they are still required to use some 73 separate forms from the time the tax becomes delinquent until it has been re-sold to a private purchaser. The layman would and frequently does say there is too much red tape in the procedure but there is no escape from it under existing laws.

**The Tax Delinquency Situation**

The need for a considerably shortened procedure is particularly urgent in several of the larger and urban counties of the state, such as Milwaukee County, City of Milwaukee, Racine County and Dane County, to cite only a few. In 1940 Milwaukee County owned tax liens on more than 21,000 separate parcels of land outside of the city of Milwaukee. Most of these parcels were "tax saturated," i.e., the burden of the delinquent taxes with interest was so large that the land had been practically abandoned by its owner. It remained as a worthless part of the tax base, annually being assessed for its share in the expense of government but making no return on such assessment. This in turn

14 Wis. Stat. (1943) Sec. 75.03; 75.19.
resulted in the necessity of borrowing on the part of taxing district to balance their annual fiscal budget. As a result thereof, parcels of land which had paid their just share of the taxes were compelled to pay an additional portion by reason of the necessity of higher levies. Furthermore, due to the existing inter-municipal accounting system governing settlement by local taxing districts with the County Treasurer whereby the taxing district is enabled to return delinquent taxes as an offset against the county tax, the possibility exists that the municipal governmental cost of one taxing district may in large part be saddled upon the taxpayers of the other taxing districts in the county. Such taxing districts rightfully demanded that the county take immediate steps to return such "tax saturated" lands to a participating share in the county tax structure. Milwaukee County did commence such procedure and since 1941 has taken tax title to over 7,000 parcels. The proposals for tax procedural amendment hereinafter discussed evolve from the experience of such endeavor.

THE "CONSOLIDATED PROCEDURE"

The first plan has been called the consolidated tax procedure because it seeks to consolidate the work involved in giving notice of application for tax deed, taking such deed and thereafter commencing legal action to perfect the title thus obtained, into a single and much shorter transaction. It is proposed to set up this new consolidated procedure alongside of the existing methods of securing tax title. Many counties in the state have kept up-to-date in the matter of collecting their delinquent taxes through the taking of tax deeds. Such counties might not be particularly interested in the proposed new procedure. On the other hand by making it available to any county possible constitutional difficulties arising out of the uniformity clause are avoided. The various steps in the proposed consolidated procedure may be outlined as follows:

1. **Adoption Optional.**

   The county board would be given the option to adopt the new method by enactment of a declaratory ordinance, which should be adopted early in the year so that the county treasurer will not have to do any of the work preparatory to holding the usual annual tax sale. The right is given to the county to later abandon the system by repealing such ordinance.

2. **Tax Sale and Notice Thereof Omitted; Evidence of Tax Lien.**

   The annual sale of tax delinquent lands by the county treasurer with its attendant requirement of newspaper publication of notice of such sale will be omitted. No tax sale certificates will be issued. Instead the tax lien will be evidenced by the delinquent tax entries on the original tax rolls forming a part of the county treasurer's records.
3. **Tax Lien Assignable by County.**

The tax lien will ordinarily be owned by the county but any person other than the county may purchase such tax lien and thereupon be issued a certificate of tax lien, which generally would be quite similar to the present tax sale certificate.

4. **Municipal Interest in Tax Liens.**

The county will be deemed to own all such tax liens, but prior to taking title by forfeiture, must in such cases pay out the interest which any municipality may have in such tax liens as a result of excess delinquent returns, that is, a settlement between the local taxing district and the county treasurer wherein such taxing district has not only been unable to collect any of the county's but also has not collected any of its own charges.

5. **Life of Tax Lien.**

Tax liens will have the same statute of limitations as tax sale certificates.

6. **Tax Lien Lis Pendens.**

At the end of the statutory period of redemption as fixed by the legislature (presently five years) the tax lien owner (county) files a "tax lien lis pendens" in the office of the register of deeds. This amounts to constructive notice of claim by the owner of the tax lien of title to the delinquent lands, subject to being divested if the land owner redeems or is successful in having the tax declared null and void. The present requirement that the treasurer shall arrange for a newspaper publication of the descriptions of all lands which have been delinquent for five years is omitted.

7. **Tax Forfeiture Notice.**

Within one year after filing such tax lien lis pendens, the tax lien owner gives a "tax forfeiture notice" to all persons, including minors and incompetents, having an interest of public record in the lands described in the tax lien lis pendens. Such notice states that the period of redemption from such tax lien has expired and that title to such lands has vested in a tax lien owner and will become absolute after 90 days unless the party served with such notice either redeems from the tax lien or avoids such tax lien by successful court action.

8. **Service of Tax Forfeiture Notice.**

Such notice is served in the same manner as is the present notice of application for tax deed; i. e.; by (a) registered mail with return receipt of addressee only demanded; (b) personal service as in the case of a circuit court summons; and (c) service by publication when either of the foregoing methods is not possible.

Within 90 days after service of such tax forfeiture notice, a person so served may exercise the following remedies: (a) He may redeem from the lien in lump sum. (b) He may enter into an agreement with the county treasurer to make such redemption in installments. (c) He may commence a legal action naming the tax lien owner and any other necessary party as defendants to avoid the tax lien upon any grounds available and with the right to have the trial of such action expedited. If such property-owner plaintiff prevails in such action, the judgment will declare the conditional tax forfeiture void and order that the tax lien on which it was based be cancelled on the county treasurer's records.


Upon proof filed with the county treasurer by the owner of a tax lien that such 90-day period has elapsed and that no redemption of the lien has been made and no court action to avoid the tax lien has been commenced, or if commenced that it has been finally adjudicated against the land-interest-owner plaintiff, the county treasurer issues a certificate of forfeiture of title of the land to the tax lien owner who must record the same in the office of the register of deeds.

11. Effect of Recorded Certificate of Forfeiture of Title.

When so recorded, such certificate of forfeiture of title vests absolute title in the tax lien owner therein named, subject only to recorded restrictions, as provided by Wis. Stat (1943) 75.14(4); the lien of subsequently-dated special assessments and taxes; and the lien of special assessments levied but not as yet necessarily on the tax roll.


After the certificate of tax forfeiture has been recorded, the county treasurer cancels of record all prior-dated tax liens against the lands described in such certificate.

13. Tax Forfeiture Title Unassailable; When.

It has been suggested by some proponents of the new consolidated procedure that a further period of six months after the date of the recording of the certificate of tax forfeiture be set up as a final grace period within which any person interested in such lands and who may have been for some reason overlooked in giving notice of forfeiture, may take such steps as may be available to set aside the purported tax forfeiture title. Failing such action within such time, the certificate owner's title becomes absolute and unassailable by anyone for any reason.
ADVANTAGES OF THE "CONSOLIDATED PROCEDURE"

Comparison of the proposed consolidated procedure with existing procedural requirements shows that the following gains would be effected by use of the new method:

1. Abolition of the annual tax sale and published notice thereof, together with the annual five-year redemption notice. This results in a considerable saving of clerical effort in the office of the county treasurer, in the preparation of annual tax sale records, as well as the listing of the lands to be sold or on which the five-year redemption period is about to elapse. In Milwaukee County substantial cash savings could be achieved annually in this manner. Very few people gain any benefit from notices of tax sale or of expiration of redemption period as presently published. In Milwaukee County, for example, under the present law, such notices are published as a supplement to a suburban newspaper, whose publication is probably read by not more than 10,000 out of the 800,000 inhabitants of the county.

2. The work of giving notices of application for tax deed, taking and recording such deed and drafting and serving a summons and complaint in bar former owner actions is reduced by the consolidation herein proposed to the work of filing a tax lien lis pendens and preparation and service of notice of tax forfeiture and subsequent proof of the results of such notice. It is estimated that such consolidation should result in a work saving of forty-five per cent over efforts required under the existing law.

3. The rights of minors and incompetents are placed on the same basis as the rights of normal adults. The elimination of the present unnecessary solicitude regarding rights of minors and incompetents, which now frequently creates an absolute barrier to ultimate tax collection, that is, taking of good title to tax delinquent land, will remove a defect in the present procedural system. It is frequently presently necessary to simply lay aside consideration of tax collection on certain parcels because of the rights of minors and incompetents therein. It would seem that where the guardians of such minors and incompetents fail to redeem or make any payment on lands for five consecutive years, that they are financially unable to make such payment or that they have voluntarily abandoned interest in such lands. It is significant that in the states of New York and Missouri, probably the leaders in present legislation to modernize the taking of tax title on tax delinquent lands, minors and incompetents are treated in the same category as normal adults.

4. The new procedure presumes that the tax forfeiture title is valid and places the burden of upsetting the same upon the former land-interest owner. The experience in Milwaukee County’s tax collection
enforcement program shows that nearly 100 per cent of the bar former owner actions are pure defaults. The large clerical labor effort involved in preparing the pleadings, findings and judgments in such actions is eliminated in the new procedure, which, however, preserves to the former land owner the right to contest the forfeiture of tax title in the same manner that he would be able to do as a defendant in county's bar former owner action.

While benefits of the "consolidated procedure" would be partially available soon after adoption by abolition of the annual tax sales, nevertheless, the benefits of the proposed consolidated procedural method would not become fully available to a county electing to make use of such a system until more than seven years after the legislature has authorized such legislation. By reason of this delay, it is evident that counties having a large tax delinquency problem, such as Milwaukee, Racine and others, may be interested in a procedural plan providing speedier relief. For such cases, students of the problem advocate introduction of still simpler system, namely, foreclosure in rem.

**Foreclosure In Rem**

Foreclosure in rem, or as it is sometimes called, summary foreclosure, is now in use in the state of New York and more recently in the state of Missouri. If the legislation of those states were adapted to the situation in Wisconsin, the law would operate substantially as follows:

1. After expiration of the 5-year redemption period, the County Treasurer would file with the Clerk of the Circuit Court a verified list of the descriptions of all parcels remaining delinquent on that particular tax roll. Each list would be numbered and each parcel included therein would be serially numbered. Certified copies of such list are filed in the offices of the County Treasurer, the District Attorney and the treasurer of the local taxing district in which the tax originated.

2. Such list includes:
   (a) A brief but intelligible description of each parcel of land either by lot and block or by metes and bounds.
   (b) The name of the last known owner of such parcel as the same appears on the last tax roll prior to the filing of such list.
   (c) A statement of the amount of each tax lien against such parcel eligible for tax deed, plus delinquent interest thereon.

3. The filing of such list with the Clerk of the Circuit Court operates as the filing of an individual lis pendens as to each parcel on the list and likewise as a separate complaint in an action against each parcel to enforce the collection of the delinquent taxes.

4. The Circuit Court is granted special jurisdiction to try such actions.
5. Such list is verified by the County Treasurer.

6. Upon filing the list with the Clerk of Courts, the County Treasurer—
   (a) Causes a "notice of foreclosure" to be published once a week for 6 weeks in at least two newspapers published in the county. Such notice has the following content:
      (1) Statement that on such and such a date the "list" has been filed with the Clerk of the Circuit Court.
      (2) That all persons interested are notified that such filing constitutes the beginning of an action to foreclose the tax liens therein listed and also constitutes a lis pendens as to each parcel.
      (3) That such action is brought against the land only and that no personal judgment is sought.
      (4) That the notice is directed to all persons having or claiming to have an interest in the real estate described on such list.
      (5) That a certified copy of the list is filed in the County Treasurer's office and will remain open for inspection at least seven weeks after the first publication of such notice. The end of such seven-week period is the last day for redemption.
      (6) That any person having any right, title, interest in or lien upon any parcel described in the list may redeem any and all tax liens and have the tax lien satisfied or assigned to such redeeptor.
      (7) Notice of such person's right to defend against the complaint by service of a verified answer upon the District Attorney for the County, setting up any defenses which such person may have to such tax lien. Such answer must be filed within 20 days from the end of such seven-week period.
      (8) A plain statement of the consequences of failure to redeem or to defend by answer, to-wit; that in the absence of such redemption or defense, all persons having any right, title and interest in said lands will be forever barred and foreclosed of all right, title and interest to the parcels described on such list.
      (9) That judgment may be taken by default.

This notice is signed by the County Treasurer and County Attorney.

(b) The County Treasurer also causes such notice to be posted in his office in the courthouse and in three other "conspicuous" places in the county. Such notice may be mailed to the last known address of each owner of the property listed as such address appears on the records in the office of the County Treasurer; if such name or address does not so appear on such a record, such County Treasurer shall so state in an affidavit to be filed in the Clerk of Court's office.

7. Land owners or mortagees may file with the County Treasurer a notice good for five years after date giving their name and address and a description of the lands in which they are interested. The County Treasurer must then mail a copy of all notices to such persons.
8. All proofs of filing, publishing, posting, etc., are required to be filed with the Clerk of Court and form a part of the judgment roll.

9. Upon the filing of a verified answer, the Court may summarily hear and determine the issues as in any action. Absolute right of severance of the trial of such action exists on demand of the defendant.

10. Actions under this act are given trial preference.

11. The County is not required to prove any procedural step in the tax process. All such are presumed to be valid and the burden is on defendant to particularly assert his defense and to prove the same.

12. The foreclosure in rem procedure specifically applies to all defendants, whether infants, incompetents, absentees or non-residents.

13. The Court has complete power of determining all issues involved and makes findings as to whether or not there has been due compliance by the County with the provisions of the law.

14. Judgment may be entered awarding possession of the land to the County, where not redeemed or no successful defense is interposed, and directing the County Clerk to execute a deed conveying to the County full and complete title to such lands.

15. Upon execution of such deed, the County shall be seized of an estate in fee simple absolute in such land. All persons, including the state, infants, incompetents, absentees and non-residents who may have any right, title, interest or claim, lien or equity of redemption in or upon such land shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

16. The point is made in connection with this procedure that a person may have paid his taxes to his local treasurer and being in possession of his tax receipt feels secure thereafter and pays no attention to any notice by publication. Therefore, since the only type of compulsory notice that is given under the in rem procedure is by publication, such person may not pay any attention to the newspaper notices and by reason thereof be in default in the action and thus lose his land. It has been suggested that this somewhat remote possibility, which nevertheless does sometimes occur, may be cared for by giving a person so injured the right to commence an action against the county to recover the fair value of the property which was thus unjustly taken away from him, together with interest at the legal rate from the date of such taking, provided that the right to commence such action shall be subject to a reasonable period of limitation, such as perhaps six years.

Comparison of "Consolidated" vs. "In Rem"

A comparison of the proposed "consolidated" procedure with the "foreclosure in rem" procedure discloses—

1. The in rem procedure is more summary and is a court action, whereas the consolidated procedure is largely administrative with permitted resort to court action.
2. In the in rem procedure, notice to the former land owner or person having an interest in the land is based wholly on publication and posting with no required personal service. The consolidated procedure requires personal service.

3. Use of the in rem procedure would not disturb the conventional tax sale procedure. On the other hand, the consolidated procedure would create an entirely new system, necessarily requiring an abandonment of the conventional method in counties where the consolidated method is adopted.

4. The in rem procedure is much shorter and after its constitutionality has been approved by the Courts, would provide a method of speedy relief for counties having a large aggregation of delinquent tax parcels eligible for tax deed.

5. The crucial question is whether either system provides due process of law in the matter of notice to the person interested as an owner or lienor in the tax delinquent lands. Obviously it would be necessary to secure a decision of the Supreme Court on this question and to finally settle the problem, it would undoubtedly be necessary to secure a decision of the United States Supreme Court.

In this connection, it is of interest to refer to the experience of the state of New York and the state of Missouri in securing court decisions. The New York Court of Appeals has upheld the constitutionality of the New York in rem procedure law. *City of Utica v. Proite*, 41 N.E. (2d) 174, 288 N.Y. 1492 (1942). Unfortunately the opinion of the court is found in the words of "Judgment affirmed with costs." In this case the appellants claimed the New York in rem law violated the guarantees of due process both in the New York and Federal constitutions. Notwithstanding the decision of the New York Court of Appeals, title insurance companies in New York were loath to insure tax titles obtained through exercise of the in rem procedures. Therefore, another test case was deliberately prepared and taken through the courts. This is the case of *Lynbrook Gardens Inc. v. Ullman*, 53 N.E. (2d) 353 (1943). The action was in the form of a demand for specific performance of a land contract to buy two lots from the Village of Lynbrook, which had obtained title thereto by use of the in rem foreclosure law. Ullman refused to accept title on the ground that the tax law (in rem procedure) was unconstitutional both under the New York and Federal constitutions. The action was framed to present two causes of action in one of which the foreclosure law had been strictly followed, although of course without giving any personal notice. In the other cause of action, the taxes had actually been paid but the treasurer's records appeared to show that they were not paid and hence a judgment of foreclosure was taken. The lower court granted judgment of fore-
closure as to the first cause of action, holding that "a judgment of foreclosure rendered without personal service of process in the proceedings in rem against property in which taxes were in default did not deprive the delinquent taxpayer of his property without due process of the law." But the court further held that a "judgment in rem for the foreclosure of a tax lien on which taxes had in fact been paid but which had been erroneously included in the list of the delinquent taxes would violate the constitution." In this case there was also involved a parcel assessed to an unknown owner. No question was raised as to the rights of minors but the lower court intimated that the New York procedure required no actual notice. The Court of Appeals reversed the lower court on a rather technical ground. The basis of such reversal was that since specific performance may not be had where the title is not marketable and since one of the objections to the title by in rem foreclosure was that it violated the United States Constitution and since that question can only be authoritatively determined by the United States Supreme Court, the title is still unmarketable and thus specific performance would not lie. From these cases it appears that the question as to whether the New York in rem procedure operates to give merchantable title will not be definitely determined until the United States Supreme Court has ruled on a case brought under that law.

Meanwhile the state of Missouri and particularly the city of Kansas City had experienced the need of a summary remedy to relieve that city and the surrounding Jackson County from a dilemma of tax enforcement similar to that presently found in Milwaukee County. After careful consideration, an in rem procedure statute generally similar, allowing for the differences in state customs, to the New York in rem procedure act was passed by the legislature. The validity of the law was promptly challenged in the courts and on July 31, 1944, the Supreme Court of Missouri in the case of Spitcaufsky et al., v. Hatten, County Collector, 182 S.W. (2d) 86 (1944), unanimously upheld the constitutionality of the law. The opinion is exhaustive and discusses more than 30 constitutional questions. Rehearing was denied on August 10, 1944. In the opinion, the Court observed that—

"The service process is a notice by publication addressed solely to the lands and having no personal defendant. No personal judgment can be rendered. The decree vests a fee simple title and orders disbursement of the sale proceeds."

"The main objectives of the legislation are summarily to foreclose long standing tax delinquencies on real estate and to convey a marketable title by judicial decree, excluding any right of redemption and collateral attack."

"Due process is a very different thing in the assessment and collection of public taxes from the same right as applied to litigation between
parties over private rights, the institution of the latter depending wholly on the will of the complainant. The reasons are apparent. The first is the government's exigent need for pecuniary support necessary for its existence. The second is the futility of impeding the annual collection of taxes by requiring a predetermination of the titles to many parcels of land (in this case 25,000 to 30,000) and the identity and competence of their owners. The third is that taxes are collected periodically under fixed laws which, in a restricted sense, impart their own notice."

"The settled doctrine of the authorities is that the taxing power is wholly legislative, and that land may be summarily foreclosed and sold for delinquent taxes even by administrative procedure alone. This does not deny due process, if there has been a compliance with the essential provisions of the statute and the land owners are afforded an opportunity to be heard, though only by an administrative tribunal after the sale."

The decision further upheld the law as against the rights of minors and incompetents, which the law treats the same as those of normal adults. The decision is, in fact, a brief for the legality of foreclosure in rem, at least as developed by the law of Missouri. The following decisions of the United States Supreme Court are cited in support of the validity of notice by publication:

*Horne v. City of Ocala*, 110 Fla. 189, 149 So. 441; app. dismissed for want of a substantial federal question 311 U.S. 608, 85 L.Ed. 385, 61 S.Ct. 28 (1940).

A brief resume of the facts and language of the decisions in these cases follows:


In 1881 the Minnesota legislature passed an act providing generally for the assessment and taxation of any real or personal property which had been omitted from the tax roll of any preceding year or years. County officers operating under such act assessed certain lands of Land Co. which had been presumed exempt under original Federal railroad and grant laws. The Minnesota courts allowed such assessment for 6 years immediately preceding assessment. On appeal to United States
Supreme Court, it was contended inter alia: that the law violated 14th amendment in that it failed to provide due notice.

It was found to be part of the general laws of Minnesota. In that state tax collections are made by suit in court, which is initiated by filing a list of tax delinquent lands in the clerk of court's office (Procedure generally as in New York and Missouri laws). The list is published and, upon completion of publication, the court has jurisdiction. In affirming the lower court, the Supreme Court said: "A law authorizing the imposition of a tax as assessment upon property according to its value does not infringe that provision of the 14th amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. (Citation)

That the notice is not personal but by publication is not sufficient to vitiate it. Whereas here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demands of due process of law. (Citation)

It cannot be doubted, under these various authorities that, in respect to the collection of these taxes, ample provision is made for notice, and therefore that it cannot be adjudged that the owner, is for want thereof, deprived of his property without due process of law. Longyear v. Toolan, 209 U.S. 414, 52 L.Ed. 859, 28 S.Ct. 506 (1907).

This was an action in ejectment brought by Toolan. His course of action depended on the validity of a tax title under Michigan law. Enforcement of delinquent taxes is brought about by county auditor petitioning the circuit court giving a list of delinquent lands by description praying for payment of taxes due or sale of land. The petition is recorded in a record book. The court then makes an order for hearing at a specified time and place with notice that on default of appearance by interested parties, decree will issue.

Such petition (including listing of delinquent parcels) is then published for 4 weeks in a newspaper in the county. Such publication is declared to be the equivalent of personal service and to confer jurisdiction.

Longyear contended that the law was unconstitutional in that it denied him, a Michigan resident, due process of law, in that it substitutes notice by publication of the proceedings for sale for personal service.

The supreme court of Michigan found for Toolan. The United States Supreme Court affirmed the lower court, followed the rules announced in the Winona Land Co. and Leigh v. Green cases and held:

(Head Note)
The notice by publication of the pendency of proceedings to sell
land to satisfy a lien for unpaid taxes, satisfies the requirement of due
process of law made by the United States Constitution 14th Amend-
ment, where the delinquent tax-payer, who has had an opportunity to
be heard upon the assessment, cannot fail, if he exercises due vigilance,
to learn of the pendency of the proceedings, and that full opportunity
to defend is afforded to him.


Certain Nebraska lands were transferred to Leigh after sale on exe-
cution to satisfy a judgment. In 1891 certain tax liens were foreclosed
affecting the same lands, and were sold to Green. Leigh claims title
under his judgment on execution and Green claims title as a result
of proceedings for foreclosure of the tax liens. Leigh brings this suit
to quiet title. The Nebraska Supreme Court rendered judgment in
favor of Green and Leigh appealed.

The question for decision was: Is the Nebraska statute under which
the sale was made and under which the defendant in error claims title,
in failing to make provision for service of notice of the pendency of the
proceedings upon a lien holder, a deprivation of property of the lien
holder without due process of law within the protection of the 14th
Amendment?

The Supreme Court of the United States said: "The evident pur-
pose of paragraph four where the owner of the land is unknown, is to
permit a proceeding in rem, against the land itself, with a provision
for service as in case of a non-resident."

"The argument for the appellant concedes that the state may adopt
summary or even stringent measures for the collection of taxes, so long
as they are 'administrative' in their character, and it is admitted that
such proceedings will not deprive the citizen of his property without
due process of law, although without notice of assessment or levy or
of his delinquency and the forfeiture of his land. But the argument is,
that when the state goes into court and invokes judicial power to give
effect to a lien upon property, although created to secure the payment
of taxes, the same principles and rules prevail which govern private
citizens seeking judicial remedies, and require service on all interested
parties within the jurisdiction."

Without holding that the notice given in this case was sufficient, the
court summarizes its decision as follows:

"The principles applicable which may be deduced from the authority
we think lead to this result: Where the state seeks directly or by author-
ization to others to sell land for taxes upon proceedings to enforce a
lien for the payment thereof, it may proceed directly against the land
within the jurisdiction of the court, and any notice which permits all
interested—who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the 14th Amendment to the Constitution."

The decisions of the Supreme Court hereinabove analyzed, together with others which might have been cited, indicate that a law providing for foreclosure of tax title in rem as outlined above; would in all probability be pronounced unobjectionable in so far as the due process clause of the 14th Amendment is concerned.

**How Would the Wisconsin Supreme Court Rule?**

In the case of *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913) our supreme court has laid down the rule that every person before being condemned as to his person or property has the right to reasonable notice of a hearing in respect to the matter and of the charges against him, and reasonable opportunity to be heard. Again in the case of *Locker v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922), our court defined the essentials of due process to be: notice that some particular judicial proceedings are already instituted or proposed to be instituted; notice of the time when and place where such hearings are to be had; and reasonable opportunity to be heard. The court says that anything short of this is absence of due process.

**MUST SUCH NOTICE BE PERSONAL NOTICE?**

In *Milwaukee County v. Dorsen*, 208 Wis. 637, 242 N.W. 515 (1932), and *State ex rel Kappa Sigma Bldg. Ass'n v. Baries*, 226 Wis. 229, 276 N.W. 317 (1937), it is held that a tax-payer is not entitled to specific notice of the meeting of a board of review since the statute fixed the time when the board was to meet and that this was sufficient notice to all persons to constitute due process of law for taxing purposes. See also the earlier case of *State ex rel Vilas v. Wharton*, 117 Wis. 558, 94 N.W. 359 (1903). In these cases our court seems to recognize that in matters of taxation for the support of government, the requirement of personal notice is not necessary as due process requires in litigation between private litigants.

However, a real estate tax lien is a lien against the land and not against the owner of the land.

Wisconsin statutes with respect to attachment (Chapter 266) permit judgments against land without personal service on the owner when he is a non-resident.

So where no personal judgment is sought, and the matter is one to enforce the right of government to subject land to its fair share of the cost of sustaining government, and where the landowner is presumed to know whether his land is tax delinquent, a statute providing for no-
tice by means of publication and posting but not of necessity requiring personal service, would seem to meet the calls of due process. *Pennoyer v. Neff*, 95 U.S. 565 (1878).

While the recent case of *State ex rel Anderton v. Sommers*, 242 Wis. 484, 8 N.W. (d) 263 (1943) involving the right to division in redemption of a real estate tax certificate under section 75.01 Stats., held that the county treasurer must give notice of such proposed division to all persons interested in the land affected, the decision does not go as far as to require personal service of such notice.

**Conclusion**

Both of the suggested revised forms of procedure are constitutional but as to each, a court decision so holding is necessary before titles obtained thereby will generally be regarded as merchantable.