by section 23 "depends upon the legislative policy expressed in the fair and natural meaning of that section."[67] The fairness rule would seem to accord more nearly than the doctrine of legislative grace with the intent of Congress to tax only net income.[68]

There is evidence to indicate that the tax bar is not satisfied with the *Lykes* case, and that an effort may be made to change the result of the case by legislation.[69] However, in clarifying the reason for the rule denying deductibility to legal expenses incurred in gift tax litigation, the *Lykes* case may help to stem somewhat the flood of litigation under section 23(a)(2).

EXTINGUISHMENT OF EASEMENTS AND OTHER INTERESTS BY TAX SALE OF DELINQUENT PROPERTY

In 1872 the owner of a tract of land in Washington, D.C. divided his property into seven lots. Six were of normal size for building uses. The seventh, only five feet wide, was designated a private alleyway for the purpose of providing the other six with ingress and egress. All of the lots were sold except the alleyway, the fee to which was kept by the original owner, who gave each of his grantees an easement over it. By 1949, however, no taxes had been paid on the alleyway for more than seventy years[1] and the delinquency exceeded $1000.[2] The defendant, owner of two of the adjoining tracts, paid in the delinquency and obtained a tax deed to the alleyway.[3] He then blocked the customary access of

[67] 343 U.S. at 120. Cf. White v. United States, 305 U.S. 281, 292 (1938).

[68] See, however, 5 Vanderbilt L. Rev. 847, 849 (1952), noting the Lykes case. The note reiterates the legislative grace doctrine with the apparent implication that Lykes involves no change of law in this respect.

[69] See American Bar Ass'n, Section of Taxation 35 (1952).

[1] If the alleyway had been dedicated to public use, it would have been tax exempt, and the problem with which this comment is concerned would not have arisen. Crane-Berkley v. Lavis, 238 App. Div. 124, 263 N.Y. Supp. 556 (1933); People ex rel. Poor v. Wells, 139 App. Div. 83, 124 N.Y. Supp. 36 (1910); Iowa Loan Trust v. Bd. of Supervisors of Polk County, 187 Iowa 160, 174 N.W. 97 (1919).

[2] Engel v. Catucci, 197 F. 2d 597 (App. D.C., 1952). See particularly Brief for Appellant and Joint Appendix 11a.

[3] Statutory requirements and procedure for acquisition of tax deeds vary greatly in detail but their broad outlines are similar. After a certain specified period of delinquency varying from one to four years, the taxing authority's lien is sold publicly at a minimum figure which is the total of back taxes, interest, penalties and costs of the sale. The buyer gets a tax certificate. Within an additional specified period of one to three years, the delinquent owner may remove the lien by recovering the tax certificate from the buyer at cost and paying any additional taxes and penalties. If the redemption privilege is not exercised, a deed vesting an indefeasible title is issued on application to the taxing authority in two-thirds of the states. Elsewhere, judicial proceedings similar to a mortgage foreclosure are required. In those jurisdictions where no judicial proceedings are required, tax deeds are considered untrustworthy by title examiners, and a suit to quiet title is often recommended. If the lien is not sold, the taxing authority acquires the title at the end of the redemption period by application or foreclosure. During the whole process the assessed owner is given notice by mail at intervals, and notice, either by

the other lots. The plaintiff, another adjoining lot owner, sued to enjoin this interference with his easement. The Court of Appeals, holding that the plaintiff's easement was not extinguished by the tax sale, affirmed the District Court's decree granting the injunction. *Engel v. Catucci.*[4]

The central issue in the *Engel* case was whether a tax sale of land burdened by an easement appurtenant extinguishes the easement.[5] A similar question has arisen in connection with restrictive covenants[6] and other interests in land.

The key to the problem is in the nature of the tax levy itself. If the taxing

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mail or by publication is provided for other interested parties. In some jurisdictions an in personam action of debt against the delinquent owner is possible, but this alternative is rarely relied upon. It is too expensive for use in large scale tax collection. The Current Status of Tax Titles: Remedial Legislation v. Due Process, 62 Harv. L. Rev. 93 (1948); Speck, Collection of "Forfeited" Real Estate Taxes in Illinois, 16 Univ. Chi. L. Rev. 655 (1949); Hillhouse and Chatters, Tax Reverted Property in Urban Areas 18–41 (1942); Allen, Collection of Delinquent Taxes by Recourse to the Taxed Property, 3 Law & Contemp. Prob. 397, 401 (1936); Chatters, Enforcement of Real Estate Tax Liens (Municipal Administrative Service, N.Y., 1928).

[4] 197 F. 2d 597 (App. D.C., 1952). See also District of Columbia v. Capital Mortgage & Title Co., 84 F. Supp. 788 (D.C. D.C., 1949). Cf. W. C. & A. N. Miller Development Co. v. Emig P. Corp., 134 F. 2d 36 (App. D.C., 1943), cert. denied, 318 U.S. 788 (1943), distinguished in the main case on the ground that it did not involve an easement.

[5] In this case, the easement passed by grant, but no distinction is made in the cases where easements are acquired by implication or prescription. E.g., Chelsea Laundry Co. v. Toscano, 14 N.J. Super. 496, 82 A. 2d 473 (1951). Naturally, the easement or covenant must be valid and capable of running with the land for the extinguishment problem to arise. Consult Clark, Real Covenants and Other Interests Which "Run With the Land" (2d ed., 1947). Thus, racial restrictive covenants cases such as Doherty v. Rice, 240 Wis. 389, 3 N.W. 2d 734 (1942), and Hawkins v. Whayne, 198 Okla. 400, 179 P. 2d 138 (1947), are severely limited in their authority by the recent case of Shelley v. Kraemer, 334 U.S. 1 (1948). It is generally held that easements in gross are extinguished by a tax deed to burdened property unless the owner of the easement has paid a separate tax for it. 5 Rest., Property § 509 (1944). Public utilities, railroads and oil pipelines are usually protected in advance from loss of their rights of way when burdened land becomes tax delinquent, by separate taxation of such easements; e.g., Fla. Stat. (1951) § 192.58; Ore. Comp. Laws (1947) § 110–543; Gulf Refining Co. v. Jenkins, 149 Okla. 331, 151 P. 2d 419 (1944); or the state levies a "franchise tax" on the fair cash value of the corporations' capital stock and the statute exempts public service easements from extinction, e.g., Mass. Gen. Laws (Ter. ed., 1932) c. 63, § 55. Cf. Tidewater Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351 (1924), a case involving a rather brazen but unsuccessful attempt to extort money from an oil pipeline company. Although a pipeline was involved, the court treated it as an easement appurtenant, holding that the servient and dominant tenements need not be contiguous. See 5 Rest., Property § 454 (1944).

[6] In some jurisdictions it is held that restrictive covenants create reciprocal negative easements. Town of Harrison v. Campagna, 81 N.Y.S. 2d 257 (1948); Halpin v. Poushter, 59 N.Y.S. 2d 338 (1945); Re Hunt and Bell, 34 Ont. L. Rep. 256, 262 (1915); Alamogordo Imp. Co. v. Prendergast, 43 N.M. 245, 91 P. 2d 428 (1939); Doherty v. Rice, 240 Wis. 389, 3 N.W. 2d 734 (1943); 14 Am. Jur., Covenants, Conditions and Restrictions, § 193 (1951). Most jurisdictions hold that the covenantee has a substantial "property right." Covenant cases cited note 9 infra. But cf. Welitoff v. Kohl, 105 N.J. Eq. 181, 147 Atl. 390 (1929) (merely a contractual right arising out of equity); Anderson v. Lynch, 188 Ga. 154, 3 S.E. 2d 85 (1939) (covenant is not a property right compensable in eminent domain proceedings). Independent of the view that covenants create negative easements is the fact that many considerations similar to those where easements are concerned govern the survival or extinction of restrictive covenants.

authority recognizes separate interests in the land and takes them into account for assessment purposes, the owner of the dominant tenement is said to have an interest "carved out" of the servient tenement. He protects his interest in the servient tenement by paying taxes on the enhanced value of his own land. Conversely the servient owner's estate and tax are lessened. Since only the delinquent property may be sold at the tax sale, it is the servient estate as lessened by the subtraction of the easement which passes to the tax-deed purchaser.[7] Although the taxing authority is not usually expected to separate the various interests in the land, it is said that assessment of an appurtenant easement does not unnecessarily complicate the taxing process.[8] This reasoning is generally accepted by the majority of courts, which favor nonextinguishment of easements and covenants.[9]

[7] E.g., Jackson v. Smith, 153 App. Div. 724, 138 N.Y. Supp. 654 (1912), aff'd, 213 N.Y. 630, 107 N.E. 1079 (1914); District of Columbia v. Capital Mortgage & Title Co., 84 F. Supp. 788 (D.C. D.C., 1949); Ehren Realty Co. v. Magna Charta Bldg. & Loan Ass'n, 120 N.J. Eq. 136, 184 Atl. 203 (1936). A corollary of this argument is that to require the *servient* owner to pay a tax on his property as unaffected by the easement would be double taxation. Alamogordo Imp. Co. v. Prendergast, 43 N.M. 245, 252, 91 P. 2d 428, 432 (1939).

[8] See cases cited note 9 infra; 5 Rest., Property § 509, Comment (e) (1944).

[9] The following statutes exempt easements and covenants from extinguishment by tax sale: Cal. Rev. & Tax Code (1939) § 3520; N.Y. Tax Law (McKinney, 1943, as amended 1947) § 154 (this section does not apply in cities, § 160 ibid.); Gen. Laws of Mass. (Ter. ed., 1932) c. 60, § 45; Okla. Stat. (1941) §§ 456, 457; Ohio Code (1948) § 5762. Easements have been held to survive tax sales in: District of Columbia v. Capital Mortgage & Title Co., 84 F. Supp. 788 (D.C. D.C., 1949); Gowen v. Swain, 90 N.H. 383, 10 A. 2d 249 (1939); Hall v. Hall, 174 Ky. 356, 192 S.W. 76 (1917); Chelsea Laundry v. Toscano, 14 N.J. Super. 496, 82 A. 2d 473 (1951); Niestat v. Equitable Security Co., 138 N.J. Eq. 480, 48 A. 2d 907 (1946); Metropolitan Life Ins. Co. v. McGurk, 119 N.J.L. 517, 197 Atl. 47 (1938); Ehren Realty Co. v. Magna Charta Building and Loan Ass'n, 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, 137 N.E. 1079 (1914); Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914); Blenis v. Utica Knitting Co., 73 Misc. 61, 130 N.Y. Supp. 740 (1911), aff'd, 210 N.Y. 561, 104 N.E. 1127 (1914); Queens Park Gardens v. Long Island Water Corp., 277 App. Div. 1146, 101 N.Y.S. 2d 454 (1950); Beeman v. Pawelek, 96 N.Y.S. 2d 204 (1949), aff'd, 276 App. Div. 1057, 96 N.Y.S. 2d 312 (1950); Loening v. Red Spring Land Co., 94 N.Y.S. 2d 568 (1949); Wilkinson v. Nassau Shores, 86 N.Y.S. 2d 603 (1949); Poetzsch v. Mayer, 115 Misc. 422, 189 N.Y. Supp. 695 (1921); Harris v. Curtis, 139 App. Div. 393, 124 N.Y. Supp. 263 (1910), aff'd, 211 N.Y. 573, 105 N.E. 1085 (1914); Ross v. Franko, 139 Ohio St. 395, 40 N.E. 2d 664 (1942); Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351 (1924); Union Falls Power Co. v. Marinette County, 238 Wis. 134, 298 N.W. 598 (1941). Covenants are exempted from extinguishment by the Code of Iowa (1950) § 448.3. In the following cases it has been held that covenants survive the tax sale of property bound by them: Schlafly v. Baumann, 341 Mo. 755, 108 S.W. 2d 363 (1937); Northwestern Improvement Co. v. Lowry, 104 Mont. 289, 66 P. 2d 792 (1937); Alamogordo Improvement Co. v. Prendergast, 43 N.M. 245, 91 P. 2d 428 (1939); Town of Harrison v. Campagna, 81 N.Y.S. 2d 257 (1948); Halpin v. Poushter, 59 N.Y.S. 2d 338 (1945); Hawkins v. Whayne, 198 Okla. 400, 179 P. 2d 138 (1947); Crawford v. Senoski, 128 Ore. 229, 274 Pac. 306 (1929); Hayes v. Gibbs, 110 Utah 54, 169 P. 2d 781 (1946); Doherty v. Rice, 240 Wis. 389, 3 N.W. 2d 734 (1942). But cf. Shelley v. Kraemer, 334 U.S. 1 (1948), and see note 5 supra. 5 Rest., Property § 509 (1944); 3 Powell, Real Property 509 (1949); 3 Cooley, Taxation §§ 1154, 1494 (4th ed., 1924); 2 Thompson, Real Property §§ 690, 2929 (1939); 14 Am. Jur., Covenants, Conditions and Restrictions § 300 (1951); Easement or Servitude or Restrictive Covenant As Affected by Sale For Taxes, 168 A.L.R. 529 (1947); Comment, 51 Harv. L. Rev.

On the other hand, if the tax levy is "on the land itself," without regard to ownership of separate interests in the land, the easement may be extinguished. Title, having been derived from the state, is regarded as forfeited to the state by the failure to pay taxes, and a purchaser at a subsequent tax sale takes title to the property unencumbered by outstanding interests. The following language from *Hefner v. Northwestern Life Ins. Co.*[10] is sometimes adopted by courts favoring extinguishment of easements and other interests:

> [Tax sale] clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority which bars or extinguishes all prior titles and encumbrances of private persons, and all equities arising out of them.[11]

This view has been accepted by a minority of courts in the United States.[12]

In determining the nature of the tax and whether easements, covenants and other interests should be extinguished, reference to the statutes is necessary. A few states expressly exempt easements and covenants from extinction by tax sale.[13] On the other hand, statutes rarely provide that the "tax is on the land itself."[14] More often, land-tax statutes are ambiguous. Where neither survival

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361, 362 (1937); 2 Black, Tax Titles § 954 (5th ed., 1889); Kloek, Effect of Tax Deeds on Easements Appurtenant and Rights of Way, 16 Chi-Kent L. Rev. 328 (1938). But consult 3 Powell, Real Property at 510 n. 69 (1949).

[10] 123 U.S. 747 (1887).

[11] Ibid., at 751. See also Brewer v. District of Columbia, 5 Mackay (16 D.C.) 274 (1886).

[12] *Easements:* Wolfson v. Heins, 149 Fla. 499, 6 So. 2d 858 (1942); Harmon v. Gould, 1 Wash. 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); Hill v. Williams, 104 Md. 595, 65 Atl. 413 (1906); Magnolia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P. 2d 133 (1946). In Hunt v. City of Boston, 183 Mass. 303, 67 N.E. 244 (1903), the right to remove gravel from a certain lot, defined by some authorities as a profit, was extinguished by a tax sale. But see 3 Powell, Real Property 381 (1949); 5 Rest., Property § 450, Special Note (1944). The Hunt case is no longer an authority in Massachusetts, see Gen. Laws of Mass. (Ter. ed., 1932) c. 60, § 45, where easements and covenants are expressly exempted from extinguishment by tax sale. *Covenants:* City of Jackson v. Ashley, 189 Miss. 818, 199 So. 91 (1940); Re Hunt and Bell, 34 Ont. L. Rep. 256, 24 D.L.R. 590 (1915); Nedderman v. City of Des Moines, 221 Iowa 1352, 268 N.W. 36 (1936). (Code of Iowa [1950] § 448.3 now specifically exempts covenants from extinction). See Messett v. Cowell, 194 Wash. 646, 79 P. 2d 337 (1938). There a covenant which forbade the extraction of lime for commercial purposes from the premises had been imposed on a plot of land. Later, an undivided one-half of the property was sold for tax delinquency when one tenant in common failed to pay his taxes. Subsequently, the tax deed purchaser obtained title to the other undivided half by a regular bargain and sale, and conveyed the whole fee to the plaintiff, who then sought a decree clearing her title of the restrictive covenant. The court held that the restriction was divested from the undivided half passed by tax sale, but not from the other half. As the restriction remaining on one undivided half made it impossible to use any part of the property without a breach of the covenant, the restriction was held to apply to the whole.

[13] Statutes cited note 9 supra.

[14] Wash. Rem. Rev. Stat. (1931) § 11108; the phrase is immediately qualified however, by the addition of the words "buildings and all rights and privileges" to the definition of taxable

nor extinguishment is expressly required, the courts rely on five types of provisions common to most tax statutes to resolve the problem. These provisions (1) define "property" for tax purposes, (2) indicate the manner of valuation and assessment, (3) indicate the nature of the tax lien, (4) indicate what sort of title the tax-deed grantee gets, and (5) establish the nature of the foreclosure proceeding, whether in rem or quasi in rem. The interpretation and weight which the courts give to these provisions, separately and in combination, furnishes a key to the decisions.

The definition of property. Where the definition of taxable property includes rights and privileges appurtenant to the land, it is assumed that the tax payment of the dominant owner includes a tax on the easement, and that the easement should therefore not be extinguished.[15] But where the tax is on "all real properties . . . by whomsoever owned,"[16] the status of the easement is ambiguous for tax purposes, and other provisions or general policy must be relied upon. In Maryland, for example, the policy has been to extinguish easements, although the statutory language is far from clear, on the ground that it is too troublesome to separate various interests for assessment.[17]

The valuation of property. Revenue statutes provide, in very similar terms, that property is to be assessed at "full cash value,"[18] "true and full value in money,"[19] or "fair cash value."[20] Where other requirements of a tax statute are not contradictory, courts favoring the survival of easements focus on valuation provisions. It is often said that such provisions require the taxing authority to

property. The N.Y. Tax Law (McKinney, 1943) § 9 provides that, "In all cases the assessment shall be deemed to be against the *real property* itself," (emphasis added) but the courts' definition of real property, as explained below, includes easements.

[15] See 5 Rest., Property § 450 (1944); Stansell v. American Radiator Co., 163 Mich. 528, 128 N.W. 789 (1910); Mich. Comp. Laws (1897) § 3825, Mich. Stat. Ann. (1950) § 7.2; Ohio Code Ann. (1948) § 5322; State ex rel. Koeln v. West Cabanne Improvement Co., 278 Mo. 310, 213 S.W. 25 (1919). But cf. Harmon v. Gould, 1 Wash. 2d 1, 94 P. 2d 749 (1939). Despite such a definition of property in the Wash. Act, Rem. Rev. Stat. (1931) § 11108, the easement was extinguished. The court said that the easement holder must segregate his interest on the tax rolls to protect it from extinguishment. In Magnolia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P. 2d 133 (1946), under Kan. Gen. Stat. (1945) § 77-201 defining property to include "all rights and interests, equitable and legal," mineral rights were segregated on the tax rolls and the taxes paid. The owner of the surface became tax delinquent and his rights were lost by tax sale. The court held that easements of egress and ingress appurtenant to the non-tax-delinquent mineral rights survived, but that other easements were extinguished. Apparently, these latter easements were unconnected with the mineral rights and were in gross; hence they were not protected by the tax paid for the mineral rights. The case is unclear on the latter point and treats the matter as a simple extinguishment. Cf. Polk County v. Basham, 234 Iowa 225, 12 N.W. 2d 157 (1943).

[16] Md. Ann. Code (1939) Art. 81, § 6 (1).

[17] Hill v. Williams, 104 Md. 595, 65 Atl. 413 (1906); Textor v. Shipley, 86 Md. 424, 38 Atl. 932 (1897).

[18] Md. Ann. Code (1939) Art. 81, § 11.

[19] Minn. Stat. (1949) § 273.11.

[20] Ky. Rev. Stat. (1948) § 132.190.

take easements into consideration in evaluating servient tenements,[21] that easements are therefore separately regarded and may not be extinguished by tax sale.[22] These courts generally assume that easements are "physically evident," and hence readily capable of assessment. Yet, while the existence of some easements is apparent, others might not be discoverable without a tedious and expensive search of the chains of title to the servient and dominant tenements. The District of Columbia, in an *amicus* brief filed in the *Engel* case, argued that:

> [I]f the court should sustain the ruling of the District Court that an easement is not extinguished by tax deed . . . the titles to thousands of pieces of real estate will be affected, the entire system of tax assesssment and tax collection in the District of Columbia will be disrupted, and an infinitely greater number of assistant assessors will be required to perform the work of real estate assessing—indeed, considerable additional legislation will be necessary to enable the District to carry out a vital act of government.[23]

However, the fact that assessments are often made with the cooperation and assistance of neighborhood real estate men makes it likely, at least in some cases, that even those easements which are not physically evident will be taken into account. Municipal governments sometimes make the further argument that unless easements are extinguished by tax sale, the state will have great difficulty in disposing of property so encumbered. In *District of Columbia v. Capital Mortgage & Title Co.*,[24] the court indicated that this objection was outweighed by the injustice and unfairness of extinguishing the dominant owner's property right.

The court in the *Capital Mortgage* case also stated that under a valuation principle which required separate taxation of individual interests, the net revenue received by the taxing authority must be the same as it would be if the dominant and servient tenements were assessed without the easement being taken into account. "The existence of the easement enhances the value of the dominant tenement. This augmented value should be reflected in an increased tax assessment. Consequently, what the District of Columbia loses by way of

[21] District of Columbia v. Capital Mortgage & Title Co., 84 F. Supp. 788 (D.C. D.C., 1949); Ross v. Franko, 139 Ohio St. 395, 40 N.E. 2d 664 (1942). 1 Bonbright, Valuation of Property 496, 497 (1937). Leases and mortgages are not taken into account in valuation. The explanation given is that such interests do not affect the value of the property in the same way that an easement does. The latter is actually subtracted from the total of possible interests. But the property is merely security for a mortgage, and a lessor holds subject to a lease from which he may get some benefit. Thus, mortgages are usually extinguished by the tax sale. E.g., Hefner v. Northwestern Life Ins. Co., 123 U.S. 747 (1887); See also Bonbright, ibid.

[22] E.g., Beeman v. Pawelek, 96 N.Y.S. 2d 204 (1949); Jackson v. Smith, 153 App. Div. 724, 138 N.Y. Supp. 654 (1912); Ehren Realty Co. v. Magna Charta Building & Loan Ass'n, 120 N.J. Eq. 136, 184 Atl. 203 (1936).

[23] Brief on Behalf of the District of Columbia, *Amicus Curiae* at 1, Engel v. Catucci, 197 F. 2d 597 (App. D.C., 1952). This argument was rejected by the court, which relied upon D.C. Code (1940) § 47-705, which provides that assessors shall determine the value "from actual view and the best sources of information in [their] reach."

[24] 84 F. Supp. 788 (D.C. D.C., 1949).

taxes on the servient tenement, should have been fully recouped by taxes on the dominant estate. . . . The District of Columbia, therefore, loses nothing."[25] This reasoning is open to doubt. An easement which totally destroys the value of a servient tenement except as it is used as an alleyway may add little or no value to a dominant tenement which has many other channels of access. If the assessment value deducted from the servient tenement were automatically added to the valuation of the dominant, the owner of the latter would be entitled to a tax abatement. In New York, for example, property which is wholly devoted to use as a right of way may be stricken from the tax rolls.[26] If, in such case, little additional valuation is placed upon the dominant tenement, the existence of the easement precludes the state from collecting more than a negligible revenue from the burdened property.

The "net revenue" argument has more weight in relation to building and use restrictions in covenants. Where a tax deduction is made for use limitations, the limitations tend automatically to enhance the value of adjoining land and thus to equalize net tax receipts.[27] However, it is sometimes argued in behalf of extinguishment that the extinction of a use limitation may greatly enhance the value of a particular plot for tax purposes. For example, the sale of liquor on property formerly restricted to residential uses will result in a higher assessment valuation and hence larger tax returns on that property. Nevertheless, the adverse effect of extinguishment of such a use limitation on surrounding property and the corresponding decrease in revenue from all but the newly liberated plot is given weight by those courts which favor survival of covenants.[28]

The nature of the tax lien. Statutes generally provide that the lien for delinquent taxes is prior to and forecloses all other liens on the property, including mortgages.[29] Courts favoring extinguishment sometimes rely on the all-inclusive language of the lien provision to effect the extinction of easements and other

[25] Ibid., at 790.

[26] People ex rel. Poor v. Wells, 139 App. Div. 83, 124 N.Y. Supp. 36 (1910).

[27] Hayes v. Gibbs, 110 Utah 54, 169 P. 2d 781 (1946); Alamogordo Imp. Co. v. Prendergast, 43 N.M. 245, 91 P. 2d 428 (1939); Schlafly v. Baumann, 341 Mo. 755, 108 S.W. 2d 363 (1937).

[28] Hayes v. Gibbs, 110 Utah 54, 169 P. 2d 781 (1946). The court added that it would be inequitable to allow the tax delinquency of one owner thus to jeopardize a whole development scheme.

[29] Hefner v. Northwestern Ins. Co., 123 U.S. 747 (1887). But see Ky. Rev. Stat. (1943) § 134-530; Hall v. Hall, 174 Ky. 356, 192 S.W. 76 (1917) (tax deed grantee takes subject to mortgages and other liens). Where a mortgagor loses his land through a tax sale, the mortgage is usually extinguished; but if he reacquires the property subsequently, the mortgage is reinstated, e.g., Interstate Building and Loan Ass'n v. Waters, 50 S.C. 459, 27 S.E. 948 (1897). The courts reason that in reacquiring the property, the mortgagor has done no more than fulfill his obligation to the mortgagee to pay the taxes on the property. Under similar circumstances it has been held that previously extinguished easements, covenants, and remainders were reinstated. Stansell v. American Radiator Co., 163 Mich. 528, 128 N.W. 789 (1910); Caffey v. Parris, 186 Ga. 303, 197 S.E. 898 (1938); Matlock v. Mize, 55 N.M. 218, 230 P. 2d 246 (1952).

interests as well. Thus, in *Harmon v. Gould*,[30] the court cited the following language from the Washington statute as requiring extinguishment:

[The] lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, debt, obligation or responsibility to or with which said real property may be charged or liable.[31]

Where statutes provide only that tax delinquencies "shall be liens,"[32] or liens "superior to all others,"[33] courts favoring extinguishment rely on other provisions or policy considerations.[34]

Courts favoring the survival of easements and other interests tend to ignore all-inclusive lien provisions. Thus, the New Jersey statute which provides that the lien is "paramount to all prior or subsequent alienations and descents of such land or encumbrances thereon"[35] is overlooked in favor of the valuation analysis explained above. Similarly, although the New Hampshire court has held in cases not involving easements that tax liens have priority over all "titles," the same court has said:

[A]n easement is not a lien, nor is it a title or interest in real property in the sense which these terms are applied to mortgage and dower rights, it is rather a servitude . . . carved out.[36]

The title that passes by the tax deed. Generally, the statutes provide that the title passed by a tax deed is "an absolute title in fee simple."[37] This provision is not necessarily inconsistent with survival of easements.[38] Other statutes provide that a purchaser by tax deed shall receive a "new and perfect title, free from all liens and encumbrances."[39] The latter provision might well be thought to be inconsistent with a policy allowing easements and covenants to survive, but strangely enough the Ohio statute specifically exempts such interests from ex-

[30] 1 Wash. 2d 1, 94 P. 2d 749 (1939).

[31] Wash. Rem. Rev. Stat. (1931) § 11260.

[32] Md. Ann. Code (1939) Art. 81, § 72.

[33] Fla. Stat. (1951) § 192.04.

[34] Wolfson v. Heins, 149 Fla. 499, 6 So. 2d 859 (1942) ("the levy is on the realty itself"). This case can be reconciled with the majority view on the ground that neither dominant nor servient owner paid taxes. Thus the sum of all interests in both estates was properly forfeited to the state. See also, Hill v. Williams, 104 Md. 595, 65 Atl. 413 (1906).

[35] N.J. Rev. Stat. (1937) 54:5-9. See also ibid., 54:5-87 (perfect title provision). See Ore. Comp. Laws (1940) c. 7, § 110-829 ("priority to . . . any . . . lien or claim whatever"); Crawford v. Senoski, 128 Ore. 229, 274 Pac. 306 (1929).

[36] Gowen v. Swain, 90 N.H. 383, 387, 10 A. 2d 249, 252 (1939). See notes 21, 29 supra and note 50 infra.

[37] N.Y. Tax Law (McKinney, 1943) § 131, but see § 154, as amended 1947, which exempts easements and covenants from extinguishment. This provision does not apply in cities (see § 160, ibid.). The N.Y. cases uniformly upheld the survival of easements and covenants everywhere before this amendment was made; e.g., Tax Lien Co. v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914); Town of Harrison v. Campagna, 81 N.Y.S. 2d 257 (1948).

[38] 1 Rest., Property § 15 (1944).

[39] Ohio Code Ann. (1948) § 5762.

tinguishment.[40] However, where, as in the Mississippi statute, the phrase, "perfect title" was used[41] in the absence of any clause saving easements and covenants, the court in *City of Jackson v. Ashley*[42] held that allowing a restrictive covenant to survive would be contrary to the statutory intent.

In a few jurisdictions, the statute provides that only the interest of the person assessed[43] or of persons made defendant[44] passes by the tax deed. In others, no specific provision is made, but the courts have interpreted the statutes to the same effect.[45] Where only the interest of the person assessed passes, survival of easements and covenants should result, and the courts have generally so held.[46] But under a statute providing that all right, title and interest of the "former owner" is vested in the purchaser, the Iowa court has held that a tax sale operates to pass title to all rights in the realty.[47]

Besides easements, mineral rights,[48] mortgages[49] and covenants, some courts have relied on "absolute title" provisions to extinguish inchoate dower,[50] rights of reverter,[51] and reversions.[52] However, a distinction is sometimes made between dower, rights of reverter and reversions on the one hand, and easements and covenants on the other. In this connection, it should be pointed out that inchoate dower, rights of reverter and reversions are not generally taxable and do not affect the valuation of the estate to which they apply.

The nature of the proceeding: in rem, quasi in rem or in personam. Generally,

[40] Ibid. Ross v. Franko, 139 Ohio St. 395, 40 N.E. 2d 664 (1942), in which an easement was held to survive, was decided under § 5762 of the 1940 statute which lacked the clause exempting easements from extinguishment. The statute received its present wording in 1943.

[41] Miss. Code Ann. (1930) § 3273.

[42] 189 Miss. 818, 199 So. 91 (1940).

[43] Code of Va. (1950) § 58-1064; Code of Ala. (1940) Title 51, § 267; W.Va. Code (1949) § 999 (113).

[44] E.g., Ga. Code Ann. (1935) § 92-8107, § 39-1303.

[45] E.g., Beeman v. Pawelek, 96 N.Y.S. 2d 204 (1949); Hall v. Hall, 174 Ky. 356, 192 S.W. 76 (1917); Smith v. Young, 178 Ky. 356, 198 S.W. 1166 (1917).

[46] Cases cited note 9 supra.

[47] Polk County v. Basham, 234 Iowa 225, 12 N.W. 2d 157 (1943) (although mineral rights were extinguished, covenants survived extinguishment under the amended Iowa Code).

[48] Ibid. [49] Authorities cited note 29 supra.

[50] Lucas v. Purdy, 142 Iowa 359, 120 N.W. 1063 (1909).

[51] Alamogordo Imp. Co. v. Hennessy, 40 N.M. 162, 56 P. 2d 1127 (1936). In this case a covenantee tried to enforce a right of reverter for the violation of a restrictive covenant prohibiting the sale of liquor. The court held that the right of reverter had been extinguished by a previous tax sale. But in Alamogordo Imp. Co. v. Prendergast, 43 N.M. 245, 91 P. 2d 428 (1939), the court held that while the right of reverter was lost, the covenant could still be enforced by injunction. The basis for this distinction can be only the valuation and tax revenue policy discussed above.

[52] Zaring v. Lomax, 53 N.M. 273, 206 P. 2d 706 (1949) (dictum). But cf. Eason v. Spence, 232 N.C. 579, 61 S.E. 2d 717 (1951) (remainder not cut off where remainderman not made a party to the tax foreclosure).

foreclosure proceedings are quasi in rem and require notice by mail to all interested parties, although some states have provided for strict in rem proceedings.[53] In *Hanson v. Carr*,[54] the Washington court stressed the in rem nature of the foreclosure proceeding to extinguish an easement. Nevertheless, the court defined the *res* as undiminished by the easement, indicating that, even in an in rem proceeding, the question of extinguishment depends upon whether or not the burdened property is thought of as decreased by outstanding interests for tax purposes. In *Hayes v. Gibbs*,[55] the court emphasized the in personam character of the *taxing process* in holding that a covenant is not extinguished by tax sale. Again the question was, at bottom, whether interests in land were taxed separately or whether the tax was on the land itself. Hence, while some commentators have set forth a contrary position,[56] the nature of the foreclosure proceeding would not appear conclusive on the issue of extinguishment.

Whether the foreclosure proceeding is in rem or quasi in rem is, of course, important to the question of notice. It is easier to foreclose all interests in land in an in rem proceeding because notice and service requirements may be less stringent than for proceedings quasi in rem or in personam.[57] Where the local statute provides for personal service on the assessed owner and notice by mail or publication to all other interested parties,[58] failure to comply with such provisions may render the whole foreclosure proceeding invalid.[59] However, statutes making the proceeding in rem and requiring notice by publication only, where interested parties are unknown, have been upheld against the usual due process objections.[60]

It may be seen from the foregoing analysis that most statutes are vague on the general question of extinguishment of easements and other interests by tax sale. Of course, provisions specifically exempting easements and covenants from extinguishment are determinative in a few jurisdictions.[61] In others, a definition

[53] E.g., N.Y. Tax Law (McKinney, 1947) § 165 et seq.; Wash. Rem. Rev. Stat. (1931) § 11278. See note 3 supra.

[54] 66 Wash. 81, 118 Pac. 927 (1911).

[55] 110 Utah 54, 169 P. 2d 781 (1946).

[56] Kloek, Effect of Tax Deeds on Easements Appurtenant and Rights of Way, 16 Chi-Kent L. Rev. 328 (1938), most of the cases cited for the in rem argument do not concern easements. Consult 3 Powell, Real Property 510 n. 69 (1949).

[57] Consult Scott, Fundamentals of Procedure (1922).

[58] E.g., Wash. Rem. Rev. Stat. (1931) § 11276. But cf. ibid., § 11278 (notice by publication sufficient for county sales).

[59] E.g., Title & Trust Co. v. Columbia Basin Land Co., 136 Wash. 63, 239 Pac. 992 (1925).

[60] E.g., Neb. Laws (1875) p. 107; Leigh v. Green, 193 U.S. 79 (1904). See also, N.Y. Tax Law (McKinney, 1947) § 165 et seq.; Lynbrook Gardens v. Ullman, 37 N.Y.S. 2d 671 (1942), rev'd 291 N.Y. 472, 53 N.E. 2d 353 (1943), cert. denied 322 U.S. 742 (1944); accord, In re New Rochelle, 182 Misc. 176, 46 N.Y.S. 2d 645 (1943), aff'd, 268 App. Div. 182, 49 N.Y.S. 2d 673 (1944), aff'd, 294 N.Y. 678, 60 N.E. 2d 838 (1945), cert. denied, 326 U.S. 720 (1945).

[61] Statutes cited note 9 supra.

of property which includes rights and privileges appurtenant should preclude extinguishment of easements and covenants.[62] Statutes providing that the tax deed grantee gets only what the assessed owner had likewise protect the dominant owner's rights.[63] Some courts use the "fair value" provision as a foundation for survival.[64] Others employ the all-inclusive title or lien provision to rationalize extinguishment.[65] It appears, however, that policy considerations are in the end determinative, and it may be said with confidence that there is a need for more specific legislation in this area.

Neither the majority position (favoring survival) nor the minority view (requiring extinguishment) is wholly satisfactory. In concluding that an interest in land is subtracted from one tenement and added to the other, the majority in effect increases the administrative burden of the taxing authority and raises a tenuous "legal" distinction between interests which are "physically evident" and those which are not. Further, in terms of net revenue, it has been shown that the deduction of value from the servient estate may far exceed the addition of value to the dominant, resulting in a loss of tax receipts. On the other hand, the minority position may be criticized as failing to accord sufficient recognition to valuable property interests and as overemphasizing the importance of administrative expediency. Moreover, if extinguishment makes for freer alienability of the servient estate, it must conversely withdraw from the security of title to the dominant.

Where the question of extinguishment depends upon whether the taxing authority has taken into account the increased value of the dominant tenement, counsel should investigate actual local assessment procedure and not rely upon theoretical descriptions of the taxing process. In any case, the burden of proving that the easement or covenant has been separately taxed should be carried by the party resisting extinguishment.

A simple means of resolving all uncertainties would be to require covenantees and owners of easements appurtenant to enter their interests specifically on the tax rolls.[66] Registration of these interests would then raise a conclusive presumption that they had been individually taxed and hence could not be extinguished. Where registration facilities are available and the dominant owner has neglected to register his covenant or easement appurtenant, it should be assumed that no tax has been paid thereon, and the easement or covenant would therefore be forfeited for nonpayment of taxes. A registration requirement would place upon the owner of a separable property right the duty of informing the

[62] Note 15 supra.

[63] Statutes cited note 43 supra.

[64] Note 22 supra.

[65] E.g., Harmon v. Gould, 1 Wash. 2d 1, 94 P. 2d 749 (1939).

[66] In jurisdictions where "rights and privileges" are included in the definition of property, such interests are not generally separately listed but are included in the valuation of the servient and dominant tenements. See Beeman v. Pawelek, 96 N.Y.S. 2d 204 (1949).

taxing authority that a taxable interest in land had been created; otherwise such property rights would be subject to extinguishment. Under these circumstances, the taxing authority, as well as the courts, would be able to determine the existence of taxable interests by glancing at the tax rolls, and there would be little additional administrative expense.

Extinguishment should not, of course, be used as a substitute for eminent domain. Where the taxing authority, in order to resell forfeited land and recover delinquencies thereon, desires to extinguish known outstanding property interests, proceedings in the nature of condemnation would seem appropriate. Compensation would be measured by the loss to the owner of the dominant tenement[67] and in many cases would be negligible. If the value of the interest is found to be substantial, however, the taxing authority might take occasion to revaluate the dominant tenement for purposes of more accurate assessment.

LIABILITY FOR PERSONAL INJURIES FROM DEFECTIVE HOUSING

The increasing growth of housing developments coupled with the possibility of choosing the size, style and color of a house from a "model" home is encouraging the average man to purchase his house in much the same manner as he purchases his automobile. The appearance of giant subdividing and construction corporations and the extensive use of such devices as the package mortgage[1] and low-cost installment land contracts have made such purchases possible. Section 15 of the Uniform Sales Act and such cases as *Carter v. Yardley & Co.*[2] in protecting buyers from defects in purchased goods indicate how the law of chattels has kept pace with the growing commercialization of our society. But with regard to real property the classical doctrine insists:

> Whatever may be the reason, no case has been found in the books where the vendor has been held liable in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises.[3]

The extent and possibility of deviation from such a doctrine is of vital concern in an economy with an increasing volume of dwelling construction.

Although the trend is toward purchase of the house as a completed product, many prospective homeowners buy land and personally contract for construc-

[67] For a full discussion of condemnation of easements and covenants, see Aigler, Measure of Compensation for Extinguishment of Easements by Condemnation, [1945] Wis. L. Rev. 1.

[1] See Package Mortgage and Optional Future Advances, 65 Harv. L. Rev. 478 (1952), for the suggestion that the package mortgage aids those purchasers who would otherwise be unable to afford such utilities.

[2] 319 Mass. 92, 64 N.E. 2d 693 (1946) (recovery by consumer from manufacturer for burns inflicted by perfume).

[3] Smith v. Tucker, 151 Tenn. 347, 362, 270 S.W. 66, 70 (1925). See also Combow v. Kansas City Ground Investment Co., 358 Mo. 934, 218 S.W. 2d 539 (1949).