

No. 1181051

IN THE SUPREME COURT OF ALABAMA

Mark Stiff, et al.

Appellants,

v.

Equivest Financial, LLC,

Appellee.

On Appeal from

the Tenth Judicial Circuit Court of Alabama

Jefferson County, Birmingham Division

Case No. CV-2018-900776

Brief of *Amicus Curiae*

National Tax Lien Association, Inc.

in Support of Appellee's Application for Rehearing

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Argument

The National Tax Lien Association, Inc. (the "NTLA") and its members are involved in all aspects of the tax lien and tax deed industry. Based on this comprehensive experience, the NTLA urges the Court to grant rehearing because of the wide-ranging impacts of the Court's June 26, 2020 opinion on the entire industry. Specifically, the Court should grant rehearing because it has misinterpreted Section 40-10-15's public sale requirement and failed to consider the statute's historical context. Rehearing is also proper because the opinion fails to consider the practical effects on all involved and has also misapprehended the statutory process for collaterally attacking claim irregularities with a tax sale.

I. The Court misinterprets Ala. Code § 40-10-15 by applying a literal approach and ignoring the section's history and remaining language.

The Court's rules of statutory construction direct it "to look at the statute as a whole to determine the meaning of certain language that is, when viewed in isolation, susceptible to multiple reasonable interpretations." *LEAD Educ. Found. v. Alabama Educ. Ass'n*, 290 So. 3d 778, 788-89 (Ala. 2019) (quotation omitted). "Because the meaning of

statutory language depends on context, a statute is to be read as a whole. Subsections . . . 'should be construed together to ascertain the meaning and intent of each.'" *Ex parte Found. Bank*, 146 So. 3d 1, 7 (Ala. 2013) (quotation omitted). The Court should also avoid interpretations leading to an absurd result. *Pace v. Armstrong World Indus., Inc.*, 578 So. 2d 281, 284-85 (Ala. 1991). When there is doubt about how to construe a statute "the contemporaneous construction placed upon" the statute by "the popular interpretation, as exemplified in practice for a number of years, should be looked to in reaching a conclusion as to the proper construction." *State ex rel. Fowler v. Stone*, 185 So. 404, 408 (Ala. 1938).

The Court should grant rehearing to interpret Section 40-10-15 within the context of the statutory scheme and with its history in mind, rather than retaining a literal interpretation of the words "in front of the door of the court-house" in isolation.

A. History confirms that Section 40-10-15 is intended to promote a competitive auction, not one literally conducted in public.

Laws directing the auction of property to satisfy delinquent taxes pre-date Alabama's statehood. The original

tax sale statute in the Mississippi Territory required the sheriff to advertise the sale's date and location

at the door of the house where the general quarter sessions are held and during one term of the court, and to also in three other places, and in the township where the land lies:--the vendue^[1] shall be fair, in open day light and the land struck off to the highest bidder who shall be able to pay down the money.

A Law Directing the Manner in Which Money Shall be Raised and Levied, *Laws of the Mississippi Territory* at 121, § 3 (April 3, 1799); see also A Law Directing the Manner in Which Money Shall be Raised, *Sargent's Code* at 74, 77 (April 3, 1799) (requiring "the vendue shall be fair").

After Congress split the Mississippi Territory, the First General Assembly of the Alabama Territory passed a similar tax collection law. See An Act to Raise a Revenue, *Acts Passed at the Second Session of the First General Assembly* at 91-92, § 6 (Dec. 16, 1819). Under this act, the sale occurred at "the premises." *Id.* The next year, the General Assembly moved the location for the tax sale to the courthouse, requiring the collector "to give notice by advertisement at the door of the courthouse of the proper

¹ "Vendue" is old English for "a sale at public auction." Vendue, *Black's Law Dictionary* (11th ed. 2019).

county and . . . that on a certain day . . . he shall at the court house of his county, . . . offer [the property] for rent to the highest bidder[.]” An Act to Raise a Revenue, *Acts of the Second Session of the General Assembly of Alabama* at 12, § 8 (Dec. 20, 1820). Then in 1883 and 1885, the Legislature passed tax collection acts removing the location requirement. See Act No. 62 at 114, § 90 (Feb. 23, 1883); Act. No. 2 at 53, § 90 (February 17, 1885).

Two years later, the 1885 Act was codified and the language was expanded to reflect the current language of Section 40-10-15: “Such sales shall be made in front of the door of the court-house of the county, at public outcry to the highest bidder for cash[.]” See also Bricknell, *Code of Alabama, Adopted by Act of the General Assembly* at 180, § 577 (1887). This newly codified section combined the two historical requirements that the notice of the sale be placed on the door of the courthouse and the collector use a competitive bidding process or “public outcry.”

B. A publicly advertised tax sale auction inside the courthouse is conducted at “public outcry.”

To read “in front of the door of the courthouse” literally and independent of the clause “at public outcry” is a misinterpretation of the statute.

Courts from the 1800s note the similarities between vendue and public outcry, explaining that the phrases describe some method of auction open to the public at which the sales price is chosen by competitive bidding:

Was this a sale then within the words of the statute, by public vendue or outcry? It is pretty clear from the ceaseless tautology in the language of legislative bodies, that this word "outcry" was used in this instance, as the synonyme of its predecessor; and that it was not intended to interdict a sale by outcry, unless it were at the same time, a sale by auction. What then is understood by an auction, according to the usages of Pennsylvania? It is a sale by consecutive bidding, intended to reach the highest price of the article by competition for it; and such a sale the legislature certainly had in its view.

Hibler v. Hoag, 1841 WL 4137, at *2 (Pa. 1841). It is, therefore, the method of selling the property, not the sale's location, that is intended by the statute's use of the phrase "at public outcry." This can be seen from the current statute's roots in the "fair vendue" provision.

A modern example of this distinction is found in the Alabama Uniform Commercial Code. Under the U.C.C., "a 'public' sale is meant a sale by auction." Ala. Code § 7-2-706, Cmt. 4. This differs from a private sale, in which there is "no reasonable prospect of competitive bidding[.]" See *id.*, Cmt. 9. Courts "analyzing whether a sale is public

or private, . . . have focused on whether there is a 'public invitation' to purchase the property; whether the invitation places restrictions on those wishing to participate; and whether the sale was conducted in a place where the public has access." *Lavender v. AmSouth Bank*, 539 So. 2d 193, 195 (Ala. 1988) (citations omitted).

An advertised tax sale in a courtroom open to the public satisfies these elements. The opinion misinterprets the statute by focusing on the physical location for the tax sale rather than the statute's historical purpose of permitting open and competitive bidding.

Even if Section 40-10-15 requires tax sales to be held at a public location, it can hardly be said that a courtroom is not public. Even the Alabama Constitution confirms that. Ala. Const. art. I, § 13 (1901) ("That all courts shall be open[.]"); see also Ala. Const. art. I, §14 (1819); see also McGinley, Results from the Laboratories of Democracy, 82 Alb. L. Rev. 1449, 1461 (2019) (collecting cases analyzing "open courts" constitutional protections as providing right of physical access to the courts).

Despite the public nature of the courthouse generally and the specific Constitutional mandate that the courthouse

be open to the public, the Court has interpreted Ala. Code § 40-10-15 to impose a physical location requirement in the literal sense. This interpretation leads to an absurd result--that is, the voiding of an untold number of tax sales in Alabama even though the sales were conducted through competitive bidding by the public.

Given the law's pervasive protection of the county's ability to effectively collect taxes, *Folsom v. Carnley*, 97 So. 95, 97 (1923) ("Taxes have often been called the lifeblood of government, without which it cannot perform its necessary functions, or even long endure."), such a drastic change in the law should be recognized by the Court only on the clearest legislative mandate. *Cf. Ex parte Milne*, No. 1190397, 2020 WL 2097552, at *2 (Ala. May 1, 2020) (Parker, C.J., concurring specially). Such a clear legislative mandate requiring literal interpretation of Ala. Code § 40-10-15 is not present here, so the Court should correct its interpretation by granting rehearing.

II. The Court's mistaken interpretation of the statute will undermine the benefits provided by the tax sale and cause unnecessary litigation at the County's expense.

In its opinion, the Court calls Equivest one of the "major investors" in the Bessemer Division, suggesting that

it is a one of many "repeat players who know their way around the courthouse." Whether Equivest purchases one or thirty properties each year is immaterial--Alabama Counties all benefit equally from tax sale purchasers of any size.

In 2019, over 6.4 million Americans failed to pay their property taxes, leaving cities and counties with a financial shortfall of more than \$15.7 billion. See Westover, *NTLA Market Research Report* (June 30, 2020), available at <https://bit.ly/3eg1IYh>. In the last year in Alabama, the tax delinquencies involved more than 17,000 properties totaling more than \$42 million in taxes. *Id.*

A county cannot provide essential services without tax revenue. See *Folsom*, 97 So. at 97. So Alabama law permits the county to sell property to satisfy delinquent taxes. Ala. Code § 40-10-1. This is an alternative to a county obtaining revenue elsewhere, by either raising taxes or through a loan of some form for the county.

To encourage purchases of properties being sold by a county, the Legislature has provided for interest to be paid to the purchaser. See Ala. Code. § 40-10-122(a). This interest is not paid by the county, but by the redeeming party. *Id.* Thus, tax sale purchasers provide an interest-

free loan to the county so that it may realize an immediate cash infusion from the tax sale each year. Without this statutorily approved arrangement, Alabama's counties would have few options for resolving the yearly budget shortfall. Thus, tax sale purchasers provide a direct cash benefit to Alabama's Counties that should not be ignored.

Tax sale purchasers also provide other indirect benefits to county residents. With the right to possess tax sale properties comes the right to make improvements to them. Ala. Code § 40-10-122(b)-(c). This results in vacant properties becoming developed and dilapidated properties becoming safer. But whether a tax sale purchaser is renovating property that has fallen into disrepair or is developing vacant land, the county obtains yet another benefit: a bolstered tax base. Properties that tax sale purchasers bring back to their full potential are likely to increase in value, which leads to more tax revenue.²

Thus, tax sale purchasers of all sizes provide tangible benefits to Alabama's counties and their residents. Those

² Without many of the statutory incentives removed, fewer bidders are likely to attend tax sales. Without these bidders, more properties will be bought by the State, Ala. Code § 40-10-18, which means less revenue available to the Counties for necessary services, Ala. Code § 40-10-20.

benefits should not be ignored by the imposition of a categorical rule voiding the tax sales of an untold number of properties per year, some of which have already been renovated and returned to the functioning tax base.

Retaining this literal interpretation standard for all aspects of the tax sale process is also an invitation for more tax sale litigation. For example, the same statute the Court interprets also requires counties to sell "to the highest bidder for cash" at the tax sale. The Court's literal interpretation standard might be used to challenge a tax sale purchaser's use of a cashier's check or wire to purchase properties at a tax sale. The tax sale in that example would be void under the Court's current analysis.

Another example comes from the second sentence of Ala. Code § 40-10-15, which requires the Probate Judge to attend the sale and "make a record thereof in a book to be kept by him in his office for that purpose[.]" Under the Court's analysis, a probate judge who uses technology--a computer spreadsheet instead of a "book"--has just voided the tax sale. The same could be true for any counties who use technology to hold tax sales online, potentially to help stop the spread of COVID-19. *Cf.* Rules of Tax Lien Auction,

Elmore County Rev. Comm'n, <https://bit.ly/3gRicYz>; 2019 Mobile County Online Tax Sale Provided by GovEase, *Call News* (April 22, 2020), <https://bit.ly/3j1DcNZ>; Online Tax Sale, Talladega County Rev. Comm'n, <https://bit.ly/2DEkNqr>. Under the Court's categorical rule voiding tax sales that do not literally comply with language from the 1800s, these tax sales would also be void even if done to promote transparency, efficiency, or safety during a pandemic.

The Court's opinion will also increase litigation expenses for Counties. While correctly identifying Ala. Code § 40-10-76 as a method of obtaining a partial refund from a delinquent taxpayer, the Court overlooks another remedy under State law that permits a tax sale purchaser to recover its bid *and* interest from the county. Ala. Code § 40-10-75. Not only does this section expose county officials to liability, but it also means that counties will become embroiled in more tax sale litigation. Given the Court's ruling, tax sale purchasers will need to name the county and its officials in ejectment and quiet title actions. This will increase litigation expenses for the counties, all because the Court has adopted a categorical

rule voiding indoor tax sales. The Court should grant rehearing to avoid these unintended consequences.

III. The Court should reconsider its categorical rule declaring large numbers of tax sales to be void.

Under Alabama law before the Court's opinion, the probate court decided whether the location of a sale complied with statutory requirements:

Within 10 days after such sale the tax collector shall make report of each sale to the probate court and praying confirmation thereof. Such report shall lie over for a period of five days for exceptions or objections thereto. If upon the expiration of five days no objections have been filed, or if in the opinion of the court they are insufficient, and it appearing to the court that the tax collector sold such real estate in accordance with the law, and the decree of court ordering such sale, the court shall make and enter an order confirming said sale

Ala. Code §40-10-13.

Here, the Supreme Court has invalidated a tax sale held in the probate court's courtroom (a public place) without any regard to whether the delinquent taxpayer objected to the sale and whether the probate court considered such an objection. Given that the tax sale certificate and tax deed were issued here, the Probate Court must have confirmed the sale knowing of its location. (Slip Op. at 2.)

The Court's opinion ignores the Legislature's directive that probate court, not the circuit court, confirm the validity of the sale. Under this misinterpretation, a tax sale purchaser now must bear the burden of obtaining confirmation of a tax sale in the circuit court as part of an action for ejectment or quiet title. The Court should grant rehearing to correct this oversight.

The location of the sale must be distinguished from other statutory requirements because State law establishes certain threshold actions necessary to give the tax collector the legal authority to sell property at tax sale. This includes a probate court order for the sale of the land, Ala. Code 40-10-1, and the tax collector giving notice to interested parties, see *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-99 (1983). The first example directly impacts delinquent taxpayers because the requirement that the judge issue an order of sale ensures the taxes are actually due and are not collected twice. See *Pickler v. State*, 42 So. 1018, 1019 (Ala. 1907); Ala. Att'y Gen. Op. No. 82-00053, 1981 WL 725477 (Oct. 29, 1981) ("A valid assessment of the property is indispensable to give the probate court jurisdiction to declare a lien and decree

a sale for the unpaid taxes."). The second example also directly impacts delinquent taxpayers because the notice is intended to give them a chance to avoid a sale altogether.

These types of pre-sale defects raise jurisdictional or due process concerns directly impacting the delinquent taxpayer, while other issues, like the location of the tax sale, are intended for the benefit of the public at large. See Slip Op. at 10 ("Among the legislature's objectives in enacting the tax-sale statutes was to create a system that is fundamentally fair and perceived by the public as such . . . Ignoring the sale-location requirement is injurious to the public . . . ").

The Court should not rewrite the statutory process for confirming tax sales by requiring literal compliance with Section 40-10-15 while ignoring the probate court's authority to analyze, in the first instance under Section 40-10-13, potential irregularities like the location of the sale. Given proper notice of the tax sale, the interested party should have to appear in the probate court to assert the tax collector's failure to comply with Ala. Code §40-10-15, rather than this Court creating a categorical rule that all tax sales held inside a courthouse are void.

Conclusion

"The application for rehearing serves the laudable purpose of allowing this Court to rectify any errors in its opinions, so that the ends of justice may be ultimately achieved." *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1060 (Ala. 2000) (per curiam). The Court should grant the application for rehearing to correct its misinterpretation of Ala. Code § 40-10-15 and to avoid the unnecessary harm that will befall Alabama's Counties following the Court's opinion. The ends of justice would be best served by reiterating that tax sale defects--including those involving the tax sale's location--should be analyzed case-by-case under the established statutory procedure.

Respectfully submitted July 17, 2020.

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