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A Commentary on North Dakota Tax Titles

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A COMMENTARY ON NORTH DAKOTA TAX TITLES

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I.

THE TAX TITLE AS A LEGAL INSTITUTION

THE sale of land for the purpose of collecting delinquent taxes which had been levied upon it was unknown to the common law, which gave the revenue authorities other procedures—the imprisonment of the taxpayer and the distraint of his chattels—for meeting the problem of the landowner who failed in his financial obligations to the sovereign.[1] Possibly the fact that the tax sale lacks a common law background and came before the courts as a statutory innovation was one of the causes for the cool judicial reception it received. But other and more cogent reasons have since been put forward as furnishing explanations of the suspicion with which tax titles are presently treated in most jurisdictions.

A recent commentary has suggested two basic causes: First, the essentially statutory character of the tax title means that it may be set aside upon proof of a deviation from prescribed procedure, while the execution of these procedures—normally a complex and technical business—is often entrusted to local officials who are unskilled or apathetic. Perfect compliance with the statutes is thus the exception rather than the rule. Second, the involuntary character of the sale and the common disproportion between the purchase price and the actual value of the land tend to create a judicial predilection in favor of the former owner.[2]

Whatever may be the underlying motivations for the attitude, it is undeniably true that the legal profession has generally concluded that titles derived through tax sales are untrustworthy. Evidence to support the validity of this assumption is easy to assemble. A survey made in 1950 revealed that while tax deeds had come before the Supreme Court of Wyoming many times, in only one instance had that tribunal held a tax title valid.[3] A scholarly and penetrating discussion appearing in 1933 remarked that, "In most of the states the entire procedure is such that it is well nigh impossible to assure the validity of a tax deed." [4] Blackwell, whose early work

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1. Blackwell, Tax Titles vii (5th ed. 1899).

2. Note, 62 Harv. L. Rev. 93 (1948). See also Simpson and Baker, *Tax Delinquency*, 28 Ill. L. Rev. 147 (1933), for an excellent, though depression-oriented, discussion of this general subject matter.

3. Note, *Limitations and Defective Tax Deeds*, 4 Wyo. L. J. 271 (1950). This is part of a student symposium appearing in the cited issue of the *Wyoming Law Journal* which gives a good over-all picture of the law in a typical western jurisdiction. See also Note, 19 Rocky Mt. L. Rev. 187 (1947).

4. Simpson and Baker, *supra* note 2, at 151.

on the subject still retains a measure of utility, becomes genuinely eloquent in discussing the weaknesses of the tax deed, referring to "the battle-field whereon lie mangled and dead nearly all the tax titles that have ever dared to show their faces in the court room." [5] It is possible to multiply similar comments at length.[6]

As a general rule, the cases involving tax deeds are concerned with drily technical points of statutory construction. The twistings and turnings of the law in this state will be explored in more or less detail in the pages to follow. Yet if the cases are read with an eye to the economic and political conditions from which they sprang, it is possible to draw the conclusion that in other states as well as in North Dakota most of the decisions rest upon a substratum of conflict between the landowning and landworking groups and the essentially commercial and financially-minded interests in the community.[7] In its most tangible form, this sometimes expresses itself in recurring efforts by state legislatures to bolster the vulnerable status of tax titles and by equally persistent efforts on the part of the courts to free themselves from the hampering effect of legislation they consider unduly restrictive.[8] The courts have usually had the last say in the matter, and since it is possible for them to effectively cushion the impact of legislative enactments by techniques of construction, the legal standing of the tax deed has steadily deteriorated.

In times of prosperity, this conflict becomes much less marked. Even in times of economic stress little reference to it appears in the opinions. But on occasion the judges have spoken emphatically on the point, as witness the language employed in one North Dakota decision by a judge who was concurring in a decision setting aside a tax sale:

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5. Blackwell, Tax Titles iii (5th ed. 1899).

6. *E.g.*, "No document of purported legal dignity has been treated more ignominiously by the legal profession than the tax sale deed," Note, 62 Harv. L. Rev. 93 (1948); "Tax titles in Mississippi do not have such legal force and effect as to bring more than taxes, damages, costs, etc., or a nominal consideration at a tax sale," Clark, *Tax Titles in Mississippi*, 17 Miss. L. J. 372, 373 (1946); "A collector of rare specimens of legal documents, searching in this jurisdiction for a valid tax deed, will need to take diligent injuiry," Eagan v. Mahoney, 24 Colo. App. 285, 175 Pac. 1119 (1913), quoted in Note, 18 Rocky Mt. L. Rev. 393 (1946); "There was a time when the conveyance of lands to a tax purchaser came as near being a solemn mockery as it was possible for any transaction wearing the sanction of legal forms," Black, Tax Titles iii (1888); "The prospective taxpayer and his property are encased in a multitude of safeguards and restrictions to such an extent that the avoidance of paying taxes has become an art," Fairchild, *Tax Titles in New York State*, 8 Brooklyn L. Rev. 61, 67 (1938).

7. Such conflicts of interest normally provide the background for the development of the law. See 1 Powell, Real Property 47-48 (1949); Holmes, The Common Law 1 (1881).

8. The discussion in Clark, *Tax Titles in Mississippi*, 17 Miss. L. J. 372 (1946), contains a detailed history of such a situation. In all fairness, it should be said that much of the legislation intended to bolster tax titles has had its origin in other considerations, among them the necessity of protecting the public revenue.

> When a party attempts to purchase land at a tax sale and to get interest at the rate of 24 per cent, with a penalty of 5 per cent, he has no reason to complain if he gets back only his principal with six per cent interest. Shylock did not far so well when he insisted on the pound of flesh.[9]

The interest rates cited were correct at the time of the opinion and indicate graphically one of the basic reasons for the tax title's lack of stability.

Viewed from the standpoint of history, the critical attitude of the courts toward tax deeds—as well as the corollary result that tax titles are undependable—finds many parallels. When courts become convinced that a particular legal institution possesses undesirable aspects, strange things happen to it. One of the factors contributing to the development of many modern principles of land law was the distaste of the English judiciary for the feudal institutions which permitted the land of England to be indefinitely tied up in the hands of a few families.[10] Such familiar doctrines of the law of property as the Rule Against Perpetuities,[11] and the rule against restraints on alienation,[12] owe their existence to this situation. A recent study has even remarked upon its influence in the development of the law of dower.[13] Since the judicial process seems to be essentially unchangeable, it should occasion little surprise to discover factors of a similar character at work remolding the law of tax deeds.

The widespread attitude of criticism on the part of the courts as they have viewed the operation of tax sales suggests, however, more than a mere historical parallel. There has accumulated a considerable body of evidence indicating that the present method of collecting real estate taxes which become delinquent has economically undesirable consequences. It has been pointed out that a cyclical effect occurs: "Tax titles are upset because the price paid is confiscatory, and the price paid is confiscatory because tax titles are notoriously liable to be upset."[14] In North Dakota the cycle is reinforced by statute, since the methods of bidding used at tax sales

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9. Mr. Justice Robinson, concurring in Davidson v. Kepner, 37 N.D. 198, 203, 163 N.W. 831, 832 (1917). Similarly vigorous language may be found in Red River Valley Land Co. v. Harris, 42 N.D. 76, 172 N.W. 68 (1919). And see Power v. Larabee, 3 N.D. 502, 57 N.W. 789 (1894), in which 1,700 acres of land worth $4 per acre were sold for a total of $96.

10. 2 Pollock and Maitland, History of English Law *310; Haskins, *The Development of Common Law Dower*, 62 Harv. L. Rev. 42, 47-48 (1948).

11. Gray, Perpetuities §263 (3d ed. 1915).

12. "In truth, the rule seems not to allow nor call for any reason except public policy." Gray, Restraints on the Alienation of Property §21 (2d ed. 1895). See also 4 Holdsworth, History of English Law 473-74 (1924).

13. Haskins, *supra* note 10, at 47-48.

14. Note, 62 Harv. L. Rev. 93, 100 (1948). See also Simpson and Baker, *Tax Delinquency*, 28 Ill. L. Rev. 147, 152-53 (1933), for a discussion of similar factors.

effectively keep the price at a minimum—a topic discussed subsequently. But in addition to the circular reaction described above, other effects take place.

Thus, during periods of economic distress tax delinquent land has a tendency to accumulate in the hands of the taxing authorities, and the absence of this land from the tax rolls necessarily tends to make the process of tax adjustment more difficult.[15] Further, during periods of depression tax sales have a deflationary effect upon the economy precisely when it is not wanted. During the period of deflation which began in 1929,[16] vast areas of land in states bordering North Dakota were offered for public sale in this manner at the lowest possible price in any already depressed market, thereby effectively reducing the prices obtainable for property remaining in private hands.[17]

North Dakota met the dilemma of the tax sale by simply suspending their effect during the depression years.[18] Statutes were enacted which extended the period of redemption from tax sales or in other ways attempted to lessen the burden resting upon landowners who were unable to meet their tax liabilities.[19] In short, when an economic emergency occurred, the methods of collecting revenue from the taxation of real property which were in use in this state proved inadequate to deal with the situation.

Nor is this the only unfortunate result of the present laws respecting tax sales. Faced with the repeated necessity of protecting landowners from the loss of their land through no real fault of their own, the courts in this state as in others repeatedly construed the statutes in the most technical manner possible. Around the taxpayer they threw the protection of the rule that statutes designed

15. Note, 62 Harv. L. Rev. 93, 100 (1948).

16. So far as North Dakota was concerned, it began before that. In 1933 the North Dakota legislature enacted a measure extending the period of redemption for persons who had lost title to land through tax sales, on the ground, among others, that "a public emergency and crisis exists throughout this state endangering the public health, welfare and morals, in that agricultural crops and products have been sold on an average below the cost of production since 1922. . ." N.D. Sess. Laws 1933, c. 253.

17. Simpson and Baker, *supra* note 14, at 149-50. It was estimated that in the five states of Michigan, Wisconsin, Minnesota, South Dakota and Oregon, 40,000,000 acres of land were tax delinquent.

18. "It is a matter of common knowledge that a severe depression existed in North Dakota during the period from 1930 to 1940. The conditions as to crops and prices prevailing made the cash resources of people very small. Very many citizens were unable to pay their taxes. The local and state governments were in difficulties for lack of tax receipts sufficient to carry on the processes of government. A real emergency faced the people and the government. This gave rise to the attempts of the legislatures meeting during that time to ameliorate those tax problems as far as possible. The five sessions of the legislature meeting in that decade passed 91 acts on tax matters." Coulter v. Ramberg, 55 N.W.2d 516, 519 (N.D. 1952).

19. Surveys of this legislation appear in Coulter v. Ramberg, 55 N.W.2d 516 (N.D. 1952); Kelsch v. Miller, 73 N.D. 405, 15 N.W.2d 433 (1944).

for his protection were to be rigidly enforced,[20] while at the same time confronting the purchaser at the tax sale with the warning implicit in the maxim *caveat emptor.*[21] However, these decisions created rules of property which laid the groundwork for future difficulties. And thus when the value of land swung spectacularly upward in the western portions of the state following the discovery of oil, landowners who had purchased land which contained a tax sale in the chain of title found themeselves deprived of the clear and unclouded ownership which was and is the prerequisite to successful development of property. It was, at one time, a genuinely beneficial thing that a sale of land for delinquent taxes should amount to little more than an assignment of tax money coupled with a dubious lien. It can scarcely be so considered at present, but the process of bolstering tax titles is hampered by the fact that overruling a precedent in this field results in a retroactive and therefore presumptively unfair shifting of rights of property. Nor does it seem possible to reach the same results by retroactive legislation, which is subject not only to the objections which are valid with respect to overruling the prior cases but also the limitations inherent in the concept of due process of law and constitutional provisions against impairment of the obligations of contract.[22]

It would be interesting to compare the status of tax foreclosures in this state with the results which have been obtained in others where effective reforms have been instituted. But such a discussion would deal with the law of tax deeds as it ought to be, rather than as it is. Accordingly, further commentary will be confined to an evaluation of the present law of this state.

II.

Procedure Followed in Issuance of Tax Deeds

Since an understanding of the basic steps which lead up to the issuance of a tax deed is necessary to a thorough grasp of the legal problems which may develop, it seems worthwhile to outline in simplified fashion the steps leading up to the acquisition of a tax title in the order in which they normally occur.

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20. "It is well established that the law governing the issuance of tax deeds must be strictly construed. This is based on the principle that where property is sold for taxes in a summary manner without any regular proceedings in a court of justice it is essential that all the requirements of law should be strictly complied with." Zuger, *Tax Titles,* North Dakota State Bar Association Section Program for 1949, pp. 48-49.

21. Tyler v. Cass County, 1 N.D. 369, 48 N.W. 232 (1890); Budge v. Grand Forks, 1 N.D. 309, 47 N.W. 390 (1890).

2. The topic of curative and retroactive legislation is discussed in the second portion of this paper, which will appear in the October, 1953, issue of the NORTH DAKOTA LAW REVIEW.

A simple case may be assumed. John Doe purchases a tract of land lying in a typical North Dakota county, giving to his grantor, Richard Roe, a purchase money mortgage for the unpaid balance of the price. He thus acquires an estate in fee simple absolute, encumbered only by the lien of the mortgage he has given to his grantor. The land does not constitute homestead property.

For the purpose of this discussion, it may be assumed that John Doe is a normal and ordinary citizen. He is distinguished from his fellows in only one aspect of his existence: he possesses an inherent and uncontrollable aversion to the payment of real estate taxes in any manner or form. It is possible, therefore, to follow his path as he proceeds along the chain of events which leads to his loss of the land through the issuance of a tax deed to his property.

If John Doe purchased his property in an odd-numbered year, he will receive on or about April 1 of that year a visit from the county assessor. This is because the statutes provide that, "All real property subject to taxation shall be listed and assessed every odd-numbered year with reference to its value, on April first of that year. . . ." [23] The process of assessment, from a legal point of view, consists of four different steps: (1) the property must be listed in the assessment book furnished to the assessor by the county for that purpose, the description of the land being set down opposite the owner's name; [24] (2) the assessor must view the land and reach a conclusion as to its value; [25] (3) the assessor must then write out opposite the description the description of the tract of land the value of the property as he has determined it; [26] and (4) he must then return the book to the county clerk and auditor.[27]

Is the valuation thus placed on the property conclusive, or is Doe entitled to question it? The answer is that he is entitled to make a contest, should he choose to do so, before the proper administrative authority—in this case the board of equalization.[28] However, in the event that the decision of that body is adverse Doe will experience great difficulty in attempting to get relief from a valuation he considers too high in the courts, since the North Dakota Supreme Court has ruled that the task of assessment is quasi-judicial in nature and that errors in judgment on the part of the assessor do

23. N.D. Rev. Code §57-0211 (1) (1943).
24. *Id.* §57 0231.
25. *Id.* §57-0227.
26. *Id.* §57-0234.
27. The procedure outlined above is derived from that summarized in Power v. Larabee, 2 N.D. 141, 49 N.W. 724, 726 (1891), and is discussed at greater length under the heading of "Assessment," *infra* pp. 252-259.
28. N.D. Rev. Code §57-0904 (1943).

not take him beyond the exclusive jurisdiction to make such valuations vested in him by the statutes.[29] For the purposes of the immediate discussion it is unnecessary to develop this aspect of the procedure at length.[30] Whatever Doe's feelings with respect to the assessment may be,[31] the fact that he has purchased the land only recently will make it possible, if a protest is made, for the revenue authorities to present highly persuasive evidence of the market value of the property.[32]

In the meantime, another portion of the taxing operation has been under way. The board of County Commissioners will have been considering the question of how much money will be needed to carry on the functions of the county for the ensuing year, and the county budget has been in the process of preparation. A similar task has engaged the attention of the State Board of Equalization, and the rate of the state tax has been certified to the county auditor.[33] The same procedure may have been followed with respect to Doe's property by a number of official bodies: cities, villages, townships, school and park districts, and the like.[34]

On the fourth Tuesday in July, the County Commissioners make their own levy on taxes [35] and the amount of taxes which Doe's individual tract must bear is now ascertainable through a simple process of computation, discussed *infra*.[36] The tax list is made out by the county auditor [37] and transmitted to the county treasurer,[38] who is thenceforth responsible for the collection of the tax.[39] All of the statutory processes involved—which have been, it is repeated, simplified in their treatment here—culminate in the receipt by John Doe of a statement of taxes due upon his property.

At this point, John Doe deviates from the norm. He decides not to pay, or, in the normal situation, is unable to do so. All taxes upon real and personal property are due on the first day of January following the year in which they were levied, but Doe will not be considered in default until the following March first.[40]

If the default continues, the county treasurer will mail to Doe

29. Shuttuck v. Smith, 6 N.D. 56, 69 N.W. 5 (1896).
30 See, "Equalization of Assessments," *infra* pp. 260-261.
31. Mr. Justice Holmes' secretary once exclaimed to him, "Don't you hate to pay taxes!" Holmes responded, "No, young feller. I like to pay taxes; with them I buy civilization." Frankfurter, Mr. Justice Holmes and the Supreme Court 42 (1938).
32. See notes 96 and 97, *infra*.
33. N.D. Rev. Code §57-1504 (1943).
34. *Id.* §57-1532.
35. *Id.* §57-1505.
See "Levy of Taxes," *infra* pp. 262-264.
57. N.D. Rev. Code §57-2002 (1943).
38. *Id.* §57-2006.
39. *Id.* §57-2007.
40. *Id.* §57-2001.

between November 1 and November 15 a notice to the effect that unless the taxes plus the accrued penalties are paid before the second Tuesday in December the land will be sold for taxes.[41] Since the land involved is a tract in which two separate interests have been hypostatized, a further question is presented. Must service of this notice of tax sale be made upon the mortgagee, Richard Roe, in order to cut off his interest? While the statute does not say so, it seems safe to conclude that the mortgagee ought to receive notice if his mortgage is of record.[42] This is a matter explained at greater length in the subsequent discussion.[43]

At the same time that the county treasurer is engaged in mailing out notices of tax sale, the county treasurer is required to prepare a list of all delinquent real estate taxes and post one copy of it in his office. Four other copies must be posted at "conspicuous public places, such as banks, public halls, or post offices, in different parts of the county." [44] In addition, at least fourteen days before the sale the auditor will give notice by publishing in the official newspaper a notice that a tax sale will be held and that a list of the land subject to tax sale may be examined in his office.[45] The posting of these notices and proof of the publication of the notice of tax sale is required to be attested to by affidavits filed in the county auditor's office.[46]

Thereafter, on the second Tuesday in December, the county auditor will commence the tax sale, either in his office or in the court room.[47] The land is offered for sale in the order in which various parcels appear in the list of tax delinquent property. The auditor is required to announce, before any parcel is offered, the total amount of taxes, penalties and costs against it.[48]

One would normally assume, since the sale is referred to in the statutes as a public auction, that the person who made the highest

41. "Between the first day and fifteenth day of November in each year, the county treasurer shall mail to each owner of any lot or tract of land subject to sale at the delinquent tax sale provided for in this chapter, a notice giving the legal description of such lot or tract to be offered for sale, and stating that such lot or tract will be sold for delinquent taxes unless such delinquent tax, with penalty, interest, and cost of advertising is paid prior to the sale on the second Tuesday in December following." N.D. Rev. Code §57-2401 (1943).

42. The statute set forth in note 41, *supra,* provides that the notice shall be mailed to "each owner" of land subject to tax sale. The word "owner" is not susceptible of precise definition. The preferred treatment of it is to say that any person possessing an interest in land is the "owner" of that interest. Thus, a person holding a mortgage on land is an "owner" of the land within the sounder interpretation of the statute. Adams v. Beale, 19 Iowa 61 (1865).

43. See "The Right of Redemption," Part II of this paper, which will appear in the October, 1953, issue.

44. N.D. Rev. Code §57-2402 (1943).

45. *Id.* §57-2407.

46. *Id.* §§57-2406, 57-2408.

47. *Id.* §57-2412.

48. *Ibid.*

bid for the property would be entitled to it, but such is not the case. Instead, the successful bidder is the person who will (a) bid the total amount of taxes, penalties and costs as announced by the auditor, and (b) offer to accept the lowest rate of interest on the foregoing amount, in no case to exceed six per cent, in the event the owner of the land should choose to redeem from the tax sale.[49] To explain this situation in another manner, assume that *A* and *B* both desire to purchase a given tract offered at the sale. If the total amount of taxes, penalties and costs announced by the auditor totals $100, *A* can commence the bidding by offering to pay the $100 and to accept six per cent interest on this amount in the event the owner of the land chooses to redeem. *B*, in his turn, can override *A*'s bid by offering to accept five per cent interest from the owner of the land in the event of redemption. *A*, of course, has the option to counter with an offer to accept four per cent. There is left to the bemused contemplation of the reader the question of the rights of the parties where both bid the "maximum" by agreeing to accept no interest whatever! The statutes make no provision for this situation, and no cases dealing with it have been unearthed.

What happens if the sale produces a dearth of bidders and no one enters an offer for the land? In that event, the land is offered once again before the sale closes and the county treasurer, if there is no bid on the second offering, will buy the land for the county.[50]

The procedure varies from this point on, depending upon whether the land was purchased by a private citizen or the county. In the event a private purchaser has entered a bid for the land, the county auditor issues to him a "County Certificate of Sale For Taxes" [51] containing (a) the description of the land, (b) the date of the sale, (c) the amount of taxes, penalties and costs for which the land was sold, (d) the rate of interest which the purchaser agreed to accept from the landowner in the event of redemption, and (e) the date on which the purchaser will be entitled to a tax deed in the event that John Doe does not make redemption.[52]

Does this mean that the purchaser is now entitled to enter into possession of the land? Definitely not. Doe will be entitled to hold the land until the time for redemption of the property has expired and the right of redemption has been legally terminated—which will take a minimum of something more than three and a quarter

49. *Id.*
50. *Id.* §57-2414.
51. *Id.* §§57-2419, 57-2420.
52. *Id.* §57-2420.

years.[53] During this period, the property will continue to be assessed annually for taxes. In the event that the purchaser pays them, he is entitled to the issuance of a "Subsequent Tax Sale Certificate" which has all the force and effect of a new sale.[54]

When the time for redemption expires, the purchaser normally presents the tax sale certificate to the county auditor, who then prepares a document entitled "Notice of the Expiration of the Period of Redemption." [55] This is served upon Doe.[56] It is also served upon Roe, the holder of the mortgage, if—but only if—he has requested service of it and has paid a fee for that purpose.[57] A subsequent discussion of the right of redemption will explore the methods of serving this notice in more detail, but it should be stated at this point that the service of this notice is a matter of considerable delicacy and relatively minor defects in the procedure may have disastrous results for the tax sale purchaser.

Ninety days after service of the notice of expiration of the period of redemption is completed, the time for redemption expires.[58] Then, and only then, is the tax sale purchaser entitled to a tax deed, which runs in the name of the State of North Dakota as grantor and vests in the purchaser "an absolute estate in fee simple in such lands." [59]

If the tax sale results in the purchase of the land by the county instead of by a private buyer, the procedure is similar in its larger aspects but the details vary considerably. After the county has purchased the land, no tax sale certificate is isued to it. The records in the county auditor's office instead stand in lieu of the certificate.[60] Thereafter, a failure to pay the taxes on the property for subsequent years is noted on the auditor's records and the entry of the fact of default is considered the equivalent of the issuance of a subsequent tax sale certificate.[61]

If Doe fails to redeem within three years, the county auditor will issue on or before June 1 of the year following the expiration of the statutory three year period a notice of the expiration of the period of redemption.[62] In this instance the mortgagee will get notice with-

53. *Id.* §57-2702.
54. *Id.* §57-2422.
55. *Id.* §57-2702.
56. In the event that Doe is a non-resident, service is made by registered mail. Otherwise it is delivered to the sheriff, who is required to either serve it personally, or cause it to be served personally, upon the landowner. N.D. Rev. Code §57-2702 (1943).
57. *Ibid.*
58. *Id.* §57-2704.
59. *Id.* §57-2705.
60. *Id.* §57-2423.
61. *Id.* §57-2425.
62. *Id.* §57-2801.

out the necessity for the payment of a fee, so long as his mortgage is of record [63]—an interesting variation from the cases where the tax sale is to a private buyer. On or before August first, in addition, the county auditor will serve notice of the expiration of the period of redemption as to tracts purchased by the county on which the statutory period has run by publishing a notice in the official newspaper of the county.[64]

Upon the expiration of the time set forth in the notice of expiration of the period of redemption, the county auditor is required to issue a tax deed to the county in the usual form, passing title to the county in fee simple.[65] The real estate thus acquired is thereupon appraised by the board of county commissioners and a maximum sale price is set.[66] Since a sale of the land by the county at a price which is too low may adversely affect the rights of other governmental units which had a hand in levying the taxes on the property in the first instance and will share in the proceeds of the sale, these organs may protest the valuation thus placed on the property.[67] It will be postulated in Doe's case that no such complications develop, and the next step in the proceedings is the posting of a notice of sale with respect to the land at the front door of the county courthouse by the county auditor, followed by its publication in the official newspaper.[68] A public sale will then be held on the third Tuesday of November,[69] each tract of land being knocked down to the highest bidder,[70] who is then entitled to a deed from the county.[71]

In the event that the land is not purchased at the annual November sale, it may be sold at private sale by the county auditor to any person who will pay the minimum sale price fixed by the county commissioners.[72] When this occurs, the former owner of the land must be given thirty days notice of the fact that the sale is to take place, to give him one last opportunity to redeem from the tax sale.[73] If he fails to do so, the sale is completed and the deed is issued.

At this point, whether the land has been sold in the first instance to a private purchaser or has taken the alternative route of sale to

63. *Id.* §57-2804.
64. *Id.* §57-2806.
65. *Id.* §57-2809.
66. *Id.* §57-2810.
67. *Id.* §57-2811.
68. *Id.* §57-2814.
69. *Id.* §57-2813.
70. *Id.* §57-2815.
71. *Id.* §57-2816.
72. *Id.* §57-2817.
73. *Id.* §57-2818.

the county and subsequent resale, John Doe may be ejected from the property and the purchaser of the land becomes entitled to its possession. It should not be assumed, however, that the ejection of Doe, even though it may be constructive in nature, should be undertaken lightly or viewed as a casual matter. The right to take possession upon issuance of the tax deed depends upon the regularity of the antecedent proceedings, and in the event these have been defective and the tax sale purchaser goes into possession of the property and takes the rents and profits, he becomes liable for the value of the use and occupancy of the property during the time he remains in possession, up to a maximum of six years.[74]

Hitherto in this discussion, John Doe has been depicted as a figure of majestic calm and Olympian indifference to what has been occurring. He has remained unruffled and steadfast through a fusillade of impressively captioned legal notices, statutory warnings, and ominous legal proceedings which would have shaken the fortitude of all but the most redoubtable of landowners. It is regrettable, therefore, to discover that at this juncture his complacency gives way and is transformed into a mighty wrath. He now descends upon the office of the nearest attorney, breathing smoke and fire, and demanding the immediate vindication of his rights. A new case involving tax deeds has been born.

The attorney thus retained will shortly find that the law of tax titles is in reality not a unified and cohesive body of law at all. It is, instead, composed of a heterogeneous collection of statutes passed at different times for different purposes, many of them inconsistent, supplemented by a body of case law as complex and difficult as any to be found in the books. The various grounds of attack upon tax deeds and the methods of defending their validity accordingly engross Doe's counsel. A host of problems unfold before him as he reads his way into the literature of the subject. What is the basic effect of a tax deed? What specific defects in the proceedings are available to Doe in his effort to undo what has been done? What limitations exist upon the right to bring an action attacking the validity of the proceedings? What other defenses may be presented? These and other questions form the basis of the succeeding portions of this paper.

III.

Basic Effect and Character of Interest Created by Tax Deed

Many cases attest to the fact that there are several generally

74. Belakjon v. Hilstad, 76 N.D. 298, 35 N.W.2d 637 (1949).

recognized theories in this country concerning the nature of the interest vested in a purchaser who takes an interest in land through tax sale proceedings. The conventional usage is to classify the various states according to the basic theory of taxation employed in each. Thus in many states it is held that the tax liability which must be borne by a person who possesses an interest in real property is a personal liability in much the same way that a contract debt is a personal liability. Accordingly, in those states when a taxpayer becomes delinquent and a tax sale occurs it is only the rights, privileges, powers and immunities belonging specifically and individually to the defaulting taxpayer which pass to the tax sale purchaser.[75] These jurisdictions, in which the interest obtained by the purchaser is regarded as being identical with that owned by the delinquent taxpayer, are referred to as "in personam" jurisdictions.

The opposing viewpoint is held in the so-called "in rem" jurisdictions. In such states it is held that the purchaser at a tax sale gets a completely new fee simple title through his purchase, regardless of the quantum of the estate possessed by the delinquent taxpayer.[76] The major premise from which this conclusion springs is that the tax is considered an obligation in rem rather than in personam, resting upon the land as a *res* rather than upon the holder of any particular interest in the land.[77] The consequences of this theory are often loosely expressed in the statement that the land itself passes to the purchaser at a tax sale, rather than any particular estate in it,[78] and that the title created by a tax sale is non-derivative in character and completely unconnected in any way with the interest possessed by the former owner of the property.[79]

When these latter statements are examined closely, they become rather difficult to sustain completely. The North Dakota cases furnish a good illustration of the true situation. While the territorial

75. The cases and statutes on this point have been carefully collected in Kloek, *Effect of Tax Deeds on Easements Appurtenant and Rights of Way*, 16 Chi-Kent L. Rev. 328, 357 *et seq.* (1938), and no attempt will be made to restate them here. A further collection of authorities appears in Note, 75 A.L.R. 416 (1931).

76. Kloek, *supra* note 75, at 336 *et seq.*

77. Bumann v. Burleigh County, 73 N.D. 655, 18 N.W.2d 10 (1945); Nelson v. Murton, 68 N.D. 108, 277 N.W. 390 (1938); Peterson v. Reishus, 66 N.D. 436, 266 N.W. 417 (1936); Baird v. Stubbins, 58 N.D. 351, 226 N.W. 529 (1929). See also Thompson, Abstracts and Titles §683 (3nd ed. 1930).

78. See cases cited note 77, *supra.*

79. The statement that the title acquired at a tax sale is independent and not derivative has been frequently made in the cases. Rufford G. Patton has commented that the "statement can be correct in those cases only where the tax title has first gone to the state, and that it is then technically correct only when the state acquired title by forfeiture rather than by foreclosure of a tax lien. In all cases of foreclosure, whether the purchaser is the state or a private party, it is a derivative title which is acquired, the same as would be the case on foreclosure of any other type of lien." Patton, *Transfers by Judicial or Statutory Process* in 3 American Law of Property 545 (1952).

tax laws were drafted on the theory that taxes on real property constituted a personal liability on the part of the landowner, the in rem theory of taxation was adopted with the coming of statehood.[80] Indeed, the statutes at present are unequivocal in their adoption of the in rem theory: as previously pointed out, they specifically provide that tax deeds are to be issued in the name of the State of North Dakota as grantor [81] and that the purchaser is to receive an "absolute estate in fee simple." [82] In addition, the Supreme Court of North Dakota has repeatedly stated the law to be that the purchaser at a tax sale gets a completely new title by direct grant from the state, antagonistic to and completely independent of the title held by the prior owner.[83]

Despite the impressive mass of authority thus built up, the North Dakota Court found it necessary to materially qualify its position on this question as recently as 1950. The case involved was *Conlin v. Metzger*,[84] which concerned an appurtenant easement of way which had been acquired by a process of prescriptive use commencing at some time between the years 1910 and 1918 and continuing for 20 or more years.[85] The question was whether a sale of the land for delinquent taxes operated to cut off the right of easement. This has been a subject of considerable litigation in other jurisdictions, and varying results have been obtained. In states where the in personam theory of taxation is employed, the problem of course solves itself. All that passes at a tax sale is the interest which the defaulting taxpayer actually enjoyed in the land, and such states accordingly hold that the easement or servitude is not cut off by the sale.[86] But in states employing the in rem theory of taxation, where the courts are committed to the principle that the sale of land for delinquent taxes results in the creation of an entirely new estate in fee simple in the land, the problem is a serious one. A few of these states have held that easements and other servitudes which restricted the use of the property by the former owner must be destroyed by the sale of the land for taxes or the statutory mandate that the purchaser is to receive a fee simple

80. Zuger, *supra* note 20, at 49.
81. N.D. Rev. Code §57-2706 (1943). In a number of cases it has been held that where a tax deed is issued in the name of the county auditor as grantor, the deed is void. Heier v. Olson, 75 N.D. 541, 30 N.W.2d 613 (1947); Goss v. Herman, 20 N.D. 295, 127 N.W. 78 (1910); State Finance Co. v. Mulberger, 16 N.D. 214, 112 N.W. 986 (1907). *But cf.* Buman v. Sturn, 73 N.D. 561, 16 N.W.2d 837 (1945).
82. N.D. Rev. Code §57-2705 (1943).
83. See cases cited note 77, *supra*.
84. 77 N.D. 620, 44 N.W.2d 617 (1950).
85. N.D. Rev. Code §§28-0104, 47-0602 (1943).
86. Kloek, *supra* note 75, at 357-66.

title has not been carried out.[87] It is pointed out in the cases so holding that a tax sale is really the foreclosure of a lien upon the land, and that the statutes ordinarily make the lien of taxes paramount to all other interests in the land.[88] This is the case in North Dakota.[89]

In *Conlin v. Metzger,* however, the Court did not find it necessary to ground its decision upon a reliance on the differences between states adopting the in personam theory and those possessing the in rem theory of taxation. Instead, with obvious accuracy, it held that the question depended upon the nature of the assessment which had been made of the land. "Only the interest properly assessed can be sold,"[90] declared the opinion. Since the tax delinquency involved in the case had commenced one year before the earliest possible commencement of the adverse use, it was obvious that the assessment for that year must have been based upon the value of the property unincumbered by the easement, and the sale of the land for that assessment therefore cut off all subsequently created interests.

It is believed that the theory thus enunciated by the court as to what passes at a tax sale states the scientific test. The rule has been stated as follows: "Where a parcel of land is valued as if it existed as an unincumbered fee simple, disregarding any easement that may exist, and the summation of interests therein is made liable for the tax with no personal liability against the owners contemplated, then upon the tax sale that summation of interests passes to the purchaser."[91] Conversely, where the reduction in value of the servient tenement and the increase in value of the dominant tenement which occur by reason of the existence of an easement or servitude are reflected by the tax assessments, it is generally held that the sale of the land for taxes does not destroy the interest of the owner of the dominant tenement, since the taxes upon the servitude or easement are in effect paid by the owner of the dom-

87. Alamagordo Improvement Co. v. Hennessee, 40 N.M. 162, 56 P.2d 1127 (1936) (possibility of reverter cut off by tax sale); Hill v. Williams, 104 Md. 595, 65 Atl. 413 (1906) (easement of way cut off by tax sale); Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911) (easement of way cut off by tax sale); *In re* Hunt and Bell, 34 Ont. L. R. 256, 24 D.L.R. 590 (1915) (restrictive covenant removed from land by tax sale).

88. Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911); *In re* Hunt and Bell, 34 Ont. L. R. 256, 24 D.L.R. 590 (1915).

89. N.D. Rev. Code §57-0240 (1943). See Thompson, A Practical Treatise on Abstracts and Titles 867 (2d ed. 1930).

90. Conlin v. Metzger, 77 N.D. 620, 622, 44 N.W.2d 617, 619 (1950).

91. 49 Mich. L. Rev. 293, 294 (1950). For other law review discussions, see Kloek, *Effect of Tax Deeds on Easements Appurtenant and Rights of Way,* 16 Chi-Kent Rev. 328 (1938); Thompson, *Taxation of Easements,* 8 Mich. L. Rev. 361 (1910); Note, 29 Neb. L. Rev. 458 (1950); Note, 16 Wash. L. Rev. 36 (1941). See also Note, 163 A.L.R. 529 (1947).

inant tenement by reason of the increase in the assessed value of his land.[92] This is the view of the *Restatement of Property*,[93] although in the case of an easement in gross the *Restatement* takes the position that the tax sale destroys the easement because the value of the use of the land allowed by such an easement is not reflected in any change in the assessed valuation of the land.[94]

Conlin v. Metzger, since it dealt with a situation where the easement had been acquired *after* the tax delinquency had occurred, did not establish a rule for the much more common situation where the easement is acquired *before* the tax delinquency takes place. It would seem probable that the view of the *Restatement* as cited above would nevertheless prevail in this state. The court obviously adopted the rationale of the *Restatement* in disposing of the situation presented in the *Conlin* case, and a reading of the statutes indicates that it is contemplated that the value of easements shall be included in assessing the dominant tenement. Thus, it is provided specifically that "real property, for the purposes of taxation, includes the land itself, whether laid out in town lots or otherwise, and . . . *all . . . rights and privileges thereto belonging or in anywise appertaining.*" [95] It is further provided that "assessors . . . shall assess and return all taxable property at its full and true value,"[96] which means, as a matter of statutory definition, "the price at which it could be obtained at private sale." [97] Since the existence of an easement or servitude appurtenant to a piece of property would normally cause a fluctuation in its sale value, it seems clear that the statutes intend the assessed value of the land to vary accordingly.

The point, however, is not completely clear. In the past, as already noted, the court has repeatedly stated that the effect of a tax sale in this state is to create a completely new and unincumbered title in the holder of a tax deed.[98] These precedents, when read in connection with the statute making the lien of taxes a para-

92. Tax Lien Co. of New York v. Schultze, 213 N.Y. 9, 106 N.E. 751 (1914); Hayes v. Gibbs, 110 Utah 54, 169 P.2d 781 (1946) (a thoughtful discussion of the problem is contained in the concurring opinion of Mr. Justice Wolfe); Restatement, Property §509, comment d (1944). *Semble*, District of Columbia v. Capital Mortgage & Title Co., 84 F.Supp. 788 (D.C. 1949), 49 Mich. L. Rev. 293 (1950).

93. Restatement, Property §509, comment d (1944). But see Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911), in which the court said: "No doubt the defendants, prior to the foreclosure proceedings, might have had the land upon which their easement was located segregated and a pro tanto reduction of the tax. . . . But having neglected that remedy, it is too late to say that the easement did not go with the land to the purchaser at tthe tax sale."

94. Restatement, Property §509 (1) (1944).

95. N.D. Rev. Code §57-0204 (1953).

96. *Id.* §57-0228.

97. *Id.* §57-0201 (4).

98. See cases cited note 77, *supra*.

mount interest,[99] furnish no little support for an argument that a tax sale might be deemed to cut off an easement even in the case where it was created prior to the tax delinquency. Other courts have so held in the past,[100] and the North Dakota Court expressly left the question open in *Conlin v. Metzger*. The problem is one which can at times assume unexpected importance, as the note appended in the margin indicates, because of the multitude of easements and other servitudes which exist in favor of public utilities, such as telephone and electric power companies.[101] It has been suggested in other studies that the best solution lies in legislation.[102]

Conlin v. Metzger is the latest case in this jurisdiction dealing with the effect of a tax sale as cutting off prior interests in land. But the effect of the rule that a purchaser at a tax sale gets a completely new fee simple interest is also felt in other situations. It necessarily carries with it the corollary proposition that upon the issuance of a valid tax deed, all previously existing interests in the property are destroyed.[103] Thus, it has been said that a tax deed "cuts off and divests estates in remainder or reversion, rent charges, trust estates, homestead interests, inchoate rights of dower, mortgages and other encumbrances, judgment liens and even back taxes and tax titles."[104] This is manifestly the law in North Dakota; indeed, in the cases where the point might have arisen, the result

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99. N.D. Rev. Code §57-0240 (1943).

100. In addition to the cases cited in note 87, *supra*, see Atkins v. Hinman, 7 Ill. (2 Gilman) 437 (1845); Nedderman v. Des Moines, 221 Iowa 1351, 268 N.W. 36 (1936); Lucas v. Purdy, 142 Iowa 359, 120 N.W. 1063 (1909); Davis v. Allen, 224 Mass. 551, 113 N.E. 304 (1916); Abbott v. Frost, 185 Mass. 598, 70 N.E. 478 (1904); Jones v. Devore, 8 Ohio St. 430 (1858).

101. "A few years ago in Pennsylvania an attorney purchased a tax deed covering a piece of property over which a company had constructed a pipe line. After the period of redemption had expired, the owner wrote the company and informed them that if they wished to retain their easement, they could do so by paying $50,000. In a few days he increased this figure to $100,000 and then to $150,000. He then wrote the company informing them that he would add $100 to the last amount for each day they delayed in accepting his offer. Still getting no action out of the company, he began to dig under the pipe line so as to undermine it. He then notified the company that if they did not meet his demands he would break the pipe. The oil company secured a preliminary injunction restraining the owner from further endangering their plant, and the latter brought an action of ejectment. The lower court held for the plaintiff, but, happily for the pipe line company, the supreme court reversed the decision, holding that the purchaser of the tax deed had taken the property subject to the easement. While the state of Pennsylvania, by statute, gives pipe-line companies the right to eminent domain, not all of our states give them such rights and in the latter jurisdictions a decision holding that the easement was extinguished by the tax deed would have been very serious to such companies." Kloek, *Effect of Tax Deeds on Easements Appurtenant and Rights of Way*, 16 Chi-Kent Rev. 328 (1938). The case involved is Tide-Water Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351 (1924).

102. Note, 29 Neb. L. Rev. 458 (1950).

103. Flick, Abstract and Title Practice §601 (1951); Thompson, Abstracts and Titles 866-67 (2d ed. 1930); 3 Cooley, Taxation §1492 (4th ed. 1924); Black, Tax Titles §420 (2d ed. 1893); Blackwell, Tax Titles §954 (5th ed. 1889).

104. Cooley, Taxation §1492 (4th ed. 1924).

has usually been assumed and the cases argued on the assumption that this was the proper interpretation.[105]

Nevertheless, a few aspects of the rule will repay exploration. Despite the provisions of the statute, there is at least one major right with respect to property which a tax deed by its very nature does not terminate. This is the right of redemption enjoyed by certain persons under a disability—minors, insane persons, and prisoners of war—who are entitled to redeem from a tax sale at any time within three years after their disability ceases despite the issuance of a tax deed.[106] The precise extent of this right of redemption—*i.e.*, whether it extends to the whole property where the redemptioner posseses only an undivided interest—has been the subject of relatively recent litigation and is discussed subsequently.[107]

Another interesting problem in this connection concerns the effect of a tax deed on contingent future interests. The idea that a tax deed cuts off all preceding interests may have some practical justification in the fact that the purchase of land at a tax sale is undoubtedly more attractive to the purchaser if he is assured of receiving a fee simple title. It possesses, however, a few logical drawbacks. To take a common example, assume a case where *A* is a life tenant and *B* is a remainderman. As between the two, the life tenant is under the duty of paying the taxes.[108] But on his failure to do so, he places not only his own interest but that of the remainderman in jeopardy, since the tax deed will cut off the remainder interest if the tax sale proceedings are carried through to the point where a valid tax deed is issued.[109] Where *B* is a vested remainderman, this situation does not necessarily lead to hardship; the remainderman is entitled to pay the taxes himself and bring an action against the life tenant to recover,[110] or he can redeem from

105. Thus in Sailer v. Mercer County, 75 N.D. 123, 26 N.W.2d 137 (1947), the controversy was over the right of a purchaser from a remainderman to redeem from a tax sale, the holding of the case being clearly based on the assumption that the remainder interest would be cut off by the issuance of a tax deed if redemption did not take place. In First National Bank v. Mohall State Bank, 53 N.D. 319, 206 N.W. 411 (1925), it was argued that the lien of a mortgage was cut off by a tax deed. Emmons County v. Bennett, 9 N.D. 131, 81 N.W. 22 (1899) holds that a regularly issued tax deed cuts off delinquent taxes for years previous to that upon which the deed is based. And in Meldahl v. Dobbin, 8 N.D. 115, 77 N.W. 280 (1898), it was held that a later tax deed cut off all interest under a prior tax deed.

106. N.D. Rev. Code §57-2604 (1943). See also Fleck, Abstract and Title Practice §601 (1951).

107. See "The Right of Redemption," Part II of this discussion.

108. N.D. Rev. Code §47-0234 (1943); Restatement, Property §129 (1936).

109. Cummings v. Cummings, 91 Fed. 602 (W.D.N.C. 1899); Watkins v. Green, 101 Mich. 493, 60 N.W. 44 (1894). The entire topic is discussed in an excellent note, *Quantum of Estate Acquired by Purchaser at Tax Sale of Property Which is Subject to Successive Estates or Different Interests*, 75 A.L.R.416 (1931). See note 105, *supra*.

110. Watkins v. Green, 101 Mich. 493, 60 N.W. 44 (1894).

the sale after it has taken place and once again recover the sums expended from the life tenant.[111]

However, if one postulates a case where the remainder interest is contingent, as in the case where it is limited to a person not in being or not capable of ascertainment, the courses of action outlined above are obviously not available to the remainderman. Remarkably few cases deal with this situation. It is not possible to serve a notice of the expiration of the period of redemption upon a remainderman who is unascertained, or to give him notice of the tax sale in writing as required by the North Dakota statutes.[112] Nevertheless, it has been specifically held that the interests of contingent remindermen are cut off by a tax deed, and the standard authorities assert this as the correct result.[113] The line of reasoning used in support of this outcome, however, seems unclear and unsatisfactory. The Georgia court, in reaching this conclusion, simply cited a heterogeneous collection of local cases dealing with the effect of tax sales on *vested* interests but made no attempt to demonstrate the applicability of these precedents to the case of the contingent remainderman.[114]

Historically it is possible to develop at least some justification for the rule in some jurisdictions. At common law the destruction of the preceding freehold interest prior to the time when the condition precedent which is the essence of the contingent remainder could be fulfilled automatically destroyed the remainder.[115] It was possible, therefore, to destroy a contingent remainder without notice to the remainderman. If, to cite a simple example, *A* conveyed to *B* for life, with remainder to *B's* first son to reach the age of 21,

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111. Black, Tax Titles §419 (2d ed.1893).

112. N.D. Rev. Code §57-2401 (1943), set forth in full in note 41, *supra*. It might be pointed out that in the case of many other interests—particularly easements and restrictive covenants—such a notice might very well not be given by the local authorities. It was said, however, in the case of *In re* Hunt and Bell, 34 Ont. L. R. 256, 24 D.L.R. 590, 596 (1915), that since a list of lands liable to tax sale was purchased before each tax sale, such publication gave notice to holders of such interests in property. "The tax being a charge upon the property itself, to the payment of which all persons having any interest in the land are . . . bound to look, they are not exonerated from exercising vigilance in protecting their rights."

113. Bell v. Summerlin, 188 Ga. 648, 4 S.E.2d 831 (1939) (interest of contingent remaindermen held cut off by sale of land for delinquent taxes). *Cf.* Jackson v. Babcock, 16 N.Y. 246 (1857). See also Black, Tax Titles §421 (2d ed. 1893); Blackwell, Tax Titles §954 (5th ed. 1889) (posing the question but not answering it specifically). Compare the following language, appearing in Blackwell, Tax Titles §954 (5th ed. 1893): "At law and in equity, he (the tenant for life) is bound to pay all legal assessments upon the land. He fails to do so after notice and demand, a sale is made and the officer conveys to the purchaser. No demand was ever made upon the remainderman for the tax and he had no notice of its assessment. Everyone would say, at first blush, that it would be a monstrous species of injustice to hold that his interest in the estate was divested by such a proceeding. . . ."

114. Bell v. Summerlin, *supra* note 113.

115. Leake, Property in Land 238-39 (Randall ed. 1909).

the state of the title would be: life estate in *B*, contingent remainder to *B's first* son to reach 21, and reversion in *A*. If *A* now conveyed his reversionary interest to *B*, the contingent remainder was regarded as being terminated. The merger of the reversion and the life estate would create an estate in fee simple in *B*, and since the destruction of the life estate by the merger terminated the estate of freehold supporting the contingent remainder, it would automatically be cut off.[116]

Manifestly, in a jurisdiction where this doctrine is still in effect, a tax sale has precisely the same effect as the destruction by forfeiture or merger of a freehold upon which a contingent remainder is dependent. Since the tax sale wipes out the estate of freehold upon which the contingent remainder depends, it should logically have the effect of wiping out the contingent remainder. But in a state where the doctrine that contingent remainders are destructible has been abolished, as is the case in North Dakota, the rule seems questionable.[117] However, a specific conclusion on the question probably cannot be drawn in advance of an adjudication by the court.

A further consequence of the doctrine that a tax deed which is valid carries a completely new fee simple to the grantee should also be mentioned. The effect of the rule on the operation of the recording act has been unique. The usual situation in which the recording act becomes important is found in the case where *A* conveys to *B*, who fails to record and thereby leaves outstanding in *A* the power to convey a second time to a bona fide purchaser, C, who by recording can cut off *B's* interest.[118] In *Baird v. Stubbins*,[119] a 1929 decision, the effect of the recording act upon the interest of a tax sale purchaser was first considered by the North Dakota Court. The land in question was owned by *A*, who failed to pay the taxes. *B* obtained a tax deed to the land which he did not record. *C* then sued A, recovered a judgment against him, levied execution on the land and purchased it at the execution sale, recording his deed. Upon learning of *B's* tax deed, *C* sued to quiet title on the theory that he was protected by the recording act, which in this state specifically protects judgment creditors as bona fide purchasers.[120]

While the resemblance of *Baird v. Stubbins* to the ordinary situation in which the recording act applies is strong, the court ruled

116. *Ibid.*
117. N.D. Rev. Code §§47-0230, 47-0234 (1943).
118. Restatement, Property §3, Ill. 3 (1936).
119. 58 N.D. 351, 226 N.W. 529 (1929), noted 3 Dak. L. Rev. 111 (1930).
120. N.D. Rev. Code §47-1941 (1943).

that *C* was not entitled to succeed. It held that *C* could not be considered a subsequent purchaser as far as *B* was concerned unless *C* acquired his title from the same source as *B*. But while *C* had acquired his title from *A*, *B* had obtained his title by an independent grant from the State of North Dakota—an entirely different source of title. It followed that although *C* had taken without notice of prior rights, and had won the race to the recording office, *B* was entitled to prevail.[121]

The reverse of this situation occurred in *Bumann v. Burleigh County*.[122] The record title to this land involved was in *X*, but the land was in reality owned by *A*. Taxes were not paid and the land was sold at tax sale to *B*, who obtained a tax deed and promptly recorded it. *A* then conveyed to *C*, who brought suit to set aside the tax sale on the grounds of a technical invalidity. It was held that *B* could not dispute *C's* right to bring the action on the theory that he had become an innocent purchaser for value of the premises from the holder of the record title to the time *C* received a conveyance from *A*. Since *B's* rights and *C's* rights stemmed from different sources, the holder of the tax deed could not rely on the recording act as against a grantee from the prior owner.

Burmann v. Burleigh County is obviously supportable on independent grounds, but the result of *Baird v. Stubbins* seems questionable. Only one state—New Jersey—has come to a similar conclusion,[123] and the result in that jurisdiction was clearly influenced by the difficulties of recording tax deeds in New Jersey, where the indexing system is inadequate to guide persons searching the record to a tax deed in the chain of title. It is certainly true that in a state possessing merely a conventional grantor-grantee indexing system the record of a tax deed from the state, without more, is difficult to detect by tracing down the chain of title, since no conveyance "out" from the original owner of the land appears in the grantor index. But North Dakota possesses a tract index system[124] designed to overcome precisely such difficulties, and the considera-

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1921. North Dakota has the so-called "race-notice" type of recording statute, N.D. Rev. Code §47-1941 (1943), in addition to a tract index which is used far more extensively than the normal grantor-grantee index. The unusual difficulties of North Dakota law with respect to the precise effect of the tract index are discussed at some length in note 125.

122. 73 N.D. 655, 18 N.W.2d 10 (1945).

123. LaCombe v. Headley, 89 N.J. Eq. 364, 104 Atl. 711 (1918), *aff'd*, 91 N.J. Eq. 63, 108 Atl. 185 (1919).

124. N.D. Rev. Code §11-1807 (1943).

tions which moved the New Jersey court should therefore be lacking in this state.[125]

Most of the states which have considered the problem have come to the conclusion that a tax deed can be cut off by a conveyance from the former owner to a bona fide purchaser, where the tax deed is not placed of record.[126] This result seems sounder in terms of the objectives which the recording acts were designed to achieve. As a New York decision has put it, "The object of the statute was

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125. It should be pointed out, however, that under the decisions of the North Dakota Supreme Court a considerable measure of uncertainty surrounds the precise operation of the tract index. See Maxwell, *The Tract Index and Notice in North Dakota*, 25 N.D. Bar Briefs 176 (1949), for a discussion of the authorities. Basically, the difficulty stems from the language of §47-1946, N.D. Rev. Code (1943): "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. *Knowledge of the record of an instrument out of the chain of title does not constitute such notice.*" (Emphasis supplied). This statute may have imported "into the law of North Dakota many of the subtleties of recording act priorities that have developed from the difficulties of search inherent in the grantor and grantee index." Maxwell, *supra*, at 180. The actual operation of the statute is best illustrated by McCoy v. Davis, 38 N.D. 328, 164 N.W. 951 (1917): O'Connor owned Blackacre. The defendant got a judgment against him. Before the judgment was docketed—and thus before the judgment became a lien on the land—O'Connor conveyed to the plaintiff, a bona fide purchaser who did not record However, the plaintiff gave O'Connor a purchase money mortgage and O'Connor immediately recorded it. Thereafter the defendant docketed his judgment, levied execution and purchased the land at the sale, all these proceedings being properly conducted. He thus acquired the land at a time when the record title was in O'Connor, but the mortgage from the plaintiff to O'Connor was also of record and apparent on the face of the tract index. In an action to try the title to the land, the plaintiff contended that the record of the mortgage gave notice to the defendant of the plaintiff's interest in the land. It was held to the contrary. While the court recognized that in other jurisdictions possessing a tract index a different result had been reached in similar cases, it justified the outcome on the basis of the statute cited above. Since the mortgage was out of the chain of title it did not constitute record notice.

Again, consider this hypothetical case: A owns Blackacre. He agrees to convey to B and signs a contract which B does not record. On the strength of this contract, C advances money to B and takes a mortgage on the property, which he records. B thereafter records his deed, so that both deed and the mortgage appear on the fact of the tract index. B now conveys the land to D, who knows that the tract index lists a mortgage to C. Does D take subject to the mortgage? As between B and C, there is no doubt of the mortgage's effectiveness. The doctrine of estoppel by deed would be applicable and is well recognized in North Dakota. But D is entitled to argue the further point that the mortgage is not in the chain of title, and that it is therefore not binding on him. In a jurisdiction which did not possess a tract index, D would have had to search the grantor index under the grantor's name for a period of time *prior* to the date when his grantor got title in order to uncover the mortgage. The overwhelming weight of authority in this country is to the effect that an instrument which can only be uncovered by such a search is outside the chain of title. Patton, *Priorities, Recording, Registration*, in 4 Am. Law of Property 596 (1952). Thus, under the general rule as to what constitutes a chain of title, D would be entitled to take free and clear of the mortgage, though it appeared on the face of the tract index when he purchased. If the illustration seems fanciful, compare McCoy v. Davis, *supra*. See also Simonson v. Wenzel, 27 N.D. 638, 147 N.W. 804 (1914); Doran v. Dazey, 5 N.D. 167, 64 N.W. 1023 (1895). Oklahoma is the only other state in the union which has gotten itself mixed up concerning the operation of its tract index in the same manner as North Dakota. Perkins v. Cissel, 32 Okla. 827, 124 Pac. 7 (1912).

In the light of this situation, the decision in *Baird v. Stubbins* is probably as good as any. Since a tax deed does not run in the name of the former owner, it is not in the the chain of title and therefore would not constitute record notice even if it appeared on the tract index. It would seem that the wisdom of the last sentence of §47-1946, *supra*, is highly questionable. It is submitted that it ought to be repealed.

126. Maddox v. Arthur, 122 Ga. 671, 50 S.E. 668 (1905); Littlefield v. Prince, 96 Me. 499, 52 Atl. 1010 (1902); Sintes v. Barber, 78 Miss. 585, 29 So. 403 (1901); New Hanover Shingle Co. v. John L. Roper Lumber Co., 178 N.C. 221, 100 S.E. 332 (1919); Fernhough v. Rockwell, 31 S.D. 75, 139 N.W. 790 (1913); Wildell Lumber Co. v. Turk, 75 W.Va. 26, 83 S.E. 83 (1914).

to enable purchasers to ascertain the validity of the title and to determine whether they could purchase with safety; and the law refers them to the record for this purpose." [127] Obviously this broad aim of the statute in North Dakota is to some extent frustrated by the present holding with respect to tax deeds. However, the decision in *Baird v. Stubbins* created no insoluble problem. What has happened is that the task of examining a title now includes a search of the records in the county auditor's office to determine whether a tax sale has occurred.

IV.

Grounds for Attack Upon Tax Deeds and Tax Sale Proceedings

In order thoroughly to understand the cases dealing with attacks upon tax deeds and tax sale proceedings, it is necessary to grasp the operation of a rather complex piece of statutory machinery. Section 57-2429 of the North Dakota Revised Code of 1943 provides:

> Tax sale certificates, either original or subsequent, in all cases shall be prima facie evidence that all the requirements of law with respect to the sale have been complied with and that the grantee therein is entitled to a deed therefor after the time of redemption has expired. No sale shall be set aside nor held invalid unless the party objecting to the same shall prove that:
>
> 1. The property upon which the tax was levied was not subject to taxation;
> 2. The taxes were paid prior to such sale;
> 3. Notice of such sale as required by law was not given; or
> 4. The piece or parcel of land was not offered at said sale to the bidder who would accept the lowest rate of interest on the amount for which the piece or parcel was to be sold.
>
> In any such case, but in no other, the court may set aside the sale or reduce the amount of taxes upon the land, rendering judgment accordingly.

The decisions have construed this section in such a way as to give it a two-fold or dual effect. In *Beggs v. Paine*,[128] the first case in which it received the court's full and sharp attention, it was compared both to a statute of limitations and a curative statute.[129] It was considered curative because it attempted to make many of

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127. Jackson *ex dem.* Merritt v. Terry, 13 Johns 471, 473 (N.Y. 1816).
128. 15 N.D. 436, 109 N.W. 322 (1906).
129. In the sense in which the court used the term here, curative legislation was retroactive in character. It was used in some of the early cases to cure minor informalities and defects in the porceedings leading up to a tax sale. The attempt to limit attacks upon tax sales to cases where only the four grounds of attack found in §57-2429, *supra*, were present represented an effort to "cure" future proceedings. The topic of curative and retroactive legislation is discussed in Part II of this paper, which will appear in the October, 1953, issue of the NORTH DAKOTA LAW REVIEW.

the objections which had been raised against tax sales prior to its enactment immaterial. While the court pointed out that the section could not operate in such a way as to retroactively validate void sales, it said that since the legislature had the power "by a subsequent statute to cure or declare immaterial any nonobservance of purely statutory requirements, it is self-evident that this power could be exercised by inserting the curative provisions in the same act which authorized and governed the proceedings." [130]

It is, however, the comparison of the statute to a statute of limitation which deserves the closest attention. *Beggs v. Paine* in substance construed the statute to mean that if a statutory defect or irregularity occurred during the course of the proceedings leading up to a tax sale, the irregularity or defect not being one of the four specified in the statute, the right to object to the defect was lost if the objection was not made prior to the tax sale.[131] "This presents," said the Court, "what we have termed the limitation feature of section [57-2429] . . . . The legislature had the power and we think it was the intention to declare by this section of the law that the neglect of the taxpayer to resort to an appropriate remedy for relief from a prejudicial irregularity in the tax proceedings before the sale, should be a bar to any relief, unless the defect complained of consists of one or more of those objections specified in the section or is some other defect which it is beyond the power of the legislature to remedy by a curative statute or bar by a statute of limitations which is not based on adverse possession."[132]

The description of the statute as being one of limitation, however, in reality appears misleading. The rule which *Beggs v. Paine* laid down actually was a forerunner of the doctrine of administrative law to the effect that unless a litigant has pursued his administrative remedies he has no right to come into court for relief from the consequences of administrative action.[133] But regardless of how

130. Beggs v. Paine, 15 N.D. 436, 449, 109 N.W. 322, 328 (1906).

131. Illustrative of the effect of this rule is the case of Anderson v. Roberts, 71 N.D. 345, 1 N.W.2d 338 (1941). The plaintiff brought an action to quiet title to land which he had acquired from a country on a contract for deed, the county having acquired title by virtue of tax sale proceedings based on a 1931 tax delinquency. The defendant argued that the tax sale was invalid because: (1) the assessor's return valuing the land for tax purposes, was not verified; (2) the record of the township board of equalization was not signed nor certified; (3) the school district in which the land was located failed to make a budget for the year 1931—a statutory prerequisite to taxation; and (4) the land involved was described improperly in the assessment roll and the assessment was therefore void. The court held that by virtue of the statute it was too late to raise the first three objections. "Unless the defects complained of are specified in the statute or are beyond the power of the legislature to remedy they may not be asserted after certificates of sale have been issued." *Accord,* Fish v. France, 71 N.D. 499, 2 N.W.2d 537 (1942).

132. Beggs v. Paine, 15 N.D. 436, 450, 109 N.W. 322, 328 (1906).

133. Dakota Corporation v. Slope County, 75 F.2d 587 (8th Cir.) *cert. denied,* 296 U.S. 593 (1935).

the rule is characterized, it is obviously of fundamental importance. Almost every subsequent case which has dealt with attacks upon the validity of tax deeds has considered it.

As the language quoted indicates, the Court, in its initial consideration of the statute, did not accept it as conclusive. Indeed, *Beggs v. Paine* gave it a highly restricted scope of operation, confining it effectively to those cases in which the defect or error in the tax deed proceedings was non-jurisdictional in character. One may hazard the guess that the court had future possibilities in mind when it included the following paragraph in the opinion:

> Taken literally, (the statute) could not be sustained to its full extent, because there are objections not mentioned which the legislature could not bar, as for instance the want of an assessment or the absence of any levy. The provisions of the statute must be deemed to be predicated upon the hypothesis that the power and jurisdiction to sell for a tax the particular property affected has been initiated by some proceeding which is inherently, and under the provisions of the constitution, sufficient to create a tax and fix it as a charge upon the land to be sold. Speaking in general terms, there must be an assessment and a levy of a tax for which the property to be sold can be constitutionally held liable. If these are wanting, there is no power to sell.[134]

In the light of the tax deed's history in the courts, this language possesses an obvious purpose. It imported into the construction of this section of the law a device—the "jurisdictional defect"—which had proved eminently successful in the past when employed against other legislation the court felt to be unduly hampering.[135] In short, the Court was unwilling to permit its hands to be tied in cases involving tax deeds, for reasons indicated in the opening pages of this discussion.

What were the jurisdictional defects which the Court asserted could be thus employed to defeat a tax sale, notwithstanding the express provision of the statute? *Beggs v. Paine* did not enumerate them in detail; the opinion merely mentioned as examples the failure to assess the land and the failure to make a valid levy of taxes. But other cases, before and after this decision, have developed a substantial body of law in this regard. Seven years before *Beggs v. Paine,* jurisdictional defects had been listed in *Roberts v. First National Bank of Fargo,*[136] involving another section of the statutes,

134. Beggs v. Paine, 15 N.D. 436, 449-50, 109 N.W. 322, 328 (1906).

135. Principally the device of the jurisdictional defect had been used in connection with a three-year statute of limitations applicable to tax deed proceedings, discussed in Part II of this paper.

136. 8 N.D. 504, 79 N.W. 1049 (1899).

as including "the non-taxability of the property, the absence of any assessment, the absence of any levy, the fact of payment, . . . the absence of any tax sale, and the fact of lawful redemption." [137] It is clear that these were also the main jurisdictional defects which could be employed to prevent the operation of §57-2429.

The cases which have discussed jurisdictional defects have divided them into two classes: they may consist of either (a) a failure to comply with a requirement imposed by statute, or (b) a failure to comply with a requirement imposed by either the state or federal constitutions. [138] This classification, of course, carries with it the corollary proposition that the legislature might, if it wished, dispense with jurisdictional requirements of the first class, since if the legislature has the ability to make a thing jurisdictional it must also possess the ability to make the same thing non-jurisdictional. As it was interpreted by the Court, the statute did precisely that in most instances. "There can be no doubt that the section cures or bars every defect which is within the power of the legislature to declare non-essential," the court declared in *State Finance Company v. Mather.*[139] While it is possible to point to occasional exceptions, this seems to be the interpretation which has been generally observed ever since.

With these observations, it is possible to turn to a discussion of specific grounds of attack upon tax sale proceedings.

A. Effect of Tax Sale of Non-Taxable Land

The statutes of North Dakota exempt from taxation property owned by the United States, the State of North Dakota, counties and other municipal corporations, Indians where the title to such property is inalienable without the consent of the Secretary of the Interior, land used for cemeteries, school properties, church build-

137. *Id.* at 512, 79 N.W. at 1051.

138. Thus, in Nind v. Meyers & Beck, 15 N.D. 400, 412, 109 N.W. 335, 340 (1906), the court speaks of "This distinction between incurable jurisdictional defects and those which are jurisdictional only to the extent that the legislature has made them so . . ." In State Finance Co. v. Mather, 15 N.D. 386, 393, 109 N.W. 350, 354 (1906), the court disapproved the case of Eaton v. Bennett, 10 N.D. 346, 87 N.W. 188 (1901), saying, "The fallacy of the opinion in *Eaton v. Bennett* lies in its failure to distinguish between those things which are mandatory solely because the legislature has seen fit to make them so, and those things which are inherently or by reason of constitutional provisions essential to the jurisdiction of the taxing power." And in Sheets v. Paine, 10 N.D. 103, 86 N.W. 118 (1901), discussing the subject specifically, the Court said: "Appellant's counsel contends that only matters prescribed by the constitution of the state are jurisdictional to a tax. *Without conceding the soundness of the contention,* we are quite willing to let the organic law speak as to any point made in this case." (Emphasis supplied). While it would seem more logical to define jurisdictional defects in terms of constitutional provisions, it seems unsafe to do so in the light of the foregoing precedents. It is clear, however, that a "statutory" jurisdictional defect is normally not as serious as a "constitutional" jurisdiction defect, particularly in the light of §57-2429, *supra.*

139. 15 N.D. 386, 390 N.W. 350, 352 (1906).

ings, buildings used for charitable purposes, property owned by agricultural fair associations, property owned by lodges and other fraternal organizations, including college fraternities, personal property owned by insurance companies, banks or rural electric cooperatives subject to certain other types of taxes in lieu of taxes upon their personal property, public parks, armories used by the National Guard, all farm structures and improvements located on agricultural lands, and property of non-profit organizations operating in conjunction with state educational institutions, plus a few other minor exemptions with respect to certain classes of personal property.[140]

While the fact that property which has been sold for taxes was not in reality subject to taxation is considered to be a jurisdictional defect,[141] it is also one of the four grounds of attack upon a tax sale specifically permitted by statute.[142] The taxable status of the property is considered jurisdictional because the levying of a tax upon certain types of property violates the Constitution of North Dakota, which declares that, "The property of the United States and of the State, county and municipal corporations, and property used exclusively for schools, religious, cemetery, charitable and other public purposes shall be exempt from taxation."[143]

Relatively few cases in this state have involved this ground of attack upon a tax sale. It is clear that such a tax sale is uniformly held void,[144] and most of the cases involving such tax sales accordingly turn upon other questions—primarily the question of the rights of the tax sale purchaser to get his money back.[145]

One interesting case dealing with a tax sale of non-taxable land is *State v. Towner County*,[146] an action to quiet title brought by the State of North Dakota against Towner County. The state had contracting to sell the land to a private purchaser by an agreement signed in 1919. From 1920 to 1924 the county accordingly levied taxes upon the land. These were unpaid. The purchaser then defaulted in his payments on the purchase price and the state cancelled the contract for deed. The county contended that the lien of taxes still attached to the land after the cancellation of the con-

140. N.D. Rev. Code §57-0208 (1943).
141. Roberts v. First National Bank of Fargo, 8 N.D. 504, 79 N.W. 1049 (1899).
142. N.D. Rev. Code §57-2429 (1) (1943).
143. N.D. Const. §176.
144. Bismarck Water Supply Co. v. Burleigh County, 36 N.D. 191, 161 N.W. 1009 (1917).
145. See McHenry v. Brett, 9 N.D. 68, 81 N.W. 65 (1899); Van Nest v. Sargent County, 7 N.D. 139, 73 N.W. 1083 (1897); Tisdale v. Ward County, 20 N.D. 401, 127 N.W. 512 (1910).
146. 68 N.D. 629, 283 N.W. 63 (1939).

tract. It was held that the lien ended with the termination of the contract. The Court declared that only the interest of the purchaser was subject to taxation, and when the contract of sale was cancelled the land reverted to the state free and clear of any tax lien.

B. Lack of Assessment

Without an assessment, the Court has repeatedly held, a tax sale is void and may be set aside at the will of the former owner.[147] Since the lack of an assessment is a jurisdictional defect, the right to set aside a tax sale which is defective for this reason is not cut off by the expiration of the three-year period of limitations [148] although it is immaterial in event other statutes of limitation are called into play.[149] The requirement of an assessment is in reality based on the provisions of the North Dakota Constitution. Thus, in *Sheets v. Paine,* [150] where it was argued that the lack of correct description of the land in the assessment roll voided the assessment, the Court stated:

> "Section 174 [of the North Dakota Constitution] in terms recognizes the necessity of an assessment as a basis of taxation . . . and §179 provides that all property shall be assessed 'in the manner prescribed by law'. . . . It must follow, and we so hold, that the tax deed set out in the defendant's answer is void . . . because it rests upon a void assessment." [151]

Precisely what acts are necessary to the validity of an assessment? In answering this question, the Court has given varying responses. In many cases, the view apparently taken is that virtually any failure to comply with the statutory provisions governing assessments is fatal. As *Sheets v. Paine* indicates, a failure to describe land properly—basically a *statutory* requirement [152]—has been inconsistently held an insufficient compliance with the *constitutional* mandate.[153] Likewise, a failure to verify the assessment

147. State Finance Co. v. Mather, 15 N.D. 386, 109 N.W. 350 (1906); State Finance Co. v. Beck, 15 N.D. 374, 109 N.W. 357 (1906); Sheets v. Paine, 10 N.D. 103, 86 N.W. 118 (1901); Shuttuck v. Smith, 2 N.D. 56, 69 N.W. 5 (1896); Power v. Bowdle, 3 N.D. 107, 54 N.W. 404 (1893). A discussion of the necessity of an assessment also appears in Zuger, *Tax Titles,* 1949 Sectional Assembly Program of the State Bar Association of North Dakota 48, 51-52.

148. Eaton v. Bennett, 10 N.D. 346, 87 N.W. 188 (1901); Power v. Kitching, 10 N.D. 254, 86 N.W. 737 (1901); Sweigle v. Gates, 9 N.D. 538, 84 N.W. 481 (1900); Roberts v. First National Bank of Fargo, 8 N.D. 504, 79 N.W. 1049 (1899).

149. Principally the ten-year statute of limitations, of course. Power v. Kitching, 10 N.D. 254, 86 N.W. 737 (1901).

150. 10 N.D. 103, 86 N.W. 118 (1901).

151. *Id.* at 106-07, 86 N.W. at 119. See also Blackwell, Tax Titles §§194, 195 (5th ed. 1889).

152. N.D. Rev. Code §57-0234 (1943).

153. See also Power v. Bowdle, 3 N.D. 107, 54 N.W. 404 (1893); Power v. Larabee, 2 N.D. 141, 49 N.W. 724 (1891); and the cases discussed *infra.*

roll,[154] and an assessment of two lots as one tract,[155] have been held sufficient in invalidate an assessment, though these defects constituted merely a failure to meet statutory requirements.

In *Power v. Larabee,*[156] an early decision, it was said that the process of assessment consisted of four steps, the clear implication being that the omission of any one of these steps was fatal:

> *First,* the land must be described by separate tracts in lists furnished for the use of the assessor; *second,* the assessor must view the land and reach a conclusion in his own mind as to its value; *third,* the assessor is required to write out opposite each tract in the roll the value as he ascertained it to be, and, *finally,* the assessor is required to swear to the assessment thus made, and annex the proper affidavit to the roll and then return it to the county clerk or auditor.[157]

Justice Bartholomew, concurring in *Power v. Larabee,* added a further requirement. He thought that the process of assessment was not complete until the taxpayer had been given a hearing on the valuation of the property. While the point is a minor one, it would seem that this view unnecessarily couples the requirement of assessment with that of equalization.[158]

In later decisions, however, the Court materially narrowed the rules laid down in *Sheets v. Paine* and *Power v. Larabee.* Thus, in *State Finance Co. v. Mather,*[159] it was said that, "The act of assessment is performed as to the land when the assessor determines its value. *That is all that is inherently necessary,* and it is clear that under our system of real estate taxation no less will suffice."[160] This latter rule, if carried to its logical conclusion, would necessarily result in a holding that if the assessor had actually made a valuation of land, no other defect in the assessment proceedings could be used to defeat a tax sale unless objection were made prior to the sale.[161] However, the view of *Sheets v. Paine* was not com-

154. Eaton v. Bennett, 10 N.D. 346, 87 N.W. 188 (1901). But this case is no longer law, as the text discussion indicates.

155. State Finance Co. v. Bowdle, 16 N.D. 193, 112 N.W. 76 (1907); Roberts v. First National Bank of Fargo, 8 N.D. 504, 79 N.W. 1049 (1899).

156. 2 N.D. 141, 49 N.W. 724 (1891).

157. *Id.* at 149, 49 N.W. at 726.

158. See "Equalization of Assessments," *infra.*

159. 15 N.D. 386, 109 N.W. 350 (1906).

160. *Id.* at 389, 109 N.W. at 352.

161. Obviously, if the single act of valuation satisfies the constitutional requirement, the performance of any other acts in connection with the assessment of land must be regarded as simply a conformity to statutory dictates. So far as statutory requirements are concerned, it would seem that the rule applicable is that of Beggs v. Paine, *supra,* in which it was held that unless an objection to a statutory defect in the tax sale proceedings is raised prior to the issuance of the certificate of sale, the right is lost through the operation of N.D. Rev. Code §57-27-2429 (1943). "There can be no doubt that the section cures or bars every defect which it is within the power of the legislature to declare non-essential." State Finance Co. v. Mather, 15 N.D. 386, 390, 109 N.W. 350, 352 (1906).

pletely eliminated from the law of North Dakota by the Mather case, and under the influence of *Sheets v. Paine* the Court has found it necessary to engraft several exceptions onto the rule of the *Mather* case.

Possibly it is simplest to summarize the law in regard to assessment by saying that there are in reality two basic theories as to what constitutes a valid assessment in this state: (1) The view of *Sheets v. Paine* that a failure to meet the statutory requirements imposed by the legislature also constitutes a failure to meet the constitutional requirement of an assessment "in the manner prescribed by law," and (2) the view of *State Finance Co. v. Mather* that the constitutional requirement is satisfied once the assessor has made a de facto valuation of the land. It is between these two different ideas that the court has oscillated in the later cases. With regard to the necessity for a description of the land as a prerequisite to a valid assessment, the view of *Sheets v. Paine* is still the law; with regard to other statutory requirements, the view of *State Finance Co. v. Mather* is clearly winning out.

1. *Lack of Sufficient Description*

Most of the cases dealing with the legal sufficiency of assessments turn upon the question of whether the land assessed was identified with sufficient clarity to be definitely identifiable. This is a familiar ground of attack upon tax sales in other states,[162] and has been more successful than ought to have been the case.

The first case decided in this state dealing with the sufficiency of a description is an assessment roll was *Power v. Larabee*,[163] in which the land was described in the assessment roll as "W. 2 of W. 2, Section 7, Township 143, Range 57." The abbreviation "W. 2" was clearly a loose method of describing the west one-half of the land involved, the numeral "2" being used in place of the more familiar and accurate "½." The court held that the description was insufficient since it was not "expressed by characters or abbreviations commonly used by conveyancers, or generally understood and used by the people at large in describing land," [164] and accordingly did not meet the legal requirement that it be "reasonably full and accurate, though it need not be technically nice and scientifically exact." [165] The court added that the description could not be ex-

162. See Clark, *Tax Titles in Mississippi*, 17 Miss. L. J. 372, 380 (1946); Note, 4 Wyo. L. J. 262, 264 (1950); Note, 67 A.L.R. 890 (1930) (collecting numerous cases).
163. 2 N.D. 141, 49 N.W. 724 (1891).
164. *Id.* at 148, 49 N.W. at 725.
165. *Id.* at 148, 49 N.W. at 725-26.

plained or supplemented by oral testimony,[166] and accordingly that the tax sale involved was illegal.

Following the precedent of *Power v. Larabee,* the following descriptions were held invalid in subsequent cases: E ½ NW ¼ of Sec. 25, Twp. 141, Rge. 59;[167] N ½ of S.E.¼ of Sec. 25, Twp. 138, Rge. 56; [168] S.E. 4 S.W. 4 W.2 S.W. 4 of Section 19; [169] S.W. 4 of S.E. 4 of section 32, town. 141, range 50; [170] N.E. 4 of N.W. 4, S. 2 of N.W. 2 and S.W. 4; [171] the "N. 23 x 200 feet" of a given lot of 600 feet, although the owner of the lot was correctly named in the assessment roll; [172] N.W. 4 of Section 35, Township 149, Range 56, Acres 160;[173] an error placing the land in range 55 instead of range 53; [174] "Cleveland Township, County of Walsh, North Dakota. Name of Owner, Florence B. Martin; description N.W. 4, Sec. 1, Twp. 155, Rng. 57"; [175] a description of land in a certificate of tax sale as the "E½ of SW¼ of NE¼"—a description of 20 acres while the land sold was 120 acres;[176] and "S.W.¼ Section 10" without a listing of township or range numbers opposite the name of the owner, although the correct numbers were listed in columns at the top of the assessment roll and could easily have been indicated by ditto marks.[177]

Even a cursory glance at the descriptions thus invalidated under this rule should be sufficient to indicate the unsoundness of the position which the Court took in these cases. The Court itself recognized at an early date that the rule it had adopted was not sup-

166. See also Sheets v. Paine, 10 N.D. 103, 86 N.W. 1188 (1901); Paine v. Willson, 146 Fed. 488 (8th Cir. 1906).

167. Power v. Bowdle, 3 N.D. 107, 54 N.W. 404 (1893).

168. Iowa & Dakota Land Co. v. Barnes Co., 6 N.D. 601, 72 N.W. 1019 (1897).

169. Sheets v. Paine, 10 N.D. 103, 86 N.W. 118 (1901). The correct description was the "SE¼ of the SW¼ and the W½ of the SW¼ of Section 19, Township 150, Range 58. The township and range numbers were not listed in the assessment roll opposite the name of the owner—an additional reason cited by the court for the invalidity of the description.

170. Lee v. Crawford, 10 N.D. 482, 88 N.W. 97 (1901).

171. Nind v. Meyers & Beck, 15 N.D. 400, 109 N.W. 335 (1906).

172. Grand Forks County v. Frederick, 16 N.D. 118, 112 N.W. 839 (1907).

173. Wright v. Jones, 23 N.D. 191, 135 N.W. 120 (1912). The printed report of this case in Volume 23 of the North Dakota Reports incorrectly gives the description as "NW¼," rather than as "N.W. 4." See Anderson v. Roberts, 71 N.D. 345, 1 N.W.2d 338 (1941). Compare this case with the description held sufficient in Beggs v. Paine, 15 N.D. 436, 109 N.W. 322 (1906), in which the description read "N.W. of Section 32, Township 130, Range 64, Acres 160," and the court said: "We have no hesitation in holding that the description in this assessment roll is as perfectly intelligible to any person of common understanding as it would be if written out in full. "N.W.' is the abbreviation which means 'Northwest' wherever the English language is written. The Northwest part of section 32, in the stated township and range, belonging to Philip Dawson, and containing 160 acres, specifically and clearly identifies the land in question, and could not reasonably be applied to any tract than the northwest quarter of the section in question."

174. Hackney v. Elliott, 23 N.D. 373, 137 N.W. 433 (1912).

715. Farmers Security Bank v. Martin, 29 N.D. 269, 150 N.W. 572 (1915).

176. State Finance Co. v. Mulberger, 16 N.D. 214, 112 N.W. 986 (1907).

177. Paine v. Willson, 146 Fed. 488 (8th Cir. 1906). See also Paine v. Germantown Trust Co., 136 Fed. 527 (8th Cir. 1904).

portable, for in *Beggs v. Paine*,[178] upholding a description no more definite than many of those cited above, it declared that it was not disposed to extend the rule of the *Larabee* case beyond its precise facts. Six years, later, however, reluctance to overturn precedent apparently got the better of it; in *Wright v. Jones*[179] it described the rule as one of property and stated that the Court had followed it too long to repudiate it, though it noted what it termed the "severe criticism" to which these holdings had been subjected.

In 1915, the North Dakota Legislature took a hand in the problem. As early as 1890, statutes had been enacted providing that in describing land in proceedings relative to assessment, it was sufficient to use "initial letters, abbreviations and figures to designate the township, range, sections, or parts of sections, and also the number of lots and blocks."[180] This was deemed sufficient to validate the description found in the early cases,[181] but the legislature amended the law in 1915 to deal with the problems of description which had arisen in the cases, the statute providing specifically that "it is hereby intended to abrogate as to all further taxation proceedings the rule of construction arising from the early and other decisions of the Supreme Court of this state under which such descriptions in taxation proceedings as N.E.[4] of a designated section are held to be indefinite and void for taxation purposes."[182] The statute appeared in this form in the 1925 Supplement to the North Dakota Compiled Laws of 1913,[183] but in the Revised Code of 1943 was omitted, apparently without the intention of repealing it.[184]

In its later discussions of the rule of *Power v. Larabee*, the Court has tended to take a far more realistic view. In *Anderson v. Roberts*,[185] a modern decision, the court clearly indicated its intention to give the precedents regarding misdescriptions a closely restricted interpretation. The precision used to describe land in tax sale proceedings, however, continues to be important; in *Star v. Nor-*

178. 15 N.D. 436, 109 N.W. 322 (1906).
179. 23 N.D. 191, 135 N.W. 1120 (1912).
180. N.D. Rev. Code §1281 (1899).
181. A discussion of the statute is found in Farmers' Security Bank v. Martin, 29 N.D. 269, 150 N.W. 572 (1915).
182. N.D. Sess. L. 1915, c. 1, §1.
183. N.D. Comp. Laws §2215 (Supp. 1925).
184. The statute is now N.D. Rev. Code §57-0202 (1943). The report of the Code Revision Committee which prepared the 1943 revision of the code states that as it appears in the code at present, the statute has been "revised in form only for clarity and convenience." 22 Report of the Code Revision Committee §57-0202.
185. 71 N.D. 345, 1 N.W.2d 338 (1941). See also Twedt v. Hanson, 58 N.D. 571, 226 N.W. 615 (1929).

steby,[186] decided in 1948, the Court struck down a notice of the expiration of the period of redemption because the notice contained an invalid description.

On principle, it would seem that the rule which ought to be applied is that of the North Dakota Revised Code: "No assessment or tax based thereon shall be held invalid if it is possible to determine definitely what property was assessed, the valuation fixed by the assessor, and the rate or amount of the tax levied, nor shall it be held invalid for any defect in form, if the person or property assessed in fact is subject to taxation, unless it shall appear that such irregularity resulted to the prejudice of the party objecting." [187]

2. *Failure to Verify Assessment Roll*

The rule originally enunciated by the Court was that a failure to verify the assessment roll invalidated all subsequent proceedings, and that no valid tax could be levied on the property involved and no sale of the land for such taxes was valid.[188] In subsequent decisions this view has been abandoned. *State Finance Co. v. Mather*.[189] held this defect immaterial unless objection was made prior to the sale and this view was reaffirmed in 1941.[190]

3. *Assessment of Two Tracts as One*

The Court has held consistently that where two separate tracts of land are assessed and sold together, the sale is void despite the fact that the two tracts may have been owned by the same person.[191] In *State Finance Co. v. Bowdle*,[192] a good illustrative case, a quarter section of land was involved. The north half of the quarter section was owned by one Ludlow and the south half was owned by Ludlow and Beck as tenants in common. It was held that the assessment of the two tracts as one invalidated the assessment and the subsequent tax sale, since the statutes provided that a "tract" of land, for assessment purposes, consisted of "any contiguous quan-

186. 75 N.D. 563, 30 N.W.2d 718 (1948).

187. N.D. Rev. Code §57-4514 (1943). But this section also provides that a tax may be held invalid if it appears that "the description of the property intended to be assessed . . . cannot be definitely ascertained from the assessment roll which is the basis of such tax." Apparently the rule that the description cannot be suppiemented by oral testimony is still the law of this state.

188. Lee v. Crawford, 10 N.D. 482, 88 N.W. 97 (1901); Eaton v. Bennett, 10 N.D. 346, 87 N.W. 188 (1901); Power v. Kitching, 10 N.D. 254, 86 N.W. 737 (1901).

189. 15 N.D. 386, 109 N.W. 350 (1906).

190. Anderson v. Roberts, 71 N.D. 345, 1 N.W.2d 338 (1941). *Cf.* Graham v. Mutual Realty Co., 22 N.D. 423, 134 N.W. 43 (1911).

191. Moore v. Besler, 39 N.D. 243, 167 N.W. 218 (1918); Griffin v. Denison Land Co., 18 N.D. 246, 119 N.W. 1041 (1908); State Finance Co. v. Beck, 15 N.D. 374, 109 N.W. 357 (1906); Roberts v. First National Bank of Fargo, 8 N.D. 504, 79 N.W. 1049 (1899); O'Neil v. Tyler, 3 N.D. 47, 53 N.W. 434 (1892).

192. 16 N.D. 193, 112 N.W. 76 (1907).

tity of land in the possession, owned by, or recorded as the property of, the same claimant, person, or company," [193] and such an assessment accordingly violated the statutory requirements. A similar result is reached where the two tracts involved are non-contaguous,[194] or when adjoining lots in a town plat are assessed together and valued at a lump sum.[195] This is clearly an instance where the non-observance of a statutory mandate is considered "jurisdictional" in character.

4. *Requirement that Land be Listed in Owner's Name*

The statutes provide that the assessment list "shall show the name of the owner, if known to (the assessor), and if unknown shall state that fact, the number of acres, and the lots and parts of lots or blocks included in each description." [196] In several cases it has been argued that a listing of property on the assessed roll under the name of a person who was not really the owner invalidated the assessment. In decisions rendered under the territorial laws this contention was upheld [197] for the reason that the territorial revenue laws were drafted on the in personam theory of property taxation [198] and an assessment of the wrong person obviously created no liability so far as the true owner of the land was concerned. When the in rem theory of real estate taxation was adopted, however, the reason for this rule ended, since the tax was thereafter levied not upon the person who owned the land involved but upon the land itself. Quite logically, the court reversed itself and ruled in subsequent decisions that a failure to assess land in the name of the true owner or owners did not invalidate the tax.[199] The statutory requirement was treated as directory and not mandatory. This appears to be the present rule.

5. *Errors in Assessing Generally*

One of the most interesting attacks upon the validity of an assessment was made in *Shuttuck v Smith*,[200] in which the validity of all taxes levied in the city of Fargo from 1890 to 1893 was ques-

193. N.D. Rev. Code §57-0201 (1943).
194. Moore v. Besler, 39 N.D. 243, 167 N.W. 218 (1918); Griffin v. Denison Land Co., 19 N.D. 246, 119 N.W. 1041 (1908).
195. Roberts v. First National Bank of Fargo, 8 N.D. 504, 79 N.W. 1948 (1899); O'Neil v. Tyler, 3 N.D. 47, 53 N.W. 434 (1892).
196. N.D. Rev. Code §57-0231 (1943).
197. Sweigle v. Gates, 9 N.D. 538, 84 N.W. 481 (1900); Roberts v. First National Bank of Fargo, 8 N.D. 504, 79 N.W. 1048 (1899).
198. See the discussion of the character of the interest created by a tax deed, *supra* pp. 236 *Et Seq.*
199. Sykes v. Beck, 12 N.D. 242, 96 N.W. 844 (1903); Hertzler v. Freeman, 12 N.D. 187, 96 N.W. 294 (1903).
200. 6 N.D. 56, 69 N.W. 5 (1896).

tioned on the ground that the taxes for which the plaintiff's property was sold were higher than they should have been because the assessors undervalued other property in the same taxing jurisdiction. The errors claimed were that a hotel worth at least $100,000 was valued at less than $20,000; a property known as the "Bishop Shanley Property" was assessed at less than 20 per cent of its worth; a tract of land valued by witnesses at $75,000 belonging to a railroad was entirely omitted from the assessment roll; the entire right of way of a railroad running through the city was not assessed, although buildings which stood on it were properly assessed; during the years in question the state board of equalization assessed the franchise, roadway, roadbed rails and rolling stock of the company at $2,500 per mile, which was allegedly one-eighth the reproduction cost; and the county farm lands were assessed at one-half their value.

Despite the formidable nature of these errors, the Court held the assessment valid. Among other things, it said:

> The law requires the assessor to assess all property not by law exempt from taxation, and to assess it at its actual value. Necessarily in this process, two things are left to the judgment of the assessor: He must say primarily what is the actual value of the property. To do this with any approach to accuracy requires broad knowledge, extended experience, and excellent judgment. He must also say whether or not any given piece of property belongs to any of the classes which are by law exempt. Simple as this may appear, it is often a difficult and delicate task. . . . But the duty of deciding these matters must be lodged somewhere, and the legislature has seen proper to lodge it primarily with the assessor. And in deciding these matters the assessor acts as a judicial officer. This being true, and the determinations of the assessor being in the nature of judgments, it is fundamental that errors and mistakes of judgment while acting within his jurisdiction do not invalidate the assessment.[201]

Similarly, it was held in *Flath v. Elefson*[202] that the valuation of land could not be proven to have been excessive by showing that the county which purchased the land at tax sale later sold it to a private purchaser at a price lower than the valuation for tax purposes. It was said in that case that the valuation methods used in fixing the sale price were distinct from those used in fixing the tax load. One did not control the other.

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201. *Id.* at 61-62, 69 N.W. at 7.
202. 73 N.D. 746, 19 N.W.2d 571 (1945).

C. Equalization of Assessments

The North Dakota Court has ruled specifically that a taxpayer is entitled to a hearing upon the correctness of the valuation which has been placed upon his property, and that the imposition of a tax based upon a valuation without a hearing amounts to a taking of property without due process of law.[203] From a constitutional standpoint, however, the precise point in the tax proceedings at which a hearing is granted is immaterial. "If at any period in the tax proceeding, or in the course of the judicial proceeding instituted to enforce the tax, the right to demonstrate that the tax against the land is excessive is granted by statute, that protection which the constitution guarantees is fully enjoyed by the citizen." [204]

Customarily the right to a hearing is granted at the meetings of the various boards of equalization.[205] Does the fact that no meeting of the appropriate board of equalization took place at the time specified by statute invalidate a sale of land for the delinquent taxes of that particular year? Since notice of the hearing is supplied only by the statutes prescribing the dates when the board will be in session, the question received an affirmative answer in *Power v. Larabee*,[206] decided in 1891. It received a negative answer in *Wells County v. McHenry*,[207] decided seven years later. The two cases, however, are not inconsistent. *Power v. Larabee* was decided on the basis of a statute concerning tax sales substantially similar to the system now in force, while *Wells County v. McHenry* involved a tax sale under the so-called "Woods Law," [208] which has since been repealed. The distinguishing feature of "Woods Law" procedure was that it involved a rendition by the district courts of judgment for the amount of delinquent taxes, the sale of land for non-payment of these taxes being treated as a sale of land to satisfy the judgment. It was pointed out in *Wells County v. McHenry*

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203. State *ex rel.* Miller v. Leech, 33 N.D. 513, 157 N.W. 492 (1916); Pickton v. City of Fargo, 10 N.D. 469, 88 N.W. 90 (1901); Power v. Larabee, 2 N.D. 141, 49 N.W. 724 (1891); Montana-Dakota Power Co. v. Weeks, 8 F. Supp. 955, 938 (D. N.D. 1934).

204. Wells County v. McHenry, 7 N.D. 246, 257, 74 N.W. 241, 245 (1898).

205. The statutory provisions dealing with this subject may be found in Chapters 57-09 (townships), 57-10 (villages), 57-11 (cities), 57-12 (counties) and 57-13 (state board of equalization) of the North Dakota Revised Code of 1943.

206. 2 N.D. 141, 49 N.W. 724 (1891).

207. 7 N.D. 246, 74 N.W. 241 (1898).

208. N.D. Sess. L. 1897, c. 67. Cases which are explanatory of the background, operation and effect of this abortive attempt to reinforce the status of tax sales by adding to them the sanction of judicial action are Purcell & Divet v. Farm Land Co., 13 N.D. 327, 100 N.W. 700 (1904); Darling & Angell v. Purcell, 13 N.D. 288, 100 N.W. 726 (1904); Emmons County v. Lands of First National Bank of Bismarck, 9 N.D. 583, 84 N.W. 379 (1900); Emmons County v. Thompson, 9 N.D. 598, 84 N.W. 385 (1900).

that the taxpayer has a right to protest the valuation of his property in Woods Law proceedings at the hearing in court, and this was regarded as satisfying the constitutional requirement. *Power v. Larabee* was distinguished because of the difference in the underlying statutes, the Court expressly stating that it did not wish to qualify anything decided in that case.

The rule originally laid down in the *Larabee* case was that the omission of the county board of equalization to meet at the time and place designated by law operated to invalidate a subsequent tax sale without proof of any actual injury to the taxpayer, since it was said that the Court would presume an injury on grounds of public policy.[209] It seems doubtful that proof of such an omission without accompanying proof of actual prejudice would be considered sufficient at present.[210] And it is clear that errors which occur in the course of equalization proceedings, as distinguished from a failure to equalize taxes at all, are not sufficient to invalidate a tax sale. Thus, it has been held that where a board of equalization meets on the day specified by law and then adjourns the session from day to day, some of the adjournments being by less than a quorum of the board, equalizations thereafter made are valid.[211] A failure of the assessor to deliver the assessment roll to the auditor on the day required by law will not invalidate the equalization proceedings if the roll is in fact received by the board of equalization while it is still in session.[212] Where the board of county commissioners sits as a board of equalization and keeps the record of equalization actions in a separate book instead of as a part of the records of the board of county commissioners, the equalization is valid.[213] And even though the record of the board of equalization is neither signed nor certified, failure to object to the defect prior to tax sale results in a loss of the right to object thereafter.[214] The principle underlying this latter holding would appear to be logically applicable to virtually any defect in the proceedings.

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209. Power v. Larabee, *supra*, syll. 2. See also Pickton v. City of Fargo, 10 N.D. 469, 88 N.W. 90 (1901), in which it was said: 'No opportunity was ever . . . given for a hearing before the paving committee or the council. It is scarcely necessary to say that the rule is well settled in this jurisdiction that a tax upon real estate which is attempted to be assessed without permitting the taxpayer to be heard before the legally designated tribunal is a void tax." *Cf.* Farrington v. New England Investment Co., 1 N.D. 102, 45 N.W. 191 (1890).

210. "No assessment or tax based thereon shall be held invalid . . . unless it shall appear that such irregularity resulted to the prejudice of the party objecting. . . ." N.D. Rev. Code §57-4514 (1943). This section was enacted in 1903, after the decision in *Power v. Larabee*. N.D. Sess. L. 1903, c. 166, §1.

211. O'Neil v. Tyler, 3 N.D. 47, 53 N.W. 434 (1892).

212. O'Neil v. Tyler, *supra* note 211.

213. Fisher v. Betts & Smith, 12 N.D. 197, 96 N.W. 132 (1903).

214. Anderson v. Roberts, 71 N.D. 345, 1 N.W.2d 338 (1941).

D. Tax Levies

The assessment of a tract of land for tax purposes should not be confused with the process of making a levy of taxes upon it. An assessment, as the preceding discussion has indicated, consists primarily of a valuation of property for tax purposes—a quasi- judicial function involving the exercise of the assessor's judgment and skill. The levy of a tax, on the other hand, is an entirely separate portion of the taxing operation. It consists of a determination, by the appropriate taxing authorities, of the amount of money to be raised by taxation during a given fiscal year.[215] Essentially this is a legislative act, the performance of which is delegated by the legislature to the various boards authorized to make tax levies.[216]

It is the making of a tax levy, in conjunction with the assessment, which ordinarily determines the tax burden which a specific piece of real property must bear. To assume a simplified case, suppose that within County X is property worth $10,000,000 and that the Board of County Commissioners decides upon a tax levy of $50,000 to meet expenses for the coming year. It is obvious that the county tax rate upon any given piece of property is thereby automatically set at .005 mills per dollar, since the total value of the assessed property within the county ($10,000,000) divided into the tax levy ($50,000) yields that figure.[217] It follows that if a resident of County X owns property value at $10,000 the county tax which will be imposed upon the property will be $50, since $10,000 x.005=$50. Of course, the amount of this tax may be varied by an adjustment of the assessment in the equalization process.

It is possible, as Blackwell points out, to make a levy of taxes in two ways. "Sometimes it is voted to raise a certain amount by a tax evenly distributed over property of a given kind, or over all property in proportion to its value, and then when the assessors have made a list of the property in the district taxed, and of its value, the total value and the total tax easily give the rate by which to calculate the tax on any piece of property whose value is known. Sometimes the valuation is made before the levy and the body making the levy itself decides upon the percentage of taxation which

215. Blackwell, Tax Titles §193 (5th ed. 1889); 3 Cooley, Taxation §1012 (4th ed. 1924).

216. 3 Cooley, Taxation §1012 (4th ed. 1924).

217. This, of course, is an illustrative case only, and the tax rate given is extremely low. The present tax laws limit state tax levies to four mills, exclusive of interest on the public debt. N.D. Rev. Code §57-1503 (1943). County tax levies are limited to 11 mills, with certain specified exceptions. N.D. Rev. Code §57-1506 (1943). The statutory regulations governing the size of such levies are set forth in Chapter 57-15 of the North Dakota Revised Code of 1943.

will be necessary to raise the amount required; then the levy takes the form of an order to assess taxable property at a certain rate named." [218] The former of these two methods is customarily called a levy by specific amount; the latter is known as a levy by percentage.

The statutes provide that in this state all levies of taxes must be by specific amounts.[219] The consequences to a tax sale of a failure to obey the statutory mandate are graphically illustrated by *Dever v. Cornwell*,[220] in which the county board of commissioners made a tax levy by percentages as follows: "For county general fund, 6 mills; for county sinking fund, 5/10 mills; for county road and bridge 5/10 mills,—total 7 mills." [221] The court held that such a levy of taxes was invalid, that the county treasurer accordingly lacked jurisdiction to sell land on which such taxes were laid, and that a tax sale and a tax deed arising out of the sale were void. It was pointed out that the assessed value of the land within the county was subject to revision by the State Board of Equalization, and accordingly such a levy of taxes was uncertain in amount.[222]

It has been held, however, that in the case of a state levy of taxes the levy is not invalidated if made in percentages or mills rather than in a specific amount, since the decision of the State Board of Equalization on the valuation of property is final and a levy of tax by percentages can therefore be easily translated into a levy of a specific amount. In such a case, the maxim that that is certain which can be made certain applies, the provision of the statute being considered directory only.[223] And similarly it has been held that the fact that the county commissioners failed to draw up a budget before making a levy of taxes was a minor defect, cured by the failure of the landowner involved to object prior to the tax sale.[224] Nor is it possible to attack a levy of taxes after a tax sale has taken place on the ground that the amount levied was in excess of the amount permitted by law.[225] In short, under present rulings

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218. Blackwell, Tax Titles §193 (5th ed. 1889).

219. "With the exception of special assessment taxes and such general taxes as may be definitely fixed by law, all state, county, city, village, township, school district and park district taxes shall be levied or voted in specific amounts of money." N.D. Rev. Code §57-1501 (1943). See also N.D. Rev. Code §11-2305 (1943).

220. 10 N.D. 123, 86 N.W. 227 (1901).

221. *Id.* at 127, 86 N.W. at 229.

222. *Accord*, Fisher v. Betts & Smith, 12 N.D. 197, 96 N.W. 132 (1903); Wells County v. McHenry, 7 N.D. 246, 74 N.W. 241 (1890).

223. Sykes v. Beck, 12 N.D. 242, 96 N.W. 844 (1903).

224. Munroe v. Donovan, 31 N.D. 228, 153 N.W. 461 (1915), *app. dismissed*, 245 U.S. 679 (1917). See also Anderson v. Roberts, 71 N.D. 345, 1 N.W.2d 338 (1941).

225. Twedt v. Hanson, 58 N.D. 571, 226 N.W. 615 (1929).

attacks upon tax sales on the ground that there was not a valid law of taxes seem destined to fail unless based upon either a total absence of any levy,[226] or a levy by percentages—which in the contemplation of the Court seems to amount to the same thing. It seems difficult to see why the rule that a levy by percentage is a jurisdictional defect should remain the law, however. Logically, such a defect should be cured by failure to object to it before the sale.[227]

(To Be Continued)

226. See O'Neil v. Tyler, 2 N.D. 47, 53 N.W. 434 (1892), in which the city council of Fargo levied a tax, but the evidence failed to show that the mayor participated in the action. The city charter provided that the "mayor and council" should levy the annual city taxes. It was held there was no valid levy and a tax levy based on failure to pay such taxes was invalidated. Moreover, it was held that the ordinance under which the council operated was void because the yeas and nays of the council when it was adopted were not recorded. See on this latter point Pickton v. City of Fargo, 10 N.D. 469, 88 N.W. 90 (1901).

227. The court used language which would support such a view in Fish v. France, 71 N.D. 499, 2 N.W.2d 537 (1942).