North Dakota Law Review

Volume 29 | Number 4 Article 1

1953

A Commentary on North Dakota Tax Titles

Charles Liebert Crum

A COMMENTARY ON NORTH DAKOTA TAX TITLES*

CHARLES LIEBERT CRUM**

V.

THE RIGHT OF REDEMPTION

THE right of redemption, briefly defined, is the right enjoyed by an owner of property to prevent a tax *sale* from ripening into a tax *title,* through the repayment to the tax sale purchaser of the amount given for the certificate of tax sale, plus necessary interest. Its paramount importance in the law of tax titles is obvious and difficult to overemphasize. Until the right of the former owner to redeem from a tax sale has been legally ended, no purchaser of land at a tax sale is entitled to feel safe in his ownership; and this holds true even though the purchaser may have received a tax deed, because the right of redemption often survives the issuance of such a document—a fact sometimes discovered by the tax deed holder to his considerable sorrow. Conversely, when once the right of redemption has been effectively terminated, the Rubicon in tax sale proceedings has normally been crossed: the law passes equitable title to the tax sale purchaser immediately, even though a deed may not have been obtained.[1] The issuance of the tax deed proper becomes, thereafter, little more than a ministerial act, since if the prior proceedings have been proper the termination of the right of redemption forecloses virtually the last string of ownership retained by the prior owner.

It is only in one case that the prior owner can thereafter assert any significant right with respect to his former property. In the event that it is a county which has acquired a tax title to land, the former owner is entitled to repurchase the land so long as the title to it remains in the hands of the county. This is, in effect, an extension of the right of redemption to the prior owner even after title has passed from him, and the statutes formerly treated it as such. But judicial usage has been to call this right one of repurchase, and it is discussed under that heading subsequently.

There appear to be only two methods of ending the right of

* Second of two parts. The first installment of this article appears in the NORTH DAKOTA LAW REVIEW for July, 1953, beginning on page 225.

** Associate Professor of Law, University of North Dakota.

1. McDonald v. Abraham, 75 N.D. 457, 28 N.W.2d 582 (1947); Buman v. Sturn, 73 N.D. 561, 16 N.W.2d 837 (1945); Beggs v. Paine, 15 N.D. 436, 109 N.W. 322 (1906). See also note 139, *infra.*

redemption from a tax sale. One method is to hold the land involved in the sale in adverse possession for a period of time sufficient to permit the running of a statute of limitations. The application of such statutes to tax sale cases is taken up hereinafter.[2] The other method is to make proper service of a correctly drawn notice of the expiration of the period of redemption, since without such service the right will continue indefinitely.[3]

Numerous cases have considered the characteristics and effect of redemption—indeed, because of its importance in tax sale cases, most of the decisions discuss it—and a number of interesting problems have developed. But before these are taken up, some preliminary observations should be made.

It was pointed out in the first portion of this paper that when land is sold for taxes it may be purchased either by a private citizen or by the county within which the land lies.[4] In either case, the former owner retains a right to redeem the land for a statutory period of approximately three years.[5] But the essential nature of the right of redemption nevertheless varies considerably according to the identity of the tax sale purchaser, for an interesting reason. If the sale was to a private buyer, it constitutes a contract and is entitled to all of the protection surrounding any other contract.[6] On the other hand, if the tax sale was to a county in the first instance, the county can assert no rights founded on a contract as against the

---

2. See "Statutes of Limitation," *infra* pp. 353-58.

3. The statute requiring notice of the expiration of the period of redemption must be strictly complied with in order to terminate the owner's right to redeem. Knowlton v. Coye, 76 N.D. 478, 37 N.W.2d 343 (1949); Messer v. Henlein, 72 N.D. 63, 4 N.W.2d 587 (1942); Cruser v. Williams, 13 N.D. 284, 100 N.W. 721 (1904).

4. "The county treasurer shall attend the tax sale . . . and when any tract of land or lot remains unsold for want of bidders, the same again shall be offered for sale before the sale is closed, and if there is no other bidder the treasurer shall bid for the same in the name of the county, and the same shall be struck off and become forfeited to the county in which the sale takes place." N.D. Rev. Code §57-2414 (1943).

5. The precise minimum period of time within which the right of redemption may be cut off varies according to whether the land is purchased privately or by the county. If the sale is to a private purchaser, the purchaser may obtain the issuance of a notice of the expiration of the period of redemption immediately after the passage of a three year period. N.D. Rev. Code §57-2702 (1) (1943). The time for redemption then expires 90 days after the service of the notice has been completed. N.D. Rev. Code §57-2704 (1943). Service of the notice itself may be completed in varying lengths of time, depending upon whether service is made upon a resident or non-resident of the state. N.D. Rev. Code §57-2702 (3) (1943). If land is purchased by the county, notice of the expiration of the period of redemption is served on June 1 of each year as to all land which has been held by the county for three years. N.D. Rev. Code §57-2801 (1943). Since tax sales are held on the second Tuesday in December of each year, N.D. Rev. Code §57-2412 (1943), this in reality gives the taxpayer a redemption period of a little more than three and a half years, and the period is not cut off by service of the notice on June 1 until October 1—an additional four months. N.D. Rev. Code §57-2802 (1943). And the code extends the period within which redemption may be made even further in the cases of minors, insane persons, or persons in captivity in an enemy country. N.D. Rev. Code §57-2604 (1943).

6. Eikevik v. Lee, 73 N.D. 197, 203, 13 N.W.2d 94, 96-97 (1944); State *ex rel.* Atkins v. Lawler, 53 N.D. 278, 290, 205 N.W. 880, 884 (1925).

state and the state is free to alter or change the terms of the sale without impairing a contract obligation, since as the creature of the state the county possesses only those rights which the state chooses to give it. On this ground, the court has sustained legislation reducing the rate of interest which a county could charge a redeeming landowner, even though the legislation was enacted after the sale took place,[7] as well as legislation altering the length of the period of redemption.[8]

Different procedures are prescribed by the statutes for those cases where land is purchased by a county and those cases where it is purchased by a private buyer. In the case of redemption from a purchase by the county, the landowner must pay the delinquent taxes, costs, and interest at six per cent.[9] But if the land has been sold to a private purchaser, the amount of interest may vary from six per cent to nothing at all. This is for a reason previously pointed out:[10] land is offered to purchasers at tax sale for the amount of delinquent taxes plus cost and interest. If two or more persons bid on the land, they compete by agreeing to lower the interest rate which will be chargeable against the delinquent taxpayer if he should make redemption, starting from a maximum figure of six per cent. Redemption may thus be made in such cases by tendering the delinquent taxes plus interest at whatever rate was finally bid by the successful buyer.

To digress briefly, it may be added that the peculiar method of bidding described above has developed its own little body of law. Because of the attractiveness to speculators of the interest rates which could, in an earlier day, be demanded of a redeeming landowner—in some cases running as high as 24 per cent[11]—there was a natural tendency for purchasers at such sales to refrain from bidding against one another.[12] While bidding in collusion or in rotation was and is illegal,[13] and a collusively accomplished sale may be set aside while the land remains in the hands of the fraudulent purchaser,[14] the sale is treated as being merely voidable and not void, and hence the court has held that if such land is sold to a

7. State *ex rel.* Atkins v. Lawler, 53 N.D. 278, 205 N.W. 880 (1925).
8. Eikevik v. Lee, 73 N.D. 197, 13 N.W.2d 94 (1944).
9. N.D. Rev. Code §57-2603 (1943).
10. Crum, *A Commentary on North Dakota Tax Titles*, 29 N.Dak.L.Rev. 225, 233 (1953).
11. See Davidson v. Kepner, 37 N.D. 198, 163 N.W. 381 (1917).
12. Noble v. McIntosh, 23 N.D. 59, 135 N.W. 663 (1912); Graham v. Mutual Realty Co., 22 N.D. 423, 134 N.W. 43 (1911); Youker v. Hobart, 17 N.D. 296, 115 N.W. 839 (1908).
13. N.D. Rev. Code §57-2413 (1943).
14. Youker v. Hobart, 17 N.D. 296, 115 N.W. 839 (1908). But it must be proven affirmatively that the defendant participated in the conspiracy. Noble v. McIntosh, 23 N.D. 59, 135 N.W. 663 (1912).

bona fide purchaser for value without notice, the right of the prior owner to have the tax sale invalidated is thereby cut off.[15]

As already stated, until the right of redemption is properly terminated it will persist until cut off by a statute of limitation. A large number of cases evidence the fact that the effective termination of the right of redemption is often difficult and complicated. The statutes provide that at the expiration of the three year period which the delinquent taxpayer is allowed for redemption, the holder of a tax sale certificate is entitled to present it to the county auditor. The county auditor will thereupon issue a document bearing the impressive caption, "Notice of the Expiration of the Period of Redemption."[16] The statutes relating to this notice are strictly construed in favor of the taxpayer,[17] and a defect in the notice is normally jurisdictional in character.[18] The general rule appears to be most plainly stated in *Baird v. Zahl*,[19] in which it was said that:

> Any deviation from the notice prescribed by the statute either in contents or mode of service which has any tendency to mislead or prejudice the rights of anyone having a right of redemption renders the notice ineffective and invalidates the tax deed based thereon.[20]

This is not to say that every mistake or error in the notice will invalidate it, because such is not the case. *Baird v. Zahl* was, in fact, a case in which a notice which was concededly erroneous in a minor particular was upheld. Nevertheless it is plain that relatively small errors can be of the utmost seriousness in connection with this notice, and that the rule that the statutes regarding it are construed in favor of the taxpayer has been rigidly applied.

Since the notice of the expiration of the period of redemption is the means which must normally be employed to take away the right of the former landowner to reclaim his property, it is not surprising that the cases involving it have been fiercely litigated. In general, the cases may be divided into three classes: (A) Cases dealing with problems of making proper service of the notice; (B) Cases dealing with errors occurring in the contents of the

---

15. Graham v. Mutual Realty Co., 22 N.D. 423, 134 N.W. 43 (1911). Collusive bidding is not considered an irregularity of a jurisdictional character. Since this is so, the right to attack a tax sale on such a ground would appear to be limited by the short statute of limitations applicable to tax deed proceedings, N.D. Rev. Code §57-4511 (1943). As subsequently pointed out, this would appear to be one of the few cases in which this statute is of much force or effect.

16. N.D. Rev. Code §§57-2702 (1), 57-2801 (1943).

17. Heier v. Olson, 75 N.D. 541, 30 N.W.2d 613 (1947). See cases cited note 3, *supra*.

18. Heier v. Olson, *supra* note 17; Werner v. Werner, 74 N.D. 565, 23 N.W.2d 757 (1946).

19. 58 N.D. 388, 226 N.W. 549 (1929).

20. *Id.* at 389, 226 N.W. at 549, syll. 2.

notice; and (C) Cases dealing with the effect of redemption and the extent of the right to redeem. The discussion which follows takes up these topics in the foregoing order.

A. Problems of Service

Service of the notice of expiration of the period of redemption is governed by two separate statutes, one of which is applicable in the event the land involved has been sold to a private purchaser, the other in the event that the land was bid in by the county at the tax sale. There seems to be no good reason why this should be so, since two statutes to regulate the service of one notice are obviously one too many; and it would simplify matters considerably if only one statutory system were used to regulate the method of service. But thus far the legislature has not seen fit to change the situation.

Of the two statutes, the provision dealing with service when the land has been purchased by a private buyer has caused the greatest difficulty. In the case of such a purchase, the county auditor is required to address the notice to "the person in whose name the lands described in the certificate [of tax sale] are assessed, and to all mortgagees or assignees of mortgagees holding unsatisfied recorded mortgages."[21] Since the notice must be formally *addressed* to these people, it is rather startling to discover that the statute does not also name them as the persons upon whom it must be *served,* but such is the case. Instead, the statute requires that the notice be served on the "owner" of the land[22] — who may quite possibly be someone other than the "person in whose name the lands . . . are assessed" — and upon the person in possession of the land, who may be quite different from either of the foregoing persons.[23] And an amendment in 1951 added to the statute a further provision that the notice must be served upon a third class of persons: "Any tenant or other person *entitled* to the possession of said property as may appear from the records of the register of deeds . . ."[24] Who is to decide whether a person is "entitled" to the possession of property is not specified in the statute; apparently the county auditor is required to decide this question—which is, it may be noted, the crucial issue in most actions of ejectment—at the peril of the tax sale purchaser.[25] The situation of mortgagees

21. N.D. Rev. Code §57-2702 (1) (1943).
22. *Id.* §57-2702 (2).
23. *Id.* §57-2702 (3).
24. N.D. Laws 1951, c. 321.
25. If there are two conflicting record titles, for instance, it would be necessary to determine correctly which of the two claimants would win in the event the matter were taken to court. Presumably the simple solution would be adopted, and service of the notice made upon both claimants.

under this statute is somewhat better. The notice is addressed to them, and the code also provides that it shall be served on them —*if* they have requested service in writing beforehand, paying the county auditor a fee of one dollar and fifty cents in advance.[26]

If this brief outline of the statute governing service of the notice in cases where land has been sold to a private purchaser suggests to the reader that the statute contains several traps for the unwary, the cases furnish abundant evidence that such is the fact. A good illustration of the type of problem which may arise in connection with the statute is *State Finance Co. v. Mulberger*,[27] a 1907 decision involving the following set of facts:

A obtained an invalid tax deed to land owned by *B*, and took possesion of the land. It was thereafter assessed in *A's* name. Thereafter *A* also defaulted in the payment of taxes and a second tax sale occurred at which the land was sold to *C*. When *C* attempted to obtain a tax deed, the notice of expiration of the period of redemption was of course addressed to *A*, since he was, in the language of the statute, the "person in whose name the lands described in the certificate are assessed." When a contest thereafter arose over the title, it was held that *C's* tax title was invalid for the reason that service of the notice of expiration of the period of redemption should have been made upon *B*, the original owner, rather than *A*, the holder of the first tax deed. The court pointed out the distinction already noted: the statute requires service of the notice upon the "owner" of the land instead of on the person assessed for the taxes. As between *A* and *B*, the "owner" was self-evidently *B*, since the first sale had been invalid. It will be apparent, however, that under the statute it would have been erroneous to *address* the notice to *B*, even though it was also erroneous not to *serve* it on him, since the land was assessed in *A's* name![28] This decision makes it necessary to determine the legal validity of all prior tax sales in every case where more than one has taken place, in order to properly ascertain who is entitled to receive service of the notice. However, the court has softened the effect of the ruling somewhat by holding in a subsequent case that service of the

26. N.D. Rev. Code §57-2702 (4) (1943).

27. 16 N.D. 214, 112 N.W. 986 (1907). *Accord*, Hodgson v. State Finance Co., 19 N.D. 139, 122 N.W. 336 (1909). *But cf.* Munroe v. Donovan, 31 N.D. 228, 153 N.W. 461 (1915), *app. dismissed*, 245 U.S. 679 (decided under a different statute and involving a situation where the tax sale purchaser let the land go to tax sale four additional times to reinforce his own title).

28. An additional problem which the decision might have raised was as to the effect of service of the notice upon B when it was not addressed to him. Might not B have taken the position that since the notice was made out to someone else, it was not binding on him?

notice upon the person in whose name the land is assessed is presumptively service upon the owner, unless something in the records indicates otherwise.[29]

The question of the identity of the "owner" of property for purposes of the service of notice has also arisen in a different manner. In *First National Bank v. Mohall State Bank*,[30] a man named Dalton gave a first mortgage on land to the plaintiff and a second mortgage to the Mohall State Bank. The Mohall State Bank foreclosed its second mortgage but did not carry the foreclosure proceedings to the point of obtaining a sheriff's deed to the property. Thereafter the American Investment Company, which had purchased the land at a tax sale some years previously, applied for a tax deed and got it. At this juncture the plaintiff sued to foreclosure its first mortgage, to be met by the defense that the tax deed to the American Investment Company cut off the lien of the mortgage.[31] The plaintiff countered with the argument that the tax deed was invalid because proper notice of the expiration of the period of redemption had not been served upon the "owner" of the land, the "owner" being the Mohall State Bank. The court ruled that service of the notice upon Dalton, the mortgagor, had been sufficient, on the theory that the Mohall State Bank had not become the "owner" of the property within the terms of the statute because of the failure to secure a sheriff's deed in foreclosing its mortgage . The "owner" for purposes of service was said to be the person who possesses title of record, even though a superior title may exist which does not show upon the record.[32]

The canon of strict construction of the statutes regulating redemption is reinforced by a rule that statutes relating to the service of notice are also rigidly construed, and it is clear that in applying the statutes the court has given them a completely literal construction.[33] Thus, where the sheriff in making service of the notice of expiration of the period of redemption by mail upon a non-resident stated in his affidavit of service that he had mailed the notice to the owner's "last known place of residence" rather than to the "last known post office address"—the statutory requirement[34] —the service was held void and a subsequently issued tax deed

29. Axt v. Bank of America, 72 N.D. 600, 10 N.W.2d 430 (1943).
30. 53 N.D. 319, 206 N.W. 411 (1925).
31. See Part I of this paper, 29 N.Dak.L.Rev. 225, at 236-44, for a discussion of this aspect of the tax deed's operation.
32. See also Larson v. Clough, 55 N.D. 634, 214 N.W. 904 (1927).
33. McDonald v. Abraham, 75 N.D. 457, 28 N.W.2d 582 (1947); Stutsman v. Smith, 73 N.D. 664, 18 N.W.2d 639 (1945).
34. N.D. Rev. Code §57-2702 (2) (1943).

was invalid.[35] Many cases hold that failure to serve the notice of the expiration of the period of redemption upon the person in possession of the land makes the service defective,[36] even in a case where the tenant himself has secured a tax deed to the property and is vigorously asserting the validity of the service![37] Similarly, a failure to list the record owner's name correctly in publishing a notice of the expiration of the period of redemption invalidates the notice.[38]

Despite the fact that the requirements of the statutes governing service of the notice must be strictly observed, the burden of proving a failure to make valid service rests upon the person asserting the invalidity of a tax deed, since the code makes tax deeds prima facie evidence that all the requirements of law with respect to the sale have been complied with.[39] Indeed, an amendment to the statutes in 1951 attempted to make this presumption of validity even stronger: it was provided that a tax deed should be *conclusive* evidence of the truth of all facts recited therein,[40] thus including the recital that "proof of legal notice of the expiration of the period of redemption (has) been filed with the county auditor . . ."[41] But it seems highly doubtful that this last statute will ever attain its objective, since in order to obtain the benefit of the rule of conclusiveness it is necessary to prove the possession of a tax deed; and in order to prove possession of a tax deed, one must show that all the necessary jurisdictional steps have been taken. A tax deed which is not jurisdictionally valid is little more than a scrap of paper, and the fact that a document may be introduced in evidence as a tax

35. Wilke v. Merchants State Bank, 61 N.D. 351, 237 N.W. 810 (1931).

36. Belakjon v. Hilstad, 76 N.D. 298, 35 N.W.2d 637 (1949); Mayer v. Ranum, 75 N.D. 548, 30 N.W.2d 608 (1948); Sailer v. Mercer County, 75 N.D. 123, 26 N.W.2d 137 (1947); Werner v. Werner, 74 N.D. 565, 23 N.W.2d 757 (1947); Bumann v. Burleigh County, 73 N.D. 655, 18 N.W.2d 10 (1945); Schott v. Enander, 73 N.D. 352, 15 N.W.2d 303 (1944); Messer v. Henlein, 72 N.D. 63, 4 N.W.2d 587 (1942); Anderson v. Roberts, 71 N.D. 345, 1 N.W.2d 338 (1941).

37. This happened in Schott v. Enander, 73 N.D. 352, 15 N.W.2d 303 (1944). Normally, of course, a tenant cannot question his landlord's title. But it has been held in this state that a tenant is not estopped from asserting a title adverse to his landlord upon issues not arising out of the relation of landlord and tenant. Eikevik v. Lee, 73 N.D. 197, 13 N.W.2d 94 (1944); Lincoln Nat. L. Ins. Co. v. Sampson, 61 N.D. 611, 239 N.W. 245 (1931); Hebden v. Bina, 17 N.D. 235, 116 N.W. 85 (1908). Undoubtedly the plaintiff in *Schott v. Enander*, supra, felt that in his capacity as tenant in possession he got much more protection than was good for him in his capacity as possessor of a hostile title! Where land has been leased and is being farmed by a tenant who does not live on the land and has no buildings on it, service must be made upon the lessee, since he is regarded as a "person in possession" within the terms of the statute. Sailer v. Mercer County, 75 N.D. 123, 26 N.W.2d 137 (1947).

38. Knowlton v. Coye, 76 N.D. 478, 37 N.W.2d 343 (1949).

39. N.D. Rev. Code §57-2429 (1943).

40. N.D. Laws 1951, c. 276, §2.

41. N.D. Rev. Code §57-2706 (1943). In other words, if the statute were accepted at face value, the possession of a tax deed would conclusively establish the validity of all prior proceedings leading up to its issuance, including the taking of all the jurisdictional steps needed to make the tax deed a tax deed in the first place.

deed does not necessarily make it such; the court has not hesitated to strike down such "bootstrap" techniques in the past.[42] Be that as it may, the rule that a tax deed furnishes prima facie evidence of compliance with the law has been deemed sufficient to require a holding that where the record does not affirmatively show that the service of the notice was improper, a tax deed will be held valid.[43] And additional protection is given the holder of a tax deed by the ruling of the court, several times reaffirmed, that where the requirements of the statute as to service of the notice have been complied with, the fact that the landowner for whom the notice was intended did not receive it is immaterial.[44]

A brief comment of one further aspect of the requirement that the notice be served on the "owner" of the land involved in a tax sale may prove worthwhile. It is probable that the statute regulating service of the notice was drafted in terms of the implicit assumption that a person who is the "owner" of property is a person who possesses an estate in fee simple absolute. But even a moment's thought will indicate immediately that the word "owner" does not possess such a precisely defined meaning, and the question of what happens when land is held by several persons possessing differing interests must therefore be considered.

From an analytical standpoint, ownership of land is a matter of degree, depending for its economic value and legal status on the quantum of rights, privileges, powers and immunitites which a holder of an interest in property possesses with respect to that property as compared with other persons.[45] Thus, to return to a

42. If a jurisdictional defect occurs in the proceedings leading up to the issuance of the purported deed, for instance, it is difficult to see how this statute could become operative any more than the three year statute of limitations, discussed hereinafter, is set in motion by the issuance of a tax deed which is invalid because of a jurisdictional defect. In both cases the meeting of all jurisdictional requirements is necessarily a condition precedent to the operation of the statutes involved. Thus, every case which has held the three year statute of limitations inapplicable to purported deeds void for jurisdictional defects can logically be cited for the proposition that N.D. Laws 1951, c. 276, §2, does not operate to cure jurisdictional defects. See the topic "Statutes of Limitation," *infra*. And compare the treatment given N.D. Rev. Code §57-2429 (1943), in Beggs v. Paine, 15 N.D. 436, 109 N.W. 322 (1906), discussed in the first portion of this paper. Crum, *op cit. supra* note 10, at 247-49.

43. Twedt v. Hanson, 58 N.D. 571, 226 N.W. 615 (1929). *Cf.* Remmich v. Wagner, 77 N.D. 120, 41 N.W.2d 170 (1950).

44. McDonald v. Abraham, 75 N.D. 457, 28 N.W.2d 582 (1947); Coverston v. Grand Forks County, 74 N.D. 552, 23 N.W.2d 746 (1946); Buman v. Sturn, 73 N.D. 561, 16 N.W.2d 837 (1945); Schott v. Enander, 73 N.D. 352, 15 N.W.2d 303 (1944); Axt v. Bank of America, 72 N.D. 600, 10 N.W.2d 430 (1943).

45. This is the basic approach popularized by the late Professor Wesley Hohfeld of the School of Law of Yale University, which has been adopted by the American Law Institute's Restatement of the Law of Property. Thus, the Restatement of Property defines the word "owner" as meaning a person who has one or more "interests" in land or in a thing. Restatement, Property §10 (1936). "The word 'interest' is used . . . both generically to include varying aggregates of rights, privileges, powers and immunities, and distributively to mean any one of them." Restatement, Property §5 (1936). Comment

case already discussed,[46] consider the situation of a life tenant and remainderman. Each of these persons is involved in a legal relationship with the other concerning the land which is the subject of their respective interests;[47] each possesses a significant number of legally protected rights, privileges, powers and immunities concerning it. Can it be said that either is so completely the "owner" that in the event of a tax sale service of the notice of expiration of the period of redemption need not be made on the other? It is submitted that such a result would be indefensible. Both the life tenant and the remainderman are "owners" of particular estates in the land;[48] the interest of each is historically treated as a presently vested interest,[49] assignable, transferrable, and inheritable, the interest of the life tenant carrying with it the right of possession but certainly not vesting in him exclusive ownership. One does not own land, as the common law attorney never tired of pointing out. One owns merely an estate in land. Therefore, since both the life tenant and the remainderman have estates in the same property, service of the notice of expiration of the period of redemption should logically be made upon both.

If the foregoing argument is accepted, it logically follows that a further conclusion is necessary. When it is perceived that an "owner" is simply a person who possesses an interest or estate, not necessarily exclusive, in a particular tract of land, it follows that any person having an interest in a tract of land sold at tax sale must be regarded as an "owner" of the land within the terms of the statute regulating service of the notice.[50] This construction of the statute is

c to §10 of the Restatement neatly illustrates the fact that the value of "ownership" varies according to the number and kind of rights, privileges, powers and immunities possessed by an "owner" of property: "The owner may part with many of the rights, powers, privileges and immunities that constitute complete property and his relation to the thing is still termed ownership both in this restatement and as a matter of popular usage. Thus an owner of an automobile may mortgage it, or have it subjected to a mechanic's lien, and still properly be said to be the owner . . . . To just what an extent either in the case of the ownership of a thing, or of any of the small aggregates of interests in a thing, the constituent interests can be parted with and the characteristics of 'ownership of the land' . . . be still regarded as existing is not a matter upon which any precise rule can be laid down."

46. See part I of this paper, 29 N.Dak.L.Rev. 225, at 242.

47. The essential difference between the two interests is simply that the life tenant possesses a present and the remainderman a future right to the possession of the land, the necessity of protecting the interest of the remainderman being regarded as sufficient to justify the courts in restraining the life tenant from the commission of acts which would prejudice the future estate of the remainderman.

48. Certainly this is true as the idea of "ownership" is used in the *Restatement of Property*. Restatement, Property §10, comment *c* (1936).

49. The situation of a contingent remainder interest as affected by tax deed proceedings has already been discussed. Crum, *supra* note 10, at 243-44.

50. This is the construction which other courts have given to the word "owner" in this connection. "In construing the redemption laws, the word 'owner' is held to be a generic term, which embraces the different species of interest which may be carved out of a fee simple estate. . . . Where land has been mortgaged to secure a debt, and judgment creditors have liens upon it, and the land is in possession of a stranger to the title,

reinforced by the fact that any person having an interest in land is by statute entitled to make redemption of whole property—not merely his own interest—and also the fact that precisely the rule of service suggested above has been adopted by the legislature in the statute governing service of the notice in cases where the tax sale has been made to the county in the first instance.[51]

While the statute governing service of the notice in case a county has purchased the land provides that service is to be made by registered mail,[52] the similar statute in case of a sale to a private citizen provides that notice is to be served personally upon the owner if he is a resident and by registered mail and publication in a newspaper once each week for three consecutive weeks if he is not.[53] The law of personal service in such instances follows the cases involving service of other types of process rather closely. Thus in *McKenzie v. Boynton*,[54] service of the notice was made by leaving a copy of it with an employee at the hotel where the landowner lived. It was held that this was not a good service of the notice under the code provision which specifies that if "the defendant cannot be found conveniently service may be made by leaving a copy of summons at his dwelling house in the presence of one or more of the members of his family over the age of 14 years, or if the defendant resides in the family of another, with one of the members of the family in which he resides over the age of 14 years."[55]

One further point deserves mention in any discussion of the law of service concerning the notice of expiration of the period of redemption. In *Axt v. Bank of America*,[56] land was bid in by a county at tax sale and the certificate of tax sale was thereafter assigned to a private buyer. It was argued for the former owner, assailing the validity of the notice of expiration of the period of redemption, that since the private buyer was a mere assignee of the

---

each is an 'owner' according to the extent of his interest or claim, and each has a right to protect his interest by a redemption from a tax sale. . . . Any right which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or engagement, or any part of which may be deemed an estate, makes the person an owner as far as it is necessary to give him the right to redeem." Adams v. Beale, 19 Iowa 61, 68 (1865), followed in Prudential Ins. Co. of America v. Kraschel, 222 Iowa 128, 266 N.W. 550 (1936). A voluminous collection of cases construing the word "owner" is found in 30 Words and Phrases 604 *et seq.* (Perm. ed. 1940).

51. N.D. Rev. Code §57-2802 (1943); *Id.* §57-2804. The extent of the right of redemption enjoyed by persons possessing less than complete and undivided ownership of land is discussed in the pages following, under the heading "Effect of Redemption."

52. N.D. Rev. Code §57-2804 (1943).

53. *Id.* §57-2702 (2).

54. 19 N.D. 531, 125 N.W. 1059 (1910).

55. N.D. Rev. Code §28-0610 (1943).

56. 72 N.D. 600, 10 N.D.2d 430 (1943).

county, the procedure followed in making out and serving the notice should have been that prescirbed for the county by the statutes. The court, however, ruled that "after a tax certificate has been assigned by the county to a private party, the sufficiency of the notice of expiration of redemption and the legality of the service thereof must be determined under the statutes applicable to tax certificates held by private individuals."

B. Errors Occurring in Body of Notice

Whether the notice of expiration of the period of redemption is issued on behalf of a private purchaser or on behalf of a county, the contents of the notice are basically the same. The essential elements which must appear in the notice are (a) a description of the land; (b) a statement of the amount for which it was sold; (c) a statement of the amount required to redeem from the sale, exclusive of the costs accruing upon the issuance of the notice; and (d) the time when the period of redemption will terminate.[57] Of course, as indicated in the preceding section, the notice must be addressed to the correct person or it will be invalid.[58]

The cases involving the notice of the expiration of the period of redemption have generally involved one or more of these elements, since a material error in the description of the land, the amount necessary to redeem, or the time when the period of redemption will terminate is sufficient to avoid it. Very often an attack on the notice will be leveled at all of these elements, as witness the case of *DeNault v. Hoerr*,[59] in which the notice was attacked on the grounds that: (1) it failed to describe the land properly; (2) it failed to set forth the amount required to redeem correctly; (3) it failed to correctly state the time within which redemption had to be made; (4) it had not been properly served on the record owner; (5) it had not been properly served upon the occupants of the property; and (6) the service had not been properly attested by proof filed with the county auditor. While the court upheld the notice, the attack leveled against it in that case was so comprehensive that the asserted errors listed above could virtually serve a checklist of potential danger spots in such notices.

1. *Problems of Description*

Some discussion of the problems involved in describing land with sufficient precision to meet the rigid standards imposed by the

57. N.D. Rev. Code §§57-2702 (1), 57-2805 (1943).
58. Tronsrud v. Farm Land Finance Co., 20 N.D. 567, 129 N.W. 359 (1910).
59. 66 N.D. 82, 262 N.W. 361 (1935).

court in tax sale cases has already appeared under the topic of "Assessment" in the preceding portion of this paper.[60] The conclusion drawn, it will be recalled, was that errors of description appearing in the assessment roll probably should not be sufficient to invalidate a tax sale unless it could be affirmatively shown that the errors were prejudicial.

The same principle logically ought to apply to errors in description appearing in the notice of expiration of the period of redemption. Nevertheless, a relatively recent decision indicates that the description of land in such notices may serve to invalidate them. In *Star v. Norsteby,*[61] decided in 1948, the following description was used in a notice: "WSE SWME, Lot 2, Section 4, Township 158, Range 94." The correct description would have been: the west half of the southeast quarter (W½ SE¼), the southwest quarter of the northeast quarter (SW¼ NE¼), and lot two (2) of section four (4) in township one hundred fifty-eight (158) north of range ninety-four (94) west of the fifth principal meridian.

While the absence of numerical fractions after the letters in the description did not invalidate the notice,[62] the court held that the description was insufficient because the typographical error which resulted in the description of the southwest quarter of the northeast quarter being given as "SWME" instead of "SW NE" invalidated it. The court said that such a description was "not a description at all . . . . The fact that the plaintiff, knowing the description of his land, might make use of the knowledge and assume that the correct description was intended does not cure the error."[63]

Other cases have reached the same result. In *Blessett v. Turcotte*[64] it was held that a tax deed was void where the notice of the expiration of the period of redemption described the land as lying in section 2 rather than section 20. And it has been held that where several tracts are sold separately but belong to the same owner, although a single notice of expiration of the period of redemption may be issued, it must describe each parcel separately and state the amount necessary to redeem each individual tract separately and is void where it does not do so.[65]

---

60. See Part I of this paper, 29 N.Dak.L.Rev. at 254-55.
61. 75 N.D. 563, 30 N.W.2d 718 (1948).
62. N.D. Rev. Code §57-0202 (4) (7) (1943); DeNault v. Hoerr, 66 N.D. 82, 262 N.W. 361 (1935).
63. Star v. Norsteby, 75 N.D. 563, 567, 30 N.W.2d 718, 720 (1943).
64. 20 N.D. 151, 127 N.W. 505 (1910).
65. Trustee Loan Co. v. Botz, 37 N.D. 230, 164 N.W. 14 (1917); Davidson v. Kepner, 37 N.D. 198, 163 N.W. 831 (1917).

2. *Problems of Amount*

The amount necessary to redeem from a tax sale must be stated with substantial accuracy in a notice of the expiration of the period of redemption, or the notice is invalid. The code provision governing the computation of the necessary amount provides that, "The county auditor shall include in the notice of the expiration of the period of redemption all real estate taxes, where three or more years have expired from the date of the original, or any subsequent tax sale certificate, issued or deemed to have been issued at the time of the service of such notice, but such notice shall show separately the amount of delinquent taxes, with penalties and interest, due for each year, and the total amount which is required to be paid in effect a redemption of the real estate from such tax deed proceedings."[66]

The cases indicate that this section is often misinterpreted by county officials, who tend to disregard the rule that a delinquent tax should not be included in the notice unless it is represented by a tax sale certificate which has been outstanding for three years at the time the notice is issued. This is made manifest by such cases as *Robertson v. Brown*,[67] in which the county auditor issued a notice on January 21, 1938. The amount stated as necessary for redemption was $510.53. This sum was arrived at by computing the sum of the taxes, penalties and interest which had accrued with respect to the land involved between the years 1930 to 1936—the delinquent taxes for 1936, of course, not having been delinquent for three years at the time the notice was issued. The court stated, in striking down the notice, that "The notice of expiration of the period of redemption may not include tax sales certificates issued or deemed to have been issued to the county within three years next preceding the date of notice . . . The inclusion . . . renders the tax deed proceedings void."[68]

In *Morehouse v. Paulson*,[69] involving the same question, the tax deed holder made the ingenious argument that the inclusion of taxes which had not been delinquent for the required period of time in the notice of the expiration of the period of redemption simply represented information of courtesy, given by the county auditor to save the owner of the land the trouble of looking up the records

66. N.D. Rev. Code §57-2803 (1943). The foregoing statute prescribes the contents of the notice when issued on behalf of a county. When the notice is issued on behalf of a private purchaser, the procedure is prescribed by §§57-2702 and 57-2703, but is basically similar to that outlined above.
67. 75 N.D. 109, 25 N.W.2d 781 (1947).
68. *Id.* at 116, 25 N.W.2d at 786.
69. 75 N.D. 525, 28 N.W.2d 608 (1947).

himself, and that the taxpayer should be presumed to know what taxes ought to be paid in order to effect a redemption. Support for this argument may be found in some of the cases, since it has been held that where the notice contains more information than is required by law and the information is beneficial and not harmful, the notice is not invalidated.[70] However, the taxes which had not been delinquent the required period of time were included in the amount which the notice informed the taxpayer had to be paid in order to redeem, and this fact caused the court to invalidate the notice.

A further point raised in *Morehouse v. Paulson* also deserves attention. The landowner in that case had failed to pay hail indemnity taxes for several of the years in question and when the notice of expiration of the period of redemption was issued the amount of these taxes was also included in the total amount demanded for redemption. It was argued for the landowner that the inclusion of the hail indemnity taxes lumped in with the general taxes in the notice invalidated the notice, and the court upheld this contention.

A few words of explanation may serve to clarify the basis of the latter ruling. Hail indemnity taxes were first imposed in 1919 after the approval in 1918 of a constitutional amendment permitting the state to establish an insurance fund to protect the owners of growing crops against damage by hail.[71] Thereafter the court ruled in *Davis v. McLean County,*[72] the first case in which the effect of hail indemnity taxes came before it, that the lien of such taxes was not entitled to priority over the lien of a mortgage executed prior to the enactment of the tax, arguing that the hail indemnity levy was not a tax in the constitutional sense because its payment by landowners was voluntary in character. For some time it was thought that this decision applied only to liens obtained prior to the enactment of the hail tax, but in *State v. Johnson,*[73] decided in 1926, the court ruled otherwise, holding that a mortgagee was entitled to redeem from a tax sale for delinquent general and hail taxes by tendering only the amount of the delinquent general taxes. The case dealt with a mortgage executed after the enactment of the hail tax legislation and gave general taxes priority over mortgage liens but made the lien of hail taxes inferior to that of mortgages executed before the hail tax lien attached.

---

70. See Kelsch v. Miller, 73 N.D. 405, 15 N.W.2d 433, 135 A.L.R. 1186 (1944).
71. See N.D. Laws 1919, c. 160; N.D. Const. Amendments, Art. 24.
72. 52 N.D. 857, 204 N.W. 459 (1925).
73. 54 N.D. 184, 208 N.W. 966 (1926).

Faced with this holding, which seriously impaired the ability of the county to sell mortgaged land to private purchasers at tax sales,[74] the legislature in 1931 enacted legislation providing that delinquent general taxes and hail indemnity taxes were to be advertised in the same notice of tax sale, but were to be separately stated and sold separately.[75] Two years later it remedied the situation still further by providing specifically that the lien of hail taxes was to take priority over all private liens on land which came into existence after March 7, 1933.[76] This legislation was upheld as constitutional,[77] with the result that hail taxes were placed on a substantially equal footing with general property taxes so far as tax sales were concerned.

Yet it remained true that in the contemplation of the court, hail taxes were not taxes in the constitutional sense; and under the influence of this idea, and the statute prescribing separate sales where delinquent real estate taxes were coupled with delinquent hail taxes, the court ruled in *Federal Land Bank v. Johnson*[78] that it was possible for a taxpayer to pay either the general taxes on his land or the hail indemnity taxes without regard to whether he also paid the other. Having reached that result, the logical next step for the court was the holding in *Morehouse v. Paulson* that it is erroneous to list hail indemnity taxes with general property taxes in setting forth the amount required to redeem from a tax sale. The proper method appears to be to list the hail indemnity taxes separately in the notice of expiration of the period of redemption, although the court did not indicate any views as to the proper procedure in *Morehouse v. Paulson.*[79] But this would be the logical solution, since it carries through a statutory scheme which requires general and hail indemnity taxes to be separately stated in

---

74. To illustrate the reason for this result, assume a typical situation. Blackacre is owned by A, and B has a first mortgage on it. A owed $100 in general taxes and $25 in hail indemnity taxes, having made default in payment after the execution of the mortgage to B. The land was sold at tax sale to C, who paid $125 for it. B then undertook to foreclose his mortgage and made redemption from the tax sale by paying C $100 plus interest. This redemption would be successful, since the foreclosure of B's mortgage lien cut off the lien of the hail taxes. Since C thus lost $25, few purchasers were willing to buy at tax sales while this holding was in effect.

75. N.D. Rev. Code §57-2411 (1943).

76. *Id.* §26-2235.

77. Federal Farm Mortgage Corporation v. Falk, 67 N.D. 154, 270 N.W. 885 (1937).

78. 67 N.D. 534, 274 N.W. 668 (1937).

79. It would seem possible, since the court has ruled that hail indemnity taxes now constitute a prior lien in precisely the same manner as general taxes, Federal Farm Mortgage Corporation v. Falk, 67 N.D. 154, 270 N.W. 885 (1937), to simplify the statutory treatment of the subject by providing that hail taxes and general taxes are to be sold together henceforth and must be redeemed together. In the light of the Federal Farm Mortgage Corporation case, *Supra,* the provisions of Section 57-2411 of the Code are really no longer needed.

the notice of tax sale and delinquent real estate list, and to be sold separately.[79a]

Closely analogous to the legal status of hail indemnity taxes is that of special assessments. Like hail taxes, these are not considered taxes in the full sense of the term; instead, the court has defined them as payments made in return for special benefits. The code provides that property in which special assessments have become delinquent is to be sold in precisely the same manner as property on which general taxes are unpaid.[79b] And in addition, the code furnishes a remarkable contrast in the manner of handling special assessments as compared to hail indemnity taxes; it is specifically proved that delinquent general taxes and special assessments shall be sold in one sum.[79c]

In an early decision involving special assessments, the court struck down a tax sale in which general taxes and a special assessment had been sold together.[79d] But that case was decided on the basis of a statute which required separate sales in such instances, since amended; and the case would not deserve mention here if it were not for the fact that in the syllabus of the opinion it was suggested that such a tax sale violated constitutional principles. While the statute on which the case was decided has been changed, the constitution has not, and possibly the case might be cited in the future for that reason, should a controversy involving special assessments arise. But the opinion contained scant discussion of the constitutional point, and in view of the general presumption of constitutionality surrounding legislative enactments, it is probable that the statute would be sustained should the validity of lump sum sales of special assessments and delinquent general taxes be questioned today.

The problems involved in determining the correct amount to be listed in the notice of expiration of the period of redemption which have been discussed thus far are problems which have arisen because of disputes over the application of the laws governing the computation of the amount which the notice of expiration of the period of redemption demands of a delinquent taxpayer. In short, they have all been errors of law rather than arithmetic. Where the error in amount is simply clerical, however, the court has apparently reached its decision on the question of whether the

79a. N.D. Rev. Code §57-2411 (1943).
79b. N.D. Rev. Code §40-2501 (1943).
79c. *Id.* §40-2502.
79d. Trustee Loan Co. v. Botz, 37 N.D. 230, 164 N.W. 14 (1917).

error invalidates the notice by determining whether the error is substantially prejudicial. Thus in one case where the amount necessary to redeem was overstated 77 cents, the court held the error immaterial.[80] In another instance an error in a subtotal of the notice, whereby $47.75 was listed as $477.05, was held non-prejudicial where the total amount was given correctly.[81] Conversely, in an early decision the court set aside a tax deed where a 96 cent error occurred in the notice, holding the overstatement prejudicial.[82]

Where an error occurs by means of which the amount necessary for redemption is understated rather than overstated, the notice is normally upheld.[83] The statutes provide that in the event an overstatement occurs and redemption is made, proof that the sum paid was less than the sum actually due does not invalidate the redemption.[84] Instead the county auditor is liable for the deficiency but has a right of action over against the redemptioner to recover from him the amount he must make up out of his own pocket.[85]

Where the notice of expiration of the period of redemption includes taxes already the subject of tax sale, from which redemption has been made, the error in amount resulting is of course sufficient to invalidate the notice.[86]

C. Effect of Redemption

The right to redeem from a tax sale is not limited solely to delinquent taxpayers. It often happens that ownership of land is divided among several persons, one or more of whom may possess a primary obligation to pay taxes in order to protect the interests of the others. To limit the right of redemption narrowly might

80. Baird v. Zahl, 58 N.D. 388, 226 N.W. 549 (1929). In Munroe v. Donovan, 31 N.D. 228, 153 N.W. 461 (1915), *app. dismissed*, 245 U.S. 679 (1917), in which an understatement of the amount necessary to redeem of 12 cents was held non-prejudicial.

81. Kelsch v. Miller 73 N.D. 405, 15 N.W.2d 433, 135 A.L.R. 1186 (1944).

82. Lee v. Crawford, 10 N.D. 482, 88 N.W. 97 (1901). Does this indicate that the magic line on one side of which an error in amount is prejudicial and on the other side of which it is not falls between 77 and 96 cents? Probably not. The individual equities in each case would probably have to be taken into account.

83. Munroe v. Donovan, 31 N.D. 228, 153 N.W. 461 (1915), *app. dismissed*, 245 U.S. 679 (1917). In McDonald v. Abraham 75 N.D. 457, 28 N.W.2d 582 (1947), the plaintiff argued that a notice of the expiration of the period of redemption was invalid because it placed the amount which he had to pay to redeem the land at too small a sum. The land was sold for taxes several times, the last sale occurring in December, 1939, for the unpaid taxes of 1938. The notice of expiration of the period of redemption was issued early in 1942. The plaintiff contended that the sum of the 1938 taxes should have been included in the notice. The court ruled against this contention, with what appears to have been obvious correctness. If the 1938 taxes had been included in the notice, such cases as *Robertson v. Brown* and *Morehouse v. Paulson*, discussed above in the text, would have invalidated the notice. Moreover, as the discussion which follows in the text indicates, the statutes presecribe another procedure to be followed where the sum of money needed for redemption is understated in the notice.

84. N.D. Rev. Code §57-2607 (1943).

85. *Ibid.*

86. Heier v. Olson, 75 N.D. 541, 30 N.W.2d 613 (1947).

therefore tend to prejudice such persons as remaindermen, mortgagees, co-tenants and the like, in cases where the obligation to pay taxes is a thing apart from the ownership of the land.

In consequence, the statutes extend the right of redemption to *any* person or corporation having an interest in the land, even though the interest may have been acquired after the tax sale took place.[87] Similarly the right extends to heirs, devisees, creditors and the executor or administrator of a landowner who dies after the occurrence of a tax sale.[88] In certain cases, the question of how much of the land may be redeemed from a tax sale has become of considerable importance, and it seems worthwhile to take up the cases which have dealt with this question.

1. *Cotenancy*

The logical starting point is *Sailer v. Mercer County,* [89] a case decided in 1947. The salient facts of that controversy were briefly these:

The land involved was held by a widow in life tenancy with vested remainders outstanding in her children. The land was purchased by Mercer County at a tax sale and notice of the expiration of the period of redemption was issued, redemption was not made, and a tax deed was issued to the county. Shortly after this occurred, the plaintiff acquired a quitclaim deed to the interest of one of the remaindermen. He then brought an action asserting the invalidity of the notice of expiration of the period of redemption, pointing out that at the time the notice was issued the land had been leased for farming purposes and arguing that service of the notice should have been made upon the lessee. There were no buildings on the property but the court ruled that the lessee was nevertheless a "person in possession" of the land within the meaning of the statute regulating service of the notice. Accordingly the service was held invalid.[90]

In the meantime the life tenant had died, leaving the plaintiff free to assert a right of possession under his deed from the remainderman. He was also free, in view of the invalidity of the notice of expiration of the right of redemption, to redeem from the tax sale, and he took the position that he was entitled to redeem the entire tract. The defense was the argument that the plaintiff was

87. N.D. Rev. Code §57-2602 (1943).
88. *Ibid.*
89. 75 N.D. 123, 26 N.W.2d 137 (1947).
90. *Accord,* Schott v. Enander, 73 N.D. 352, 15 N.W.2d 303 (1944); Anderson v. Roberts, 71 N.D. 345, 1 N.W. 2d 338 (1941).

entitled only to redeem his own interest, two-elevenths of the whole, and § 57-2605 of the North Dakota Revised Code of 1943 was cited in support of this view:

> Any person who has or claims an interest in or lien upon an undivided share of any piece or parcel of land sold may redeem such undivided share of such land by paying to the county treasurer an amount proportionate to the amount required to redeem the whole of such land . . . .

A dissenting opinion agreed with the contention that this statute was controlling and limited the plaintiff to redemption of his own interest only. It was pointed out that the statute cited was borrowed from Minnesota, and asserted that the Minnesota construction was the owner of the an undivided interest could redeem only his own estate, not the whole property.[91] But the answer of the majority of the court was that the plaintiff was not attempting to make redemption under the provisions of § 57-2605 but under the provisions of § 57-2602, which stipulates that "any" person having "an interest" may redeem, without further qualification. What the majority said, in effect, was that the holder of an undivided interest has an option: he may redeem only his own share of the property, paying a proportionate share of the taxes, or alternatively he may redeem the entire tract, paying the full amount of the taxes.

While the point is a close and knotty one, the position of the majority seems the sounder. The statutes obviously contain provisions conferring both a general and special right of redemption, and the majority could point to a rule of construction stipulating that such provisions are to be construed in such a manner as to give effect to both of them if possible.[92] Moreover, the language of §57-2605 is permissive in character: it says that the owner of an undivided interest "may" redeem his own share. There is nothing which says he "shall" or "must" do so, to the exclusion of other interests. The language of the statute itself thus reconciles readily to the "option" point of view.

But in addition it may be pointed out that the view of the majority in reality takes nothing away from the tax sale certificate holder. If one holder of an undivided interest is entitled to redeem, the rest will normally also be entitled to do so. If the right of redemp-

91. The case principally relied on by the dissent was Goodrich v. Florer, 27 Minn. 100, 6 N.W. 452 (1880), construing Minn. Stat. 1878, c. 11, §§91, 92. The case involved an attempt by an insane person to redeem the entire property from a tax sale, through her co-tenants could not have redeemed in their own right, and strikingly resembles *McDonald v. Abraham* discussed in the text immediately following. It can be distinguished from *Sailer v. Mercer County* on the same grounds pointed out with respect to *McDonald v. Abraham*.

92. N.D. Rev. Code §1-0207 (1943).

tion persists as to one, it persists as to all,[92a] at least in the ordinary case. To allow one cotenant to redeem the entire property is no harder on the certificate holder than to allow all the cotenants to accomplish the same thing by individual redemption of their individual shares. In either instance the certificate holder receives precisely the same amount of compensation.

The rule thus laid down next came before the court in *McDonald v. Abraham*,[93] and an important qualification was written into it. The plaintiffs, an adult and two minor children, inherited a tract of land from their grandfather. At the time of the inheritance the land had been sold for taxes and a certificate of tax sale had been issued to Barnes County. A notice of the expiration of the period of redemption was issued and a tax deed was eventually obtained by the county, which then sold the land to the defendants.

Three years later the plaintiffs sued jointly to determine the ownership of the land, taking the position that since two of them were minors they had a right to redeem at any time up to a period of three years after coming of age.[94] The court agreed with the plaintiffs that the minor children, because of their disability, were in a position to assert a right to redeem. The question which then naturally raised itself was whether they could redeem the whole tract, including the portion held by the adult plaintiff. The court ruled they could not do so ,their right to redemption being limited to the two-thirds share they held in their own right.[95] Superficially the result would seem inconsistent with the decision in *Sailer v. Mercer County*, and it is surprising to note that the latter case was not even cited in the opinion. When the two cases are carefully compared, however, it is possible to draw a clear distinction between them. *Sailer v. Mercer County* involved a situation in which each of the cotenants could have redeemed in his own right, if he had wished to do so, because the error which extended the right of redemption left it unimpaired as to all of them. But *McDonald v. Abraham* involved no such case; the right of redemption persisted in the case of two children only because of a specific statutory provision and to allow it to extend the entire tract would have been to

92a. Werner v. Werner, 74 N.D. 565, 23 N.W.2d 757 (1947).

93. 75 N.D. 457, 28 N.W.2d 582 (1947).

94. "Any minor, insane person, or person in captivity in any country with which the United States is at war, having an estate in or lien upon land sold for taxes, may redeem the same within three years after his disability ceases, but in such cases the right to redeem must be established in a suit for that purpose brought against the party holding the title under sale." N.D. Rev. Code §57-2604 (1943).

95. *Accord*, Goodrich v. Florer, 27 Minn. 100, 6 N.W. 452 (1880), discussed *supra* note 91.

extend indirectly to the adult cotenant a right of redemption which could not have been exercised directly. The two cases, read together, appear to stand for the proposition that the owner of an undivided interest may normally redeem the entire tract so long as his cotenants could redeem their own interests individually; where they cannot do so, redemption is apparently limited to the cotenants own portion.

2. *Mortgagees*

As between a mortgagor and mortgagee, it is well settled that the mortgagor is under the primary duty of paying taxes.[96] Where he does not do so, and the mortgagee pays the taxes in order to protect the property from tax sale, he is entitled to add the amount of taxes paid to the amount of his lien.[97] Likewise, where a tax sale has occurred, the mortgagee has the right to redeem from it.

The general rule is that redemption by a mortgagee simply entitles him to add the amount paid to accomplish the redemption to the sum of the mortgage debt.[98] This is, in some respects, an unusual result; one would suppose that the mortgagee, by redeeming, would find himself subrogated to the rights of the tax sale purchaser. However, the courts have generally ruled that a tax title held by a mortgagee cannot be asserted against a mortgagor,[99] and the only effect of a redemption from a tax sale by a mortgagee is therefore an increase in the size of the mortgage lien.

The holding that a mortgage may not assert a tax title as against a mortgagor was first made in North Dakota in 1902 in *Finlayson v. Peterson*,[100] and has been followed ever since. The case involved a situation in which a mortgagee had acquired several tax deeds to land covered by his mortgage and thereafter transferred these tax deeds to a third party by virtue of them. The court held that "under such a state of facts a trust relation arises in which the mortgagee or his grantee becomes a trustee and as such is not only debarred from acquiring title himself as against the trustor but is under an obligation to pay the taxes as a means of protecting the trust property against a hostile title."[101]

Whether the trust theory enunciated in the foregoing statement rests on sound ground seems questionable. Tiffany states flatly that

96. 4 Am. Law of Property 198 (1952).
97. N.D. Rev. Code §57-4502 (1943).
98. For collections of cases dealing with this situation, see Notes, 84 A.L.R. 1366 (1936); 123 *Id.* 1248 (1939).
99. 5 Tiffany, Real Property §1425 (3d ed. 1939).
100. 11 N.D. 45, 89 N.W. 855 (1902).
101. *Id.* at 53, 89 N.W. at 859.

no such fiduciary relationship exists between mortgagor and mortgagee,[102] and adds that, "The more satisfactory ground . . . appears to be that, it being for the advantage of the state that taxes be promptly paid, and the right to purchase at tax sale being unnecessary for the protection of the mortgagee, it is against public policy to allow the mortgagee, by leaving the taxes unpaid, to acquire a tax title and so save the costs of foreclosure."[103] But even this explanation seems doubtful. Why there should be a public policy against saving mortgagees the costs of foreclosure is difficult to see.

However, the rule is firmly established in this state. In *Baird v. Fischer*,[104] the court referred to it with evident approval, and held that a second mortgagee could not assert a tax title against a first mortgagee who had already foreclosed his first lien, where the second mortgagee retained a right of redemption from the foreclosure of the first mortgage. The court seemed to feel that the situation of the two mortgagees was analogous to that of tenants in common. While the mortgagor himself had the primary duty to pay taxes, it was asserted that the duty also rested upon the mortgagees in case of a default by the mortgagor. Otherwise the state would simply sell the land and wipe out the interests of all the parties. A dissenting member of the court was not impressed by this reasoning and saw no reason for holding that the junior mortgagee occupied a position of trust with respect to the holder of the senior mortgage.

Where a mortgagor has failed to pay taxes and a third party has purchased the land at tax sale and obtained a valid tax deed, a mortgagee may purchase the land with no fear that his purchase will accrue to the benefit of the former mortgagor. The trust theory ceases to be applicable in such a situation. In the one case on the point in this state, it was said that "The mortgage lien being extinguished, the mortgagee or his successor in interest no longer stood in any relation of trust or confidence with respect to the property and was as free to bargain for its purchase as though the mortgage never existed."[105]

D. The Right of Repurchase

The right to redeem from a tax sale ends with the issuance of a properly drawn and served notice of the expiration of the period

102. 5 Tiffany, Real Property §1413 (3d ed. 1939).
103. Tiffany, *supra* note 102, §1425.
104. 57 N.D. 167, 220 N.W. 892 (1928).
105. Williams v. Campion, 53 N.D. 456, 206 N.W. 703 (1925).

of redemption and the running of the time specified therein. Thereafter the holder of the tax sale certificate is entitled to go into possession of the property and to obtain a tax deed. In the case where land has been purchased at a tax sale by a private buyer, this normally completes the tax sale transaction; the land now belongs to the buyer in fee simple absolute, and he may deal with it as he chooses. But in the event the land has been purchased by the county, the issuance of a tax deed to the county is only the first step in a further statutory process for the disposition of the property.

Obviously, a county is rarely in a position to operate the land itself and there is no reason why it should attempt to do so, although where difficulty is encountered in reselling the property it may be leased or rented.[106] The statutes therefore provide that an annual sale of land to which the county has acquired tax deeds shall be conducted on the third Tuesday in November of each year,[107] at which time the land may be sold to the highest bidder.[108] Prior to the annual sale the land must be appraised by the board of county commissioners, which is authorized to fix a minimum sale price for the property,[109] subject to the right of the various agencies which had a hand in levying taxes on the land in the first instance to protest the valuation thus made if in their judgment it is too low.[110]

It is the resale of the property which finally terminates the tax sale transaction so far as the county is concerned. The entire tax sale transaction has as its primary objective the raising of revenue, and it is only through the resale of the tax-forfeited property that the county may convert its title into cash. It may happen, of course, that no one will offer to purchase the land at the annual sale. In

106. Rosenstein v. Williams County, 73 N.D. 363, 15 N.W.2d 378 (1944).

107. N.D. Rev. Code §57-2813 (1943).

108. This sale should not be confused with the sale which initiates the process of acquiring a tax title in the first instance. The original tax sale amounts simply to an assignment of delinquent tax moneys owing to the county, coupled with a lien which the tax sale purchaser is entitled to foreclose if redemption from the sale is not made. The sale under discussion now is held to dispose of land, the title to which has already been acquired by the county through the process of foreclosing the lien for taxes.

109. N.D. Rev. Code §57-2810 (1943). This statute provides that the price fixed shall be sufficient to cover all special assessments, hail indemnity taxes, penalties, interest and costs levied against the property. However, where the board concludes that the market value of the property is less than the amount of these imposts, the board may set a lesser amount as the minimum sale price. Incidentally, it was held in Flath v. Elefson, 73 N.D. 746, 19 N.W.2d 571 (1945), that the assessed value originally placed on the land for the purposes of taxation could not be shown to have been erroneous through proof of the fact that when the county later sold the land it fixed a minimum sale price less than the assessed value of the land. The court held that the valuation methods used in fixing the sale price were distinct from those used in fixing the size of the tax load, and neither controlled the other.

110. N.D. Rev. Code §57-2811 (1943).

this event the statutes provide that the land may be sold privately or reoffered at the succeeding annual sale.[111]

During the period after title has been lost but prior to resale, the former owner of the land retains one important right. So long as the title to the tract remains in the county, he may exercise a statutory option to repurchase the land,[112] being entitled to thirty days notice of any anticipated private sale. This right is obviously closely similar to a right of redemption, and for purposes of this discussion it seems convient to treat it under that heading; but the court has often pointed out that the extension of this right to the former owner makes him simply a preferred purchaser entitled to take back the land without profit to the county.[113]

On several occasions, contests have arisen over the precise application of the section of the code granting this right to the former owner. Since the right persists, in the language of the statute, "so long as the tax title . . . remains in the county,"[114] it is clearly important to determine precisely when the county loses title. This point has been the subject of somewhat conflicting adjudications. It was said in *Lyche v. Steele County*,[115] that the rules governing the annual sale are those governing any other auction—or at least closely analogous — and the contract of sale is completed when the bid of the prospective purchaser is accepted. Since under the law of this state the making of a contract for the sale of land operates to pass equitable title to the purchaser immediately,[116] the case appears to stand for the proposition that the passage of equitable title is sufficient to cut off the right to repurchase. A similar ruling was made in *Horab v. Williams County*,[117] decided in 1945, in which it was held that once a purchaser has made the high bid at an annual sale and it has been accepted, the board of county commissioners is thereafter without power to require the purchaser to follow the procedure specified by the code for the case where land is sold to a private purchaser.[118]

In *Coverston v. Grand Forks County*,[119] a different result was

111. N.D. Rev. Code §57-2817 (1943).
112. *Id.* §57-2818.
113. Rosenstein v. Williams County, 73 N.D. 363, 15 N.W.2d 378 (1944). It may be pointed out that at one time the right of repurchase was called a right of redemption in the statutes. N.D. Laws 1939, c. 238.
114. N.D. Rev. Code §57-2819 (1943).
115. 72 N.D. 238, 6 N.W.2d 92 (1942).
116. Clapp v. Tower, 11 N.D. 446, 93 N.W. 862 (1903).
117. 73 N.D. 754, 19 N.W.2d 649 (1945).
118. In this particular instance, it was ruled that the former owner of the land could not assert a right to repurchase the land after receiving a thirty-day notice of private sale, since the thirty-day notice provision applicable to private sales could not be applied to the annual sale at auction.
119. 74 N.D. 552, 23 N.W.2d 746 (1946).

reached. The purchaser in that case made the high bid for a piece of property at the annual sale, one-fourth of the purchase price being paid by check at the time. He also signed a contract for deed which was, however, never signed by the chairman of the board of county commissioners or the county auditor. Three days later he offered to pay the balance of the price in cash. This offer was approved by the board of county commissioners. On the same day the chairman of the board and the county auditor executed a deed from Grand Forks county running to the purchaser, and the deed was left with the county auditor to be delivered to the purchaser. Before this deed was actually delivered, but while the purchaser was waiting for it, an attorney for the former owner tendered to the county auditor the sum needed to repurchase the property. Though the deed was thereafter delivered, it was held, that the delivery was ineffective and that the repurchase was valid. It may be sugested that the court was aparently influenced by the fact that the failure of the former owner to redeem sooner had been due to oversight. The case nevertheless holds that under some circumstances repurchase may be effected by the former owner so long as the deed running to the purchaser from the county has not actually been delivered.[120]

An interesting contention concerning the effect of a repurchase was advanced in *Rosenstein v. Williams County*.[121] The county leased a tract of land under an arrangement whereby it was to receive a portion of the crop as compensation. When the former owner thereafter repurchased the property, he demanded that the lessee turn over to him the share of the crop which would previously have gone to the county. It was held that he was justified in this demand and the county's argument that it was entitled to the lessor's share was overruled.

One further point may be added concerning the right of repurchase. When once a county has acquired title to land through tax forfeiture, the former owner has constructive notice of the date on which the annual sale is to be held from the statutes themselves, and public notice is given in addition. Moreover, if the property is sold at private sale the former owner is entitled to a thirty-day period of grace before the sale is completed within which to repurchase. Normally, therefore, he receives ample warning that his right of repurchase is to be terminated. But the code also contains

120. See also Cary v. Morton County, 57 N.D. 700, 233 N.W. 928 (1929) (an analogous situation).
121. 73 N.D. 363, 15 N.W.2d 378 (1944).

a provision permitting a county to transform such land into a county or municipal park or recreation area, without notice to the former owner.[122] Under this statute, the right of the former owner to repurchase the property may be extinguished without notice to him,[123] though this will obviously happen only rarely.

VI. Statutes of Limitation and Curative Statutes

In the opening pages of this discussion, mention was made of the general distrust which the members of the legal profession have felt in the past concerning tax deeds. Among methods utilized in the recurring attempts to strengthen them may be listed such devices as the enactment of short statutes of limitation with respect to actions attacking the validity of tax titles,[124] the enactment of curative legislation,[125] and the adoption of statutes declaring the unassailability of tax titles except for defects in the proceedings specifically enumerated.[126] To this list of these enactments may be added those statutes imposing what may be termed procedural or evidentiary disabilities, *i.e.*, statutes providing that there shall be a prima facie presumption of validity with respect to tax deeds,[127] or even attempting to make the presumption conclusive.[128]

Most of these topics have already been dealt with, but there remain for consideration the effect of statutes of limitation upon actions involving tax titles and the effect of curative legislation.

A. Statutes of Limitation

There are three statutes of limitation potentially applicable to actions involving the validity of tax deeds. One of these prescribes

---

122. N.D. Rev. Code §11-2708 (1943).

123. Bloomdale v. Rutland, 74 N.D. 651, 24 N.W.2d 38 (1946).

124. These have been widely adopted in many states, and represent a common method of attempting to protect tax titles. See, *e.g.*, Ala. Code §51-295 (1940); Ark. Stat. Ann. §48-1118 (1947); Mont. Rev. Code §2214 (1935); N.C. Gen. Stat. §1-52 (1943); N.D. Rev. Code §57-4511 (1943); S.D. Code §57-0903 (1939).

125. A good example is §2214.2, Mont. Rev. Code (1935): "Any tax deed heretofore issued in this state shall not be held invalid by reason of any defect in the form, substance, or amounts stated to be due in the notice of application for tax deed and all tax deeds heretofore issued are legalized and declared to be valid and legal regardless of any error, defect, omission, irregularity or failure to correctly state the amount due in the notice of application for tax deed, provided that this act shall not apply to any case where, prior to the passage and approval of said act, the owner of land or party entitled to redeem shall pay or tender to the owner or holder of the tax deed or the county treasurer of the county wherein the land described in said tax deed is situated, the amount actually due for taxes, penalty and interest at the time when said money is so tendered." As the discussion under the heading of "curative legislation" indicates, such a statute would raise grave problems of constitutionality in North Dakota.

126. E.g. N.D. Rev. Code §57-2429 (1943), discussed in the first portion of this paper. See 29 N.Dak.L.Rev. at 247 *et seq.*

127. N.D. Rev. Code §57-2429 (1943).

128. N.D. Laws 1951, c. 276, §2. See text to notes 41 and 42, *supra*, for a discussion of this statute.

a limitation period of three years,[129] and will be hereinafter referred to as the "three year statute." Another prescribes a limitation period of ten years,[130] and a third limitation period of twenty years.[131] It seems unnecessary to discuss the latter statute in this paper, since its application involves conventional principles of adverse possession applicable to any litigation concerning title to land.[132] The ten year statute of limitations is somewhat more closely related to the subject of tax titles, and some treatment of it is appropriate. However, it has been the subject of an excellent discussion by Mr. H. G. Ruemmele in a prior volume of this *Review*, and there appears to be no reason the points made in that article should be the subject of repetition here.[133]

In any event, it is the three-year statute of limitations which possesses the most distinctive history The earliest case in which it was involved was *Hegar v. DeGroat*,[134] decided in 1893. The action was one of ejectment to recover possession of land which the defendant held under a tax deed. It was conceded the deed was void on its face, for reasons left unspecified in the opinion, but the statute of limitations was relied on as a defense. In disposing of the case the court set a pattern which has been followed ever since in cases involving similar circumstances. It argued

---

129. "Any person having or claiming title to or a lien or encumbrance upon any land, whether in his possession or the possession of another, or vacant and unoccupied, may commence and maintain an action against any person, county or state claiming any title to or interest in such lands, or a lien upon the same, adversely to him by or through any tax sale, tax certificate, or tax deed, to test the validity of the tax sale, tax certificate, or tax deed, or to quiet the title to said land as against the claims of such adverse claimant, or to remove the cloud from the title arising from such tax sale, tax certificate or tax deed. No action nor defense based upon the invalidity of any such tax sale, tax certificate or tax deed shall be commenced or interposed after three years from the issuance of a tax deed *unless such tax sale, tax certificate or tax deed is void by reason of jurisdictional defects.* The purchaser at any tax sale or the holder of any tax certificate or tax deed may maintain an action to test the validity thereof or to quiet title to said lands, and if he is the holder of a tax deed he may demand the possession of such lands." N.D. Rev. Code §57-4511 (1943). The italics are supplied, and indicate the basic weakness of the statute.

130. N.D. Rev. Code §47-0603 (1943), as amended by N.D. Laws 1951, c. 276: "A title to real property, vested in any person or those under whom he claims, who shall have been in the actual, open, adverse and undisputed possesesion of the land under such title for a period of ten years and who shall have paid all taxes and assessments legally levied theron, shall be valid in law. A contract for deed shall constitute color of title within the meaning of this section from and after the execution of such contract."

131. "No action for the recovery of real property or for the possession thereof shall shall be maintained, unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action." N.D. Rev. Code §28-0104 (1943).

132. It may be pointed out that a fourth period of limitation is potentially applicable to tax deed controversies. The so-called Marketable Record Title Act, N.D. Laws 1951, c. 280, §3, has been characterized as, "in effect, a statute of limitation to run against old claims to real estate." Leahy, *The North Dakota Marketable Record Title Act*, 29 N.Dak.L.Rev. 265 (1953).

133. See Ruemmele, *North Dakota's Ten Year Statute of Limitations*, 28 N.Dak.L.Rev 159, 298 (1952).

134. 3 N.D. 354, 56 N.W 150 (1893).

that by the terms of the statute as it was then worded, there was presupposed a *valid* sale and conveyance of the land,[135] and that the statute did not apply where there was a jurisdictionally defective proceeding. The court put the matter this way:

> "We are clear that the statute cannot be invoked as a bar to an action to recover possession in a case where the defendant's only claim of title is a tax deed void on its face. The deed being void on its face, there was nothing for the statute to operate upon—nothing to set it in motion."[136]

Six years later, in *Roberts v. First National Bank of Fargo*,[137] the court amplified the rule of *Hegar v. DeGroat*, holding that no tax deed subject to a jurisdictional defect was sufficient to start the statute running. Such jurisdictional defects were listed 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,"[138] as well as cases where the tax deed is void on its face.[139]

Most of the cases dealing with the statute since these early decisions have turned upon the question of whether jurisdictional defects were present in the proceedings leading up to the tax sale, *e.g.*, in the assessment of the land,[140] or thereafter, such as the

---

135. The statute, as written at the time, provided that "No action shall be commenced by the former owner or owners of land, or by any person claiming under him or them to recover possesesion of land which has been sold and conveyed by deed for nonpayment of taxes, or to avoid such deed, unless such action shall be commenced within three years after the recording of such deed." N.D. Comp. Laws §1640 (1887).

136. 3 N.D. at 364, 56 N.W. at 154.

137. 8 N.D. 504, 79 N.W. 1049 (1899).

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

139. Any deviation from the form prescribed by statute for a tax deed renders the deed itself void on its face. "It is well-settled law that where the statute prescribes the form of a tax deed, even though it requires only a substantial conformity thereto, a deed which omits to show any one or more of the facts which the statutory form should disclose, is void. This is so because the statute by prescribing the form has thereby made every fact recited in the form a matter of substance." Beggs v. Paine, 15 N.D. 436, 439, 109 N.W. 322, 323 (1906). *Accord*, Beck v. State Finance Co., 192 Fed. 25 (8th Cir. 1911). But this does not mean that the tax *sale*, as distinguished from the tax *deed*, is thereby invalidated. In point of fact, *Beggs v. Paine* indicates that when the right of redemption is once cut off, title passes at once to the tax sale purchaser without the issuance of a deed in proper form. Beggs v. Paine, *supra*, syll. 3. This construction is reinforced by the provisions of §57-2701, N.D. Rev. Code (1943): "Any owner of a tax sale certificate, original or subsequent, shall be entitled, if there is no redemption, to the possession, rents and profits of the land involved, at the expiration of the period of redemption, and if on demand of such owner the party in possession refuses or neglects to surrender possession, he may be proceeded against as one holding over after the determination of his estate, by an action in forcible detainer. . . ." And N.D. Rev. Code §57-2808 (1943), provides that the "failure of the owner or any mortgagee, or other lienholder, to redeem. . . . before the period of redemption expires, shall operate . . . to pass all of the right, title, and interest of the owner, mortgagee, or lienholder in and to said premises, to the county by operation of law. . . ." Both of the foregoing statutes obviously were drafted on the theory that the termination of the right of redemption ended the owner's former estate, and automatically transferred it to the tax sale certificate holder. Thus a failure to obtain a tax deed in proper form is not so serious as it might appear.

140. See "Lack of Assessment," Part 1 of this discussion, 29 N.Dak.L.Rev. at 252 *et seq.*

termination of the right of redemption,[141] accepting without question the rule that a defect which is jurisdictional in character does not set the three year statute in operation.[142] This is a common construction in other states,[143] and the present North Dakota code provision amends the original form of the statute to incorporate the rule directly into the statute itself.[144]

The three year statute of limitations may accordingly be dismissed as being of little practical importance in all save the most exceptional cases,[145] since a tax title proceeding must be carried out with virtual perfection to set the statute in operation, and if the proceeding is perfect there is no need for the statute. In short, under the present ruling, the statute only lends protection in those cases where it is not needed. An attempt to strengthen the statute was made during the last session of the legislature, but failed of passage.[146]

In contrast to the construction given the three year statute of limitations is the treatment which has been accorded the so-called "ten-year statute."[147] It is clear that the decisions of the court have proceeded upon the unspoken premise that in many cases a three-year period of limitation is too short to be fair to landowners but that a ten year period is sufficient to give them adequate protection. Accordingly decisions construing the ten year statute have given the holders of tax titles a very considerable degree of favorable treatment.

Three basic requirements were laid down in the statute for the

141. It was suggested in Munroe v. Donovan, 31 N.D. 228, 153 N.W. 461 (1915), *app. dismissed*, 245 U.S. 679 (1917), that the three-year statute of limitations might not apply to defects appearing in the notice of expiration of the period of redemption. But it has since been settled that such defects are jurisdictional, and where the notice of expiration of the period of redemption is prejudicially defective, the three year period of limitations does not commence running. Knowlton v. Coye, 76 N.D. 478, 37 N.W.2d 343 (1949); Hodges v. McCutcheon, 72 N.D. 150, 5 N.W.2d 83 (1942).

142. In addition to the cases cited in the text, see Hodges v. McCutcheon, 72 N.D. 150, 5 N.W.2d 83 (1942); Brett v. St. Paul Trust Co., 49 N.D. 653, 193 N.W. 317 (1923); Munroe v. Donovan, *supra* note 141; Lee v. Crawford, 10 N.D. 482, 88 N.W. 346 (1901); Eaton v. Bennett, 10 N.D. 346, 87 N.W. 188 (1901); Sweigle v. Gates, 9 N.D. 538, 84 N.W. 481 (1900).

143. Blackwell, Tax Titles §927 (2d ed. 1889).

144. See note 129, *supra*.

145. See note 15, *supra*, for an example of such a case.

146. House Bill No. 605, Thirty-Third Legislative Assembly of North Dakota. In substance this measure provided that at the expiration of two years from the issuance or recording of a tax deed, whichever was later, the claimant under the tax deed (or purported tax deed, as the case might be), was entitled to file an affidavit with the register of deeds, giving notice to holders of adverse claims that unless notice of the adverse claim was placed on record within 120 days, the adverse claim would be cut off. It will be noted that no other service of this notice was provided for. This makes it rather strong medicine, but the constitutionality of such legislation was sustained against the attack that it offended against due process of law by the Iowa Supreme Court in Swanson *v.* Pontralo, 238 Iowa 693, 27 N.W.2d 21 (1947).

147. N.D. Rev. Code §47-0603 (1943), as amended by N.D. Laws 1951, c. 276. See note 130, *supra*.

successful invocation of the ten year period of limitation. In order to be protected, a claimant of land must show: (1) that he is vested with color of title—*i.e.*, that he possesses an instrument in writing, "having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance . . ."[148] (2) that he has been in adverse possession of the land for ten years;[149] and (3) that he has paid taxes on the land for that period. Since a tax deed which is void on its face nevertheless confers color of title upon its possessor, it is clear that title to land may be acquired under the ten year statute even though the deed involved would be insufficient to set the three-year statute in operation.[150]

The close connection between the ten year statute of limitations and the law of tax sales is made clear by one significant feature of the statute. Ordinarily a statute of limitations makes certain exceptions in its coverage. The twenty year statute of limitations, for example, does not operate against minors, insane persons, or prisoners.[151] But it is interesting to note that the ten year statute of limitations operates whether the persons affeced by its working are under a disability or not.[152]

Does this mean that if a minor child inherits property upon which he is unable to pay taxes, he must necessarily lose his property at a tax sale? The answer is that it does not. For although the ten year statute of limitations will automatically provide a tax sale purchaser with a title "valid in law"[153]—no matter what defects may exist in the tax sale proceedings[154]—the code also provides that at any time within three years after attaining maturity,

---

148. Black, Tax Titles §287 (1888); Ruemmele, *supra* note 133, at 162. It is possible that this definition is both too strict and too liberal at the same time. It may be too liberal in not including good faith as an element of color of title, since there are intimations in several North Dakota cases that the court looks to this element. Ruemmele, *supra* note 133, at 163-64. Similarly, the definition of color of title quoted above does not cover the case of a contract for deed, in which the words of conveyance are not couched in the present but in the future tense. However, one of the purposes in amending §47-0603 at the 1951 session of the legislature was to provide specifically that a contract for deed constituted color of title; and the court had held to this effect earlier. Robertson v. Brown, 75 N.D. 109, 25 N.W.2d 781 (1947); *accord,* Schauble v. Schultz, 137 Fed. 389 (8th Cir. 1905).

149. Under the 1951 amendment to the statute, tacking of adverse possession was legalized. Previously the court had ruled that it was not permitted. Streeter Co. v. Fredrickson, 11 N.D. 300, 91 N.W. 692 (1902).

150. Woolfolk v. Albrecht, 22 N.D. 36, 133 N.W. 310 (1911); Styles v. Granger, 17 N.D. 502, 117 N.W. 777 (1908); Power v. Kitching, 10 N.D. 254, 86 N.W. 737 (1901).

151. N.D. Rev. Code §28-0114 (1943).

152. Schauble v. Schultz, 137 Fed. 389 (8th Cir. 1905).

153. This is the language of the statute. N.D. Rev. Code §47-0603 (1943), as amended by N.D. Laws 1951, c. 276.

154. See cases cited note 150, *supra.*

the minor may redeem from the sale.[155] In short, the chapter on tax sales contains what is in effect an exception for disability to the operation of the ten year statute, a clear indication of the close relationship between the two. Indeed, the Eighth Circuit Court of Appeals, in one of the earliest cases dealing with the statute, characterized it as being in the nature of a revenue measure,[156] having as its primary purpose the encouragement of tax payments; and this purpose is also the purpose underlying the law of tax sales generally.

When this is seen, a rather fundamental question presents itself. The statute has two aspects: it is both a limited kind of revenue statute, aimed specifically at tax sales and designed to discourage attacks upon them while at the same time preserving the right of redemption in worthy cases, and it is also a rule of property, applying to interests in land of virtually every type. Viewed narrowly as a revenue measure, a part of the law of tax titles, there seems little doubt that the statute works with reasonable fairness to all parties concerned, and possesses the additional merit of certainty. But viewed as a rule of property—a general statute applicable to all types of estates in land—what appraisal should be made of it?

An answer is difficult to make. In some respects, the statute seems a little harsh. In *Schauble v. Schultz*,[157] it was held that a group of minors, owners of land subject to a contract of sale, fell with its purview and were not excused from the loss of their property through adverse possession by reason of their minority. If the case had been one involving a tax sale, the result would not have been serious. The minors could have redeemed when they came of age, and therefore would not have been greatly injured. But in the case where adverse possession is set up under color of interests other than tax deeds, it seems difficult to justify such treatment of persons under disability except possibly on the ground that the statute's rigidity promotes certainty of land titles. However, the question of whether the values inherent in lenient treatment for the unfortunate or disabled outweigh those involved in certainty of title is one for the legislature, which has thus far voted in favor of certainty of title.

B. Curative and Retroactive Legislation

One who studies the literature dealing with tax titles will quickly notice a recurring phrase in the opinions and text discussions.

155. N.D. Rev. Code §57-2604 (1943).
156. Schauble v. Schultz, 137 Fed. 389 (8th Cir. 1905).
157. 137 Fed. 389 (8th Cir. 1905).

The cases often speak of "curative legislation" without defining the term at any length or attempting to be particularly precise in its application. Some writers use the term to describe the short statutes of limitation generally applicable to tax deeds discussed in the preceding section,[158] and in fact there is clearly a close relationship between such statutes and other enactments designed to strengthen tax titles.[159] Similarly the term "curative legislation" has been used to characterize statutes designed to limit the number of defects for which tax titles may be attacked,[160] or imposing procedural disabilities upon a party attacking tax sale proceedings.[161]

But the looseness of the term's usage should not be permitted to disguise the fact that when properly applied, it describes a particular and very specifically delimited class of legislation. It normally describes legislation which attempts to legalize or validate defective tax proceedings retroactively, and used in that sense the topic of curative legislation merits treatment here.

It is true, of course, that both the Constitution of the United States[162] and the State of North Dakota[163] contain provisions forbidding ex post facto laws. But historically these have been construed as relating to retroactive criminal legislation only, and have not been generally applied to prevent states from enacting legislation designed to deal with civil problems.[164]

In one sense, any retroactive legislation is unfair; it alters the legal consequences of actions after they have been taken, sometimes in a manner that could not have been foreseen. But as Prof. William Crosskey has put it, the unfairness varies from case to case. "It is non-existent in cases of the doing of heinous things in reliance on legal technicalitites; in other cases, supervening unforeseen events may give rise to equities that wipe any unfairness out; and the public welfare sometimes demands that legislation be passed which, in some measure, disregards individuals' strict antecedent rights."[165] These considerations have been regarded as justifying such legislation in certain cases, and because of the numerous technicalities involved in tax sale proceedings the use of such legislation has been

158. Black, Tax Titles vi (2d ed. 1893); Blackwell, Tax Titles §948 (2d ed. 1889).
159. See the dissenting opinion in Nind v. Meyers & Beck, 15 N.D. 400, 109 N.W. 335 (1906), for a discussion of this point.
160. See Beggs v. Paine, 15 N.D. 436, 448-50, 109 N.W. 322, 327-28 (1906) (discussing §57-2429 of the Revised Code of 1943 in those terms).
161. See N.D. Laws 1951, c. 276, §2.
162. U.S. Const., Art. I, §10.
163. N.D. Const., Art. I, §16.
164. It has been vigorously contended that the clause was intended to prohibit all retroactive legislation, whether civil or criminal. Crosskey, Politics and the Constitution, chapter 11 (1953).
165. 1 Crosskey, Politics and the Constitution 324 (1953).

particularly frequent in the course of legislative attempts to strengthen the tax laws.[166]

The most frequently quoted statement of the legislative power in this regard is that of Judge Cooley: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which might have been dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode and manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."[167]

It seems probable that this statement of the scope of the power to enact curative legislation is somewhat too far-reaching to be accepted completely without qualification. It is obvious, for instance, that the limitations inherent in the due process clauses of both the federal and state constitutions,[168] as well as the provisions against legislative impairment of the obligations of contract,[169] are applicable to curative legislation. Thus it is only natural to find the courts dealing with these statutes in terms of their "inherent justice," arguing that in certain cases it is manifestly unfair and inequitable that a person should have the benefit of a purely technical rule where the "substantial equities" of the case are on the other side, while at the same time holding in other cases that the retroactive statute disturbs vested rights and is consequently invalid.[170] Such treatment of the subject obviously stems from the application of the standard of reasonableness which is at the core of the due process clause.

One of the early cases dealing with curative legislation in this state is *Finlay v. Peterson*.[171] The case involved the legality of a mortgage foreclosure. The legislature attempted to validate a method of service invalid under the law in existence when the foreclosure proceedings were commenced. While the court ruled that

166. Black, Tax Titles §482 (2d ed. 1893).

167. Cooley, Constitutional limitations 775-76 (8th ed. 1924); and see also Black, Tax Titles §484 (2d ed. 1893); Blackwell, Tax Titles §952 (2d ed. 1889); 11 Am. Jur. 1211.

168. Acklin v. First National Bank, 64 N.D. 577, 254 N.W. 769 (1934); Beggs v. Paine, 15 N.D. 436, 109 N.W. 322 (1906); Dever v. Cornwell, 10 N.D. 123, 86 N.W. 227 (1901); Finlay v. Peterson, 5 N.D. 587, 67 N.W. 953 (1896).

169. Blakemore v. Cooper, 15 N.D. 5, 106 N.W. 566 (1905); Fisher v. Betts & Smith, 12 N.D. 197, 96 N.W. 132 (1903); Roberts v. First National Bank, 8 N.D. 504, 79 N.W. 1049 (1899).

170. See Gibson v. Hibbard, 13 Mich. 214 (1865); Berry v. Clary, 77 Me. 482, 1 Atl. 360 (1885); Cooley, Constitutional Limitations 777, 784 (8th ed. 1924).

171. 5 N.D. 587, 67 N.W. 953 (1896).

the statute could not be given a retroactive application without upsetting vested rights, it used language which indicated clearly that it conceived the legislature to possess a broad power to legislate retroactively:

> "We think that even when a proceeding of any kind is void, with the exception of a judicial proceeding void for want of jurisdiction, it is nevertheless within the power of the legislature to validate such proceeding by retroactive legislation, if it would be grossly unjust for the person against whom the healing law is directed to insist upon his purely technical rights, destitute of all equity."[172]

In *Wells County v. McHenry*,[173] the court used even stronger language. The Wells County Board of Equalization had failed to meet in year 1889 and it was asserted nine years later that this omission invalidated the taxes for that year.[174] However, in 1897 the legislature enacted a curative statute in connection with the establishment of a system of tax lien foreclosure whereby judgment against tax delinquent land was obtained in the district court and the land was then sold to satisfy the judgment.[175] Since the hearing in the district court afforded the taxpayer the opportunity to contest the valuation of his property of which he had been deprived by the failure of the board of equalization to meet, the court upheld a retroactive application of the statute. It stated:

> "The validity of curative statutes in relation to tax proceedings has been sustained by this court and that such legislation is constitutional has become one of the elementary principles of law . . . . Barring the matter of the right to a hearing, (for this cannot be dispensed with,) the legislature may legalize any step or declare immaterial any omission in a tax proceedings, provided, of course, there is something which may be called an assessment and levy."[176]

But these statements, explicit as they are, do not constitute the last word on the subject. They were statements made in early cases, and in recent years there has become evident a clear disposition on the part of the court to restrict the operation of retroactive statutes in tax title cases as much as possible. In this connection it may be pointed out that the identity of the person or entity which is subject to the effect of retroactive legislation is of great importance. It has already been indicated, for instance, that if a tax sale is made to a private buyer it constitutes a contract

172. *Id.* at 592, 67 N.W. at 955.
173. 7 N.D. 246, 74 N.W. 241 (1898).
174. It normally does so. Power v. Larabee, 2 N.D. 141, 49 N.W. 724 (1891).
175. This was the so-called "Woods Law," N.D. Laws 1897, c. 67, to which frequent reference is made in the early cases.
176. 7 N.D. at 256, 74 N.W. at 244.

and the buyer is entitled to all the constitutional protection surrounding vested contract rights.[177] Conversely, if the tax sale was made to a county in the first instance, retroactive legislation has a much broader scope of operation since such a sale does not constitute a contract which the state is bound to respect.[178] Thus in *Blakemore v. Cooper,*[179] the court ruled that the repeal of a statute making tax deeds prima facie evidence of the regularity of antecedent proceedings did not affect the right of a holder of a tax deed to introduce it in evidence as prima facie proof of title, because this was one of the contract rights assured to a private purchaser on buying the land and such a contract right could not constitutionally be impaired. While a retroactive reduction in the rate of interest chargeable against a landowner redeeming from a tax sale was upheld in *State v. Lawler,*[180] the court was careful to point out that the case involved the rights of a county rather than a private person, and that no contract existed between the county and the state.

At present there are few retroactive statutes on the books in this state. A few provisions of minor importance may be found in the sections of the code dealing with the sale of land for nonpayment of special assessments,[181] and other such enactments are possible to locate.[182] But apparently it takes some overriding consideration to induce the enactment of such legislation and its approval by the courts, such as a period of economic stress or a suddenly-discovered technicality in the law which threatens to overthrow an inconvenient number of tax titles. The most prominent use of such legislation was during the 1930's, when the period of redemption was extended several times by the legislature in an attempt to ease the lot of landowners struggling to meet the exigencies of a depression; and the court expressed serious doubts as to the constitutionality of these measures at the time.[183]

The subject is one which cannot be ignored entirely, because of the extensive use of such legislation in the past; but it is probable that no serious problems will arise concerning it in the future until some condition as yet unforeseen prompts the enactment of new measures of this type. The present attitude of the court was foreshadowed by *Dever v. Cornwell.*[184] The land involved had been

177. See cases cited note 6, *supra.*
178. See cases cited note 6, *supra.*
179. 15 N.D. 5, 106 N.W. 566 (1905).
180. 53 N.D. 278, 205 N.W. 880 (1925).
181. See in particular N.D. Rev. Code §40-2508 (1943).
182. See note 125, *supra,* for a good example from another jurisdiction.
183. State *ex rel.* State Bank of Streeter v. Weiler, 67 N.D. 593, 275 N.W. 67 (1937).
184. 10 N.D. 123, 86 N.W. 227 (1901).

sold for non-payment of taxes which the county commissioners had levied by percentages rather than specific amounts. Normally this would have been sufficient to avoid the sale,[185] but there was cited to the court a curative act which provided that "the levy of taxes as made in the various counties for the year 1895 is hereby legalized and made valid for all intents and purposes the same as if made in conformity to the law then in force." The court held that this act did not validate a sale of the land for these taxes, on the ground that if it did so it would amount to a legislative taking of property from one person to give it to another.

The latter cases have generally followed this view, and the extent to which the present court has questioned the efficacy of such legislation is perhaps best illustrated by the language it employed in *Acklin v. First National Bank*,[186] in which it was said:

> "It might seem at first glance that this court adheres to a broad doctrine of legislative power to declare valid that which is void . . . . We believe that the legislature might, by curative act, remedy a situation where an estoppel in pais or equitable estoppel exists. The relief would perhaps not differ materially from what a court of equity would grant under the same circumstances without a curative act; but nevertheless it may be within the province of legislation."[187]

VII. Conclusion

Most of the value judgments formed during the course of preparation for this discussion have already been expressed in its pages and little remains to be said concerning them. It was pointed out in an early section that the law of tax titles is not a unified and cohesive body of law at all, but rather a heterogenuous collection of statutes passed at different times and for different purposes, many of them inconsistent. This fact makes a comprehensive treatment of the subject extremely difficult, and encyclopedic treatment has not been attempted here. The outline used simply selected those topics which seemed of particular interest, while omitting others which were perhaps equally important.

It would be, in all probability, worthwhile to take up such topics as the law of champerty, which is often involved in tax deed cases,[188] or the requirement of a deposit of delinquent taxes as a condition

185. See Part I of this paper, 29 N.Dak.L.Rev. 225, at 262-63.
186. 64 N.D. 577, 254 N.W. 769 (1934).
187. *Id.* at 588-89, 254 N.W. at 774.
188. See such cases as Morehouse v. Paulson, 75 N.D. 525, 28 N.W.2d 608 (1947); Sailer v. Mercer County, 75 N.D. 123, 26 N.W.2d 137 (1947); Robertson v. Brown, 75 N.D. 109, 25 N.W.2d 781 (1947).

precedent to bringing an action to set aside a tax deed,[189] or even the relationship of the statutory action to quiet title to tax deed cases,[190] particularly in the light of the holding in *Herman Hanson Oil Syndicate v. Benz*[191] that the lessee of a mineral interest may maintain such an action.[192] But it has been felt that the law on these topics might well be reserved for discussion at some later time.

At least one comment may be made in closing. It is simply that it seems apparent that some sort of recodification of the laws dealing with the sale of land for taxes might well be attempted, both for the purpose of simplifying the law and insuring the greater certainty of titles. There seems to be no sound reason why two separate statutes should regulate the methods of serving the notice of expiration of the period of redemption, or why delinquent hail taxes should be sold separately while delinquent special assessments are sold in a lump sum with delinquent general taxes; and there are unquestionably many other places in the statutes where simplification and consolidation of the laws regulating this subject would prove feasible and also beneficial.

189. Baeverstad v. Reynolds, 73 N.D. 603, 18 N.W.2d 20 (1945), discussing N.D. Rev. Code §57-4510 (1943).

190. See Murphy v. Missouri & Kansas Loan Co., 28 N.D. 519, 149 N.W. 957 (1914).

191. 77 N.D. 20, 40 N.W.2d 304 (1949).

192. The holding is sub silentio and not specifically mentioned in the opinion itself—a fact which has caused some doubt on the question to persist because the true import of the case has not been realized. I am indebted to Mr. Charles Foster of Bismarck, one of the attorneys in the case, for bringing the point to my attention, and informing me that the question was in fact carefully considered by the court.