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The Minnesota Tax Title: An Argument for Its Marketability -- The 1874 Forfeiture System from a 1974 Perspective

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I. THE MINNESOTA TAX TITLE AND ITS ROLE IN THE PROPERTY TAX SCHEME

The taxation of real property is one of the main sources of income for the political subdivisions of the state of Minnesota.¹ These revenues, although they flow to the counties, relieve the burden on the state's tax structure and give it a considerable interest in the viability of the property tax system. The state takes an active role in guaranteeing the continued receipt of property tax revenues by providing a statutory enforcement mechanism.² The power to tax may have an awesome reputation, but it would be an empty power indeed if unaccompanied by the power to collect the taxes when due. Collection is a simple matter where the duty to pay a tax is imposed upon an individual,³ since civil liability⁴ and criminal sanctions⁵ routinely attach to failure to pay. Property taxes, however, are levied against the land,⁶ and no one individual has a personal obligation to pay,⁷ thus forcing the counties to rely upon the statutory forfeiture procedures for enforcement.

Those procedures must be certain and efficient, for the government's ability to collect taxes bears an inverse relationship to the government's duty to provide services to its citizens. Tax revenues may decline in a failing economy, but the demand for government services only grows.⁸ Increasingly,

1. For the fiscal year ending June 30, 1973, receipts by local governmental units based on taxation of real property totaled \$825,661,940. This amount represented 32.14 percent of all taxes collected in Minnesota by state and local governments. MINNESOTA STATE DEP'T OF REVENUE, THE MINNESOTA STATE AND LOCAL TAX SYSTEM BULL. No. 1, at 55 (1974).

2. MINN. STAT. ch. 279 (1971), *as amended* Minn. Laws 1974 ch. 459, §1, chs. 280-83 (1971).

3. This is the method used in Minnesota for the collection of inheritance, gift, income, and excise taxes. *See id.* § 290.54.

4. *Id.* § 290.48.

5. *Id.* § 290.53, subd. 4.

6. *Id.* §§ 272.01, subd. 1, .31.

7. *Independent-Consolidated School Dist. No. 27 v. Waldron*, 241 Minn. 326, 328, 63 N.W.2d 555, 558 (1954); *Weberling v. Bursell*, 180 Minn. 283, 230 N.W. 654 (1930); *Maxwell v. Hatherly*, 170 Minn. 27, 211 N.W. 963 (1927); *Nortmann-Duffke Co. v. Federal Crushed Stone Co.*, 172 Minn. 567, 216 N.W. 250 (1927); *State v. Security Nat'l Bank*, 143 Minn. 408, 173 N.W. 885 (1919) (dictum); *State ex rel. Vossen v. Eberhard*, 90 Minn. 120, 95 N.W. 1115 (1903); *Falvey v. Board of County Comm'rs*, 76 Minn. 257, 79 N.W. 302 (1899); *Martin v. Lennon*, 19 Minn. 67 (Gil. 45) (1872) (dictum).

8. The types of problems which plague tax titles become especially acute in times of economic depression. Because of the generally unsatisfactory status of tax deeds in the eyes of purchasers, potential buyers are few and often the state itself must bid in the land in question, thus removing it from the tax rolls at a time when the need for the revenue it generates is greatest. *See L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* tit. 16, at 174 (1960); *Baker, Tax Delinquency—Legal Aspects*, 28 ILL. L. REV. 159, 161 (1933); Note, *The Current Status of Tax Titles: Recent Legislation v. Due Process*, 62 HARV. L. REV. 93, 94 (1948). For a discussion of legislative attempts to relieve tax forfeiture hardship in Minnesota during the

those who are familiar with the property tax system are coming to question the efficacy of last century's collection techniques in today's fiscal setting.⁹

Forfeiture, the most common method of collecting property taxes, is simple in theory.¹⁰ Delinquent taxes become a lien which may be foreclosed by the sale of the land.¹¹ The procedure serves the interests of the state by deterring non-payment with a heavy sanction,¹² replacing lost revenues with the purchase price paid for the forfeited land,¹³ and returning the land to private ownership and hence to the tax rolls.¹⁴ Unfortunately, forfeiture is anything but simple in practice. Fraught with technical difficulties, the procedure often breaks down. The resulting ignominy of the tax title is well documented elsewhere.¹⁵ Suffice it to say that tax titles remain unmarketable¹⁶ in Minne-

Depression, see *State v. Aitkin County Farm Land Co.*, 204 Minn. 495, 284 N.W. 63 (1939). See generally Smith, *Recent Legislative Indulgences to Delinquent Taxpayers*, 3 LAW & CONTEMP. PROB. 371 (1936).

9. A study of the tax forfeiture proceedings was called for in a resolution of the Real Property Division of the Hennepin County Bar Association, April 25, 1974, on file at William Mitchell Law Review Office.

10. For a general discussion of forfeiture as a method to enforce the collection of taxes, see H. BLACK, TAX TITLES § 194 (2d ed. 1893).

11. Compare MINN. STAT. § 272.31 (1971) with *id.* § 280.01.

12. For the failure to pay the assessed amounts, the taxpayer stands to lose not simply an equal pecuniary sum, but rather the entire ownership and use of the parcel of land against which those taxes were assessed. See discussion accompanying notes 85-105 *infra*.

13. Revenues from the sale of tax forfeited lands each year average from \$750,000 to \$1,000,000. Letter from Attorney General Douglas M. Head to Governor Harold LeVander, May 12, 1969, on file at William Mitchell Law Review Office.

14. MINN. STAT. § 282.01, subd. 1 (1971): "[I]t is the general policy of this state to encourage return of tax-forfeited lands to private ownership and the tax rolls through sale . . ." *But see* J. JENSEN, PROPERTY TAXATION IN THE UNITED STATES 330 (1931); Wager, *Utilization of Reverted Tax Delinquent Land in Rural Areas*, 3 LAW & CONTEMP. PROB. 453 (1936).

15. 4 AMERICAN LAW OF PROPERTY § 18.67 (A.J. Casner ed. 1952); H. BLACK, TAX TITLES (2d ed. 1893); C. FLICK, ABSTRACT AND TITLE PRACTICE ch. 9 (2d ed. 1958). Although there has not been a comprehensive study of Minnesota tax titles, the types of problems which they raise have not gone uncommented on in other states. See, e.g., Note, *Tax Assessments, Tax Sales and Tax Deeds in Alabama*, 25 ALA. L. REV. 535 (1973); Davis, *Tax Deeds in Colorado*, 18 ROCKY MT. L. REV. 393 (1946); Bowen, *Florida Tax Deed Titles*, 7 MIAMI L. Q. 497 (1953); Thompson, *Tax Titles in Florida*, 6 U. FLA. L. REV. 1 (1953); Harbert, *Tax Foreclosures and Tax Titles*, 1952 ILL. L.F. 209; Russell, *Michigan Tax Titles*, 3 WAYNE L. REV. 87 (1957); Comment, *Tax Deeds Void on Their Face and Three Year Statute of Limitations*, 20 MO. L. REV. 87 (1955); Clark, *Tax Titles in Mississippi*, 17 MISS. L.J. 372 (1946); Note, *Tax Sale Law in New Jersey: A Re-Examination*, 26 RUTGERS L. REV. 266 (1973); Fairchild, *Tax Titles in New York State*, 8 BROOKLYN L. REV. 61 (1938); Note, *Marketable Title in New York State: Tax Deeds*, 9 SYRACUSE L. REV. 69 (1957); Crum, *A Commentary on North Dakota Tax Titles*, 29 N.D.L. REV. 225 (1953); Kenyon, *Status of Oklahoma Tax Titles*, 8 OKLA. L. REV. 414 (1955); Note, *The Effect of Violation of the Oregon Tax Foreclosure Statute*, 28 ORE. L. REV. 184 (1949); Comment, *Marketability of Tax Titles—The Pennsylvania Real Estate Tax Sale Act of 1947*, 4 VILL. L. REV. 546 (1959); Note, *Some Tax Title Problems in Utah*, 3 UTAH L. REV. 97 (1952); Kaye, *Current Comments on Tax Titles*, 27 WIS. B. BULL., April, 1954, at 13; *Symposium—The General Property Tax in Wyoming*, 4 WYO. L.J. 227, 262-81 (1950).

16. Minnesota Title Standard No. 45 states that tax titles less than 40 years old are un-

sota, a result that subverts the interests of the state,¹⁷ constricts the flow of tax revenues,¹⁸ and prevents the return of forfeited land to private ownership.¹⁹

An archaic and error-prone forfeiture procedure,²⁰ the unique status of real property,²¹ a judicial abhorrence of forfeiture,²² and the conservatism of the real-property bar²³ have combined to leave tax titles unmarketable despite

acceptable unless supported by a quiet title action or registration of title. The outside limit of 40 years is supplied by Minnesota's Marketable Title Act, MINN. STAT. § 541.023 (1971), which, with certain exceptions, states that claims against sources of title more than 40 years old not manifested in either an action or preserving notice will conclusively be presumed to have been abandoned. *See generally* Note, *Minnesota Marketable Title Act: Analysis and Argument for Review*, 53 MINN. L. REV. 1004 (1969). Short of this 40 year period, tax titles are not acceptable in Minnesota because of their accepted position as one not representing a marketable title. A marketable title, as explained by the Minnesota Supreme Court in *Howe v. Coates*, 97 Minn. 385, 107 N.W. 397 (1906), is one:

[W]hich a reasonable purchaser, well informed as to the facts and their legal bearing, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept [The purchaser] should have a title which will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonable free from any doubt which should interfere with its market value. *Id.* at 399, 107 N.W. at 403.

Under such a standard, a title based on tax forfeiture proceedings is suspect because of the heavy shadow of doubt which the necessity of strict compliance with statutory proceedings casts upon its validity. Any number of purely technical errors in the proceedings, if discovered, will leave the purchaser of the title on which the proceedings were based with doubt as to the exact nature and extent of his holdings and potential buyers with increased skepticism as to its value. *See* discussion accompanying notes 151 to 174 *infra*.

17. *See* note 8 *supra*.

18. *See* notes 8, 14 *supra*.

19. *See generally* GOVERNOR'S TAX STUDY COMMITTEE, REPORT OF THE GOVERNOR'S MINNESOTA TAX STUDY COMMITTEE 207 (1956).

20. *See* notes 37 to 140 *infra* and accompanying text.

21. *Cf.* *Kitchen v. Herring*, 42 N.C. 191 (1851):

The principle [of specific performance] was adopted [for land], not because it was fertile or rich in minerals . . . but simply because it was *land*—a favorite and favored subject in England, and every country of Anglo Saxon origin. Our constitution gives to land pre-eminence over every other species of property; and our law . . . gives to it the same preference. . . . [L]and is *assumed* to have a peculiar value . . . without reference to its quality or quantity. *Id.* at 192-93 (emphasis in original).

22. *See* *Warroad Co-Op Creamery Co. v. Hoyez*, 182 Minn. 73, 233 N.W. 824 (1930). The field of tax forfeiture has been a fertile one for judicial prose. *See, e.g.,* *Farr v. Nordman*, 236 Mich. 266, 282, 78 N.W.2d 186, 188 (1956) (Smith, J., dissenting):

We have here no minor tragedy. A family is losing its home. . . . When an officer of the government, as here, a stranger to the title, undertakes to sell that which he owns not, we scrutinize his acts with a jealous eye. . . . We are keenly aware of the inviolability of private property, the sacred attributes of the homestead, protected by the genius of the common law and the letter and spirit of our Constitutions. We are equally aware of the demands of our sovereign people that the tide of the tax moneys flow on and still on, unhaltingly and undiminished, that the powers of the government not waste or falter through the machinations of the wicked, or the wiles of the adroit. The statute, then, will be enforced to the letter. But it must be to the letter. Every "i" must be dotted and every "t" crossed. A sale founded on forfeiture receives no indulgence from a court of equity, tax moneys or no. *Id.* at 282-83, 78 N.W.2d at 188.

23. *See* Note, *The Current Status of Tax Titles: Remedial Legislation v. Due Process*, 62

repeated attempts²⁴ at reform legislation. Since the 1874 Legislature adopted the present form of judicially supported forfeiture,²⁵ strict compliance with the many statutory procedures has been a prerequisite to a valid forfeiture.²⁶ Although various limiting and curative statutes²⁷ have been enacted to ameliorate the harsh effects of that rule, their practical effect has been limited. Since its adoption, Minnesota Title Standard 45 has provided in substance that a tax title remains unmarketable for 40 years unless supported by an action to quiet title or registration.²⁸

In an apparent attempt to promote the marketability of tax titles, the 1969 Legislature imposed a 1-year statute of limitations on attacks upon tax titles

HARV. L. REV. 93, 103 n.54 (1948).

24. *E.g.*, MINN. STAT. §§ 279.14 (renders certain irregularities in notice harmless); 280.33 (tax certificates and deeds prima facie evidence of regularity of proceedings); 280.34 (3 year statute of limitations for actions challenging validity of certain portions of sale); 284.09 (1 year statute of limitations for certain non-exempted actions); 284.22 (provisions concerning tax titles to be liberally construed in favor of the state; party asserting invalidity of tax titles bears burden of proof) (1971).

25. Prior to that time the proceedings had been in pais. *See* *Chauncey v. Wass*, 35 Minn. 1, 16-17, 30 N.W. 826, 831-32 (1886). This procedure posed serious enforcement problems for local officials; *e.g.*, *St. Paul & Sioux City Ry. v. McDonald*, 34 Minn. 182, 25 N.W. 57 (1885) (400,000 acres involved); *St. Paul & Chicago Ry. v. McDonald*, 34 Minn. 195, 25 N.W. 453 (1885) (tract of land from St. Paul to Winona), causing the Minnesota court to remark that "It had become proverbial that a tax title was no title at all, and a sale for taxes was as near a mockery as any proceeding having the appearance of legal sanction could be." *Chauncey v. Wass*, *supra* at 16, 30 N.W. at 832, quoting *O'Grady v. Barnhisel*, 23 Cal. 287, 292 (1863).

26. *Absetz v. McClellan*, 207 Minn. 202, 206, 290 N.W. 298, 300 (1940); *Warroad Co-Op Creamery Co. v. Hoyez*, 182 Minn. 73, 75, 233 N.W. 824, 825 (1930); *Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 413, 67 N.W. 219, 220 (1896). *See* *Hall v. County of Ramsey*, 30 Minn. 68, 14 N.W. 263 (1882). The rule of strict compliance is, however, subject to the application of the doctrine of de minimis. *London & Northwest American Mortgage Co. v. Gibson*, 77 Minn. 394, 80 N.W. 205 (1899); *Western Land Ass'n v. McComber*, 41 Minn. 20, 42 N.W. 543 (1889). The application of this maxim to tax judgments is not uniformly followed in other states, however. *See, e.g.*, *Walton v. Moore*, 58 Ore. 237, 114 P. 105 (1911) where the court had the following thoughts about tax proceeding trifles:

From the case of *Shylock v. Antonio*, reported at large by Shakespeare, down to the last volume of [state] reports, the courts have held that statutes providing for forfeiture shall be strictly construed, and far be it from this court to say that a sum of money, coined by the government of the United States, which under certain circumstances it is a penitentiary offense to steal, and which is sufficient to furnish bread to the hungry, cheering drink to the thirsty, and the miser the means of contributing to charity, shall be treated as unsubstantial in a case of this character. *Id.* at 243-44, 114 P. at 106.

27. *See* note 24 *supra*.

28. REAL PROPERTY DIVISION OF MINNESOTA STATE BAR ASS'N, STANDARDS FOR TITLE EXAMINATION NO. 45 (1971); *see* note 16 *supra*. Quiet title actions are provided for numerous parties. MINN. STAT. §§ 284.04 (holder of tax certificates); 284.08 (persons claiming adversely to state or its successors in interest); 284.11 (action by state or its successors in interest for forfeited land); 284.27 (action by county for benefit of prospective purchasers) (1971). Tax titles may also be cleared by registering the land pursuant to MINN. STAT. §§ 508.01 *et seq.* (1971). Prior to the amendment of MINN. STAT. § 508.04 by Minn. Laws 1939 ch. 100, § 2, however,

for jurisdictional defects, permitting persons wrongfully deprived of their property to recover instead from a state assurance fund.²⁹ Since earlier acts had cured or limited the actions that could be maintained upon technical defects, it appeared for a time that the new statute would protect tax titles against all attack, and thus allow Minnesota title examiners to approve such titles as marketable after the expiration of the 1-year period.³⁰

Although the Minnesota Supreme Court has yet to consider the construction and validity of those 1969 amendments, the promise of marketability that they offered has not been fulfilled. In 1971, the Minnesota State Bar Association adopted a caveat³¹ to Title Standard 45, reaffirming its position on unmarketability in spite of the change in the law. Whether the Bar Association was prompted by the fear that the amendments were unconstitutional, by the belief that the statutory language was too narrow to include all fatal defects, or by the worry that conservative examiners would refuse to pass tax titles regardless of the standards is unimportant. For whatever reason, tax titles remain unmarketable in Minnesota, and the retention of Title Standard 45 has given the reform movement renewed impetus.³² This note will not quarrel with the caveat to Title Standard 45, which may well have been prudently adopted; instead, it will analyze the present statutory scheme and argue that a properly drafted statute can give tax titles marketable status.

II. THE TAX FORFEITURE SYSTEM

In Minnesota, forfeiture is a judicial proceeding.³³ The district court's jurisdiction to enter judgment is special and purely statutory.³⁴ Since the court has no authority to transfer title by virtue of its common law powers or general trial jurisdiction,³⁵ the validity of the proceedings depends upon strict compliance with statutory procedures.³⁶

To isolate the current impediments to marketability, it is helpful to trace a title through the forfeiture procedure, noting examples of errors and defects which are fatal to the proceedings, setting aside those which are adequately dealt with by the present statutory scheme, and focusing upon those which remain troublesome.

registration of a tax title required a prior adjudication of its validity. *See In re Jamieson*, 169 Minn. 472, 211 N.W. 686 (1927).

29. Minn. Laws 1969 ch. 373, § 1 (codified at MINN. STAT. § 284.28 (1971)).

30. Letter from Attorney General Douglas M. Head to Governor Harold LeVander, May 12, 1969, on file at William Mitchell Law Review office.

31. "CAVEAT: The above standard remains unchanged notwithstanding M.S.A., Section 284.28, as amended by Minn. Laws, Chapter 373 (1969)."

32. *See* Resolution of the Real Property Division of the Hennepin County Bar Association, *supra* note 9.

33. *Chauncey v. Wass*, 35 Minn. 1, 16-17, 30 N.W. 826, 831-32 (1886); *see* note 25 *supra*.

34. *Eastman v. Linn*, 26 Minn. 215, 2 N.W. 693 (1879).

35. *Id.*

36. *See* note 26 *supra*; H. BLACK, TAX TITLES § 155 (2d ed. 1893).

A. The Chronology of Forfeiture

Real estate taxes in Minnesota become due on the first Monday of the January following their assessment.³⁷ Although taxes which exceed 10 dollars may be paid in two equal installments,³⁸ the first on or before May 31, and the second on or before October 31,³⁹ failure to pay in full on or before November 1, will result in an 8-percent penalty.⁴⁰ The taxes are declared delinquent if not paid by the first Monday in January following the year in which they fall due,⁴¹ and an additional 2-percent penalty is then imposed.⁴² It is at this point that the forfeiture procedure proper begins.

1. Filing the Delinquency List

The forfeiture procedure is set in motion when the county auditor, on or before February 15, files with the clerk of district court a list of all delinquent taxes in his county.⁴³ The effect is equivalent to filing a complaint to enforce payment of the taxes and penalties against each listed parcel of land,⁴⁴ and when supported by the auditor's affidavit, the filing commences the action and gives notice to the world that the taxes on the described parcels are delinquent.⁴⁵

Since filing is required for the benefit of delinquent taxpayers,⁴⁶ it is a condition precedent to the court's jurisdiction, and hence, a prerequisite to a valid judgment.⁴⁷ Mere errors in form in the making of the list do not affect

37. MINN. STAT. § 276.01 (1971).

38. *Id.* § 279.01. The staggering of tax payments tends to insure a more even flow of revenues to the taxing agency and also presents the taxpayer with a less odious sum. Jensen, *The Tax Calendar and the Use of Instalment Payments, Penalties and Discounts*, 3 LAW & CONTEMP. PROB. 354, 357-58 (1936).

39. MINN. STAT. § 279.01 (1971).

40. Minn. Laws 1974 ch. 459, § 1 amended MINN. STAT. § 279.01 (1971) to increase the penalty on non-homestead property to 12 percent.

41. MINN. STAT. § 279.02 (1971).

42. *Id.* The penalty follows the tax and is collected in the same manner. *Baker v. Kelley*, 11 Minn. 480 (Gil. 358) (1866).

43. MINN. STAT. § 279.05 (1971):

[W]hich list shall contain a description of each parcel of land on which such taxes shall be so delinquent . . . with the name of the owner, if known, and if unknown, so stated, appearing on the delinquent list, and the total amount of taxes and penalties, with the years for which the same are delinquent

44. *Id.*

45. *Kipp v. Dawson*, 31 Minn. 373, 17 N.W. 961, 18 N.W. 96 (1884).

46. "[T]his resolution was . . . intended as notice to the tax-payer, so that by examining it he might be able to ascertain with certainty . . . whether any proceedings had been commenced against his land as delinquent." *Russell v. Gilson*, 36 Minn. 366, 367, 31 N.W. 692, 693 (1887) (Mitchell, J.). *Accord*, *State v. Whiteside*, 236 Minn. 142, 144-46, 52 N.W.2d 127, 128-29 (1952); *Merriman v. Knight*, 43 Minn. 493, 494, 45 N.W. 1098 (1890).

47. *State v. Whiteside*, 236 Minn. 142, 146, 52 N.W.2d 127, 129 (1952); *Foster v. Berg*, 123 Minn. 180, 181, 143 N.W. 355, 356 (1913); *Minnesota Debenture Co. v. Scott*, 106 Minn. 32, 36, 119 N.W. 391, 393 (1902); *Merriman v. Knight*, 43 Minn. 493, 494, 45 N.W. 1098 (1890).

jurisdiction,⁴⁸ but some statement of the amount of taxes and penalties due, even though erroneous,⁴⁹ is necessary to confer jurisdiction.⁵⁰

2. Publication of Notice in a Designated Newspaper

The county auditor must publish notice of delinquency and a list of the affected parcels in a "designated newspaper"⁵¹ weekly for 2 consecutive weeks on or before March 20 of each year.⁵² Not only is designation of a newspaper for the publication of notice a jurisdictional requirement,⁵³ but the Minnesota Supreme Court has also held that a certified copy of the resolution designating the newspaper must be filed prior to the first publication of the list.⁵⁴ Errors in the designation of the newspaper⁵⁵ or in the filing of the resolution⁵⁶ may be fatal defects.

Publication, too, is a jurisdictional prerequisite.⁵⁷ The tax forfeiture proceeding is in rem,⁵⁸ and the constructive notice provided by publication is

48. *E.g.*, *State v. Minnesota Power & Light Co.*, 246 Minn. 235, 75 N.W.2d 386 (1956); *Cook v. John Schroeder Lumber Co.*, 85 Minn. 374, 88 N.W. 971 (1902) (failure of county auditor to verify delinquency list by affidavit); *McNamara v. Fink*, 71 Minn. 66, 73 N.W. 649 (1898) (errors in assessment of land); *Board of County Comm'rs v. Morrison*, 22 Minn. 178, 179 (1875) (errors in affidavit). It is the *existence* of the publication, not the *proof* of it which gives the court jurisdiction. *See Hoyt v. Clark*, 64 Minn. 139, 142, 66 N.W. 262, 263 (1896).

49. *Kipp v. Dawson*, 31 Minn. 373, 17 N.W. 961, 18 N.W. 96 (1884).

50. *Bonham v. Weymouth*, 39 Minn. 92, 99-100, 38 N.W. 805, 807-08 (1888).

51. A "designated newspaper" is the one chosen by the county board to carry in the county the notice and list of real estate on which taxes are delinquent. *See MINN. STAT.* § 279.08 (1971). The purpose of such a designation is to enable a taxpayer to ascertain with certainty whether any proceedings have been commenced against his land. *Merriman v. Knight*, 43 Minn. 493, 45 N.W. 1098 (1890).

52. *MINN. STAT.* § 279.09 (1971).

53. *Eastman v. Linn*, 26 Minn. 215, 2 N.W. 693 (1879).

54. *Foster v. Berg*, 123 Minn. 180, 181, 143 N.W. 355 (1913).

55. The resolution must name the newspaper which is to carry the notice and not merely the individual who is to do the printing. *Foster v. Gage*, 117 Minn. 499, 136 N.W. 299 (1912) ("Herald Printing Company"); *Hall v. County of Ramsey*, 30 Minn. 68, 14 N.W. 263 (1882) ("H.P. Hall, Publisher of the St. Paul Daily Globe"); *Eastman v. Linn*, 26 Minn. 215, 2 N.W. 693 (1879) ("F. Dagget, Editor of the Litchfield News-Ledger"). Moreover, even when the name of the newspaper is given, its designation must be sufficient to avoid ambiguity. *Russel v. Gilson*, 36 Minn. 366, 31 N.W. 692 (1887) (designation of "The Minneapolis Tribune" insufficient when the Minneapolis Tribune Company published two newspapers, one "The Minneapolis Daily Tribune" and the other "The Minneapolis Weekly Tribune").

56. *State v. Whiteside*, 236 Minn. 142, 52 N.W.2d 127 (1952) (failure to file certified copy of county board resolution naming "designated newspaper" prior to publication of the delinquent list); *Foster v. Berg*, 123 Minn. 180, 143 N.W. 355 (1913) (same).

57. *Eastman v. Linn*, 26 Minn. 215, 2 N.W. 693 (1879).

58. *Independent-Consolidated School Dist. No. 27 v. Waldron*, 241 Minn. 326, 63 N.W.2d 555 (1954); *Spaeth v. Hallam*, 211 Minn. 156, 158, 300 N.W. 600, 601 (1941); *Nortmann-Duffke Co. v. Federal Crushed Stone Co.*, 172 Minn. 567, 216 N.W. 250 (1927); *Maxwell v. Hatherly*, 170 Minn. 27, 211 N.W. 963 (1927); *State ex rel. Vossen v. Eberhard*, 90 Minn. 120, 95 N.W. 1115 (1903); *Falvey v. Board of County Comm'rs*, 76 Minn. 257, 79 N.W. 302 (1899); *Martin v. Lennon*, 19 Minn. 67 (Gil. 45) (1872). For a general discussion of the use of an in personam

necessary to satisfy due process.⁵⁹ Filing of a correct affidavit of publication, on the other hand, is not a jurisdictional prerequisite.⁶⁰ The failure of the published list to state the amount due⁶¹ or to describe the land⁶² is a fatal defect.

3. Judgment

Notice is deemed served after the final publication of the delinquency list,⁶³ and the district court then acquires jurisdiction to enforce the delinquent taxes, accrued penalties, and costs against each parcel of land.⁶⁴ Any person claiming an interest in the land may answer within 20 days of the final publication,⁶⁵ and if no answer is filed, the clerk of court must enter judgment by default against the land.⁶⁶

These default judgments are presumptively valid unless the taxes were paid prior to judgment⁶⁷ or the land was exempt from taxation.⁶⁸ Although the judgment is subject to collateral attack,⁶⁹ it is prima facie evidence of its

action for the collection of property taxes, see Rubin, *Collection of Delinquent Real Property Taxes by Action In Personam*, 3 LAW & CONTEMP. PROB. 416 (1936).

59. *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895), *aff'g* *County of Redwood v. Winona & St. Peter Land Co.*, 40 Minn. 512, 41 N.W. 465, 42 N.W. 473 (1899); see *Dousman v. City of St. Paul*, 23 Minn. 394 (1877).

60. *Schoonmaker v. St. Paul Title & Trust Co.*, 152 Minn. 94, 188 N.W. 223 (1922).

61. *Bonham v. Weymouth*, 39 Minn. 92, 38 N.W. 805 (1888); *Collins v. Welch*, 38 Minn. 62, 35 N.W. 566 (1887); *Tidd v. Rines*, 26 Minn. 201, 2 N.W. 497 (1879) (the figures 10 48, without more, insufficient to describe \$10.48).

62. *Foster v. McClure*, 121 Minn. 409, 141 N.W. 796 (1913); *Fagan v. Huntress & Brown Lumber Co.*, 80 Minn. 441, 83 N.W. 382 (1900); *Kern v. Clarke*, 59 Minn. 70, 60 N.W. 809 (1894) (S.E. ¼, N.E. ¼, and N.E. ¼, S.E. ¼ insufficient to describe the S.E. ¼ of the N.E. ¼, and the N.E. ¼ of the S.E. ¼ of a given section); *Knight v. Alexander*, 38 Minn. 384, 387, 37 N.W. 796, 797 (1888); *Williams v. Central Land Co.*, 32 Minn. 440 (1884) (defective plat map and surveyor's certificate); *Keith v. Hayden*, 26 Minn. 212, 2 N.W. 495 (1879) (S.² N.E.⁴ & N.W.⁴ S.E.⁴ insufficient to describe the S. ½ of the N.E. ¼, and the N.W. ¼ of the S.E. ¼ of a given section. The test of sufficiency is whether a man of ordinary intelligence would identify the land described with reasonable clarity. *Doherty v. Real Estate Title Ins. & Trust Co.*, 85 Minn. 518, 89 N.W. 853 (1902). A tax proceeding may require a greater sufficiency of description than a private deed, however, because the intent of the parties in a private deed may be inferred from the surrounding circumstances while in a tax proceeding there is no intent. *Bell v. McLaren*, 89 Minn. 24, 26, 93 N.W. 515, 516 (1903); *Connecticut Mut. Life Ins. Co. v. Jacobson*, 75 Minn. 429, 432-33, 78 N.W. 10, 11 (1899); *Knight v. Alexander*, 38 Minn. 384, 387, 37 N.W. 796, 797 (1888).

63. MINN. STAT. § 279.14 (1971).

64. *Id.*

65. *Id.* § 279.15.

66. *Id.* § 279.16.

67. *Id.*

68. *Id.*

69. A collateral attack on a tax judgment, as with any other type of judgment, may be made where the court was without jurisdiction. See discussion II, A & B, *infra*. In addition, however, a tax judgment may also be attacked on the grounds that the taxes were paid prior to judgment or that the land was exempt from taxation. *Falvey v. Board of County Comm'rs*, 76 Minn. 257, 79 N.W. 302 (1899).

own validity and the regularity of the procedure by which it was entered.⁷⁰ If answer is made, the matter is tried to the district court,⁷¹ and the form of the resulting judgment will be the same as in a default except that the fact of trial and the names of all persons answering will be recorded.⁷²

The judgment, regardless of whether it was entered by default or after trial, must contain the essential elements of the statutory form,⁷³ although it need not follow the statute precisely.⁷⁴ For example, failure to state that no answer was filed and that the 20 days had run since final publication is not fatal.⁷⁵ A statement of the amount of a tax judgment in numerals without an indication of what those numerals represent, on the other hand, will void the judgment for uncertainty.⁷⁶

A tax judgment may be collaterally attacked if the court did not have jurisdiction to enter it.⁷⁷ However, errors in drafting the list,⁷⁸ in any proceedings prior to the filing of the list,⁷⁹ in assessing and levying the taxes,⁸⁰ in publication or designation,⁸¹ or in identifying the amount of the tax⁸² or the identity of the owner⁸³ will not deprive the court of its jurisdiction.⁸⁴

4. Sale

Judgment results in a lien against the land,⁸⁵ which may be satisfied by foreclosure and sale.⁸⁶ After complying with the requirement that notice of the sale be published for 3 consecutive weeks,⁸⁷ the county auditor sells all land subject to an unsatisfied judgment at a public sale on the second Monday in August of each year.⁸⁸ All lands not sold to the public are bid in for the state.⁸⁹

70. MINN. STAT. § 279.16 (1971).

71. *Id.* §§ 279.17, .18, .19.

72. *Id.* § 279.18.

73. *Kipp v. Collins*, 33 Minn. 394, 396-97, 23 N.W. 554, 555 (1885).

74. Substantial compliance is permissible. MINN. STAT. § 279.18 (1971). *Cf. Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 67 N.W. 219 (1896).

75. *Gilfillan v. Hobart*, 34 Minn. 67, 67-68, 24 N.W. 342, 342 (1885); *Kipp v. Collins*, 33 Minn. 394, 397, 23 N.W. 554, 555 (1885).

76. *Fagan v. Huntress & Brown Lumber Co.*, 80 Minn. 441, 83 N.W. 382 (1900); *Keith v. Hayden*, 26 Minn. 212, 2 N.W. 495 (1879) (alternative holding); *Tidd v. Rines*, 26 Minn. 201, 2 N.W. 497 (1879).

77. *See note 69 supra.*

78. *See* MINN. STAT. § 279.14 (1971).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* This section does not cure jurisdictional defects, but only renders certain irregularities harmless. *Foster v. Berg*, 123 Minn. 180, 143 N.W. 355 (1913).

85. MINN. STAT. § 272.31 (1971).

86. MINN. STAT. § 280.001 (Supp. 1973). *See* MINN. STAT. §§ 280.01, .12 (1971).

87. MINN. STAT. § 280.12 (1971).

88. *Id.*

89. This practice was previously mandated by statute. *See* MINN. STAT. § 280.02 (1971). That

Notice of the sale is a condition precedent to the county auditor's authority to sell the land,⁹⁰ and thus, failure to comply with the publication requirement is fatal.⁹¹

The sale is conditional, subject to the rights of the original owner of the land to redeem it.⁹² At the time of the sale the purchaser receives a certificate evidencing his interest and after the period for redemption has expired may apply to the state for a tax deed.⁹³ Land bid in for the state may be sold to a purchaser in the same manner if it is not redeemed within 3 years of the original sale.⁹⁴ Prior to the expiration of 3 years from the date of the sale, land bid in for the state may be transferred to an individual purchaser by means of a "state assignment certificate" which transfers the state's interest and vests title in the assignee upon expiration of redemption.⁹⁵

To be valid, the sale must be conducted in accordance with the statutory procedures.⁹⁶ The harshness of this strict compliance rule is mitigated by the fact that sale and assignment certificates and tax deeds are *prima facie* evi-

section, however, was rendered inapplicable to all sales after May, 1974, by a 1973 amendment to the tax forfeiture laws, which provided:

Effective the second Monday in May 1974, and each year thereafter, no parcel of land against which judgment has been entered and remains unsatisfied for the taxes of the preceding year or years may be sold at public vendue as provided in sections 280.01 and 280.02 by the county auditor but shall be treated in the same manner and regarded in all respects as land bid in for the state by the auditor in the manner provided in section 280.02 [*sic*]. No notice of sale shall be published or posted in 1974 and in years thereafter, and no auditor's certificate authorized by section 280.03 shall be issued on the second Monday in May 1974, or thereafter. [The last reference to 280.02 is apparently a clerical error and should be 280.12.]

Though this language is not entirely clear, it appears that its purpose is to alter the manner in which the tax sale is made, rather than shift the responsibility for land not sold to individual purchasers from the state to the counties. Thus, it probably should not be interpreted as altering the practice of bidding in unsold land for the state. If that were forbidden, the title of land decreed forfeit, but not sold at the time of expiration, would be in limbo. *See* MINN. STAT. § 281.18 (1971). Moreover, the amendment expresses no intent to supercede the section which provides for assignment of the interests of the state prior to expiration of redemption, a section which would be useless if bidding in for the state were to cease. *See id.* § 280.11.

90. *Foster v. Malberg*, 119 Minn. 168, 171, 137 N.W. 816, 817 (1912); *McCord v. Sullivan*, 85 Minn. 344, 345, 88 N.W. 989, 990 (1902); *Olson v. Phillips*, 80 Minn. 339, 83 N.W.2d 189 (1900).

91. *McCord v. Sullivan*, 85 Minn. 344, 88 N.W. 989 (1902); *Olson v. Phillips*, 80 Minn. 339, 83 N.W. 189 (1900); *Kipp v. Dawson*, 31 Minn. 373, 17 N.W. 961, 18 N.W. 96 (1884); *Prindle v. Campbell*, 9 Minn. 212 (Gil. 197) (1864).

92. *See* notes 106 to 140 *infra* and accompanying text.

93. MINN. STAT. §§ 280.13, subd. 4, .25-.28 (1971).

94. *Id.* § 280.12.

95. *Id.* § 280.11. Thus, no tax deed is necessary; the certificate itself serves as a conveyance and may be recorded. *Id.* Prior to May, 1974, a similar procedure was followed with land sold at a tax sale to individual purchasers. At the time of the sale they were given a "certificate of sale," which when filed of record was sufficient to transfer the fee simple title, subject only to the right of redemption. *Id.* §§ 280.01-.03.

96. *See* notes 26 & 36 *supra*.

dence of the regularity of the forfeiture proceedings up to, and including, sale.⁹⁷ Moreover, mere misrecitals in the certificate or deed will not invalidate a sale.⁹⁸ To do so requires proof of one of the following: (a) the taxes were paid prior to judgment,⁹⁹ (b) the land was exempt from taxation,¹⁰⁰ (c) the court lacked jurisdiction to render judgment,¹⁰¹ (d) judgment was satisfied before sale,¹⁰² (e) notice of sale was not given,¹⁰³ or (f) the parcel was not sold to the proper bidder.¹⁰⁴ A tax title may also be upset for reasons unrelated to defects which void the sale.¹⁰⁵

5. Redemption

The original owner of tax-forfeited property is generally given a period of 5 years from the date of the sale in which to redeem it.¹⁰⁶ In many cases, he will have additional time, as the period for redemption does not expire, though 5 years have elapsed since sale, until 60 days after proof of service of notice of expiration of redemption is filed with the county auditor.¹⁰⁷ If the property was bid in for the state and has not been sold or assigned, notice will normally be given 4 years and 10 months after sale,¹⁰⁸ but if the property was sold to an actual purchaser at sale or bid in for the state and later sold or assigned, the holder of the property may elect to give notice as early as 4 years and 10 months after sale¹⁰⁹ or as late as 6 years after the sale or assignment.¹¹⁰

In a few instances, the original owner may be permitted to redeem the

97. MINN. STAT. § 280.33 (1971). This is so even where the contents of the sale or assignment certificate must be proved by parol because of destruction or loss. *Mitchell v. McFarland*, 47 Minn. 535, 50 N.W. 610 (1891). This principle does not apply, however, to disputes as to the payment of the tax itself or claims that the property was exempt. MINN. STAT. § 280.33 (1971).

98. MINN. STAT. § 280.33 (1971).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Further defects may arise with respect to the redemption process. See notes 106 to 140 *infra* and accompanying text.

106. MINN. STAT. § 281.17 (1971). Generally, other persons having an interest in the property as well as the owner may redeem within the same period of time. *Id.* §§ 281.01, .18. Where the owner dies after the sale, however, the stated period of redemption during which his estate or other interested persons may redeem is 3 years and 6 months from the date of sale. *Id.* § 281.05.

107. *Id.* §§ 281.14, .18, .21, .23, .33.

108. If by this time land bid in for the state has not been assigned or sold, the county auditor is required to give notice of expiration of redemption "forthwith." *Id.* § 281.23. Notice is valid, however, even though he delays. *Id.* § 281.23, subd. 1.

109. *Id.* § 281.21.

110. *Id.* § 281.322. Technically, the time is computed from the date of the tax judgment sales certificate, forfeited tax sale certificate, or state assignment certificate. *Id.* Failure to serve notice of expiration of redemption within the 6-year period voids the certificate. *Id.* §§ 281.323, .324, .326.

property many years after the sale. A person under a legal disability¹¹¹ at the time of expiration of the period for redemption, may redeem at any time within 1 year after removal of the disability by bringing an action against the holder of the title.¹¹² This right will terminate 40 years after expiration of the period for redemption.¹¹³

Upon expiration of redemption, title vests in the purchaser, the state, or its assignee as appropriate.¹¹⁴ No additional documents need be executed or filed in the case of a purchaser¹¹⁵ or assignee,¹¹⁶ but where land bid in for the state has not been assigned, the county auditor upon expiration of the period of redemption executes a certificate of forfeiture and files it with the register of deeds or the registrar of titles.¹¹⁷

Notice of expiration of redemption is prepared by the auditor at the request of the purchaser or assignee¹¹⁸ and is directed to the person in whose name the land is assessed and to any mortgagee or lienee of record.¹¹⁹ Where the land is bid in by the state and no assignee or private purchaser exists, the auditor is required to give the notice of expiration of redemption.¹²⁰ Within 20 days after receiving the notice, the sheriff must serve it upon the person to whom it is directed if the person to be served may be found in the county,¹²¹ or, failing that, upon any person in possession,¹²² or, failing both

111. Persons under a disability are minors, insane persons, idiots, and persons in captivity or in any country at war with the United States. *Id.* § 281.04.

112. *Id.*

113. *See id.* § 541.023.

114. *Id.* § 281.18.

115. *See id.* § 280.03.

116. *See id.* § 280.11.

117. *Id.* § 280.23, subd. 8. This difference in treatment is necessary since the state may assign property bid in for it after notice of expiration or redemption has been given. In such an event, the original notice is invalid, and the assignee must give notice in the manner provided for purchasers and assignees. *Id.* § 281.24. Thus, one cannot safely infer that redemption has in fact occurred from passage of time after the auditor has given notice of expiration of redemption unless a filing, such as required by the above-cited statute, is made.

118. *Id.* §§ 281.13, .21.

119. *Id.* § 281.13.

120. *Id.* § 281.23. Notice is given by posting, publication, and by service on persons in possession. *Id.* § 281.23, subsd. 2-5.

121. *Id.* § 281.13.

122. *Hutchinson v. Child*, 164 Minn. 195, 204 N.W. 648 (1925); MINN. STAT. § 281.13 (1971). This is required even when the person in possession claims adversely to the owner. *Pomroy v. Beattie*, 139 Minn. 127, 165 N.W. 960 (1918). Moreover, when two or more persons occupy the land and the possession of each is substantial, suited to the use of the property, and "independent of and of the same dignity of the other," each must be served. *McHardy v. State*, 215 Minn. 132, 9 N.W.2d 427 (1943) (husband and wife occupying premises as lessees); *Absetz v. McClellan*, 207 Minn. 202, 290 N.W. 298 (1940) (land occupied both by business and dwelling house); *cf. Casserly v. Morrow*, 101 Minn. 16, 111 N.W. 654 (1907). The degree of possession necessary for "possession," and thus notice, is a fact question and must be determined in light of the character of the land and the uses to which it can be applied. If land is occupied and those occupying it are applying the land to the uses for which it is fit, they must be served, even though they are not continuously living upon the land. *Nygren v. Patrin*, 288 Minn. 54, 179 N.W.2d 76 (1970)

alternatives,¹²³ by weekly publication for 3 consecutive weeks.¹²⁴ Any person who claims an interest in the property may redeem by paying to the county treasurer the accrued taxes, penalties, and interest,¹²⁵ or, if the land was purchased at sale, the purchase price and interest.¹²⁶ The effect of redemption is to annul the sale.¹²⁷

While due process does not require that the original owner of tax-forfeited land be given a right to redeem nor notice of the expiration of any period for redemption,¹²⁸ the statutes creating those rights are liberally construed in favor of the owner.¹²⁹ The notice provisions are mandatory¹³⁰ and must be followed strictly in order to terminate the period for redemption.¹³¹ Many defects in the notice of expiration of redemption including improper date of the judgment or sale,¹³² error as to the amount for which the land was sold,¹³³ failure to state that the certificate had been presented to the county auditor by the holder,¹³⁴ the absence of the auditor's seal,¹³⁵ and an improper statement of the amount necessary for redemption¹³⁶ have been held by the Minnesota court to be fatal to the notice.

Again, curative legislation¹³⁷ ameliorates the harshness of the strict com-

 (second home used for vacations); *Wallace v. Sache*, 106 Minn. 123, 118 N.W. 360 (1908) (crop land); *cf.* *St. Paul Swimming Club v. First Nat'l Bank*, 148 Minn. 430, 182 N.W. 514 (1921) (lakeshore clubhouse used from May to October). *See generally* Comment, *Termination of Right to Redeem Following Tax Sale—Who Is in Actual Possession so as to Require Notice of Termination*, 46 IOWA L. REV. 185 (1960).

123. The sheriff's return specifying that he cannot find in the county the person to whom the notice is directed and that no one is in possession of the land is *prima facie*, but not conclusive, evidence of those facts. *Holmes v. Conter*, 212 Minn. 394, 4 N.W.2d 106 (1942). An attack on the return to be successful must be made with evidence that is "clear and satisfactory." *Id.*

124. MINN. STAT. § 281.13 (1971). There are special mitigating provisions for property owned by persons in the military service. *See id.* §§ 281.273-.277. *See generally* Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 501 *et seq.* (1970).

125. MINN. STAT. §§ 281.01, .02 (1971).

126. *Id.* § 281.02.

127. *Sunderman Inv. Co. v. Craighead*, 143 Minn. 286, 173 N.W. 653 (1919).

128. *State v. Aitkin County Farm Land Co.*, 204 Minn. 495, 502, 284 N.W. 63, 67 (1939).

129. *State ex rel. Central Hanover Bank & Trust Co. v. Erickson*, 212 Minn. 218, 223, 3 N.W.2d 231, 234 (1942); *Otis v. City of St. Paul*, 102 Minn. 208, 113 N.W. 269 (1907); *Merrill v. Dearing*, 32 Minn. 479, 21 N.W. 721 (1884). *See Minnesota Debenture Co. v. Harrington*, 104 Minn. 16, 115 N.W. 746 (1908).

130. *See, e.g., Warroad Co-Op Creamery Co. v. Hoyez*, 182 Minn. 73, 233 N.W. 824 (1930).

131. *McHardy v. State*, 215 Minn. 132, 135, 9 N.W.2d 427, 429 (1943).

132. *Kipp v. Fitch*, 73 Minn. 65, 75 N.W. 752 (1898); *Eide v. Clark*, 57 Minn. 397, 59 N.W. 484 (1894).

133. *State ex rel. National Fire Ins. Co. v. Scott*, 92 Minn. 210, 99 N.W. 799 (1904). This is so even though the error benefits the redemptionee. *Id.*

134. *Helmer v. Shevlin-Mathieu Lumber Co.*, 129 Minn. 25, 151 N.W. 421 (1915).

135. *Downing v. Lucy*, 121 Minn. 301, 141 N.W. 183 (1913).

136. *Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 67 N.W. 219 (1896). *But see* *London & Northwest Am. Mortgage Co. v. Gibson*, 77 Minn. 394, 80 N.W. 205 (1899), where the court applied the doctrine of *de minimis* to an understatement of 75¢ on a \$628.03 judgment; *Robert v. Western Land Associates*, 43 Minn. 3, 44 N.W. 668 (1890) (difference of "several cents"); *Western Land Associates v. McComber*, 41 Minn. 20, 42 N.W. 543 (1889) ("fraction of a cent").

137. MINN. STAT. § 284.22 (1971).

pliance rule by protecting the title of the state or its successors in interest against attack, unless a defect deprives the authorities of jurisdiction to conduct the forfeiture proceedings or causes substantial prejudice to the rights of the original owner.¹³⁸ However, failure to include the name of the assessed owner of realty in the posted notice of expiration of redemption has been held by the Minnesota court to be outside the scope of the curative acts and to void the entire forfeiture proceeding.¹³⁹ The curative acts are, of course, by their very terms inapplicable to defects which deprive the court of its jurisdiction.¹⁴⁰

6. Statutes of Limitation

After the expiration of the period for redemption, the various statutes of limitation¹⁴¹ begin to run, barring various rights and claims in no consistent manner and creating confusion. At this point, at least 5 ½, and possibly 6 ½, years will have elapsed since the date of the delinquency.¹⁴²

Although many of the defects which would otherwise void tax titles are eliminated by the curative acts, it would be constitutionally impermissible for them to protect tax titles against all attack since, as retrospective legislation, they may not destroy vested rights.¹⁴³ In contrast, statutes of limitation may bar even actions based on rights which have vested, because these statutes limit merely the period of time during which the rights may be enforced¹⁴⁴ and do not attempt to destroy the right itself. The only constitutional restraint applicable is that there must be permitted a reasonable period for assertion of the rights.¹⁴⁵ After the expiration of such a period, a statute of limitation may protect from attack even those tax titles which are alleged to be absolutely void.¹⁴⁶

Except when based on defects of a jurisdictional nature, exemption from taxation, or payment of taxes prior to judgment, Minn. Stat., Section 284.09, acts to bar all claims against the state or its successors in interest 1 year after the proof of service of the notice of expiration of redemption is filed. While jurisdictional defects are thus specifically excepted from this statute, they become key terms in Section 284.28 which purports to bar, 1 year after the proof of service of the notice of expiration of redemption or the auditor's certificate of forfeiture, all claims based on defects which are "juris-

138. *Id.*

139. *McHardy v. State*, 215 Minn. 132, 9 N.W.2d 427 (1943).

140. *State v. Whiteside*, 236 Minn. 142, 52 N.W.2d 127 (1952); MINN. STAT. §§ 279.14, 280.33, 284.22 (1971).

141. MINN. STAT. §§ 280.34, 284.09, .28 (1971).

142. This assumes judgment by default. Indeed, a greater time may be required if the case is litigated, since delay in awaiting trial must be taken into account. See notes 41, 43, 52, 65-66 & 106-110 *supra* and accompanying text.

143. See note 234 *infra* and accompanying text.

144. See note 235 *infra* and accompanying text.

145. See notes 244 to 272 *infra* and accompanying text.

146. See note 240 *infra* and accompanying text.

dictional," Section 284.09 is tolled, however, where the owner of the land is under a disability,¹⁴⁷ and both Sections 284.09 and 284.28 are tolled whenever either the owner or his successors in interest are in adverse, actual, open, continuous, and exclusive possession of the land.¹⁴⁸

If a jurisdictional defect results, and because of an omission, mistake, or misfeasance of a public officer or employee a person is deprived of his property, he may recover damages from a state assurance fund.¹⁴⁹ Such actions against the fund must be instituted within 6 years after the 1-year statute of limitations has run.¹⁵⁰

Except for claims based on payment of the tax prior to judgment or the exemption of the property from taxation, which may be brought at any time, Section 280.34 purports to bar all attacks upon the tax sale itself. It runs against jurisdictional defects, but it does not address itself to claims arising out of defects which occur after the time of the tax sale.

B. Gaps in the Statutory Scheme

The various curative acts and statutes of limitation, even when taken together, fail to shield tax titles from all attacks. Often ambiguous and confusing, the present statutory scheme is a patchwork affair, and in amending it through the years, the Legislature has simply permitted some defects to slip through the cracks. Constitutional considerations, moreover, have prevented the Legislature from barring some claims¹⁵¹ and have raised doubts about the effectiveness of legislative attempts to bar others.¹⁵²

Although the extent to which defects escape the network of curative acts and statutes of limitation is open to interpretation,¹⁵³ it is clear that 1 year after expiration of the period of redemption tax titles are not safe from attack. Thus, if an examiner of title in Minnesota discovers a tax title of less than 40 years duration in the chain of title, a fear that unknown but fatal defects might have contaminated the forfeiture proceedings compels him to require the registration or quieting of the title before passing it.¹⁵⁴

From the chronology of forfeiture, several specific sources of potential problems can be isolated. First, phrases such as "jurisdictional defects" and "defects fatal to the jurisdiction of the authorities" are key terms in the statutes,¹⁵⁵ and in spite of the fact that each of these terms is susceptible of several meanings,¹⁵⁶ the Legislature has neglected to define them. Existing

147. Moreover, another statute grants persons under disability at the time of expiration of redemption an affirmative right to redeem after their disability is removed. See notes 111 to 112 *supra* and accompanying text.

148. *Nygren v. Patrin*, 288 Minn. 54, 179 N.W.2d 76 (1970).

149. MINN. STAT. § 284.28, subd. 5 (1971).

150. *Id.* § 284.28, subd. 8. Special provision, though, is made for persons under disability.

151. See notes 293 to 295 *infra* and accompanying text.

152. See notes 224 to 272 *infra* and accompanying text.

153. See notes 176 to 223 *infra* and accompanying text.

154. See notes 16 & 28 *supra*.

155. See MINN. STAT. §§ 280.33, 284.09, .22, .28 (1971).

156. See notes 176 to 204 *infra* and accompanying text.

judicial interpretation has done little to mitigate the confusion,¹⁵⁷ with the result that the validity of a tax title may well depend upon a future court's interpretation of these terms.

Second, since the scope of some of the statutes of limitation and curative acts is determined by the identity of the holder of the tax title, the law applicable to a tax title held by an original purchaser at a tax sale or the assignee of the interests of the state who takes prior to expiration of redemption may differ from that applicable to titles held by the state or by persons who have purchased the land from the state after expiration of the period for redemption.¹⁵⁸ This anomaly appears to be the result of historical accident rather than legislative design,¹⁵⁹ but regardless of its source, produces only confusion and unequal treatment.¹⁶⁰

Third, many of the statutes of limitation and curative acts are limited to defects occurring at particular points in the forfeiture chronology, and are not applicable to defects arising at a later time.¹⁶¹ Not only is this approach confusing, but it allows some defects to escape entirely.¹⁶² Fourth, as it adopted new statutes, the Legislature failed to amend or repeal the existing ones. Some statutory provisions appear to be duplicative only and to obtain the same result with different language.¹⁶³

Fifth, the statutory scheme retains some anachronistic provisions. Persons under a disability, for example, receive favored treatment,¹⁶⁴ notwithstanding the changes in social conditions in the past century, so that claims existing in their favor may remain alive for 40 years.¹⁶⁵ Finally, the extent to which due process limits the legislature's power to bar certain claims is not altogether settled.¹⁶⁶ Unfortunately, the Minnesota courts have not had an opportunity to pass upon the constitutionality of most of the statutes involved and thus a nagging doubt remains as to the validity of certain parts of the statutory scheme.¹⁶⁷

To be fully understood, the manner in which the various statutes combine to cure some defects, bar some claims, and permit others to escape, must be represented graphically. The following chart illustrates the manner in which most defects are screened out by the statutes and demonstrates the categories of claims and defects that may remain.

157. See *State v. Minnesota Power & Light Co.*, 246 Minn. 235, 75 N.W.2d 386 (1956).

158. See notes 205 to 223 *infra* and accompanying text.

159. Apparently no other states vary rights on such a distinction.

160. See notes 205 to 223 *infra* and accompanying text.

161. For example, MINN. STAT. § 279.14 (1971) only deals with defects arising prior to judgment and *id.* § 280.33 only deals with defects arising prior to or during sale.

162. See, e.g., *id.* § 280.34. This 3-year statute of limitations only applies to attempts to invalidate the sale itself and thus does not bar actions based on defects which arise during the redemption process.

163. Compare, e.g., *id.* § 280.34 with *id.* § 284.28.

164. *Id.* §§ 281.04, 284.09.

165. See MINN. STAT. § 541.023 (1971).

166. See notes 224 to 272 *infra* and accompanying text.

167. Letter from R.J. Whaling, Itasca County Auditor, to Philip Olfelt, Special Assistant Attorney General, March 29, 1969, on file at William Mitchell Law Review Office.

TIME	HOLDER
	1. Original purchaser at tax sale (real estate tax sale certificate)
Notice Served	§ 279.14 cures errors in list, assessment, levy, publication, amount of tax & identity of owner, but not exemption or payment.
Judgment	§ 279.14 voids judgment for exemption or payment
Sale	§ 280.33 cures misrecitals in deed or certificates & all other defects except: 1) property exempt, 2) taxes paid, 3) court had no jurisdiction, 4) judgment satisfied, 5) no notice of sale & 6) sold to wrong bidder
Expiration of Redemption (filing of proof of service of auditor's notice of expiration of redemption or auditor's certificate of forfeiture)	§ 281.04 extends period for redemption indefinitely for persons under disability
1 year	§ 284.28(1)(b) bars all attacks on titles for jurisdictional defects except for persons in possession
3 years	§ 280.34 bars invalidation of sale except for exemption & payment, & provides claims based on these defects may be brought at any time

**REMAINING BASES
FOR ATTACK
FOR 40 YEARS**

1. Fatal, non-jurisdictional defects arising after sale
2. Exemption or payment
3. Persons under a disability
4. Persons in possession
5. Claims which may not constitutionally be barred

AND SOURCE OF TITLE

2. Assignee of the state before expiration of redemption (state assignment certificate)

§ 279.14 cures errors in list, assessment, levy, publication, amount of tax & identity of owner, but not exemption or payment

§ 279.14 voids judgment for exemption or payment

§ 280.33 cures misrecitals in deed or certificates & all other defects except 1) property exempt, 2) taxes paid, 3) court had no jurisdiction, 4) judgment satisfied, 5) no notice of sale & 6) sale to wrong bidder

§ 281.04 extends period for redemption indefinitely for persons under disability

§ 284.28 (1)(b) bars all attacks on titles for jurisdictional defects except for persons in possession

§ 280.34 bars invalidation of sale except for exemption & payment & provides claims based on these defects may be brought at any time

3. State & successors in interest (land retained by state for 3 years & declared state's)

§ 279.14 cures errors in list, assessment, levy, publication, amount of tax & identity of owner, but not exemption or payment

§ 279.14 voids judgment for exemption or payment

§ 280.33 cures misrecitals in deed or certificates & all other defects except 1) property exempt, 2) taxes paid, 3) court had no jurisdiction, 4) judgment satisfied, 5) no notice of sale & 6) sale to wrong bidder

§ 281.04 extends period for redemption indefinitely for persons under disability

§ 284.22 cures all defects except those fatal to the jurisdiction of the authorities or causing substantial prejudice to the owner

§ 284.09 bars all attacks except for 1) jurisdictional defects, 2) exemption, 3) payment, 4) possession & 5) disability

§ 284.28 (1)(a) bars all attacks based on jurisdictional defects except for persons in possession

§ 280.34 bars invalidation of sale except for exemption & payment & provides claims based on these defects may be brought at any time

1. Fatal, non-jurisdictional defects arising after sale
2. Exemption or payment
3. Persons under a disability
4. Persons in possession
5. Claims which may not constitutionally be barred

1. Exemption or payment
2. Persons under a disability
3. Persons in possession
4. Claims which may not constitutionally be barred

As the chart illustrates, the problems inherent in the current statutory procedure are: 1) the failure of the courts and Legislature to adequately define the term "jurisdictional defects" and to clarify the exact defects that are cured or limited by the present statutory scheme,¹⁶⁸ 2) the unique position held by owners of tax-forfeited land that had been exempt from taxation or on which the taxes had been paid,¹⁶⁹ 3) the extended periods of redemption and the suspension of the statutes of limitation for persons under a disability,¹⁷⁰ and 4) the statutory and constitutional rights of owners in possession.¹⁷¹ In addition to the gaps apparent on the face of the statutory scheme, there exists some case law intimating the existence of another class of defects, which does not really fit into the traditional jurisdictional-non-jurisdictional dichotomy, and which will also be held fatal to titles, notwithstanding the curative acts and statutes of limitation, if there is some paramount public policy that would be served by the voiding of title.¹⁷²

The rationale for the adoption of Title Standard 45's caveat¹⁷³ is obvious. Tax titles 1 year or even 3 years after the expiration of the period of redemption cannot be considered marketable. They remain vulnerable, and regardless of the likelihood that actions will be brought, caution is dictated by the philosophy of title examination. The title standards alone cannot declare the marketability of tax titles;¹⁷⁴ what is required is legislative intervention.

III. FILLING THE GAPS IN THE STATUTORY SCHEME

The failure of the earlier attempts of the Legislature to assure the marketability of tax titles dictates a cautious approach to revision. The natural complexity of the subject matter, the statutory nature of the proceedings, the vagaries of the current scheme, and the historic reluctance of the courts to aid in a forfeiture make careful drafting both more difficult and more important.

168. See notes 176 to 204 *infra* and accompanying text.

169. See notes 273 to 284 *infra* and accompanying text.

170. See notes 285 to 292 *infra* and accompanying text.

171. See notes 293 to 295 *infra* and accompanying text.

172. See *Johantgen v. Bank*, 258 Minn. 88, 102 N.W.2d 822 (1960), where the court held void a real estate tax assignment certificate one of the holders of which was a person connected with the administration of forfeiture proceedings, even though the holder's status did not qualify under MINN. STAT. § 280.33 (1971) as a ground for invalidation of the sale. The court stated that such a result was the only means by which it could enforce the policy proscribing the purchase of tax-forfeited land by such individuals. See also Note, *The Current Status of Tax Titles: Remedial Legislation v. Due Process*, 62 HARV. L. REV. 93, 97 n.20 (1948), where it is suggested that the courts in determining the validity of tax sale proceedings on occasion have also been influenced by the price paid for the land. For an illustration of such a view, see *Johnson v. McAbey*, 350 Mo. 1086, 169 S.W.2d 932 (1943) (sale for \$79.05 of land worth \$1,000 to \$2,000 so inadequate as to amount to "fraud").

173. The caveat is set out in full at note 31 *supra*.

174. But see the strong consideration given to such standards by the Iowa Supreme Court in *Simeon v. City of Sioux City*, 252 Iowa 779, 108 N.W.2d 506 (1961) and *Tesdell v. Hanes*, 248 Iowa 742, 82 N.W.2d 119 (1957).

To determine whether the goal of making tax titles marketable can be achieved through legislation, it is first necessary to examine the gaps in the present scheme, determine the reasons for their existence and the placement of their boundaries, and inquire into the limitations which constitutional considerations would impose upon remedial legislation. Then, and only then, would it be possible to delimit a manner in which the marketability of tax titles might be assured.¹⁷⁵

*A. Jurisdictional Defects and Defects Fatal
to the Jurisdiction of the Authorities*

For pedagogical purposes, the vast number of potential defects in tax forfeiture proceedings are usually classified as "jurisdictional" or "procedural."¹⁷⁶ The former create a vested right to void the forfeiture;¹⁷⁷ the latter do not.¹⁷⁸ When used in this sense, the term "jurisdictional defect" is synonymous with "fatal defect," but in reality there may exist many fatal defects which in a strict legal sense would not be considered jurisdictional.¹⁷⁹ While procedural defects may be simply corrected by curative legislation,¹⁸⁰ fatal defects, since they create a vested right, are never technically "cured,"¹⁸¹ though actions based on them may be barred by statutes of limitation.¹⁸²

Whether in a pedagogical sense a particular defect is "jurisdictional" or "procedural" is often difficult to ascertain. A defect may be decreed to be jurisdictional because of the requirements of due process,¹⁸³ legislative declaration,¹⁸⁴ or because of the belief of a reviewing court that a particular procedure is essential to the statutory scheme.¹⁸⁵

Because of the presence of certain language in the statutory scheme,¹⁸⁶ the

175. See note 16 *supra*.

176. See Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY MT. L. REV. 181, 188 (1962).

177. *Smith v. Kipp*, 49 Minn. 119, 125, 51 N.W. 656, 657 (1892); *Kipp v. Fernhold*, 37 Minn. 132, 134, 33 N.W. 697, 697 (1887).

178. *Coffin v. Estes*, 32 Minn. 367, 20 N.W. 357 (1884); *Kipp v. Dawson*, 31 Minn. 373, 380-82, 17 N.W. 961, 963-65, 18 N.W. 96 (1884).

179. See the discussion of this point in *State v. Minnesota Power & Light Co.*, 246 Minn. 235, 250-51, 75 N.W.2d 386, 396-97 (1956). The court recognizes that there may be, and often are, fatal irregularities occurring after judgment which thus do not go to the question of the court's jurisdiction.

180. The basic theory behind curative acts is that the legislature may withdraw retroactively requirements the need for which it might have dispensed with in advance. See *Wistar v. Foster*, 46 Minn. 484, 486, 49 N.W. 247, 248 (1891). See generally H. BLACK, *TAX TITLES* § 484 (2d ed. 1893); R. PATTON & C. PATTON, *LAND TITLES* § 83 (2d ed. 1957).

181. See note 234 *infra* and accompanying text.

182. See notes 224 to 272 *infra* and accompanying text.

183. *Foster v. Berg*, 123 Minn. 180, 143 N.W. 355 (1913).

184. *State v. Whiteside*, 236 Minn. 142, 52 N.W.2d 127 (1952).

185. *Johantgen v. Bank*, 258 Minn. 88, 102 N.W.2d 822 (1960). Though the dichotomy is presented as pedagogical, the classification a defect falls into will have practical significance since curative acts do not operate upon "jurisdictional" defects.

186. See MINN. STAT. §§ 284.09 ("jurisdictional defects"), .22 ("defects fatal to the juris-

Minnesota Supreme Court has not strictly adhered to the "jurisdictional-procedural" dichotomy. Instead, it appears to have classified defects as being either fatal or non-fatal, and then to have further subdivided the fatal category into those which are "jurisdictional" and those which are "fatal to the jurisdiction of the authorities." This distinction was first developed by the court in *State v. Minnesota Light & Power Co.*¹⁸⁷ Searching for clues of legislative intent while interpreting the exception to Section 284.09 for "jurisdictional defects in the proceedings," the court looked to the curative act applicable to claims against the state and its successors, Section 284.22, which excepts defects "fatal to the jurisdiction of the authorities in the proceedings."¹⁸⁸ The court stated that it believed that the term "jurisdiction of the authorities" referred to the power of the authorities involved in the proceedings to carry out their statutory duties¹⁸⁹ and that it extended to acts necessary to establish the court's jurisdiction to enter judgment as well as to acts occurring subsequent to judgment which affect the power of public tax officials to act.¹⁹⁰ When viewed in this light, the court's jurisdiction to enter judgment becomes merely a subclass of the total jurisdiction of the authorities to carry out the tax forfeiture. The court then reasoned that, having used a different phrase in Section 284.09, the Legislature must have intended a different meaning, and it determined that the term "jurisdictional defects" must have referred to jurisdiction in the judicial sense¹⁹¹ and that it included only those defects which would deprive a court of its jurisdiction over the subject matter.¹⁹²

As a result, it is the term "fatal to the jurisdiction of the authorities" and not "jurisdictional defects" which is more nearly synonymous with the term "fatal defect." Defects occurring before judgment may both destroy the jurisdiction of the authorities and deprive the court of its jurisdiction to enter judgment, but defects occurring after judgment cannot be jurisdictional in the judicial sense, since the jurisdiction of the court has already been validly established and fully exercised.¹⁹³ Post-judgment errors, however, may deprive other involved authorities of their jurisdiction to carry out the forfeiture proceedings and can thus be fatal.¹⁹⁴

To further complicate matters, *Johantgen v. Bank*¹⁹⁵ may offer some authority for the proposition that there exists even a third category of defects

diction of the authorities") (1971).

187. 246 Minn. 235, 75 N.W.2d 386 (1956).

188. *Id.* at 251, 75 N.W.2d at 397.

189. *Id.*

190. *Id.*

191. *Id.* at 252, 75 N.W.2d at 397.

192. *Id.*

193. While this may seem obvious, MINN. STAT. § 284.09 (1971) which uses the phrase "jurisdictional defects" is not limited to attacks on the judgment alone but reaches all claims and defenses regarding the status of the title and is thus confusing.

194. *See, e.g.,* McHardy v. State, 215 Minn. 132, 9 N.W.2d 427 (1943).

195. 258 Minn. 88, 102 N.W.2d 822 (1960).

which are fatal and which void the proceedings without regard to whether they deprive either the authorities or the court of the power to act. In order to effectuate the policy of a statute¹⁹⁶ prohibiting certain officials involved in the administration of forfeiture proceedings from purchasing land at tax sale, the court held it necessary in *Johantgen* to void an assignment certificate which did not name all purchasers.¹⁹⁷ It is arguable that such a defect was not within the scope of either Section 284.09 or Section 284.28 and that *Johantgen* therefore created a new class of fatal defects against which the statutes of limitation would not run. Section 284.09 acts to bar all causes of action or defenses respecting lands forfeited to the state but it excepts certain claims from the operation of the statute.¹⁹⁸ The concern, in light of *Johantgen*, is that this list of exceptions would not be exclusive and that a court seeking a way to avoid a forfeiture which it felt was harsh and inequitable might merely claim that other legislatively declared expressions of public policy are additional exceptions to Section 284.09 and not within the scope of Section 284.28 because the failure to comply with them does not give rise to jurisdictional defects. Certain of these judicially-created exceptions to the 1 year statutes of limitation would be limited by Section 280.34,¹⁹⁹ but others would continue for 40 years.²⁰⁰

While the theoretical existence of this judicially-created class of fatal defects might be viewed by many as a contortion of the canons of statutory construction, it does point out the basic flaw in the current statutory scheme. Where the Legislature has over the years apparently changed its attitude toward tax titles²⁰¹ and attempted to make them marketable by a patchwork statutory scheme,²⁰² the possibility that some defects will slip through the cracks in some unknown manner continues to cause cautious title examiners to refuse to pass titles based on tax deeds.²⁰³ An unmistakable expression of

196. MINN. STAT. § 280.05 (1971).

197. 258 Minn. at 90, 102 N.W.2d at 823-24.

198. Exempt are claims and defenses by persons in possession or under a disability, and those based on jurisdictional defects, or exemption or payment. MINN. STAT. § 284.09 (1971).

199. By its very terms, MINN. STAT. § 280.34 (1971) only applies to actions to set aside or invalidate a sale, and thus does not bar claims based on post-sale defects, such as those during the redemption period.

200. See MINN. STAT. § 541.023 (1971).

201. Compare, e.g., Minn. Laws 1939 ch. 341, § 3 (codified at MINN. STAT. § 284.09 (1971)) with Minn. Laws 1963 ch. 810, §§ 1-5 (codified at MINN. STAT. § 284.28 (1971)) and Minn. Laws 1969 ch. 373, § 1 (codified at MINN. STAT. § 284.28 (1971)).

202. See notes 151 to 174 *supra* and accompanying text.

203. The non-specific nature of this fear makes it all the more difficult to dispel. The attitude is typified by a letter from a Wisconsin attorney quoted in Note, *The Current Status of Tax Titles: Remedial Legislation v. Due Process*, 62 HARV. L. REV. 93 (1948):

Title examiners in this neighborhood have become pretty strict and technical, and I may say often pretty unrealistic, and each one hesitates to pass a title of this sort for a purchaser, even though as a practical matter there is no likelihood of an adverse claim being made, for fear that when his client comes to sell, the next examiner will raise the objection. *Id.* at 103 n.54.

legislative intent to make tax titles marketable along with a comprehensive and clearly drafted statute is necessary to convince the courts that public policy now requires protection of the once ignominious tax title.²⁰⁴

1. "Jurisdictional" in Context: The Effects of the Ambiguity of the Term on the Marketability of the Tax Titles

It would appear that the interpretation of "jurisdictional defects" applicable to Section 284.09 after *Minnesota Power & Light* would be applicable to the same term in Section 284.28, so that the new statute would only bar claims based upon defects which are jurisdictional in the judicial sense, allowing the plaintiff to pursue claims which are based on other fatal defects.²⁰⁵ The Legislature in enacting Section 284.28 may have been unaware of the rule of *Minnesota Power & Light*, or it may have been under the misapprehension that pre-existing curative or limiting legislation had barred all claims except those based on defects fatal to the court's jurisdiction. The statutory scheme is sufficiently confusing that the latter error is a natural one. If Section 284.22 cures all defects except those fatal to the jurisdiction of the authorities and those causing substantial prejudice to the owner, and Section 284.09 places a 1 year limitation all all actions based on any defect which is not fatal to the jurisdiction of the court unless it involves exemption, payment, possession, or disability, then Section 284.28, by barring claims based on defects fatal to the jurisdiction of the court, would appear to eliminate nearly all remaining claims.²⁰⁶

The flaw in that logic is that Sections 284.22 and 284.09 appear not to apply to claims adverse to the title of a person who purchased forfeited land at a tax sale or who took an assignment of the state's interest in land bid in for the state prior to the expiration of redemption. Section 284.22 speaks only of "the title of the state," while Section 284.09 refers to "any claims adverse to the state, or its successor in interest." While one might argue that these phrases are intended to apply to any person taking his title by means of the state-created forfeiture system, that conclusion requires a liberal construction of the statutory language, which would appear a rather insubstantial basis for titles to real property.

204. See notes 317 to 320 *infra*.

205. Compare MINN. STAT. § 284.09(1) with § 284.28, subd. 1(a), (b) (1971). The language is virtually identical. The former applies to all cases except those "where the alleged forfeiture is invalid because of jurisdictional defects in the proceedings." *Id.* § 284.09(1). The latter purports to bar claims and defenses based upon causes of action and defenses "claiming that the forfeiture to the state of any land for nonpayment of taxes is invalid" or "claiming that any auditor's certificate of sale or state assignment certificate arising from the nonpayment of taxes on a parcel of land is invalid because of any jurisdictional defect." *Id.* § 284.28, subd. 1(a), (b).

206. It would seem logical to assume that one statute barring all claims except those based on defects fatal to the jurisdiction of the court and another barring all claims based on defects fatal to the jurisdiction of the court, would, when taken together, bar all possible claims. There would appear to be no claim which could escape categorization as either fatal or not fatal to the jurisdiction of the court.

A more literal reading of the statutory language compels a more cautious conclusion. Particularly difficult to construe away is the reference in Section 284.09 to the county auditor's certificate of forfeiture,²⁰⁷ a document which exists only where land is bid in for the state at the sale and not redeemed or assigned prior to the expiration of the period for redemption.²⁰⁸ Since the statute, by its express terms, begins to run upon the filing of the certificate, it is difficult to see how it could run against claims adverse to the title of land with regard to which no such document was ever filed. To construe the reference to the county auditor's certificate of forfeiture to include proof of service of the auditor's notice of expiration of the period for redemption²⁰⁹ would appear so inconsistent with recognized principles of statutory construction as to be beyond the pale.²¹⁰ This conclusion is buttressed by the language

207. MINN. STAT. § 284.09 (1971) purports to bar all claims "unless such cause of action or defense is asserted in an action commenced within one year after the filing of the county auditor's certificate of forfeiture, as provided by section 281.23, subdivision 8, and acts supplemental thereto, or by any other law hereafter enacted providing for the filing and recording of such a certificate."

208. *See id.* § 281.23 (1971). This section provides the mechanism by which the county auditor is to give notice of expiration of the period of redemption for parcels of land "bid in for the state at any tax judgment sale" and not "sold or assigned to an actual purchaser by 60 days before the expiration of the stated period of redemption." *Id.* § 281.23, subd. 1. After the period for redemption has expired the auditor must:

[E]xecute a certificate describing the lands, specifying the tax judgment sale at which the same were bid in for the state, and stating that the time for redemption thereof has expired after notice given as provided by law and that absolute title thereto has vested in the State of Minnesota. *Id.* § 281.23, subd. 8.

Provision is also made for recording the certificate in the office of the registrar of titles or register of deeds and the filing of a copy at the office of the county auditor. *Id.* In the case of parcels of land sold to an actual purchaser, the county auditor gives the notice of expiration of redemption, but no such certificate is recorded. Instead, the proof of service of the notice of expiration of redemption which is filed with the auditor is the relevant event. *See id.* §§ 281.13, 21.

209. Since there is no certificate in the case of property sold or assigned to an actual purchaser, the date of the filing of the proof of service, which serves as the date upon which the 60 day period for redemption after the notice of expiration begins to run, is the only date which could be used to give effect to the statute of limitations. Unless the statute is construed to include some other date within its language, the provision would be meaningless. *See id.* §§ 281.21, 284.09.

210. It would seem that no construction at all would be permitted here, since the statutory language is clear and unambiguous. MINN. STAT. § 645.16 (1971) provides in pertinent part: "When the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." The courts have construed this provision to forbid construction of a statute that is unambiguous on its face. *See, e.g.,* Minneapolis-St. Paul Sanitary Dist. v. City of St. Paul, 240 Minn. 434, 61 N.W.2d 533 (1953); *Martinka v. Hoffmann*, 214 Minn. 346, 9 N.W.2d 13 (1943); *Minnesota & Pac. R.R. v. Sibley*, 2 Minn. 13 (Gil. 1) (1858).

The Minnesota court has never had an opportunity to interpret the language of the statute in cases where there has not been an auditor's certificate. To date, the only cases involving the interpretation of the statute have involved land bid in for the state which had not been assigned prior to redemption. *See* *Nygren v. Patrin*, 288 Minn. 54, 179 N.W.2d 76 (1970); *State v. Minnesota Power & Light Co.*, 246 Minn. 235, 75 N.W.2d 386 (1956); *State v. Whiteside*, 236 Minn. 142, 52 N.W.2d 127 (1952).

of other statutes of limitation which begin to run upon the filing of whichever document is appropriate.²¹¹ Since the Legislature has on occasion referred to both documents, it would appear that when it refers to only one it does not intend to include the other.

Although Section 284.22 contains no such explicit cross-reference, its language is equally limiting.²¹² The title of an individual purchaser at sale or an assignee of the state's interest prior to the expiration of redemption would not commonly be termed "the title of the state." It is arguable that in those cases the state never held "title" to the tax-forfeited property since it held only bare legal title, subject to the equity of redemption in the assessed party, rather than absolute title, in which legal and equitable title merge.²¹³ That rather theoretical argument aside, it is difficult to see how a title can be referred to as the title of the state at a point in time at which it has indisputably passed to another. In many cases the claim will be based on a defect which arose subsequent to the time that legal title passed from the state to the individual purchaser or assignee, and thus it is only the title of that latter party and not the title once held by the state which will be at issue in such a case.²¹⁴ The applicability of the statute to these claims is doubtful.²¹⁵

The strict interpretation would be consistent with the distinction which runs throughout the statutory scheme between the state and its successors and individual purchasers and assignees prior to expiration of redemption.²¹⁶

211. *E.g.*, MINN. STAT. § 284.28, subd. 1(a), (b), 2, 3 (1971).

212. MINN. STAT. § 284.22 (1971) provides:

The title of the state to land forfeited for delinquent taxes shall not be held invalid in any action or proceeding by reason of any failure, omission, error, or defect in the proceedings respecting the taxation of such land or the forfeiture thereof unless the court shall determine that such failure, omission, error, or defect was fatal to the jurisdiction of the authorities in the proceedings, or that the rights of the owner or other party in interest were substantially prejudiced. All provisions of law in that behalf shall be construed liberally in favor of the state and its officers and agents. The burden of proving that title of the state, or its successor in interest, is invalid in any such case shall rest upon the party so asserting.

213. Land bid in for the state prior to expiration of redemption or sale to an actual purchaser is held in trust for the respective taxing districts. Absolute title does not vest in the state until the period of redemption has expired. *See Fortman v. City of Minneapolis*, 212 Minn. 340, 4 N.W.2d 349 (1942); *State ex rel. Beeth v. Monick*, 201 Minn. 635, 277 N.W. 211 (1938); MINN. STAT. §§ 281.18, .25 (1971); *OP. MINN. ATT'Y GEN.* 405 (1938).

214. If, for example, the defect occurred in the redemption process after the land had been bid in for the state and assigned, only the title of the assignee, not that of the state, would be at issue. *Cf.* authorities collected note 213 *supra*.

215. It would appear that the statutory construction principles discussed with reference to MINN. STAT. § 284.09 would be equally applicable here. *See* note 210 *supra* and accompanying text. Again, the Minnesota court has been without opportunity to consider the question. All cases litigated under this statute have concerned the title of the state or a purchaser from it after expiration of redemption rather than a purchaser at sale or an assignee. *See State v. Minnesota Power & Light Co.*, 246 Minn. 235, 75 N.W.2d 386 (1956); *State v. Whiteside*, 236 Minn. 142, 52 N.W.2d 127 (1952); *State v. Child*, 235 Minn. 99, 49 N.W.2d 638 (1951); *McHardy v. State*, 215 Minn. 132, 9 N.W.2d 427 (1943).

216. In the past the Minnesota court has interpreted the statutory scheme to produce results similar to those posited here. In *State ex rel. Western Land Ass'n v. Smith*, 36 Minn. 456, 32

The Legislature, for whatever policy reason, has made a purposeful classification between the two types of title holder and may have chosen to treat them differently in many respects, including, one may infer, the applicable statutes of limitation and curative acts.

Original purchasers and assignees are afforded no separate statutory protection similar to that offered by Sections 284.22 and 284.09. Instead, their rights are governed by Section 280.34, which places a 3-year limit on actions questioning the validity of the sale. That statute does not refer to jurisdiction, but purports to bar all actions except those based on exemption or payment.²¹⁷

When taken together, Sections 284.28 and 280.34 do not bar all claims based on fatal defects. First, it is unclear whether the general language is adequate to include defects which are fatal to the jurisdiction of the authorities.²¹⁸ There is some case law which indicates that a statute of limitations will not be construed to run against fatal defects unless the statute expressly provides that it applies to such claims.²¹⁹ Arguably, then, the title of an original purchaser or assignee might be vulnerable to all claims based on fatal defects, unless those defects deprived the court of its jurisdiction.

Even if the statute does run against defects fatal to the jurisdiction of the authorities, its scope is limited to defects arising prior to or during the sale, and thus defects arising at a later point in the proceedings and fatal to the jurisdiction of the authorities will give rise to claims until 40 years have elapsed.²²⁰ An example of this latter class would be a defect in the notice of expiration of redemption.²²¹

Despite the fact that most claims based on defects fatal to the jurisdiction

N.W. 174 (1887), the court interpreted an amendment to the statutes to extend the time for redemption of land in which the state or its successors had taken an interest, but not to extend the time for redemption where a purchaser at sale or assignee had acquired the property. The result of this decision was explained in *State v. Aitkin County Farm Land Co.*, 204 Minn. 495, 284 N.W. 63 (1939) thus:

The resulting decision was that as to "persons holding tax certificates," as assignees of the state, before the period of forfeiture had expired, the statute respecting notice applied, but it was held inapplicable to an assignee or grantee who acquired such interest after forfeiture, in which case, by the terms of the statute, the conveyance became absolute and without right of redemption. *Id.* at 512, 284 N.W. at 71.

It is not unreasonable to hypothesize that the present statutes could be similarly construed, treating the different classes of holders of tax-forfeited land in entirely different fashion.

217. MINN. STAT. § 280.34 (1971) provides:

No sale shall be set aside or held invalid unless the action in which the validity of the sale is called in question be brought, or the defense alleging its invalidity be interposed, within three years after expiration of the time for redemption, except that an action to set aside or cancel such sale on the ground that the parcel was exempt or that the tax was paid before judgment or sale may be commenced, or a defense alleging the invalidity of the sale on such ground may be interposed, at any time.

218. See notes 176 to 204 *supra* and accompanying text.

219. See notes 226 to 229 *infra* and accompanying text.

220. See MINN. STAT. § 541.023 (1971).

221. For examples of the manner in which such defects may arise, see text accompanying notes 106 to 140 *supra*.

of the authorities or the jurisdiction of the court will be barred within 3 years after expiration of redemption,²²² sufficient potential for attack remains to fetter the marketability of tax titles.²²³ Moreover, the necessity of applying numerous statutes of limitation to determine which defects remain is a sufficiently cumbersome process to create its own strong argument for statutory reform.

2. *Barring Claims Based on Fatal Defects: The Constitutional Issue*

The caveat to Title Standard 45, as well as the resistance to the adoption of a comprehensive short-term statute of limitations, may arise from fears that due process prohibits barring claims based on certain fatal defects. Some concern has been expressed that Section 284.28 may be unconstitutional on those grounds.²²⁴ The authorities are split as to whether a statute of limitations will bar actions and defenses based upon defects that have rendered the forfeiture procedure void.²²⁵ The Minnesota court's position on this issue remains unclear.

Early Minnesota decisions treated any deed produced by a forfeiture proceeding containing fatal errors as void on its face, the court holding that the statute of limitations would not begin to run upon the recording of such a deed, whether the defect appeared on the face of the deed or aliunde.²²⁶ In 1909, the last apparent application of the rule, the court agreed that it had reduced the reach of the statute of limitations to claims based upon technical errors and defects, but chose not to overrule its prior decisions.²²⁷

Since this early line of cases has never been expressly overruled, it should not be ignored today. Nevertheless, these cases may be distinguishable. None of them expressly holds that a statute of limitations barring claims based on "jurisdictional" defects would violate due process. Instead, by holding that the statutes of limitation did not run against certain defects, the court resolved the cases without reaching the constitutional issue.²²⁸ Nor is there any indication that the court limited the application of the statutes to avoid

222. See MINN. STAT. § 280.34 (1971).

223. See note 16 *supra* and accompanying text.

224. See letter from Charles L. Horn, Jr., attorney-at-law, to Philip J. Olfelt, Special Assistant Attorney General, June 7, 1972, on file at William Mitchell Law Review Office; letter from R.J. Whaling, Itasca County Auditor, to Philip J. Olfelt, Special Assistant Attorney General, March 29, 1969, on file at William Mitchell Law Review Office.

225. 4 T. COOLEY, *THE LAW OF TAXATION* §§ 1510, 1515-46 (4th ed. 1924); Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY MT. L. REV. 181, 186-89 (1962); Note, *The Current Status of Tax Titles: Remedial Legislation v. Due Process*, 64 HARV. L. REV. 93, 98-99 (1948).

226. *Babcock v. Johnson*, 108 Minn. 217, 121 N.W. 909 (1909); *Holmes v. Loughren*, 97 Minn. 83, 105 N.W. 558 (1906); *Whitney v. Wegler*, 54 Minn. 235, 55 N.W. 927 (1893) (dictum); *Smith v. Kipp*, 49 Minn. 119, 51 N.W. 656 (1892); *Knight v. Alexander*, 38 Minn. 384, 37 N.W. 796 (1888); *Kipp v. Fernhold*, 37 Minn. 132, 33 N.W. 697 (1887); *Feller v. Clark*, 36 Minn. 338, 31 N.W. 175 (1887); *Sheehy v. Hinds*, 27 Minn. 259, 6 N.W. 781 (1880).

227. *Babcock v. Johnson*, 108 Minn. 217, 220, 121 N.W. 909, 910-11 (1909).

228. *E.g.*, *Holmes v. Loughren*, 97 Minn. 83, 105 N.W. 558 (1906), where the court stated:

striking them down. On the contrary, dicta in some of these cases imply that the court was simply attempting to construe the statutes so as to effectuate legislative intent.²²⁹

Even if the court would once have held a statute which barred claims based on fatal defects repugnant to due process, the better reasoned rule is that a statute of limitations may protect from attack even a tax title alleged to be absolutely void. The leading authority for this proposition is another early decision. At the turn of the century, the New York Court of Appeals held in *Meigs v. Roberts*²³⁰ that a statute of limitations was effective to bar a claim based on a "jurisdictional defect." Distinguishing statutes of limitation from curative acts, the court concluded that the former could not correct "jurisdictional" defects, but that the latter will bar any right "however high the source" if it allows a reasonable period of time for enforcement of the right.²³¹

Relying heavily on *Meigs*, the United States Supreme Court, in *Saranac Land & Timber Co. v. Roberts*,²³² reached the same conclusion, squarely holding that a statute of limitations could bar claims based on fatal defects. *Saranac*, like *Meigs* before it, was based on strict legal reasoning and precedent and did not discuss the policy underlying the legislative choice to bar these claims. The Supreme Court reasoned that the police power is sufficiently broad to permit a state legislature to enact any statute which does not violate a specific constitutional provision.²³³ Since a fatal defect creates a vested property right, curative legislation runs afoul of the constitution if it attempts to retroactively abridge that right.²³⁴ Since statutes of limitation, on the other hand, are not retrospective, they do not result in an impermissible

If statutes of this kind are to be construed as applicable to any action, no matter what its form may be, in which title to the property will be finally and conclusively determined by the judgment, would they be constitutional? [citations omitted]

This is a serious question, which we do not decide, for the reason that, no matter whether the statute . . . would be valid or not, it cannot be invoked in this case. A statute of limitations is not put in operation in favor of a party claiming under a tax sale, unless there is a valid tax judgment behind it. *Id.* at 88, 105 N.W. at 559.

229. See *Feller v. Clark*, 36 Minn. 338, 339, 31 N.W. 175, 175 (1887). Further support for this view might be gleaned from the dissent of Gilfillan, C.J., in *Sanborn v. Cooper*, 31 Minn. 307, 310, 17 N.W. 856, 857 (1883), where the chief justice points out that when the court was presented with the same issue in the context of an executor's or administrator's sale several years earlier in *Spencer v. Sheehan*, 19 Minn. 338 (Gil. 292) (1873), it clearly did not require the defendant to prove the validity of the sale to avail himself of the statute of limitations.

230. 162 N.Y. 371, 56 N.E. 838 (1900).

231. *Id.* at 378, 56 N.E. at 840.

232. 177 U.S. 318 (1900).

233. *Id.* at 324-25.

234. *Wichelman v. Messner*, 250 Minn. 88, 107, 83 N.W.2d 800, 816 (1957); *Snortum v. Snortum*, 155 Minn. 230, 193 N.W. 304 (1923); *Peet v. City of East Grand Forks*, 101 Minn. 523, 112 N.W. 1005 (1907); *Olson v. Cash*, 98 Minn. 4, 107 N.W. 557 (1906); *McCord v. Sullivan*, 85 Minn. 344, 88 N.W. 989 (1902); *Thompson v. Morgan*, 6 Minn. 292 (Gil. 199) (1861). See generally H. BLACK, *TAX TITLES* § 484 (2d ed. 1893); Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY MT. L. REV. 181, 189-91 (1962); Comment, *Curative Tax Legislation*, 32 ILL. L. REV. 456 (1957). Since no person has a vested right in a cause of action based on mere irregularities in judicial proceedings which do not

taking, but fall within the broad scope of the police power.²³⁵ A statute of limitations barring claims based on fatal defects, the Supreme Court declared in *Saranac*, is constitutionally equivalent to any other statute of limitations.²³⁶

Since *Saranac*, the emerging rule is that these statutes may bar all claims, including those based upon deprivations of procedural due process in the forfeiture proceeding.²³⁷ Some courts, however, continue to hold the contrary view,²³⁸ and several states have embraced the intermediate position that a statute of limitations runs against fatal defects only if the purchaser is in adverse possession.²³⁹

Although the Minnesota Supreme Court has never addressed the issue squarely, it did cite *Meigs* with approval in upholding Minnesota's 40-year law, lending credence to the theory that it would permit the Legislature to bar all attacks on tax titles with an appropriate statute of limitations.²⁴⁰ The policy considerations implicit in the earlier cases and explicit in the later ones support such a conclusion. As the *Saranac* court pointed out, there is little reason to distinguish between these and any other statutes of limitation. If anything, the state's interest in barring stale claims is stronger in this area than in many others.²⁴¹

The absence of effective statutes of limitation would deprive land titles of

affect his substantial equities, however, curative acts extending to such mere irregularities, and not to matters of jurisdiction, cannot be attacked on constitutional grounds. *Farnsworth Loan & Realty Co. v. Commonwealth Title Ins. & Trust Co.*, 84 Minn. 62, 86 N.W. 877 (1901).

235. *Wichelman v. Messner*, 250 Minn. 88, 108, 83 N.W.2d 800, 817 (1957); P. BAYSE, *CLEARING LAND TITLES* § 206 (2d ed. 1970).

236. 177 U.S. at 327-28.

237. *E.g.*, *Davault v. Essig*, 80 Cal. App. 2d 970, 183 P.2d 39 (Dist. Ct. App. 1947), *cert. denied*, 333 U.S. 843 (1948); *Swanson v. Pontralo*, 238 Iowa 693, 27 N.W.2d 21 (1947); *Shell Oil Co. v. Board of County Comm'rs*, 171 Kan. 159, 231 P.2d 220 (1951), *aff'd*, 171 Kan. 595, 237 P.2d 257, *dismissed for want of substantial federal question*, 342 U.S. 938 (1952); *Hood River County v. Dabney*, 246 Ore. 14, 423 P.2d 954 (1967); *Shaffer v. Mareve Oil Corp.*, ___ W. Va. ___, 204 S.E.2d 404 (1974).

238. *E.g.*, *Gradison v. Logan*, 135 Ind. App. 185, 190 N.E.2d 29 (1963).

239. *See Wells v. Thomas*, 78 So. 2d 378 (Fla. 1954). For a legislative application of this rule, see *WIS. STAT. ANN.* § 75.30 (1957).

240. *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957). In *Wichelman*, the court stated: "such a statute [of limitations] will bar any right, however high the source from which it may be deduced. . . ." *Id.* at 108, 83 N.W.2d at 817, *quoting Meigs v. Roberts*, 162 N.Y. 371, 378, 56 N.E. 838, 840 (1900). *See P. BAYSE, CLEARING LAND TITLES* § 206 (2d ed. 1970); R. PATTON & C. PATTON, *LAND TITLES* § 84 (2d ed. 1957).

241. What is involved, essentially, is the collection of the state's life-blood—taxes. This interest has shown itself throughout tax forfeiture due process standards, such as that allowing for service by publication. *See County of Redwood v. Winona & St. Peter Land Co.*, 40 Minn. 512, 41 N.W. 465, 42 N.W. 473 (1889), *aff'd sub nom. Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895). As explained by the Missouri Supreme Court in *Spitcaufsky v. Hatten*, 353 Mo. 94, 182 S.W.2d 86 (1944):

Due process is a very different thing in the assessment and collection of public taxes from the same right as applied to litigation between parties over private rights. . . . The reasons are apparent. The first is the government's exigent need for the pecuniary support necessary to its existence. The second is the futility of impeding the annual collection of taxes by requiring a predetermination of the titles to many parcels of land . . .

the certainty which underlies much of American conveyancing law.²⁴² Important in the ordinary real property transaction, certainty is vital where tax titles are involved, not only because of their greater vulnerability, but also because of the state's financial interest in marketable tax titles. To subject tax titles to attack for an indefinite period of time protects landowners who breach their duty to pay property taxes when due at the expense of all other taxpayers. The government's failure to comply with the statutory formalities gives the delinquent taxpayer a windfall, and when he fails to take advantage of his right to upset the procedure within a reasonable time, he can hardly be heard to complain that the application of a statute of limitations is fundamentally unfair.²⁴³

All jurisdictions, including those that hold that a statute of limitations may bar all fatal defects, agree that due process is denied unless the statute allows the original owner a reasonable period of time in which to enforce his rights.²⁴⁴ There is no set length of time that the courts have determined to be reasonable, but rather reasonableness will depend upon the nature of the subject and the purpose of the statute. Generally, however, a court will not disturb a legislative finding of reasonableness unless the time permitted for the bringing of an action is so brief as to constitute "a practical denial of justice."²⁴⁵

The reported decisions indicate that a relatively short period of time is sufficient to comply with due process. The Iowa Supreme Court, for example, has upheld²⁴⁶ a statute of limitations which bars all claims against tax titles 2 years and 120 days after recording of the tax deed.²⁴⁷ The statute permits any person in possession to file an affidavit in the office of the county recorder after the 2-year period has run, thereby extinguishing after 120 days, all rights to attack the title.²⁴⁸ The filing is, by statute, the only notice required.²⁴⁹

and the identity and competency of their owners. The third is that taxes are collected periodically under fixed laws which, in a restricted sense, impart their own notice. *Id.* at 111, 182 S.W.2d at 96.

242. One of the expressed purposes of Minnesota's Marketable Title Act is that the marketability of real estate shall not be fettered by ancient records. MINN. STAT. § 541.023, subd. 5 (1971). This same "slate-cleaning" certainty, moreover, is one of the purposes behind Torrens registration. See *In re Juran*, 178 Minn. 55, 58, 226 N.W. 201, 202 (1902).

243. This argument, of course, does not apply to the situation where taxes were paid prior to judgment or the land was exempt, and was taken because of the error of a governmental employee.

244. *Wichelman v. Messner*, 250 Minn. 88, 108, 83 N.W.2d 800, 817 (1957); *Kozisek v. Brigham*, 169 Minn. 57, 210 N.W. 622 (1926); *Bradley v. Norris*, 63 Minn. 156, 65 N.W. 357 (1895); *State v. Messenger*, 27 Minn. 119, 6 N.W. 457 (1880); *Holcombe v. Tracy*, 2 Minn. 241 (Gil. 201) (1858); R. PATTON & C. PATTON, *LAND TITLES* § 84 (2d ed. 1957). See 4 T. COOLEY, *THE LAW OF TAXATION* § 1511 (4th ed. 1924).

245. *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800, 817 (1957); *Hill v. Townley*, 45 Minn. 167, 169, 47 N.W. 653, 654 (1891).

246. *Swanson v. Pontralo*, 238 Iowa 693, 27 N.W.2d 21 (1947).

247. IOWA CODE §§ 448.15, .16 (1971).

248. *Id.*

249. *Id.*

The Iowa decision is in accord with the other available authorities. *Meigs* itself upheld a 2-year statute of limitations. Similarly, a California intermediate appellate court in *Davault v. Essig*²⁵⁰ upheld a 1-year statute of limitations as reasonable and valid when applied to bar an attack on a tax title for "jurisdictional" defects. The only notice required was the recording of the tax deed.²⁵¹ The Oregon Supreme Court upheld²⁵² a 2-year statute of limitations applicable to all claims against tax titles and which allowed persons with pre-existing claims only 6 months after the effective date of the act to enforce them, relying²⁵³ on *Saranac* and *Turner v. New York*.²⁵⁴ The 6-month provision aside, the Oregon statute is much stricter than any currently in effect in Minnesota. In Oregon both the period for redemption²⁵⁵ and the statute of limitations²⁵⁶ run concurrently from the date of judgment, decree of foreclosure, and sale. Moreover, notice of expiration of redemption may be by publication.²⁵⁷

Additional support for the proposition that a short-term statute of limitations applicable to all attacks upon tax titles is constitutionally permissible can be found in Minnesota's title registration system.²⁵⁸ Since both a statute of limitations and a registration proceeding cut off the right to pursue vested rights in real property, the constitutional considerations are the same.

That the Minnesota title registration act is constitutional is well-settled. In *State ex rel. Douglas v. Westfall*,²⁵⁹ the Minnesota court held that the provision barring all attack upon a registered title 60 days after entry of the court's decree did not deprive persons of their property without due process of law in light of the statute's notice provisions and the aggrieved party's right to appeal from the judgment. It is significant that the original owner of tax-forfeited land will have a much longer time after the entry of judgment to mount his attack upon a tax title. At least 5 ½ years will pass after the decree of forfeiture before the statute of limitations even begins to run.²⁶⁰ The analogy between title registration and tax forfeiture is strengthened by the fact that both statutory schemes establish an assurance fund to reimburse the innocent landowner who is deprived of his property through the negligence of a public official.²⁶¹ Access to such a fund surely goes far to mitigate the

250. 80 Cal. App. 2d 970, 183 P.2d 39 (Dist. Ct. App. 1947), *cert. denied*, 333 U.S. 843 (1948).

251. *Id.* at 972, 183 P.2d at 40.

252. *Hood River County v. Dabney*, 246 Ore. 14, 423 P.2d 954 (1967).

253. *Id.* at 30 n.15, 423 P.2d at 962 n.15.

254. 168 U.S. 90 (1897).

255. ORE. REV. STAT. § 312.120 (1971).

256. *Id.* § 312.230.

257. *Id.* § 312.190.

258. MINN. STAT. ch. 508 (1971).

259. 85 Minn. 437, 89 N.W. 175 (1902).

260. See note 142 *supra* and accompanying text.

261. The Minnesota tax title assurance fund appears to be the only such fund in any state tax forfeiture system.

harshness which might otherwise support a claim of deprivation of due process.

Though the authorities do not specifically delimit what constitutes a "reasonable time," it is clear that the courts will not hold a period unreasonably short unless it is so brief as to result in a practical denial of justice.²⁶² Thus a 1-year, or even shorter, statute of limitations seems reasonable in the context of the Minnesota statutory scheme.²⁶³ That scheme provides several forms of notice to apprise the delinquent taxpayer of the fact that he is in danger of losing his land. First, notice of all delinquent taxes is published soon after declaration of delinquency.²⁶⁴ Second, that notice of sale must be published for 3 consecutive weeks prior to sale.²⁶⁵ Finally, notice of expiration of redemption must be served upon the person in whose name the property is assessed if he can be found in the county.²⁶⁶ Service by publication is permitted only if he cannot be found and no one is in possession of the property.²⁶⁷ Because a tax forfeiture proceeding is in rem, each notice is sufficient to bind all persons.²⁶⁸ While the statutes may not always achieve their purpose of giving the original owner actual notice of the impending forfeiture, a 1-year statute of limitations engrafted onto this scheme cannot be called unreasonable when compared to a registration proceeding or to the tax forfeiture schemes approved by the courts of Iowa,²⁶⁹ Oregon,²⁷⁰ New York,²⁷¹ and California.²⁷²

262. *Wichelman v. Messner*, 250 Minn. 88, 108, 83 N.W.2d 800, 817 (1957); *Hill v. Townly*, 45 Minn. 167, 169, 47 N.W. 653, 654 (1891); *State v. Messenger*, 27 Minn. 119, 125, 6 N.W. 457, 459 (1880); *Stine v. Bennett*, 13 Minn. 138 (Gil. 153) (1968); *Holcombe v. Tracy*, 2 Minn. 241 (Gil. 201) (1858).

263. Periods of less than 1 year have been held reasonable in a variety of situations. *See, e.g.*, *Koziesek v. Brigham*, 169 Minn. 57, 210 N.W. 622 (1926) (3 month limit on existing medical malpractice claims after applicable statute of limitations reduced from 6 to 2 years); *Frasch v. City of New Ulm*, 130 Minn. 41, 153 N.W. 121 (1915) (30 day notice for claims against municipalities); *State v. Messenger*, 27 Minn. 119, 6 N.W. 457 (1880) (60 days sufficient for claims arising from establishment of public highway by statute); *Archambau v. Green*, 21 Minn. 520 (1875) (6 months reasonable for mortgage foreclosures); *Stine v. Bennett*, 13 Minn. 138 (Gil. 153) (1868) (4½ months sufficient for enforcement of foreign judgment). Of special significance is the 9-month preserving notice limit held reasonable under the Minnesota Marketable Title Act in *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957), and the 60-day period for Torrens registration claims upheld in *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N.W. 175 (1902).

264. MINN. STAT. § 279.09 (1971).

265. *Id.* § 280.12. *See id.* § 280.001 (Supp. 1973).

266. *Id.* § 281.13 (1971).

267. *Id.*

268. *In re Delinquent Taxes*, 147 Minn. 344, 180 N.W. 240 (1920); *Chauncey v. Wass*, 35 Minn. 1, 30 N.W. 826 (1886).

269. *Swanson v. Pontralo*, 238 Iowa 693, 27 N.W.2d 21 (1947) (2 years plus 120 days).

270. *Hood River County v. Dabney*, 246 Ore. 14, 423 P.2d 954 (1967) (2 years).

271. *Meigs v. Turner*, 162 N.Y. 371, 56 N.E. 838 (1900) (2 years).

272. *Davault v. Essig*, 80 Cal. App. 2d 970, 183 P.2d 39 (1947) (1 year).

B. *The Uncertain Status of Claims Based on Exemption and Payment*

Despite the unique emphasis given exemption and payment in the present statutory scheme,²⁷³ it is unclear on the face of the statutory language whether the court has jurisdiction to enter judgment in a tax forfeiture action when the land is exempt from taxation or the taxes have in fact been paid. The issue is of more than academic interest since Section 284.28 is likely to bar only those claims based on defects which are jurisdictional in the judicial sense, and not claims based on all fatal defects.²⁷⁴ If exemption and payment do not deprive the court of its jurisdiction, claims and defenses based on these defects may be brought for 40 years, since the other statutes of limitation applicable to tax titles expressly except exemption and payment from their purview.²⁷⁵

None of the statutes which discuss exemption and payment state whether the court's jurisdiction to enter judgment depends upon taxability and delinquency, although it is abundantly clear that exemption and payment will void the tax title.²⁷⁶ Since fatal defects and jurisdictional defects are not synonymous in Minnesota²⁷⁷ it is possible that exemption and payment fall into a class of fatal pre-judgment defects which do not deprive the court of its jurisdiction.

The statutory language lends some credence to this theory. Section 280.33, a curative act, separately excludes defects which deprive the court of its jurisdiction and exemption and payment.²⁷⁸ Similarly, Section 284.09, a statute of limitations, in listing the claims excluded from its scope, enumerates defects fatal to the jurisdiction of the authorities separately from exemption and payment.²⁷⁹ It must be presumed that the Legislature intended each term in these statutes to have force and effect.²⁸⁰

There is also judicial precedent to support the view that exemption and payment do not affect the court's jurisdiction to enter judgment. In 1886, the Minnesota court, in *Chauncey v. Wass*,²⁸¹ considered a substantially similar statutory scheme and held that the district court's jurisdiction to enter

273. The statutory provisions on the exemption of certain lands stems from article 9, § 1 of the Minnesota constitution, which exempts from taxation "public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public purpose. . . ." See *State v. Board of Foreign Missions of Augustana Synod*, 221 Minn. 536, 22 N.W.2d 642 (1946). The ground of payment was statutorily conceived. See *Chauncey v. Wass*, 35 Minn. 1, 30 N.W. 826 (1886).

274. See notes 186 to 194 *supra* and accompanying text.

275. See MINN. STAT. §§ 280.34, 284.09 (1971).

276. See *id.* §§ 277.09, 279.14, .19, .22, 280.34.

277. See note 186 *supra* and accompanying text.

278. "No sale shall be set aside or held invalid . . . unless the party objecting to the same prove either that the taxes were paid before the judgment was rendered, or that such parcel was exempt from taxation, or that the court rendering the judgment pursuant to which the sale was made had not jurisdiction to render the same. . . ." MINN. STAT. § 280.33 (1971).

279. Compare MINN. STAT. § 284.09(1) (1971) with *id.* § 284.09(2), (3).

280. Compare MINN. STAT. § 645.16 (1971) with *id.* § 645.17, subd. 2.

281. 35 Minn. 1, 30 N.W. 826 (1886).

judgment depended upon the filing of the delinquency list and not upon the government's right to collect the taxes set out in that list. Recognizing that if jurisdiction were to depend upon the ultimate resolution of that fact issue, the tax judgment, whether by default or after trial and answer, would have little effect, bind no one, and leave the question of taxability permanently open, the court refused to permit collateral attack of a tax judgment.²⁸² The decision implies that the Legislature has the power to determine the scope of the court's jurisdiction in forfeiture actions.²⁸³

The distinction between fatal defects which deprive the court of its jurisdiction and those which do not would be merely technical but for the fact that "jurisdictional defect" is the operative language of Section 284.28. It is arguable that the Legislature intended to bar claims based on the court's lack of jurisdiction while preserving claims based on exemption and payment, since the equitable considerations differ substantially between these two classes of claims. In the former, the owner's interest in procedural fairness is balanced against the breach of his own duty to pay property taxes when due; in the latter, the property owner comes into court with clean hands. This interpretation of legislative intent is bolstered by the 1969 Legislature's failure to repeal or amend Section 280.34 which not only excludes claims based on exemption and payment from its limitation provisions, but also states that such claims may be brought at any time.

One cannot assume that Section 284.28 will extend to claims based on exemption and payment. The courts should not be expected to hold that the Legislature meant to say something rather different than that which the statute plainly states.²⁸⁴ The prudent title examiner must assume that the timebombs of exemption and payment may continue to tick for 40 years.

C. Suspension of the Statute of Limitations for Persons Under a Disability

Historically, persons under a disability have been excepted from the operation of statutes of limitation by savings clauses.²⁸⁵ Minnesota's tax forfeiture statutes appear to follow that rule today. Section 284.09, the 1-year statute applicable to claims against the title of the state and its successors in interest, contains a savings clause which preserves the rights of persons under a disability to bring an action within 1 year after the removal of the disability.²⁸⁶

282. *Id.* at 15, 30 N.W. at 831.

283. *Accord*, *McCarter v. Neil*, 50 Ark. 188, 6 S.W. 731 (1888); *Mayo v. Foley*, 40 Cal. 281, 284 (1870); *Gaylord v. Scarff*, 6 Iowa 179, 186 (1858); *Emmons County v. First Nat'l Bank*, 9 N.D. 583, 84 N.W. 379 (1900); *Cadmus v. Jackson*, 52 Pa. 295, 304 (1866). *But see* H. BLACK, *TAX TITLES* § 169 (2d ed. 1893); J. VANFLEET, *COLLATERAL ATTACK* § 571, at 597 (1892). *Cf.* *Bornemann v. Ofsthun*, 175 Minn. 493, 221 N.W. 876 (1928) (death of owner jurisdictional prerequisite to administration of his estate).

284. *See* MINN. STAT. § 645.17 (1971).

285. *See* R. PATTON & C. PATTON, *LAND TITLES* § 84, at 278-79 (2d ed. 1957). *See generally* *Developments—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1229-32 (1950).

286. That statute provides in part: "Any person under disability to sue when such certificate was filed . . . may assert such cause of action or defense in an action commenced at any time

Strangely, no similar provision is found in either of the statutes of limitation, Sections 280.34 and 284.28, which are applicable to claims against an original purchaser, an assignee of the interests of the state, or their successors in interest. Nor is a similar provision found in the portion of Section 284.28 which bars those actions against the state and its successors in interest which are based on "jurisdictional defects." Instead, Section 281.04 applies in such cases, producing some confusion. That statute provides that persons under a disability during the period for redemption may redeem at any time within 1 year after the disability is removed by bringing an action against the holder of the title.²⁸⁷ This extension of the period for redemption has the effect of a general savings clause.

The result produced by these statutes subverts the interests of the state. Since an owner under disability can, by redemption or an action attacking the title, oust the subsequent holder of the title at any time during a 40-year period, tax titles are likely to be unmarketable and the tax-forfeited property unsalable. Consequently, the entire collection system is weakened.²⁸⁸

The favored treatment of owners under a disability seems unnecessary, a vestigial remainder of another era when persons suffering a legal disability were less protected than they are today.²⁸⁹ At one time the courts held that statutes of limitation did not run against the claims of incompetents and unfortunates.²⁹⁰ Today, they hold that in the absence of express savings language, statutes of limitation do run against the claims of these persons.²⁹¹ In light of the need to provide stability for tax titles and the widespread use of devices such as guardianship, conservatorship, and guardian ad litem ap-

within one year after the removal of the disability." MINN. STAT. § 284.09 (1971).

287. It provides:

Minors, insane persons, idiots, or persons in captivity or in any country with which the United States is at war, having an estate in or lien on lands sold for taxes, of record in the office of the register of deeds of the county where the lands lie, before the expiration of three years from the date of such sale, may redeem the same within one year after such disability shall cease; but in such case the right to redeem must be established in a suit for that purpose brought against the party holding the title under the sale. *Id.* § 281.04.

The time period during which disability will result in giving rise to additional rights is, it should be noted, shorter than the period for expiration of redemption. The effect of that anomaly is unknown.

288. See note 8 *supra*. This exemption of certain persons from the application of the statute also runs counter to the expressed purpose of such enactments being "statutes of repose." See *County of Redwood v. Winona & St. Peter Land Co.*, 40 Minn. 512, 526, 42 N.W. 473, 479 (1889), *aff'd sub nom. Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895); *Denny v. Marrett*, 29 Minn. 361, 13 N.W. 148 (1882).

289. It was suggested as early as 1949 that such statutes were probably unnecessary. See Bayse, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1099-1100 (1949).

290. PATTON, *supra* note 285, at § 84. The reason behind such an attitude was the general disfavor of such statutes of limitation in the courts. See *e.g.*, *Baker v. Kelley*, 11 Minn. 480, 493-94 (Gil. 358, 370-71) (1866). More recently, however, the courts have liberalized their view of such statutes. See, *e.g.*, *City of St. Paul v. Chicago, Milwaukee & St. Paul Ry.*, 45 Minn. 387, 397, 48 N.W. 17, 21 (1891). See generally III R. POUND, JURISPRUDENCE § 94, at 293-94 (1959).

291. PATTON, *supra* note 285, at § 84. For illustrations of this result see, *e.g.*, *Vance v. Vance*,

pointments which permit the person under disability to pursue legal remedies, it seems equitable and consistent with sound public policy to apply the same statutes of limitation and redemption periods to persons under a disability as to all other persons.²⁹²

D. Persons in Possession

Under the present statutory scheme, persons in possession of tax-forfeited land enjoy the suspension of all statutes of limitation which would otherwise be applicable. They may attack the tax title of the subsequent purchaser or of the state at any time.²⁹³

There is no constitutionally permissible alternative to the present treatment of this class of claimants, for it is settled in Minnesota as well as in nearly all other jurisdictions, that the legislature is without power to compel an owner in possession of real estate to anticipate a dispute over his title or to bring an action to prove his title on penalty of losing the property.²⁹⁴ The practical effect of this exception to the statutes of limitation is slight, however. Title examiners unanimously except the rights of persons in possession from their title opinions.²⁹⁵ This technique does not impair the marketability of the title, but does necessitate a careful inquiry to ascertain whether anyone is in fact in possession of the property.

IV. THE PATH TO MARKETABLE TITLE

Minnesota tax titles, in the shadow of the caveat to Title Standard 45, con-

108 U.S. 514 (1883); *Cox v. Von Ahlefeldt*, 105 La. 543, 30 So. 175 (1900).

292. Further evidence of the desirability of such a result might be gained from the observation that at least 20 states, including Minnesota, have enacted legislation limiting the maximum period of time allowed persons under disability to bring suit. The statutes are collected in Bayse, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 1097, 1100 n.78 (1949). Minnesota's Marketable Title Act sets an outside limit of 40 years. See MINN. STAT. § 541.023 (1971). In addition, the statute applicable to ordinary civil actions limits the total amount of time a statute may be tolled by disability to 5 years or 1 year after the disability ceases, whichever is earlier. MINN. STAT. § 541.15 (1971), as amended Minn. Laws 1974 ch. 384, § 2.

Whether statutes such as MINN. STAT. § 284.09 (1971) provide real protection is subject to question, since only disabilities existing at the time of the filing of the certificate will toll it. Even though disabilities may be tacked, if a person on that day is not under a disability no subsequent disability, not even insanity, will toll the statute. See *Kelley v. Gallup*, 67 Minn. 169, 69 N.W. 812 (1897). MINN. STAT. § 281.04 (1971) appears a bit more generous. See note 287 *supra*.

Allowing the statute to run against persons under disability would not deny them due process. *Vance v. Vance*, 108 U.S. 514 (1883).

293. MINN. STAT. §§ 284.09, .28 (1971).

294. *Williams v. Kirkland*, 80 U.S. 311 (1871); *Konantz v. Stein*, 283 Minn. 33, 167 N.W.2d 1 (1969); *Willard v. Hodapp*, 98 Minn. 269, 107 N.W. 954 (1906); *State ex rel. Douglas v. Westfall*, 85 Minn. 447, 89 N.W. 68 (1902); *Taylor v. Winona & St. Peter Ry.*, 45 Minn. 66, 47 N.W. 453 (1890); *Feller v. Clark*, 36 Minn. 338, 340, 31 N.W. 175, 176 (1887) (concurring opinion); *Sanborn v. Petter*, 35 Minn. 449, 29 N.W. 65 (1886); *Baker v. Kelley*, 11 Minn. 480 (Gil. 358) (1866).

295. See R. BLACK, J. MOOTY & C. PATTON, MINNESOTA PRACTICE METHODS §§ 103, at 40, 117, at 50 (1956).

tinue to resist legislative efforts to render them marketable. Although due process permits a statute of limitations to bar even claims and defenses based upon the court's lack of jurisdiction to enter judgment if the original owner is allowed a reasonable time to attack the proceeding, the legal status of the tax title has scarcely improved since Minnesota's current tax forfeiture system was established in 1874.²⁹⁶

The path to marketable title is barred not by constitutional limitations upon the state's power to deprive delinquent taxpayers of their realty, but by the traditional judicial reluctance to aid in a forfeiture of land and by the ambiguities of Minnesota's archaic and patchwork statutory scheme. One year after expiration of the period for redemption, few claims which might defeat a tax title remain viable.²⁹⁷ Nevertheless, it is frequently impossible to determine whether a particular parcel is vulnerable to such claims, and thus, the few defects which have slipped through the gaps in the statutory scheme cast a pall of doubt over all tax titles.²⁹⁸

Although the judiciary could clear the roadblocks from the path to marketable title, it seems unrealistic to await a line of decisions broadly construing and declaring constitutional the Minnesota Legislature's latest attempt to endow tax titles with marketable status.²⁹⁹ Since the problem arises in part from a judicial policy decision to place the loss of the land upon the purchaser rather than the original owner in certain exigent circumstances,³⁰⁰ a search for the solution must begin with its public policy components.

A. *The Role of Public Policy in the Tax Title Controversy*

Assuming the validity of the traditional notion that money damages are inadequate compensation for the loss of an interest in real property,³⁰¹ the forfeiture and sale of land due to errors committed by public officials will necessarily injure either the purchaser or original owner of the land. Since both persons cannot own the affected parcel, the courts must weigh the

296. See authorities collected notes 25 to 28 *supra*.

297. See chart pp. 18-19 *supra*.

298. Perusal of the decisions which have held tax titles invalid will reveal that the defects responsible for the invalidity are generally not of the sort that appear of record. See, e.g., *Johantgen v. Bank*, 258 Minn. 88, 102 N.W.2d 822 (1960).

299. Pessimism is dictated by the fact that 14 years passed from the Minnesota Marketable Title Act's enactment in 1943 until the Minnesota Supreme Court confirmed its constitutionality in *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957).

300. Some commentators consider judicial hostility toward tax titles to be the primary cause of their lowly status. L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* tit. 16, at 173 (1960). Another commentator has noted:

Courts throughout the country have continuously ignored or emasculated all of the above-mentioned measures [to make tax titles marketable]. In some states this has reached the point where legal writers consider it fruitless for the legislature to enact any new statutes or to strengthen any existing ones until the attitude of the judiciary changes. Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 *ROCKY MT. L. REV.* 181, 193 (1962).

301. See, e.g., *Abbott v. Moldestad*, 74 Minn. 293, 77 N.W. 227 (1898).

equities favoring each and determine who should bear the inevitable loss. Further, since the controversy is heavily affected with the public interest, the decision's effects upon the state's taxpayers must be added to the balance.³⁰² Resolution of the resultant knotty issues calls for a choice between deeply rooted and conflicting legal philosophies.

Those who would give primacy to the interests of the state in collecting its tax revenues when due favor a strong forfeiture statute which cuts off all rights of delinquent taxpayers after a short time has passed. If non-payment of real property taxes carries an inadequate sanction, revenues will dwindle and the conscientious taxpayers will be forced to bear the cost of providing community services and facilities to be used by all.³⁰³ According to this view, those who fail or refuse to bear their fair share of the collective tax burden are entitled only to the minimal protections afforded by procedural due process and are certainly not deserving of judicial solicitude or legislative grace.³⁰⁴

Tenaciously held by the opposing school of thought, however, is the tenet that a strict forfeiture procedure with a short-term statute of limitations is inherently unjust because it will produce much hardship in a few isolated cases.³⁰⁵ The possibility that a person's land may be irredeemably lost due to the negligence of the public officials conducting the forfeiture proceeding is abhorrent to many.³⁰⁶ The individual's interest in protecting the peaceful use

302. See Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY MT. L. REV. 181, 194-95 (1962).

303. Non-payment of real property taxes is sufficiently wide-spread that it results in a significant loss of needed revenues. Some Minnesota communities face such a problem today. The Bloomington school district, for example, anticipates a deficit of more than 1.6 million dollars in fiscal 1975-76. The bulk of that deficit, slightly more than 1.4 million dollars, is attributable to delinquent property taxes. Believing that the present statutory scheme offers no realistic hope of recovering these revenues, the district has appealed to the Legislature to provide financial assistance to school districts with high delinquent property taxes. Bloomington Sun, Aug. 29, 1974, at 1, col. 3.

Not only does the present system fail to deter delinquency, it also may actually contribute to the loss of real property tax revenues. Since tax titles are unmarketable, tax forfeited land is difficult to sell. Consequently, forfeited land is frequently removed from the tax rolls for long periods of time, transferring the tax burden which that property should bear to other land and its owners. See notes 8 & 14 *supra*.

The problem reached its peak during the Great Depression. In Nassau County, New York, for example, land forfeited for taxes during the period from 1931 to 1938 was valued at approximately 3 million dollars, and its removal from the tax rolls forced the tax rate on the remaining assessable property in the county to be increased to a level far exceeding all previous limitations. Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY MT. L. REV. 181, 183 n.15, citing N.Y. World-Telegram, Sept. 7, 1938, at 2, col. 6.

304. See, e.g., *Waddingham v. Dickson*, 17 Colo. 223, 231, 29 P. 177, 180 (1892): "The payment of taxes is a duty which property holders owe to the government. If they neglect this duty, they have no right to expect relief from the courts on account of merely technical errors on the part of the public officers . . ."; *Thomas v. Kolker*, 195 Md. 470, 475, 73 A.2d 886, 888 (1950).

305. See, e.g., *Farr v. Nordman*, 346 Mich. 266, 282, 78 N.W.2d 186, 188 (1956) (Smith, J., dissenting); *Farr v. Nordman*, 346 Mich. 266, 270, 78 N.W.2d 186, 193 (1956) (Black, J., dissenting).

306. See Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY

and enjoyment of his property against negligent government interference is strongest in those instances where he himself is blameless.³⁰⁷ The owner who has paid his taxes and who received no notice of his alleged delinquency or the impending foreclosure presents a hard case indeed.

The core question is whether the desirability of protecting private ownership of land against wrongful interference is outweighed by the state's interest in preserving the integrity of the property tax collection mechanism. Faced with this choice, the courts have consistently preferred the rights of the individual owner.³⁰⁸ State legislatures, on the other hand, are coming with increasing frequency to favor the interests of the state over those of the landowner.³⁰⁹

It is not surprising that a representative and deliberative body should favor the taxpayers, nor that an independent, adjudicative body should favor the individual. Nevertheless, the polarization of the decision makers has produced inconsistent decisions which do not form an integrated and logical body of law.³¹⁰

When viewed in this context, the ignominy of tax titles is explicable, as is the failure of previous legislative attempts to endow them with marketable status. Aware of the judicial predilections, the real property bar, which as a practical matter determines the standards for marketability, greets most reform legislation with extreme caution.³¹¹

Without prejudging the policy issue itself, it seems fair to conclude that the legislature and not the courts should make the decision.³¹² In the legislative forum, the facts can be gathered, all points of view represented, and all of the issues fully aired. The judicial process is not so well suited to resolving broad

MT. L. REV. 181, 193-94. Even where the taxes are delinquent, some persons oppose forfeiture on policy grounds. Young states:

The image of the poor, marginal landowner who either cannot pay the tax, is unaware of the consequences of non-payment, or simply never learns of the tax debts, stands in contrast to that of the land speculator, investing a few dollars for land worth possibly hundreds of times that much. *Id.* at 193.

307. *Id.* at 195.

308. See note 300 *supra* and accompanying text.

309. See, e.g., *Shell Oil Co. v. Board of County Comm'rs*, 171 Kan. 159, 231 P.2d 220 (1951); *Cherin v. R. & C. Co.*, 11 Ill. 2d 447, 143 N.E.2d 235 (1957); *Hood River County v. Dabney*, 246 Ore. 14, 423 P.2d 954 (1967).

310. See notes 151 to 223 *supra* and accompanying text.

311. See, e.g., letter from Charles L. Horn, Jr., attorney-at-law, to Philip J. Olfelt, Special Assistant Attorney General, June 7, 1972, on file at William Mitchell Law Review Office:

Frankly, I don't think that any title standard can solve the problem of marketability of tax titles. Although my experience in the matter has been somewhat limited, it is my conclusion (which I think most lawyers would agree with) that almost any defect in the forfeiture proceeding is ultimately determined to be jurisdictional by our Supreme Court, and until MSA § 284.28 has been thoroughly construed and reviewed by that court I would not want to rely upon this statute as the ultimate solution to the basic problem.

312. Some courts have frankly stated as much. See *Spitcaufsky v. Hatten*, 353 Mo. 94, 111, 182 S.W.2d 86, 96 (1944); *Hood River County v. Dabney*, 246 Ore. 14, 30, 423 P.2d 954, 962 (1967).

questions of fiscal and social policy.³¹³

The lack of credibility which attends the Minnesota Legislature's apparent decision to endow tax titles with marketable status may be traced to the form of the legislation it has adopted. The courts, despite a self-imposed ban on judicial legislating, habitually intervene where a statute produces harsh and inequitable results in its application to particular facts. They have been particularly willing to do so in tax title cases.³¹⁴ The Legislature, then, if it wishes its decision to protect tax titles to receive judicial deference, must structure the forfeiture system to afford the maximum degree of individual protection consistent with the public interest. In addition, it must so clearly express its intent to render tax titles marketable, that a court in striking down a tax title must cross the line that separates statutory construction from judicial legislation.³¹⁵

In establishing an assurance fund to compensate persons deprived of their property by the wrongful acts of public officials³¹⁶ the Minnesota Legislature has taken a step in the right direction. Financed by a tax upon the sale of tax-forfeited land, the fund is patterned after the assurance fund established by the Title Registration Act and appears to be unique to Minnesota. Though money damages may not be considered an adequate remedy for the loss of one's real property, the temptation to void a tax title is assuredly weakened where the injured owner may recover up to the fair market value of the land from the fund.

B. *Evaluating the Legislative Reform Alternatives*

Though the recently adopted assurance fund illustrates the proper legislative approach to the problem of rendering tax titles marketable, additional legislation is necessary if the Legislature is to achieve its objective. Only the extent and format of that legislation remain to be determined.

The path to marketable title is forked at this point. The Legislature might

313. Commentators calling for systematic and comprehensive reform of the law governing tax titles in particular or conveyancing in general select the legislature as the appropriate body to implement and determine the nature of the substantive changes in the law. See L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* tit. 16, at 175-86 (1960). Cf. P. BAYSE, *CLEARING LAND TITLES* §§ 1, 6, 8, 373 (2d ed. 1970).

314. See note 300 *supra* and accompanying text.

315. The importance of such a legislative expression is noted by Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749 (1965):

[T]he canons of statutory construction . . . offer the courts contradictory alternatives, of which the best and the worst examples are the counterpoint that statutes are to be construed liberally according to their purpose, and the doctrine that statutes in derogation of the common law are to be construed strictly. Of course, what actually happens is that courts will apply the one or the other canon of construction to statutes as they are informed that the statute is the product of a conscious public purpose or of only a narrow-purposed, well-lobbied, special interest. *Id.* at 768.

Cf. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-35 (1947).

316. MINN. STAT. § 284.28, subds. 5-7 (1971).

simply amend the existing statutes of limitation and curative acts to close the remaining gaps. On the other hand, it could revise the entire forfeiture system, simplifying and modernizing it to minimize defects and include a short-term statute of limitations to bar claims based upon those few defects that do occur. Each method has its advantages and disadvantages and should be scrutinized closely.

1. *Amendment of the Existing Statutes of Limitation*

To suggest this alternative is merely to set the general parameters of reform legislation. The necessary substantive changes in the present law could be accomplished by any number of amendments some of them arguably only a few words in length. On the other hand, the present statutes of limitation could be repealed and replaced with a comprehensive short-term statute.

Whichever precise method is chosen, several ingredients are essential. First, it must express, in clear and unmistakable language its intent to render tax titles marketable and to bar as many claims and defenses as the Constitution will permit.³¹⁷ The basic tool for accomplishing this is the statement of policy, setting forth precise findings of fact as to the evils of unmarketable tax titles and declaring an intent to mitigate them by barring, after a reasonable time, all claims and defenses based upon defects in the proceedings.³¹⁸ Second, the Legislature should include language purporting to bar all claims and defenses, whether based upon defects that are jurisdictional, non-jurisdictional, or unclassified, and without regard to whether the present owner of the land is a purchaser at sale or his successor in interest, or the state or its successors in interest. Those defects which have previously slipped through the cracks in the statutory scheme should be expressly included.³¹⁹ Third, statutes granting special concessions to claims preserved by the owner's disability to sue and claims based upon exemption or payment should be repealed to prevent confusion and to provide further evidence of the Legislature's intent.³²⁰

Finally, the right of access to the assurance fund should be preserved and expanded. Presently, the statute grants a right of access to the fund only where the wrongful acts of public officials result in a "jurisdictional"

317. States which have been successful in making tax titles marketable have often relied on a strong legislative policy statement. Typical is that of Illinois: "Section [747] shall be liberally construed so that tax deeds . . . shall convey merchantable title." ILL. ANN. STAT. ch. 120, § 747 (Smith-Hurd Cum. Supp. 1974). Other examples are found in MD. ANN. CODE art. 81, § 97 (1969); ORE. REV. STAT. § 312.214(1) (1974).

318. See notes 315 & 317 *supra* and accompanying text.

319. For a summary of those defects, see chart pp. 18-19 *supra*.

320. Although the rights of owners in possession of the property at the time of forfeiture may arguably be terminated for non-payment of taxes, it would appear unnecessary to repeal the previous statutory concessions to them. Since it is relatively simple to determine whether someone is in possession and since title examiners except the claims of such person from their opinions, the present status of those persons does not impair the marketability of tax titles. See note 295 *supra* and accompanying text.

defect.³²¹ That term should be avoided and the category of covered defects expanded to include all substantial and prejudicial defects so that all defects which would have voided the title under prior law are necessarily included.³²² Perhaps defects known or suspected to be fatal today should be expressly enumerated. Language should be added expressly stating that the right to claim against the fund is intended as a substitute for the cause of action barred by the short-term statute of limitations.³²³

A carefully drafted amendment, incorporating these features, has much to recommend it. Not only is incremental change technically simpler to implement, but a clarification and extension of principles already incorporated in the statutory scheme would be more politically palatable and less controversial than radical reform.³²⁴ Further, since the public officials charged with carrying out the forfeiture proceedings would not be required to learn a new set of procedures, jarring problems of transition could be largely avoided.

On the other hand, such limited reform has one basic flaw. It attacks the symptoms rather than the cause of the marketability problem, and thus may fail to endow tax titles with marketable status. So long as the forfeiture procedure remains complex and error-prone and so long as the strict compliance rule remains in effect, potentially fatal defects will continue to threaten the validity of tax titles. Because of the inherent limitations of language, even the most careful drafting cannot assure that all claims and defenses are included within the scope of the statute. Though a short-term statute of limitations appears comprehensive on its face, the real estate bar may continue to be plagued by doubts.³²⁵ The fate of past attempts to patch up the statutory scheme indicates that such fears are not entirely groundless.³²⁶ Moreover, the addition of new provisions to the statutory scheme may further lessen its clarity, thus increasing the risk that fatal defects will evade its curative and limiting provisions.

An amendment to the existing statutes of limitation, however broad its language, cannot guarantee that tax titles will attain marketable status if the

321. MINN. STAT. § 284.28, subd. 7 (1971).

322. The drafting problem presented by this suggestion is obvious. Perhaps claims should be allowed in the case of any "substantial and prejudicial defect." In addition, cases where the land was exempt from taxation or the taxes were paid prior to forfeiture could be expressly included as grounds for a claim. While such broad language might permit recovery by persons who would be unable to void a tax title today, the advantages which would accrue from marketable tax titles appear sufficiently substantial to warrant seeking an extra margin of safety.

323. Not only will this stress the legislative intent to render tax titles marketable, but it should also assist a court in determining whether to allow a claim against the assurance fund.

324. Some commentators have noted that hostility to the tax title is rampant among the real estate bar. See L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* tit. 16, at 173 (1960). If this is the case in Minnesota, opposition to radical reform must be anticipated.

325. Earlier reform legislation has met a skeptical reception. See note 311 *supra* and accompanying text.

326. *Johantgen v. Bank*, 258 Minn. 88, 102 N.W.2d 127 (1960) certainly gives one grounds for concern.

judiciary does not support the underlying legislative policy decision. The few jurisdictions in which tax titles are marketable have not achieved that result by means of a patchwork solution, but rather by the enactment of far-reaching reform legislation.³²⁷

3. *Revising the Tax Forfeiture System*

Though more difficult to accomplish, a more certain means of endowing tax titles with marketable status is to recognize and attack directly the conditions which make them unmarketable. Originally designed to implement a policy that favored the interests of the individual landowner, the present statutory scheme is wholly unsuited to effectuate the Legislature's current preference for the interests of the state and its taxpayers.³²⁸ Rather than relying solely on statutes of limitation or curative acts to eliminate fatal defects and claims based upon them after the fact, the Legislature might abolish the detailed procedural requirements and technicalities which cause such defects in the first instance.³²⁹

Modernizing and simplifying the forfeiture system will require long-term legislative study to determine the specific statutory provisions that would best serve Minnesota's needs. Nevertheless, a consideration of the systems enacted in those few jurisdictions where tax titles are marketable will delineate the options available.

The Oregon tax forfeiture system³³⁰ is perhaps the best example of a simple and concise scheme designed to implement modern tax title theory. Essential to that system's success has been the clear and unmistakable expression of the legislature's intent to enforce forfeitures of realty upon which taxes are delinquent without regard to any other circumstances.³³¹ Admitting its past hostility to forfeiture of real property, the Oregon Supreme Court has openly acknowledged a duty to defer to the legislative mandate.³³²

The Oregon system combines a comprehensive short-term statute of limitations with a conclusive presumption that the property owner has notice of various facts regarding the assessment and payment of the real property taxes.³³³ In Oregon, property is subject to forfeiture 3 years from the date taxes levied on the property become delinquent.³³⁴ The forfeiture proceeding

327. See notes 330 to 353 *infra* and accompanying text.

328. For a discussion of the changing economic and social conditions and their effect upon legislative attitudes toward tax titles, see Young, *The Tax Deed—Modern Movement Towards Respectability*, 34 ROCKY MT. L. REV. 181, 193-97 (1962).

329. For a discussion of the manner in which the technical requirements of the statutes lead to fatal defects, see notes 37 to 150 *supra* and accompanying text.

330. ORE. REV. STAT. ch. 312 (1974).

331. ORE. REV. STAT. § 312.214 (1974).

332. See *Hood River County v. Dabney*, 246 Ore. 14, 423 P.2d 954 (1967); *Chizck v. Port of Newport*, 252 Ore. 570, 450 P.2d 749 (1969).

333. Compare ORE. REV. STAT. § 312.230 (1974) *with id.* § 312.216.

334. ORE. REV. STAT. § 312.010(1) (1974).

is in rem³³⁵ and notice of the proceeding is usually given by publication for 4 consecutive weeks in a newspaper having general circulation in the county.³³⁶ Any answer or defense which is filed by the owner or any other person interested in the property is heard in a summary fashion,³³⁷ and if the taxes are found to be delinquent, the court will order the property sold to the county for a sum equal to the taxes and interest.³³⁸ At this point, the land may not be sold to a private purchaser.³³⁹

Persons having an interest in the property may redeem for 1 year following the entry of judgment and decree of forfeiture.³⁴⁰ That right is terminated by publication of the notice of expiration for redemption for 2 consecutive weeks at the conclusion of the year period³⁴¹ and a deed to the county is executed.³⁴² Two years after the date of judgment and decree of forfeiture, every action, defense, claim, or proceeding, regardless of its form, which would challenge the validity of the tax title is barred.³⁴³ No exceptions are made for defects fatal to the jurisdiction of the authorities to carry out the proceedings, for the court's lack of jurisdiction, because the property was exempt from taxation, or because the taxes had been paid prior to forfeiture.³⁴⁴ At this point the property may be sold to a private purchaser.³⁴⁵

Within approximately 5 years from the date of the delinquency, the entire Oregon forfeiture procedure is complete and the county holds marketable title to the property. Not only does the system protect innocent purchasers of tax-forfeited property from loss, but it also assures that the county can sell such property at a price approaching its market value, and thus replace the revenues lost by reason of the delinquency.³⁴⁶

While the Oregon system is probably the most efficient and effective, other jurisdictions have reformed their statutory schemes to produce marketable tax titles. The Illinois procedure,³⁴⁷ for example, is modeled upon the title registration system. The purchaser or assignee of tax-forfeited property may

335. *Id.* § 312.050(2).

336. *Id.* § 312.040(1). Personal service may also be used in place of publication. *Id.* § 312.040(2).

337. *Id.* § 312.080.

338. *Id.* § 312.100.

339. *Id.*

340. *Id.* § 312.120.

341. *Id.* § 312.190.

342. *Id.* § 312.200.

343. *Id.* § 312.230(1).

344. *Id.* § 312.214(1).

345. *Id.* § 312.270.

346. It has been noted that the unmarketability of tax titles produces a vicious circle. Tax-forfeited land brings only a small price because the title is so vulnerable to attack, while the low sales price and the image of the land speculator continue to contribute to its unmarketable status. L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* tit. 16, at 174 (1960).

347. ILL. ANN. STAT. ch. 120, § 747 (Smith-Hurd Cum. Supp. 1974).

petition the county court to issue a tax deed at any time within 5 months of the expiration of redemption.³⁴⁸ That deed, issued upon notice and hearing,³⁴⁹ is incontestable except by direct appeal.³⁵⁰ A strong expression of legislative intent³⁵¹ also helps assure that the resulting titles are marketable.³⁵²

The Minnesota Legislature may wish to pattern a revised forfeiture system after those in effect in Oregon or Illinois, or it may wish to fashion its own simplified procedure. A role should probably be found for the assurance fund, a unique feature of the present Minnesota law, in the new scheme. Whatever its details, however, a reform plan which attacks the cause rather than the symptoms of the tax title problem is more likely to succeed. The courts will tend to construe the statutes generously to effectuate legislative intent where a comprehensive reform is undertaken.³⁵³

A comprehensive reform is not a panacea. Abandonment of the present familiar procedures may result in some short-term disruption, and though this should be outweighed by the long-term benefits, it may create an obstacle to the enactment of reform legislation. A more important problem is that the new scheme can operate only prospectively and cannot give tax titles existing prior to its effective date marketable status. Though the benefits of the new system will begin to accrue immediately, as the number of more vulnerable tax titles dwindles, some of those titles will remain subject to attack for 40 years.³⁵⁴ Thus, revision of the forfeiture system must be accompanied by an amendment to the existing statutes of limitation directed at rendering these older tax titles marketable.³⁵⁵ The short-term comprehensive statute of limitations and assurance fund, discussed above as a separate reform option, should be combined with the comprehensive revision of the forfeiture system for optimal results.

V. CONCLUSION

Though the path to marketable title may be long and tortuous rather than simple and direct, it is one that must be taken. The importance of the revenues generated by the property tax demands, particularly in times of a troubled economy, that steps be taken to assure the effectiveness of the real property tax collection mechanism.

Legislative action is required to render tax titles marketable in Minnesota,

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* "Section [747] shall be liberally construed so that tax deeds . . . shall convey merchantable title."

352. *See* *Cherin v. R. & C. Co.*, 11 Ill. 2d 447, 143 N.E.2d 235 (1957).

353. *Cf. Hood River County v. Dabney*, 246 Ore. 14, 423 P.2d 954 (1967); *Shaffer v. Marevo Oil Corp.*, ___ W. Va. ___, 204 S.E.2d 404 (1974).

354. *See* MINN. STAT. § 541.023 (1971).

355. This is the technique that was adopted in Oregon. Those with claims against existing tax titles were given a short period of time after the enactment of the new comprehensive short-term statute of limitations to enforce their claims or waive them. ORE. REV. STAT. § 312.230(1) (1974).

for the present statutory scheme is simply inadequate to bar all claims and defenses against a tax title. As technical as the remaining grounds for attack may be and as infrequently as they may actually arise, the prudent title examiner can never be certain that the tax title with which he is dealing is not the rare title which will be attacked. The judiciary and the real property bar cannot be expected to treat the tax title as marketable in the face of an inadequate and outdated statutory scheme.

The constitutional considerations which once may have given legislatures grounds for pause have been effectively laid to rest. The Minnesota Legislature appears to have decided long ago that public policy would best be served by marketable tax titles even if a few cases of individual hardship would necessarily be produced. All that remains to be done is to replace the 1874 tax forfeiture statutes with a scheme better suited to state of Minnesota as it is in 1974.