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## Utah's Short Statutes of Limitation for Tax Titles: The Continuing Specter of *Lyman v. National Mortgage Bond Corp.*—A Need for Remedial Legislation

*Phillip Wm. Lear\**

Courts have generally favored the delinquent taxpayer over the tax title purchaser when adjudicating rights in real property that has been sold for taxes.<sup>1</sup> The Supreme Court of Utah is no exception.<sup>2</sup> Some 40 years ago, in an effort to afford tax titles some degree of respectability and stability, the Utah legislature inaugurated a program of remedial legislation.<sup>3</sup> A major portion of the legislative activity involved the enactment of "short" statutes of limitation. In a series of four provisos, the legislature enacted a 4-year statute of limitations that barred defenses to tax titles where the delinquent owner or his successor had been out of possession for 4 years prior to commencement of the action,<sup>4</sup> and reduced the prescriptive period for ownership by adverse possession from 7 to 4 years.<sup>5</sup>

Ambiguities in the statutes, however, coupled with the courts' inconsistent interpretations of legislative intent have enveloped these short statutes of limitation in a cloud of judicial uncertainty that places their continued effectiveness in doubt. The practical effect of this is far-reaching. First, title examiners cannot rely on the statutes to nullify defects that should no longer be subject to attack. As a consequence, prospective sellers are

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1. See, e.g., *Consolidated Motors, Inc. v. Skousen*, 56 Ariz. 481, 487-88, 109 P.2d 41, 44 (1941); *Colpitts v. Fastenau*, 117 Colo. 594, 597, 192 P.2d 524, 526-27 (1948).

2. See, e.g., *Salt Lake Home Builders, Inc. v. Colman*, 30 Utah 2d 379, 518 P.2d 165 (1974), noted in 1974 UTAH L. REV. 121; *Toronto v. Sheffield*, 118 Utah 460, 222 P.2d 594 (1950); *Telonis v. Staley*, 104 Utah 539, 144 P.2d 513 (1943). In addition, see 6 UTAH L. REV. 284, 285 (1958); 3 UTAH L. REV. 97 (1952).

3. UTAH CODE ANN. § 59-10-36 (1953) provides that a certified record of tax sale proceedings is prima facie evidence of their regularity and shifts the burden to the delinquent owner to show any irregularity. This represents a radical change from the traditional approach. As a consequence of this statute, the risk assumed by the purchaser, should tax title prove invalid, is reduced by giving him a lien against the delinquent property to the extent of taxes, interest, and penalties paid. UTAH CODE ANN. § 59-10-65 (1953); see 1974 UTAH L. REV. 121, 122.

4. UTAH CODE ANN. §§ 78-12-5.1, -5.2 (Supp. 1975).

5. UTAH CODE ANN. §§ 78-12-7.1, -12.1 (Supp. 1975).

required to pay additional and often exorbitant hazard premiums for policies of title insurance on properties that have tax deeds in the chain of title. Occasionally, title insurance is refused altogether. The second consequence is that tax titles are undesirable and lack marketability; they are often avoided except for their nuisance value. As a result, properties that could be placed into revenue-generating posture often remain in the ownership of the county, lying fallow for tax purposes.

This article first will review the statutes, their interpretive case law, and theoretical underpinnings. Then, it will propose amendments to the current statutory format that should work to ameliorate what has become an intolerable situation.<sup>6</sup>

## I. STATUTES

The four provisos that comprise Utah's "short statutes of limitation"<sup>7</sup> represent the latest legislative effort to stabilize tax titles. This statutory package can be divided into three parts: (1) statutes limiting actions involving affirmative relief or defenses; (2) statutes of limitation dealing with land held in adverse possession; and (3) a definition statute.

### A. *Limitation of Actions*

Section 78-12-5.2 bars defenses to tax titles and actions to recover property forfeited for failure to pay assessed property taxes. In general terms, this statute reduces from 7 to 4 years the period in which the landowner dispossessed by a tax sale or his successor in interest can maintain a cause of action to quiet title to real property or interpose any defense against the tax title holder.<sup>8</sup> The statute commences to run upon the date of the sale,

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6. For a survey of tax sale procedures and related tax title problems in Utah see Comment, *Tax Sales and Tax Titles in Utah: Windfalls and Windstorms*, 1 J. CONTEMP. L. 299 (1975).

7. The designation "short statutes of limitation" is used to identify special shortened statutes of limitation that were enacted in most jurisdictions during the Great Depression to bring repose to titles originating in the increased number of tax sales during that period. Traditional periods of limitation were abandoned wherever tax titles were involved. This general designation includes within its scope adverse possession statutes pertaining to tax titles. See III *infra*.

8. UTAH CODE ANN. § 78-12-5.2 (Supp. 1975) reads:

**Holder of tax title—Limitations of action or defense—Proviso.**—No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other

conveyance, or transfer that creates the tax title.<sup>9</sup> The statute does not, however, operate to bar the dispossessed landowner or his successor from instituting an action or interposing a defense if he or his successor occupied or enjoyed possession at any time within 4 years preceding commencement of the action or assertion of the defense.<sup>10</sup>

A companion proviso, section 78-12-5.1, requires occupation or possession of the property within the 4-year period immediately preceding commencement of the action or defense as a condition precedent to any action or interposition of a defense brought by the dispossessed landowner or his successor in interest.<sup>11</sup>

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purchase thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense. And provided further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title, to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title.

The statutory period for actions or defenses founded upon title to real estate is found in the parent sections to be 7 years. UTAH CODE ANN. §§ 78-12-5, -6 (1953).

For similar statutes in neighboring jurisdictions see ARIZ. REV. STAT. ANN. §§ 42-451, -452 (1956) (if dispossessed owner does not redeem within 3 years from date of sale, action may be initiated by tax sale purchaser to foreclose right of redemption, after which redemption and recovery claims are forever barred); CAL. REV. & TAX. CODE §§ 3725-31 (West 1970) (1-year statute from date of execution of tax deed for both private sale and sales where property is struck off to the county); COLO. REV. STAT. ANN. § 39-12-101 (1973) (5-year statute from date of delivery of the tax deed); IDAHO CODE § 63-1143 (Supp. 1974) (6-year statute from date of tax deed which also requires a concurrent 6 years of peaceable possession and payment of taxes); NEV. REV. STAT. § 361.600 (1973) (3-year statute from date of execution and delivery of tax deed); N.M. STAT. ANN. § 72-8-21 (1953) (2-year statute from date of sale); WYO. STAT. ANN. § 39-141 (1957) (6-year statute from date of sale).

9. UTAH CODE ANN. § 78-12-5.2 (Supp. 1975).

10. *Id.*

11. UTAH CODE ANN. § 78-12-5.1 (Supp. 1975) reads:

**Seizure or possession within seven years—Proviso—Tax title.**—No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment.

### *B. Adverse Possession*

The statutes setting forth a prescriptive period for ownership by adverse possession are found in sections 78-12-7.1<sup>12</sup> and 78-12-12.1.<sup>13</sup> These provisos establish an avenue to ownership of real property obtained under a tax sale proceeding where the tax deed, defective so as to convey no title, renders the limitation of action statutes inapplicable. Where the tax title holder establishes by prima facie evidence that he or his predecessor has been the owner of real property under a tax title for the 4-year period prior to commencement of the action, he is considered to be the owner by adverse possession. No adverse possession may be established under these provisos, however, if, within the 4 years prior to the

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12. UTAH CODE ANN. § 78-12-7.1 (Supp. 1975) reads:

**Adverse possession—Presumption—Proviso—Tax title.**—In every action for the recovery or possession of real property or to quiet title to or determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four-year period.

13. UTAH CODE ANN. § 78-12-12.1 (Supp. 1975) reads:

**Possession and payment of taxes—Proviso—Tax title.**—In no case shall adverse possession be established under the provisions of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors, have paid all the taxes which have been levied and assessed upon such land according to law. Provided, however, that payment by the holder of a tax title to real property or his predecessors, of all the taxes levied and assessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and for not less than one year after the effective date of this amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession.

For similar statutes in neighboring jurisdictions see COLO. REV. STAT. ANN. § 38-41-108 (1973) (7-year statute); IDAHO CODE § 63-1143 (Supp. 1975) (no separate adverse possession statute); NEV. REV. STAT. § 11.080 (1973) (no action for recovery may be maintained unless the plaintiff, his ancestor, or predecessor in interest was seised or possessed of the premises 5 years before commencement of the action); N.M. STAT. ANN. § 23-1-22 (Supp. 1973) (10-year statute, and then only under color of title); WYO. STAT. ANN. § 1-13 (1957) (10 years of possession).

commencement of the action, (1) the dispossessed landowner has actually occupied or been in possession of the real property,<sup>14</sup> or (2) the tax title holder or his predecessor has failed to pay all taxes levied.<sup>15</sup>

### C. "Tax Titles" and "Actions" Defined

Section 78-12-5.3 was enacted to provide definitional support to the terms "tax title" and "actions," found in the provisos. For purposes of these provisos, section 78-12-5.3 defines a tax title as

any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance, or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such property whereby the property is relieved from the tax lien.

"Action," as found in the limitation of action provisos discussed above, includes counterclaims and cross-complaints as well as all civil actions for affirmative relief.<sup>16</sup>

## II. CASE LAW

### A. Due Process Challenge to the Validity of the Limiting Statutes: *Hansen v. Morris*

*Hansen v. Morris*,<sup>17</sup> the first case decided under the new short statutes of limitation, involved a constitutional challenge to the validity of the limiting statutes in sections 78-12-5.1 and 78-12-5.2.<sup>18</sup> The defendants had acquired property which they never occupied and upon which they had failed to pay taxes. The property was deeded to the county following the "May sale"<sup>19</sup> and subsequently conveyed to the plaintiff's predecessor in interest. Defendants contended that the tax title conveyed no interest since the plaintiff had failed to prove all statutory steps incident to perfection of the tax title and therefore the statute of limita-

14. UTAH CODE ANN. § 78-12-7.1 (Supp. 1975).

15. *Id.* § 78-12-7.1, -12.1.

16. *Id.* § 78-12-5.3.

17. 3 Utah 2d 310, 283 P.2d 884 (1955).

18. Other relevant issues raised by the defendant were (1) that plaintiff's failure to plead the statutes precluded his reliance thereon on appeal, and (2) that the repeal of the parent limitations statute by enactment bearing the same date as the provisos in fact repealed the short statutes and thus they did not exist. *Id.* at 312, 283 P.2d at 885.

19. Property not redeemed within the 4-year statutory redemption period is subject, after proper notice by the county, to sale by the county auditor or his deputy at an annual sale in May. See 1974 UTAH L. REV. 121.

tions did not apply. Defendants further argued that even if the statute did apply, it was unconstitutional because it deprived them of property without due process.<sup>20</sup> The court held that the limitation of actions statutes did not deprive the dispossessed landowner of property without due process where the tax deed is valid on its face and the governmental officials had authority to issue the deed.<sup>21</sup> There was no claim in *Hansen* that the deed was not valid on its face or that it was not issued by the proper governmental authority.

The court expressly limited its holding in *Hansen* (and thereby the constitutional operation of the limitation of actions statutes) to cases in which the tax deeds are valid on their faces and have been issued by competent authority after all statutory steps have been followed.<sup>22</sup> Therefore, application of the statutes to void or validate deeds issued by officials lacking statutory authority would presumably deprive a delinquent owner of property without due process of law in violation of the Fourteenth Amendment.<sup>23</sup>

*B. Judicial Recognition of Ambiguity in the Statutes:  
Peterson v. Callister*

The import of *Peterson v. Callister*<sup>24</sup> is twofold. First, the case manifests judicial recognition of and concurrence with the purpose of the limitation of actions statutes. Second, it identifies certain ambiguous statutory language which confuses interpretation of the legislature's intent. In *Peterson*, after defendant's predecessor in interest failed to pay taxes on the property, it was struck off to the county at a tax sale. The plaintiff took a tax deed from the county and then occupied the land. Both the auditor's deed to and the tax deed from the county were recorded, although unacknowledged.<sup>25</sup> Subsequently, defendant came into ownership

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20. 3 Utah 2d at 315, 283 P.2d at 887.

21. 3 Utah 2d at 315, 283 P.2d at 887, citing *Geekie v. Kirby Carpenter Co.*, 106 U.S. 379, 384 (1882). In that case the United States Supreme Court held that a Wisconsin short statute of limitations similar to the one challenged in *Hansen* did not violate due process.

22. 3 Utah 2d at 315, 283 P.2d at 887.

23. See *Kanawha & Hocking Coal & Coke Co. v. Carbon County*, No. 13853 (Sup. Ct. Utah, May 6, 1975) (dissenting opinion).

24. 6 Utah 2d 359, 313 P.2d 814 (1957).

25. Utah law requires a deed to be acknowledged before it can be recorded. UTAH CODE ANN. § 57-3-1 (1953). However, failure to append the acknowledgment to the deed does not invalidate the deed as a conveyance and does not render it void on its face. This would put it outside the ambit of §§ 78-12-5.1 and 78-12-5.2. The challenge here was that failure to acknowledge the deed subjected the sale to attack on grounds that statutory steps incident to perfection of the title had not been observed.

by means of a quitclaim deed, but failed to pay taxes or occupy the land. In reaffirming *Hansen v. Morris*, the court held that section 78-12-5.1 is

a statute of repose, obviously intended to lay at rest claims against tax titles which are asserted more than four years after acquisition of a tax title under statutory proceedings, and where the record owner has not had possession during that period.<sup>26</sup>

Having ruled that section 78-12-5.1 was a statute of repose, the court felt impelled to address itself to certain wording contained in both sections that allowed the party instituting the action or interposing the defense to proceed where he could show that he had been in possession, regardless how brief, within the 4 years prior to commencement of the action or interposition of the defense. The court felt that the language was inconsistent with the statute's nature and purpose. After pointing out that an out-of-context reading of the statutes appeared to allow the dispossessed party to defeat an action by a tax title holder who had been in possession long after the statutory period had run by proving possession at any time within the 4-year period prior to the action, the court stated:

We believe the legislature had in mind a four-year statute of limitations barring claims against tax titles, which four-year period dated from the initiation of the tax title, during which period any claimant against the tax title must have had possession of the property to protect any claim he might have. Any other interpretation does not square with the general nature and purpose of the act, and could lead to novel and, we believe, unintended results, so as to defeat the entire purpose of a statute that seems to be designed to settle, not confuse, and to make certain, not uncertain, titles based on statutory liquidation of tax charges.<sup>27</sup>

The court made it clear that the 4-year period dated from initiation of the title; the delinquent taxpayer would have to assert his interest during that period or be forever barred.

### C. *Stability of Tax Titles Undermined: Lyman v. National Mortgage Bond Corp.*

Any stability that tax titles may have achieved under *Hansen* and *Peterson* was nullified by *Lyman v. National Mort-*

26. 6 Utah 2d at 361, 313 P.2d at 815.

27. *Id.* at 362, 313 P.2d at 816. This issue was not squarely before the court.



*gage Bond Corp.*<sup>28</sup> In *Lyman*, the plaintiff's predecessor in interest exclusively and openly possessed property obtained from the county by a tax deed. Plaintiff and his predecessor had maintained exclusive and open possession continuously after the deed was issued, but had failed to pay taxes on the property before the taxes became delinquent. The property had been redeemed, however, through payment of taxes prior to the May sale of each year after issuance of the deed. The court perceived the issue as whether or not the plaintiff's failure to pay the assessed taxes before they became delinquent prevented the court from quieting title in the plaintiff pursuant to the short statutes of limitation.

Both the limitation of actions and adverse possession provisos were before the court. Plaintiff urged that the four provisos were not to be read together, but instead were distinct in purpose and conceptually distinguishable in application. Plaintiff's argument appears to have been that sections 78-12-5.1 and 78-12-5.2 qualified him to bring the action and entitled him to a quieted title even absent his adverse possession and payment of taxes. Read separately, the limitation of actions sections, 78-12-5.1 and 78-12-5.2, allow a tax title holder of 4 or more years to bar claims or defenses by a legal title holder regardless of whether the tax title holder possessed the property or paid taxes. Sections 78-12-7.1 and 78-12-12.1, on the other hand, were traditional adverse possession statutes requiring continuous possession and payment of taxes.<sup>29</sup>

The court conceded that a strict interpretation of the statutes would dictate a holding for the plaintiff. In its interpretation, however, the court read all four provisos together and ruled that sections 78-12-7.1 and 78-12-12.1 required establishment of a valid claim to the property by continuous possession and the payment of taxes before the limitation of actions statutes would operate to bar defenses to actions challenging the tax title, even though sections 78-12-5.1 and 78-12-5.2 did not expressly so provide.<sup>30</sup> The court reasoned that the plaintiff must succeed on the strength of his own claim or title—not the weakness inherent in the defendant's case through his failure to occupy or possess the property during the statutory period.<sup>31</sup> Since payment of a delinquent tax was held not to constitute payment of taxes within the

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28. 7 Utah 2d 123, 320 P.2d 322 (1958).

29. *Id.* at 124-26, 320 P.2d at 323-24.

30. *Id.* at 126-27, 320 P.2d at 324-25.

31. *Id.* at 127, 320 P.2d at 325.

meaning of the adverse possession provisos, plaintiff did not establish a valid claim to the property.<sup>32</sup>

The court also found constitutional objections to plaintiff's bifurcated reading of the statutes. To construe the statutes to bar defendants from presenting claims where plaintiff established no valid claim to the property was said to constitute a deprivation of property without due process of law.<sup>33</sup>

### III. ANALYSIS

Traditionally, tax titles were perfected either by proving strict compliance with statutory prerequisites for the issuing of tax titles<sup>34</sup> or by establishing rights by adverse possession.<sup>35</sup> As part of Utah's remedial legislation, the rigid rules requiring proof of all steps in the taxation process in order to perfect title were amended to provide that a tax deed would be regarded as *prima facie* evidence of the regularity of all proceedings subsequent to the preliminary sale "and of the conveyance of the property to the grantee in fee simple."<sup>36</sup> The purpose of the short statutes of limitation was to provide a period of time for the validity of the tax deed and proceeding to be challenged, after which the dispossessed landowner's rights to recovery would be cut off.

*Lyman* brings into focus the problems which, inherent in the statutes or judicially contrived, prevent effective application of the statutes. The problems that merit comment here are (1) the fundamental conceptual distinction between the limitation of actions and the adverse possession provisos, (2) the requirement of possession as a prerequisite to invoking the two limitation of actions statutes, and (3) the computation of the statutory period in the limitation of actions statute and the prescriptive period for ownership under the adverse possession statutes.

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32. *Id.* at 125-26, 320 P.2d at 323-24. For a contrary view see Justice Worthen's dissent. *Id.* at 128-32, 320 P.2d at 326-28.

33. 7 Utah 2d at 128, 320 P.2d at 325.

34. See, e.g., *Salt Lake Home Builders, Inc. v. Colman*, 30 Utah 2d 370, 383, 518 P.2d 165, 167 (1974) noted in 1974 UTAH L. REV. 121; *Olsen v. Bagley*, 10 Utah 492, 495, 37 P. 739, 740 (1894).

35. UTAH CODE ANN. § 78-12-7 to -12 (1953); see *Lyman v. National Mortgage Bond Corp.*, 7 Utah 2d 123, 320 P.2d 322 (1958).

36. UTAH CODE ANN. § 59-10-64(5) (1953). See also *Pender v. Alix*, 11 Utah 2d 58, 61, 354 P.2d 1066, 1068 (1960) (dissenting opinion).

### A. *Limitation of Actions vs. Adverse Possession*

#### 1. *Limitation of actions*

The prevailing rule that statutes of limitation are statutes of repose is based in part upon the proposition that persons who sleep upon their rights may lose them.<sup>37</sup> They are designed to compel the exercise of a right within a reasonable time and to suppress stale claims.<sup>38</sup> While the individual derives the immediate benefit from the operation of a statute of repose,<sup>39</sup> the public is also benefited by the stimulation of activity and the promotion of security in human affairs.<sup>40</sup> This policy of repose may be outweighed if the interests of justice require vindication of the barred party's rights, as where the party has not been negligent, but rather has been innocently prevented from asserting his rights.<sup>41</sup>

The short or special statutes of limitation were designed to establish comparatively short periods of time, running in favor of the holder of the tax title, after which the statutory presumption of the regularity of the proceeding and the validity of the title could not be questioned.<sup>42</sup>

The constitutionality of these short statutes of limitation is generally not an issue. Unless forbidden by their state constitutions, state legislatures may constitutionally shorten the period fixed by previously existing statutes.<sup>43</sup> The United States Supreme Court has long sustained shortened statutes that limit the period in which the prima facie evidence of regularity can be rebutted as complying with due process requirements<sup>44</sup> as long as notice requirements are met.<sup>45</sup> Sections 78-12-5.1 and 78-12-5.2

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37. *Ashton-Jenkins Co. v. Bramel*, 56 Utah 587, 596, 192 P. 375, 378 (1920); *see Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

38. *Chase Security Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

39. *Kyle v. Green Acres, Inc.*, 44 N.J. 100, 110, 207 A.2d 513, 519 (1965).

40. *Id.* at 108, 207 A.2d at 517; *see Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

41. *E.g.*, *Housing Authority v. Commonwealth Trust Co.*, 25 N.J. 330, 342-43, 136 A.2d 401, 408 (1957).

42. *E.g.*, *Layton v. Holt*, 22 Utah 2d 138, 139-40, 449 P.2d 986, 987 (1969); *Peterson v. Callister*, 6 Utah 2d 359, 362, 313 P.2d 814, 816 (1957).

43. *Ochoa v. Hernandez*, 230 U.S. 139, 161-62 (1913).

44. *Bardon v. Land & River Improvement Co.*, 157 U.S. 327, 333 (1895).

45. Notice is still a volatile issue. Most states' taxing statutes, including Utah's, provide for notice by publication where notice is required during the tax sale proceedings. The universal exception is notice of assessment, which is generally mailed. The representative Utah statutes are UTAH CODE ANN. § 59-10-10 (notice of assessment by mailing); § 59-10-29 (notice of delinquent list by publication); and § 59-10-64 (1953) (notice of final sales by publication). Notice by publication, however, has come under substantial fire.

withstood due process and equal protection challenges made before the Supreme Court of Utah in *Hansen v. Morris*.<sup>46</sup>

Short statutes of limitation do not operate as a bar against attack where the deed does not describe the property sold at a tax sale or where the description is so vague or erroneous that the property in question cannot be identified.<sup>47</sup> Insufficiency of description, however, is a question of fact.<sup>48</sup>

Special or short statutes of limitation do not run where the tax deed is absolutely void on its face—not merely voidable—due to some jurisdictional defect<sup>49</sup> or where the jurisdictional defect, not apparent on the face of the deed, entails an irregularity in the proceedings.<sup>50</sup> The statutes do not run even where the tax title holder takes possession of the land and occupies it for the pre-

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950), the Supreme Court said:

[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

*Mullane* involved a court action for settlement of accounts where published notice was held to be inadequate. The *Mullane* rule has been applied in condemnation cases to invalidate notice by publication. *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

Clearly the *Mullane* rule has application to residents known to the taxing authorities where personal service or service by mailing are logical and reasonable means of complying with the stricter standard. Publication or posting are still necessary, however, and are often the only feasible means where the owners are unknown or nonresidents. *Legg, Tax Sales and the Constitution*, 20 Okla. L. Rev. 365, 375-76 (1967).

The *Mullane* rule has not been applied to tax sales. There is a substantial body of case law that permits the conclusion that perhaps publication or posting is sufficient on grounds that with ownership of property comes the implied knowledge that the property is subject to taxation; therefore the owner is *ipso facto* on notice of losing his property when he fails to pay the assessed tax. *Legg, supra* at 368-69. *See also* *Leigh v. Green*, 193 U.S. 79, 88 (1904); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

46. *See* text accompanying notes 17-23 *supra*. *But see* *Kanawha & Hocking Coal & Coke Co. v. Carbon County*, No. 13853 (Sup. Ct. Utah, May 6, 1975) (dissenting opinion).

47. *Redfield v. Parks*, 132 U.S. 239, 251 (1889); *Crisman v. Johnson*, 23 Colo. 264, 268-70, 47 P. 296, 298 (1896); *Hansen v. Morris*, 3 Utah 2d 310, 315, 283 P.2d 884, 887 (1955); *Denny v. Stevens*, 52 Wyo. 253, 259-60, 73 P.2d 308, 310 (1937).

48. *Bird v. Benlisa*, 142 U.S. 664 (1892); *Hansen v. Morris*, 3 Utah 2d 310, 283 P.2d 884 (1955). Examples of jurisdictional defects include situations in which (1) the land sold at the tax sale was not subject to taxation; (2) the land sold was not subject to the taxes for which it was sold, *Mecham v. Mel-O-Tone Enterprises*, 23 Utah 2d 403, 464 P.2d 392 (1970); (3) taxes for which the land was sold were never assessed, *Huntington City v. Peterson*, 30 Utah 2d 408, 518 P.2d 1246 (1974); (4) the assessment was void, *Keller v. Chournos*, 102 Utah 535, 133 P.2d 318 (1943); and (5) the taxes had been paid, and there had been an incorrect duplicate assessment, *Cameron Estates, Inc. v. Deering*, 308 N.Y. 24, 123 N.E.2d 621 (1954).

49. *Moore v. Brown*, 52 U.S. (11 How.) 414, 426 (1850).

50. *Bird v. Benlisa*, 142 U.S. 664, 666 (1892).

scribed period.<sup>51</sup> In most states, however, where the deed is valid on its face and is voidable merely for some irregularity in the proceeding, the limiting statute runs from the date of execution and delivery of the deed or, in some cases, from the date of recording, regardless of possession.<sup>52</sup> But where the tax deed is void on jurisdictional grounds, the general rule is that the party claiming under the void deed must prove actual possession for the statutory period in order to perfect title. This application shows the interplay between, and the distinctive roles of, a limiting statute and an adverse possession statute in a short statutes-of-limitation package.

## 2. *Adverse possession*

The very act of claiming title by adverse possession for a statutory period precludes the idea of a valid paper title.<sup>53</sup> Where the statute under which the tax title holder claims is considered to be of the same nature as a general statute of limitations for lands held in adverse possession and the deed, valid on its face, appears to convey title to the land, the tax deed is regarded as having "color of title" even though it is void and fails as a conveyance.<sup>54</sup>

Color of title is important only insofar as it gives the adverse possessor of part of the property constructive possession of the whole for the purpose of acquiring prescriptive title thereto<sup>55</sup>—provided, however, that the portion claimed under con-

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51. See *Jackson v. Irion*, 196 La. 728, 200 So. 18 (1941).

52. *Taylor v. Miles*, 5 Kan. 498, 7 Am. R. 558 (1870); *Peterson v. Callister*, 6 Utah 2d 359, 313 P.2d 814 (1957).

53. *Central Pac. Ry. v. Tarpey*, 51 Utah 107, 114, 168 P. 554, 556 (1917).

54. *Valley Inv. Co. v. Los Angeles & S.L.R.R.*, 119 Utah 169, 225 P.2d 722 (1950); *Bozievich v. Slechta*, 109 Utah 373, 166 P.2d 239 (1946); *Baker v. Goodman*, 57 Utah 349, 194 P. 117 (1920); *Welner v. Stearns*, 40 Utah 185, 120 P. 490 (1911). See also *Nicholas v. Giles*, 102 Ariz. 130, 426 P.2d 398 (1967); *Kimble v. Allen*, 298 P.2d 1042 (Okla. 1956).

55. Defective deeds have been held to give color of title where (1) the limiting statute for valid deeds was unconstitutional, *Bradbury v. Dumond*, 80 Ark. 82, 96 S.W. 390 (1906); (2) the tax judgment was void, *Woodside v. Durham*, 317 Mo. 15, 295 S.W. 772 (1927); *Bozievich v. Slechta*, 109 Utah 373, 166 P.2d 239 (1946); (3) the assessment was void, *Florida Fin. Co. v. Sheffield*, 56 Fla. 285, 48 So. 42 (1908); (4) the sale was conducted at a time and place other than those designated by law, *Bennet v. North Colorado Springs Land & Improvement Co.*, 23 Colo. 470, 48 P. 812 (1897); *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13 (1952); (5) the tax deed, void on its face, was not sufficient to set the limiting statute in motion, *Matthews v. Blake*, 16 Wyo. 116, 92 P. 242 (1907); and (6) there was failure to comply with statutory prerequisites for the sale itself, such as the failure of the auditor to affix his affidavit and publication of sale for less than the statutory period, *Bozievich v. Slechta*, 109 Utah 373, 166 P.2d 239 (1946).

structive possession is not in actual possession by another.<sup>56</sup> An instrument serves as color of title only where the location and identity of the property are accurately described.<sup>57</sup> When land is held under such color of title after open, notorious, continuous, exclusive, and hostile possession for the statutory period, good legal title vests in the tax title holder or his successors in interest. Any right of recovery by the dispossessed legal owner or his successors in interest is cut off.<sup>58</sup> Some jurisdictions impose a further requirement that the grantee of the tax sale deed proceed in good faith in the purchase and receipt of the tax deed in order to perfect his title by adverse possession,<sup>59</sup> even though this requirement is not expressed in the statute.<sup>60</sup>

Where a tax deed is not valid on its face, there is a split of authority concerning whether or not it constitutes color of title. The majority rule is that where a tax deed invalid on its face follows the ordinary form for such deeds, is executed by an official having authority to issue tax deeds, and purports to convey land by description accurate enough to permit identification, it will qualify as color of title under adverse possession statutes.<sup>61</sup> But even where the tax deed is valid on its face, it does not give color of title if the description of the property is inadequate to permit identification.<sup>62</sup> A few cases, however, totally reject the color of title concept where the deed is invalid on its face.<sup>63</sup>

### *B. The Requirement of Possession Under the Provisos*

The holding in *Lyman*, that the tax title holder or his successor must establish possession and payment of taxes before the limitation of actions sections can be invoked to bar a defense, presents two problems. First, it ignores the concept of possession through seisin by a valid deed (not to be confused with color of

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56. *McCay v. Parks*, 201 Ala. 647, 649, 79 So. 119, 121 (1918); *Central Pac. Ry. v. Tarpey*, 51 Utah 107, 114, 168 P. 554, 556 (1917); *Welner v. Stearns*, 40 Utah 185, 195, 120 P. 490, 493 (1911).

57. This concept is to be distinguished from the possession by a naked trespasser without color of title, which is limited to the area of his actual possession.

58. See *Central Pac. Ry. v. Tarpey*, 51 Utah 107, 114, 168 P. 554, 556 (1917).

59. *Pratt v. Parker*, 57 N.M. 103, 255 P.2d 311 (1953).

60. *E.g.*, *Bower v. Cohen*, 126 Ga. 35, 40-42, 54 S.E. 918, 920-21 (1906).

61. See *Deputron v. Young*, 134 U.S. 241, 254 (1890); *Lawrence v. Murphy*, 45 Utah 572, 147 P. 903 (1915).

62. *Horsky v. McKennan*, 53 Mont. 50, 57, 162 P. 376, 379 (1916); *Sanchez v. Garcia*, 72 N.M. 406, 410, 384 P.2d 681, 683 (1963).

63. *Redfield v. Parks*, 132 U.S. 239, 251-52 (1889); *Matthews v. Blake*, 16 Wyo. 116, 124, 92 P. 242, 243 (1907).

title where the deed is merely valid on its face), which has never required payment of taxes to establish rights of ownership. Second, section 78-12-5.2, as a statute of repose, is subverted where the dispossessed party or his successor in interest may assert rights in the property indefinitely after the May sale, provided that he or his successor has possessed the property at any time during the 4 years prior to commencement of the action or interposition of the defense.

In Utah, the grantee at a tax sale (or the county where no party purchases) takes a new and paramount title in fee simple.<sup>64</sup> Under traditional concepts of real property law and limitation of action statutes generally, a party seised of property need not be in possession to maintain an action for recovery or possession.<sup>65</sup> Although the term "seisin" has no precise or definite meaning in American jurisprudence, it is generally thought of as the force of possession under a deed, as opposed to possession or occupancy in fact.<sup>66</sup> Therefore, where the tax title constitutes a valid title and represents seisin of the land, possession in fact should not be required.

The payment of taxes is not relevant in determining rights in a quiet title action that is premised on theories other than adverse possession. Traditionally, payment of taxes has been one of the elements that manifests and supports open, notorious, and exclusive possession adverse to the owner of the legal title.<sup>67</sup> Under Utah's adverse possession provisos, payment of taxes supports a curious kind of presumed or constructive possession, apparently because the tax title gives color of title only.<sup>68</sup> But where a party shows possession by seisin or force of possession under a completely valid deed, nonpayment of taxes should be irrelevant to the determination of his relative strength of title for purposes of succeeding in a quiet title suit, unless, of course, he has been disseised, himself, by a tax sale.

This reasoning invalidates the majority opinion in *Lyman*, where the threshold question of the validity of the tax deed was never reached.<sup>69</sup> Payment of taxes should not have been required

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64. UTAH CODE ANN. §§ 59-10-64(5) to (7) (1953); see *Welner v. Stearns*, 40 Utah 185, 194, 120 P. 490, 493 (1911). For a more extensive discussion of the nature of tax titles in Utah see Comment, *supra* note 6.

65. See UTAH CODE ANN. § 78-12-5 (1953).

66. *Ford v. Garner's Adm'r*, 49 Ala. 601 (1873); *Kanawha & Hocking Coal & Coke Co. v. Carbon County*, No. 13853 (Sup. Ct. Utah, May 6, 1975).

67. *Bowen v. Olson*, 2 Utah 2d 12, 15, 268 P.2d 983, 985 (1954).

68. See text accompanying notes 53-54 *supra*.

69. *Lyman v. National Mortgage Bond Corp.*, 7 Utah 2d 123, 127, 320 P.2d 322, 325 (1958).

if the tax deed was valid since the tax title holder would have already established possession by seisin under the valid deed. This line of reasoning is supported by the general rule and policy of most limitation of actions statutes of this nature that neither actual possession nor payment of taxes by the tax title holder is required to invoke the statute.<sup>70</sup>

The nature of the tax title as legal title draws into question the use of the language "owner of a legal title" found in section 78-12-5.2. It is clear from the context of this section that the statute is referring to the party dispossessed of his property at a tax sale for failure to pay taxes. In reality, and consistent with the notion that the tax title is a new and paramount title, the holder of the tax deed is the owner of the legal title.

The second problem, pertaining to the nature of section 78-12-5.2 as a statute of repose undermined by the possession exception, was raised by the majority in *Peterson v. Callister*.<sup>71</sup> If section 78-12-5.2 is to be consistent with the purpose of the limiting statutes in a tax title contest, it must establish a time after which no challenges may be brought. Allowing the dispossessed party to circumvent the statute and assert rights to the property at any time in the future by proving actual possession—regardless how brief—during the 4 years prior to the action, works to preserve stale claims, condones negligence, and adds insecurity to human affairs in flagrant disregard of all policy considerations and objectives of such statutes.

### C. Computation of the Statutory Period

Both limiting statutes, sections 78-12-5.1 and 78-12-5.2, provide a statutory period ending "four years after the date of the tax deed, conveyance, or transfer creating such tax title," during which claims may be asserted. Whether this language was intended to mean that the statute commences to run the day of the private sale (where one is held), upon termination of the redemption period, or the date of the May sale is unclear. There is neither statutory expression nor judicial pronouncement on the issue short of a statement that the period commences 4 years from the date of conveyance creating the tax title.<sup>72</sup>

The answer is contained in the resolution of the question of when a tax title is initiated. The dispossessed landowner has a

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70. See note 52 and accompanying text *supra*.

71. See text accompanying notes 26-27 *supra*.

72. See note 27 and accompanying text *supra*.



statutory right of redemption during the period between the preliminary sale in the January following delinquency and April 1st, 4 years later.<sup>73</sup> Any properties or interests purchased by tax sale during that period are subject to redemption. During the redemption period, the purchaser takes only an equity in the property that carries with it no right of possession. This right of possession ripens into an absolute title only when the delinquent party fails to redeem.<sup>74</sup> Since a tax title, by judicial determination, is absolute in quality,<sup>75</sup> a "tax title" does not really become a tax title until the redemption period ends.<sup>76</sup> The limiting period for adjudication of rights, therefore, should commence upon the termination of the redemption period in the case of private sales, or on the date of the May sale where the delinquent properties are sold to the public or struck off to the county.

The foregoing construction has distinct advantages. First, it gives the dispossessed party whose land is sold at sale prior to the May sale additional time to assert any rights—without undermining the objectives of limiting statutes. Moreover, the additional time might serve to appease courts that are reluctant to uphold forfeitures occasioned by tax sales.

#### IV. RECOMMENDATIONS

The problem areas raised by *Lyman* and discussed in the preceding section can be resolved by minor legislative amendments to the limiting statutes. As no theoretical or linguistic inconsistency appears to burden the adverse possession statutes, no recommendations for amendment with respect to them are made.

##### A. *The Possession Requirement*

In order to give tax titles a degree of certainty, the primary objective of the short statutes of limitation is to establish relatively short periods of time after which the statutory presumption of the regularity of the proceeding and the validity of the title cannot be questioned. In keeping with this goal, section 78-12-5.2

73. UTAH CODE ANN. § 59-10-56 (1953); Comment, *supra* note 6; 3 UTAH L. REV. 97, 100 (1952).

74. UTAH CODE ANN. § 59-10-64(1), (5) (1953) (when sold at May sale); § 59-10-64(1), (6) (1953) (when struck off to county).

75. See note 61 *supra*.

76. For a good discussion of this concept see *Crisman v. Johnson*, 23 Colo. 264, 271-72, 47 P. 296, 299 (1896).

should be amended by deleting the portion of the proviso that prevents the statute from barring an action or defense by the dispossessed landowner or his successor in interest where he can show actual possession at any time within the 4-year period that immediately precedes the action or defense. This deletion would serve to require the dispossessed landowner to bring his action within the 4-year period following creation of the tax title or be forever barred. It would prevent him from sleeping on his rights for years and then bringing an action or interposing a defense simply by showing that he occupied the property within the 4 years prior to the commencement of the action or interposition of the defense.

The proposed amended statute should read as follows:

No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act [deletion]. [P]rovided, [however], that this section shall not bar any defense by a city or town, to an action by the holder of a tax title to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title.<sup>77</sup>

To achieve consistency with the parent limiting statute (section 78-12-5) and statutes of limitation generally having to do with actions for the recovery or possession of real property, the possession limitation contained in section 78-12-5.1 should be amended to read:

[P]rovided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title *and no person may commence or interpose such action or defense unless that person or his predecessor has actually occupied such property within such four-year period.*<sup>78</sup> (Proposed amendment emphasized.)

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77. For current version see note 8 *supra*. This proposed amendment is consistent with the statutes applicable in neighboring jurisdictions.

78. For the current version see note 11 *supra*. This proposed amendment, less the

### B. Computation of the Statutory Period

The definitional section should be amended as follows:

The term "tax title" as used in section 78-12-5.2 and section 59-10-65, and the related amended sections 78-12-5, 78-12-7, and 78-12-12, means that title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such property whereby the property is relieved from a tax lien. *An interest in real property obtained at a tax sale becomes a tax title upon termination of the redemption period in the case of property sold pursuant to section 59-10-37 and upon the date of final sale in the case of property sold pursuant to section 59-10-64.*<sup>79</sup> (Proposed amendment emphasized.)

This amendment recognizes that the purchaser at a tax sale has no title until after the redemption period or upon final sale and that the statutes of limitation would commence to run at the time the equity matures into a legal title.

### V. CONCLUSION

Eighteen years ago, a local author exposed the dilemma occasioned by *Lyman* and astutely urged the legislature to take corrective action.<sup>80</sup> It is obvious now, as it was then, that the Supreme Court of Utah, given its aversion to property forfeitures of any kind, is unlikely to back down from *Lyman*, even though the opinion is fraught with theoretical inconsistencies. Given the increasing number of properties that proceed to tax sales in Utah, and the need to engender public interest and confidence in tax titles in order to place delinquent properties back into a revenue generating posture, it is apparent that either the problems be resolved, or we brace ourselves for taxation in another sector to raise requisite revenues and abandon hope of ever purchasing realty free of tax title clouds. Legislative attention must be directed toward resolving this critical problem brought about by the current ambiguous statutory language, judicial disenchantment with tax titles generally, and confusion with regard to the

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possession requirement, is consistent with the statutes applicable in neighboring jurisdictions. See note 8 *supra*.

79. For relevant portions of the current version see text accompanying note 16 *supra*.

80. See 6 UTAH L. REV. 284 (1958).

short statutes of limitation specifically. Until the legislature amends the present statutes, the cloud over this area of the law will grow darker and more ominous.