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In recent decisions, the Utah Supreme Court has overturned a long-established approach for settling boundary disputes.[1] The court has placed significant restrictions on traditional means of settling disputes between neighbors regarding the practical location of boundaries. Understanding the full impact of the recent Utah decisions requires familiarity with Utah law on adverse possession[2] and with boundary dispute doctrines used in other jurisdictions.[3] Several commentaries have already explored the specific decisions,[4] beginning with *Halladay v. Cluff*,[5] in which the Utah court has developed its new position. This article assesses these decisions in a larger context and proposes legislation[6] to revamp Utah's statute of limitations, making adverse possession the normal means of resolving most boundary disputes.

I. Legal Doctrines

Courts have employed several major doctrines to award property to a party in possession despite superior record title in

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1. *See* Parsons v. Anderson, 690 P.2d 535 (Utah 1984); Stratford v. Morgan, 689 P.2d 360 (Utah 1984); Halladay v. Cluff, 685 P.2d 500 (Utah 1984).

2. Utah Code Ann. § 78-12-12 (1953).

3. *See* Browder, *The Practical Location of Boundaries*, 56 Mich. L. Rev. 487 (1958); Comment, *Built-up Boundaries Outweigh Paper Boundaries*, 4 Calif. L. Rev. 293 (1916) [hereinafter Comment, *Built-up Boundaries*]; Comment, *Agreed Boundaries and Boundaries by Acquiescence: The Need for a Straight Line from the Courts*, 9 Loy. L.A.L. Rev. 637 (1976).

4. *Recent Developments in Utah Law*, 1985 Utah L. Rev. 131, 193; Note, Halladay v. Cluff: *"Objective Uncertainty" In Deed!*, 11 J. Contemp. Law 567 (1985) [hereinafter Note, *In Deed!*]; Note, *Objective Uncertainty in Boundary by Acquiescence:* Halladay v. Cluff, 1984 B.Y.U. L. Rev. 711.

5. 685 P.2d 500 (Utah 1984).

6. *See infra* text accompanying notes 112-14.

another person.[7] These doctrines are: (1) long-term adverse possession; (2) short-term adverse possession; (3) prescriptive easement; and (4) boundary dispute doctrines, including boundary by agreement, acquisition, and estoppel. All of these doctrines are related, though their requirements differ.

A. Adverse Possession

Adverse possession, sometimes known as title by prescription, transfers interests in land to a person in possession without the consent of the legal owner.[8] The doctrine originated in thirteenth century England and by 1623 evolved into the prototype for American statutes.[9] The English statute was essentially a statute of limitations which limited the time in which a person with legal title could bring an action to regain possession from one in wrongful possession.[10] The English rule was adopted by most early American jurisdictions and still prevails today.

American scholars characterize the doctrine of adverse possession as a method of taking title to another's property through a "wrongful" occupation.[11] There are varying explanations for the rule, but most courts agree on its basic rationale. Justice Holmes aptly stated: "The true explanation of title by [adverse possession] seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life."[12] Although his possession is said to be wrongful, the claimant seldom deliberately sets out to take land from another by claiming adverse possession.[13] Most people, in fact, settle into a piece of land believing that the land belongs to them. The doctrine has therefore been accepted as additional title assurance for one who possesses land under a belief of ownership.[14]

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7. *See generally* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 11.8, at 764-65 (1984) [hereinafter R. CUNNINGHAM].

8. *See* R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 1012, at 1087 (abr. ed. 1968) [hereinafter R. POWELL].

9. *See id.* at 1087-88.

10. *Id.* at 1088.

11. *See* R. CUNNINGHAM, *supra* note 7, § 11.6, at 757.

12. M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 417-18 (1943) (quoting letter from Justice Holmes to William James (Apr. 1, 1907)).

13. J. CRIBBET & C. JOHNSON, CASES AND MATERIALS ON PROPERTY 1554 (5th ed. 1984).

14. *See* Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135-37 (1918).

However, because adverse possession is a judicial doctrine governed by state statutes, the requirements differ from state to state. Two types of adverse possession exist in the United States today, "long-term" and "short-term."

To satisfy the elements of long-term adverse possession,[15] one must have (1) actual, (2) open and notorious, (3) hostile, (4) exclusive, and (5) continuous possession of the land for the statutory period, usually about twenty years.[16] The first element, actual possession, requires some physical occupation of the land. This may be satisfied by such possessory acts as building fences, roads, or buildings,[17] which define the boundaries of the land taken. Some courts relax the actual possession element, requiring only constructive possession, when the claimant holds a document that gives "color of title"[18]—the appearance of title to the land claimed. Under this exception to the actual possession rule, the description in the document, rather than the possessory acts, set the boundaries.[19]

Open and notorious possession requires that there be visible

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15. Forty-one states have this type of adverse possession. Pendley v. Pendley, 338 So. 2d 405, 406-07 (Ala. 1976); ALASKA STAT. § 09.10.030 (1983); ARIZ. REV. STAT. ANN. § 12-526 (1982); ARK. STAT. ANN. § 37-101 (1962); COLO. REV. STAT. § 38-41-101 (1982); Ruggiero v. Town of East Hartford, 2 Conn. App. 89, 477 A.2d 668, 672-73 (1984); DEL. CODE ANN. tit. 10, § 7902 (1975); FLA. STAT. ANN. § 95.12 (West 1982); GA. CODE ANN. § 44-5-163 (1982); HAW. REV. STAT. § 657-31 (1976); ILL. ANN. STAT. ch. 110, para. 13-101 (Smith-Hurd 1984); IOWA CODE ANN. § 614.1 (West 1950 & Supp. 1986); KAN. STAT. ANN. § 60-503 (1983); KY. REV. STAT. ANN. § 413.010 (Baldwin 1972); ME. REV. STAT. ANN. tit. 14, § 801 (1980); MD. CTS. & JUD. PROC. CODE ANN. § 5-103 (1984); MASS. GEN. LAWS ANN. ch. 260, § 21 (West 1959); MICH. STAT. ANN. § 27A.5801 (Callaghan 1986); MISS. CODE ANN. § 15-1-13 (1972); MO. ANN. STAT. § 516.010 (Vernon 1952); NEB. REV. STAT. § 25-202 (1985); N.H. REV. STAT. ANN. § 508:2 (1983); N.J. STAT. ANN. § 2A:14-30 (West Supp. 1986); N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 1979); N.C. GEN. STAT. § 1-40 (1983); N.D. CENT. CODE § 28-01-04 (1974); OHIO REV. CODE ANN. § 2305.04 (Baldwin 1981); OKLA. STAT. ANN. tit. 12, § 93 (West 1960 & Supp. 1987); OR. REV. STAT. § 12.050 (1983); PA. STAT. ANN. tit. 12, § 71 (Purdon 1970); R.I. GEN. LAWS § 34-7-1 (1984); S.C. CODE ANN. § 15-67-210 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 15-3-3 (1984); TENN. CODE ANN. § 28-2-101 (1980); TX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1987); VT. STAT. ANN. tit 12, § 501 (1973); VA. CODE § 8.01-236 (1984); WASH. REV. CODE ANN. § 7-28-050 (1961); W. VA. CODE § 55-2-1 (1981); WIS. STAT. ANN. § 893.25 (West 1983); WYO. STAT. § 1-3-103 (1977).

16. R. CUNNINGHAM, *supra* note 7, § 11.7, at 758.

17. *See id.*

18. Through the color of title exception, a person can increase the amount of land "possessed" by adverse possession because the description in the document giving color of title may include more land than is actually possessed. Lott v. Muldoon Rd. Baptist Church, 466 P.2d 815, 817-18 (Alaska 1970); Nyman v. City of Eugene, 286 Or. 47, 64, 593 P.2d 515, 524 (1979).

19. *Lott*, 466 P.2d at 817-18.

evidence of the use of the land. Actual possession usually satisfies this element perforce; it is a more difficult (and particularly important) element in the case of constructive possession. This element, sometimes called the "notice" requirement, is considered crucial because it provides the legal owner with notice of the claimant's intention and thus with the opportunity to take preventive measures against the possessor.[20]

The third element, hostility, means in most states that the possession cannot be with the owner's permission.[21] Therefore, any use with permission such as a license or lease will not qualify as adverse possession. Some courts add to the lack-of-permission requirement by requiring specially that the possession be under a claim of right.[22] Claim of right may be difficult to establish because many courts do not have a clear definition of the concept.

The exclusive-possession element demands that the owner and the adverse possessor never had concurrent ownership.[23] This requirement solidifies the adverse possessor's claim of continuous possession and evidences an intent to exercise dominion over the land to the exclusion of all others.

Under the last element of adverse possession, continuity, the possessor cannot allow any significant interruptions of his possession before the statutory period runs. What constitutes a significant interruption depends on the nature of the land.[24] If an adverse possessor transfers his interest to another before the period of limitations has run, "tacking" allows the new possessor to add the time of his possession to that of his predecessor and use the aggregate to satisfy the statutory period.[25] To successfully invoke tacking, there must be privity between transferor and transferee, and the transfer must be made with a document showing color of title.[26]

The second form of adverse possession, short-term adverse possession, has much the same requirements as long-term ad-

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20. Olwell v. Clark, 658 P.2d 585, 587 (Utah 1982); R. POWELL, *supra* note 8, ¶ 1013.

21. Penn v. Ivey, 615 P.2d 1, 3 (Alaska 1980); R. CUNNINGHAM, *supra* note 7, § 11.7, at 760.

22. R. POWELL, *supra* note 8, ¶ 1015, at 1091.

23. Raftopoulos v. Monger, 656 P.2d 1308, 1311 (Colo. 1983); Dzuris v. Kucharik, 164 Colo. 278, 282, 434 P.2d 414, 416 (1967); *see* R. CUNNINGHAM, *supra* note 7, § 11.7, at 762.

24. R. CUNNINGHAM, *supra* note 7, § 11.7, at 763.

25. *See* R. POWELL, *supra* note 8, ¶ 1021.

26. *See generally* Warren, *A Problem in "Tacking,"* 88 U. PA. L. REV. 897 (1940).

verse possession, with the differences of a shortened limitation period and the special requirement that the adverse possessor either pay the property taxes before the legal owner,[27] or base his claim on a document (which boosts the claim to one made under color of title).[28] If the possessor pays the taxes or has color of title and satisfies all the requirements of long-term adverse possession for a shorter statutory period—usually five to seven years—he receives title to the land.

Short-term adverse possession was probably created as an incentive to pay taxes.[29] But it also creates an incentive to take land by adverse possession. Because one must procure a tax description from the assessor's office in order to pay land taxes, one is likely to become aware that he is not the legal owner of land he possesses. One who thus learns that he is on land to which he has no legal title may deliberately try to take it through short-term adverse possession.[30]

One who possesses land for a long period without having legal title, but believing he is the actual owner, is unlikely to think of procuring a tax description in order to pay taxes on the land.[31] The tract that he wrongfully possesses will probably lie next to his own, and he will think that he is already paying taxes on it. Consequently, such a person rarely takes land by short-term adverse possession. Furthermore, boundaries between properties are probably seldom settled under the short-term adverse possession requirement of paying taxes. Therefore, the ra-

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27. *See* Montgomery, *The Adverse Possession of Land Titles in Utah*, 3 UTAH L. REV. 294, 310 (1953). Currently, nine states have shortened statutes of limitations for cases where taxes are paid, in addition to their long-term statutes. ALA. CODE § 6-5-200 (1977); ARIZ. REV. STAT. ANN. § 12-525 (1982); ARK. STAT. ANN. § 37-102 (1962) (possession not required); COLO. REV. STAT. § 38-41-108 (1982); ILL. ANN. STAT. ch. 110, paras. 13-107, -109 (Smith-Hurd 1984); S.D. CODIFIED LAWS ANN. § 15-3-15 (1984); TEX. CIV. PRAC. & REM. CODE ANN. § 16.025 (Vernon 1986); WASH. REV. CODE ANN. § 7.28.070 (1961); WIS. STAT. ANN. § 893.27 (West 1983).

28. States which have shortened statutes of limitations for cases involving color of title include the following: ALA. CODE § 6-5-200 (1977); ALASKA STAT. § 09.25.050 (1983); ARIZ. REV. STAT. ANN. § 12-523 (1982); and N.C. GEN. STAT. § 1-38 (1983). Some states require color of title for longer adverse possession also. *See, e.g.*, N.D. CENT. CODE § 28-01-08 (1974).

29. *See* Montgomery, *supra* note 27, at 313.

30. A few states allow shortened statutes of limitations for color of title claims. *See supra* note 28. These statutes also require affirmative action by the possessor, thus preventing anyone from adversely possessing land not included in his deed description but within his physical boundary.

31. *See* Herrmann v. Woodell, 107 Idaho 916, 919-20, 693 P.2d 1118, 1121-22 (1985); Platt v. Martinez, 90 N.M. 323, 324, 563 P.2d 586, 587 (1977).

tionale behind long-term adverse possession of providing additional title assurance does not apply to short-term adverse possession.

Utah is one of the few states that does not have long-term adverse possession,[32] though it does have short-term adverse possession. However, since short-term adverse possession does not help resolve boundary disputes, Utah property owners must look to other methods of resolving such disputes and providing better title assurance.

B. Prescriptive Easements

The doctrine of prescriptive easements is another method whereby one can obtain rights to the land of another without the owner's permission.[33] The prescriptive easement is a judicial doctrine based on the statute of limitations. It was created at about the same time as adverse possession and operates in much the same manner.[34] The requirements for a prescriptive easement also resemble those of adverse possession. One can obtain a prescriptive easement by showing that a particular use of land has been "open and notorious, continuous, uninterrupted, adverse, and under claim of right."[35]

A crucial difference between the doctrines of adverse possession and prescriptive easement is that the former gives title to land while the latter confers only a right to use it in a specific way.[36] Therefore, the doctrine will not serve to settle boundary disputes as does long-term adverse possession.[37] The prescriptive easement does, however, serve to settle disputes over the use of land.

C. Boundary Dispute Doctrines

Boundary dispute doctrines[38] were created to resolve recur-

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32. *See supra* note 15.

33. *See* R. CUNNINGHAM, *supra* note 7, § 8.7; R. POWELL, *supra* note 8, ¶ 413.

34. *See supra* notes 9-10 and accompanying text.

35. J. DUKEMINIER & J. KRIER, PROPERTY 994 (1981); *see also supra* note 8 and accompanying text.

36. R. POWELL, *supra* note 8, ¶ 413, at 555.

37. Another reason why the doctrine of prescriptive easements is insufficient for settling boundary disputes is that a disputed tract will rarely be used for a specific purpose for the prescribed length of time. In most cases, the use of a disputed tract is construed as possession rather than a use and therefore does not qualify for a prescriptive easement. *See* R. CUNNINGHAM, *supra* note 7, § 8.7, at 452.

38. *See* R. CUNNINGHAM, *supra* note 7, § 11.8.

ring problems encountered in trying to fix boundaries between adjoining property owners. Adjoining landowners often suffer from incorrectly marked boundaries or unclear deed descriptions. Three separate doctrines have been developed to resolve such questions. These include: (1) boundary by agreement, (2) boundary by acquiescence, and (3) estoppel.[39] All of these principles share similar policy foundations which are to promote efficient use of property, to reduce litigation, to establish a status of repose, to remove stale claims, and to avoid the necessity of producing evidence of events from the distant past.[40]

1. Boundary by agreement

The theoretical bases of boundary by agreement and boundary by acquiescence are similar but not identical. The differences are important in defining the elements of each of these boundary resolution rules. Boundary by agreement is premised on a contractual theory,[41] whereas boundary by acquiescence, though it has some of the same elements, is founded on public policy considerations similar to the justifications for adverse possession.[42]

The elements of an enforceable boundary by agreement are (1) an agreement (2) between adjoining landowners, (3) settling a boundary that was uncertain or in dispute, and (4) executed by actual location of a boundary line.[43] In addition to these requirements, many courts, including Utah,[44] require mutual acceptance for a long period of time, typically the same length of time required for long-term adverse possession.[45] As commentators have pointed out,[46] the stated requirement that the boundary set by agreement must have existed for a long period of time effectively removes a major distinction between boundary by agreement and boundary by acquiescence. In theory at least,

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39. *See generally* Browder, *supra* note 3. This article remains the best exploration of these boundary doctrines.

40. *See, e.g.*, Hales v. Frakes, 600 P.2d 556, 559 (Utah 1979).

41. *See* Comment, *Built-up Boundaries, supra* note 3, at 293-96.

42. Olsen v. Park Daughters Inv. Co., 29 Utah 2d 421, 425, 511 P.2d 145, 147 (1973).

43. Brown v. Milliner, 120 Utah 16, 24, 232 P.2d 202, 206 (1951); R. CUNNINGHAM, *supra* note 7, § 11.8, at 766-68; Browder, *supra* note 3, at 490-95; Note, *Boundaries by Agreement and Acquiescence in Utah*, 1975 UTAH L. REV. 221, 221.

44. Hobson v. Panguitch Lake Corp., 530 P.2d 792, 794 (Utah 1975).

45. R. CUNNINGHAM, *supra* note 7, § 11.8, at 767.

46. Note, *supra* note 43, at 222-23.

there should be no general time requirement in boundary by agreement.

The boundary by agreement doctrine requires that the boundary agreement be in writing to comply with the Statute of Frauds because it involves the transfer of title to land.[47] To the degree the boundary is set on a line that differs from the record-title line, one of the parties gains title to an additional parcel of land at the expense of the other. Yet most boundary-by-agreement situations involve only an oral understanding. To preserve oral agreements, some courts have indulged in the fiction that, because there is uncertainty, the agreement merely defines the actual boundary rather than transferring land from one party to another.[48] Professor Browder justifies this fiction by arguing that boundary agreements are essentially in a unique category in which public policy should support a deviation from traditional contractual rules such as the Statute of Frauds. Courts, he indicates, have appropriately argued that boundary agreements are akin to arbitration agreements and are therefore not subject to the Statute of Frauds.[49]

Another contractual requirement—that the agreement be supported by consideration—is satisfied by the dispute-or-uncertainty requirement. Each party by agreeing on a boundary surrenders its right to assert its position in a more formal context. The compromise position reached "does not create new rights, but only establishes existing ones."[50]

The legal difficulties associated with boundary by agreement are troubling, but seldom defeat the doctrine's application. The major obstacle is providing sufficient evidence to prove boundary by agreement.[51] As mentioned above, most agreements made to settle boundaries are oral. Given the "long period of time" requirement in Utah, there is little chance that the original owners who made the agreement are still in possession of the land. Therefore, it is unlikely that they will be available to testify as to the agreement. Even assuming that the original parties are available, it is unlikely that they could remember the alleged

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47. *See* Comment, *Built-up Boundaries*, *supra* note 3, at 293-94.

48. *See, e.g.*, Brown v. Milliner, 120 Utah 16, 25, 232 P.2d 202, 206-07 (1951).

49. Browder, *supra* note 3, at 490-93. The requirement of dispute or uncertainty is necessary to justify this analogy because there cannot be arbitration without a dispute.

50. *Id.* at 491.

51. *See* Stith v. Williams, 227 Kan. 32, 35, 605 P.2d 86, 89 (1980); Huggans v. Weer, 189 Mont. 334, 337-38, 615 P.2d 922, 924-25 (1980).

agreement. And if the original parties are still in possession, the party adversely affected by the agreement may not want to admit that he made it. These problems have led the courts to create the doctrine of boundary by acquiescence.

2. Boundary by acquiescence

According to many courts, the doctrine of boundary by acquiescence is an extension of boundary by agreement. These courts presume an agreement once the elements of boundary by acquiescence are satisfied.[52] Generally, those elements are: (1) occupation up to a visible line marked definitely by monuments, fences, or buildings, and (2) mutual acquiescence in the line as a boundary, (3) for a long period of time (4) by adjoining landowners.[53] Because it does not require an agreement, this doctrine does not have the same contractual underpinnings as boundary by agreement. Boundary by acquiescence is actually akin to a prescriptive theory in which rights are created by operation of law. Thus, it is not necessary in boundary by acquiescence to show satisfaction of contractual consideration requirements, and the Statute of Frauds does not pose a problem.[54] Rather, the doctrine is based on certain policy considerations which are illustrated by the Utah Supreme Court in *Olsen v. Park Daughters Investment Co.*, where the court said that boundary by acquiescence is based on the policy

> that the peace and good order of society require that there be stability . . . in the ownership and occupation of lands . . . . [B]oundary lines which have been long established and accepted by those who should be concerned should be left undisturbed in order to leave at rest matters which may have resulted in controversy and litigation . . . .[55]

Because of the differences between these two doctrines, it is not necessary to prove the boundary was established by the parties as the result of a dispute or uncertainty.

As shown above, boundary by agreement and by acquiescence have several important differences and are based on differ-

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52. *See Brown*, 120 Utah at 25, 232 P.2d at 207.

53. *See* Hales v. Frakes, 600 P.2d 556, 559 (Utah 1979); Fuoco v. Williams, 18 Utah 2d 282, 284, 421 P.2d 944, 946 (1966); *see also Recent Developments in Utah Law*, *supra* note 4, at 193-94.

54. *See* Comment, *Built-up Boundaries*, *supra* note 3, at 300.

55. 29 Utah 2d 421, 425, 511 P.2d 145, 147 (1973); *see also* Note, *supra* note 43, at 224.

ing rationales. However, because the requirements of these two boundary resolution doctrines are so similar in some respects, the courts have often confused their elements.[56] Utah courts provide a good example of such confusion in boundary disputes. The best case to illustrate this confusion is *Madsen v. Clegg*.[57] It is a particularly important case because it was the first of recent cases to make reference to dispute and uncertainty in determining whether boundary by acquiescence applied.[58] Until *Madsen*, the strong opinion of Justice Wolfe in the 1951 case of *Brown v. Milliner* had adequately illuminated that dispute and uncertainty were not necessary elements of the acquiescence doctrine:

> In some of the opinions of this court on the subject of disputed boundaries, there are statements to the effect that the location of the true boundary must be uncertain, unknown or in dispute before an agreement between the adjoining land owners fixing the boundary will be upheld, citing *Tripp v. Bagley* in support thereof . . . . But the *Tripp* case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary was uncertain or in dispute and that the parties agreed upon the recognized boundary as the dividing line will be implied from the parties' long acquiescence.[59]

In *Madsen,* the court failed to understand this language when it said that "[t]he doctrine of boundary by acquiescence has long been recognized, and when the location of the true boundary between adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line . . . ."[60] The court further reasoned that an agreement is implied from acquiescence, therefore requiring uncertainty or dispute.[61]

The court in *Madsen* describes acquiescence in terms of boundary by agreement, failing to see the major difference between the two doctrines. Boundary by agreement requires an express agreement between the parties. Since this doctrine is

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56. R. CUNNINGHAM, *supra* note 7, § 11.8, at 768; Note, *In Deed!, supra* note 4, at 567-68.

57. 639 P.2d 726 (Utah 1981).

58. *Id.* at 729.

59. *Brown,* 120 Utah at 27, 232 P.2d at 208 (citation omitted).

60. 639 P.2d at 728.

61. *Id.* at 729-30.

based on contract law, the agreement can be defeated if there is a failure of consideration. If actual knowledge of the boundary situation exists, the consideration of the party gaining the land fails because he exchanged nothing, not even a nagging uncertainty, to establish the boundary. Therefore, uncertainty or dispute is a necessary element of boundary by agreement. Boundary by acquiescence includes the requirement of acquiescence in a marked boundary for a long period of time. This element is defeated if the parties had knowledge of the true boundary, because in that case there is no acquiescence. Since this doctrine is based on the operation of law—on the policy of setting boundaries on an equitable basis—uncertainty or dispute is not needed to fulfill the requirements of contract law. The court in *Madsen* apparently thought these requirements were interchangeable.[62]

In *Halladay v. Cluff,* three years after *Madsen v. Cluff,* the court drew on the language of *Madsen* in explicitly requiring uncertainty as an element of boundary by acquiescence.[63] The opinion in *Halladay,* with its new requirement, drastically reduces the availability of boundary by acquiescence. The court set an objective standard for uncertainty or dispute, requiring, for example, that deeds be inconsistent or that surveyors disagree on the true boundary.[64] This, of course, places on property owners the financial burden of getting their land surveyed. The burden is likely to be particularly noticeable when the land is transferred, since title insurance does not cover an incorrectly placed boundary.

3. *Estoppel*

Under certain facts, a boundary may be established by the acts or representations of the original titleholder. Even if the record title describes a different boundary line, detrimental reliance on the title owner's misstatements of the boundary location may give rise to a boundary by estoppel. If the true owner of the

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62. *Id.* at 730.

63. *Halladay,* 685 P.2d 500, 504-05 (Utah 1984). Though Justice Howe concurred in *Madsen,* 639 P.2d at 730 (Howe, J., concurring), he later explained in his dissenting opinion in Stratford v. Morgan, 689 P.2d 360, 365 (Utah 1984) (Howe, J., dissenting), that he "regarded the reference in [*Madsen*] to uncertainty and dispute as surplusage, and directed to cases where a boundary is fixed by an express parol agreement as distinguished from a case of boundary by acquiescence." For that reason, he explained, he "only concurred in the result in that case." *Id.*

64. 685 P.2d at 505-06.

property knows that his neighbor is making improvements that will abut an existing fence line which the parties have erroneously considered as the actual boundary line, then the true owner may later be estopped from asserting a boundary claim that shows the true line running through his neighbor's newly constructed building. The elements of boundary by estoppel are: (1) representations by the true owner that the mutually accepted line is the true boundary; (2) reasonable reliance by the neighbor on those representations; and (3) substantial costs detrimentally incurred by the neighbor. In most cases, the true owner must have known that his representations were erroneous or must have been grossly negligent in making them. A court with its equity powers can, because of the estoppel, quiet title in the neighbor.

Other equitable grounds may exist for fixing a different boundary than the one which the record description would establish. For instance, the Utah Supreme Court recently used the equitable doctrine of reformation of a deed to change the record boundary line to correspond with the boundary line intended by the parties to the conveyance.[65]

II. Application of the Law

The full impact of Utah's relatively drastic departure from prior decisions regarding the dispute-or-uncertainty requirement in the boundary by acquiescence context is best illustrated by applying the above boundary resolution approaches used in other jurisdictions to the facts of a recent Utah case. This exercise will show that the Utah Supreme Court has left a major gap in its recognition of rights to property held for long periods of time.

A. The Facts

The fact situation we shall apply comes from a Utah case predating the recent flurry of cases in which the Utah Supreme Court established its novel approach. *Brown v. Peterson Development Co.*,[66] decided in 1980, involved a large strip of land, seventy feet by 969 feet. Since before 1925, an old fence had been the practical boundary between the adjoining properties.

65. Stratford v. Morgan, 689 P.2d 360 (Utah 1984).
66. 622 P.2d 1175 (Utah 1980).

Plaintiffs' land lay immediately to the west of the fence. However, their record title, according to a survey made in 1973, ended seventy feet west of the old fence. Plaintiffs and their predecessors had "occupied, possessed and used the land included in the disputed strip for more than 40 years."[67] Defendants' land, on the east side of the fence, was divided into three parcels. The description of parcel one, on the north, overlapped the eastern twenty-six feet of the disputed strip. The forty-four feet of land between parcel one and the plaintiffs' land was not covered by any deed. Parcel two, in the middle, had two descriptions, the first overlapping the disputed strip by two feet, and the other reaching all the way to the eastern border of the plaintiffs' description. The third parcel, on the south, ended at the old fence. Land between the plaintiffs' description and parcels two and three was also not covered by any deed.[68] No evidence is given to show that taxes were paid by either party, but it can be presumed that each party paid taxes for the land described in its deed and that no one paid taxes on the land not covered by any deed.

The court ruled in *Brown* that the plaintiffs had good title to the disputed strip because their predecessors in interest had established title "by operation of law under the doctrine of boundary by acquiescence."[69] The opinion offers, however, no analysis of the traditional elements of boundary by acquiescence.

One unfamiliar with Utah law might immediately inquire why this fact situation was litigated under boundary by acquiescence and did not justify application of the more common doctrine of adverse possession. The answer is that Utah does not have a long-term adverse possession doctrine descended from the original common law. Twenty years of possession is not sufficient to establish adverse-possession title in Utah.[70] The claimants could only have qualified under Utah's shortened seven-year adverse possession rule, and this requires payment of taxes for seven consecutive years.[71] The difficulty with this approach, however, is that property tax assessments are always based on

67. *Id.* at 1176-77.
68. *Id.* at 1177.
69. *Id.*
70. *See* Montgomery, *supra* note 27, at 301, 310.
71. UTAH CODE ANN. § 78-12-12 (1953).

the record metes-and-bounds description.[72] Thus, only the party who possesses under some document including the same description used by the county property tax assessment records can obtain property by short-term adverse possession.[73]

Several commentators have pointed out that some states which apply adverse possession restrictively appear to compensate by applying boundary by acquiescence more liberally.[74] Utah law prior to *Halladay v. Cluff* fits into this pattern. The payment-of-taxes requirement has transformed many claims that would be treated under the doctrine of adverse possession in other states to a claim relying on one of the boundary-resolution doctrines in Utah. For that reason, Utah has far more boundary by agreement and boundary by acquiescence cases than other jurisdictions in which this fact situation would be a typical adverse possession case.

B. The Application

The following is an analysis of each boundary dispute doctrine as applied to the facts of *Brown*.

1. Adverse possession

Under the long-term adverse possession a successful plaintiff must show the fulfillment of the five requirements listed above. Since the disputed strip was "occupied, possessed, and used . . . for more than forty years" by the plaintiffs, and the defendants did not interfere,[75] the actual, open and notorious, exclusive, and continuous possession requirements are apparently satisfied by the facts of *Brown*.

The hostility requirement is not so easily satisfied. Hostility usually means possession without the permission of one legally

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72. The lack of a long-term adverse possession doctrine may also create problems where valuable improvements have been made in the disputed area by the nonprevailing party. In Goodman v. Wilkinson, 629 P.2d 447 (Utah 1981), the court affirmed the lower court's order requiring plaintiff to reimburse defendant for the fair value of the shed and fruit trees placed on the property by defendant unless plaintiff decided to remove them rather than use them. Utah, like many states, has a so-called betterments statute to govern the situation where improvements are made by a possessor who later loses a title dispute regarding the property on which the improvements were made. UTAH CODE ANN. § 57-6-3 (1986).

73. *See* Montgomery, *supra* note 27, at 310-11.

74. *See* G. NELSON & D. WHITMAN, REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT 138 (2d ed. 1981).

75. Brown v. Peterson Dev. Co., 622 P.2d 1175, 1177 (Utah 1980).

entitled to possession.[76] The facts of *Brown* do not indicate whether there was permission. Thus, some jurisdictions would find claimants' position inadequate to establish title by adverse possession. These jurisdictions place the burden of showing hostility on the plaintiff, thus they might find that the claimants' state of mind was not hostile through the full twenty-year period.[77] If the fence had been regarded all along as the actual boundary line that fit the claimants' record title description or if there was no explanation for the possession, then plaintiff could not show that he had the requisite hostile intent required for title by adverse possession.

However, other jurisdictions hold that adverse-possession claimants should be allowed the benefit of a presumption that an otherwise unexplained possession by one who does not have record title is a hostile act under the requirements of adverse possession.[78] In a court that follows this rule, the defendant would have to show permission.

A question remains as to the land in *Brown* that was not covered by any deed. Apparently neither party ever had legal title to that portion of the property. Although the defendants are not the proper party from whom to seek title to that land, possession by plaintiffs should be sufficient to establish title by adverse possession against the title owner, whoever that is (presumably a prior grantor who never succeeded in conveying away the full strip). Because the plaintiffs paid no taxes on the unclaimed strip, they cannot get title to it through short-term adverse possession. In some states, however, (including California) proving that no one else paid taxes on the land satisfies the tax requirement in short-term adverse possession situations.[79] If that rule were applied to the facts in *Brown*, the plaintiffs would get only the land not covered by any deed. Of course, the plaintiffs would not get all the land up to the old fence unless another doctrine justifying such taking applies, but some land is better than none.

In summary, there is a fundamental difference between adverse possession and boundary by agreement. Adverse possession is based on a philosophy of a hostile claimant taking the

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76. *See supra* text accompanying notes 20-21.

77. *See* R. CUNNINGHAM, *supra* note 7, § 11.7, at 761.

78. *Id.* at 760.

79. Gilardi v. Hallam, 30 Cal. 3d 317, 326, 636 P.2d 588, 593, 178 Cal. Rptr. 624, 629 (1981).

land from the owner of record. Boundary by agreement is based on an actual agreement. In adverse possession cases, there is no agreement because the claimant establishes the boundary without the consent of the other landowner. In fact, proof of an agreement would negate the hostility element necessary to show adverse possession. Conversely, there is no hostility requirement in either boundary-by-agreement or boundary-by-acquiescence cases. Notwithstanding this fundamental difference, most boundary dispute claimants in Utah are forced into the boundary resolution doctrines because adverse possession doctrines are unavailable.

2. Prescriptive easement

Attempting to apply the *Brown* facts to the prescriptive easement doctrine will not produce the results desired by most property owners. Applying the doctrine will not quiet title in the person in possession;[80] it will merely give that person a right to use the land in a specific manner. In *Brown,* the plaintiff's predecessors used the land only for farming. There were no particular lanes of ingress or egress. It is unlikely, however, that any court will construe farming as a mere use as opposed to possession of the land.[81] Even if a court did, that use is not a viable option for plaintiffs since the disputed tract and the adjoining tracts are too small for farming.[82] Therefore the doctrine of prescriptive easements does not resolve the boundary dispute.

3. Boundary dispute doctrines

a. Boundary by agreement. This brings us to the application of these facts to the boundary dispute resolution doctrines. To satisfy the requirements of boundary by agreement, the plaintiff must show that there was uncertainty or dispute about the actual boundary (which assumes that the property of the parties is adjoining), and that the parties agreed to set the boundary at a particular place.[83] These requirements can rarely be satisfied and are therefore seldom litigated. In *Brown,* there is no evidence of any communication between the parties. Thus, boundary by agreement fails.

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80. *See supra* text accompanying notes 36-37.
81. *See* R. CUNNINGHAM, *supra* note 7, § 8.7, at 452.
82. Brown v. Peterson Dev. Co., 622 P.2d 1175, 1177 (Utah 1980).
83. *See supra* text accompanying note 43.

b. Boundary by acquiescence. Boundary by acquiescence is similar to boundary by agreement. Nevertheless, it works through the operation of law rather than through private agreement.[84] The four traditional requirements for boundary by acquiescence are (1) occupation up to a visible line marked definitely by monuments, fences, or buildings, (2) acquiescence in the line as the boundary (3) for a long period and (4) by adjoining landowners.[85] Since there is no contractual basis, this doctrine has traditionally presumed agreement by the parties and therefore has not required dispute or uncertainty. The court in *Brown* determined without discussion that all the requirements of boundary by acquiescence were easily met.[86]

But *Brown* may have been decided differently in Utah had it arisen after *Halladay v. Cluff*. The traditional doctrine of boundary by acquiescence does not apply after *Halladay* because the claimants may have had difficulty showing the newly required element of uncertainty or dispute at the time the fence was erected.[87] There is no discussion of this element in *Brown*, but because the fence was so old, it is highly unlikely that evidence could have been found to illuminate the circumstances surrounding the initial construction of the fence. Under traditional boundary-by-acquiescence reasoning, an agreement was implied from the fact that the fence had been erected and was allowed to serve as the practical boundary between the properties for such a long time. Now, however, Utah courts require an objective showing that the implied agreement grew out of a dispute or uncertainty as to the proper location of the boundary. The claimants probably would be unable to carry this burden of proof. They would in essence have to establish the same factors that are required in a boundary-by-agreement case, which more than likely would be impossible.[88] The end result would be to award the seventy-foot disputed strip of property to the party whose record title covered the disputed area—the reverse of *Brown*'s result.

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84. *See supra* text accompanying note 41.

85. *See supra* text accompanying note 53.

86. Brown v. Peterson Dev. Co., 622 P.2d 1175, 1177 (Utah 1980).

87. *See supra* text accompanying note 51 (discussing evidence).

88. The court in Stratford v. Morgan, 689 P.2d 360, 364 (Utah 1984), said that the dispute arose when a survey was made. This implies that the dispute requirement will be satisfied when parties acquiesce in a boundary for the required time after a survey shows a boundary different from the boundary acquiesced in. That kind of reasoning, however, contradicts the requirement that the true boundary must not be known by the parties.

c. Estoppel. Since the defendant in *Brown* apparently made no actual representations to the plaintiff, the doctrine of estoppel would be held inapplicable to the facts of that case.

III. Survey of Cases

The Utah Supreme Court has decided fourteen boundary cases in the past seven years.[89] In this section, four of these cases are considered as representative of different categories: (1) claims that might have satisfied the general adverse possession requirements in other states, but were not recognized in Utah under the doctrine of boundary by acquiescence; (2) claims that met the earlier requirements for boundary by acquiescence in Utah but would not meet the stricter doctrine announced in *Halladay v. Cluff;* (3) claims following the *Halladay* decision that satisfy boundary by acquiescence requirements; and (4) claims following *Halladay* that were recognized on a theory of equitable reformation of deeds because they would not qualify under the new acquiescence requirements. By looking at the cases chronologically, we gain a perspective of the immediate context from which the new *Halladay* requirement evolved and the problem it has created.

In looking at each case we will consider what the result would have been if (1) Utah had an alternative adverse-possession doctrine eliminating the necessity of tax payments by the claimant; (2) the pre-*Halladay* approach to the doctrine of boundary by acquiescence had not been changed; and (3) the additional requirement that boundary by acquiescence arise from a dispute or objective uncertainty were applied.

A. *Claims That Failed Under the Pre-*Halladay *Approach*

In *Hales v. Frakes,*[90] the parties argued over a strip of land two rods wide lying between the record title boundary on the north and an old fence line on the south. Plaintiff owned prop-

89. These include Parsons v. Anderson, 690 P.2d 535 (Utah 1984); *Stratford,* 689 P.2d at 360; Halladay v. Cluff, 685 P.2d 500 (Utah 1984); Wood v. Myrup, 681 P.2d 1255 (Utah 1984); Condas v. Willesen, 674 P.2d 115 (Utah 1983); Leon v. Dansie, 639 P.2d 730 (Utah 1981); Madsen v. Clegg, 639 P.2d 726 (Utah 1981); Eddington v. Clegg, 639 P.2d 143 (Utah 1981); Goodman v. Wilkinson, 629 P.2d 447 (Utah 1981); Brown v. Peterson Dev. Co., 622 P.2d 1175 (Utah 1980); Park v. Farnsworth, 622 P.2d 788 (Utah 1980); Monroe v. Harper, 619 P.2d 323 (Utah 1980); Neeley v. Kelsch, 600 P.2d 979 (Utah 1979); and Hales v. Frakes, 600 P.2d 556 (Utah 1979).

90. 600 P.2d 556 (Utah 1979).

erty to the north of the strip in question. Record title to the disputed strip was owned by defendant. The trial court refused to accept plaintiff's claim that she was entitled to the disputed property under the doctrine of boundary by acquiescence. Essentially, the court found that the fence had been built to keep cattle from entering plaintiff's property to the north. The fence was placed two rods south of the true boundary line because a road was to be built to join an already-existing four-rod wide road to the west. The fence line was the continuation of a fence that ran along the south side of the road on the property to the west of the disputed strip. Based on these facts, the supreme court agreed that plaintiff had not established boundary by acquiescence because the parties had never intended the fence to be the boundary line.[91]

This case would probably have turned out the same both before and after *Halladay v. Cluff*. After *Halladay* there would probably have been a second element missing. Because the fence had been built prior to 1933 by a common owner before the larger tract had been subdivided, the boundary was not established to settle a dispute or an uncertainty.

The plaintiff in *Hales* may, however, have been able to satisfy the requirements of adverse possession if there were a statute of limitations retaining the common-law approach requiring a twenty-year period of possession but making no mention of property tax payments.[92] Certainly the time period here would

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91. *Id.* at 560. For a case where a possessor failed to establish boundary by acquiescence because a line intended to be a boundary was not marked by monuments, see Monroe v. Harper, 619 P.2d 323 (Utah 1980). The boundary between the parties' parcels in *Monroe* was set in an old survey and marked with a row of stakes. After the line was set, the disputed tract was in the possession of the plaintiff who developed it with a road and an orchard. Approximately 25 years after the old survey, the defendant, who owned the land on the north, had a new survey made and found the true boundary to be about 17 feet south of the old line. Sometime between the time these surveys were made, the stakes placed during the old survey disappeared.

The supreme court ruled for the defendant based on one of the elements required for boundary by acquiescence—"occupation up to a visible line marked definitely by monuments, fences, or buildings." *Id.* at 325. The court construed this prerequisite strictly, noting that the trees and gravel roadway, though placed within the disputed strip, were not located on the boundary line.

Obviously the parties knew where the old boundary was marked. Nevertheless, through strict construction of the requirement, the court in effect created the same result as in *Halladay*. The parties in *Monroe* were forced to rely on the deed description despite continuous possession for 25 years.

92. Another case where 20-year adverse possession may have been satisfied but for the tax requirement is Neeley v. Kelsch, 600 P.2d 979 (Utah 1979). In *Neeley*, a dispute over a seven-acre tract of land involved the doctrine of adverse possession but none of

have been sufficient; the defendant did nothing to interfere with plaintiff's or her predecessor's use of the property until 1974 when defendant tore down the fence that had been constructed in 1933. It is unclear, however, whether sufficient adverse hostility and other elements required for adverse possession could be met. Apparently the defendant did not use the property north of the fence line during that time. If the plaintiff did and that possession was uninterrupted, it is possible that the case would have come out in the plaintiff's favor—the reverse of the actual result.

*B. Claims That Succeeded Under the Pre-*Halladay *Approach*

Olsen v. Park Daughters Investment Co.[93] was a quiet title action involving a boundary dispute between parties owning property on either side of the Provo River. The defendants received an eighty-acre tract of land on the west side of the river in 1883. Their deed described the middle of the river as the easterly boundary of their tract. The plaintiffs received their land east of the river three years later. Theirs was also an eighty-acre tract, but the deed described the tract by metes and bounds. The westerly boundary was a straight line that crossed the river at a bend and invaded the land described in the plaintiffs' deed.[94]

The basis for the plaintiffs' suit was the Marketable Record Title Act.[95] Under this Act, the plaintiffs' deed would have negated any prior deed. The court ruled, however, that the Marketable Record Title Act did not apply because it was superseded by the doctrine of boundary by acquiescence.[96] The court

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the boundary doctrines. The trial court's ruling in favor of the defendant landowners was reversed under the doctrine of adverse possession. Because defendants had never paid taxes on the disputed parcel, the requirements of adverse possession had not been satisfied although defendants apparently convinced the trial court that other requirements for adverse possession had been fulfilled. *Id.* at 982. Here a party who had used and possessed a tract of land for more than 20 years without interruption or objection from the record owner was forced into court and ended up losing his claim to the property. If Utah had a 20-year statute of limitations for adverse possession claims, this case would probably have been decided differently. The policy behind both statutes of limitations and adverse possession in reducing conflict and cutting down on litigation was frustrated in this case.

93. 29 Utah 2d 421, 511 P.2d 145 (1973).

94. *Id.* at 423-24, 511 P.2d at 146-47.

95. *Id.* at 424-25, 511 P.2d at 147; *see* UTAH CODE ANN. § 57-9-1 to -10 (1986).

96. *Olsen*, 29 Utah 2d at 426, 511 P.2d at 148.

held that when a dispute about boundaries between properties arises, and a physical boundary has been acquiesced in for a long period of time, the conflict is presumed to be reconciled.[97] Although a dispute like the one required in *Halladay* existed, it was probably not a determining factor. The case would have come out the same with or without dispute, for uncertainty is traditionally presumed to exist when there is long acquiescence in the boundary.

In most cases of boundary by acquiescence, a fence is built or a line otherwise marked for some unknown reason by an earlier occupant of the land. The actual boundary is subsequently destroyed for one reason or another and the subsequent owners acquiesce in the new boundary. In such a case, there will be uncertainty so long as there is no survey of the land. The *Halladay* case takes away this type of uncertainty by presuming knowledge if a survey is possible. Therefore, the requirement effectively precludes boundary by acquiescence in Utah unless there is a defect or mistake showing uncertainty on the deeds themselves rather than in the minds of the parties.

Olsen is perhaps the only case in Utah that would have clearly come out the same both before and after *Halladay*. The reason for this is that the common grantor in the 1880's made a mistake on the deeds which created uncertainty and dispute. No conduct on the part of the parties could have created uncertainty in the location of the boundary.

C. *Claims That Fail Under the Post-*Halladay *Approach*

A prime example of a boundary-by-acquiescence case where a party lost after *Halladay* but would have won before is *Stratford v. Morgan.*[98] In 1951, plaintiffs bought a 4.77 acre tract next to Big Cottonwood Creek to farm as a hobby. Shortly thereafter, the plaintiffs built a fence along the river. They treated the land as their own, using it without interruption until 1979.

In 1979, the plaintiffs had the land surveyed and found that the actual boundary zig-zagged across their fence and created two disputed parcels of land on the plaintiffs' side of the river. The plaintiffs then presented defendant with quitclaim deeds for the disputed parcels. The defendant refused to sign them.

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97. *Id.* at 425, 511 P.2d at 147.

98. 689 P.2d 360 (Utah 1984).

Plaintiffs then initiated a quiet title action to get title to the land.[99]

The court held that the plaintiffs did not establish boundary by acquiescence because there was no uncertainty or dispute as to the true boundary, since a survey was available to the parties.[100] All the other elements of boundary by acquiescence were satisfied. There was insufficient dispute because the dispute did not start until the 1979 survey was made.[101] As in *Olsen*, nothing the plaintiff could have done would get the disputed parcels through any of the boundary resolution doctrines because the deeds accurately set forth the boundaries. The plaintiffs were therefore forced to give up the land that they had used for twenty-eight years.

*D. Claims That Succeed Under the Post-*Halladay *Approach*

Another approach used by the court since the *Halladay* decision may provide a judicial alternative to claimants who previously would have relied on the doctrine of boundary by acquiescence. That approach is to permit reformation of a deed in order to allow one occupying up to a visible fence to quiet title to the disputed parcel even though a survey showed the actual description in the recorded deeds fell short of the fence. In *Hottinger v. Jensen*,[102] decided three months after *Halladay*, the court ignored the parties' arguments regarding boundary by acquies-

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99. *Id.* at 361-62.

100. For another case dealing with post-*Halladay* boundary by acquiescence, see Parsons v. Anderson, 690 P.2d 535 (Utah 1984). In *Parsons*, both parties claimed a strip of land that was about five feet wide and 340 feet long. Title to this strip was quieted in the plaintiffs' predecessors in 1939. Defendant, the wrongful possessor, also acquired his land to the west of the plaintiffs' by warranty deed in 1972, and received a quitclaim deed for the disputed strip dated 1957. Since at least 1957, a fence existed, running in a straight line from north to south starting at the dividing line on the south and serving as the boundary. The fence, which placed the disputed strip on the defendant's side, existed in part until the dispute arose.

Both parties paid taxes on the property from 1967 to 1976. Plaintiffs paid first in six of those years, and in the other three years, both parties paid on the same day with no record of who paid first.

The trial court quieted title in the defendant based on boundary by acquiescence. The supreme court then reversed. Boundary by acquiescence failed because there was no uncertainty or dispute and because it was unclear whether the long time requirement was satisfied. Justice Howe dissented because the court did not look at all the facts showing the length of possession. Furthermore, he disagreed with the court's use of uncertainty or dispute as a requirement of boundary by acquiescence.

101. 689 P.2d at 363-64; *see also supra* note 88.

102. 684 P.2d 1271 (Utah 1984).

cence. Instead, defendant successfully obtained reformation of the deed to quiet title in her name.

Defendant and her husband acquired the land in 1945 as part of a fifteen-acre parcel. They divided the property in 1958, keeping only the parcel which contained their home, yard, and garden. The larger parcel that they transferred to new grantees, according to the stipulated facts, was intended to be separated from the defendant's home property by an existing fence. After two further transfers of the larger parcel under the same mutual understanding as to the intended boundary line, plaintiffs obtained the property in 1973. Plaintiffs claimed there were no representations made to them that the fence was the boundary line. Finally, in 1980, plaintiffs learned from a survey that defendant had been using a ninety-foot strip north of the fence line that was described in the deed as plaintiffs' property. The actual description brought the boundary line to within a few feet of defendant's house. At that time plaintiffs tore down the previously erected fence, built a new one at the line described in the deed, and brought suit to quiet title to the disputed area. Defendant's counterclaim asked for reformation of the deed and title quieted in her name.[103]

The court ruled in defendant's favor, ordering reformation of the deed and quieting title in defendant. Plaintiffs were not able to prevent reformation of the deed because they were deemed to have inquiry notice of the mistake in the original deed descriptions which negated their claim to be bona fide purchasers without notice. The notice arose from possession and obvious use of the property by defendant and the existence of the fence both before and after plaintiffs' purchase.[104]

The facts of this case would satisfy general long-term adverse possession requirements, but lack of tax payments by the defendant prevented her from gaining title by adverse possession under Utah's short-term adverse possession statute. It also appears that the time period between 1958 and 1980 would have been sufficient to satisfy the time requirements to establish boundary by acquiescence. The other elements required prior to *Halladay* would also have been met. However, the requirement of objective uncertainty probably would not have been satisfied, so boundary by acquiescence would not have been available af-

103. *Id.* at 1272-73.

104. *Id.* at 1273-74.

ter *Halladay*.[105] A survey, the very means by which the discrepancy between the record boundary description and the existing fence line was discovered, is a determinative factor in *Halladay*'s objective uncertainty requirement.[106]

The court could have determined that actions commenced and tried before *Halladay* would be decided free of the newly adopted prerequisite for application of boundary by acquiescence by refusing to give *Halladay* retroactive effect. It was unnecessary to reach that issue, however, because the case provided a sufficient alternative basis for decision.

The reformation-of-deed approach may be suitable in several other boundary dispute situations. However, in the typical case the original grantor or grantee of the deed first incorporating the challenged description will not be a party in the law suit. Evidence and proof sufficient to permit a court to order reformation of a deed would be difficult if not impossible to discover. The understandings and intentions regarding boundary lines are generally not easy to reconstruct.[107] These realities regarding the difficulty of accurately deciphering events from the distant past are part of the theoretical basis for prescriptive theories. Acts by the parties, in the form of long-term, uninterrupted possession, are better and more reliable forms of evidence as to the intent of the parties regarding the practical location of boundaries.

IV. Conclusion

The best solution to the Utah scheme of protection for parties in long-term possession of property is not to tinker with boundary-by-acquiescence principles but to amend the state's adverse-possession rules.[108] The state should retain its current

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105. *See supra* text accompanying notes 63-64.

106. *See* Halladay v. Cluff, 685 P.2d 500, 507 (Utah 1984).

107. *See* Neeley v. Kelsch, 600 P.2d 979 (Utah 1979). In *Neeley*, a similar issue of mutual mistake was argued. In that case, although the original parties were present, the Utah Supreme Court ruled that there was insufficient evidence to support a finding of mutual mistake which would justify the ruling that the original deed to defendants should be reformed to include the disputed tract.

A similar problem arises in boundary by agreement. *See supra* text accompanying note 51.

108. A bill proposed in the 1987 General Session of the Utah Legislature attempt to overturn the effect of *Halladay v. Cluff*. Senate Bill No. 120, Boundary By Acquiescence, adding Utah Code Ann. § 78-40a-1 to -5. The bill introduces a distinction between a "marked boundary" and the "actual boundary". A marked boundary may become the basis for a quiet title action if:

(1) the marked boundary has been in place for 20 years or more;

seven-year statute of limitations based on payment of property taxes. In addition, however, the legislature should adopt an alternative statute of limitations requiring a longer period—up to a maximum of twenty years—for claims that cannot qualify for the shorter seven-year period.

This approach is the appropriate means of protecting "persons in possession as quickly as is reasonably possible"[109] in the limitation periods promulgated by the National Conference of Commissioners on Uniform State Laws in the curative and limitation provisions of the Uniform Simplification of Land Transfers Act.[110] It is significant that this Act, which is designed to strengthen and streamline record titles generally,[111] nonetheless liberally enforces the rights of persons in possession. Yet, the Utah Supreme Court, when faced with the same competing policies—record title compared to rights springing from long-term possession—leaned heavily in the other direction in order to strengthen the position of record title and the recording system generally. This attention to record title is too legalistic because it ignores generations of deference to the practical realities represented by the unchallenged possessory conduct of another.

The Utah Supreme Court has eliminated an important doctrine in its arsenal for reaching equitable results in cases based on possession.[112] It may not be fully satisfied with the announced principles and the apparently inconsistent results flowing from the old doctrine of boundary by acquiescence. But that liberality in applying this boundary doctrine was justified because it was the last route of escape for a party that had exercised significant possessory claims to property for substantial periods of time.[113]

The state legislature should recognize the unfortunate situation that has now been created. It should be willing to close the

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(2) there is no evidence that during the 20-year period any of the owners of the properties adjoining the marked boundary ever asserted that the marked boundary was other than the actual boundary; and

(3) all owners have used their properties only up to the marked boundary during the 20-year period.

Id. at § 78-40a-2.

109. UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT § 3-404 comment (1977).

110. *Id.* § 3-404.

111. *See id.* prefatory note.

112. *See* Halladay v. Cluff, 685 P.2d 500, 514-15 (Utah 1984) (Howe, J., dissenting) (An appendix lists cases supporting the old boundary-by-acquiescence doctrine.).

113. *Id.* at 509.

hole that its own unreasonable limitation on statutes of limitations has created. It should provide a statutory means of blocking a record title owner who has been less than diligent in protecting his rights in the face of another's possessory activities. There appears to be no special reason why the age-old right to perfect adverse possession title should be limited to claimants who pay property taxes on the disputed property. Boundary-dispute cases in particular make the tax payment requirement unreasonable.[114] There should be a residuary statute of limitations for a longer period of time to cover all those claimants who do not qualify for any shortened time period. Payment of taxes and making claims under color of title are justifiable grounds for giving a claimant special treatment by allowing a shorter possessory period,[115] but Utah's approach to statutes of limitations is inadequate if it does not cover parties who fit into one of the shortened time periods.

114. *See supra* text accompanying note 30.
115. *See supra* text accompanying notes 29-30.