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Tax Titles in Utah: Caveats for Potential Purchasers and Proposals for Change

I. INTRODUCTION

Since at least 1892, when the first widely reported dispute over the validity of a tax deed surfaced in the Territory of Utah,¹ Utah courts have faced a steady stream of tax sale cases. Over time, the law governing the validity of tax titles in the state has been molded by both legislative and judicial action. Today many, but not all, of the issues surrounding tax sales have been resolved or at least addressed by the courts.

This comment analyzes tax title law in Utah. It focuses solely on tax sales of real property for non-payment of local property taxes, and principally addresses the needs of potential purchasers of tax deeds, attorneys who represent those purchasers, and title insurers and other persons who have an interest in understanding the stability of tax titles (or lack thereof).

Part II explains the underlying premises and theories of tax titles and outlines the mechanics of the tax sale process. Part III summarizes the possible events and circumstances which may invalidate a particular tax sale or may limit the extent to which the purchaser is capable of obtaining a fee simple interest in property purchased at a tax sale. Part IV examines the remedies available to the tax sale purchaser who acquires a defective title. Finally, Part V evaluates the merits of the current tax sale structure and proposes legislative and judicial action to increase the marketability of tax titles without infringing the rights of persons who fail to pay their property taxes.

1. Little v. Gibbs, 30 P. 986 (Utah 1892).

II. THE THEORY OF TAX TITLES AND THE MECHANICS OF THE TAX SALE PROCESS

A. *The Theory of Tax Titles*

A substantial body of commentary and case law has developed to explain the nature of the title acquired by tax deed.² The generally accepted premise is that tax titles are independent grants of property rights from the government.³ Holders of tax deeds presume that these property rights give them "a new and paramount title which totally destroys the prior title."⁴ Therefore, at least in theory, the holder of a tax deed has a fee simple absolute interest.

Unfortunately for tax sale purchasers, the ideal tax title rarely exists outside the theory. The law of tax titles is one area where general premises are almost completely undermined by a host of exceptions. In practice, tax titles are rarely insurable or marketable.

B. *Mechanics of the Tax Sale Process*

The Utah Code describes the mechanics of the tax sale process in great detail.⁵ They are presented here in simplified summary form to illustrate the procedures leading to a valid tax sale.

Prior to May twenty-second of each year, the county assessor must ascertain the names of the owners of all taxable prop-

2. See, e.g., *infra* note 5.

3. See, e.g., *Tuft v. Federal Leasing*, 657 P.2d 1300, 1303 (Utah 1982); *Hanson v. Burris*, 46 P.2d 400, 406 (Utah 1935), *aff'd sub nom. Ingraham v. Hanson*, 297 U.S. 378 (1936). *Hanson* stated that "[p]urchasers [of tax deeds] . . . take with a 'new and complete title in land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles, and incumbrances of private persons and all equities arising out of them.'" *Id.* (quoting *Hefner v. Northwestern Life Ins. Co.*, 123 U.S. 747 (1887) (other citations omitted)).

4. *Tuft*, 657 P.2d at 1303.

5. See UTAH CODE ANN. §§ 59-2-101 to -1327 (1987 & Supp. 1991). For other summaries of the mechanics of the tax sale process in Utah during past years, see 2 BYU LEGAL STUD., SUMMARY OF UTAH REAL PROPERTY LAW 637-76 (1978 & Supp. 1981); Robert P. Hill, Note, *Salt Lake Home Builders, Inc. v. Colman—Tax Titles in Utah*, 1974 UTAH L. REV. 121, 121; Philip W. Lear, *Tax Sales and Tax Titles in Utah: Windfalls and Windstorms*, 1 J. CONTEMP. L. 299, 299-304 (1975); Douglas H. Parker, Comment, *Some Tax Title Problems in Utah*, 3 UTAH L. REV. 97, 98-101 (1955).

erties within the county⁶ and determine the value of each owner's property.⁷ The assessor may adjust these values under certain circumstances.⁸ As she completes these tasks, the assessor prepares a record of this information.⁹ Collectively these tasks constitute what is commonly known as the "assessment."¹⁰

After finishing the assessment, and prior to May twenty-second, the assessor completes the assessment roll, attaches an affidavit, swearing that she has faithfully complied with all her duties, and delivers the roll to the county auditor.¹¹

Upon receipt of the assessment roll, the county auditor makes necessary changes in the assessment, including equalization adjustments, and sends a statement to the State Tax Commission.¹² After completing these responsibilities, and prior to November first, the auditor attaches her affidavit to the roll, stating that she has corrected the assessment and has otherwise performed everything required of her.¹³ She then delivers the roll to the county treasurer.¹⁴

The county treasurer, after receiving the assessment roll, and before November first, indexes the names of all property owners, and mails or otherwise gives notice to the owners of the amount of tax levied against each property.¹⁵ The property

6. UTAH CODE ANN. § 59-2-303(1) (1987).

7. *Id.* § 59-2-303(2).

8. *Id.* § 59-2-304(1) (Supp. 1991).

9. *Id.* § 59-2-305. The assessment date is critical in determining the priority of the tax lien and, perhaps, the validity of the subsequent tax deed. In *Huntington City v. Peterson*, 518 P.2d 1246 (Utah 1974), the Utah Supreme Court emphasized the importance of the assessment date. In that case, Huntington City received a warranty deed to real property eight days before the property was assessed by the county. The court acknowledged that once the assessment was made, it related back to January first of the tax year. However, because Huntington City, an entity exempt from taxation under applicable state law, received title to the property prior to the assessment, the assessment could not become a valid lien on the property, and the subsequent tax sale was invalid. *Id.* A similar result occurred in *Utah Parks Co. v. Iron County*, 380 P.2d 924 (Utah 1963).

10. See UTAH CODE ANN. § 59-2-1302 (Supp. 1991).

11. *Id.* § 59-2-311.

12. *Id.* §§ 59-2-320 to -325 (1987). The auditor's duties also include attaching an additional affidavit certifying compliance with the orders of the county board of equalization. *Id.* § 59-2-1011 (Supp. 1991).

13. *Id.* § 59-2-326 (1987).

14. *Id.*

15. *Id.* § 59-2-1317 (Supp. 1991). While the assessment is a lien on the underlying real estate, it is also, under the Utah Supreme Court's current interpretation, a personal obligation of the property owner. *Dillman v. Foster*, 656 P.2d 974, 977-

owner then has until noon on November thirtieth to pay the taxes assessed.¹⁶ At noon on November thirtieth, the county treasurer closes the treasurer's office, prepares a delinquency list and assesses penalties and interest against each delinquent property.¹⁷

After preparing the delinquency list, and on or before December thirty-first, the treasurer publishes a list of delinquent properties and property owners in one issue of a newspaper of general circulation in the county.¹⁸ The published notice must state that unless the delinquent taxes are paid before January sixteenth, the property will be sold to the county at a preliminary tax sale.¹⁹

At noon on January fifteenth, if the delinquency has not been cured, the real estate is deemed sold to the county at a preliminary tax sale.²⁰ The treasurer then, on or before March thirty-first, makes a record of the delinquent properties and property owners and attaches an affidavit certifying that the delinquency record is correct.²¹ This becomes the official tax sale record, which is thereafter maintained in the county treasurer's office.²²

At any time within four years after the preliminary tax sale to the county, any person having an interest in the property may redeem the real estate by paying to the county treasurer

78 (Utah 1982) (disavowing *San Juan County v. Jen, Inc.*, 401 P.2d 952 (Utah 1965)).

16. UTAH CODE ANN. § 59-2-1331(1) (Supp. 1991).

17. *Id.* § 59-2-1331.

18. *Id.* § 59-2-1332.5.

19. *Id.*

20. *Id.* § 59-2-1336. This provision, mandating preliminary tax sale at noon on January fifteenth, is inconsistent with § 59-2-1332.5, which requires notice of the sale to state that taxes must be paid before January sixteenth or the property will be sold. Payments received between noon and the close of business on January fifteenth would be made prior to the January sixteenth deadline specified in the sale notice but after the preliminary tax sale had occurred. Thus, a person receiving the required notice could strictly comply with its stated time deadline and still have her property sold at a preliminary tax sale. The inconsistent interaction of these two statutes, while of minor importance because they deal only with the preliminary and not the final tax sale, should nevertheless be amended to arrive at a consistent result. In 1991 the Utah legislature amended § 59-2-1332.5 to change the notice date to January sixteenth. 1991 Utah Laws ch. 40, § 2. Apparently this change was made without regard to its impact on § 59-2-1336.

21. UTAH CODE ANN. §§ 59-2-1338 to -1339(1) (Supp. 1991).

22. *Id.* § 59-2-1339(2).

er the full amount of the taxes, interest, and penalties.²³ In years subsequent to the preliminary tax sale, so long as no redemption occurs and the property continues to be deemed sold to the county, the real estate is assessed as though no delinquency had ever occurred in prior years.²⁴

If March thirty-first of the fourth year after the preliminary tax sale passes without a redemption, the property is prepared for the final May tax sale.²⁵ As part of this preparation, the treasurer compiles a list of all properties which will become subject to final tax sale and delivers the list to the county auditor.²⁶ Every day thereafter until the date of the final sale, the treasurer gives the auditor a statement of redemptions which affect the final tax sale listing.²⁷

Upon receiving the final tax sale listing from the treasurer, the county auditor publishes, once each week for four consecutive weeks in a newspaper of general circulation in the county, a list of the properties to be sold at the final tax sale.²⁸ The auditor also sends notice of the impending sale by certified mail to "the last known recorded owner and all other recorded lienholders, according to the deed, as of the preceding March 31, at their last known address."²⁹

If no person comes forward and redeems the property prior to the hour set for the final tax sale, the auditor appears at the appointed place and conducts an auction of the real estate.³⁰

23. *Id.* § 59-2-1346(1).

24. *Id.* § 59-2-1342(1).

25. *Id.* § 59-2-1343.

26. *Id.*

27. *Id.* § 59-2-1345(1).

28. *Id.* § 59-2-1351.

29. *Id.* § 59-2-1351(2).

30. *Id.* § 59-2-1351(5). Technically, the owner's right of redemption expires at the close of business on the day *before* the tax sale: "Real estate . . . may be redeemed . . . at any time . . . prior to the day of the final tax sale Property may not be redeemed after the expiration of the redemption period" *Id.* § 59-2-1346(1).

Based on the foregoing language and the decision in *Rushton v. Sage Land Co.*, 583 P.2d 76 (Utah 1978), holding that an owner has no right to redeem property once the redemption period has expired, it seems clear that counties need not accept "redemption" payments made on the day of the final tax sale but prior to the time of sale. In *Rushton*, under a former statute which extended the redemption period only to the April first preceding the final tax sale, a "redemption" payment which was received by a county prior to the time of the tax sale but after the April first redemption deadline was held ineffective to redeem the property from tax sale. The tax deed subsequently issued was valid. *Id.* at 76-77.

At the auction, the county auditor, as directed by the county's governing body, may either sell the property to the highest bidder or may sell the smallest portion of the property necessary to pay taxes, interest, penalties, and administrative expenses of the sale.³¹ If there are no acceptable bids, the property is struck off to the county, which then becomes the owner of the property as though it had purchased at the tax sale.³² If a successful bidder purchases the property, the county auditor issues a tax deed to the purchaser in the name of the county and records the tax deed with the county recorder.³³ Upon issuance of the tax deed, the purchaser is theoretically the owner of a fee simple interest in the property.

III. EVENTS OR CIRCUMSTANCES WHICH INVALIDATE TAX SALES OR LIMIT THE TYPE OR EXTENT OF PROPERTY HELD UNDER TAX DEEDS

Despite the general assertion that tax sale purchasers acquire absolute title to real estate obtained at a final tax sale, Utah courts have carved out numerous exceptions to this general rule which, in many circumstances, render tax deeds void. The following is a brief discussion of theories which have been used to invalidate tax deeds. Potential purchasers at tax sales should consider the application of these theories to specific properties prior to bidding.

31. UTAH CODE ANN. § 59-2-1351(5) (Supp. 1991). For example, Utah County has, in at least some years, conducted their sales using the latter method, selling the smallest portion of the property necessary to pay taxes, interest, penalties, and sale expenses. All successful bidders are required to pay the full amount of the taxes, interest, penalties, and administrative expenses. No bidder can bid more or less than such amount. Instead the bidders offer to reduce the size of the property they are willing to accept in exchange for the set amount. For example, bidder A may offer to pay such sum for the entire parcel. Bidder B may then offer to pay the same price for the entire parcel less a number of feet off one side. Bidding continues until no person is willing to accept a smaller portion of the real estate for the required price. Homes and other real estate with substantial improvements are sold to the bidder willing to accept the smallest percentage ownership interest. Because the portion not sold at the tax sale is retained by the record owner, the tax sale purchaser becomes a tenant in common with the prior owner and obtains an undivided interest equal to the percentage bid at the sale. Author's Observations at Utah County Tax Sales during May 1989, 1990, and 1991.

32. UTAH CODE ANN. § 59-2-1351(7) (Supp. 1991).

33. *Id.* § 59-2-1351(6).

A. Due Process Challenges to Tax Sales

The United States Supreme Court has determined that, in all tax sales of real estate conducted pursuant to state law, the Due Process Clause of the Fourteenth Amendment requires that notice of the sale be given to all entities having an interest in the property. In *Mennonite Board of Missions v. Adams*³⁴ the Court held that every valid tax sale requires, as a prerequisite to preventing constitutional challenge and invalidation for lack of due process, "[p]ersonal service or mailed notice"³⁵ to each entity with a "legally protected property interest."³⁶ Therefore, to conduct a valid tax sale in any state there must at least be an attempt to ascertain the names and addresses of parties having an interest in the affected real estate and supplement "constructive notice by publication . . . [with] notice mailed to [the interested parties'] last known available address[es]."³⁷

Presumably in response to *Mennonite*, the Utah legislature amended Utah's tax sale notice procedures in 1987.³⁸ Prior to 1987, notices of pending tax sales were sent to "the last known record owner at his last known address by certified mail."³⁹ The amended Utah law now requires that "[n]otice of sale . . . be sent by certified mail to the last known recorded owner and all other recorded lienholders, according to the deed, as of the preceding March 31, at their last known address."⁴⁰

As will be discussed in Part V of this comment, Utah's notice statute still may not pass constitutional due process muster in certain circumstances.⁴¹ Moreover, even assuming

34. 462 U.S. 791 (1983). For articles addressing *Mennonite*, see Christopher H. Connors, *Recent Decisions*, 23 DUQ. L. REV. 773 (1985); Ellen F. Friedman, Comment, *The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosures*, 56 FORDHAM L. REVIEW 1209, 1221-24 (1988).

35. *Mennonite*, 462 U.S. at 799.

36. *Id.* at 798. *Mennonite* dealt specifically with the right of mortgagees to receive personal service or mailed notice of pending tax sales.

37. *Id.*

38. 1987 Utah Laws ch. 4, § 241. This session law does not specifically mention that the amendment included a new requirement of notice to lienholders. However, because the 1986 Utah Code contains the old language and the 1987 Utah Code contains the new requirement, the editors of Utah Laws must have erroneously failed to note the addition.

39. UTAH CODE ANN. § 59-10-64 (1986).

40. *Id.* § 59-2-1351(2) (Supp. 1991).

41. See *infra* notes 130-37 and accompanying text.

that Utah's notice statute meets due process requirements, the mere existence of the statute does not assure a lack of administrative or clerical errors. The county's search of property titles may be incomplete or inaccurate.⁴² The county may inadvertently fail to mail a notice or may mail notice to the wrong person or wrong address.⁴³ In short, Utah's statute, as applied by the counties, does not completely foreclose the possibility of a due process challenge to a particular tax sale.⁴⁴

*B. Record Owner, Cotenant, or Mortgagee
Who "Purchases" at Tax Sale*

In 1936, the Utah Supreme Court held that "one who is under a duty to pay taxes cannot add to or strengthen his title

42. The possibility of a due process challenge stemming from a failure of the county to accurately search property titles is recognized in a written notice the Utah County Auditor gave to bidders at Utah County's May 30, 1991 tax sale. That notice stated:

While Utah County has attempted to give notice to all property owners, and those persons, corporations, partnerships and entities with a substantial interest, it has not performed a title search on each parcel due to excessive cost and budgetary and time constraints, and a specific sale may be challenged on constitutional due process grounds.

Appendix, para. 3.

43. For an example of the failure of a county to send notice, resulting in the invalidation of a tax deed on statutory grounds (although due process concerns were also present), see *Fivas v. Petersen*, 300 P.2d 635 (Utah 1956). Discovery in the pending case of *Hatch v. Orem City Corp.* also presents an excellent example of the failure of a county to send notice to a lienholder of record. In answer to interrogatories in that case, Utah County admitted that it had failed to conduct a complete search of property records for lienholders. As a result, Utah County failed to send notice of the tax sale to a lienholder, Orem City. Answers of Def. Utah County Auditor to Pl.'s' Second Req. for Admis., Interrogs. and Demand for Production of Documents at 6, *Hatch v. Orem City Corp.*, No. 910400131 (Utah 4th Dist. Ct. Mar. 25, 1991).

44. One of the few consolations to a tax sale purchaser in such circumstances is that a shortened limitation period may operate to vest title in the tax sale purchaser despite due process deficiencies in the tax sale procedures. *Kemmerer Coal Co. v. Brigham Young Univ.*, 723 F.2d 54, 57-58 (10th Cir. 1983) (The court held that BYU's tax title was valid despite the county's failure to give notice to the record owner because of the expiration of the four-year limitation period: "While it may have been 'repugnant to fundamental fairness' to deprive [the record owner] of its property without proper notice, we do not believe it fundamentally unfair to apply the statute of limitations . . ." (quoting *Frederiksen v. LaFleur*, 632 P.2d 827, 831 n.14 (Utah 1981))); see *Hansen v. Morris*, 283 P.2d 884 (Utah 1955); see also *infra* notes 116-23 and accompanying text.

by purchasing the land at tax sale."⁴⁵ In that case, and in the cases that followed, Utah courts have consistently found that any entity with an obligation to pay taxes on a parcel of land cannot neglect to pay those taxes and thereafter acquire a fee simple interest at a tax sale—cutting off liens and other interests.⁴⁶ Therefore, a tax sale "purchase" by any entity having an interest in the real estate, including record owners, cotenants, and lienholders, merely constitutes a payment of the outstanding taxes—which accrues to the benefit of all persons with an interest in the property. Any tax deed granted by a county in connection with such payment does not by itself add to the entity's ownership interest.

C. *Failure of Government Officials to Strictly Perform Duties*

Because tax sales result in the forfeiture of property, Utah courts have consistently invalidated tax titles when taxing authorities have not strictly complied with every statutory requirement prerequisite thereto, no matter how slight or insignificant the non-compliance.⁴⁷ This principle, often referred to

45. *Hadlock v. Benjamin Drainage Dist.*, 53 P.2d 1156, 1157 (Utah 1936).

46. *Buchanan v. Hansen*, 820 P.2d 908 (Utah 1991) (holding that a lienholder cannot redeem property from tax sale and thereby eliminate the interest of other lienholders); *Marchant v. Park City*, 788 P.2d 520 (Utah 1990); *Sweeney Land Co. v. Kimball*, 786 P.2d 760 (Utah 1990); *Massey v. Prothero*, 664 P.2d 1176, 1178 (Utah 1983) (citing *McCready v. Fredericksen*, 126 P. 316 (Utah 1912) (stating that a cotenant who purchases at a tax sale does not thereby divest the other cotenant of the property, but "that [the purchasing cotenant's] payment is regarded as simply discharging the assessment, and it will inure to the benefit of all [other cotenants]" (quoting HENRY C. BLACK, A TREATISE ON THE LAW OF TAX TITLES § 282 (2d ed. 1893)))); *Tuft v. Federal Leasing*, 657 P.2d 1300, 1303 (Utah 1982) (stating that the record owner who purchases at a tax sale does not thereby obtain a "new and paramount title," but merely makes a "payment of the taxes, or a redemption by the owners"); *Dillman v. Foster*, 656 P.2d 974, 979 (Utah 1982) (concluding that one who fails to pay his taxes and later purchases at a tax sale merely pays his "taxes, and the title will be the same as it was before the sale, except that the lien for taxes is discharged" (quoting 72 AM. JUR. 2D *State and Local Taxation* § 941 (1974)))); *Olwell v. Clark*, 658 P.2d 585 (Utah 1982); *Reynolds v. Van Wagoner*, 592 P.2d 593 (Utah 1979); *Heiselt v. Heiselt*, 349 P.2d 175 (Utah 1960); *Crofts v. Johnson*, 313 P.2d 808, 810 (Utah 1957) (finding that a mortgagee cannot divest his mortgagor by purchasing at a tax sale); *Sperry v. Tolley*, 199 P.2d 542 (Utah 1948); *Farnsworth v. District Court*, 160 P.2d 434 (Utah 1945); *Albergo v. Gigliotti*, 85 P.2d 107 (Utah 1938); *Marchant v. Park City*, 771 P.2d 677 (Utah Ct. App. 1989), *aff'd*, 788 P.2d 520 (Utah 1990).

47. *E.g.*, *Salt Lake Home Builders, Inc. v. Colman*, 518 P.2d 165, 167 (Utah 1974) (holding that the rule of *strictissimi juris* applies to invalidate a tax sale conducted by a person other than the county auditor); *Mecham v. Mel-O-Tone*

as the rule of *strictissimi juris*,⁴⁸ has been summarized as follows:

The forfeiture of one's property for the nonpayment of taxes has always been regarded as a harsh procedure, which may work great hardships on property owners. An awareness of this fact invariably pervades the decisions in such cases, with the result that, in the interpretation and application of statutory requirements antecedent to forfeiture of property, they [the statutory requirements] are construed in favor of the taxpayer and against the taxing authority, and are *strictissimi juris*.⁴⁹

As the following materials demonstrate, Utah courts have closely followed the rule of *strictissimi juris*, invalidating tax sales for seemingly unimportant and technical deviations from statutory tax sale procedures.

1. Failure to attach affidavit to assessment rolls

Historically, one of the most common errors committed by county officials was their failure to attach an affidavit to the assessment rolls.⁵⁰ At least twelve Utah Supreme Court cases

Enter., Inc., 464 P.2d 392, 393 (Utah 1970) (stating that "[t]he courts of this state have always been jealous of the rights of land owners to maintain their title unless and until the taxing authorities comply strictly with the law as written"); *Fivas v. Petersen*, 300 P.2d 635, 637-40 (Utah 1956) (invalidating a tax sale due to the county's failure to strictly comply with a state statute requiring notice to the record owner).

48. "Of the strictest right or law." BLACK'S LAW DICTIONARY 1422 (6th ed. 1990).

49. *Fivas*, 300 P.2d at 637 (footnotes omitted). The rigidity of the *Fivas* rule of *strictissimi juris* has been somewhat ameliorated by the legislature's subsequent enactment of UTAH CODE ANN. § 59-2-1362 (Supp. 1991), which provides:

[A] copy of the record of any tax sale duly certified . . . as a true copy of the entry in the official record showing the sale is prima facie evidence of the facts shown in the record. The regularity of all proceedings connected with the assessment, valuation, notice, equalization, levies, tax notices, advertisement, and sale of property described in the record, is presumed, and the burden of showing any irregularity in any of the proceedings resulting in the sale of property for the nonpayment of delinquent taxes shall be on the person who asserts it.

Id. A line of cases prior to the enactment of this statute had held that the tax deed purchaser had the burden of showing that all proceedings leading up to the tax sale were strictly complied with. *See, e.g., Huntington City v. Peterson*, 518 P.2d 1246, 1249 (Utah 1974).

50. *See, e.g., Thomas v. Heirs of Braffet*, 305 P.2d 507 (Utah 1956).

prior to 1957 invalidated tax sales for this reason.⁵¹ Since 1957, not one recorded Utah case has invalidated a tax sale for failure to attach an affidavit.⁵² However, this is not due to a reversal of precedent. Instead it results from a lack of cases addressing this issue before the courts. This dearth of cases may be due to a variety of reasons: greater care by county officials in attaching affidavits, disposal of cases at the trial level without appeal due to the well-defined law on this issue, or passage of shortened limitation periods for tax deeds. Whatever the explanation, Utah precedent is clear—failure of county officials to attach proper affidavits will invalidate a tax sale.

2. *Failure to properly publish notice of the tax sale*

As previously mentioned, the county auditor is required to publish notice of each pending tax sale once each week for four consecutive weeks in a newspaper of general circulation in the county.⁵³ The Utah Supreme Court has consistently invalidated tax titles if the auditor has failed to properly publish notice of the final tax sale.⁵⁴

51. *Id.*; *Farrer v. Johnson*, 271 P.2d 462 (Utah 1954); *Pender v. Jackson*, 260 P.2d 542 (Utah 1953); *Dowse v. Kammerman*, 246 P.2d 881 (Utah 1952); *Valley Inv. Co. v. Los Angeles & Salt Lake R.R.*, 225 P.2d 722 (Utah 1950); *Sperry v. Tolley*, 199 P.2d 542 (Utah 1948); *Jenkins v. Morgan*, 196 P.2d 871 (Utah 1948); *Petterson v. Ogden City*, 176 P.2d 599 (Utah 1947); *Tree v. White*, 171 P.2d 398 (Utah 1946); *Bozievich v. Slechts*, 166 P.2d 239 (Utah 1946); *Equitable Life & Casualty Ins. Co. v. Schoewe*, 144 P.2d 526 (Utah 1943); *Telonis v. Staley*, 144 P.2d 513 (Utah), *vacated*, 144 P.2d 513 (Utah 1943).

52. One Utah case after 1957 did invalidate a tax deed for failure to attach affidavits. However, the invalidation was by stipulation in a pre-trial order and not by ruling of the court. *Heiselt v. Heiselt*, 349 P.2d 175 (Utah 1960). Another Utah case after 1957 upheld a tax deed despite the fact that the county auditor failed to attach his affidavit to the assessment roll; however, the underlying reason for the result was the shortened statute of limitations which applies to tax deeds. *Layton v. Holt*, 449 P.2d 986 (Utah 1969). For a discussion of the shortened limitation period for tax deeds, see *infra* notes 116-23 and accompanying text.

53. UTAH CODE ANN. § 59-2-1351 (Supp. 1991).

54. *Bozievich*, 166 P.2d at 240 (referring to a stipulation by the parties to the invalidity of a tax deed because the sale was advertised for less than statutory period); *Curley v. Mills*, 139 P.2d 882, 883 (Utah 1943) (finding that insufficient passage of time between the first and last publication invalidated tax deeds); *Peterson v. Weber County*, 103 P.2d 652, 655 (Utah 1939); *Home Owners' Loan Corp. v. Stevens*, 97 P.2d 744 (Utah 1940); see also *Petterson v. Ogden City*, 176 P.2d 599 (Utah 1947) (determining that a sale by a municipality for delinquent special improvement taxes was invalid because, in part, the city treasurer did not comply with an ordinance requiring timely publication of delinquency).

3. *Failure to adequately describe land in the tax deed*

The failure of the auditor to properly describe the real estate being conveyed by the tax deed effectively nullifies the tax title. However, on this question Utah courts have been much more willing to uphold a tax sale despite minor inadequacies in deed descriptions. Perhaps this is due to the somewhat difficult determination of what constitutes a defective description. Most of the decisions in this area require case-by-case resolution. However, the Utah Supreme Court has listed several factors which may be useful in deciding whether a particular description is adequate.

In *Mammoth City v. Snow*,⁵⁵ the first case decided by the Utah Supreme Court on this issue, the court made a general statement regarding the factors to consider in determining what constitutes a defective description. The court stated that

[w]here there is no sufficient description of the property assessed to identify it with reasonable certainty, or fairly apprise the taxpayer for what property he is assessed, he may enjoin the collection of the tax, or if property owned by him has been sold for non-payment of such a tax, he may treat the sale as a nullity and have it set aside or a certificate of sale or deed based thereon canceled.⁵⁶

In the next such case, *Burton v. Hoover*,⁵⁷ the court invalidated a tax deed which described the property only as "Sec. 7-5-4" and "Sec. 18-5-4" (omitting all references to proper designations of ranges and townships).⁵⁸ Later, in *Tintic Undine Mining Co. v. Ercanbrack*,⁵⁹ the court found that failure to give the township, range, and section number in the tax deed description was fatal to the validity of a tax deed.⁶⁰ In *Tintic*, the court further elaborated on the reasons for requiring adequate descriptions of the property. It stated:

55. 253 P. 680 (Utah 1926).

56. *Id.* at 686-87.

57. 74 P.2d 652 (Utah 1937).

58. *Id.* at 653.

59. 74 P.2d 1184 (Utah 1938).

60. *Id.* at 1188.

When real property is assessed or sold for taxes, the description must be such that the property can be definitely known and located. The tax becomes a lien on the property, and the description must be definite enough for the lien to attach to the property without extraneous evidence. If there is no lien, there can be no sale. It must be definite enough so the owner will know just what property is being sold, and a prospective purchaser will know what particular piece of property he could buy, so as to determine its value.⁶¹

In *Ferguson v. Mathis*,⁶² the court stated:

[I]f a description in tax proceedings is too vague, too indefinite, to notify the owner that it is his property that is being taxed, and insufficient to inform prospective purchasers as to just what property is to be sold, the resulting tax title after sale is void. So too the courts hold that though a description of property in tax sale proceedings may be incorrect or erroneous, yet if such description be not so vague or erroneous as to be misleading to the owner, and is sufficiently accurate to apprise the owner and prospective purchaser of the land covered by the proceedings, and identifies the property so definitely that a lien can attach thereto, the tax sale proceedings will not be voided for such error in the description alone.⁶³

Based on the foregoing cases, it appears that in order to decide whether a particular description is valid it is important to ask the following questions:

(1) Does the description identify the property with reasonable certainty?

(2) Does the description fairly apprise the owner and prospective purchasers which property is being sold at the tax sale?

(3) Can the property be definitely known and located by reference to the description alone and without reference to extraneous evidence?

If these questions can be answered in the affirmative, the tax sale will not likely be voided for insufficiency of the description.

61. *Id.*

62. 85 P.2d 827 (Utah 1938).

63. *Id.* at 828-29 (citations omitted).

4. *Failure of auditor to conduct final tax sale*

Utah statutes require that the county auditor conduct the final May tax sale.⁶⁴ If any other person conducts the sale, the tax deeds derived therefrom are invalid. In *Salt Lake Home Builders, Inc. v. Colman*,⁶⁵ the Utah Supreme Court found that a tax sale conducted by an employee of the Salt Lake County Auditor's office, rather than by the auditor himself, was invalid. The court rejected arguments that the employee, as a de facto officer, should be deemed to have authority to perform such sales. Instead, the court found that the rule of *strictissimi juris* overrides the otherwise convincing argument that acts of de facto officers are deemed valid as to third parties.⁶⁶

5. *Inability to locate missing documents*

As mentioned earlier, the failure of county officials to attach required affidavits to the tax rolls will invalidate a tax sale. What is the result, though, if an affidavit was originally attached, but has been subsequently lost or destroyed? What if the assessment roll itself, which once existed, can no longer be found? Will the tax deed be invalidated? *Tree v. White*⁶⁷ provided at least partial answers to these questions:

[The holders of the tax deed] concede that one of the affidavits was missing at the time of trial. However, they contend that such fact alone would not prove that both were not in fact properly executed and physically attached at the time they were required to be executed and attached. . . .

"The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping them safely in their offices. Where a paper is

64. UTAH CODE ANN. § 59-2-1351(5) (Supp. 1991).

65. 518 P.2d 165 (Utah 1974).

66. *Id.* at 167. The employee who conducted the sale, Mr. Wendell Hibler, was a tax accountant who had prepared the tax rolls for submission to the county treasurer. *Id.* at 166. He had the distinction (or misfortune) to have his name mentioned in two Utah Supreme Court cases. Salt Lake County relied on him to conduct more than one tax sale. *Id.* at 169 (Ellet, J. dissenting) (noting tax sale apparently conducted by Mr. Hibler in 1967); *Page v. McAfee*, 487 P.2d 861, 863 (Utah 1971) (Ellett, J. dissenting) (noting tax sale conducted by Mr. Hibler in 1970).

67. 171 P.2d 398 (Utah 1946).

not found where, if in existence, it ought to be deposited or recorded, the presumption therefore arises that no such document has ever been in existence. Until this presumption is rebutted, it must stand as proof of such non-existence."⁶⁸

Similar results followed in two other Utah cases on the subject.⁶⁹ Based on these three cases, if an affidavit or other document is missing or lost, Utah courts will presume that the document never existed. However, if the holder of the tax deed introduces evidence sufficient to rebut the presumption (e.g., by having the official whose affidavit is missing testify that she did attach such an affidavit to the rolls) the tax sale purchaser may prevail.⁷⁰

6. *Failure to properly assess taxes*

Improper assessment of taxes can also create defects in tax titles. If the assessor makes an improper assessment by, for example, assessing exempt property, all subsequent actions to collect the assessed amount, including any tax sale, are void. This result has followed from a long line of Utah cases.⁷¹

68. *Id.* at 400 (quoting *Hall v. Kellogg*, 16 Mich. 135, 139 (1867) (citation omitted)).

69. *Farrer v. Johnson*, 271 P.2d 462, 464-65 (Utah 1954) (invalidating a tax deed based on the language of *Tree* dealing with lost affidavits, 171 P.2d at 400); *Jenkins v. Morgan*, 196 P.2d 871, 875 (Utah 1948) (finding that lacking the affidavit of auditor invalidated tax sale).

70. An interesting game of burden shifting might result from the combination of the *Tree* line of cases with the legislative mandate that

[a] copy of the record of any tax sale duly certified . . . is prima facie evidence of the facts shown in the record. The regularity of all proceedings connected with the assessment, valuation, notice, equalization, levies, tax notices, advertisement, and sale of property described in the record is presumed, and the burden of showing any irregularity in any of the proceedings resulting in the sale of property for the non-payment of delinquent taxes shall be on the person who asserts it.

UTAH CODE ANN. § 59-2-1362 (Supp. 1991). Apparently the interplay of this statute with *Tree* requires that once the holder of the tax deed introduces a certified copy of the tax deed, the burden of showing some irregularity shifts to the person challenging the deed. Then, if the challenger introduces tax rolls with missing affidavits to rebut the presumption of the statute, the burden shifts back to the tax sale purchaser to overcome the presumption that the affidavit was never attached to the roll. *Jenkins*, 196 P.2d at 874-75, implies that such might be the proper result.

71. *Huntington City v. Peterson*, 518 P.2d 1246 (Utah 1974) (finding that absence of record of any assessment prior to sale of land to tax exempt entity voided subsequent tax sale); *Mecham v. Mel-O-Tone Enter.*, 464 P.2d 392 (Utah 1970) (holding that where record owner had paid all taxes assessed when due,

a. Assessment of exempt property. Several sections of the Utah Code excuse some property owners from the payment of property taxes.⁷² Exempt entities include owners of:

property exempt under the laws of the United States; . . .
property of the state, school districts, and public libraries; . . .
property of counties, cities, towns, special districts, and all
other political subdivisions of the state; . . . ; property owned
by a nonprofit entity which is used exclusively for religious,
charitable, or educational purposes; . . . [and some] places of
burial⁷³

In addition, certain property of disabled veterans and their relatives,⁷⁴ some property of blind persons and their relatives,⁷⁵ some property of indigent persons,⁷⁶ property used for irrigation purposes,⁷⁷ and property used to furnish power for irrigation purposes⁷⁸ are all potentially exempt from tax assessment. Given the broad and varied scope of the various exemptions it is easy to understand how an assessor might erroneously assess exempt real estate. When this happens, any tax sale pursuant to the erroneous assessment is invalid.⁷⁹

b. Assessment of property not located in the county. Each county is responsible to assess only property located within its boundaries. Therefore, whenever property lies along an uncertain border with an adjacent county, the possibility exists that the record owner will challenge the tax sale purchaser's title on grounds that the property was assessed by the wrong county.

subsequent tax sale by the county was invalid); *Stowell v. State*, 115 P.2d 916 (Utah 1941) (holding that tax deed granted by county was invalid where county made improper assessment against property owned by the state but being purchased by private person under contract); *Tintic Undine Mining Co. v. Ercanbrack*, 74 P.2d 1184 (Utah 1938) (holding that where assessment of jointly owned property was made partly in the name of wrong owner, and other errors were made in the assessment, the subsequent sale of the property for taxes was invalid); *Mammoth City v. Snow*, 253 P. 680 (Utah 1926) (determining that vague description of property in assessment rendered subsequent tax sale void).

72. UTAH CODE ANN. §§ 59-2-1101 to -1114 (Supp. 1991).

73. *Id.* § 59-2-1101(2).

74. *Id.* § 59-2-1104.

75. *Id.* § 59-2-1106.

76. *Id.* § 59-2-1107.

77. *Id.* § 59-2-1111.

78. *Id.* § 59-2-1110.

79. *See, e.g., Huntington City v. Peterson*, 518 P.2d 1246 (Utah 1974).

In one recent Utah case, *Baxter v. Utah Department of Transportation*,⁸⁰ the parties argued over whether Davis County or Weber County was the proper entity to assess taxes against property created by the shifting of a boundary river between the two counties. The final outcome of the case depended largely on an issue of navigable waters law rather than a tax law question; nevertheless, it emphasizes the potential problems faced by a tax sale purchaser of land which lies along an uncertain county boundary.

c. Assessment of property which the State Tax Commission is required to assess. The Utah legislature has provided that "[t]he county assessor shall assess all property located within the county which is not required by law to be assessed by the commission."⁸¹ Utah courts have invalidated tax sales when the county assessor has attempted to collect taxes against real estate properly assessable by the State Tax Commission.⁸² The State Tax Commission has exclusive authority to assess most single unit property which crosses county lines, property of public utilities, property of airlines, and mining property.⁸³ Thus any assessment by the county of these properties would be void.

7. Tax sale of property for which taxes were never delinquent

In one reported Utah case a county sold property for which there had never been a tax payment delinquency. Needless to say, the court invalidated the tax sale.⁸⁴

D. Tax Deeds Which Convey Only Improvements to Real Estate

There are some persons claiming ownership of land under tax deeds granted during the early 1900s which only conveyed an interest in improvements to real estate. In *Marchant v. Park City*,⁸⁵ the Utah Supreme Court held that a description in a tax deed purporting to convey "that certain frame dwelling

80. 783 P.2d 1045 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

81. UTAH CODE ANN. § 59-2-301 (1987) (emphasis added).

82. *E.g.*, *Crystal Lime & Cement Co. v. Robbins*, 209 P.2d 739 (Utah 1949) (holding that assessment of mining property by county which was properly assessable by State Tax Commission invalidated subsequent tax deed from county).

83. UTAH CODE ANN. § 59-2-201(1) (Supp. 1991).

84. *Mecham v. Mel-O-Tone Enter.*, 464 P.2d 392 (Utah 1970).

85. 788 P.2d 520 (Utah 1990).

house by Lumber Yard in Park City, Summit County, Utah, assessed to William Rolfe in the year 1912" was ineffective to convey title to real property.⁸⁶ Part of the rationale for the holding relied on evidence that Park City, in the early 1900s, separately assessed improvements and the underlying real estate. Because the tax deed was not sufficiently specific in identifying the underlying real property, the deed was held ineffective to convey such property.⁸⁷

E. Bankruptcy of the Record Owner

The United States Supreme Court has ruled that federal bankruptcy law preempts state law in administering bankruptcy estates. As stated in *New York v. Irving Trust*,⁸⁸ "[t]he federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements of the controlling power"⁸⁹ In interpreting this statement, bankruptcy courts and at least one court of appeals have held that the bankruptcy of an owner of real estate, which is subject to a tax lien created by state law, stays states (and their political subdivisions) from conducting tax sales of such real estate during the pendency of the bankruptcy, and from publishing or mailing notice of a pending tax sale to the debtor.⁹⁰ The natu-

86. *Id.* at 522.

87. *Id.*; see also *Marchant v. Park City*, 771 P.2d 677 (Utah Ct. App. 1989) (explaining the ineffectiveness of an insufficiently specific tax deed to convey underlying real estate), *aff'd*, 788 P.2d 520 (Utah 1990).

88. 288 U.S. 329 (1933).

89. *Id.* at 333 (citation omitted).

90. See, e.g., *Phoenix Bond & Indem. Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123 (9th Cir. 1989) (holding that state tax sale of debtor property after bankruptcy petition was filed was void from its outset); *United States v. Eagle Inv. Co. (In re Crosby)*, 109 B.R. 195 (Bankr. S.D. Miss. 1989) (holding that tax sale conducted by county after filing of bankruptcy petition was null and void absent lifting of automatic stay); *Greer v. Perry County (In re Greer)*, 89 B.R. 757 (Bankr. S.D. Ill. 1988) (holding that tax sale conducted after filing of bankruptcy constituted violation of automatic stay and was without legal effect, regardless of whether participants had notice or knowledge of existence of the stay); *Richard v. City of Chicago*, 80 B.R. 451 (N.D. Ill. 1987) (voiding tax sale held after the filing of bankruptcy petition as a violation of the automatic stay); *Village Savings Bank v. Town of Lewisboro (In re Haight)*, 52 B.R. 104 (Bankr. S.D.N.Y. 1985) (holding that any action by a town to sell property subject to tax lien was in violation of the bankruptcy automatic stay); *Universal Minerals, Inc. v. County of Cambria (In re Universal Minerals, Inc.)*, 17 B.R. 265 (Bankr. W.D. Penn. 1982) (returning to

ral conclusion which follows from such cases is that tax sales conducted while the property owner is in bankruptcy may be set aside unless the county obtains relief from the automatic stay prior to proceeding to tax sale.

F. Liens and Encumbrances Which Survive Tax Sales

The Utah Code provides:

Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment of the judgment or lien.⁹¹

Similar language has been interpreted by the Utah Supreme Court to give tax liens priority over nearly all other liens against assessed property. In *Union Central Life Insurance Co. v. Black*⁹² the court stated:

The provisions of our statute are that the lien is not removed until the tax is paid or the property is sold for the payment of the same. Such provisions by the courts in other jurisdictions are generally construed as being an expression of the legislative intent to give to the state or other taxing body the right to subject the property to the satisfaction of the lien prior to the satisfaction of any other lien or claim against the property, whether such other lien or claim exists before the levy of the tax or otherwise. That construction must, in our judgment, necessarily result from the language found in our statute. To hold otherwise must necessarily result in defeating the legislative intent that the lien cannot be removed until the taxes are paid or the property sold.⁹³

bankruptcy estate property claimed by county as result of tax sale); *Young v. Critton* (*In re Young*), 14 B.R. 809 (Bankr. N.D. Ill. 1981) (Court held that tax sale conducted after bankruptcy filing was ineffective to transfer real estate and was in violation of the automatic stay despite fact that county had no knowledge of commencement of bankruptcy proceedings; purchaser at tax sale only acquired county's claim against the real estate.); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980) (holding city in criminal contempt for publishing notice of tax sale of property owned by bankruptcy debtor).

91. UTAH CODE ANN. § 59-2-1301 (1987).

92. 247 P. 486 (Utah 1926).

93. *Id.* at 489.

Hence, the lien for general property taxes should have priority over all other liens regardless of the time such other liens attached. Therefore, under well-established principles of lien priority, a purchaser at a tax sale should obtain title to property free of all preexisting liens.⁹⁴

Such an analysis is deceptively simple. While the priority of tax liens is clear when compared with privately created liens, the analysis is not so easy when liens of other governmental entities are involved. Additionally, interests which are not commonly known as liens (i.e., easements and restrictive covenants) also present the question of whether such interests are terminated by a final tax sale.

1. *Federal tax liens*

As previously noted, Utah law usually elevates general property tax liens above all other liens, regardless of the time the other liens attach. However, because federal law often supersedes or preempts state law, special concerns arise when liens created by federal statute have attached to the real estate sold at a tax sale.

The most notable and pervasive federally-created liens which may have priority over state tax liens, and the only type dealt with in this comment, are federal tax liens. Fortunately for the tax sale purchaser, section 6323(b)(6) of the Internal Revenue Code

renders federal tax liens junior to liens securing local real estate taxes, if such real estate tax liens are entitled to priority under local law [I]t applies to all federal tax liens, regardless of when they arose, upon which enforcement or foreclosure had not previously been finalized by judgment, sale or agreement.⁹⁵

Because Utah law does entitle local real estate tax liens to priority, federal tax liens are subordinate to real property taxes

94. GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* § 6.12 (2d ed. 1985).

95. *United States v. Amos*, 287 F. Supp. 886, 890-91 (N.D. Ill. 1968), *aff'd sub nom. United States v. Bluhm*, 414 F.2d 1240 (7th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *see also* 26 U.S.C. § 6324(d)(3) (1988).

regardless of the time they arise. Therefore, a local property tax sale of land subject to a federal tax lien will eliminate the federal tax lien.

2. *Liens of municipalities for special assessments*

Purchasers at a tax sale should take special note of the existence of municipalities' liens created by the formation of special improvement districts and their corresponding assessments. It is possible that cities' liens for such assessments may survive the tax sale for general property taxes regardless of the time of their creation. The Utah Code provides that municipal improvement district assessments

constitute a lien against the property upon which the assessment is levied This lien . . . shall be *equal to and on a parity* with the lien for general property taxes. The lien . . . shall continue until the assessments . . . are paid, notwithstanding any sale of the property for or on account of a delinquent general property tax⁹⁶

On its face, this provision seems to say that neither liens for general property taxes nor improvement district liens can be superior or inferior to each other. However, as will be discussed in Part V, it is not clear what such a conclusion means. The concept of two equal liens may be difficult or impossible to harmonize with prevailing notions of lien priority. At least one Utah case ruled, under prior law,⁹⁷ that liens of equal priority cannot exist under normal circumstances, and that the lien for general taxes takes priority over a municipal assessment lien, despite statutory language to the contrary.⁹⁸ However, be-

96. UTAH CODE ANN. § 17A-3-323 (1987) (emphasis added).

97. REV. STAT. OF UTAH § 17-7-48 (1933). The version of the statute at issue in that case stated, in relevant part:

Special assessments made and levied to defray the cost and expense of any work or service contemplated by the provisions of this article, and the cost of collection thereof, shall constitute a lien upon and against the property upon which such assessment is made and levied from and after the date upon which the ordinance levying such assessment becomes effective, *which lien shall be superior* to the lien of any mortgage or other encumbrance, whether prior in time or not, *except the lien of general taxes*, and such lien shall continue until the tax is *paid notwithstanding any sale of the property for or on account of a general or special tax*.

Id. (emphasis added).

98. *Western Beverage Co. v. Hansen*, 96 P.2d 1105, 1107 (Utah 1939); *see also*

cause the result under current law is uncertain, tax sale purchasers should be cautious in purchasing any property which is subject to a lien for municipal assessments.⁹⁹

3. *Easements and restrictive covenants*

Purchasers at tax sales should be aware that tax titles, while purporting to be "new and paramount title[s] which totally destroy[] the prior title[s],"¹⁰⁰ do not destroy and are not paramount to easements and restrictive covenants in most instances.

Reasoning that the assessor determines the value of property by factoring in the property's diminished usefulness due to easements and restrictive covenants, the Utah Supreme Court has concluded that "ordinarily a tax sale does not divest easements charged upon the property sold."¹⁰¹ In *Hayes v. Gibbs*, the court explained this result by stating:

[A]ssessment is the basis of the tax title and only that interest which was properly assessed can be sold. If the person assessed as owner had no title to the easement, certainly the tax sale could not pass title thereto; the property assessed and the property conveyed must be the same. If property rights which are not included in an assessment are sold or extinguished by a tax sale, there would be a taking of property without due process of law.¹⁰²

However, if the assessment occurs before the easement is granted, the reasoning in *Hayes* suggests that the tax deed purchaser will acquire the property free of the easement because the assessment was of the whole property, free of easements.

Petterson v. Ogden City, 176 P.2d 599, 601 (Utah 1947) (refusing to overturn the holding in *Western Beverage*). For further discussion of the problem with equality of liens in this context, see *infra* notes 140-47 and accompanying text.

99. The safest course for the tax sale purchaser in such circumstances is to acquire both the tax deed and the interest of the municipality. See *Pender v. Bird*, 224 P.2d 1057 (Utah 1950).

100. *Tuft v. Federal Leasing*, 657 P.2d 1300, 1303 (Utah 1982).

101. *Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946).

102. *Id.*

G. Effect of the Soldiers' and Sailors' Civil Relief Act

Under the federal Soldiers' and Sailors' Civil Relief Act,¹⁰³ the enforcement of civil liabilities against persons in military service is suspended in certain circumstances.¹⁰⁴ The United States Supreme Court, in *Le Maistre v. Leffers*,¹⁰⁵ determined that the Act applies to toll the running of the redemption period granted under state law for real property sold at tax sales.¹⁰⁶ Therefore, a tax sale of property owned by persons protected under the Act, even after the passage of the statutory time period between initial assessment and final tax sale, is voidable by the protected sailor or soldier.

The Utah Supreme Court has confronted this issue. In *Day v. Jones*¹⁰⁷ the court invalidated a tax sale and divested the tax sale purchaser of all title to property of a serviceman who qualified for protection under the Soldiers' and Sailors' Civil Relief Act.

H. Environmental Liability

It may prove very costly to purchase land at a tax sale without making a prior examination of the property. Under federal law, the owner of real estate polluted with hazardous chemicals or toxic waste products may be liable for the cost of cleaning up such substances.¹⁰⁸

Under prior law, liability for clean-up costs was extended to owners of property containing toxic substances regardless of fault. In *United States v. Maryland Bank & Trust*,¹⁰⁹ a bank which foreclosed on contaminated real estate was held liable for clean-up costs despite its innocent holding and use of the property.

In response to *Maryland Bank*, Congress amended the liability laws to provide that a defense to clean-up suits was the fact that the landowner had acquired the property without reason to know of the existence of the toxic substances. Howev-

103. 50 U.S.C. §§ 501-91 (1988).

104. *Id.* § 510; NELSON & WHITMAN, *supra* note 94, § 8.9.

105. 333 U.S. 1 (1948).

106. *Id.* at 5-6.

107. 187 P.2d 181 (Utah 1947).

108. 42 U.S.C. § 9607 (1988 & Supp. I 1989).

109. 632 F. Supp. 573 (D. Md. 1986).

er, the amended statute provides that

[t]o establish that the defendant had no reason to know . . . the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.¹¹⁰

Hence, any purchaser at a tax sale would be well-advised to make a physical examination of any property she might purchase and inquire into the use of the property and practices of the prior owners, lest she be found liable for clean-up costs.¹¹¹

IV. REMEDIES FOR TAX SALE PURCHASERS WHO ACQUIRE DEFECTIVE TAX TITLES

After reviewing defects which may be present in a particular tax deed, it may appear to the reader that acquiring such a deed is, at best, speculative. While, to some extent, such a conclusion is accurate, there are important protections of tax deed purchasers which reduce the speculative nature of tax deeds. The legislature has an interest in cultivating and protecting the integrity of tax deeds to enable counties to collect assessed taxes. It is probably for this reason that several statutes have been enacted to give remedies and defenses to tax deed holders.

A. *Lien in Favor of Tax Sale Purchaser for Taxes Paid*

The Utah Code provides that "[e]very person who . . . purchases any invalid tax title . . . shall . . . have a lien against the property for the recovery of the amount of the purchase price paid to the county to the extent that the county would

110. 42 U.S.C. § 9601(35)(B) (1988 & Supp. I 1989).

111. For an example of the risk of environmental liability as it relates to tax sales, at the May 1991 Utah County tax sale the county auctioned off an abandoned gas station in Goshen, Utah. The auditor stated at the sale that he had personally contacted the record owners who informed him they had no desire or intent to redeem the property. The auditor's subsequent comments at the sale implied that perhaps the property was subject to potential environmental liability. Only one bidder was brave enough to step forward and offer to pay the taxes. Author's Observations at May 30, 1991, Utah County Tax Sale.

have a lien prior to the sale by the county¹¹² The practical effect of this statute is to vest the purchaser of an invalid tax deed with essentially the same rights as those possessed by the tax collector prior to the invalid tax sale. This result has been upheld in several Utah cases and has been extended to allow judgment against the record owner for taxes paid by the tax purchaser in years subsequent to the final tax sale.¹¹³

However, not all cases have allowed the holder of an invalid tax deed to recover the purchase price of the deed. If the tax deed is invalidated due to an erroneous assessment of exempt property, or if for some similar reason taxes were not actually due under the assessment, some cases have refused to grant relief to the purchaser of the tax deed.¹¹⁴

Furthermore, if the tax deed holder fails to affirmatively request reimbursement of the taxes paid as part of her pleadings in the action to determine ownership of the disputed property, both statute and case law prohibit her from recovering those amounts and bar her thereafter from obtaining such relief.¹¹⁵ Therefore, as a practical matter, every tax deed hold-

112. UTAH CODE ANN. § 59-2-1352 (1987).

113. *Dillman v. Foster*, 656 P.2d 974 (Utah 1982) (finding that principles of unjust enrichment or implied contract entitled purchaser of invalid tax deed to judgment for taxes paid on property after the tax sale in spite of general rule that there can be no recovery for a voluntary payment of a debt of a third person); *Crystal Lime & Cement Co. v. Robbins*, 335 P.2d 624 (Utah 1959) (allowing reimbursement of tax deed holder despite invalid assessment); *Farrer v. Johnson*, 271 P.2d 462, 467 (Utah 1954) (giving holder of tax deed a "lien and foreclosure [of the lien] for amount actually paid for tax deeds, plus subsequent general taxes paid and interest at the legal rate for the statutory period"); *Adams v. Lamicq*, 221 P.2d 1037 (Utah 1950); *Crystal Lime & Cement Co. v. Robbins*, 209 P.2d 739 (Utah 1949) (making an equitable determination that the record owners would be required to reimburse the tax sale purchasers for money paid at the tax sale as a condition to quieting title in the record owners); *Reeve v. Blatchley*, 147 P.2d 861 (Utah 1944) (holding that reimbursement of tax sale purchaser is required as condition to quieting title in record owner, and record owner cannot offset required reimbursement of taxes by alleged damages suffered due to tax sale purchaser's unlawful detainer of the property).

114. *Anson v. Ellison*, 140 P.2d 653, 656 (Utah 1943) (holding that a valid lien for taxes cannot arise from an invalid levy, and purchaser, at tax sale resulting from invalid levy, has no right to recover money paid for tax deed); *Shipp v. Sheffield*, 117 P.2d 996, 997-98 (Utah 1941); see also *Farrer v. Johnson*, 271 P.2d 462, 467 (Utah 1954) (stating in dicta that "any irregularity in the procedure of taxing the parcels in question[] that would invalidate a tax lien in the taxing body" would prohibit the holder of an invalid tax lien from recovering the purchase price).

115. UTAH CODE ANN. § 59-2-1352 (Supp. 1991) ("The lien [to reimburse the holder of the invalid tax deed for taxes paid] shall be foreclosed in any action in

er whose title is challenged should include a counterclaim, in the alternative, for reimbursement of the purchase price should the tax deed be invalidated.

*B. The Shortened Adverse Possession and
Statute of Limitations for Tax Titles*

In 1953, the Utah legislature enacted a series of statutes to assist holders of tax deeds in obtaining good title despite defects in the tax proceedings or other invalidating events. The first set of these statutes creates a limitation period on challenges to tax deeds, barring suits against holders of tax titles after the expiration of four years from the date of the final tax sale.¹¹⁶ However, the limitation period is tolled if the record owner has been in actual possession of the property within four years of the commencement of any suit to quiet title.¹¹⁷ Furthermore, the statutes never bar a city or town from maintaining a lien on the property which is of equal or greater priority than the general tax lien which was the basis of the tax sale.¹¹⁸

Another set of statutes, also enacted in 1953, makes the holder of a four-year-old tax deed the presumed owner of the property by adverse possession unless the record owner has been in actual possession of the property or the tax deed holder has not paid all taxes levied on the property during the four-year period.¹¹⁹

In *Frederiksen v. LaFleur*,¹²⁰ the Utah Supreme Court upheld these statutes and allowed a purchaser of a defective tax deed to rely on the four year statute of limitations even though he could not show adverse possession.¹²¹

which the invalidity of the tax title is determined. If the lien is not foreclosed at the time of the determination of the invalidity of the tax title, any later action to foreclose the lien shall be barred."); *Toronto v. Sheffield*, 222 P.2d 594, 600 (Utah 1950) ("[B]ecause [tax deed holders] merely denied [record owner's] ownership and asked for no affirmative relief, [tax deed holders] are unable to recover from such [record owners], who should have paid these taxes, the money they are out. Had such [tax deed holders] commenced this action or demanded affirmative relief [tax deed holders] could have recovered . . .").

116. UTAH CODE ANN. §§ 78-12-5.1 to -5.2 (1987 & Supp. 1991).

117. *Id.*

118. *Id.* § 78-12-5.2.

119. *Id.* §§ 78-12-7.1 & 78-12-12.1.

120. *Frederiksen v. LaFleur*, 632 P.2d 827 (Utah 1981).

121. *Id.* at 830. Shortly after passage of the 1953 statutes, the Utah Supreme

However, there are a few exceptions to the general rule set out in *Frederiksen*. In addition to those exceptions expressly set forth in the statutes noted above, the tax title statute of limitations does not apply to persons with an existing interest in the property who purchase at tax sale in an attempt to divest cotenants or lienholders of title or interest in the property.¹²²

Cotenants and record owners can still divest each other and lienholders of title by reliance on tax deeds, but to succeed they must rely on the longer, seven-year general adverse possession statute with all its requirements, including hostile possession which is open and notorious.¹²³

C. Action Against County for Refund of Taxes Paid

Under the early common law in most states, tax sale purchasers had no right to recover money paid to the county in consideration for a tax deed, even if the tax was erroneously or illegally assessed. As summarized in *Black on Tax Titles*:

At the common law, the purchaser of a defective title at a tax sale comes strictly within the rule of caveat emptor, unless aided by express statutory authority he is not entitled to recover back his money by suing the city or county for whose taxes the land was sold.¹²⁴

However, even in the days of Henry Black several states had enacted statutes modifying the common law rule and permitting recourse against counties. For example, a Massachusetts statute mandated that the tax deed

Court ruled that these tax title limitation statutes were ineffective to bar suits unless the tax deed holders could also show compliance with the general adverse possession statute. *Lyman v. National Mortgage Bond Corp.*, 320 P.2d 322 (Utah 1958). The court's ruling substantially undermined the effectiveness of the 1953 legislation as a means of placing limitations on quiet title actions against tax deed purchasers.

However, twenty-three years later, in *Frederiksen v. LaFleur*, the court reversed its earlier position, overruling *Lyman*. Thus, the latest rule is that after four years from the granting of a tax deed, the tax deed holder has good title in almost every instance, despite almost all deficiencies in the tax deed, including due process violations. *Kemmerer Coal Co. v. Brigham Young Univ.*, 723 F.2d 54, 57-58 (10th Cir. 1983); *Frederiksen*, 632 P.2d at 831 n.14 (Utah 1981).

122. *Massey v. Prothero*, 664 P.2d 1176, 1179 (Utah 1983) (cotenants); *Dillman v. Foster*, 656 P.2d 974, 978-79 (Utah 1982) (lienholders).

123. *Massey*, 664 P.2d at 1180; *Dillman*, 656 P.2d at 979-80; see UTAH CODE ANN. §§ 78-12-2 to -21 (1992).

124. BLACK, *supra* note 46, § 476.

shall contain a special warranty that the sale has in all particulars been conducted according to the provisions of law; and if it should subsequently appear that by reason of any error, omission, or informality in any of the proceedings of assessment or sale, the purchaser has no claim upon the property sold, there shall be paid to such purchaser . . . the amount paid by said purchaser, together with interest thereon . . . which payment shall be in full satisfaction of all claims for damages for any defects in the proceedings.¹²⁵

Neither Utah courts nor its legislature have directly addressed the question of whether the purchaser of a defective tax title can seek reimbursement from the county which issued the deed. However, in two cases with somewhat analogous facts, the Utah Supreme Court has held that the purchaser of a deed who is not the first purchaser of the tax deed, but only holds a quit claim deed from the original tax sale purchaser, is not entitled to be reimbursed by the county when the underlying tax deed is held invalid.¹²⁶

Yet, despite Utah's apparent adoption of the common law rule on this issue, more recent cases contain dicta which might be construed as opening the door to suits for reimbursement. For example, in *Fivas v. Peterson*,¹²⁷ a tax deed dispute in which the county was not a party, the court stated:

If [county officials] collectively fail to perform the duties to the taxpayer and the public required by the statutes, that failure is chargeable to the county as the taxing entity.

... There appears to be no reason why public officials should be allowed to be both blind and dumb. . . . It must be judicially assumed to be true, that the public employee is not unlike his brother in other pursuits; that he is reasonably efficient and diligent in the performance of his duties, but will tend to meet only the standard of efficiency that is required of him. To place the stamp of approval upon the action of the county in this case would amount to judicial recognition and

125. *Id.* § 477 (quoting PUB. ST. MASS. ch. 12, § 39). A more recent, albeit modified, version of the statute can be found at MASS. GEN. L. ch. 60, § 46 (1921).

126. *Nix v. Tooele County*, 118 P.2d 376 (Utah 1941); *Wilson v. Salt Lake County Corp.*, 194 P. 125, 126 (Utah 1920).

127. 300 P.2d 635 (Utah 1956).

approval of the type of inefficiency and ineptitude that is sometimes erroneously assumed to be the standard of work by public employees. Such a substandard should not be recognized as allowable nor encouraged by permitting slipshod procedure by county officials¹²⁸

Apparently the Utah Supreme Court recognizes that there is some room for criticism of county officials who fail to perform their duties. As will be discussed later, more than mere criticism of county officials who make erroneous assessments or related errors should be incorporated into Utah tax title law.¹²⁹

V. RECOMMENDED MODIFICATIONS TO EXISTING UTAH TAX TITLE LAWS

A. *Amendment of Notice Provisions*

As previously noted, Utah law requires that notice of pending tax sales be given by certified mail "to the last known recorded owner and all other recorded lienholders, according to the deed, as of the preceding March 31, at their last known address."¹³⁰ On the surface this language seems to satisfy the Supreme Court's mandate in *Mennonite Board of Missions v. Adams*,¹³¹ that every valid tax sale requires, as a prerequisite to preventing constitutional challenge and invalidation for lack of due process, "[p]ersonal service or mailed notice"¹³² to entities with "legally protected property interest[s]."¹³³

However, upon closer examination, Utah's statute may be insufficient to dispel the due process concerns raised in *Menno-nite*. The requirement of notice only to recorded lienholders and the last known recorded owner may leave some interested entities without adequate notice of the sale. For example, suppose A is the record owner of Blackacre. B is purchasing the property from A under a uniform real estate contract. B records a mere notice of interest in Blackacre. Because B is not the last

128. *Id.* at 637-38; see also UTAH CODE ANN. § 59-2-1330 (Supp. 1991); Utah Parks Co. v. Iron County, 380 P.2d 924 (Utah 1963).

129. See *infra* text accompanying note 151.

130. UTAH CODE ANN. § 59-2-1351(2) (Supp. 1991).

131. 462 U.S. 791 (1983). For articles addressing *Mennonite*, see *supra* note 34.

132. *Mennonite*, 462 U.S. at 799.

133. *Id.* at 798. *Mennonite* dealt specifically with the right of mortgagees to receive personal service or mailed notice of pending tax sales.

known recorded owner of Blackacre and is not a lienholder, in the traditional meaning of that term, county officials, upon reading and complying with the literal language of the statute, neglect to send B any notice of the impending tax sale. Under *Mennonite*, B's due process rights have probably been violated.¹³⁴

Consider also the interesting case in which A, the owner of Blackacre, grants an easement to B after the tax lien accrues but before the tax sale is finalized.¹³⁵ The easement owner, who is clearly not classifiable as a lienholder, will probably not get notice of the tax sale. The usual rules, which do not allow easements to be extinguished by a tax sale, probably do not apply in this circumstance because at the time the assessment was made the property was not yet subject to the easement.¹³⁶ Arguably, under this scenario the tax sale would extinguish the easement, but failure to give notice to the easement owner might be construed as a due process deficiency which would reinstate the easement. Perhaps the fact that the easement owner had constructive notice of the tax lien would be sufficient to uphold the tax sale, but such a result is not certain.

As another example, consider the effect of Utah's notice requirement on the April first purchaser of real estate which is about to be sold for delinquent taxes. This purchaser does not receive notice of the pending sale as required by *Mennonite*. Hence, he may be deprived of due process. Of course, some deadline for determining interests prior to the tax sale must be selected for administrative reasons. Nevertheless, in the event ownership changes hands or liens are recorded between March thirty-first and the date of the tax sale, the possibility exists

134. This fact pattern is exactly what occurred in *Furniture Distribution Ctr. v. Miles*, 821 P.2d 1165 (Utah 1991). One of the defendants, Burkinshaw, sold property to the plaintiff, Furniture Distribution Center (FDC), under a uniform real estate contract. FDC recorded a notice of interest in 1979. Subsequently, Burkinshaw failed to pay the property taxes and the land was sold at a tax sale. Summit County failed to give notice to FDC of the pending sale. *Id.* at 1165-66.

135. See *Hayes v. Gibbs*, 169 P.2d 781, 786 (Utah 1946). Because easements and other servitudes, which were in place prior to the assessment date, are probably not divested by a Utah tax sale, failure to give notice to the holders thereof is probably inconsequential. See *supra* notes 100-02 and accompanying text.

136. See *supra* notes 100-02 and accompanying text.

that the sale will be set aside on due process grounds even though statutory requirements have been met.¹³⁷

Finally, consider the ambiguity of Utah's notice statute, as presently worded, when applied to persons with only future or contingent interests in the real estate. It is not clear that such interests make the holders thereof "the last known recorded owner." Therefore, county officials might not consider mailing notice to such persons.

These examples show that there are situations in which strict compliance with the statute may not be sufficient to give notice to all persons with an interest in the affected real estate. An amendment to the statute which more clearly mirrors the language of *Mennonite* would be appropriate. Utah Code section 59-2-1352(2) might be amended to read, in part, as follows: "Notice of the sale shall also be sent by certified mail to all entities with any recorded interest in the property which will or may be affected by the tax sale."

In addition, the legislature may wish to consider adding a provision which assures notice to persons who acquire interests in property subject to the final tax sale after March thirty-first. Such notice might be accomplished by adding the following statute to the Code:

Between March thirty-first and the date of the Final May Tax Sale each year, the county recorder shall provide a copy of the following notice to all persons who record any instrument purporting to grant any interest in real estate in the county:

NOTICE

Any interest in real estate granted by virtue of the instrument recorded by you this day may be sold for non-payment of general property taxes during the Final May Tax Sale in May of this year if, under certain circumstances, such property taxes have not been paid and the real estate has not been redeemed from preliminary tax sale prior to the Final May Tax Sale. It is your duty to insure that either (a) the property affected by the instrument you have recorded is not subject to tax sale or (b) that the property is redeemed from preliminary tax sale prior to the day of the Final May Tax Sale.

137. The chances for a successful due process challenge by a purchaser just prior to the sale seem remote. The purchaser can easily search the records of the county recorder prior to the purchase and determine whether a tax sale is pending.

If the person recording the instrument is not the entity who is purportedly granted an interest in the affected real estate, and the affected real estate is subject to Final May Tax Sale in May of the year the instrument is recorded, the auditor shall send a copy of the foregoing notice to the last known address of the entity who is purportedly granted such interest within two (2) days of the date the instrument is recorded. The county recorder shall provide the auditor a daily list of all new recordings to assist the auditor in complying with the requirements of this section.

B. Relaxation of the Rule of Strictissimi Juris for Insignificant Errors

The rule of *strictissimi juris* has been overused as a theory for invalidating tax deeds for technical noncompliance with minor statutory provisions. Given the complex series of steps which Utah statutes require as a part of the tax sale process,¹³⁸ it is likely in most tax sales that a county official will fail to strictly perform a required act. If the rule of *strictissimi juris* is applied without some consideration for the practical significance of the missing or ill-performed act, tax sales will continue to be subject to attack for insignificant errors and minor inconsistencies.

A better approach to *strictissimi juris* would be to apply equitable principles to soften the impact of the theory in those instances where the violation has no impact on the rights of the record owners.

For example, suppose an auditor has failed to attach his affidavit to the assessment rolls. *Strictissimi juris* would set aside the sale.¹³⁹ One alternative to such a rigid rule would be to make the failure only a rebuttable presumption of the invalidity of the tax sale. Then, if the tax sale purchaser introduces sufficient evidence to show that the auditor did comply with duties which are relevant to protecting the record owner's rights, the mere failure to attach an affidavit could be ignored as insignificant and the presumption of invalidity overcome. In

138. See *supra* notes 5-33 and accompanying text.

139. See *supra* notes 47-49 and accompanying text.

other words, once a technical non-compliance is shown, the person seeking to uphold the tax deed would have the burden of showing that the non-compliance did not prejudice the rights of the party challenging the deed.

As another example, suppose that the auditor is ill on the day of the tax sale. She instructs an assistant to conduct the sale and, by relying on agency principles, gives the assistant the power to conduct the sale. *Strictissimi juris* would set aside the sale. Under the proposed alternative, if the tax sale purchaser introduces sufficient evidence to show that the sale was conducted with the same skill and under the same procedures which the auditor would have used, the tax sale could be upheld because the record owner's rights were not impaired by the technical non-compliance.

The only purpose of *strictissimi juris* is to insure protection of the rights of the record owner. If the rule is applied to give unnecessary and excessive protection to the record owner at the expense of the tax sale purchaser, it creates instability and uncertainty in tax titles, encourages litigation to resolve tax title disputes, promotes delinquency in the payment of taxes, and discourages bidding at tax sales—lowering the prices bid at such sales.

*C. Resolution of the Equal Priority Problem
with Municipal Assessment Liens*

As previously noted, under Utah statute, liens for municipal improvement assessments are apparently placed on par with liens for general property taxes.¹⁴⁰ However, the concept of equality of priority for two liens has inherent difficulties.

Under currently accepted principles of lien priority, the foreclosure of a lien eliminates all liens which are subordinate to the foreclosed lien, and the purchaser at foreclosure takes a priority position equal to the position the foreclosed lien occupied. Superior liens are not eliminated.¹⁴¹ However, if two liens are equal in priority, the foreclosure of one lien cannot eliminate the other, else the foreclosed lien would be superior. However, neither can the non-foreclosed lien remain, else it would be superior. Therefore, if two liens are, by statute,

140. See *supra* note 96 and accompanying text.

141. NELSON & WHITMAN, *supra* note 94, § 7.14.

deemed to have equal priority, how does the foreclosure of one lien affect the existence of the other lien?

This quandary can be resolved in at least three ways. The first possible solution is for the judiciary to ignore the legislature's mandate of equality and declare that one lien is superior to the other. The Utah Supreme Court did this in *Western Beverage Co. v. Hansen*,¹⁴² when it declared the general tax lien superior despite the apparent intent of the legislature to create liens of equal priority.¹⁴³

A second solution is for the judiciary to ignore the priority problems created by equality of liens and blindly declare that both liens are equal while allowing one lien to take priority over the other as a practical matter. This was the result proposed by the dissent in *Western Beverage* in which Judge Wolfe advocated allowing the purchaser at the sale of the first lien to be foreclosed to take subject to the second lien to be foreclosed.¹⁴⁴ While this solution does lip service to the legislative mandate of equality, it does not allow equality. Instead it makes the second lien foreclosed superior to the first lien foreclosed.

A third, and better solution is for the legislature to amend the Code to require the joint foreclosure of both liens. This possibility was referred to by the majority in *Western Beverage* when it stated:

No provision has been made for a joint collection of the special assessments for improvements and general taxes. The legislature might have provided for filing with the county tax officers a statement of special taxes due, for a prorata division

142. 96 P.2d 1105, 1109 (Utah 1939).

143. It should be noted that the language of the statute analyzed in *Western Beverage* was not as clear as the current statutory language on the question of equality of liens. In *Western Beverage* the applicable statute stated that

[s]pecial assessments . . . shall constitute a lien . . . which shall be superior to any lien or other encumbrances . . . except the lien of general taxes, and such lien shall continue until the tax is paid notwithstanding any sale . . . on account of a general or special tax.

Id. at 1107 (emphasis deleted) (quoting REV. STAT. OF UTAH § 15-7-48 (1933)); cf. UTAH CODE ANN. § 17A-3-323 (1987). The language specifically making the two liens of equal priority was the result of a subsequent amendment to the Code.

144. *Id.* at 1114 (Wolfe, J., dissenting).

of the proceeds from the tax sale, or some other adequate or suitable procedure.¹⁴⁵

In implementing this solution, the legislature might enact a new statute which would mandate that the appropriate county official search delinquent titles for a record of municipal assessment liens. The official would be required to give notice to the municipality of the pending tax sale. The municipality would then have time to send the county information regarding the outstanding balance due on the assessment lien and notify the property owner of the foreclosure of that lien. The county would then sell the property to satisfy both the general tax lien and the assessment lien and remit the proper amount to the city. In the event no bidders offer to purchase at the sale, the property could vest in the county and the city as tenants in common with their ownership interests equal to the proportion of the amount due each entity compared to the total amount due.¹⁴⁶

Such a procedure would have at least three advantages over the first two alternatives. First it would eliminate the expense of conducting a separate sale to foreclose the municipal lien. Second, it would increase the stability of tax titles without unfairness to record owners. Third, it would erase the lien priority problem of the current statute.¹⁴⁷

D. Tender of Bond for Unpaid Taxes or Limitation of Period During Which Record Owner May Reimburse Purchaser of Invalid Tax Deed

One of the potential problems which may arise in quiet title actions after a final tax sale is that record owners may fail to promptly reimburse the tax sale purchaser for money expended to purchase the tax deed. In *Crystal Lime & Cement Co. v. Robbins*,¹⁴⁸ the trial court invalidated a tax deed and ordered the record owner to pay the tax sale purchaser a sum

145. *Id.* at 1108.

146. For example, if a city has a lien for \$100, the general property taxes are \$200, and no bidders offer to purchase, the city and the county could become owners of the property as tenants in common. The city would acquire a 1/3 interest in the land and the county would have a 2/3 interest.

147. A fourth possible solution to the problem would be to eliminate the parity-of-liens statute altogether and simply state that one of the liens is superior to the other.

148. 335 P.2d 624, 626-27 (Utah 1959).

equal to the taxes, interest, and penalties paid at the tax sale. The court made payment of the taxes an express condition to a decree quieting title in the record owner. Eight years passed without payment and without the entry of the decree. During this eight year period title to the property was uncertain. Finally, the trial court dismissed the record owner's complaint for lack of prosecution. However, the Utah Supreme Court reversed with instructions to enter an order allowing the record owner a reasonable time in which to pay the required sum.

The implications of *Robbins* are that unless courts, as part of their decrees, set a definite time period for the payment of the unpaid taxes, record owners can maintain effective control of the property indefinitely without reimbursing the tax purchaser.

To remedy this problem, trial courts should routinely state a time period during which reimbursement must occur. Alternatively, the legislature should mandate that payment occur within a specified time and provide that, in the event payment is not made within that period, title to the property will be quieted in the tax sale purchaser. Another alternative is to require the record owner to post a bond or to tender the amount due for taxes, penalties, and interest as a condition to maintaining the quiet title action. This was apparently the requirement imposed in one early Utah tax title case.¹⁴⁹ It has also been applied by statute in some states.¹⁵⁰

E. Waiver of Immunity for Errors of County Officials

As discussed earlier, Utah appears to adhere to the common law rule that purchasers of tax deeds cannot seek reim-

149. *Pacific Bond & Mortgage Co. v. Beaver County*, 89 P.2d 476, 477 (Utah 1939) (sums which might have been payable in the event of invalidity of the tax deed were probably paid because a county was the defendant who held under the tax deed).

150. See BLACK, *supra* note 46, § 464. The relevant section of this treatise states:

The statutes of several states provide that the original owner, or any person seeking to have the [tax] sale and deed set aside, shall bring into court, upon commencing his action for that purpose, an amount sufficient to cover the taxes legally chargeable on the land, with the costs of the sale, and sometimes also interest on the bid or a penalty, the same to be paid over to the purchaser in case his title is adjudged invalid.

Id. (citations omitted).

bursement from county officials when the underlying tax assessments, upon which their deeds are based, are invalid.¹⁵¹ Such a result is inequitable and inappropriate for two reasons.

First, in circumstances where the tax was assessed against tax-exempt property, property which was properly assessable by the State Tax Commission, or property which is not located in the county, the county is, under current law, allowed to recover money from the tax sale purchaser which it was never entitled to receive and which it will never be liable to repay.

Second, the current standard does not encourage counties to comply with statutory prerequisites to tax sales, as they will not incur any liability for failing to follow such standards.

Of course, county liability to refund the tax deed purchase price is not necessarily desirable in all circumstances. In those instances in which the tax could have properly been assessed against the property, it may not be appropriate for the county to needlessly reimburse the tax deed purchaser and then have to seek repayment of the taxes from the record owner. Instead, the tax deed purchaser might only be allowed to proceed against the record owner for payment of the taxes.

Clearly, though, in cases where the collection of the tax itself would never have taken place if not for the illegal assessment (i.e., because the property was exempt from taxation), reimbursement against the county should be had to prevent unjust enrichment.

VI. CONCLUSION

While in theory tax titles should be among the most stable and marketable titles available, a long history of judicial action in Utah invalidating such titles has created an atmosphere of caution in accepting and insuring tax deeds. Much of this judicial action has been unnecessarily protective of record owners' interests while ignoring the need to protect the tax sale purchaser and to encourage active bidding at tax sales.

While certain procedural devices have been implemented to shore up tax titles and resolve uncertainties in the law, the need for additional action is apparent. By taking further steps to ensure constitutionally required notice to record owners; by reducing the harsh and unnecessary effects of the rule of *stric-*

151. See *supra* notes 124-26 and accompanying text.

tissimi juris; by resolving the ambiguity over the parity of general tax liens with municipal assessment liens; by mandating that reimbursement be made within a specified time to a tax sale purchaser for money expended to purchase an invalid tax deed or, alternately, by requiring as a condition to maintaining a quiet title action that the record owner post a bond or tender the amount of taxes paid by the tax sale purchaser; and by waiving the liability of counties for the errors of their officials in at least some instances, the legislature and the judiciary can create more stable tax titles, insure that parties with interests in properties sold at tax sale are not treated unfairly, and assist in the effective collection of property taxes and municipal assessments.

Guy Lamoyne Black

APPENDIX

Notice of Auditor to Bidders at May 30, 1991
Utah County Tax Sale

MAY 1991 TAX SALE

30 MAY, 1991 10:00 A.M.

NOTICE TO ALL BIDDERS--THIS SALE
IS SUBJECT TO THE FOLLOWING
RESTRICTIONS, PROVISIONS &
INSTRUCTIONS:

ALL BIDDERS MUST PRE-REGISTER AND RECEIVE A BID NUMBER IN ORDER TO PARTICIPATE IN THE BIDDING. PLEASE DO THIS BEFORE THE BIDDING STARTS, IF POSSIBLE, IN ORDER TO ELIMINATE ANY CONFUSION AFTER THE START OF THE SALE.

1) UTAH COUNTY DOES NOT WARRANT VALID OR LEGAL TITLE TO ANY OF THE PROPERTIES, NOR DOES IT WARRANT THE EXISTENCE OF ANY PARCEL. UTAH COUNTY DOES NOT WARRANT THAT IT HAS THE LEGAL RIGHT TO SELL ALL PARCELS.

2) UTAH COUNTY HAS ATTEMPTED TO PROTECT THE RIGHTS OF ALL PARTIES BY COMPLYING WITH ALL NOTICE PROVISIONS OF TITLE 59 OR THE UTAH CODE ANNOTATED, 1953, AS AMENDED.

3) WHILE UTAH COUNTY HAS ATTEMPTED TO GIVE NOTICE TO ALL PROPERTY OWNERS, AND THOSE PERSONS, CORPORATIONS, PARTNERSHIPS AND ENTITIES WITH A SUBSTANTIAL INTEREST, IT HAS NOT PERFORMED A TITLE SEARCH ON EACH PARCEL DUE TO EXCESSIVE COST AND BUDGETARY AND TIME CONSTRAINTS, AND A SPECIFIC SALE MAY BE CHALLENGED ON CONSTITUTIONAL DUE PROCESS GROUNDS.

4) THE FOLLOWING IMPORTANT FEATURES OF THE SALE MUST ALSO BE NOTED:

A) IN THE EVENT A PARCEL WHICH IS SUBJECT TO THE FARMLAND ASSESSMENT ACT (GREENBELT) IS SEVERED BY VIRTUE OF THE BIDDING PROCESS, THE PURCHASED PARCEL MAY NOT QUALIFY FOR GREENBELT STATUS. A ROLLBACK TAX WOULD THEN BE IMPOSED, WHICH TAX IS IN ADDITION TO THE ADVERTISED DELINQUENT TAX AMOUNT.

B) EXCEPT FOR PARCELS THAT ACTUALLY GO TO BID, NO DEED SHALL BE ISSUED IN A NAME DIFFERENT THAN THAT OF THE RECORD OWNERS.

C) COLLUSIVE BIDDING IN THE PUBLIC AUCTION PORTION OF THE SALE WILL BE PROHIBITED TO THE EXTENT THAT BIDS SUBMITTED AND THE TAX DEED ISSUED THEREAFTER WILL ONLY BE EXECUTED IN THE NAME OF AN INDIVIDUAL BIDDER/PURCHASER.

ALL PURCHASES ARE SUBJECT TO THE ABOVE FACTS TOGETHER WITH THOSE ADDITIONAL INSTRUCTIONS DELIVERED BY THE UTAH COUNTY AUDITOR.