

1949

Valley Investment Co. v. Los Angeles & Salt Lake Railroad Company : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Valley Investment Co. v. Los Angeles & Salt Lake Railroad*, No. 7300 (Utah Supreme Court, 1949).
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In the
Supreme Court of the State of Utah

VALLEY INVESTMENT CO., a corporation,

Plaintiff and Appellant,

vs.

LOS ANGELES & SALT LAKE RAIL-
ROAD COMPANY, a corporation,

Defendant and Respondent.

Case No.
7300

BRIEF OF RESPONDENT

FILED

2 - 1949

CLERK, SUPREME COURT, UTAH

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Salt Lake City, Utah,
August 1, 1949.

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vs.

LOS ANGELES & SALT LAKE RAIL-
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Defendant and Respondent.

Case No.
7300

BRIEF OF RESPONDENT

STATEMENT OF CASE

This action was filed in the Third Judicial District Court at Salt Lake City, Utah by the plaintiff, a Utah corporation, who sought therein to quiet its title to the property described in the complaint. The case was tried before the Honorable Roald A. Hogenson, sitting without a jury, and after trial rather lengthy briefs were filed. After due consideration thereon, Judge Hogenson decided the case

in favor of the defendant and against the plaintiff and signed findings of fact and conclusions of law wherein it was determined that the plaintiff's right to quiet title to such property was barred by the statute of limitations, specifically the four year limitation statute applicable to defective tax titles as set forth in Chapters 19 and 20, Laws of Utah, 1943.

STATEMENT OF FACTS

Most of the facts in the case were stipulated, but in addition to the stipulation certain recitals in deeds and certain other documents were introduced in evidence, and some little testimony was given with respect to the nature of the property and facts pertaining to possession or occupancy of the property.

The property involved was owned by one Oscar F. Hunter from 1894 to 1928. In 1928 the said Oscar F. Hunter executed a deed wherein he conveyed the property to his nine children—or to eight children, the interest of the ninth going to three children of a deceased child. In that deed to the nine children it was recited that the conveyance was “subject to a life estate in Mindwell Chipman Hunter and Anna Elizabeth Hindley Hunter and survivor.” There is nothing shown in the record as to any such life estate having been conveyed to these two women, and they were apparently polygamous wives of Oscar F. Hunter, although Mindwell Chipman Hunter signed as wife in the deed conveying the property to the nine children. Later Mindwell Chipman Hunter furnished information for the death certificate covering the death of Anna Elizabeth Hindley

Hunter wherein it was certified that the said Anna Elizabeth Hindley Hunter was the wife of Oscar F. Hunter. The status of these two wives, or as to which may have been considered the lawful wife—whether material or not—was not otherwise cleared up by the record.

In 1931 the nine children who had received the property by deed from Oscar F. Hunter in 1928 executed various deeds by which they conveyed whatever interest they had in the property to Mindwell Chipman Hunter (Tr. 43-44). Under date of February 29, 1936, Mindwell C. Hunter gave a bargain and sale deed covering the property to Irene Hunter Chamberlain. Under date of November 21, 1937, Irene H. Chamberlain McAlpine of Portland, Oregon, executed a quitclaim deed to the plaintiff, Valley Investment Co., a Utah corporation.

The property in question during all of this time was vacant, unimproved, alkali property (Tr. 47, 58). There is no evidence that any of plaintiff's predecessors held actual possession of the property at any time after 1930, and the record affirmatively shows that there was no such physical occupation of the property by plaintiff or any of its predecessors since March 31, 1936 (Tr. 66). The general property taxes for the year 1930 as assessed to the heirs of Oscar F. Hunter, as named in the deed of 1928, were not paid, and a treasurer's tax sale for nonpayment of such taxes was made on December 22, 1930 (Exhibit 2). The taxes for the years 1931, 1932, 1933, 1934 and 1935 were also unpaid, and there was no redemption of the treasurer's sale for the unpaid 1930 taxes, as a result of which an auditor's tax deed to Salt Lake County covering said property was exe-

cuted on March 31, 1936 (Exhibit 3). On November 7, 1941, pursuant to the provisions of Title 80, Chapter 10, Section 68, Revised Laws of Utah 1933, as amended by Chapter 101 of the Session Laws of Utah 1939, Salt Lake County issued its deed by which it quitclaimed to the defendant, Los Angeles & Salt Lake Railroad Company, the property involved in this action (Exhibit 4). In 1941 defendant built spur tracks across this property to serve the Remington Arms Plant.

The taxes as they had been assessed upon this property, as shown by Exhibit 2, were in the neighborhood of \$15.00 per year. After 1932 they fell below \$15.00 per year. The price paid by the defendant for the quitclaim deed, shown as the consideration in Exhibit 4, was \$172.46. This amount would be approximately the equivalent of the six years' taxes—1930 to 1935, inclusive—as shown in Exhibit 2, plus a similar average yearly amount for the additional six years up to and including 1941. Thus it is apparent that the defendant in purchasing said property from the county paid to the county an amount to equal taxes which should have been paid on the property from and after the year 1930, when the plaintiff's predecessors first failed to pay said taxes. Regardless of whether plaintiff will admit that the recital in the deed, Exhibit 4, is sufficient to show payment of the amount of all of these taxes, the plaintiff nevertheless stipulated that the defendant did pay all taxes assessed against said property for the years 1942 to 1947, inclusive (Tr. 50).

The defendant has been in possession of the property from August, 1941 to the present time, and neither plain-

tiff nor any of its predecessors in interest has possessed or physically occupied said property at any time since March 31, 1936 (Tr. 66).

At the time of the treasurer's tax sale for delinquent taxes as made on December 22, 1930, the auditor's affidavits as were required by statute were not attached to the assessment roll. This lack of the auditor's affidavits constitutes the only defect in the whole procedure. At least no other defects were shown by the record, and except that such defects be shown, the auditor's deed and tax sale themselves are prima facie proof that all necessary proceedings were taken (Section 80-10-68 (7), Utah Code Annotated 1943).

ARGUMENT

ARGUMENT NO. 1

THE COURT DID NOT ERR IN ITS REFUSAL TO
SIGN AND FILE PLAINTIFF'S PROPOSED FINDINGS.

Plaintiff and appellant assigned 27 errors. However, in his argument counsel for appellant did not address himself specifically to any particular assigned error but grouped them together, and the purport of the majority of the errors as assigned by appellant merely states in effect that the court should have decided for the plaintiff and against the defendant and should have signed the findings, conclusions and judgment as presented by plaintiff rather than those granting judgment in favor of defendant.

In addressing himself to such an argument under his Argument No. 1, counsel accuses the court of being "very

careless in the terminology” used in the findings and conclusions as signed, and throughout his Argument No. 1 as well as his Arguments Nos. 4, 5, 6, and 7, counsel tries to quibble over the use of words and expressions, both as used in the findings as signed by the court and as used in the statutes under consideration in this case. He criticizes the use of the expression “conveyed or purported to convey,” as well as the use in the findings of the expression “struck off and sold.” It is the opinion of counsel for the respondent that in all matters such as involved in this case we must look to substance rather than to mere form, and quibbling over the use of words will not assist us much in getting down to the real meaning of what a court intends in a judgment, nor of what the legislature may have intended in the enactment of a statute.

Counsel seems to agree with the statement in the findings, as appears in paragraph 9 as signed by the court, that on November 7, 1941, Salt Lake County executed and delivered a deed by which it “conveyed or purported to convey” the property to the defendant. The position of the defendant with respect to the use of such words is that it is immaterial whether or not the conveyance to Irene Hunter Chamberlain or to the plaintiff actually conveyed a good title, because regardless of whether such title may have been good as far as the actual documentary procedure is concerned, the grantee might still be barred by reason of limitations. The question as to whether or not the deed to the defendant by which the county conveyed or purported to convey the property amounted to a good conveyance might be immaterial if the facts are such that even assuming the

tax deed to be invalid, yet a purported conveyance would give sufficient color of title upon which adverse possession could be predicated, which might ripen into a good defense as against the plaintiff. Therefore, quibbling over the words "conveyed or purported to convey" does not get us anywhere and does not assist the court.

In paragraph (b) of his Argument 1 on page 19, counsel argues that the treasurer's sale was void for lack of proper auditor's affidavits, and he states that thus only a purported sale took place. *There was an actual treasurer's sale which took place.* Whether or not it was void because of some defect in the procedure does not say that there was no treasurer's sale and does not say that the property was not sold for unpaid taxes assessed in 1930. There was a treasurer's sale and the property was sold, but because of some defect we may admit that the treasurer's sale was void.

The same is true with respect to his argument under paragraph (d) where he says that the finding that the defendant purchased the property from the county is not true. We dispute counsel's statement. The defendant did purchase the property from the county. The fact that because of some defect in procedure the purchase may be declared void does not enable plaintiff to say that the defendant did not purchase and pay for said property.

In paragraph (e) on page 21 counsel states that the evidence does not show that defendant negotiated for the property in the summer of 1941. Perhaps there is not direct evidence to that effect, but it is inferentially shown because

the testimony does show that the defendant went onto the property and built the trackage on it during August of 1941, and no deed was issued to the property until November 7, 1941 (Tr. 57). The fact that a deed was subsequently issued by the county would at least allow the inference that when the defendant went onto the property and built its trackage there in August of 1941, there must have been some contact with the county prior to going onto the property. Whether that be a fact or not, however, is immaterial and would not constitute such error as would necessitate reversal or even serious consideration by this court.

In paragraph (c) of Argument 1, beginning at page 19, counsel criticizes the use by the court of the term "struck off and sold" to the county. We will refer to this particular phase of the matter in a later subdivision of this argument, but here again we think that we must look to the substance rather than to the mere form and look to what procedure is required and what is meant, if anything, by the words "struck off and sold" that may be different as far as procedure is concerned from what was actually done. Counsel states that the 1939 legislature completely revised the procedure to foreclose a tax lien and that Chapter 101, Laws of Utah 1939, referred to in the trial court's findings, repealed the provisions relating to the execution of the auditor's tax deed. We must dispute counsel's statement. The provisions relating to auditor's tax deeds were not repealed. Section 2 of Chapter 101, Laws of 1939, specifies the sections which were repealed and these were sections relating to the treasurer's affidavit. *The provisions relating to auditor's tax deeds were not repealed.* We will admit that

the 1939 legislature did reframe some of the wording of the statute and rearrange some of the sections as regards material contained therein, but the fundamental procedure was not substantially changed.

Counsel refers to the fact that the last nineteen lines of Section 80-10-66, which provide for the auditor's tax deed, were deleted in the amended enactment of said section. They were deleted from Section 66 but "Section 80-10-68 was enacted in its stead," as stated by counsel, and most of what was contained in those nineteen lines in Section 66 was carried over into Section 68 as amended. (See subparagraphs (5) and (6) of Section 68 as contained in Utah Code Annotated 1943.) The fact that provisions formerly contained in one section may upon amendment be differently combined in other sections does not necessarily say that they are changed so that their effect is not the same. If counsel will read the provisions of Section 80-10-68 and compare them with the provisions of the nineteen lines which he refers to as being deleted from Section 80-10-66, he will find that he is in error in his statement that "not one clause of those nineteen deleted lines mentioned above was incorporated into 80-10-68, or any subdivision therein contained."

ARGUMENT NO. 2

TAX TITLE IS DEFECTIVE.

At the outset defendant will admit that by reason of the failure of the auditor's affidavits to be attached to the assessment rolls at the time of the tax sale, defendant's tax

title is defective, and at this juncture we wish to point out that that is the very reason we are here seeking to apply the provisions of the statute of limitations as contained in Chapter 19, page 22, Laws of Utah 1943, designated as Section 104-2-5.10, Utah Code Annotated 1943. If the tax proceedings as had upon this property were not defective, then the defendant would not be attempting to rely upon any limitation statute. If the tax title was not defective, there would be no reason for any attempt to apply the provisions of Section 104-2-5.10 as contained in the 1943 statutes. In fact, if there were no defects in the tax title procedure there would be no necessity whatsoever for the provisions as enacted by the legislature and contained in said Section 104-2-5.10. The fact that proper procedure had not been strictly followed in connection with this treasurer's sale for taxes compels the conclusion that the defendant did not get a good indefeasible title from the county in its deed of November 7, 1941. That does not mean, however, that the defendant cannot claim some rights by virtue of said deed from Salt Lake County upon which it can base a possession which will be adverse to the plaintiff and which, if sufficient time has elapsed, will form an adequate basis by which defendant can bar plaintiff's right to recover the property solely upon the basis of adverse possession and payment of taxes.

The plaintiff cites the case of *Anson v. Ellison*, 140 P. 2d 653, and states that defendant has no basis to assert a lien for taxes by virtue of its purchase of the tax title or for taxes paid to the county. Defendant is not attempting to claim or assert any lien for such taxes, but defendant will

not agree with plaintiff's theory that defendant received absolutely nothing. The defendant did receive a deed from the county which gave the defendant sufficient color of title upon which it could base an adverse possession, and with that color of title the defendant went into possession and held the possession for sufficient length of time to bar plaintiff's rights if Chapter 19, Laws of Utah 1943, is applicable to the situation involved herein.

In order to save some argument with plaintiff, we again repeat that if the tax procedure had been properly followed and if the tax title were good, defendant then would have based its defense upon that tax title and upon valid procedure having been taken. The fact that the tax procedure was not strictly followed and that therefore the tax title was defective puts defendant in the position where it must prevail, if at all, upon adverse possession under the four-year statute. This court has held that a deed from the county, such as was issued to the defendant in this case, even though the same be defective, is sufficient to form a basis for adverse possession from which, if the proper time has run with the payment of taxes, the one who has held that possession and paid such taxes can set them up as a bar against a plaintiff even though the plaintiff may otherwise have a good record title to the property. See *Welner v. Stearns*, 40 Utah 185, 120 P. 490.

If in the Anson case, as cited by plaintiff, the plaintiff had secured the same tax title—which was admittedly invalid—and thereunder had held possession and paid taxes for seven years, plaintiff here would not seriously contend under such circumstances that a good title had not been

acquired by such adverse possession. Just so in the case at bar. Even though defendant may have acquired its title and possession under a defective tax title, a definite provision of our statute of limitations says that if the former owner should seek to avail himself of his record title and attempt to recover the property he must do so within four years, and under such circumstances if he does not do so within four years he is as effectively barred as he would be under the provisions of the statute where an adverse possessor not relying on a tax title has nevertheless held possession for seven years and paid taxes. At the time of the Anson case an invalid tax title gave nothing except a basis upon which one who took possession and paid taxes for seven years thereafter could perfect a defense against one seeking to assert a record title. Since that time, however, with the enactment of the 1943 statute, the legislature provided in effect that although seven years are necessary in ordinary adverse possession cases, if the adverse possession is based upon a defective tax title, then if the prior record owner wants to avail himself of his good record title he must do so within four years or be barred.

ARGUMENTS NO. 4 AND NO. 5

SECTION 104-2-5.10 AS AMENDED AND SET FORTH BY CHAPTER 19, LAWS OF UTAH 1943, IS APPLICABLE AND IS A VERY DEFINITE AND EFFECTIVE BAR TO PLAINTIFF'S ACTION HEREIN.

SECTION 104-2-5.10 AS AMENDED BY CHAPTER 8, LAWS OF UTAH 1947, DOES NOT APPLY AS A BAR

TO PLAINTIFF'S ACTION BUT IS MERELY A CLARIFICATION OF CHAPTER 19, LAWS OF UTAH 1943, SHOWING THAT SAID CHAPTER 19 DOES APPLY TO THE CASE AT BAR.

Defendant is going to change the order of the argument here and argue with respect to plaintiff's point No. 4 ahead of plaintiff's point No. 3, and defendant will combine plaintiff's Arguments Nos. 4 and 5 under this one heading.

In his argument counsel for appellant gives his own manufactured designations to various statutory provisions and refers to different sections as "Auditor's Tax Deed Statute," "Struck Off and Sold Statute," and "Struck Off and Sold Limitation Statute." Appellant attacks the finding of the court that the substance of the provisions of Section 80-10-66, Revised Statutes of Utah 1933, were transferred to and embodied in Section 80-10-68. Under the provisions of Section 80-10-66 as it existed before the 1939 amendment it was provided:

"If any property sold to the county and not assigned is not redeemed within the time and in the manner aforesaid, the county recorder shall immediately, upon the expiration of the period of redemption, file the tax-sale record for the year of original sale with the county auditor, *who shall as soon as may be thereafter make out a deed conveying to the county all such property, and cause the same to be recorded in the name of the county.*" (Italics ours.)

This provision, according to the wording as therein contained, was not taken verbatim over into the 1939 amend-

ment, and therefore plaintiff's counsel says that we no longer have an Auditor's Tax Deed Statute. The effect of Section 80-10-68 as amended in 1939 and as carried into the Utah Code Annotated 1943, while not using the same terminology, accomplishes the same purpose. Subparagraph (5) of Section 80-10-68 in the 1943 statute provides that deeds issued by the county auditor must recite the amount of taxes, penalties, etc., as contained in the latter portion of Section 66 as it existed prior to the 1939 amendment, and paragraph (5) of Section 68 goes on to provide the form of tax deed to be issued by the county to a purchaser at the May sale. Subparagraph (6) of Section 68 then provides:

“Any property offered for sale as aforesaid and for which there is no purchaser shall be struck off to the county by the county auditor, who shall publicly declare substantially as follows: ‘All property here offered for sale and which has not been struck off to a private purchaser is hereby struck off and sold to the county of_____ (naming the county), and I hereby declare the fee simple title of said property to be vested in said county.’ The county auditor shall thereupon make an endorsement opposite each of the entries in the tax sale record showing the preliminary sale of said property for delinquent taxes, substantially as follows: ‘The fee simple title to the property described in this entry was on the_____ day of May, 19_____, sold and conveyed to the county of_____ in payment of general taxes charged against the same,’ and shall sign his name thereto. The fee simple title to said property shall thereupon vest in the county. The auditor shall then deposit said tax sale record with the county recorder and the book shall thereupon become a part of the official records of

the recorder and shall be deemed to have been recorded by him. * * *

Thus the auditor, by endorsement upon the tax sale record, states and certifies over his signature that the property in question was sold and conveyed to the county, and the record is then filed with the county recorder and the title thereupon vests in the county. The certification by the auditor is that the property was "sold and conveyed to the county." The effect is the same as formerly when the auditor made a formal auditor's deed conveying the property to the county, and merely simplified the procedure by having the auditor endorse the fact of such conveyance upon the tax sale record rather than making a separate deed for the same, and then filing the tax sale record with the county recorder as a record of the title's having been sold and conveyed to the county. This distinction in wording and in effecting the conveyance to the county by endorsement on the tax sale record rather than by a separate deed is a distinction and a difference in form but not in substance, and the effect is the same as it was prior to the 1939 statute, which is that there is a preliminary sale by the treasurer, then a May sale, and if property is not purchased by some outside individual, the auditor conveys the property to the county.

We insist that the trial court was justified in saying that the substance of the provisions of 80-10-66 were embodied in Section 80-10-68 as amended by the 1939 Laws.

Chapter 19, Laws of Utah 1943, provides:

"No action for the recovery of real property struck off and sold to the county, as provided by sec-

tion 80-10-68 (6), Utah Code Annotated 1943, or for the possession thereof shall be maintained and no defense or counter-claim to any action involving the recovery of property, or the defense of title to property, sold at such tax sale, or public or private sale, or for possession thereof, shall be set up or maintained, unless the same be brought or set up within four years from date on which the sale was held.

* * *

There was a reason why the legislature enacted Chapter 19, Laws of Utah 1943, and it is a well-known principle of statutory construction that we must assume that the legislature did not do a useless thing and the statute must be upheld as being valid if possible. The basis of the statute and the reason for its enactment was not sales that had been made pursuant to Section 80-10-68 (6), after the amendment of 1939. The basis and reason for the statute arose long before that time.

There was a justifiable reason for limiting the period of adverse possession with respect to property purchased on tax sales to four years, or some other similar period short of the usual seven years required in the regular adverse possession statute. Such shorter period enabled a person who had bought property from the county after tax sales which might be questioned to have the assurance that if the tax title was going to be attacked the prior owner of the property would have to do so within the four years and he would thereby not have to wait too long to know whether his title could be confirmed or whether he might have to suffer having the property taken away from him.

At the time of the enactment of Chapter 19, Laws of Utah 1943, the 1939 amendment was contained in the 1943 Code as it had been compiled, and Section 80-10-68 (6) contained the substance of the provisions which represented, if they did not embody verbatim, the provisions which had theretofore existed in the statutes with respect to tax sales and the conveyance of property by the auditor to the county where such tax sales had not been redeemed. It is true that Chapter 19 refers by specific terms to real property struck off and sold to the county, "as provided by section 80-10-68 (6), Utah Code Annotated 1943." In construing what was meant by the legislature in enacting this statute we must consider the reason for the statute and the history back of it. Counsel argues that this statute refers only to property which he says was "struck off and sold to the county" under the provisions of the "Struck Off and Sold Statute," but could not within reason be considered to include property "conveyed to the county under the Auditor's Tax Deed Statute." He argues that this property was never struck off and sold to the county. We disagree. It was sold to the county on the tax sale and it was conveyed to the county by the auditor's tax deed as effectively and to all intents and purposes the same as if the auditor had endorsed his conveyance upon the tax sale record.

Counsel argues that the statute does not apply to the case in question because inasmuch as the tax proceedings were defective nothing was conveyed to the county. Counsel in effect states that if the tax sales and the auditor's deed or conveyance to the county all defective, then the property is not sold to the county, and where they are thus

defective and property not sold to the county Chapter 19 does not apply. *If all tax proceedings were proper and valid and the sale to the county a legal sale, we repeat as hereinabove stated, there would be no purpose whatsoever in the enactment of Chapter 19, Laws of Utah 1943. The only possible necessity and the only reason for the enactment of such a statute is to give a basis for confirmation of tax titles after a lapse of a short period of time in such instances where the tax sales and the conveyances to the county are for some reason defective and invalid and subject to being set aside.*

Plaintiff's attitude in his brief is the same as it was in the trial court, that there is ambiguity in the statute, and respondent will agree with him to the extent that there must be some interpretation by this court and some construction placed upon the statute to find just what was intended by the legislature. The history back of tax titles within this state, particularly during the 1930's and the cases decided by this court leave no question at all as to the reason for the enactment of this statute.

Counsel for appellant did not see fit to refer to very much by way of authority, but respondent would like to refer to some cases and authorities that may give some assistance in construing the intent of the legislature in enacting the statute in question.

INTENT OF LEGISLATURE AND BACKGROUND
OF CIRCUMSTANCES FORMING BASIS OF AND
NECESSITY FOR CHAPTER 19, LAWS OF UTAH 1943.

In 50 American Jurisprudence, Section 305, page 291, it is stated:

“Mischief to Be Prevented or Remedied.—In the construction of an ambiguous statute it is proper to take into consideration the particular evils at which the legislation is aimed or the mischief sought to be avoided—that is, to the occasion and necessity for the law, or causes which induced its enactment, as well as the remedy intended to be afforded and the result sought to be attained, or the benefits expected to be derived, where these matters can be legitimately ascertained. Where possible, the statute should be given such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit. *Under these rules, a case which is within the mischief of a statute has been regarded as within its provisions, and the tendency has been to so interpret the statute as to embrace all situations in which the mischief sought to be remedied is found to exist.*” (Italics ours.)

In considering the background and reasons for the enactment of the statute as contained in Chapter 19, Laws of Utah 1943, we find the following: During the period of 1930 up to the time of this statute, 1943, and particularly the period during the depression days, a lot of property had gone to tax sale and to tax deed in all of the counties within the State of Utah, but in many if not most instances proper steps had not been taken by the various counties, even under the statutory provisions then existing, so as to enable the counties to acquire good titles to these tax properties. This court held that in some instances the title of the county was not good because the auditor's affidavits had not been attached, as in the case at bar. In other in-

stances advertising of the May sale had not been published for the full length of time determined necessary. Because of these and other defects the counties could not dispose of such properties to advantage because it became a matter of common knowledge that a tax title could be upset. Yet in spite of this a lot of the properties had been sold to the county, auditor's deeds had been issued to the county, the property had been conveyed or struck off to the county, and such properties had stood in the name of the county on the county records so that further tax revenue could not be received therefrom, and people, standing in a position formerly and now held by plaintiff and its predecessors, stood by disregarding their tax obligations to the sovereign tax power.

The case at bar is a good and flagrant example of the very thing that happened in numerous instances. The original tax sale was made in 1930 and although neither plaintiff nor any of its predecessors has made any move to pay such taxes to the county or redeem the property from the county, it is still trying to recover the property because there has been some increase in its value because of an inflation that has existed over the country, and now seeks to defeat the statute and recover the property in spite of the fact that nineteen years have elapsed without any pretense on its part of recognizing the sovereign tax power or attempting to pay or redeem the property from any of the taxes assessed.

As was said by the court in the case of *Towson v. Den-son*, 86 S. W. 661:

“The right of the state to have its taxes promptly paid is as important as the right of the individual to be protected in his property. Taxes are the price paid for such protection. Those only who have color of title obtain rights of possession under the act. And he who claims to be the real owner can prevent this by himself paying taxes or taking actual possession of and improving the lands.”

Under conditions as they existed in the State of Utah prior to 1943 people in a position such as plaintiff and its predecessors felt that they could rely on recovering their properties at any time they so chose even though the properties had gone to tax sale and been conveyed or struck off to the county. They felt there was no necessity of going into possession of their lands and paying their taxes to the county, and even felt there was not much need for worry if someone else purchased these lands from the county and improved them. All they were concerned about was that if someone else purchased and improved and paid taxes on the property, they could step in just shortly before the seven-year period of adverse possession had run and they could then reclaim and take possession of the property. It is for this very reason that the statute as contained in Chapter 19, Laws of Utah 1943, was passed—to stabilize these tax titles and to give both the county and the purchaser something they could rely on. The upholding of such a law would enable the county to dispose of such properties and to recover some of the tax monies due it, as has been done in the case at bar. The defendant paid all of the taxes that were assessed or would have been assessed during the time the county held the property as a part of the purchase price

and has paid all taxes since. The statute gave a basis of assurance to a purchaser, who paid these tax monies to the county, that if his title in the property was not good the former owner would have to attack it within four years, and if not attacked within four years, such purchaser could rest secure in the knowledge that his title and possession could not thereafter be disturbed.

If this was not the purpose and effect of Chapter 19, Laws of Utah 1943, then it had no purpose and was without effect whatsoever. The law does not do a useless thing and does not consider that the State Legislature would pass a useless act.

There is a justifiable reason for making a separate provision in the limitations statutes with respect to such tax titles and the majority of states have at one time or another made such separate provision for such tax titles. The State of Oklahoma in 1919 passed a statute confirming such tax titles after six months. This was amended in 1923 extending the period to twelve months, but provided that a prior owner, if he sought to avoid or set aside a tax deed which had been purchased on resale from the county, must do so within twelve months. In discussing the question and the reason for the statute the Supreme Court of Oklahoma, in *Swan v. Kuehner*, 10 P. 2d 707, stated :

“* * * ‘It had become proverbial that a tax title was no title at all, and a sale for taxes was as near mockery as any proceeding having the appearance of legal sanction could be. The principal cause was the difficulty in proving the various steps essential to the validity of such a sale.’ * * * and

that it was necessary that some additional inducement be offered to the purchase of land offered for sale at a tax resale.

“* * * The 1923 act shows a clear legislative intent to limit the time during which a former owner of real estate may commence an action to avoid or set aside a resale tax deed to one year. * * *

“The 1923 act (section 6) provides that ‘* * * such notice and return shall be presumptive evidence of the regularity, legality and validity of all the official acts leading up to such resale.’ That presumption may be rebutted by the former owner or owners of the land in an action to avoid or set aside the deed commenced within one year after the recording of the deed; but at the expiration of one year the presumption becomes conclusive. The former owner has a right, for one year after the date of the recording of the resale tax deed, to commence an action for the purpose of rebutting the presumption created by the legislative authority. The length of time is reasonable. The legislative power to provide for the issuance of a tax deed is the legislative power to provide a limited period in which the presumptions arising from the execution, acknowledgment, delivery, and recording of a resale tax deed may be rebutted, and the legislative power to provide that after the expiration of that period the presumptions may not be rebutted. * * * *‘It is immaterial whether the sale and the deed be void or valid. It is sufficient, that a sale has been made, and the deed recorded, to bring the statute into activity, and, after the lapse of the period limited, to entitle the purchaser, and those claiming under him, to its protection.’ * * **”
(Italics ours.)

It will be noted that the Oklahoma statute sets up presumptions as to the validity of the tax proceedings, just as the

Utah statute does. (See Section 80-10-68 (7), Utah Code Annotated 1943).

In that Oklahoma case the trial court held for the plaintiff but the Supreme Court said the one year limitation statute applied and reversed the trial court, saying:

“* * * The action of the plaintiff was not commenced within the period prescribed by the applicable statute of limitations for the commencement of such an action. The trial court should have so held and should have denied the plaintiff the relief sought.”

A similar statute in the State of Montana was involved in the case of *Cullen v. Western Mortgage & Warrantly Title Co.*, 134 P. 302. In that case the defendant did not seasonably enter the plea of the statute of limitations and the Supreme Court of Montana, while holding that if the plea had been seasonably interposed it would have been a sufficient defense, nevertheless held that being a plea of statute of limitations it was a matter which could be waived and if not waived, must be asserted, and that under the circumstances in that case the defendant had delayed so long in interposing the plea of the statute that the trial court was considered as not having abused his discretion in refusing to allow an amendment to set up the plea. It is interesting to note that in the Montana case there is an argument similar to the one urged by plaintiff in the trial court in this case wherein plaintiff said that it was not seeking to recover the property or possession thereof, but merely to quiet title to the property and that therefore our 1943 stat-

ute does not apply. With respect to a similar contention the Montana court said :

“Respondent makes the suggestion that the statute applies only to actions ‘to set aside or annul a tax deed’; that this is not such an action, but one to quiet title merely, hence the statute does not apply. In other words, a plaintiff seeking, in fact, to destroy the effect of a tax deed must confront the statute if he assail the tax deed as such, but, designing to accomplish precisely the same thing, he may avoid the statute by calling his action one to quiet title, declaring upon his ownership generally and demanding that his adversary appear and plead the tax deed. This is surely a subordination of substance to form; a thing is not changed by changing its name. Where the sole object of an action is to get rid of a tax deed as a claim of title adverse to the plaintiff, we see no reason why it is not as much an action to annul or set aside such deed as though expressly so designated.”

The court went on to state with respect to the action there involved that under the authorities, “* * * that this action as it finally exhibits itself in the agreed statement of facts is subject to the limitational provisions of the statute in question.” The court nevertheless upheld the trial court in refusing to allow the plea of the statute to be invoked at an extremely late date.

An early case involving such a statute is the case of *Walker v. Boh*, (Kans.) 4 P. 272. In that case it was the holder of the tax title who sought to quiet the title as against the former owner and that was one of the early cases involving a statute similar to our 1943 statute that confirms the wording of our statute as being one that may be used

“as a shield but not as a sword.” In that case the defect was that proper notice of the tax sale had not been published, but inasmuch as the holder of the tax title, *who was out of possession*, was the one seeking to invoke the aid of the statute, the Kansas court held that the statute did not apply in his favor. The statute in that case read:

“Any suit or proceeding against a tax purchaser, his heirs or assigns, for the recovery of land sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, except in cases where the taxes have been paid on the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter.”

The Kansas court in that case said:

“Now, it may be that this limitation has so run in favor of the plaintiff’s tax deed that no person could maintain an action against him for the recovery of the land, or to defeat or avoid his tax deed. But this is not such an action. This is not an action ‘*against*’ the plaintiff, but it is an action brought by himself and in his own favor; nor is it an action brought to recover the land, or to defeat or avoid the tax deed, but it is an action simply to quiet title, upon the assumption that the tax deed is valid, and virtually to bolster up and sustain the tax deed; the defendant is simply *defendant*, and is not asking for any affirmative relief. Now, it does not seem that this limitation reaches any such case as this. The statute seems to be enacted to prevent persons from *instituting* proceedings to defeat or avoid tax deeds after the five years have elapsed, but it does not seem to be enacted for the purpose of preventing persons from defending their rights when attacked. After the five-years limitation has run, the holder of

the tax deed may unquestionably retain all that he is in the possession of under his tax deed, but he must not commence an action to obtain something more without being prepared to meet any defense which the defendant may set up."

If the plaintiff were in possession of the property in question here and defendant had acquired a tax deed, then plaintiff may logically argue that it was merely suing to remove a cloud from its title, but the statute in question was designed absolutely to protect a purchaser of a tax title from the county who had gone into possession of property and to prevent the former owner from instituting proceedings on an affirmative basis to recover title or possession or to take anything away from the tax deed holder that he had acquired by virtue of that tax deed.

In view of the foregoing we feel that further reference to the intent of the legislature in enacting Chapter 19, Laws of 1943, would be proper.

Sutherland on Statutory Construction, Third Edition, Volume 2, Section 4506, page 322, has the following to say with respect to legislative intent:

"If legislative intent has meaning for the interpretative process it means not a collection of subjective wishes, hopes and prejudices of individuals, but rather the objective footprints left on the trail of legislative enactment. Legislative intent can't be 'dreamed up'. It can be *speculated about*; but it can be *discovered* only by factual inquiry into the history of the enactment of the statute, the background circumstances which brought the problem before the legislature."

The "background circumstances" which brought the problem before the legislature were not the titles based upon Section 80-10-68 (6), as amended by the 1939 statute, but it was the fact that numerous tax titles based upon procedure prior to 1939 had been declared to be invalid because the procedure set up in the statute had not been strictly followed, as a result of which a large amount of property had gone off the tax rolls, and this was a means of confirming titles in individuals who purchased tax titles without waiting the full seven years.

With respect to interpretation, Sutherland, Volume 2, Section 4505, page 321, also states as follows:

"* * * But as all future circumstances cannot be anticipated by even the most farsighted legislator the function of judicial interpretation cannot be completely avoided. When such a circumstance arises certainly the safest starting point for interpretation will be the statute itself. *But it is by no means the safest stopping point.* Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation." (Italics ours.)

Again we insist it was to perfect tax titles by limitation so as to get property back on the tax rolls that formed the basis of this 1943 statute.

Another means of construction which is used by courts, as indicated in the last paragraph just quoted, is that the

court must consider "the legislative history of the statute under litigation." The statute in question was amended in 1947, and by the 1947 amendment the legislature very clearly pointed out that it intended the statute to cover not only the specific section as quoted, being "section 80-10-68 (6)," but also property "conveyed to the county prior to September 1, 1939 by auditor's deed under the provisions of section 80-10-66, Revised Statutes of Utah 1933."

Amendatory acts can be very helpful in explaining and construing the intent of the legislature at the time it enacted the original act. Sutherland on Statutory Construction, Third Edition, Volume 1, Section 1929, page 410, says:

"* * * The object in construing an amendatory act is to determine the legislative intent * * * The amendment will be given a reasonable construction; a literal construction which would lead to absurd consequences will be avoided. When the intent of the legislature is not clear from its language the court will consider surrounding circumstances."

And again in Section 1931, page 416, the same authority states:

"Since an amendment changes an existing statute the general rule of statutory interpretation that the surrounding circumstances are to be considered is particularly applicable to the interpretation of amendatory acts. The original act or section and conditions thereunder must be looked at. Judicial or executive interpretation of the original act especially must be considered. The court will determine what defects existed in the original act, which defect the legislature intended to cure, and then construe the amendment so as to reduce or eliminate the defect intended to be remedied."

"If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change." (Italics ours.)

Volume 2, Section 5110, page 526, states:

"Where a former statute is amended, or a doubtful meaning of a former statute rendered certain by subsequent legislation a number of courts have held that such amendment or recent legislation is strong evidence of what the legislature intended by the first statute. * * *

"* * * Where the original law was subject to very serious doubt, by permitting subsequent amendments to control the former meaning a great deal of uncertainty in the law is removed. And the legislature is probably in the best position to ascertain the most desirable construction. In addition it is just as probable that the legislature intended to clear up uncertainties, as it did to change existing law where the former law is changed in only minor details. In *People v. Davenport* (91 N. Y. 574) where the New York court has established a test that is highly satisfactory, it was stated, 'The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. *If it follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight.*' * * *" (Italics ours.)

After the enactment of Chapter 19 of the 1943 Laws, there were controversies which arose as to whether by mentioning Section 80-10-68 (6) the legislature intended to

limit the statute to apply only to tax titles arising after the amendment of 1939, or whether the period of limitation as contained in Chapter 19 was intended to apply to all tax titles in connection with which there may be some defect so that by a shorter period of limitation the property might be put back on the tax rolls. Because these controversies arose and because there was some discussion of it among members of the bar, the draftsmen who drafted the original 1943 statute prepared and submitted the 1947 amendment. The 1947 amendment itself, therefore, is strong evidence of the intent of the legislature and shows that the legislature intended for the 1943 law to cover all void tax titles and limit the period during which an action could be brought by the former owner to four years. The amendments to other sections as contained in chapters 18 and 20 of the 1943 laws very strongly confirm that this was the intent of the legislature.

A matter similar to the one involved in the case at bar was before the federal court in the case of *United States v. Perkins, Secretary of Labor*, 17 F. Supp. 177. An early statute affecting the citizenship of a minor provided that where the minor had alien parents, upon naturalization of or resumption of American citizenship "by the parent", the minor would automatically become an American citizen. In construing what was meant by the words "by the parent", it was argued very forcibly that a mother was not included in the words, the mother's domicile following that of the father the father was the one to be considered as the parent involved in that action. The act was subsequently amended by Congress and in the amended act it was provided that

upon "the naturalization of or resumption of American citizenship *by the father or the mother*" a minor would automatically become an American citizen. The Federal District Court in and for the District of Columbia in applying the earlier act held that the subsequent amendment was merely a legislative interpretation of what Congress had intended by the original act. The court stated:

"I think that the amended act was passed not to change the former law but to clarify it, by expressing more clearly the intent of Congress. It is true of course that an act passed for the purpose of clarifying a former act does not change the law as it had theretofore existed, and could not divest parties of rights which had been acquired under the original act, * * *

Although the prior act was the one which it was argued applied to the case, the court concluded:

"I think that under the law petitioner became a naturalized citizen upon the resumption of citizenship by his mother."

A similar problem came before the Supreme Court of Iowa in the case of *Rural Independent School District v. New Independent School District*, 94 N. W. 284. That case involved a school township as distinguished from an independent school district or distinct school corporation. Originally the school districts were organized upon a township basis and the general school law referred to a "school township." The general school law was amended from time to time and carried forward the phraseology "school township." However, other legislation authorized the creation of independent school districts as separate, independent cor-

porations, formed on a different basis than the original school townships. The court in that case observed:

“* * * In other words, it seems that when rural independent districts were created the general language of the school law, as it existed at the time, and was subsequently re-enacted with reference to the formation of the territory of cities, towns, or villages into independent districts, was not changed to correspond. * * *”

The case arose because of the question of the different terminology as used in the separate statutes, but the court went on to say after referring to the changes in the general school law:

“* * * Under these circumstances, we are justified in taking into consideration the general legislative purpose, and giving it effect, even though we are required thereby to extend or curtail the language used in some portions of the statute. *The rule that a statute cannot be extended by construction so as to cover a casus omissus is recognized in the criminal law, but not in the interpretation of remedial statutes.*” (Italics ours.)

Because of the controversy which arose in the School District case the legislature amended the statute while the matter was in litigation and with respect thereto the high court said:

“Since the proceedings involved in this case were commenced, the Legislature has amended Code, Section 2794, so as to make it directly applicable to such a case as the one now before us * * *; and counsel for plaintiff contends that this legislative recognition of the necessity for an amendment in

order to cover such a case is an admission that previously the statute did not cover the case. We need not, however, assume to be so ignorant of the methods of legislation as to profess not to know that a statute may be insufficient in its language to carry out the legislative intent, and that when difficulties arise in its interpretation the Legislature is likely to change the language so as to make its application clear in other cases, even though the amendment could not be effective as to the case in which the difficulty has arisen. *It is quite as likely that the language of the amendment was intended to make the statute correspond to what had previously been supposed or assumed to be the law as that it was thereby intended to change the general intent and purpose of the law.*" (Italics ours.)

The high court then concluded:

"Our conclusion is that to carry out the legislative intent found in Code, Section 2794, reading it in the light of the history of the school legislation and contemporaneous provisions of the school law, we should consider 'school township,' in that section, as 'school corporation,' and thus find that, as originally enacted in the Code of 1897, its meaning was the same as that which is now expressly declared by act of the Twenty-Ninth General Assembly." (Italics ours.)

In the case of *School District No. 18 v. Pondera County*, 297 P. 498, the Supreme Court of Montana had a similar question before it, and the particular statute there in question involved the collection and apportionment of taxes between a county and a school district. Counsel for plaintiff and appellant will find the use of the words "struck off" somewhat involved in that Montana case, and "sold to the

county” is also somewhat involved. In that case the Montana court in part held:

“Under the authorities cited, the construction of section 2234 asked by the county, strictly according to its letter, would condemn the provision as unconstitutional, while under that contended for by the school district the act will be valid. If a statute is capable of two constructions, one of which will condemn it as unconstitutional while the other will preserve it, it is the duty of this court to give to the statute that construction which will vitalize it. * * *

“‘It is a familiar rule that a thing may be within the letter of a statute and yet not within the statute, because not within its spirit nor within the intention of its makers’ (Holy Trinity Church v. United States, 143 U. S. 457, 12 S. Ct. 511, 512, 36 L. Ed. 226), and ‘a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers’ (Riggs v. Palmer, 115 N. Y. 506, 509, 22 N. E. 188, 189, 5 L. R. A. 340, 12 Am. St. Rep. 819). There is a presumption existing against the construction of a statute which would render it ineffective, inefficient, or which would cause grave public injury, as well as where it would render the statute unconstitutional. Bird v. United States, 187 U. S. 124, 23 S. Ct. 42, 47 L. Ed. 100.”

In the case at bar the construction contended for by plaintiff and appellant, which would strictly limit the application of Chapter 19 of Laws of 1943 to tax titles arising upon sales made pursuant to and after the 1939 amendment, would render the statute “ineffective, inefficient, and would cause grave public injury.” Such a construction would not assist the county in getting property back on the tax rolls.

There is another point to be considered here. If the construction contended for by appellant with reference to Chapter 19, Laws of Utah 1943, should be adopted by this court then it would compel a holding by this court that Chapter 8, Laws of 1947 is unconstitutional, whereas if the theory contended for by respondent should be adopted by the court, there would be no necessity for the court to declare Chapter 8 of Laws of 1947 unconstitutional. Chapter 8 of Laws of Utah 1947 was enacted by the legislature merely to clarify and show what was actually intended by it in Chapter 19 of Laws of 1943. Chapter 8 did not have a saving clause providing that an action could be maintained or defense set up within four years from the effective date of the act. If there is no saving clause such a statute cannot be applied immediately. There must be some reasonable lapse of time allowed during which the prior owner can bring his action or set up his defense. This saving clause was included in Chapter 19, Laws of 1943, and if this chapter is given effect with respect to all defective tax titles so as to limit the period to four years from and after the effective date of the act, then there is no necessity for a saving clause with respect to Chapter 8, Laws of 1947, because Chapter 19, Laws of 1943 would take care of the four-year period and would be a bar to actions or defenses brought or set up by prior owners, and Chapter 8 as set forth in the 1947 statutes then would need to be applied only to sales which may be made on or after the effective date of such act. Thus by construing the 1947 amendment as contained in Chapter 8 to be merely a legislative interpretation of the intent of the legislature when it enacted

Chapter 19, we would have a construction which would save the constitutionality and make effective both statutes.

In the Pondera case the Montana court went on to say:

“So, here, the statute under consideration can be rendered effective and constitutional by declaring that the provision as to the division of interest and penalties therein provided for applies only to amounts collected on the payment of delinquent taxes levied for state and county purposes, and does not apply to payments made in connection with taxes levied for the support of other bodies politic. As stated in *Holy Trinity Church v. United States*, above: ‘This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include any act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.’

“But it is urged that, because section 2234 was amended in 1929 to read as we now interpret the section, we must presume that a change in the law was made, and that, originally, it did not so provide, citing 36 Cyc. 1165. Like most rules, the rule that a change in the law is presumed from the fact of amendment has its exceptions, among which is the rule that the presumption falls when its indulgence would violate a constitutional provision or the intention of the Legislature * * * and a change in a statute may be made merely to express more clearly the original intention of the Legislature (*State ex rel. Rankin v. Wibaux County Bank*, 85 Mont. 532, 281 P. 341). Thus an amendment to a statute mak-

ing it directly applicable to a particular case is not necessarily an admission on the part of the Legislature that it did not originally cover such a case. *Rural Independent School District v. New Independent School District*, 120 Iowa 119, 94 N. W. 284.

“Here a reasonable inference from the fact of amendment is that * * * the Legislature expressed more clearly its original intention * * * and, because of what is heretofore said, we now hold that such was the intention of the Legislature concerning, and the effect of, section 2234 before amendment.”

Sutherland on Statutory Construction, Third Edition, Volume 2, Section 4503, page 319, states:

“Inasmuch as the court cannot escape the consequence that its determination will affect the meaning of the statute, it would appear to be a more appropriate exercise of the judicial function if the court would face the difficult task and at the risk of being wrong, determine as best it can what the legislature intended. If the court decides incorrectly, the legislature may at succeeding sessions correct the error. If it decides correctly, it will have saved the expense and burden of the legislative process and will have given judicial relief to those who were in the beginning entitled to it.”

We think there would be no question but what if the construction as contended for by appellant were given to Chapter 19, Laws of Utah 1943, it would necessitate further action on behalf of the legislature, and the matter would be so amended in the next legislature as to still shorten the period of limitations during which prior owners could attack defective tax titles in order to enable counties within

the State of Utah to maintain and replace these properties on their tax rolls to receive the tax revenue they are entitled to therefrom.

In finding a basis to construe the intent of the legislature we are not left solely to text statements and cases from other jurisdictions. This court has given us very definite rules by which we can arrive at a proper construction of such a statute as the one involved in Chapter 19, Laws of Utah 1943. In the case of *Norville v. Tax Commission*, 98 Utah 170, 97 P. 2d 937, this court went to considerable length in setting forth the basis of proper construction of such tax statutes. We quote the following excerpts from that case:

“Statutes duly enacted by the legislature are presumed to be constitutional and valid. (Cases cited.) When there is ambiguity in the terms of a statute or when it is susceptible of two interpretations, one of which would render it unconstitutional and the other would bring it within constitutional sanctions, the court is bound to choose that interpretation which would uphold the statute. * * * (Cases cited.)”

While it was not involved nor directly stated in that case a similar rule has been announced many times that where a statute may be susceptible of two interpretations, one of which would give it effect and the other would show it to be an entirely useless and ineffective piece of paper, that construction which would give some meaning and effect to the statute would be adopted. In the *Norville* case the court goes on to state:

“The duty of this court in construing and interpreting legislative acts is to give effect to the intent of the legislature. (Cases cited.)

“As stated in Sutherland on Statutory Construction, Sec. 241, at p. 320: ‘In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion.’

“In *Helvering v. New York Trust Co.*, 292 U. S. 455, 54 S. Ct. 806, 809, 78 L. Ed. 1361, the United States Supreme Court reaffirmed what it said in *Ozawa v. United States*, 260 U. S. 178, 43 S. Ct. 65, 67 L. Ed. 199: ‘We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.’

“See also *State v. Livingston Concrete Bldg. & Mfg. Co.*, 34 Mont. 570, 87 P. 980, 9 Ann. Cas. 204, and *Territory ex rel. Sampson v. Clark*, *supra* (2 Okl. 82, 35 P. 883), wherein the Court said: ‘When the intention (of the legislature) can be gathered from the statute, *words may be modified, altered, or supplied to give to the enactment the force and effect which the legislature intended.*’ (Italics ours.)

“* * *

“The general rule of construction of ambiguous words in a statute is stated in 3 A. L. R. 404: ‘Where words have been omitted from a statute or an ordinance by inadvertence or through a clerical error,

and the intent of the legislature is ascertainable from the context, the court will *insert* the words necessary to carry out that intent. Courts will not permit an act to be declared invalid for uncertainty, where reason demands the *insertion of words* therein.'

"See annotations there given. In *Chez ex rel. Weber College v. Utah State Building Commission*, 93 Utah 538, 74 P. 2d 687, 692, this court held that 'words which are obviously necessary to complete the sense (of a statute) will be supplied to effect a meaning clearly shown by other parts of the statute.' "

A meaning clearly shown by other parts of the statute is adequately supplied and confirmed by the provisions of Chapters 18 and 20, Laws of 1943.

It would not need any supplying of additional words to show that Section 80-10-66 was intended to be covered by the legislature because a comparison of the two sections shows that 80-10-68 (6) embodies the provisions covering real property sold and conveyed to the county or real property struck off and sold to the county as they were originally contained in 80-10-66. Therefore, real property that is sold and conveyed by auditor's deed to the county as provided by Section 80-10-66, Revised Statutes of 1933, is real property struck off and sold to the county and conveyed to the county by auditor's endorsement on the tax sale record as provided by Section 80-10-68 (6), Utah Code Annotated 1943.

By giving proper construction to the statute in question and considering the remedy sought to be effected by the statute, there is no question but what it was directly

intended to cover a situation such as the one involved in this case at bar and could have no other purpose.

ARGUMENTS NO. 3 AND NO. 6

PLAINTIFF'S ACTION IS AND WAS BARRED BY THE PROVISIONS OF SECTION 104-2-5, UTAH CODE ANNOTATED 1943, AS AMENDED BY CHAPTER 18, LAWS OF UTAH 1943.

PLAINTIFF'S ACTION IS BARRED BY THE PROVISIONS OF SECTION 104-2-6, UTAH CODE ANNOTATED 1943, AS AMENDED BY CHAPTER 20, LAWS OF UTAH 1943.

Sections 104-2-5 and 104-2-6, Utah Code Annotated 1943, refer specifically to actions involving adverse possession of realty. Originally Section 5 provided that no action should be brought for the possession of realty unless it appeared that the plaintiff or predecessor was seized or possessed of the property within seven years. Section 6 as originally contained in the 1943 Code is a little broader and states that no cause of action or defense or counterclaim founded on the title or rents or profits out of the same shall be effectual unless the person urging the cause of action or defense, or predecessor, was seized or possessed of the property within seven years. By Chapter 18 and Chapter 20, Laws of 1943 the legislature in effect repeated these provisions with respect to seisin and possession of the property and adverse possession, but in each instance added a provision which stated that where tax titles were involved and

where the property involved was held by another under tax deed, then the plaintiff or the one urging the cause of action or defense must show that he or his predecessor in interest was seized or possessed of the property within four years. THESE TWO CHAPTERS SHOW VERY DEFINITELY THE INTENT OF THE LEGISLATURE TO MAKE A SHORTER PERIOD OF LIMITATION FOR ADVERSE POSSESSION WHERE ONE GOES INTO POSSESSION UNDER A TAX TITLE.

Appellant in his Argument No. 3 states that these sections cannot apply because if one can show a legal record title as plaintiff does here, even though the property is possessed by another, that such possession or occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title unless it shall appear that the property has been held and possessed adversely for seven years. •

This presumption is not a conclusive presumption but is merely a presumption that possession will follow the legal title unless there is evidence to the contrary, and if there is evidence to the contrary, then such presumption will not and cannot be invoked. Section 104-2-5 says that one seeking to recover the property cannot maintain such an action "unless it appears" that he or his ancestor was seized or possessed of the property within seven years. Neither the plaintiff nor its predecessors, according to stipulated facts in the record, was seized or possessed of this property at any time after March, 1936, and the action in question was not filed until substantially more than eleven years later.

What is meant by the words "seized or possessed"? "Possessed" is defined by Webster as, "To occupy in person; to have as occupant, to have and hold." This definition was adopted and used by the Supreme Court of Texas in *Evans v. Foster*, 15 S. W. 170.

In *Fuller v. Fuller* (Me.) 24 A. 946, the court said:

"According to etymology the word possession means to sit upon, hence to occupy in person."

In the case of *Hoysradt v. D. L. & W. R. Co.*, 151 F. at page 330, the Federal Court said:

"In the primary and most familiar sense of the word 'occupy' it is the equivalent to the word 'possess'."

"Seisin" is defined by Webster as, "Possession or corporal possession; the act of taking possession."

At early common law a landlord or seller would take a tenant or purchaser onto the land and there hand him a branch or handful of soil, thereby giving him as near as could be possible the actual possession of the land. This was termed livery of seisin, and the tenant or purchaser would thereafter remain on the land and be considered as seized thereof.

In the case of *Northern Pacific R. R. Co. v. Cannon*, 46 F. 224, the Federal Court said:

"The term 'seised' is equivalent to the term 'possessed.' 'Seisin' means 'possession'."

Bragg v. Wiseman, (W. Va.) 47 S. E. 90:

“In the common law seisin signified possession.”

Webb v. Wheeler, (Neb.) 114 N. W. 636; *Finlay v. Stevens*, 36 A. 2d 767:

“Seisin means a claim of title accompanied with possession.”

Mercer County State Bank of Manhaven v. Hayes, (N. D.) 159 N. W. 74:

“Seisin implies possession. It is possession with a legal right to the estate in the land.”

Woolfolk v. Buehner, (Ark.) 55 S. W. 168:

“Seisin and possession are synonymous meaning that possession which is held under claim of title.”

Ft. Dearborn Lodge I. O. O. F. v. Klein, (Ill.) 3 N. E. 272:

“Seisin means possession with the intention of asserting a claim to a freehold estate in the premises.”

Altschiel v. O'Neill, (Ore.) 58 P. 95; *Hess v. Hess*, (Ore.) 91 P. 2d 850:

“Seisin may be defined to be a possession of land under a claim either express or implied by law of an estate amounting at least to a freehold.”

Ford v. Garner's Adm., 49 Ala. 601; *Mellenthin v. Brantman*, (Minn.) 1 N. W. 2d 141:

“Under our law the word seisin has no accurately defined meaning; at common law it imported a feudal investiture of title by actual possession. We say it has the force of possession under some legal title or right to hold.”

The record clearly shows that neither the plaintiff nor any predecessor in interest held or occupied or had possession of any of this property at any time since 1936, eleven years prior to the commencement of this action. Plaintiff does not even seek to deny that. Plaintiff merely asserts that it and its predecessor were seized by virtue of holding the paper record title.

In the case of *Towson v. Denson*, 86 S. W. 661, the Supreme Court of Arkansas had a statute somewhat similar to the one involved here in issue before it and that court held that a mere constructive possession was not “seisin” within the meaning of that State’s Kirby’s Digest, Section 5061, which provided that no action for the recovery of lands sold for taxes should be maintained against the purchaser unless the plaintiff or his predecessor in interest was seized or possessed of the lands within two years next before the commencement of the action.

Clearly, in the case at bar, neither the plaintiff nor any ancestor, grantor or predecessor in interest was seized or possessed of the property in question within seven years before the commencement of this action and the evidence before this court shows that fact affirmatively and the presumption of possession following the record title therefore falls and Section 104-2-5 is a bar to plaintiff’s action herein.

Thus under the provisions of Section 104-2-5, such section would have been a bar to plaintiff's action even prior to the amendment of 1943 as contained in Chapter 18, Laws of Utah 1943. Under the provisions of said Chapter 18 the period is reduced to four years, and it cannot be disputed that neither plaintiff nor its predecessors was seized or possessed of the property within four years prior to commencement of plaintiff's action herein.

With respect to plaintiff's argument that one holding possession adversely is presumed to hold under and in subordination of the legal title, our only answer is that this court has held contrary to plaintiff's contention.

The case of *Welner v. Stearns*, 40 Utah 185, 120 P. 490, will be instructive and helpful at this point.

“* * * The respondent Amanda Stearns * * * held the legal or paper title to the lots, and, so far as appears, never was in actual occupancy thereof. In 1891 or 1892 she ceased to pay taxes on the lots, and they were sold to Salt Lake county for the unpaid taxes for the years of 1892 and 1893. After the four-year redemption period had elapsed, and Almanda Stearns had failed and neglected to redeem the lots from the tax sale, a tax deed, which purported to convey them to Salt Lake county, was duly issued, and delivered to it, in August, 1898. The undisputed evidence shows that in the spring of 1899 appellant took actual possession of all of the lots in controversy. * * * After appellant had gone into possession, as aforesaid, and before the county delivered a deed to him, he paid to it all of the taxes, including costs that had accrued, against the lots, and which had remained unpaid, commencing with the year 1891 or 1892 and up to and including the year 1898, the year when the tax deed was issued

to Salt Lake county, and, in consideration of the payment of the taxes and costs, Salt Lake county, in May, 1900, made and delivered a deed conveying the property to him. * * *

Appellant continued in possession after the county deeded to him and paid all taxes up to the time of the trial. This court after reviewing the facts and circumstances stated:

“In our judgment, the whole question hinges upon whether the appellant had acquired title to the lots in controversy by adverse possession.”

In the case at bar we admit that defendant cannot prove a good tax title, and therefore the question is whether the defendant can prevail upon the basis of adverse possession under the four-year statute as contained in Chapter 19, Laws of Utah 1943.

In the Stearns case it was admitted by the respondent that the appellant's possession was adverse—at least from the time he obtained his deed from Salt Lake County—but it was contended that seven years had not elapsed after that time up to the filing of the original action. This court further stated:

“* * * The county had obtained a tax deed as early as August, 1898. The county's tax title, although defective, was in no way related to or based upon the title of Almanda Stearns. Under our statute, as under most of the state statutes of the Union, the tax sale initiates a new title, and has no relation with the previous chain of title. 37 Cyc. 1473. When the period of redemption had expired and the tax deed had issued, the county thereafter held under a new title, and any possession that was taken by vir-

tue of such new title was, prima facie at least, adverse to the original title. * * * *In view, therefore, that by the tax deed a new title was created, there can be no presumption that the possession of appellant was in subordination of Almanda Stearns' title. This presumption was fully met and destroyed by reason of the foregoing circumstances. * * ** (Italics ours.)

The same would be true in the case at bar. The presumption that defendant held possession under and in subordination to plaintiff's legal title was fully met and destroyed by reason of the circumstances set forth herein.

In the Stearns case it was argued that:

“* * * because appellant did not obtain his deed from the county until May, 1900, therefore he did not have color of title until that time. * * *

Admittedly after that time he would have had color of title.

This court further said:

“* * * For the purpose of meeting the presumption that appellant took and remained in possession in subordination of the paper title, it is immaterial that the tax deed was defective, and did not in law convey an indefeasible title. Appellant's possession was just as much adverse to Borg's title, although the deed was defective, as it would have been if the deed had conveyed a perfect title; the only difference being that under a deed which is defective the claimant in possession must obtain the title, if he obtains it at all, by virtue of the statute, while if the deed is good, and conveys an indefeasible title, the title is in him from the time the deed is delivered.

“* * * If possession can ever be hostile and adverse to the claimant of paper title, then it seems to us that, under the evidence in this case, appellant’s possession was so, and that, unless the judgment or decree can be supported upon some other ground, it must fail.”

In that case judgment had been given by the trial court in favor of the holder of the record title, and this court reversed the trial court in favor of the tax title under adverse possession of the appellant.

With respect to the lack of tax payments this court said:

“* * * Almanda Stearns had then failed to pay any taxes on the property, and had apparently abandoned it for a period of 17 or 18 years, when she purported to convey it to Addison Cain. The respondent Borg, who is the grantee of Cain, stands in no better plight than either Cain or Almanda Stearns would stand. * * *”

In the case at bar the heirs of Oscar Hunter were scattered over the country. Plaintiff’s predecessors had paid no attention to the property from the time when they conveyed their interest to Mindwell Chipman Hunter in 1931, save for the deed which she later gave to Irene Hunter Chamberlain in 1936, and all of them failed to pay any taxes on the property for a period now approaching nineteen years. The parties evidently knew the property had been sold for taxes because Mindwell C. Hunter gave only a bargain and sale deed, not a warranty deed, to Irene Hunter Chamberlain in 1936, and Irene H. Chamberlain McApine gave only a quitclaim deed to plaintiff in 1947. Therefore, the same thing could be said of plaintiff and its

predecessors as was said in the Stearns case—they failed to pay any taxes on the property and apparently abandoned it for a period of seventeen or eighteen years and then purported to convey it to the plaintiff, and the plaintiff, who is a grantee of Irene Hunter Chamberlain is in no better plight than either Mrs. Chamberlain or Mindwell Chipman Hunter.

Clearly, under the authority of this Stearns case, the possession of the defendant from a time it secured its deed from Salt Lake County would not be “under and in subordination to the legal title” at any time after the county’s deed to the defendant, and it affirmatively appears that the property had not been seized or possessed by the plaintiff or any of its predecessors at any time since 1936.

Respondent respectfully submits that Section 104-2-5, as amended by Chapter 18, Laws of Utah 1943, is an effective bar to plaintiff in this action. The same provisions were included in the amendment by which our legislature amended Section 104-2-6, and Chapter 20, Laws of Utah 1943, would likewise be applicable to bar plaintiff’s action and also confirms the argument given herein under what is designated as appellant’s point No. 4, showing the intent of the legislature in enacting the statutes as they did in 1943.

ARGUMENT NO. 7

CHAPTER 19, LAWS OF UTAH 1943, AS AMENDED BY CHAPTER 8, LAWS OF UTAH 1947, IS NOT UNCONSTITUTIONAL.

Respondent admits as good law that Chapter 8, Laws of Utah 1947, should be considered unconstitutional if taken alone and by itself. Had there been no prior enactment as contained in Chapter 19, Laws of 1943, then it would have been imperative to have a saving clause in Chapter 8, Laws of 1947, by which some reasonable time would have been given to enable prior property owners to make some claim with respect to their property.

Defendant and respondent is not relying upon Chapter 8, Laws of 1947, to sustain its title by limitation herein. Defendant is relying upon Chapter 19, Laws of 1943. However, Chapter 8, Laws of 1947, does assist the court in interpreting and construing what was meant by the legislature when it enacted Chapter 19, Laws of 1943. The enactment of such Chapter 19, together with the two adjoining chapters, 18 and 20, shows very clearly the intent of the legislature. Chapter 19 can be applied to all tax titles which by reason of some defect did not pass to the county or to subsequent purchasers what was intended. Where such tax titles are defective, as is true in the case at bar, Chapter 19, Laws of 1943, sets a limitation and prior owners must assert their rights within four years. Chapter 8, Laws of 1947, merely clarified what was intended and very definitely shows that the legislature intended to cover all defective tax titles in order to get tax properties back on the rolls, and there was no intent to limit such four-year provision only to tax titles that may accrue under the limited construction as contended for by plaintiff. By giving this interpretation to the statutes and by concluding that the 1947 amendment contained in Chapter 8 was merely a clar-

ification by the legislature, there is no necessity of declaring said Chapter 8 unconstitutional, and if any construction can be taken by this court which will so uphold such a statute as constitutional, then such interpretation and construction should be given.

ARGUMENT NO. 8

We would like to call the court's attention to the fact that in the findings and judgment as signed by the court defendant's title was not quieted. Defendant was not given affirmative relief, and by barring the plaintiff from further prosecuting such an action, the court did not give the defendant affirmative relief further than to say that the action would be *res judicata* and that anyone claiming by the plaintiff or through the plaintiff could not bring such an action against the defendant upon the same facts.

CONCLUSION

By way of conclusion we wish to reiterate that the question involved herein is not one as to whether the tax sale or auditor's deed to the county and the resultant deed to the defendant were valid or invalid. True, that matter comes in incidentally because if the tax sale and the auditor's tax deed and all tax proceedings had been valid, we would not be concerned in any way with the 1943 statute contained in Chapter 19. But the fact that the tax sale and the auditor's deed were not valid and that there was thus a defect in the title which the county conveyed to the defendant gives the reason and the only reason for the application of such a limitation statute. Such defect and invalid tax title gives the reason and the only reason for

the enactment of such a statute as was contained in Chapter 19, and gives the reason and the only reason for the amendment of the two statutes as contained in Chapter 18 and Chapter 20, Laws of 1943. If the tax title were valid and if the auditor's deed defendant is relying on were also valid, we would not attempt to rely either on the four-year statute of limitation or any other statute of limitation. The tax sale and the auditor's tax deed followed by the deed from the county to the defendant merely gave rise to conditions under which the defendant secured possession. The defendant secured that possession with the deed from the county on or shortly prior to November 7, 1941, and that deed gave the defendant color of title sufficient to form the basis of an adverse possession against plaintiff or any of its predecessors. The fact that the tax proceedings were void does not say that the county nor the defendant under the county holds possession in subordination to the legal title. The cases of this court have decided to the contrary, and such tax proceedings do give inception to a new title which forms a sufficient basis to show that defendant's possession was adverse and not in subordination to the plaintiff's right.

The statute contained in Chapter 19, Laws of Utah 1943, is not a curative statute. It does not and did not intend to say that what the county had done on its tax titles would be approved and that such tax titles would be considered as valid and proper, but the statute says that even if such tax titles are invalid and improper, nevertheless where adverse possession has its inception in the county tax sale procedure the prior owner will be barred if he does not assert his right in four years. The statute is one of

limitation to enable the county to recover its tax monies and to get such properties back on the tax rolls.

A consideration of the background and reason for the enactment of the statute leaves no other construction for this court except to conclude that by the 1943 statute the legislature intended to give a basis whereby all of the defective tax titles that had accrued over the period of the depression during the 1930's and prior could be perfected by a shorter period of limitation, and there was no intent whatsoever to limit it to tax procedures or tax sales which had occurred after the amendment of 1939. The intent of the legislature was to cover all tax titles and that intent was very clearly and definitely shown by the amendment which the legislature made in the 1947 law after controversies had arisen concerning what the 1943 law actually covered. The amendment merely clarified the 1943 act.

Respondent submits that the trial court did not err in any respect and the judgment of the trial court upholding both the 1943 statute and the 1947 amendment with respect thereto should be affirmed.

Respectfully submitted,

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Salt Lake City, Utah,
August 1, 1949.