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# Louis L. Marks v. White Fawn Milling Corporation, Walker Bank & Trust Company, and T. H. Humphreys : Brief of Respondents

Utah Supreme Court

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Edward F. Richards; Attorney for Walker Bank & Trust Company; Maxfield Feed & Coal, Inc.

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# In the Supreme Court of the State of Utah

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LOUIS L. MARKS,

*Plaintiff,*

vs.

WHITE FAWN MILLING COR-  
PORATION, a Utah corpora-  
tion,

*Defendant,*

WALKER BANK & TRUST COM-  
PANY,

*Receiver,  
Respondent,*

T. H. HUMPHREYS, State Engi-  
neer of the State of Utah,

*Appellant,*

No. 6229

T. H. HUMPHREYS, State Engi-  
neer of State of Utah,

*Plaintiff,  
Appellant,*

MAXFIELD FEED & COAL, IN-  
CORPORATED, a corpora-  
tion, successor in interest to  
White Fawn Milling Corpora-  
tion, a Utah corporation,

*Defendant,  
Respondent.*

No. 6287

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## RESPONDENTS' BRIEF

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EDWARD F. RICHARDS,

*Attorney for*

Walker Bank & Trust Company

and

Maxfield Feed & Coal, Inc.

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# In the Supreme Court of the State of Utah

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LOUIS L. MARKS,

*Plaintiff,*

vs.

WHITE FAWN MILLING CORPORATION, a Utah corporation,

*Defendant,*

WALKER BANK & TRUST COMPANY,

*Receiver,  
Respondent,*

T. H. HUMPHREYS, State Engineer of the State of Utah,

*Appellant,*

No. 6229

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T. H. HUMPHREYS, State Engineer of State of Utah,

*Plaintiff,  
Appellant,*

MAXFIELD FEED & COAL, INCORPORATED, a corporation, successor in interest to White Fawn Milling Corporation, a Utah corporation,

*Defendant,  
Respondent.*

No. 6287

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## RESPONDENTS' BRIEF

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The respondents in each of the above named cases agree with the statement of facts set forth in appellant's brief.

### STATEMENT OF PARTICULAR QUESTIONS INVOLVED

1. Revenue statutes or statutes imposing liabilities must be strictly construed.

2. There is no lien against the right to use water or land for cost of delivery of water unless specifically so prescribed by statute.

3. Claim of State Engineer for services rendered pursuant to 100-5-1 Revised Statutes of Utah, 1933, is not a preferred claim in receivership.

4. Purchaser of land and water rights is not personally liable for obligation of previous owner in connection with distribution of water by State Engineer unless he is specifically made so by contract or State law.

### A R G U M E N T

Appellant has cited several cases to support the principle that a statute in derogation of common law shall not be strictly construed but shall be construed liberally with the view to effect the objects of the statute and promote justice. Respondents in this case do not see just where this principle has any application in these cases for it is not pointed out in appellant's brief what common law is in conflict with the statute under consideration, namely, Section 100-5-1, Revised Statutes of Utah, 1933.

However, in this connection we wish to call the court's attention to the case of *Mormeister vs. Golding*, 84 Utah 324, 27 Pac. (2) 447, which, in discussing the construction of the statute there involved, states as follows:

"It is further well settled that statutes in derogation of common law are strictly construed. Consequently, the authority of the court or any board or commission or department to procure evidence by a deposition, and to use the same, must be clearly conferred and authorized by statute."

From appellant's argument there is no question but that appellant is contending that the statute above mentioned is one which places a burden upon the rights of an individual or is in effect a revenue law or statute. If this contention is true, and it must be true if appellants are to prevail in their appeal, then it is uniformly held by the courts that such statutes must be strictly construed in favor of the taxpayer and against the taxing power.

59 C. J. 1129:

"A statute creating a new liability, or increasing an existing liability, or even a remedial statute giving a remedy against a party who would not otherwise be liable, must be strictly construed in favor of persons sought to be subjected to their operation. Such statutes will not be so extended as to include liabilities other than those designated or fairly within its terms."

59 C. J. 1131:

"As a general rule revenue laws, such as laws imposing taxes and licenses, are neither

remedial laws, nor laws founded upon any permanent public policy; but, on the contrary, operate to impose burdens upon the public, or to restrict them in the enjoyment of their property and the pursuit of their occupations, and, when they are ambiguous or doubtful, will be construed strictly in favor of the taxpayer and against the taxing power. However, the rule of strict construction should be applied with due regard to the intention of the legislature as expressed in the statute, and it has been held that revenue statutes should be reasonably construed with a view to carry out their purposes and intent. It has also been stated that revenue statutes should be construed strictly, in so far as they may operate to deprive the citizen of his property, by summary proceedings or to impose penalties or forfeitures upon him, but otherwise such statutes ought to be construed with fairness, if not liberality, in order to carry out the intention of the legislature. The provisions of such statutes are not to be extended by construction or implication beyond the clear import of the language used; nor will they be enlarged so as to embrace matters or persons not specifically named or pointed out. In order to sustain the tax, it must come clearly within the letter of the statute, and the powers granted to officers charged with its execution must be strictly pursued. \* \* \*

Woodring v. Straup, 45 Utah 173, 143 Pac. 592:

“The rule, as declared by the great weight of authority, is that, in determining whether the Legislature has granted to municipal corporations the power to levy and collect special taxes, the statutes under which it is claimed such power is conferred are strictly construed. In

Suth. Stat. Const. Sec. 363, the author says:

“ ‘A due regard for individual rights and the plainest principles of justice requires that taxing statutes shall have only the effect which the Legislature clearly intended; in construing them all reasonable doubts as to such intent should be resolved in favor of the citizen.’

“And again in the same section, it is said:

“ ‘A statute conferring authority to impose taxes must be construed strictly. A tax law cannot be extended by construction to things not named or described as the subjects of taxation’.”

In 2 Dillon's Mun. Corp. (4th Ed.) Sec. 763, the rule is well illustrated in the following terse and concise language:

“ ‘It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the *power be plainly and unmistakably conferred*. It has, indeed, often been said that it must be specifically granted *in terms*; but all courts agree that the authority must be given either in express words or by necessary or unmistakable implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any consideration of convenience or advantage,’ Hamilton's Law of Special Assessments, Sec. 195; 1 Page & Jones Taxation by Assessment, Sec. 229; 37 Cyc. 966; 25 A. & E. Ency, Law, 1171.”

L. A. & S. L. Ry. vs. Richards, 52 Utah 1, 172 Pac. 474:

“The authorities cited by respondent to the effect that laws relating to taxation should be strictly construed against the taxing power, are



acknowledged and approved. We recognize that as the law, and would readily apply it in the present case, if there was anything in the case to which it could be applied."

In re Osgood's Estate, 52 Utah 185, 173 Pac. 152:

"While we are aware of, and approve, the general rule, that a law which imposes a tax of any kind or character cannot be extended by construction between the literal terms of the statute, yet we also recognize the rule that where, as here, all property which passes by will is within the express terms of the statute, then the burden should fall upon the person who claims an exemption under the statute to establish that fact."

Norville vs. State Tax Commission, ..... Utah .....,  
97 P. (2) 937:

"The doctrine that taxing statutes are, in case of doubt as to the intention of the legislature to be, construed strictly against the taxing authority and in favor of those on whom the tax is levied, has been well set out in the case of *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 55 S. Ct. 50, 79 L. Ed. 211. See, also, *Los Angeles S. L. R. Co. v. Richards*, 52 Utah 1, 172 P. 474; *W. F. Jensen Candy Co. v. State Tax Commission*, 90 Utah 359, 61 P. 2d 629, 107 A. L. R. 261; 25 R. C. L. Sec. 307 at p. 1092; *Cooley on Taxation*, Vol. 11, 4th Ed. Sec. 503 at p. 1113."

In the opinion of respondents the statute in question clearly indicates that it was not the legislative intention to create a lien of any description against the right to the use of water or the land merely for the

failure to pay the amounts assessed by the State Engineer. In section 100-5-1, which has been set forth in appellant's brief, the State Engineer is merely given the right to forbid the use of the water by any such delinquent. In other words, in this case, had the White Fawn Milling Company continued to use the water, the State Engineer had the right to prohibit the use thereof until the obligation was paid, and he had the right to sue such user for the amount owing. Every word used clearly states that the rights of the Engineer must be against the person who incurred the obligation and not against any subsequent purchaser. Nor is there anything in the section that even suggests or indicates that the legislature intended that a lien should be created and exist against the right to the use of water or the land upon which it is used. And where the legislature desired to create a lien, it has done so in specific words as in Section 100-5-4, which covers the question of headgates and measuring devices. In this section the following language is used:

“\* \* \* If the owners of irrigation works, canals or reservoirs shall refuse or neglect to construct and put in such headgates, flumes or measuring devices, after thirty days notice to do so by the State Engineer, it shall be the duty of the State Engineer to construct or cause to be constructed such measuring devices and the cost of the same shall be a lien against the lands and water rights served thereby.”

And to attempt to give to the statute the construction that appellant insists should be given would be to go contrary to all of the authorities in this state

and numerous others in construing revenue or tax statutes. In order to sustain a tax it must come clearly within the letter of the statute.

Appellant seems to rely entirely upon the case of Minersville Reservoir & Irrigation Company vs. Rocky Ford Irrigation Company, 90 Utah 283, 61 Pac. (2) 605, to show that a lien exists in favor of the State Engineer. However, this case does not construe Section 100-5-1, Revised Statutes of Utah 1933, as impressing a lien upon the water right but merely states that in a sense an unpaid water assessment becomes an encumbrance against the water right. The real question decided in this case, as respondents see it, is that one who is receiving the beneficial use of the water and service of the State Engineer cannot by contract, assignment, or otherwise, free himself from the liability to pay the obligation. With this statement we heartily agree and concede that the White Fawn Milling Company could not be relieved of the obligation it owes by any transfer of its rights and accordingly the receiver has allowed the claim of the State Engineer. Likewise, the new purchaser would not assume the obligation nor become bound for the same under the wording of the statute. As we have heretofore said, the statute clearly indicates that the rights that the State Engineer has to collect the money or to shut off the water are against the person who incurs the same and who obtains the beneficial use of his services.

If the statute does not create a lien, then there

can be no question but that the State Engineer's claim in the receivership matter would merely be a common claim for, as will be noted from the claim set forth in appellant's abstract, the preference is merely claimed under and by virtue of the provisions of Title 100, Revised Statutes of Utah 1933. It is not a claim for labor nor for any other item held to be a prior claim in this state in receivership matters, and we respectfully submit that the order of the court denying such claim as a preferred claim and allowing it as a common claim was proper.

If the claim of the State Engineer was not a preferred claim and did not create a lien then any subsequent purchaser would take title to the land and rights to the use of the water without being obligated to take care of the obligation created by a prior owner and the State Engineer could not collect the same from the subsequent owner nor could he deprive him of the use of the water. This principle is clearly set forth in the annotations appearing in 55 A. L. R. 789 and 13 A. L. R. 346, and the case of Home Owners Loan Corporation vs. Logan City, 97 Utah 235, 92 Pac. (2d) 346, where this court stated:

“It follows from the above analysis that a subsequent purchaser of premises from which is cut off the water supply is under no duty to pay the arrears owed by a prior tenant or owner or both as a condition precedent to having the water turned on for use on his property unless he has agreed to be liable for the payment of the same.”

In the Logan case, all parties agreed and this court held that there was no lien created by the ordinance though the ordinance gave to the city the power to shut off the water until all arrears for the water furnished had been paid. The language used in the Logan law was:

“\* \* \* may cause the water to be shut off from such premises and shall not be required to turn the same on until all arrears for water furnished shall be paid in full.”

The state statute in question reads as follows:

“\* \* \* may forbid the use of water by such delinquent while such default continues.”

The language in the ordinance is almost identical with that of the statute in question and it is apparent therefrom that the State Engineer received no greater right from the words in the statute under discussion than the city could have received from the words in the ordinance.

Furthermore, can we say that a lien may be created which would in any way bind a subsequent purchaser of property unless some method or provision is made for the recording of such lien or the giving of notice to the subsequent purchaser that a lien is claimed. *Title Guaranty & Trust Company vs. Allen*, 256 N. Y. Supl. 400.

We therefore respectfully submit:

1. That in the case of *Louis L. Marks vs. White Fawn Milling Corporation*, Defendant, *Walker Bank & Trust Company as Receiver*, and *T. H. Humphreys*, State Engineer of the State of Utah, as Appellant,

the District Court was correct in entering an order in the receivership matter ordering that the claim of the State Engineer be allowed as a common claim but denying that it had any preference over other claims.

2. That in the case of T. H. Humphreys, State Engineer of the State of Utah, plaintiff and appellant, and Maxfield Feed & Coal, Inc., defendant and respondent, that the District Court was correct in entering its decree dismissing the suit commenced by plaintiff and appellant and contend that this court should affirm the decisions of the District Court in both cases.

EDWARD F. RICHARDS,  
*Attorney for Respondents*