1977

Kennecott Copper Corporation v. Salt Lake County : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNECOTT COPPER CORPORATION,)
Plaintiff and Respondent,)
vs.)
SALT LAKE COUNTY,)
Defendant and Appellant.)

Case No. 15169

BRIEF OF APPELLANT

Appeal from a Judgment of the
District Court of Salt Lake County
Honorable Dean E. Conder, Judge

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vs.	)	Case No. 15169
SALT LAKE COUNTY, Defendant and Appellant.	)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is a claim for refund brought by the plaintiff-respondent, Kennecott Copper Corporation, against defendant-appellant, Salt Lake County, to recover ad valorem property taxes paid to Salt Lake County under protest for the year 1976.

DISPOSITION IN TRIAL COURT

Plaintiff-respondent filed an alternative motion for Judgment on the Pleadings or Summary Judgment with regard to its First Cause of Action.

Defendant-appellant filed an alternative motion for Judgment on the Pleadings or Summary Judgment with regard to plaintiff's First and Second Causes of Action. The Court denied defendant's Motions and took plaintiff's alternative Motion under advisement. Plaintiff and defendant submitted

legal memoranda to the Court. The Court issued its memorandum decision granting plaintiff a Summary Judgment. The trial court ruled that Salt Lake County under the facts as presented, was without legal authority to re-set its mill levy after the date prescribed by statute. By denying defendant's Motions, the Court also ruled that the previous decision of the Supreme Court of the State of Utah in Salt Lake City Corporation et al. v. Salt Lake County, case no. 14776 decided October 7, 1977, in which Kennecott Copper Corporation was a plaintiff and Salt Lake County the defendant, had no binding affect upon the instant action and was not therefore res judicata.

RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks reversal of the judgment of the trial court and further requests that this Court enter an order determining:

(1) that defendant-appellant, Salt Lake County, had the authority to adopt the mill levy as finally adopted and subsequently approved by the State Tax Commission of Utah and utilized for the year 1976; and

(2) that the issues presented by the Complaint of plaintiff-respondent, Kennecott Copper Corporation, have previou been decided by the Supreme Court in Salt Lake City Corporation, et al., v. Salt Lake County, case no. 14776, in which Kennecott Copper Corporation appears as a named plaintiff, and that Kenne Copper Corporation is therefore barred and precluded from re-litigating the same issues in a subsequent case against the same defendant.

STATEMENT OF FACTS

On August 9, 1976 the Salt Lake County Board of Commissioners set the general Salt Lake County property tax levy at 14.42 mills.

On September 20, 1976 the Salt Lake County Board of Commissioners re-set the mill levy thereby adopting a general property tax mill levy of 16 mills. The 16 mill levy was approved by the State Tax Commission of Utah.

On the 24th day of September, 1976, plaintiff-respondent Kennecott Copper Corporation, in conjunction with other named plaintiffs, filed an original action in the Utah Supreme Court against Salt Lake County entitled "Petition and Motion for an Extraordinary Writ," Case No. 14776. (T-39-47) Included in Count I of plaintiff-respondent's petition were the following allegations:

> "7. On May 28, 1976, this Court in the case of Salt Lake City Corporation et al. v. Salt Lake County et al., 550 P.2d 1291 (Utah 1976) determined that where a Utah County of the first class decides to provede certain municipal type services to unincorporated areas of that county they must do so in accordance with the terms of the Municipal Type Services to Unincorporated Areas Act, Utah Code Annotated, Section 17-34-1 et seq., 1953 as amended. A copy of said decision is attached hereto as Exhibit 'A' and by this reference made a part hereof. Said decision states as follows:
>
> 'This is an equitable enabling statute permitting counties to provide equal services to the unincorporated areas of the county. But where the county elects to provide such

services the statute says it is to defray the costs by either one of two methods: (1) by levying taxes on taxable property in the unincorporated areas of the county receiving the service; or (2) by imposign a service charge pr fee to persons benefited by such services.

Where the county chooses to follow the first part of the statute (providing services) the second part of the statute must be followed. The extent by which the costs would be defrayed by the two methods would of course depend on all the cost thereof and all the surrounding circumstances. To hold that the county may provide services without attempting to collect money to defray the cost would serve as an unjust burden upon the city residents and be contrary to the clear statutory language.'

Said decision remanded the aforesaid case to the District Court 'with directions to enjoin the furnishing of all municipal services (except fire fighting services) to unincorporated areas of the county until the respondents comply with the provision of Section 17-34-1, U.C.A. 1953, Replacement Volume 2B'."

"17. Respondents have continued providing the services of street lighting, planning and zoning, and garbage and refuse collection and disposal to the unincorporated areas of the county since the date of this Court's decision mandating that such be discontinued until such time as Salt Lake County complies with the terms of Utah Code Annotated, Section 17-34-1 et seq., 1953 as amended."

"20. Respondents actions in continuing to provide the aforesaid services without complying with this Court's decision in Salt Lake City Corporation v. Salt Lake County, supra, and without complying with the terms of Utah Code Annotated Section 17-34-3, 1953 as amended, and in raising the general mill levy on September 20, 1976, so as to be able to continue to provide aforesaid services with general fund revenues constitutes a direct defiance, and blatant disregard, of this Court and of the legislature of the State

of Utah. Said actions are illegal, null and void, ultra vires and without any legal authority."

Paragraphs 22, 23 and 24 of said petition alleged as follows:

"22. Utah Code Annotated, Section 59-9-6.3, 59-9-8, 17-36-31, 1953, as amended, require the Salt Lake County Board of County Commissioners to set the mill levy for the tax year in question on or before the second Monday in August. These provisions are as follows:

'The board of county commissioners of each county must levy a tax on the taxable property of the county between the last Monday in the seventh month of each fiscal year and the second Monday in the eighth month of each fiscal year to provide funds for county purposes including but not limited to the following:
(1) For general county purposes;
(2) For the care, maintenance and relief of indigent sice and otherwise dependent poor;
(3) For the construction, improvement and maintenance of county roads;
(4) For all other purposes authorized by law.

Utah Code Annotated, Section 59-5-6.3, 1953 as amended.

The governing body of each city and town, and each board of county commissioners, must file a statement with the state tax commission, on or before the second Monday in August of each year, showing the amount and purpose of each levy fixed by such governing body and board.

Utah Code Annotated, Section 59-9-8, 1953 as amended.

On or before the second Monday in August of each year, the governing body shall levy a tax on the taxable real property and personal property within the county. In its computation of the total levy subject to sections 59-9-6.5, it shall determine the requirements for each fund and specify the number of mills apportioned to each fund.

The proceeds of the tax apportioned for purposes of the general fund shall be credited in the general fund.

The proceeds of the tax apportioned for utility and other special fund purposes shall be credited to the appropriate accounts in the utility or other special funds.'

Utah Code Annotated, Section 17-36-31, 1953 as amended."

"23. As above set forth in Salt Lake County Commission on September 20, 1976, attempted to reset the general property tax mill levy applicable to all taxable real property in Salt Lake County from 14.42 mills to 16 mills."

"24. The attempted resetting of the general mill levy on September 20, 1976, after the statutorily required setting on or before the second Monday in August, is without legal authority, null, void, ultra vires and without any force and effect."

Paragraphs 2, 3 and 4 of plaintiff-respondent's Petition for Extraordinary Writ contained the following request for relief:

"2. That such extraordinary Writ prohibit Respondents from assessing, collecting or proceeding to assess and collect 1.58 mills of the general Salt Lake County property tax mill levy; said 1.58 mills representing the difference between the 16 mill levy set by the Salt Lake County Board of Commissioners on September 20, 1976 and the 14.42 mill levy set by said Board on August 9, 1976."

"3. That this Court declare the mill levy of September 20, 1976, above set forth to be illegal, ultra vires, accomplished without authority, beyond the purview of the law, and of no force and effect."

"4. That Respondents be restrained, enjoined and prohibited from assessing, collecting, or proceeding any further to assess and collect 1.58 mills of the general Salt Lake

County property tax mill levy pending a hearing and that such restraint, injunction and probhibition be made permanent upon hearing."

On October 7, 1976, this Court issued its written decision in that case. (T-38)

Thereafter, on the 7th day of December, 1976, Kennecott Copper Corporation, as plaintiff, filed a Complaint against Salt Lake County in the District Court of Salt Lake County. (T-2-16)

Plaintiff-respondent's Complaint including its First and Second Causes of Action contains allegations substantially the same as the allegations of the Petition for Extraordinary Relief, decided by the Utah Supreme Court on October 7, 1976, case No. 14776. In the Petition for Extraordinary Relief, plaintiff sought injunctive relief. In plaintiff's second lawsuit, plaintiff sought refund of taxes paid under protest. The legal and factual issues presented by both actions are identical. Defendant-appellant Salt Lake County, in response to plaintiff-respondent's second lawsuit, filed its Answer. (T-20-23)

Among the affirmative defenses asserted by defendant-respondent were the defenses of Res Judicata and Collateral Estoppel. These defenses were based upon the fact that the Utah Supreme Court, in case No. 14776, had previously decided the same issues and resolved the same requests for relief between the plaintiff-respondent Kennecott Copper Corporation and defendant-appellant Salt Lake County.

Plaintiff-respondent Kennecott Copper Corporation thereafter moved alternatively for judgment on the pleadings or for summary judgment with regard to its First Cause of Action. (T-25-28)

Defendant-appellant Salt Lake County moved alternatively for judgment on the pleadings or for summary judgment with regard to the First and Second Causes of Action by the plaintiff. (T-33-48)

Defendant-appellant's motions were denied. (T-49)

Plaintiff- respondent's motion was taken under advisement with each party supplying the Court with legal memoranda. (T-50-62) and T-63-72)

On April 4, 1977, the Court issued its Memorandum Decision granting plaintiff-respondent's motion for summary judgment. (T-73-76) Defendant-appellant Salt Lake County appealed. (T-85) In its Memorandum Decision, the Court reasoned and found as follows:

> "In this case the Court finds that Salt Lake County, on August 9, 1976, set the Mill Levy for taxation at 14.42 mills. Thereafter, on September 20, 1976, the County by a new resolution changed the Mill Levy to 16 mills.
>
> The issue to be decided by the Court is whether or not the imposition of a mill levy of 16 mills, voted upon by the Salt Lake County Commission September 20, 1976, is lawful.
>
> Utah Code Annotated 59-9-6.3 requires the Board of County Commissioners of each County in the State of Utah levying an ad valorem property tax to fix the mill levy between the

dates of the last Monday of July of each year, and the second Monday of August of each year. The applicable provision of 59-9-6.3 reads as follows:

'The Board of County Commissioners of each County must levy a tax on the taxable property of the County between the last Monday in the seventh month of each fiscal year, and the second Monday in the eighth month of each fiscal year, to provide funds for County purposes...'

The provision of 17-36-1 of the Utah Code Annotated also provides:

'On or before the second Monday in August of each year, the governing body shall levy a tax on the taxable real and personal property in the County...'

In addition to the Sections already cited, the Court calls attantion to 59-9-8 which provides for:

'The governing body of each city and town, and the said Board of County Commissioners, must file a statement with the State Tax Commission, on or before the second Monday in August of each year, showing the amount and the purpose of each levy fixed by such governing body and Board.'

The Court finds that the words 'must' and 'shall' as set forth in the 59-9-6.3 and 17-36-1 are mandatory and not merely directory. Black's Law Dictionary in referring to the word 'must' says:

'This word, like the word 'shall', is primarily a mandatory affect...'

An examination of the same word in 'Words and Phrases' shows that generally speaking the use of the word 'must' is mandatory, not merely directory.

In view of the provisions of 59-9-8 it seems that the Utah Legislature has consistently held to the levy being fixed by the second Monday in

August of each year. That provision has been in the Code since the laws of 1923. Section 59-9-6.3 was added to the law in 1961, and merely carries out the legislative intent.

Defendants refer the Court to 59-11-7 which reads: 'No assessment, or act relating to assessment, or collection of taxes, is illegal on account of inofrmality, or because the same was not completed within the time required by law.'

The Court finds that there is a distinction between the assessment and the levy of the tax. McQuillin on Municipal Corporation, Section 44.92 states:

'Levy and assessment are distinct processes, and, except where otherwise provided by Statute, both are essential to taxation.'

The Code citation above referred to relates to the 'assessment', whereas the first citations refer to the 'levy' of the tax.

McQuillin on Municipal Corporations, Section 44.93 says: 'Whatever preliminaries are by law made essential and mandatory, as distinguished from directory merely, to the levy of a tax, must be observed or the tax will be void.'

The same authority at Section 44.95 states as follows: 'The time for making the levy is, in most jurisdictions, prescribed by statute or charter. Unless such provision is directory merely, the taxing authorities may not disregard a definite provision as to the time for the making of the levy, or as to when the amount of the tax is to be determined and certified. Generally, only one levy a year is authorized for the same purpose; but where no time is fixed for the levy the ordinance may be passed at any time within the year.'

'The applicable law governs as to the effective date of a levy, and as to the period covered thereby. It has been held that a municipality is authorized to levy taxes in

anticipation of demands that will arise in the future. A levy of taxes by a city during the year of its incorporation generally is authorized.'

The Court recognizes the general rule on statutory construction of revenue legislation as set forth in Sutherland on Statutes and Statutory Construction, Section 6701. General Rule. 'While the power to tax, and the exercise of that power is indispensable to the effective operation of government, the rule has become firmly established that tax laws are to be strictly construed against the state and in favor of the taxpayer. Therefore, where there is reasonable doubt as to the meaning of a revenue statute it should be resolved in favor of those taxed.'

For the foregoing reasons the Court grants the Plaintiff's Motion for Summary Judgment, and directs the plaintiff to prepare an appropriate order."

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR SUMMARY JUDGMENT BECAUSE THE ISSUES RAISED BY PLAINTIFF'S COMPLAINT HAVE PREVIOUSLY BEEN DECIDED BY THE SUPREME COURT OF UTAH AS AGAINST PLAINTIFF AND IN FAVOR OF DEFENDANT.

In denying defendant's motions, the trial court completely ignored the fact that the same parties to this action had already litigated the same issues in the Utah Supreme Court. In so doing, the trial court failed to recognize the rule of res judicata by which a final judgment or decree on the merits is conclusive as to all points and matters determined in a former suit. The fact that the first action was initiated and decided in the Supreme Court does not alter the effect of the former adjudication.

> "The doctrine of res judicata applies as well to judgments of courts of last resort as to those of nisi prius courts; and a decision of an appellate court will preclude any further action on the same matter between the parties, provided the court acts within its jurisdiction." 50 C.J.S. Judgments, Section 607 p. 30.

Nor does the fact that plaintiff-respondent's first action in the Supreme Court involved extraordinary relief alter the effect:

> "It is well settled that the doctrine of res judicata is applicable to judgments in mandamus and prohibition proceedings, that is, the special character of these proceedings does not ipso facto, preclude

> a judgment rendered therein from operating as res judicata in another action or proceedings." 21 A.L.R. 3d, Mandamus-Prohibition-Res Judicata Section 2 at p. 213.

The effect of the former adjudication involving the same issues, whether raised in an action for extraordinary relief or otherwise is, therefore, conclusive.

> "Many cases have dealt with the question as to the conclusive effect of a judgment in a mandamus or prohibition proceeding on issues raised in another action. As to issues actually determined by the judgment in the mandamus or prohibition proceeding, the judgment is conclusive, thus precluding the parties from relitigating the same issues." 21 A.L.R. 3d 206, Section 2 at p. 214.

In its first lawsuit in the Supreme Court, Kennecott asserted that the defendant Salt Lake County was not complying with the Court's decision in Salt Lake City Corporation et al. v. Salt Lake County, et al., 550 P2d 1291 (Utah 1976) and Section 17-34, Utah Code Annotated, 1953, as amended, and sought prohibition against Salt Lake County. In its second action in the District Court, Kennecott asserted that the defendant Salt Lake County was not complying with the Court's decision in Salt Lake City Corporation et al v. Salt Lake County et al., 550 P2d 1291 (Utah 1976) and Section 17-34, Utah Code Annotated, 1953, as amended, and sought a refund for taxes paid under protest.

In its first lawsuit in the Supreme Court of Utah,

plaintiff Kennecott alleged that the Salt Lake County mill levy for 1976 was illegal as being statutorily untimely and too late and sought prohibition of the subsequent levy. In the second lawsuit, plaintiff sought a refund for the excess between the mill levy initially adopted and the one subsequently adopted on the grounds it was statutorily untimely.

Plaintiff's petition in the Supreme Court was denied as to both claims. Justice Henroid filed a written dissent from the majority opinion. Justice Crockett voted to deny plaintiff's petition on other grounds.

The issues disposed of by the Supreme Court in the first lawsuit are the same as the ones presented in the second lawsuit filed by Kennecott.

It is, therefore, submitted that under the doctrine of res judicata the issues determined in the former action are conclusively settled by the judgment of the Supreme Court and may not again be relitigated in the second action between Kennecott and Salt Lake County and that the trial judge erred in denying the defendant's alternative motions. See 21 A.L.R. 3d 305, Mandamus-Prohibition-Res Judicata, Section 9(b) p. 232. See also Restatement of Judgments, Section 48 and Tentative Draft No. 4 Restatement of the Law Second, Judgments, April 15, 1977.

POINT II

THE ACTION OF SALT LAKE COUNTY IN RE-SETTING THE MILL LEVY AS FINALLY ADOPTED DID NOT NULLIFY THE LEVY AND THE DECISION OF THE TRIAL COURT IN SO RULING WAS ERRONEOUS.

County tax levies are covered by Sections 59-9-6.1 through 59-9-6.5, Utah Code Annotated, 1953, as amended 1961.

Sections 59-9-6.1 sets out the legislative purpose for enacting the sections of the Code dealing with County levies.

> "Since it is difficult to provide a break down of mill levies for specific purposes on a state-wide basis due to the varying needs of individual counties, it is advisable and in the best interest of good county government that an over-all levy be provided for. This will allow the county legislative body to use county funds where needed and to improve budgetary procedures in accordance with the uniform accounting system passed by the 1957 legislature. It is the purpose of this bill to provide a maximum over-all mill levy for counties according to assessed value." (emphasis supplied)

The purposes of this legislative scheme are three fold:

(a) to allow county legislative bodies to use county funds where needed;

(b) improve budgetary procedures in accordance with the uniform accounting system; and

(c) provide a maximum over-all mill levy for counties according to assessed value.

Section 59-9-6.2 implements in part the legislative purpose by setting the maximum mill levy. Sixteen mills are allowed for counties with a total assessed value of more than $20,000,000 and eighteen mills for counties with a total assessed value of less than $20,000,000. That Salt Lake County is entitled to levy 16 mills is not disputed by either plaintiff or defendant.

Section 59-9-6.3 provides that:

> "The Board of County Commissioners of each county must levy a tax on the taxable property of the county between the last Monday in the seventh month of each fiscal year and second Monday of the eighth month of each fiscal year to provide funds for county purposes...." (emphasis supplied)

Section 59-9-6.4 constitutes a recognition on the part of the legislature that the County Commissions are the proper bodies to "determine the amount" available for each purpose authorized by law. (emphasis supplied)

Section 59-9-8 requires that the governing body of each city and town, and each board of County Commissioners, "must file a statement with the State Tax Commission, on or before the second Monday in August of each year, showing the amount and purpose of each levy...."

Section 59-9-9, Utah Code Annotated, 1953, as amended, imposes a statutory duty upon the State Tax Commission to "...carefully examine such statements, and, if it appears that any levy has been fixed in excess of the maximum amount permitte by law, it shall immediately notify the county attorney of the county in which it appears that such excess has been fixed." (emphasis supplied)

A careful reading of Sections 59-9-6.3, 59-9-8 and 59-9-9 will demonstrate that the three statutes were enacted to insure compliance with the maximum mill levy limitations of Sections 59-9-6.2, Utah Code Annotated, 1953, while still leavin the authority to set the levy to the county boards.

There is no indication in the statutes that the legislature intended a levy to be void because it was not set within the time set out in the statutes. To the contrary, Section 59-9-9 and Section 59-9-10, Utah Code Annotated, contemplate that a correct levy be set and enforced after the time prescribed in Section 59-9-6.3, Utah Code Annotated, 1953. If the legislature had wanted to nullify the levy because of imposition after the time prescribed in Section 59-9-6.3, they would have included such a provision. If the time element had been viewed as critical by the legislature, they would not have passed a statute that of necessity contemplates a setting of the final correct levy after the time prescribed in the statute.

It is respectfully submitted that the ruling of the trial court fails to give recognition to the intent on the legislature with regard to the setting of a correct mill levy and is therefore erroneous and should be reversed.

POINT III

THE WORD "MUST" HAS BEEN CONSISTENTLY HELD TO BE DIRECTORY RATHER THAN MANDATORY BY THE UTAH SUPREME COURT WHEN APPLIED TO TIME LIMITS INVOLVING PUBLIC AND GOVERNMENTAL BODIES.

An analysis of the several cases decided by the Utah Supreme Court will demonstrate that the Court has viewed words such as "must" and "shall" as directory rather than mandatory when dealing with public bodies.

Our Supreme Court has further indicated that the Courts should not interfere with actions of County Commissions

except in extreme circumstances. In Cottonwood City Electors v. Salt Lake County Board of Commissioners, 499 P.2d 270 (1972) the Supreme Court was called upon to review rejection by the Salt Lake County Commission of a petition to incorporate a town to be known as Cottonwood City. In addressing the legality of the Commission's refusal to act upon the petition of the residents of the area, our Court first indicated how questions involving the County and its governing body should be approached Justice Crockett, speaking for a unanimous Court made the following significant observation:

> "...it is appropriate to have in mind certain foundational propositions relating to the County and its governing body the County Commission. The County is a political subdivision of the State whose creation and whose powers and duties are derived from the constitution and statutory law. It is the function of the County Commission to so govern the County as to best provide for its general welfare and good order, and to carry on the various activities and provide the public services usually considered to be the responsibility of county government. It has such powers as are specifically enunciated by law and those that are reasonably and necessarily implied in order to discharge those responsibilities. In connection therewith it acts as the legislative body for the County, and also in various of its duties acts as the executive in administering county affairs. In order to discharge those responsibilities in an efficient and appropriate manner it must necessarily be allowed a reasonable latitude of discretion." 499 P.2d at pages 271 & 272. (emphasis supplied)

And as was further stated by Justice Crockett in the same case:

"...the courts should not interfere with the actions of the Commission unless it appears that it acted beyond its authority, or in some manner which is clearly contrary to law, or so without basis in reason that its action must be deemed capricious and arbitrary." (emphasis supplied.

With the foregoing standards in mind, the Court's attention is now directed towards the Utah cases dealing with the effect of time limits contained within certain statutes and how the Utah Supreme Court has applied the standards.

An early case to come before the Utah Supreme Court was Tanner v. Nelson, 70 Pac. 984 (1902). The case arose when the state superintendent of public instruction gave the required statutory notice that the superintendent of public instruction, the principal of the state normal school and county superintendents would hold a convention at Salt Lake City for the purpose of adopting textbooks for use in the district schools of the state. The statute in question provided that "the convention shall meet and publicly open and read the proposals" for textbooks. It was contended by the appellant that the provision referred to above was directory and that substantial compliance was sufficient. The respondent argued that the statute was mandatory, and that the failure to read the bids as opened was fatal to the proceedings. In analyzing the statute in light of the parties' contentions, the Court observed as follows:

"The statutory provisions which may thus be departed from with impunity without affecting the validity of the statutory proceedings are usually those which relate to the mode or

time of doing that which is essential to effect the aim and purpose of the legislature, or some incident of the essential act."

"Where the provision is in affirmative words, and there are no negative words, and relates to the time or manner of doing the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto, by an official person, the provision has been usually treated as directory. (emphasis supplied)

70 Pac. 984 at page 987.

The Court then went on to uphold the actions of the public officials as being in substantial compliance with the purposes of the act. In reaching its decision the Court observed the following significant quotations:

"When the statute directs an act to be done in a certain way at a certain time, and a direct compliance as to time and form does not appear to the judicial mind to be essential, the proceedings are held valid, though the command by the statute has been disregarded. The statute in such a case is said to be directory."

"Irregularities in official action, consisting in the neglect or lack of strict compliance with statutory directions, should not be allowed to vitiate the proceedings taken under a statute, when the objects and ends of the statute have been substantially accomplished, and neither public nor private persons are injured by the course of proceedings."

In the case of Wright v. Park City School District, 133 Pac. 128 (1913), the Utah Supreme Court was reviewing an action brought to prohibit Park City School District from proceeding to levy a tax to maintain a high school separate and apart from the other school districts of Summit County.

The action claimed that the separate school could not be established because the board did not proceed within the sixty day statutory period. No action had been taken until about nine months after the act in question became law. The two statutory provisions involved provided as follows:

Section 2: "Within 60 days after the approval of this act each county superintendent of district schools shall report to the board of county commissioners as to whether or not, in his opinion, the county should remain one high school district."

Section 3: "Upon receipt of such report and recommendations the board of county commissioners shall set a day for hearing the same, which shall be not less than thirty days nor more than sixty days from the day of setting...."

Plaintiff contended that the sixty day provisions were mandatory. Defendants argued the provisions were directory and that substantial compliance was sufficient. The Court held the language to be directory. The Court, in reaching its decision, made the following significant statements:

> "The general rule is that a statute, prescribing the time within which public officers are required to perform an official act, is directory only, unless it contains negative words denying the exercise of the power after the time specified or the nature of the act to be performed, or the language used by the Legislature shows that the designation of time was intended as a limitation."

The Court went on to cite Sutherland's treatise on Statutory Construction and adopted the following quotation:

> "Provisions regulating the duties of public officers and specifying the time for their performance are, in that regard, generally directory. Though a statute directs a thing

> to be done at a particular time, it does not necessarily follow that it may not be done afterwards."
>
> "Statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless so declared in the statutes."

Finally, the Court observed: "There is nothing in the nature of the duty to be performed either by the county school superintendent or the board of county commissioners, under the statute in question that justifies the inference that the Legislature intended that if it were not performed within the time specified it should not be performed at all." In the instant case there is no indication that the legislature intended that no levy be set by the County if not done so by the second Monday in the eighth month of each fiscal year. The initial 14.42 mill levy had been approved by the County Commission, certified to the Salt Lake County Auditor, approved by the State Tax Commission, but not reported to the Salt Lake County Treasurer. Thus, the mill levy process on the 14.42 mills had not been completed when the County Commission, realizing its mistake, increased the mill levy with the approval of the Tax Commission to 16 mills as allowed by law and thereby attempting to avoid violating Article XIV, Sections 3 and 4 of the Constitution of Utah, which prohibits the County from incurring debt in excess of expected tax receipts for the current year.

In Hablin v. State Board of Land, 187 P.178 (1919), the Utah Supreme Court was asked to interpret whether the word "must" in a statute requiring that an application for preference right to purchase school land within ninety days was mandatory or directory. The plaintiff had failed to file an application within ninety days after the survey plats had been filed in the United States Land Office. The State Board of Land claimed it could not grant the application because more than ninety days had elapsed since the filing of the plat. The Utah Supreme Court determined that the Board had the power to grant the application and issue a certificate of sale notwithstanding more than ninety days had elapsed because the word "must" as used in the statute was directory.

Plaintiff-respondent, in its argument in the trial court cited the case of Glen v. Ferrell, 5 Utah 2d 439, 304 P.2d 380 (1956), as authority for the proposition that the word "must" is mandatory rather than directory. However, plaintiff-responsdent fails to recognize the factual differences presented in that case. That case involved an attempt to attach personal property of a non-resident located in the State of Utah. The Utah attachment statute required that shares of a corporation "must be attached by leaving with the president, secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of defendant is attached...." The plaintiff failed to serve an officer of

the company as required by the rule. The Court held the statutory procedure to be mandatory and found no compelling reason to view the word "must" as directory. The case is readily distinguishable on several grounds. First, the attachment was used as a basis for acquiring jurisdiction and the courts have been reluctant to over-look irregularities when extraordinary writs or proceedings are involved. In the instant case there is no jurisdictional problem present. The statute does not prohibit the Commission from setting the levy if the time limit has not been met. In Ferrell, plaintiff was an individual claiming against another individual. In the instant case as in the three previous cases cited herein, defendant is a governmental entity. The Court is required to take a more restrained approach when dealing with the powers of such governmental entities. See discussion by Justice Crockett in Cottonwood case. The cases previously cited and relied upon by defendant all relate to time deadlines and governmental authority to act beyond such a deadline. The instant case involves the same problem. In Ferrell, there was no time element involved but merely the manner in which plaintiff had proceeded. Defendant-appellant would submit that the case of Glen v. Ferrell, supra, is therefore not in point. The most recent Utah Supreme Court decision involving time limits for public bodies to act clearly demonstrates that Wright v. Park City, supra, is still controlling in the State of Utah.

Sjostrom v. Bishop, 15 Utah 2d 373, 393 P.2d 472 (1964) involved the failure of an elected public official to timely file with the city recorder and publish in a daily newspaper, a sworn statement of campaign expenses. The statute in question provided, in part, as follows:

> "Every elective officer in a city of the first and second class shall within thirty days after qualifying file with the city recorder and publish...."

The Utah Supreme Court was required to determine whether the time limit was mandatory or directory. In determining the language to be directory, the Court set forth the guidelines to be followed in making such a determination. "The most fundamental one is that the court should give effect to the intention of the legislature." In the instant case, the legislative intent was to set and insure compliance with a maximum mill levy limitation. That intent has not been frustrated by the defendant-appellant's actions herein. Next, "the court must analyze the statute in the light of its history and background; the purpose it was designed to accomplish; and what interpretation and application will best serve that purpose in practical operation." In the instant case the history and background of the statutes involved indicate that the statutes in question were passed to provide for an over-all levy. Its purpose was further to allow county legislative bodies to utilize county funds where needed and improve budgetary procedures in

accordance with the uniform accounting system passed by the 1957 legislature, and finally, to provide a maximum over-all mill levy according to assessed valuation. None of the foregoing purposes would be frustrated by this Court's determination that the re-setting of the levy was proper. On the contrary, if this Court were to adopt the position of the plaintiff Kennecott, the intent of the legislature would be frustrated because it would impede the ability of the county legislative body i.e., the county commission, to use funds where needed. Salt Lake County has the statutory right to levy 16 mills. It has the duty to meet the needs of its citizens, individuals and corporate alike. It has the constitutional duty to expend only such amounts as can be anticipated as revenues. To adopt plaintiff's position would not only ignore these rights, duties and responsibilities, but do violence to the legislative purpose of the statutes in question. Salt Lake County has the power to levy taxes. It has the power to set and adopt a mill levy. It must therefore follow that it has the power to re-set and re-adopt a mill levy. See 17-4-1 and 17-4-3, Utah Code Annotated, 1953. See also Cottonwood City Electors v. Salt Lake County Board of Commissioners, supra, at pages 271 and 272.

Further, in the instant case the 16 mills were approved by the State Tax Commission of Utah. As was stated by the Utah Supreme Court in the case of Baker v. Tax Commission, 520 P.2d 203 (1974):

> "Since the commission has general supervision over the tax laws of the state and over those charged with the enforcement of the laws, and has the power on appeal to make such correction or change in the order of the county board of equalization as it may deem proper, it must necessarily follow that its authority to cancel, vacate or change an assessment when, upon a proper showing, it has been determined that the assessment should be so cancelled, vacated or changed...."

In the same case when the Supreme Court reviewed the powers of the County Commission sitting as a board of equalization it cited the following quote with approval:

> "Power of a county board of taxation to "revise and correct assessment in accordance with the true value of the taxable property" necessarily includes the right to cancel the assessment entirely where the property is determined to be not taxable...."
>
> 520 P.2d 203 at page 206.

The foregoing decision is a clear indication of how extensive the powers of the Tax Commission and County Commission are with respect to the assessment and collection of taxes. The Tax Commission had the authority to approve the increased mill levy in the instant case. It exercised that authority. In addition, the Supreme Court in the Baker case, when confronted with the contention that the Commission lost jurisdiction to hear matters after the statutory deadline made the following observation:

> "There is no merit to the contention that the Commission lost jurisdiction simply because these appeals from the ruling of the Board were not taken within five days after June 20, when those rulings were not even made until September 15."

It is respectfully submitted that the Tax Commission had the authority to approve the re-set mill levy after the time prescribed in Section 59-9-6.3 and that its action in approving the increased levy, so long as within the maximum allowed by statute, should be sustained by this Court.

POINT IV

THE ACTION OF SALT LAKE COUNTY IS FURTHER VALIDATED BY THE CURATIVE EFFECT OF SECTION 59-11-7, UTAH CODE ANNOTATED, 1953, AS AMENDED.

Section 59-11-7, Utah Code Annotated, 1953, as amended provides as follows:

> "No assessment or act relating to assessment or collection of taxes is illegal on account of informality or because the same was not completed within the time required by law." (emphasis supplied)

Plaintiff-respondent argued that the instant case is not covered by the foregoing curative statute because they are only attacking the levy made by Salt Lake County. The trial court agreed. Defendant-appellant would submit that plaintiff's argument in this regard is totally without merit and the ruling of the trial court is not supported by the authorities. To say that the levy is not an act related to the assessment or collection of taxes is to completely disregard the general accepted meaning of that term. "To "levy" a tax means to raise or collect a tax - to impose or assess a tax, and collect it under authority of law. "Levy" is the legislative act, whether

state or local, which determines that a tax should be laid. It is the first essential to a valid tax of any description." 72 Am Jur 2d §704. In short, the levy is the tax that is assessed or charged against the property. "The word "levy" as applied to taxation, is given a variety of meanings. Strictly speaking, a levy is the legislative act, whether state or local, which determines that a tax shall be laid, and fixes its amount, and this is the meaning of the term as used in this chapter." §1012 Cooley on Taxation.

"Levying a tax usually means the fixing of the rate at which property is to be taxed." Emeric v. Alvarado, 2 P.418. See also Black's Law Dictionary. Assessment on the other hand embraces more than simply the amount. "It includes the procedure on the part of the officials by which the property is listed, valued, and finally the proportion declared. It is said to include the whole statutory mode of imposing the tax, and embraces all the proceedings for raising money by the exercise of the power of taxation from the inception to the conclusion of proceedings." 72 Am Jur 2d §704. To say that the levy is not an act relating to the assessment or collection of taxes is like saying that the human body includes only the head and legs, but nothing between. It is respectfully submitted that the action taken by Salt Lake County in adopting a mill levy within the limits set by law was a valid act within the broad powers granted to such bodies. That substantial compliance

with the time period set for adopting the levy is sufficient to constitute a valid levy within the meaning of the decisions of the Utah Supreme Court relating to the time within which public bodies must act; and, finally, that the curative statute enacted by the Legislature is sufficient to avoid any technical defect that might have occurred because of the adoption of the mill levy shortly after the statutory time had passed.

It is therefore respectfully submitted that the trial court failed to consider the intent of the legislature and the plain meaning and purposes of Section 59-11-7, Utah Code Annotated, 1953, as amended, when it granted plaintiff's Motion for Summary Judgment and should therefore be reversed.

CONCLUSION

We respectfully submit to this Honorable Court that the trial court erred, that under the facts and circumstances of this case and the law applicable thereto, the mill levy adopted by Salt Lake County for the year 1976, although re-set after the time specified by statute, was still a valid mill levy. That the assessments made during 1976 based upon said mill levy are valid. That the issues presented in the second action filed by plaintiff, Kennecott, were previously adjudicated by this Court and therefore should not have been re-litigated. That the decision of the trial court is contrary to law and not in accordance with previous decision

of this Court and should be reversed and judgment be entered for the defendant-appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing BRIEF OF APPELLANT by personally delivering the same to James B. Lee and Kent W. Winterholler, attorneys for Plaintiff, 79 South State Street, Salt Lake City, Utah 84111, this _____ day of July, 1977.

BILL THOMAS PETERS