

1949

# Rocky Mountain Honey Co., Inc. v. Marion R. Crystal and Delsa N. Crystal : Reply Brief of Appellant

Utah Supreme Court

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E. L. Schoenhals; Attorney for Appellant;

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**In the Supreme Court  
of the State of Utah**

**ROCKY MOUNTAIN HONEY CO., INC.,**  
*Appellant,*

**vs.**

**Case No.  
7243**

**MARION R. CRYSTAL, and  
DELSA N. CRYSTAL, his wife,**  
*Respondents.*

**REPLY BRIEF OF APPELLANT**

**FILED**

**FEB 8 1949**

**E. L. SCHOENHALS,**  
*Attorney for Appellant.*

**CLERK, SUPREME COURT, UTAH**

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# In the Supreme Court of the State of Utah

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ROCKY MOUNTAIN HONEY CO., INC.,

*Appellant,*

vs.

MARION R. CRYSTAL, and

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*Respondents.*

Case No.  
7243

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## ARGUMENT

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### FIRST CAUSE OF ACTION

#### A. PROOF OF NOTICE OF INTENTION.

Respondent cites Jones vs. Foulger. Appellant points out—distinctions of why this case, which is copied to cover all of page 13 of said Brief, has no application to the case at Bar. This old case was decided as based upon Section 273 of Compiled Laws of Utah 1907. Our Legislature has since passed the following laws which change the law and the following reasons for distinction are given references U.C.A. '43:

##### 1. 15-7-38:

This section provides for the exclusive remedy of payment under protest and action to recover money.

## 2. 15-7-39:

“Failure to appear before board \* \* every objection deemed waived.”

## 3. 15-7-40:

Governing body acquires exclusive jurisdiction unless 2/3 of owners file objections.

4. The case cited was an action to restrain collection of a tax. The law of 1907 did not exclude such a remedy as our present law does.
5. The assessment was made upon owners who did not adjoin or abut the improvement, and while Respondent has yelled about his property being in Lot 8, he has conceded the fact that when the assessment was levied Lot 8 and 7 were in one parcel and assessment levied to the *FULL DEPTH* as permitted under 15-7-22.
6. No notice given in the case cited with respect to the property, see our Exhibit V, W, Y and D, Notice of Intention.

Respondent cites the Branting case. Appellant cited this case for the proposition that:

“mere irregularities not jurisdictional.”

Respondent cites it for the proposition that he should be given right to be heard. Again, the Branting case, as the Jones vs. Foulger case, was decided upon the Statutes of 1907. Respondent again calls this Court's attention to the fact that subsequent to 1907 the Legislature limited the right of the tax payer to be heard as more fully shown under propositions 1 to 6 above, so we must disregard the Branting case so far as the purpose for which Respondent seeks to use it.

Elkers vs. Millard County, 77 Utah 303, 294 Pac. 307, cited by Respondent, has nothing to do with the case at Bar. It involves other sections of the Code, to-wit, Drainage District.

Respondent on page 12 relies on failure to comply with section 1735 of the City Ordinance as reason why the lower Court should be affirmed without even considering:

1. 15-7-41 Assessment not subject to review.
2. 15-7-40 2/3 must file objections.
3. 15-7-39 Failure to file objections constitutes waiver.
4. 15-7-38 Exclusive remedy pay under protest sue to recover.

But, Respondent overlooked completely:

15-7-38, which places burden of proof on Respondent.

Now, what are the facts?

Exhibits "V", "W", "Y" and "D".

They speak for themselves, they are unrefuted.

Has Respondent carried the burden. No.

What is the situation?

Appellant has established compliance beyond all reasonable doubt. Moreover, the Branting case supra holds that this is a mere irregularity and where the Legislature had permitted an attack, that such an attack would be futile as not jurisdictional.

**FIRST CAUSE OF ACTION****B. ASSESSEMENT NEVER INTENDED TO EFFECT PROPERTY.**

Respondent has not answered pages 8 and 9 of Appellant's Brief.

Respondent has left unchanged the fact recited by Appellant that at the time of the assessment the tract in issue was a part of a larger tract of land owned as a unit.

Respondent has not only neglected to explain *Hester vs. Collector*, *Jordan vs. City of Olive Hill* and *State vs. Coombs*, but has missed the following important facts shown on examination of Exhibit "A".

On the first page, last line is recited:

"Both sides of Pugsley Street."

Which, alone, is sufficient since in the middle of page 2 it recites to the entire depth of the property owned by the abutters of Pugsley Street. This included property here under consideration. Again, on page 3 of Exhibit "A", underscored red for the Court's convenience, is recited:

"All of Block 138."

Exhibit "S" shows Lot 8 to be in Block 138, so Respondent will find it difficult to explain this away. Please bear in mind also that Exhibit "U" had Exhibit "A" printed thereon.

This one notice alone was sufficient and notwithstanding this, see Exhibit "D". Note here again the notice,

"Both sides of Pugsley Street."

"and Block 138"



Lot 8 is a smaller subdivision of Block 138, so again Respondent is faced with a fact for which he gives no answer, since none can be given, and note in this notice it recites as legal descriptions only Blocks, and give Blocks "1A", 6, 24 of Platt C, then "Block 138" again. Exhibit "E" does the same thing all over again describing the property.

Again, Exhibit "B",

Sewer extension 437. Full Depth.

Property described by meets and bounds.

Again, Exhibit "W",

Here we have FIVE published notices, any one of which would be sufficient, complete and binding on Respondent.

Moreover, had all of the Statutes cited under title 15 not been in force, can Respondent in candor represent to this Court that notice was not given under the five publications above. In describing property the legal description recites beginning in Lot 7, thence describes the course. See the certificate of the Abstractor himself in Exhibit "S" between entry 51 and 52. How did he describe the property here at issue. Nowhere in said description is Lot 8 mentioned. Is counsel naive enough to believe or pretend that the very property here in question is not properly described by the Abstractor when the Abstractor describes one course, then East 330 feet, which in the notices is described as to the full depth. Has the Abstractor improperly described the very property in dispute when he fails to say Lot 8? Certainly not. Exhibit 2, introduced by Respondent, shows at entry 32 that Respondent, as of October 25, 1934, had notice of record of the said special tax.

### C. LOSS OF INTEREST

Respondent, desperately realizing that the lower Court cannot be sustained, at least that the judgment cannot be sustained upon the findings, discusses loss of interest. This issue cannot be raised for the first time on appeal. There is no finding of fact to sustain any such contention.

Exhibit "C" on page 3, and Exhibit "F" show that the deed to the property in question was recorded March 3, 1938. Certificate of tax sale, Exhibit "J", shows same to have been recorded October 25, 1934. See also Exhibit "G".

Now the city owns the property, and all that Exhibit "F" purports to be is a receipt for \$256.64 and shows on its face that Appellant's assignor not only paid the said money, but was entitled to the deed, which later deed was recorded, see Exhibit "G".

### D. FAILURE IN PROCEDURAL STEPS

Concerning section 1737, again, doesn't the burden of showing an irregularity rest upon Respondent. Did Respondent carry this burden? The Court's attention is directed to R 69 where Appellant showed compliance.

Moreover, Branting vs. Salt Lake City was a case on the very issue here involved and the Court said:

"Respondent did not offer any objection to the assessment, an irregularity which might be waived by failure to protest."

Moreover, the city in the Branting case did not have the Statutes referred to in 1 to 6 under A, First Cause supra. The same answer as above applies to contention of Respondent with respect to pages 21, 22, 23.

Counsel cites *Eastman vs. Gurry*, 15 Utah 411—49 Pac. 310, and contends this case places the burden on Respondent to prove every step in the tax sale. The Legislature has changed the law since this case was decided.

80-10-35

“ \* \* The burden of showing any irregularity in any of the proceedings resulting in the sale of property for the nonpayment of delinquent taxes shall be upon him who asserts it.”

Also, 15-7-38 is much broader than the above Statute in case of special tax and permits procedure therein outlined only. See argument, First Cause, A.

See also:

**TREE vs. WHITE**

171 Pac. 2nd 398

Concerning Respondent's statement that there was no occasion for reimbursement for the taxes paid by Appellant, see Exhibit "F". This Court has in volumes of decisions decided to the contrary and Appellant shall not here recite again all these decisions holding in equity these taxes must not only be paid, but also, tendered into Court.

## **SECOND CAUSE OF ACTION**

### **A. FAILURE TO ESTABLISH EASEMENT.**

In Exhibit 1, the legal description fully describes the entire piece of property and then gives a right-of-way as follows:

“together with a right-of-way along the Sough line of the East 10 rods thereof.”

It is ridiculous for Respondent to say that they were merely taking water rights under the right-of-way. If the property had been described and omitted the right-of-way over other ground not within the description, or where the said right-of-way was not included within the property first described, then the argument of Respondent would at least escape being facetious, but when an under water grant is given by meets and bounds and all of the right-of-way described is a right-of-way over the very property already described, the assertions of Respondent are so ridiculous as to require no further comment. Counsel, again realizing the lower Court erred, claims abandonment. The trouble with this claim is that the lower Court's findings do not find an easement then an abandonment. The Court found, R 58:

“No grant exists or ever existed.”

Can Respondent claim an abandonment under the findings?  
Can Respondent rely on an abandonment without admitting a valid right-of-way?

And even more ridiculous than all is the statement of Respondent that grantor may retake from grantee the property by adverse possession.

### **THIRD AND FOURTH CAUSE OF ACTION**

Respondent has failed to answer Appellant's Brief sufficiently or set forth anything warranting comment.

### **FIFTH CAUSE OF ACTION**

#### **A. NO EVIDENCE WARRANTING RESTRAINING ORDER.**

In R 32 Appellant alleges property not claimed by Respondent and as shown from Exhibit “S” as belonging to

Appellant contained a ditch, and Appellant seeks to enjoin Respondent from interfering with same. Respondent, at R 59 and 60, makes no finding that the ditch is on property they claim, and yet the Court refuses to enjoin Respondent from interfering with a ditch on Appellant's property when there was evidence of such interference.

## DUNCAN vs. HEMMELWRIGHT

—Utah — 186 Pac. 2nd 965

“It is well settled in this jurisdiction that failure to make findings of fact on material issues is error and is ordinarily prejudicial.”

## S U M M A R Y

### P O I N T S

Point 1. 15-7-1 “ \* \* ASSESSMENTS \* NOT SUBJECT TO REVIEW IN LEGAL OR EQUITABLE ACTION, EXCEPT FOR FRAUD, GROSS INJUSTICE OR MISTAKE.”

Respondent makes no answer and does not even attempt to explain how the judgment of the lower Court can be sustained when there is no finding of fraud, gross injustice or mistake. The Legislature having spoken, the lower Court should be reversed.

Point 2. *IRREGULARITIES CANNOT VOID TAX SALE.*

The findings of the lower Court, should they have had evidence to support them, which of course, they did not, at the most pretend to make findings on irregularities only. Respondent has failed to show any law contra to Stott vs. Salt Lake City, holding that even under such findings the

judgment could not be sustained and, of course, the findings are not supported by any evidence showing even an irregularity in any of the particulars found.

Point 3. 15-7-40 *"IF THE OWNERS OF TWO-THIRDS OF THE PROPERTY DO NOT FILE OBJECTIONS, GOVERNING BODY HAS JURISDICTION."*

Here the Legislature has prescribed the only method by which the city could have been divested of jurisdiction to levy the assessment. Respondent claims the city did not have jurisdiction, but has failed to show that two-thirds of the owners filed objections and must, therefore, concede jurisdiction in the city.

Point 4. 15-7-38 (a) *"NO SPECIAL TAX SHALL BE DECLARED VOID \* \* IN CONSEQUENCE OF ANY ERROR OR IRREGULARITY."*

Point 5. *"BURDEN OF PROOF EVEN UNDER THESE CIRCUMSTANCES RESTS UPON PARTY WHO BRINGS SUCH SUIT."*

Point 6. *"MUST PAY TAX UNDER PROTEST, NOTICE IN WRITING OF INTENT TO SUE, ACTION WITHIN SIXTY DAYS TO RECOVER TAXES PAID ONLY, WHICH REMEDY SHALL BE EXCLUSIVE."*

Point 7. *"NO COURT SHALL ENTERTAIN ANY COMPLAINT THAT PARTY DID NOT MAKE TO BOARD OF EQUALIZATION."*

The above is all direct quotes from the Statute. The Legislature has spoken. This should have been the law under which the lower Court was to have been governed, although from the judgment rendered it is apparent that



the lower Court ignored the Statutes of the State of Utah, which should have governed its decision, particularly, the Statute above given. Had the Legislature said to Appellant, what legislation do you want, to require reversal of the lower Court, Appellant would have to say, nothing has been left out. The application of the Statute to the decision is too conclusive to require further comment.

**Points 4, 5, 6 and 7. *RESPONDENT HAS NEGLECTED TO DISCUSS ANY ONE OF THE AFOREMENTIONED ITEMS IN THE BRIEF SUBMITTED.***

**Point 8. *REIMBURSEMENT FOR TAXES PAID.***

The ridiculous assertion at page 25 in Respondent's Brief that there were no benefits derived from said sewer is ridiculous for the following reasons:

- (a) No evidence before the Court on this issue.
- (b) No finding of fact on this issue.
- (c) Even had there been such a finding and if the same were true, the law is to the contrary where the assessment is on a large piece, later broken into smaller tracts.

**Point 9. *RIGHT-OF-WAY BY DEED.***

Where the Appellant requested to draw a right-of-way deed for the right-of-way Appellant claims to therein be granted, Appellant could not have drawn an instrument more artfully to convey to his client a right-of-way, yet the lower Court has ignored the same.

**Point 10. *EASEMENT.***

Point 11. *DITCH FOUND TO BE OFF OF THE PROPERTY CLAIMED BY RESPONDENT, YET LOWER COURT FAILS TO RESTRAIN THE RESPONDENT, WHO OWNS NO INTEREST IN THE LAND, FROM INTERFERING WITH THE DITCH FOUND TO BE UPON THE LAND OF RESPONDENT.*

Point 12. *REMOVEMENT OF GRAVEL.*

Respectfully submitted,

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*Attorney for Appellant.*