

1956

R. Jerry Fivas and Alaire J. Fivas v. Joseph E. Peterson and Florence E. Petersen : Brief of Appellants

Utah Supreme Court

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IN IN THE SUPREME COURT

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R. JERRY FIVAS, and
ALAIRE J. FIVAS,
Plaintiffs and Respondents,

v.

Case No. 8,470.

JOSEPH E. PETERSEN and
FLORENCE E. PETERSEN,
Defendants and Appellants.

APPELLANTS' BRIEF.

CYRUS G. GATRELL,

Attorney for Appellants.

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IN THE SUPREME COURT
of the
STATE OF UTAH

R. JERRY FIVAS and
ALAIRE J. FIVAS,

Plaintiffs and Respondents,

-vs-

No. 8470

JOSEPH F. PETERSEN and
FLORENCE E. PETERSEN,

Defendants and Appellants.

APPELLANTS' BRIEF

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Two copies of within brief
received March 8, 1956.

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-vs-

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Defendants and Appellants.

APPELLANTS' BRIEF

STATEMENT OF FACTS

This is an appeal by defendants from an adverse judgment in an action to quiet title, or more correctly speaking, to determine adverse claim to a tract of land in Salt Lake County, which plaintiffs claim to have acquired through a sale for taxes for the year 1949 assessed against defendants, of which defendants had no notice by reason of the failure of the assessor

The case was tried entirely on documentary evidence (R.43) consisting of certified copy of tax sale record, auditor's tax deed, defendants' requests for admission of facts and plaintiffs' responses thereto, and plaintiffs' interrogatories and defendants answers thereto, which established the following facts:

Defendants acquired title to said tract by warranty deed recorded March 30, 1948, the record bearing the notation, "Recorded at request of J. F. Petersen, Riverton, Utah," the fee and entry book showing the deed after recording was mailed to "J. F. Petersen, Riverton, Utah." (R.8)

The tract was then assessed in the names of the defendants, but no address given (R.9) and consequently no tax notice was mailed to or received by defendants. (R. 17, 21, 24, 26, 29, Int. 14-15)

It was the practice of the County Treasurer to make out all tax notices upon a printed form, which form for the year 1949 bore the following notation:

"Effective date of delinquent charges:

Delinquent at Noon November 30, 1949

December 1st 2% penalty plus 25¢
advertising each property
January 1st, interest 8% per annum
January 10th sale fee 50¢ plus
redemption fee 50¢"

(R. 15, 18, Req.3)

With the delinquent list the treasurer published notice that unless the taxes, costs and penalty were paid before January 10, 1950, the property would be sold for taxes, penalty and costs. It was the custom and practice of the treasurer to demand and collect an advertising fee in addition to the tax and penalty, and he did not during the year 1949 or any subsequent year accept payment of tax and penalty after delinquency without the advertising fee. (R. 15, 18, Req. 4, 5)

The tax sale record (Ex.1) recited sale for \$10.23 tax, .20 penalty, costs .75, total \$11.18, and showed subsequent delinquent taxes for 1950 and 1951, but for no other years. The tax deed (Ex. 2) recited sale to plaintiffs for \$11.18, the precise amount for which it was sold to the county more than four years previously.

Notwithstanding these defects, the court adjudged the tax title to be good, and rendered judgment in favor

STATEMENT OF POINTS RELIED ON FOR REVERSAL.

1. That the absence of any address upon the assessment roll and consequent failure of defendants to get notice, invalidated the tax sale.

2. That the tax deed, Exhibit 2, showing a sale for an unlawful consideration is void on its face.

3. That the notice of the treasurer published with the delinquent list, demanding more than was due as a condition to preventing sale, was ineffective, and the sale therefore void.

4. That the treasurer having established the rule that after delinquency he would not accept the amount of the tax and penalty, a tender would have been unavailing and was therefore unnecessary as the law does not require a vain and useless act.

ARGUMENT.

Point 1.

The assessor having neglected to enter the address of defendants upon the assessment roll when he assessed the property to them, the treasurer was

unable to give defendants the valuation and tax

notices as required by Secs. 59-10-9 and 59-10-10, and defendants having had no notice and no opportunity for hearing the sale would on that account be void.

In *Jungk v. Snyder*, 28 U. 1, 78 P. 168 assessment of a patented mining claim to "Unknown owners" was held void, the very patent upon which the assessment was based giving the names of the owners, as here the record on which the assessment was based gave the address of the owners.

In *Asper v. Moon*, 24 U. 241, 67 P. 409, an assessment to "W. H. Folsom et al." of property owned by W. H. and H. P. Folsom was held void, as H. P. Folsom had no notice, though adequate notice was given to W. H. Folsom.

As stated by this court in *Tintic Undine M. Co. v. Ercanbrack*, 93 U. 561 (at p. 570) 72 P2d 1184:

"The records are at the courthouse, and the assessor must not be permitted to deprive an owner of his property by neglect and palpable inaccuracies in his official work."

True, our present statutes contain no provision expressly requiring the address of the

owner to be entered in the assessment roll, the Legislature of 1919 having by Chap. 53 amended Sec. 5905 C.L.'17 to read:

"The state tax commission must prepare and furnish to each county an assessment book with appropriate headings, in which must be listed by the county assessor of each county all property within the county."

thus substituting for a section of about four and a half folios, containing 16 specifications, one of but 34 words eliminating all 16 specifications, but we do not believe the legislature intended to, or could, eliminate the constitutional requirement of due process, which requires notice and an opportunity for a hearing.

Point 2.

The tax deed reciting a sale for an inadequate consideration was void on its face. Under the statute the deed must recite the consideration. Sec. 59-10-26 provides that all delinquent taxes and penalty bear interest at 8% per annum from January 1st following delinquency. Sec. 59-10-64 requires the auditor to give notice of the final

sale, specifying that

"No bid for less than the total amount of taxes, interest, penalty and costs which are a charge upon such real estate will be accepted,"

and he is directed to

"sell all such real estate for which an acceptable bid is made: * * * * and the highest bid shall be construed to mean the bid of that bidder who will pay in cash the full amount of the taxes, penalties, interest and costs for the smallest portion of the entire parcel. * * * * Deeds issued by the county auditor in pursuance of this section or of section 59-10-61 shall recite the total amount of all the delinquent taxes, penalties, interest and costs which were paid in for the execution and delivery of the deed."

Under subsection 8, lands not disposed of at the May sale may thereafter be disposed of by the county commissioners

"for such price and upon such terms as the said board may determine,"

but no such discretionary power is vested in the auditor. He may sell only for

"the full amount of the taxes, penalties, interest and costs," neither more nor less.

The deed reciting the sale to the county for taxes of 1949 in the sum of \$10.23, the 2% penalty

would be 20¢, a total for tax and penalty of \$11.43, which, under Sec. 59-1-26 would bear interest at 8% per annum from Jan. 1, 1950, to May 13, 1954, a period of 4 years, 4 months and 12 days, yet the deed for plaintiff recites a consideration of but \$11.18, the exact amount of the taxes, penalty and costs without interest, so the deed appears to be void on its face. In addition, the tax sale record (Ex. 1) affirmatively shows delinquent taxes for two subsequent years.

Concerning a deed which was void on its face in showing the sale to have been made to the county as a competitive bidder, in *Wall v. Kaighn*, 25 U. 244, 144 P. 1100, this court said:

"While we have no statute prescribing the form of a tax deed, yet for that reason statements in a tax deed showing an illegal or void sale, or that the deed was improperly issued, and which are made in connection with and concerning recitals required to be stated, cannot be disregarded, and the deed treated as valid. In the case of *Price v. Barnhill*, 79 Kan. 93, 98 Pac. 774, the court said:

"A statement in a tax deed showing that it was improperly issued is fatal to its validity, although occurring in the course of a recital not required by the statute."

"Mr. Justice Sharswood, in *Ball v. Busch*, 64 Mich. 336, 31 N.W. 565 said:

"The legislature did not intend to say that a paper shall be held *prima facie* valid, when it carries upon its face the evidence that shows it is void."

"The Maine Court said the same thing in *Allen v. Morse*, 72 Me. 502.

"Cooley in his work on taxation (3d Ed.) at page 999, says:

"It has been held that if the recitals in a tax deed show the proceedings to have been in any respect defective, the deed cannot be helped by showing that those proceedings were in fact good."

"To the same effect see *Grimm v. O'Connell*, 54 Cal. 522; *Brady v. Dowden*, 59 Cal. 51. The statement in 37 Cyc. 1436, supported by cases there cited, is, we think, applicable to the question in hand:

"A tax deed is void if it omits any of the recitals expressly required by statute to be incorporated in it; and aside from such requirements, it must contain sufficient recitals of fact to show a compliance with the law under which the land became liable to sale and was sold, and these must not be in the form of conclusions of law, as that proceedings were taken "according to law," or "in manner and form as directed by law," but the particular facts must be recited. Especially it is necessary to recite enough of the previous proceedings to show authority in the officer making the sale, and the authority for the execution of the deed and the manner of its execution; and the recitals in a tax deed of lands to a county ~~taxation~~ must show affirmatively the right of the county to take the land, but these conditions being met, and the law being silent as to the incorporation of particular recitals, it is generally held, that only so much of the previous history need be set out as it is

essential to the meaning and validity of the tax deed, standing by itself as an independent instrument of conveyance. But of course, if it shows that it was made without any legal authority, or shows disobedience to any requirement of the law, it is void and inoperative for every purpose."

But, say the plaintiffs, though the deed may recite an inadequate consideration and therefore appear to be void on its fact, it is otherwise made to appear that there was in fact sufficient consideration, referring to plaintiffs' responses to defendants' requests for admission of facts. But, even assuming that a deed void upon its fact might thus be validated, the contention is without merit. Plaintiffs admit (R.9) that on the date of the May sale in 1954 there were no taxes upon said real property unpaid except for the years 1949, 1950, 1951, 1952, 1953, and that the amount of such taxes, with penalty and interest to said date totaled \$64.59, and

"That plaintiffs admit that the amount paid by them to the County Auditor or to the County Treasurer, or both, of Salt Lake County for and in connection with the said tax deed was not in excess of the sum of \$64.56."

We do not think plaintiffs in drawing this response intended it to be an admission of the fact

requested by defendants, but it certainly is not a "denial under oath," and it leaves to surmise how much was paid to the auditor upon the sale, how much to the treasurer, how much for, and how much in connection with, the deed, whether some sums were paid by way of redemption from subsequent sales for taxes of 1952 and 1953, (forbidden by Sec. 59-10-41) and certainly does not indicate that any sum was paid for the deed other than the consideration recited therein; so even though plaintiffs may now claim this as an admission of the facts requested by defendants, it cannot be said to show the payment to the auditor of an adequate consideration for the deed.

It is said that "Where the statute prescribes the particular form to be used, that form becomes substance and must be strictly pursued, or the deed will be held void." (Blackwell on Tax Titles, Sec. 773, Black on Tax Titles, Sec. 395, 24 Cal. Jur. Taxation Sec. 341) and while our statutory form is permissive, the provisions as to what it shall contain, above quoted, are mandatory.

Under the case of Wall v. Kaighn, supra holding that a deed showing the sale to have been made unlawfully is void on its face, we think no further citations are necessary, but would call attention to the recent case of Dreiling v. Colby, 170 Kan. 570, 228 P.2d 504, where the court said at page 507 of the Pacific Report:

"The tax deed was invalid for another reason. It did not recite the data required by the statute to make it valid. That was sufficient to sustain the judgment. Evidence adduced on the invalid motion for a new trial that interest, penalties and costs were added, if true, did not comply with the requirements of the statute relative to what the tax deed was required to contain."

See also Davis v. Harris, 180 Okla. 626, 71 P.2d 616; Collins v. Jolley, 79 Kan. 695, 100 P. 477; Salmer v. Lathrop, 10 S.D. 216, 72 N.W. 570; Hill v. Turnersverein, 77 Okla. 242, 187 P. 920.

Introduction of void deed does not make prima facie case.

Kneke v. Knight, 206 Cal. 225, 273 P. 786

Point 3.

The notice published with the delinquent list demanding more than was due as a condition to preventing sale was ineffective, and the sale there-

fore void.

Formerly the liability for the advertising fee accrued upon delinquency and publication of the delinquent list, but that was the only consequence of delinquency up to the sale date, and it was profitable for the heavy tax payers to delay payment until just before the sale date, but in 1915 the legislature made three amendments to the revenue act in the 1907 compilation. Section 2615 fixing the date of delinquency was amended by adding the provision for the penalty; Section 2620 providing for publication of notice was amended by deleting reference to "cost of publication" and substituting the word "penalty"; Section 2622 relating to the treasurer's fees was amended by deleting all reference to "cost of publication" and reducing the certificate fee to 50¢.

We here insert a composite of so much of said sections as is material to this question, a line running through the words stricken by the amendment, and the words inserted being underscored:

Sec. 2615. * * * All delinquent taxes shall bear a penalty of three per cent of the amount of such taxes.

Laws 1915, ch. 77, p. 97.

Sec. 2620. * * * The county treasurer must publish with such list a notice that unless the delinquent taxes together with the cost of publication penalty are paid * * * the real property upon which such taxes are a lien will be sold for taxes, penalty and costs * * * Laws 1915, ch. 27, p. 34.

Sec. 2622. The treasurer shall collect two dollars fifty cents for each certificate of sale in full for all his services, and ~~shall charge and collect twenty-five cents for publishing the name and amount of taxes due on each piece of property sold, which~~ sum shall be paid by him into the county treasury.

Laws 1915, ch. 95, p. 139

The amendments thus deleting from Sec. 2620 the requirement that "cost of publication" be paid as a condition to preventing sale, and substituting the word "penalty" withdrew from the treasurer the authority to charge the advertising fee on taxes paid before the sale date, and the amendment to Sec. 2022 deleting all reference to "cost of publication" withdrew the authority to charge it on sale and reduced all costs on sale to 50¢, notwithstanding the failure of the legislature to notice

Sec. 975 in the fee bill fixing the fees of the treasurer.

These sections were carried into the subsequent publications with the following section numbers:

<u>1907</u>	<u>1917</u>	<u>1933 & 1943</u>	<u>1953</u>
975	2524	28-2-5	21-2-5
2615	6015	80-10-25	59-10-26
2620	6016	80-10-28	59-10-29
2622	6019	OMITTED	-----

By the omission from the Revision of 1933, the authority of the treasurer to charge the fees prescribed by the section in the fee bill was revived, if but only/and when any property went to sale for taxes.

In *Fidelity Inv. Co. v. Salt Lake County*, 119 U. 419, 228 P.2d 278, this court said:

"In this case the county treasurer specified in the tax notice that commencing December 1, 1949, a penalty of 2% would be added "plus 25¢ advertising each property", and in the publication of the delinquent list he specified that "unless the delinquent taxes, together with the penalty and costs" were paid before January 10, 1950, the properties would be sold on said date for taxes, penalty and costs. The county treasurer was in error in demanding payment

of an advertising fee of 25 cents in instances where the taxes together with the penalty were paid prior to said date. There is no statutory authority to collect the 25 cents advertising fee in addition to the penalty if the delinquent taxes with penalty are paid before date of preliminary sale."

Thus, there is no question that the treasurer had no authority to collect or to demand the payment of an advertising fee as a condition to preventing sale, and the authorities hold that an excessive demand in the notice renders the notice ineffective and the sale void.

Alexander v. Pitts, 61 Mass. (7 Cush.) 503.
Warden v. Broome, 120 Cal. App. 187, 98 P. 252.
Walton v. Moore, 58 Ore. 237, 113 P. 58.
Hall v. Chamberlain, 31 Cal. 2d 873, 192 P.2d 759.
Clarke v. Strickland, 5 Fed. Cas. p. 984.
Colkins v. Doollittle, 45 Cal. App. 776, 188 P. 601.
Lawrence v. Ayres, 206 Okla. 218, 242 P. 142.
Gage v. Lyons, 138 Ill. 590, 28 N.E. 832.

In Alexander v. Pitts the tax was \$330. Notice said \$4.12. Sale for correct amount, but held void.

In Warden v. Broome the delinquent list stated the amount as \$19.90 but the correct amount was \$19.40, for which amount it was sold. The court said:

"The publication of the delinquent list setting forth the amount due for taxes, penalties and costs, is a prerequisite to a valid sale to the state * *. Since it is a statutory requirement we cannot give less weight

to its importance than to other provisions of the statute * * * It is immaterial that the property was sold to the state for the correct amount. This result might have been accomplished equally well in the absence of any advertisement of the amount due. The effect of the proceedings is to divest the owner of his title by virtue of statutory proceedings. In such proceedings the provisions of the statute should be strictly complied with."

In *Walton v. Moore* the notice stated the amount of interest to be \$1.12, when the amount due was \$1.05.

In *Hall v. Chamberlain* the amount was \$56.46, but the addenda gave the amount necessary to redeem as \$58.56.

In *Clarke v. Strickland* as the county commissioners levied a county tax greater than authorized, the whole such tax was void, and as stated in the syllabus:

"The treasurer in advertising the delinquent tax in this case, gave as the sum due the whole amount including the county tax. This was a fatal defect in the proceedings. The county tax being illegal, was not due."

Colkins v. Doolittle involved the notice to redeem where the statute provided that the applicant for a deed should file an affidavit showing the

giving of such notice, and if redemption be made after the filing of such affidavit the redemptioner "must pay in addition to the other amounts required, \$3.00 for the service of the notice and the making of such affidavit." The court says:

"This \$3.00 is no part of the amount due at the time when the notice is given; and if the notice includes it in the amount necessary to effect a redemption at that time, the notice is ineffective, and the deed given thereunder conveys no title. Reed v. Lyon, 96 Cal. 501, 31 P. 619."

In Lawrence v. Ayres, in the 5th syllabus by the court, the law is thus stated:

"The inclusion in the notice for resale of lands for nonpayment of taxes of one per cent penalty on \$62.97 taxes, interest and penalties in the sum of sixty three cents but which penalty had not accrued and was not due and delinquent at the date of the first publication of such notice, renders the notice fatally defective and the resale deed based thereon is invalid."

In Gage v. Lyons, it appears that the tax sale is made after a judgment fixing the amount, and the court says:

"If the judgment against land for taxes includes an illegal tax or improper costs, and there is no appearance by the owner, a sale of the property thus wrongfully charged

will be void. (Citations) * * * It is clear that the items of 3 cents for selling each lot; making delinquent list on precipe, 2 cents; and attending sale and issuing certificates of sale, 15 cents,—could not have been earned and due when the judgment was rendered. The lot-owner had the right to pay his taxes after judgment without being obliged to pay these items of costs, but, as they were included in the judgment, it could not be discharged or satisfied without the payment of the full amount for which it was rendered."

And so we say that a property owner, at any time after delinquency has the right to discharge the tax lien by payment of the amount then due for tax and penalty, and a demand that unless he pays additional "costs" for advertising renders the notice fatally defective and invalidates the sale.

Point 4.

The treasurer having established the rule that after delinquency he would not accept the amount of tax and penalty, tender would have been unavailing and was therefore unnecessary as the law does not require a vain and useless act.

Consistent with the notice hereinbefore discussed, the treasurer demanded and collected the advertising fee

on any tax paid after delinquency, so the tender of

the tax and penalty without the advertising fee would have been a vain and useless act, hence was unnecessary, and for this reason also must the sale be held void. As stated by the court in *Hills v. Exchange Bank*, 105 U.S. 319 at p. 321:

"It is the general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established in this court in repeated decisions in regard to another branch of the law concerning the collection of taxes. *Bennett v. Hunter*, 9 Wall. 326; *Tacey v. Irwin*, 18 Id. 549; *Atwood v. Weems*, 99 U.S. 183."

And this court so declares the law in Utah:

Thomas v. Johnson, 55 U. 424, 186 P. 437.
H.O.L.C. v. Washington, 108 U. 469, 161 P.2d 355.

In *Tacey v. Irwin*, 85 U.S. (18 Wall.) 549, at p. 551 the court says:

"It is difficult to see how, upon the case as found here, the sale can be sustained. The law does not require the doing of a nugatory act, as would have been a formal tender of payment, after the action of the commissioners, declining to receive the taxes from any person in behalf of the owner. *Bennett v. Hunter* decides that the owner has the right to pay either in person or through anyone not disavowed by

him, who is willing to act for him. This right the commissioners, by the rule which they established and the uniform practice under it, effectually denied. The friends and agents of absent owners were informed that it was useless to interpose on their behalf, and that unless the owner appeared in person and discharged the tax the property would be sold. This was equivalent to saying that a regular tender by any other person would be refused. While the law gave the owner the privilege of paying by the hands of another, the commissioners confined the privilege to a payment by the owner himself. This was wrong and was a denial of the opportunity to pay accorded to the owner by the act, and the lands were therefore not delinquent when they were sold.

"If an offer in a particular case to pay the tax before sale, and refused by the commissioners because not made by the owner in person, renders a subsequent sale by the commissioners void, surely a general rule announced by the commissioners, that in all cases such an offer would be refused must produce the same effect. Such a rule of necessity dispenses with a regular tender in any case."

In Chicago, K. & W. R. Co. v. Harris, 49 Kan. 415. 30 P.

456, the third paragraph of the syllabus by the court reads:

"In a proceeding of mandamus to compel the performance of a public duty, no formal demand upon the defendants is necessary where their course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing."

And in the body of the opinion the court says:

"Having distinctly manifested their purpose not to perform this duty, the question of a formal demand is no longer important. It appears that it would have been useless and foolish, and the law rarely requires the doing of a useless act. (Citations.)"

"No tender is necessary where the position taken by the collector renders it a useless proceeding."

Cooley on Taxation, 4th Ed. Sec. 1251.

So in the case at bar, a tender after delinquency and before the sale date would have been "useless and foolish", and therefore not required.

We call attention particularly to plaintiffs' response to paragraph 5 of defendants' second request for admission of facts. (R.18) (It may be noted, however, that the case of Fidelity Inv. Co. v. Salt Lake County, supra, establishes that there was at least one tender of the amount of the tax and penalty without the advertising fee, other than the one made by "Cyrus G. Gatrell," made in the case of Gatrell v. Salt Lake County hereinafter discussed.)

We desire to call the attention of the court to the case of Gatrell v. Salt Lake County No. 96625

in the District Court of Salt Lake County, No. 8093, in this Court, which involved the same questions covered by points

3 and 4 in this brief. The property involved a tract consisting of 6 complete blocks, and the major portion of two others in St. Albans, arbitrarily divided into 5 items embracing disconnected lots scattered throughout the plat, had been sold for taxes for the year 1950 assessed against the owner, Falconaero, Inc. and taxes for 1951 were also delinquent and reported back to the 1950 sale. In July of 1952 the plaintiff Gatrell as mortgagee, deeming the sale invalid, tendered to the treasurer the full amount of the tax and penalty for 1950 with interest thereon up to the date of tender, but not including the advertising fee or any other costs, also the same for the year 1951, which tenders were rejected, and plaintiff then brought his action, depositing the amounts of such tenders in court with his complaint. While the action was pending taxes for 1952 became delinquent, and plaintiff late in December tendered payment of the tax and penalty, which tender was likewise rejected, notwithstanding the decision in the Fidelity Inv. Co. case rendered nearly two years before. The District Court adjudged the tax sale to be void and that plaintiff by his tender and deposit

of said sums in court had satisfied and discharged the tax liens for the three years 1950, 1951, and 1952. Defendant appealed, the record was filed in this court Oct. 15, 1953, and time to file brief extended to Dec. 15, 1953, and on December 16, the appeal was dismissed on motion of appellant, so this court was not permitted to pass on the questions involved, in that case.

The memorandum opinion of the trial judge in that case is of no assistance, as that was given under a misapprehension, due to the blunder of the compiler of U.C.A. 1953 in renumbering the sections, making section 2125 refer to section 59-10-30 instead of 59-10-29. The error was called to his attention and a written argument furnished him and the defendant containing the substance of the discussion in this brief under points three and four, and judgment was then rendered accordingly.

It may be interesting to note that the rule that one is not required to make a tender when it is reasonably certain that it would be rejected, has been applied in a labor dispute, where it was held that an

employee having been notified by the union that his future tender of dues would not be accepted unless he presented a valid excuse for non-attendance at union meetings or paid fines incident thereto, a tender of future dues was not required, and the Union was not justified in requiring his discharge for failure to pay such dues. Par. 12,980 Nat. Lab. Rel. Bd., Dec. page 12579.

CONCLUSION.

We respectfully submit that the plaintiffs' tax title is void for each of the four grounds mentioned herein, that the judgment of the lower court should be reversed and the case remanded to the lower court with instructions to enter judgment for the defendants, subject to the right of plaintiffs to establish and foreclose any lien they may be entitled to under the provisions of Section 59-10-65 U.C.A. 1953.

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