

1956

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

Utah Supreme Court

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Civil No. 8470

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IN THE SUPREME COURT
of the
STATE OF UTAH

R. JERRY FIVAS and ALAIRE J.
FIVAS,

Plaintiffs and Respondents,

— vs. —

JOSEPH F. PETERSEN and
FLORENCE E. PETERSEN,

Defendants and Appellants.

RESPONDENTS' BRIEF

JAMES W. BELESS, JR.
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IN THE SUPREME COURT of the STATE OF UTAH

R. JERRY FIVAS and ALAIRE J.
FIVAS,

Plaintiffs and Respondents,

— vs. —

JOSEPH F. PETERSEN and
FLORENCE E. PETERSEN,

Defendants and Appellants.

Civil No. 8470

RESPONDENTS' BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment in a suit to quiet title wherein the plaintiffs relied upon a sale for taxes for the year 1949 and particularly upon an auditor's tax deed issued after the May sale in 1954. At the time of trial the plaintiffs introduced in evidence the original auditor's deed (Ex. 1) and a copy of the tax sale record certified by the official custodian of the record at the time of the certificate under the seal of his office, (Ex. 2) making a prima facie case pursuant to Section 59-10-36, U.C.A. 1953.

The burden then shifted to the defendants, who had filed an Answer generally denying title in the plaintiffs, to prove the title in the plaintiffs as derived from the tax sale as defective and invalid. The defendants introduced no evidence, and it was stipulated that all answers to interrogatories and requests for admissions of fact as filed by both parties should be admitted. Judgment was given by the trial court in favor of plaintiffs.

STATEMENT OF POINTS

On the record as made in the trial court the defendants in the trial court, as now on appeal, argued for invalidity of the tax sale on the four points as set forth in Appellants' Brief. Respondents now reply to these arguments in the same order and present the following points to the court for consideration:

POINT I.

FAILURE OF THE TAXPAYER TO RECEIVE TAX NOTICES DID NOT INVALIDATE THE TAX SALE, AS THE BURDEN IS ON THE TAXPAYER TO PROTECT HIS PROPERTY FROM TAX SALE BY DETERMINING AND PAYING HIS TAXES.

POINT II.

THE TAX DEED RECITES A SUFFICIENT CONSIDERATION IN COMPLIANCE WITH PARAGRAPH (5) OF SEC. 59-10-64, U.C.A. 1953, WHICH IS BY ITS TERMS DIRECTORY AND WHICH MUST BE SO CONSTRUED TO GIVE REASON AND EFFECT TO THE OTHER PARAGRAPHS OF THE SAME SECTION.

POINT III.

THE NOTICE PUBLISHED WITH THE DELINQUENT LIST CONTAINED NO EXCESSIVE DEMAND WHICH WOULD INVALIDATE THE SALE.

POINT IV.

THE DOCTRINE OF WAIVER OF TENDER HAS NO APPLICATION TO THIS SITUATION. WAIVER OF TENDER REQUIRES KNOWLEDGE AND INTENT.

ARGUMENT

POINT I.

FAILURE OF THE TAXPAYER TO RECEIVE TAX NOTICES DID NOT INVALIDATE THE TAX SALE, AS THE BURDEN IS ON THE TAXPAYER TO PROTECT HIS PROPERTY FROM TAX SALE BY DETERMINING AND PAYING HIS TAXES.

Appellants have argued that both the notice of valuation and the tax notice were invalid and improper as they were not mailed by the County Treasurer and further that the tax sale was invalidated as the County Assessor did not have on the tax rolls any address for the taxpayer from which the treasurer could obtain his mailing address.

Appellants relied for authority upon *Jungk v. Snyder*, 28 Utah 1, 78 P. 168 (1904). That case involved the validity of a tax notice on a mining claim, wherein the notice showed the owners as "unknown", and the notice was actually mailed to "Ophir, Unknown, Henrietta

claim." The parties attacking the tax sale showed that the assessor had made no attempts to locate and identify the owners and their addresses and that the property was assessed in the name of the claim, with the notation "owners unknown." The applicable law was Section 43 of the Revenue Act of 1896 (Sess. Laws 1896, P. 435, c. 129) which provided specifically and spelled out that the assessor should determine so far as possible the names of the owners and their addresses from "taxpayers' statements, county records, or otherwise." The section construed in the *Jungk* case is not in the law today and was succeeded by Sec. 5912 R.S. 1898 and C. L. 1907 and Sec. 2610, R.S. 1898, now both carried after many amendments into present Sections 59-10-9 and 59-10-10, U.C.A. 1953, which generally provide for the mailing of valuation and tax notices by the County Treasurer. By the amendments to the old laws the entire theory of the law of taxation has been changed with the burden being placed upon the taxpayer instead of the county officials to see that the taxpayer ultimately receives notices regarding his property. This is both logical and reasonable in view of the increase in population and the increase in number of separate assessed parcels of property. The time has passed when the county officials should be expected to know personally any great number of taxpayers or should be expected to conduct intensive investigation to identify, locate and personally contact taxpayers.

The changes in the applicable law have kept pace with the practical population changes. Section 59-10-9,

U.C.A. 1953, now provides regarding the valuation notice as follows:

“The county treasurer shall furnish to each taxpayer by mail to the address noted on the assessment book, postage prepaid, or leave at his residence or usual place of business, *if known*, a notice of the kind and valuation of property assessed to him, also notice of the days fixed by the county board of equalization for hearing complaints.” (Italics ours.)

Section 59-10-10, U.C.A. 1953, provides regarding the tax notice from the treasurer as follows:

“He shall proceed to collect taxes and shall furnish to each taxpayer, except car companies and the owners of automobiles, motor stages, motor transports, and trailers employed in common-carrier business, by mail, postage prepaid, or leave at his residence or usual place of business, *if known*, a notice of the amount of tax assessed against him, which shall set out the aggregate amount of taxes to be paid, for state, county, city, town and school purposes, etc.” (Italics ours.)

We stress the inclusion in each section of the phrase “if known,” which we submit must reasonably mean if known to the County Treasurer, either through personal knowledge or sources of information available in his *own* office and in regard to the property taxed.

The Washington Supreme Court in *Spokane County v. Glover*, 2 Wash. 2d 162, 97 P. 2d 628 (1940), decided that “the proceeding to assess and collect taxes upon real property was a proceeding in rem; that the owner of

property is chargeable with knowledge of every step in the tax procedure; and that statutory provisions with regard to owners are directory rather than mandatory." The *Glover* case involved a question as to whether the County Treasurer should go outside his office and use every possible means to locate taxpayers, in fact conducting a fugitive hunt for them, or whether a duty was on the taxpayer to keep the treasurer informed as to his whereabouts. The court stated that the policy should reasonably be that "which charges the owner of property with knowledge of the fact that his property is taxable every year" and that the "legislature did not intend to ineffectuate the entire taxing system by making the owner's duty to pay taxes conditional upon the sending of a notice by the treasurer." The *Glover* case contains a full discussion of the difficulties that would face the treasurer if by necessity he had the burden of locating all taxpayers.

Sutter v. Scudder, 110 Mont. 390, 103 P. 2d 303, 306 (1940) gives a statement of general policy in the following language:

"It is incumbent upon a property owner to take notice of the known fact that all property is taxed annually, and unless the taxes are paid that the property will be sold at tax sale," and cites 61 C.J. 565; *Detroit Life Ins. Co. v. Fuller*, (Mich.) 199 N.W. 699; *McGuire v. Bean*, 151 Wash. 474, 276 P. 555.

Appellants have argued that failure to get a tax notice to the taxpayers involved ultimately taking their property without due process.

In *Pender v. Ebey*, 194 Okla. 407, 152 P. 2d 268 (1944) the court stated that:

“* * * generally, every person is charged with knowledge as to whether his taxes are paid, and if they are not paid he is charged with knowledge that the land may be sold in the manner provided by law, and owner is charged with notice of the time and place where such sales are required to be made.” See also *N. H. Ranch Co. v. Gann*, 42 N.M. 530, 82 P. 2d 632; *Jones v. Mills County* (Iowa) 279 N.W. 96; *Selzer v. Baker*, (N.Y.) 65 N.E. 2d 752 (1945).

We submit that there can be no lack of due process when the burden is actually on the taxpayer to protect his property and to see that his taxes are paid.

The record in the instant case shows through the admissions of the defendants in the negative that they did not make any inquiry of the county assessor or county treasurer as to why tax notices were not received, where the tax notices were, or what the taxes amounted to. (R. 29). Appellants answered in the negative Respondents' Interrogatory No. 25 which was: “If no tax notices for the years 1948 and subsequent years covering said property were received by you, did you ever contact Barnes Banking Company or Horace J. Knowlton or Elsie M. Knowlton to make inquiry regarding said tax notices or the taxes due upon said property?” (R. 22). The record reveals that Barnes Banking Company had a mortgage upon said property, and the Knowltons were the grantors of appellants. (R. 22, 24).

We submit that the logic of the cases cited above, which hold that the taxpayer is charged with knowledge of his property being subject to tax and with the burden of seeing that the taxes are paid, should control. This burden on the taxpayer necessarily imposes on him the duty of supplying the treasurer with a current address and of checking with the treasurer as to why any tax notice is not received if a tax may be assumed to be due. We submit that the present statutes, Section 59-10-9 and Section 59-10-10, U.C.A. 1953, are a legislative pronouncement of a change of policy supporting the practical doctrine of the *Glover* case, *supra*, and abandoning the unworkable theory of our old statutes and the *Jungk* case, *supra*.

POINT II.

THE TAX DEED RECITES A SUFFICIENT CONSIDERATION IN COMPLIANCE WITH SEC. 59-10-64 (5) WHICH IS BY ITS TERMS DIRECTORY.

The appellants have referred to Section 59-10-64, U.C.A. 1953, in arguing that the tax deed issued by the County Auditor to the respondents on May 13, 1954 was void on its face because the consideration as recited was not that actually paid.

The statute provides in paragraph (5), which also sets out the form of the deed, as follows: (*italics ours*)

“59-10-64. (5) The County auditor *is authorized* in the name of the county to execute deeds conveying in fee simple all property sold at said public sale to the purchaser and to attest the same

with his seal. 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, the year for which the property was assessed and sold to the county at preliminary sale, a full description of the property and the name of the grantee, and when executed and delivered by the auditor shall be prima facie evidence of all proceedings subsequent to the preliminary sale and of the conveyance of the property to the grantee in fee simple. A copy of deeds issued by the county auditor in pursuance of this section and section 59-10-61 shall be promptly sent to the state land board.

The deed *may be substantially* in the following form:

TAX DEED

.....County, a body corporate and (politic) of the State of Utah, grantor, hereby conveys to....., grantee, of the following described real estate in..... County, Utah:

(Here describe the property conveyed)

This conveyance is made in consideration of payment by the grantee of the sum of \$..... delinquent taxes, penalties, interest and costs constituting a charge against said real estate, which was sold to said county at preliminary sale for nonpayment of general taxes assessed against it for the year 19..... in the sum of \$.....

Dated this day of,
19.....

County

By
County Auditor"

According to this statute the county auditor "is authorized" to give a deed as set out above. "Authorized" is a word that has very generally been construed by the courts to imply permissive use of discretion. See *Creek Nation v. United States*, 318 U.S. 629, 87 L. Ed. 1046; *State v. Laven*, (Wis.) 71 N.W. 2d 287.

The statute provides the form for the tax deed, and it is specific in providing that the deed "may be substantially" in that form. "Substantially" is again another word that has been construed by the courts. In *People ex rel. Darr v. Alton R. Co.*, (Ill.), 43 N.E. 2d 964, the court held "substantially the following form" did not require that notice of protest should be in exact form as that prescribed in a statute, but meant only that notice should, in main, contain all essential requirements of the form prescribed. "Substantial compliance" is a compliance in substance, not necessarily a literal, exact compliance. *Martien v. Porter*, 68 Mont. 450, 219 P. 817.

The county auditor is required by Section 59-10-64 (4), U.C.A. 1953, to require payment of not only the taxes, penalties, interest and costs for the single year for which the sale is made, but also all other taxes, penalties, interest and costs for subsequent years which are a charge

against the real estate being sold. A comparison of paragraph (4) of Section 59-10-64 thus requiring sale for "an amount including all taxes assessed subsequently to the date of the preliminary sale" and of paragraph (5) of the same section which provides the substantial form for the tax deed and sets forth in that form provision for the one single year of the sale only, compels the conclusion that the amount paid to the auditor must of necessity be greater than the consideration provided to be recited in the form.

There would appear to be no good reason in either law or logic why the exact consideration, either the full exact amount of taxes, interest, costs and penalties for the first year or the full amount of all taxes and other items which are charged against the property, should by necessity be included on the face of the tax deed. There is no question but that the usual deed of conveyance whether warranty or quitclaim, need not recite the actual full consideration in dollars to be valid. The statute is clearly directory and gives only a suggested form, and failure to follow exactly that form should not prejudice the validity of the conveyance and the entire tax sale which it consummates.

In any event, Section 59-10-64 in paragraph (5) thereof makes the tax deed prima facie evidence of all proceedings subsequent to the preliminary sale, in this instance, on January 10, 1950, and of the conveyance of the property itself to the grantee. See 30 A.L.R. 8 and 88 A.L.R. 264 citing cases upholding this prima facie evi-

dence rule. The Appellants have complained that the deed fails to show on its face the payment of interest due on the 1949 taxes. However, the record fails to show that as a matter of fact all interest due was not paid. By their answers to the appellants' request for admissions of fact, the respondents admitted that the amounts of taxes and penalties for the years 1949 to 1953 inclusive, together with interest to May 13, 1954 amount to a total of \$64.56 (Answer No. 6 dated December 23, 1954). (R. 9). The respondents further admitted that the amount paid by them to the County Auditor or to the County Treasurer or both for the tax deed was not in excess of the sum of \$64.56 (Answer No. 7 dated December 23, 1954) (R. 9). This latter answer of the respondents was made in response to the request for admission of facts of the appellants which requested an admission that the amount paid by the respondents was in excess of the sum of \$64.27, which figure was corrected by the respondents in their answer to coincide with the total amount as actually due and as admitted in their previous answer (Defendant's Request No. 7, dated December 16, 1954) (R. 5).

Appellants have cited *Wall v. Kaighn*, 45 Utah 244, 144 P. 1100, as a case in point under Section 59-10-64, U.C.A. 1953, and quoted language from that decision. The *Wall* case involved an auditor's deed which recited facts which clearly indicated that the county itself was a competitive bidder at its own sale and which failed to show any circumstances whereby the county could be a lawful purchaser. This was a case decided in 1914 which

construed Sections 2621, 2623, and 2629, R.S. 1898, Comp. L. 1907. Many amendments and changes have been made in those sections since 1914, and Section 59-10-64, U.C.A. 1953, here under consideration, was not in the law in its present form at the time of the *Wall* decision.

In the instant tax deed there is nothing in its recitals which shows any irregularity in the tax sale. The statute, Sec. 59-10-64, U.C.A. 1953, calls for a showing on the deed of interest paid. The deed issued recited interest paid. (Ex. 1).^{*} The other authority cited by appellants is *Dreiling v. Colby*, 170 Kan. 570, 228 P. 2d 504, wherein the Kansas court by dicta refers to a tax deed which failed to recite the data required by statute. The opinion in this case is of no help in construing our statute as it fails to show what requirement was lacking. The Kansas statute, however, appears by comparison to be mandatory as to its requirements regarding recitals to be contained in the tax deed by provision that “said deed *shall recite* —.” (Italics ours.) Kansas G.S. 1935 79-2501.

We question the propriety of the expression “void on its face” as used by the appellants, who are affected in no way by any variation in setting forth and itemizing the actual consideration paid, including interest. The tax debtor should not be permitted to benefit by such harmless variation in consideration recited (where an intelligent adherence to two paragraphs of the same section, namely, 59-10-64 (4) and (5) require a variation) in avoiding an otherwise valid tax sale. We submit that the language of Section 59-10-64 and a logical interpreta-

tion of that statute should call for a construction of the section as being *directory* only and not mandatory.

POINT III.

THE NOTICE PUBLISHED WITH THE DELINQUENT LIST CONTAINED NO EXCESSIVE DEMAND WHICH WOULD INVALIDATE THE SALE.

Appellants argue that an excessive demand was made in the published delinquent list because of an alleged practice of the county treasurer in collecting a 25c advertising fee between December 1st and the following January 10th as claimed to be allowed (1) by reference thereto on the tax notice, or (2) because of an interpretation of the word "costs" in the delinquent list to be synonymous with "advertising fee."

Respondents emphasize that the record of this case will not support the conclusions of the appellants as set forth in their Statement of Facts (App. Br. 4) that there was any established custom and practice for the County Treasurer to demand and collect an advertising fee in addition to the taxes and penalties. On the contrary the record does establish that there was *no* policy or practice in this regard (R. 18).

The conduct of the County Treasurer in the preparation of both the tax notice and the delinquent list was entirely in accord with statutory requirements. Section 59-10-10 and Section 59-10-29, U.C.A., 1953.

Appellants rely chiefly on *Fidelity Investment Co. v. S. L. County*, 119 Utah 419, 228 P. 2d 278. That deci-

sion was limited to finding the 25c advertising fee invalid during the 40 day period between December 1st and the following January 10th. There is no question but that after January 10th the 25c advertising fee was entirely valid and collectable. We submit that the *Fidelity* decision, *supra*, diluted the constructive demand by the County Treasurer in the tax notice. (We say constructive demand here, as it could only be constructive to a taxpayer who did not receive a tax notice.)

The demand of the county treasurer as authorized by statute was part of the law of which every taxpayer was presumed to know and which subject thereto he held his property. *Closson v. Closson*, 30 Wyo. 1, 215 P. 485, 29 A.L.R. 1371; *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L. Ed. 953, 45 Sup. Ct. Rep. 491. That demand made by the County Treasurer pursuant to statute was tempered by the construction placed on it by the *Fidelity* decision, *supra*. Case law is a part of the whole body of the law of the land to which the presumption of knowledge thereof applies equally with statutory law. *Spitzer v. Board of Trustees* (C.C.A. Ohio), 267 F. 121, 126.

Thus the taxpayer had the benefit of the *Fidelity* decision, *supra*, and any demand made by the County Treasurer in the delinquent list notice, and also on the tax notice itself, was the legal demand as required by statute as limited by the *Fidelity* case. Any constructive demand made by the County Treasurer was only that which he legally could make, namely for an advertising fee after January 10th.

Appellants' alleged demand to the taxpayer is the published delinquent list. Section 59-10-29, U.C.A 1953, provides that the delinquent list shall show:

“* * * the *amount of the taxes due*, exclusive of penalty. The county treasurer must publish with such list a notice that unless the delinquent taxes, together with the penalty, are paid before the 10th day of January, or if such date falls on Sunday or a legal holiday, then the 11th day of January, the real property upon which such taxes are a lien, excepting only such property as is held by the county under a prior preliminary tax sale, will be sold for *taxes, penalty and costs* on said date.” (Italics ours.)

Appellants' argument requires that the “costs” referred to in this section of necessity mean exclusively the advertising fee. Manifestly this interpretation is not justified, as the statute fails to separately itemize interest, which is a valid charge and which of necessity must be included within the scope of “costs.” The most serious charge that appellants could make against the form of the delinquent list notice is that the term “costs” is not precisely defined.

Section 59-10-29, U.C.A. 1953, *supra*, requires the setting forth of several items, including the amount of the original tax. We respectfully submit that each of the authorities cited by appellants on pages 17 to 20 of their Brief are authorities concerned with the effect of incorrectly published *amounts* due and are not concerned with any definition of “costs” as included in our statute. We emphasize that the record here shows no error in

the "amount of taxes due, exclusive of penalties" as set forth in the instant tax notice and delinquent list notice.

There is no question raised by appellants as to the validity of any demand made after January 10th. We contend that the effect of the *Fidelity* case, supra, on the tax notice and the delinquent list notice, together with a reasonable and logical construction of the delinquent notice, will not support any finding of an unlawful demand prior to January 10th.

POINT IV.

THE DOCTRINE OF WAIVER OF TENDER HAS NO APPLICATION TO THIS SITUATION. WAIVER OF TENDER REQUIRES KNOWLEDGE AND INTENT.

The appellants' fourth contention is that the tax title should fail as the County Treasurer had made an unauthorized demand upon the taxpayers, and that had the taxpayer made a tender of the authorized amount it would not have been accepted by the treasurer, and that such tender is therefore waived.

Appellants' argument assumes:

- (1) An actual demand on the taxpayer.
- (2) A definite policy on the part of the County Treasurer not to accept payment of taxes without the 25c advertising fee. Each of these assumptions is unwarranted.

The appellants admitted by their answers to interrogatories that they did not receive any tax notice for the year 1949 or for subsequent years; that they made no

inquiry of the County officials, their grantors or the mortgagee holding a mortgage upon the real property as to why tax notices were not received. (See interrogatories Nos. 14, 15, 16, 17, 18 and 25 (R. 21-22) and answers thereto (R. 29, 33)).

The only reference in the record to any policy or lack of policy on the part of the County Treasurer as to the acceptance of the payment of the taxes and penalties without inclusion of the 25c advertising fee is admission No. 5 of Respondents (R. 18) wherein an interview with former county officials was reported. Those officials recalled only one instance of such a tender and that by Mr. Gatrell, attorney for appellants. We submit that one limited actual tender did not establish a course of conduct or a firm policy.

Appellants then argue that if the two assumptions of fact above made by them are true then any tender is waived automatically, as it is assumed to be a useless act.

In the *Fidelity* case, *supra*, as in *Gatrell v. Salt Lake County*, Dist. Ct. No. 96625, referred to by appellants in their brief, there was an actual tender of the amount owing on taxes, less the 25c advertising fee during the forty day period. The tender was kept good by the payment into court of the amounts actually tendered. Respondents stress that in the instant case no tender was made and that in fact the taxpayer by his own admissions

did not have in mind at any time material to this action the necessity of paying, indeed, even the intention of inquiring into, these taxes (R. 21, 22, 29, 33).

We do not quarrel with the decision of the *Fidelity* case, *supra*, nor do we quarrel with the fundamental general rule of law that a tender of an amount lawfully owing will discharge the claim, provided the obligee has manifest a clear intention that the amount will not be accepted. However, we submit that the law of tender and waiver of tender as discharging an obligation must be strictly limited to cases of intentional contractual relationship between parties dealing with full knowledge of the material facts involved. The tendering of an obligation and likewise the waiver of such tender is a volitional type of activity and is not an automatic result that comes about from unconscious activity. Here the appellants are in effect saying that the taxpayers are prejudiced because *if* they had received a demand and *if* they had made the tender, the amount would not have been accepted. Where either of these two suppositions does not in fact materialize, this argument must fail as not falling within the doctrine of waiver of tender. We submit that it is not enough that someone else (and we emphasize that this record and appellants' brief shows that no one other than Mr. Gatrell himself had ever made such tender and been refused) has made such tender; that this is not enough to discharge the tax obligation of other taxpayers in complete ignorance of Gatrell's completely isolated tender.

The law seems to universally support the principle that no waiver of tender exists where the creditor is not given actual knowledge of the proposed tender and given an opportunity to object. See 52 Am. Jur. 217. A tender and a waiver of tender both presuppose actual knowledge in the contracting parties of the demand and the futility of the tender. If there is no knowledge of either the tender or the futility of payment, there can be no waiver.

In Re Auerbach's Estate, 23 Utah 529, 65 P. 488, our Supreme Court stated:

“A waiver is the relinquishment or refusal to accept of a right. It is effective only when it is made intentionally and with knowledge of the circumstances.”

The *Auerbach* case cites for its authority for this statement *Bennecke v. Insurance Co.*, 105 U.S. 355, 26 L. Ed. 290.

In *Reed v. Union Cent. Life Ins. Co.*, 21 Utah 295, 61 P. 21, our Supreme Court again referred to the *Bennecke* case and again held that a waiver is an intentional relinquishment of a known right and that there must be both knowledge of the right and an intention to relinquish it.

We quote from *Dexter v. Sexton*, 43 N.Y.S. 171:

“Waiver is intentional, not accidental. Waiver must be by one in possession of full knowledge and with the intent to waive.”

We submit that in this case any claim for support of waiver of tender must be founded upon an accidental or unconscious waiver of tender. In the cases of *Mundt v. Mallon*, 106 Mont. 422, 76 P. 2d 326, and *Freedman v. Fire Ins. Assn.*, 168 Penn. 249, it has been held that waiver is essentially a matter of intention and cannot arise out of acts done in ignorance. In *Santina v. General American Ins. Co.*, 54 Nev. 127, 9 P. 2d 1000, the court held that "knowledge is the essential element of waiver." In *Jewell v. Jewell* (Maine) 24 Atl. 84, the court said: "A waiver involves assent and is primarily an act of the *understanding*." (Italics ours.) In *Hollander v. Heaslip*, 222 Fed. 808, the court held:

"A waiver exists only where one with full knowledge does or forbears to do something inconsistent with a right or with his intention to rely on that right."

We submit that the tender of the delinquent taxes less the 25c advertising fee in the *Fidelity* case, *supra*, and the *Gatrell* case, *supra*, should not be given the unreasonable effect of discharging the tax liens of all taxpayers without any conscious efforts on their parts. We feel that to extend the holding of the *Fidelity* case, *supra*, is an unreasonable protection of the rights of a taxpayer who has a period approximating five years before sale or after delinquency during which to pay a lawful tax on real estate by his claiming that for a period approximating three weeks he would have paid an unlawful tax to the extent of 25 cents, had it occurred to

him to make redemption during that interval. As a practical matter the forty day period is cut in half because the County Treasurer's office is closed to all payments for about three weeks after November 30th for preparation of the delinquent list.

Appellants have cited the cases of *Thomas v. Johnson*, 55 Utah 424, 186 P. 437, and *H.O.L.C. v. Washington*, 119 Utah 469, 161 P. 2d 355. These are both cases where the creditor exercised an affirmative repudiation of the amount *actually* sought to be tendered by the debtor. These cases are not in point here where the parties who could have made a tender by their admissions stated that they never had any such idea or intention (R. 21, 22, 29, 33).

After January 10, 1950 and until the property was sold at the May sale in 1954 a 25c charge was entirely proper, as the *Fidelity* case, *supra*, would necessarily infer. Appellants would give all taxpayers an opportunity to defeat every tax title by use of an obscure technicality that existed only for a short period of the lengthy time required to consummate the tax sale and where the taxpayers admittedly had no intention of making any tender to take advantage of such technicality.

We submit this would be allowing the taxpayer to upset and ineffectuate the entire taxing system and would make absolutely impossible the perfection of any marketable tax title, absent the question of limitations.

CONCLUSION

Appellants' objections to this tax title in their 4 separate points apply largely to all tax titles. The objections covered in their Points II, III and IV could be objections to every tax title in the State of Utah, and the theory for which appellants argue in their Point I could likewise create an objection in many tax titles besides that now before this court.

Respondents submit that to uphold the claimed defects because of the attacks herein brought, or any of them, is to declare the impossibility of protecting our general taxing authority's power to enforce payment of general taxes by the methods intended. Absent questions of limitations, the tax title purchaser would be forever frustrated in perfecting a marketable title.

We respectfully submit that the argued objections of the appellants are at best trivial, immaterial and in no way affected appellants or their rights in the property taxed. We emphasize the overriding principle that the power of the taxing authority to function must be sustained; that the rights of the taxpayers must be fully protected, but that as in the language of the United States Supreme Court in *Pillow v. Roberts*, 13 Howard 472, 14 L. Ed. 228, 230:

“The power of the legislature to make the deed of a public officer prima facie evidence of the regularity of the previous proceedings, cannot be doubted. And the owner who neglects or re-

fuses to pay his taxes, or redeem his land, has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequences of his own neglect."

The judgment of the lower court should be affirmed, appellants to pay the costs incurred in connection with this appeal.

Respectfully submitted,

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