1956

R. Jerry Fivas and Alaire J. Fivas v. Joseph E. Peterson and Florence E. Petersen : Petition for Rehearing of Plaintiffs and Respondents

Utah Supreme Court

James W. Beless, Jr.; Lewis S. Livingston; Attorneys for Plaintiffs and Respondents;

No. 8470

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.

PETITION FOR REHEARING OF PLAINTIFFS AND RESPONDENTS

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

The plaintiffs and respondents respectfully petition this Court for a rehearing on its opinion issued in the above entitled cause on the 16th day of August, 1956. The petition is based upon the following grounds:

1. The majority opinion misconstrues the plain intent of Sections 59-10-9 and 10, Utah Code Annotated 1953, by making the County an entity for the performance and responsibility of particular county officials.

2. The majority opinion misconstrues the apparent intent of Sections 59-10-9 and 10, Utah Code Annotated 1953, by demanding that the County Treasurer ascertain the address of the taxpayer.

3. The majority opinion makes an assumption of facts not supported by the record.

The attorneys for the plaintiffs and respondents hereby certify that this petition for rehearing is made in good faith and not for the purpose of delay.

Respectfully submitted,

JAMES W. BELESS, JR.
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Attorneys for Plaintiffs and Respondents

ARGUMENT

Our analysis of this Court's opinion dated August 16, 1956 leads us to conclude that the majority of the Court has construed Sections 59-10-9 and 10, Utah Code Annotated 1953 by applying two separate theories to find the notice given to the taxpayer by the County Treasurer as insufficient. First, the county is determined to be an entity for purposes of responsibility under the taxing statutes, and knowledge of other county officials is charged to the Treasurer. Second, the legislature must not have meant what it said by deletions of duties of the Treasurer by the amendment of the statute in 1931,

and the duty remaining of mailing a notice to the taxpayer at his address, "if known," is construed to mean "if ascertainable."

The majority opinion clearly demonstrates the Court's impelling conviction that forfeitures should be prevented if any inequities are thereby caused. Complementing the effect of the above theories of statutory construction, the majority opinion finds in this situation per se an inequity because it involves a tax title.

Our contentions that the Court has misconstrued the statutes and has misapplied facts are set forth under the following separate points.

POINT I

THE MAJORITY OPINION MISCONSTRUES THE PLAIN INTENT OF SECTIONS 59-10-9 AND 10 BY MAKING THE COUNTY AN ENTITY FOR THE PERFORMANCE AND RESPONSIBILITY OF PARTICULAR COUNTY OFFICIALS.

The majority opinion construes Sections 59-10-9 and 10, Utah Code Annotated 1953, by considering the County as an entity for the discharge of that portion of the taxing procedure directed by statute to the County Assessor and Treasurer. That opinion states:

> "The recorder, by placing a deed on record, the assessor, by carrying the information from the deed to the assessment rolls, and the treasurer, by sending out the notices and collecting the taxes, are all performing duties upon which part of the taxing process depends. If they collectively fail to perform the duties to the taxpayer and the

> public required by the statutes, that failure is chargeable to the county as the taxing entity."

We submit that the practical effect of such a construction of those sections would impose duties prescribed solely for discharge by the Treasurer upon the Recorder, Assessor, Auditor or other officials. The statutes are clear in giving certain named officials certain duties. We believe those duties cannot be delegated, without thereby violating the rule of strictissimi juris when such delegated acts are considered in tax title litigation. We believe that knowledge in the Recorder or information in his office cannot be charged to the Assessor or the Treasurer by the imposition of this fiction of "county entity." We submit that such delegation of duties and charging of knowledge as between county officials is a strained construction of the taxing statutes which have been written in detail purposely to pinpoint responsibility on certain officials and to spell out their duties.

For an example, Chapter 8, Title 59, is entitled "County Auditor's Duties." It would be a manifest distortion of legislative intent to declare duties therein defined as those of the Auditor to be performable by the other county officials or the "county entity." In *Telonis v. Staley,* 104 Utah 537, 144 P. 2d 513 at 517 this Court stated:

> "The affidavit is one of the statutory functions of the county auditor and such affidavit must be executed and properly attached."

We believe that this Court would have found an affidavit executed by any other county official than the auditor as illegal and sufficient to have voided any subsequent tax sale. The logical extension of the reasoning of this Court in the instant opinion would, in making the county an entity for purposes of placing responsibility under the taxing statutes, condone such an irregularly executed affidavit.

The effect of the majority opinion's theory of the "county entity" appears to be to charge the Treasurer and the Assessor with knowledge of any address for a taxpayer as found in the office of any other county official; thus, an address for a taxpayer in the Recorder's office is by this fiction known to the Treasurer or the Assessor within the meaning or "if known" in the wording of Sections 59-10-9 and 10. We believe that any such application of a fiction of "county entity" strains any possible undisclosed intent of the legislature beyond reason.

We submit that the only reasonable meaning of the words of Section 59-10-9, "The county treasurer shall furnish to each taxpayer by mail to the address . . . if known, a notice . . ." is directed to the Treasurer and to him alone. We submit that the words "if known" must reasonably mean "if known to the Treasurer or if found in his office."

POINT II

THE MAJORITY OPINION MISCONSTRUES THE CLEAR INTENT OF SECTIONS 59-10-9 AND 10 BY DE-

MANDING THAT THE COUNTY TREASURER ASCERTAIN THE ADDRESS OF THE TAXPAYER.

The second effect of the majority opinion appears to be to construe the words "if known" in Sections 59-10-9 and 10 to mean "if ascertainable." What degree of diligence shall be used by the Treasurer in his search for the taxpayer is left to his judgment and reason.

We believe that any construction of Sections 59-10-9 and 10 to retain therein a direction for the Treasurer to make a search outside of his office for the taxpayer ignores the plain fact that the legislature specifically deleted such duties by its amendment of the statute in 1931. Any such construction is repulsive to the plain wording of the section which now directs the Treasurer to mail notices to the taxpayer at his address, "if known."

The legislature by its amendment in 1931 deleted the affirmative duties of the Treasurer to seek out the taxpayer. It placed on the Treasurer the simple, practical duty of sending notices to the taxpayer at his address, "if known," and it gave some responsibility to the taxpayer, only that of keeping the treasurer's office advised of a current address. The majority opinion has read into the statute a legislative intent to retain all the duties of search on the Treasurer, despite their specific deletion, and the explanation is made that the amendment "was enacted during the depths of the depression when taxes were hard to collect." If the intent was to increase the efficiency of the tax collecting procedure, certainly a shifting of some responsibility to

the taxpayer would have effected both a savings to the government of costs of search for delinquent taxpayers and a better collection of taxes through better contact with taxpayers.

The enlightened theory of courts of sister states in this situation has been to place the burden on the taxpayer and to relieve the Treasurer from any search. *Spokane County v. Glover,* 2 Wash. 2d 162, 97 P. 2d 628 (1940); *Sutter v. Scudder,* 110 Mont. 390, 103 P. 2d 303 (1940); *Pender v. Ebey,* 194 Okla. 407, 152 P. 2d 268.

We submit that the amendment of 1931 was purposeful, clear and gave no need of interpretation of the remaining words "if known." It gave some responsibility to the taxpayer and took a burdensome, costly duty of questionable degree of fulfillment from the Treasurer. The taxing government and honest, diligent taxpayers were all benefited at the expense only of the careless or even evasive and dishonest taxpayer, as pointed out by Justice Worthen in his dissenting opinion.

We believe that the forfeiture provisions of the taxing statutes have a definite need. We recognize that there must be a choice between a possible forfeiture to insure the taxing government of its revenue and some loss to the "slothful, careless, sleeping taxpayer." However, to assure against any forfeiture and to vitiate the penalty provisions of the taxpaying statutes, we submit that a construction should not be placed on these statutes to strain the words "if known" to mean "if ascertainable" and to retain a duty of dubious fulfillment on the

Treasurer. We believe that such burden was purposely removed from the Treasurer by the deletions of the 1931 amendment. If any latent legislative intent must be divined, cannot the legislature be given credit of having had a sensible, purposeful intent in bringing the law to date consistent with economy and common sense?

POINT III

THE MAJORITY OPINION MAKES AN ASSUMPTION OF FACTS NOT SUPPORTED BY THE RECORD.

By a bold assumption of facts the court has determined that "plaintiffs, as purchasers of the tax title, would retain the benefits of an *inequitable bargain* in which they purchased the property at a price *obviously greatly disproportionate* to its value"; that this transaction was a *"harsh bargain";* that defendants' forfeiture would necessarily be the result of *"a harsh procedure,"* and that this was a controversy involving forfeiture with a *"consideration relatively small in comparison to the value of the property."* (Emphasis ours).

The record in this matter, both before the trial court and on appeal, is brief and clear. Nowhere in that record is there any proof or showing, direct or indirect, as to the value of the property in question or any showing as to value to compare with any amounts paid by plaintiffs on the tax sale. In making any assumption as to the value of the land necessarily being greatly in excess of the amount paid for the tax deed by the plaintiffs this

Court was thereby going beyond the record or any inference raised from any facts in that record.

This court has repeatedly stated in its past decisions the proposition that on appeal from a judgment for the plaintiffs the Supreme Court is required to take all the evidence and every reasonable inference therefrom in a light most favorable to the plaintiffs. The corollary to this rule necessarily must be that the Supreme Court cannot go outside the record to determine facts or draw inferences against the prevailing party in the trial court if no facts for such finding or inferences were proved or shown in the lower court. *Kimball Elevator Co. v. Elevator Supplies Co.,* 2 Utah 2d 289; 272 P. 2d 583 (1954); *Beck v. Jeppesen,* 1 Utah 2d 127, 262 P. 2d 760 (1953); *Hoyt v. Wasatch Homes, Inc.,* 1 Utah 2d 1, 261 P. 2d 927 (1953).

The assumption of facts as made by the majority opinion is a prerequisite to a determination that there was in this situation any inequity. It appears to us, as suggested by Justice Worthen in his dissenting opinion, that the majority of the Court is eager to avoid a "forfeiture" and to prevent a "harsh bargain." We submit that any such end result should not be reached by making an assumption of facts not allowed by the record nor suggested by any facts or figures contained therein. No inference of value or lack of it can be drawn if there are *no* facts concerning value to infer from.

CONCLUSION

The majority opinion of this Court leaves us with the definite impression that its author has sensed some inequity which must be righted by judicial inquiry necessarily beyond the record and/or judicial interpretation of the intent of the legislature beyond the plain wording of the statutes.

The majority opinion forcefully raises the question of whether the statutes through their clear wording, natural intent and meaning and over-all necessary purpose should not be subordinated to the equities as sensed by an appellate court. We believe that this opinion places the personal determination of equities and the abhorance of forfeiture above the clear purpose of the tax sale procedures as firmed into statutory law by the legislature. We submit that this substitution of personal economic and moral convictions for the written law, unbounded by self-restraint to do good, constitutes error both as to misapplication of facts and misconstruction of law in this instance.

We believe that the majority opinion of this Court is an example of the situation as cited by Justice Black in his dissenting opinion in *Adamson v. California,* 332 U.S. 46 (1947) where "The 'natural law' formula . . . has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely on the legislative domain of the States." (cited in "Judicial Self-

Restraint: The Obligation of the Judiciary," Am. Bar Jour., Vol. 42, Number 9, page 829, September, 1956.)

We believe that serious error has been committed, and we ask that the Court reconsider the legal principles enunciated and the assumptions of facts made in the majority opinion and that this matter may be reheard by this Court.

Respectfully submitted,

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