

2007

Kennecott Copper Corporation, a corporation v. Salt Lake County, a political subdivision of the State of Utah, State Tax commission of Utah : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

T NO. 7639 R

**IN THE SUPREME COURT
of the
STATE OF UTAH**

KENNECOTT COPPER COR-
PORATION, a corporation,
Plaintiff and Appellant,

vs.

SALT LAKE COUNTY, a political
subdivision of the State of Utah,
Defendant and Respondent,

STATE TAX COMMISSION OF
UTAH,
Intervenor and Respondent.

Case No. 7639

BRIEF OF RESPONDENTS

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UTAH,
Intervenor and Respondent.

Case No.
7639

BRIEF OF RESPONDENTS

STATEMENT OF FACT

The statement of fact is adequately set forth in the stipulated findings of the lower court. (R2-10) Plaintiff has set forth most of these findings in its brief, therefore further elucidation is unnecessary.

STATEMENT OF POINTS

1. The assessments here in question were not made in an arbitrary or discriminatory manner.
2. The valuation of the lands here in question was made in accordance with the statutory mandates.

3. The lands here in question do not come within that portion of Section 80-5-56, U. C. A., 1943, as amended, which provides:

“All metalliferous *mines and mining claims*, both placer and rock in place, shall be assessed at \$5 per acre and in addition thereto at a value equal to two times the net annual proceeds thereof for the calendar year next preceding.”

ARGUMENT

I

THE ASSESSMENTS HERE IN QUESTION WERE NOT MADE IN AN ARBITRARY AND DISCRIMINATORY MANNER.

There is nothing in the record to indicate that plaintiff has been treated in an arbitrary or discriminatory manner. The fundamental standards followed by the commission in assessing the lands of the smallest taxpayer within its jurisdiction have been adhered to in assessing the lands of the Kennecott Copper Corporation. True, the Kennecott Copper Corporation stands in a unique position because of the magnitude of its operation. Its production and industry can be pointed to with pride by the people of the state. If the assessments here in question are wrong, the commission stands ready to correct them.

Plaintiff stresses the point that lands owned by others in the vicinity of plaintiff's mill site and tailings pond are assessed from \$4.14 per acre to \$66.16 per acre. (R-12) Certainly there can be no discrimination here be-

cause plaintiff's lands are now assessed at \$45.73 per acre.

The assessment of plaintiff's lands were protested to the commission. The commission considered the matter and determined that in its opinion \$45.73 per acre was fair. (R-95) Plaintiff attempts to make much of the fact that the figure of \$45.73 per acre is not the personal valuation of Mr. Higgs, an employee of the property tax department of the Tax Commission. (R-56) The assessment of lands are made by the Tax Commission. (R23-24) Plaintiff cannot contend that Commissioner Hammond, who has been a member of the commission since 1931 and in charge of ad valorem property taxation, is not at least as qualified to pass on the validity of an assessment as one of the commission's employees. (R80-49)

Commissioner Hammond testified that in his opinion the assessment was fair. (R-95) Mr. Higgs testified that he reported the lands in question to the commission as a unit in the entire operation of plaintiff *in connection with net proceeds*. (R-57) Plaintiff's statement on page 16 of its brief would leave us to believe that these lands were reported to the commission to be assessed as "mines or mining claims," within the meaning of 80-5-56, U. C. A., 1943, as amended. This is entirely false. Furthermore, it was stipulated by the parties hereto in the findings of the lower court (R-8) that:

"The only instance which has come to the attention of the commission wherein a dump is located on other than a mining claim, patented or unpatented, is the Kennecott Copper Dump as

outlined on Exhibit A. All other dumps being located on a mining claim, patented or unpatented, have been assessed at \$5.00 per acre. * * *

In 1947 the legislature changed the assessment of property from "full cash value" to "40%" thereof. (80-5-56 U.C.A. 1943, as amended) In order that the court will understand why the figure of \$45.73 per acre remained constant at this time, except for blanket changes, a portion of the testimony of Commissioner Hammond is quoted: (R93-94)

"A. During the period of the war, there was violent fluctuations in values, in market values, and in the values based on the use to which land could be put. We called the matter to the attention of the Legislature, and presented this issue to them. We said land values and other values are rapidly rising, and they are rising in erratic ways, in such a manner that it is very difficult to tell just what property is truly worth. Some properties are sold at very high values; others not quite so high, even where the properties were the same; so there was confusion in values, in market values along that time. We were reluctant to move the values up on the basis of this confused situation, and we presented the matter to the Legislature. We told them that there are at least two things involved:

One of them, as to whether they wished to control levies, or rather control public expenditures through levies. We explained that, if we should follow the market on values, that, in effect, that would take away the

practical control that was then in operation through these levy laws, and we suggested that one or two things—one of two things—be done; either that the levies be changed so as to exercise a practical control over a vastly increased assessed valuation, or that the law be enacted which would change the base of valuation in such a way that these levies still would be in practical control.

A good deal of discussion was had at that time. It was thought that property was then assessed at about forty per cent of its current value. The Legislature took the course of—determined that the value should be forty per cent of what was called its reasonable fair cash value; so that, for the most part, values were not changed when this law became effective, although we had been making studies which indicated, in some areas, that the values were certainly less than forty per cent, and, through a re-assessment procedure, in a number of counties, the assessments were changed.

Q. Now, this \$45.73 per acre valuation, the Commission went into that matter, they studied it various times and their determination, after reasonable study of it, was that the land was worth \$45.73 an acre, is that not correct?

A. Yes, sir, that is correct.”

II.

THE VALUATION OF THE LANDS HERE IN QUESTION WAS MADE IN ACCORDANCE WITH THE STATUTORY MANDATES.

Under the provisions of 80-5-56, U.C.A., 1943, as

amended, the legislature has provided that property other than mines or mining claims shall be assessed at forty per cent of its "reasonable fair cash value."

Section 80-3-1 (5) U.C.A., 1943, provides:

"'Value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor."

It is general law that these provisions pertaining to valuation of property are set up as guides or standards by the legislature to aid the taxing body in arriving at a valuation. These factors all resolve themselves into one element which comprises enumerable factors, conditions and circumstances and changes, which element is commonly denominated "*market value*." See *Continental National Bank vs. Naylor*, 54 Utah 49, 63, 64; 179 Pac. 67; See also the text *State and Local Taxation of Property by National Industrial Conference Board, Inc.*, 1930. At Page 16 it is stated:

"As a general rule, however, the legislatures have stopped with the definition of taxable value, frequently modified by the statements that the value is to be that amount which would be paid for the property 'by a willing buyer to a willing seller,' or that amount which would be expected in the '*settlement of a just debt from a solvent debtor*;' that the value must be that which the seller would ordinarily receive at a voluntary, rather than a forced sale; or that the value must be that obtained in a 'fair, free and well-advertised market.'

“A perusal of these statutory provisions leads to the conclusion that there is nothing unusual or obscure about the meaning of taxable value. Value means to the legislator approximately the same thing that it means to the economist, although the two define it in different ways. *Taxable value means selling or market value.* It does not mean necessarily the capitalization of income yield or potential income yield; nor does it mean necessarily the price actually received for any piece of property at any particular sale. Taxable value is a norm. It is the price that property might reasonably be expected to bring in a normal market * * *”

The plaintiff stresses the fact that the commission in assessing these properties, took into consideration the use to which the properties would be subjected. Plaintiff asserts that if this element is injected into the picture “the lid is off in that forty per cent of the amount at which the property would be taken in payment of a just debt due from a solvent debtor no longer applies.” (Pl. Brief, 21, 22) No such statement was admitted by defendants or intervenors or by Mr. Hammond who testified for the commission. (R-88) The commission took into consideration this element of use and arrived at the assessed valuation of \$45.73 per acre. It did not arrive at any “astronomical” figure. As Mr. Hammond testified, the valuation of the properties in question was a very difficult determination to make, but upon considering the facts and all the circumstances, the commission arrived at the value of \$45.73 per acre. This difficulty of valuation stresses the very essence of that general doctrine

in the law which is: *that a court shall not substitute its judgment for that of a taxing body unless it can be determined that fraud or malice was present in making the assessment.*

See *Home Fire Insurance Company v. Salt Lake County*, 19 Utah 189, 194, 195, 56 P 681, 682; Also *First National Bank of Nephi v. Christensen*, 39 Utah 568, 578, 579, 118 P 778, 781.

"In such case, those whose property was intentionally assessed at a higher percentage or valuation than was placed on the *general mass of taxable property in the county* may invoke the aid of courts to compel the taxing officers to reduce the excessive assessment so made, to the same proportion of value as was placed upon the *general mass of other taxable property in the county*. A denial of such right results in inequality and a want of uniformity in the assessment and taxation.

"The burden to show the inequality was on the plaintiff.

"* * * Of course, specific instances here and there where a lower valuation in proportion to the actual or cash value was placed on taxable property than was placed on plaintiff's property do not, within themselves, furnish sufficient ground for complaint. To constitute such ground, it must be made to appear that a greater valuation in proportion to the actual or cash value was placed on plaintiff's property than was placed on the *general mass of taxable property in the county* * * *"

See also *Continental National Bank of Salt Lake City v. Naylor*, 54 Utah 49, 69, 179 P 67, 75.

“Even if we could find that there was some apparent discrimination in point of fact by which appellant and other banks and their stockholders were required to pay something more than was required of taxpayers on some other classes of property, still, as we understand the authorities, appellant would have no standing in a court of equity to restrain the collection of the tax unless the discrimination resulted from wrong principles, methods, or standards, willfully and intentionally adopted. Discriminations resulting from mistake, inadvertence, and miscalculations or error of judgment must be remedied in some other form of proceeding than the one adopted by appellant in the case at bar.”

See also *Nutter v. Carbon County*, 58 Utah 1, 11, 196 P 1009, 1013; also *Pingree National Bank of Ogden*, 54 Utah 599, 183 P 334.

In order that the court can understand the difficulties in the valuation of land of this type, portions of the testimony of Commissioner Hammond are inserted. (R82-83-84-85)

“Q. Mr. Hammond, I appreciate that I’m trying to be perhaps too informal on this thing, but I am trying to do it in the interest of fairness. Now you’ve had these questions in mind, and you have discussed the answers, and you have heard Mr. Collins’ answers. Now, if you disagree, I want to give you full opportunity to state just wherein you disagree and

the reasons that you might care to give, so that the Court can be fully informed of the Tax Commission's position.

A. I disagree in this particular: Land has value according to the highest or the best use to which it can be put. This land, in my opinion, has had its—

Q. Which land?

A. The land in the, under the tailings dump, in my opinion, has had its value, for the purpose for which it was previously used, completely destroyed, at least for all present considerations, but there has been a value created there for the purpose to which it is being, now being put, namely, for a tailings pond. It is particularly advantageous to the mining company in question to have land available close to its operations, and at an altitude from which, or at an altitude which makes it easy to get the tailings on to it, so that I think that the value of this land must be considered on the basis of the use to which it can be put in this particular case by Kennecott Copper Company.

Q. Then, you agree with Mr. Collins that, if the test or basis of assessment is to be forty per cent of its reasonable fair cash value in the sense that it would be accepted by a creditor from a solvent debtor in payment of a debt, that it would have no, or a nominal value in that sense?

A. No, I do not. I would like to explain my position there. Of course, we are getting into some hypothetical situations—

Q. Oh, yes.

A. —but consider the land as it is, suppose—and as it is now being used—suppose that some—

one owned that land and could turn the land over to a person to whom he owed some money, and that that land is still needed by Kennecott Copper, I would say that the land under those conditions has a great deal of value.

Q. Yes; but, apart from its present use by Kennecott or a successor, do you agree that the land would not have any value, or at least a nominal value?

A. Yes, if Kennecott were abandoned, if there were no such use for this land, I would say that its value certainly was questionable, and might be in a negative sum.

Q. Yes; now, measured by its value to Kennecott or a successor and its present use, I think, in your honest opinion, you feel that the figure of \$45.73 is the result of the exercise of an honest judgment, is that correct?

A. That is correct.

Q. But, by the same token, do you disagree with Mr. Collins' opinion that you might just as well have assessed the land on that measure of value at \$4,573 per acre?

A. I would disagree with him as far as such an assessment is concerned.

Q. What would be your standard of value, apart from a judgment figure, in the sense that someone pulled out or wrote down \$45.73?

A. In the first place, I'd say that the bottom price—the bottom value—of this land is its value as it was prior to the time it was used for a tailings dump.

Q. That has been destroyed, has it not?

A. That's true, but that would come into the consideration, for this reason, in the use—in the other use to which the land is being put,

surely it would be worth at least as much as it cost, or it wouldn't be put to this other use.

Q. All right, using that as a starting point, what else would you do, or did you do?

A. Then, of course, the problem is if we should assume that that is the floor, in a consideration of this value, the next point would be, what would be the top value by which the land could be considered to be worth, and there we would get into a field of possibly astronomical figures, but, in the consideration of this, we certainly did not weigh the value of the land that might—well, the value that Kennecott might be compelled to pay in case, in case the title to the land suddenly were declared in someone else, and in case they had to buy the land for their own use. We would not consider that that top figure would be a sound basis for valuing the land; in other words, we wouldn't say that the forced value—the value that would be forced upon a company in order to get it would be a sound basis for value.

Q. That is these astronomical figures?

A. That is correct.

Q. So, you strike a figure somewhere in between, is that correct?

A. That is correct.

Q. And that figure, is it not fair to say, was purely an arbitrary one that—having to assign a figure somewhere in between those selected?

A. No, it wasn't an arbitrary one, but it was a difficult one to figure. It was a difficult one to reach.

Q. And could it not just as well have been \$475 per acre?

- A. If we had gone that high in the assessed value, I would say that we were putting a weight to a figure, a forced figure, that the company might be required to pay, and I recognize that a company might be required to pay a most unreasonable figure, under certain circumstances."

Plaintiff's contention that a taxing body cannot look to the factor of "use" to which property is put to determine a market value or the assessment of said property is entirely without merit. As Commissioner Hammond testified, the use to which land may be put is an important factor in their assessment.

Plaintiff at pages 19, 20 and 21 of its brief sets forth a portion of the testimony of Mr. Collins, whom plaintiff considers an expert in valuing mines and mining property. However, Mr. Collins specifically testified that in the course of his work at Tracy-Collins Trust Company they never made loans on mines or mining claims, that they did not engage in that type of business and, therefore, were never called upon to make appraisals of mines or mining property. (R-78)

In the case of *Susquehanna Power Company v. State Tax Commission of Maryland*, 283 U.S. 291, 295, 296, 51 Sup. Ct. 434, 436, 75 L. Ed. 1024, 1046, 1047; this question concerning the use to which property is put in determining valuation was discussed by the Court. The Susquehanna Power Company had purchased large tracts of land from private individuals, and also had been granted considerable land by the state to construct a dam

in a navigable river. This right of construction was granted by license from the United States Government. Upon completion of the dam, the lands in the bed of the Susquehanna River, and in addition the surrounding lands which had been purchased and granted to the company, were covered by the waters of the dam. The State Tax Commission of Maryland assessed these lands which were covered by the waters of the dam at a higher rate than the surrounding land. The company had objected upon the grounds that the Tax Commission was taking into consideration the value of the license granted by the Federal Government. The court, however, dismissed this as without merit and held that the taxation of said lands was constitutional and within the law. The court stated in the course of its opinion the following:

“No basis is laid in the present record for assailing the tax on constitutional grounds, either because the commission has placed a higher value on appellant’s lands than on others having a similar location and use, or because it has directly taxed appellant’s license. *The contention urged is that the lands are assessed at a higher value than they were before they were submerged, and higher than farm uplands in the neighborhood, and that since their use as a part of appellant’s power project is rendered possible only by the federal license and by the water in the river, the assessment at the higher value, in effect, involves a forbidden tax on the license. and taxation of appellant for the value of the waters of a navigable stream.*

“Accepting as we must on this record, the valuation of the commission as neither excessive

nor discriminatory, we can perceive no basis, either legal or economic, for relieving appellant from the burden of the tax by attempting the segregation of a part of that value and attributing it to independent legal interests, not subject to taxation, because those interests have a favorable influence on the value of the property.

"An important element in the value of land is the use to which it may be put. That many vary with its location and its relationship to the property or legal interests or others. See Willipis-cogee Lake Cotton & Woolen Mfg. Co. v. Gilford 64 N.H. 337, 10 Atl. 849. Its proximity to means of transportation, highways, railroads or tide-water (see State, New York, L. E. & W. R. Co. Prosecutor, v. Yard, 43 N.J.L. 632; State, Trask, Prosecutor v. Carragan, 37 N.J.L. 264; cf. Hersey v. Barron County, 37 Wis. 75) or its location in the vicinity of water power belonging to another but available for use upon it (State v. Flavell, 24 N.J.L. 370) may increase its utility and hence its taxable value. A dock on New York harbor may have a greater value than one on non-navigable waters (cf. Leary v. Jersey City 248 U.S. 328, 63 L. Ed. 271, 39 S. Ct. 115, supra; Central R. Co. v. Jersey City, 209 U.S. 473, 52 L. Ed. 896; 28 S. Ct. 592, supra) even though the advantages of the former may be terminated through the exercise of the superior power of the federal government over navigable waters (see United States v. Chandler-Dunbar Water Power Co. 229 U.S. 53, 57 L. Ed. 1063, 33 S. Ct. 667)."

"A large part of the value of property in civilized communities has been built up by its interrelated uses; but it is a value ultimately reflected in earning capacity and the price at which the property may be sold, and hence is an element

to which weight may appropriately be given in determining its taxable value. It has never been thought that the taxation of such property at its enhanced value is in effect taxation of its owner for the property of others. Nor can we say that the present tax, based upon what must be taken to be the fair value of appellant's lands profitable used in the business of developing and selling power, is forbidden because that use would not have been possible without the control which appellant has acquired over navigable waters through the grant of its license. Those considerations which lead to the recognition of the power of a state to tax the property used by the grantee in the enjoyment of a federal license require recognition of the power to tax it on the basis of accepted standards of value, customarily applied in the taxation of other forms of property. See Union P. R. Co. v. Peniston, 18 Wall. 5, 34-37, 21 L. Ed. 787, 792-794, supra.

III.

THE LANDS HERE IN QUESTION DO NOT COME WITHIN THAT PORTION OF SECTION 80-5-56, U.C.A., 1943, AS AMENDED WHICH PROVIDES:

"ALL METALLIFEROUS MINES AND MINING CLAIMS, BOTH PLACER AND ROCK IN PLACE, SHALL BE ASSESSED AT \$5 PER ACRE AND IN ADDITION THERETO AT A VALUE EQUAL TO TWO TIMES THE NET ANNUAL PROCEEDS THEREOF FOR THE CALENDAR YEAR NEXT PRECEDING."

Plaintiff, in its brief, attempts to bring these lands within the meaning of this statute by construing them to be a "part" of plaintiff's mine. The above-quoted provi-

sion is clear and unambiguous, and the terms referred to are *mines and mining claims*, and these properties have never been reported as a mine or mining claim by plaintiff or its predecessors in interest. (R-8) The most that can be said is that these properties constitute a "part of plaintiff's mining operation."

The reason for the enactment of such a statute as this is to overcome the difficulties in valuing a mine. Since it cannot be determined, with any degree of certainty, the value of the ore body beneath the surface of the ground, the legislature had to enact some provision which would place a reasonable value on that ore body. The result was this provision embodied in Section 80-5-56, Utah Code Annotated, 1943, which provides a flat \$5 per acre assessment, plus two times the net annual proceeds. Thus, we see that the reason for this rule of valuation is a matter of necessity and it, therefore, should not be extended to include cases clearly not within reason for the rule.

In other words, if by visual examination of a piece of property a value can be placed thereon, and there are no hidden values such as would be found in an ore body hundreds of feet below the surface of the ground, the reason for the rule does not exist.

In the case of *South Utah Mines and Smelter v. Beaver County*, 262 U. S. 325-332, 43 Su. Ct. 577, 67 L. Ed. 1004-1008, the court stated:

"The rule prescribed for the valuation of metalliferous mines, as we have already indicated, is one of necessity, and should not be extended

to cases clearly not within the reason of the rule. The tailings severed and removed from the mine claims changed in character, placed on other and separate lands, and having an adjudicated value of their own, in our opinion constituted a unit of property entirely apart from the mine from which they had been taken. See *Forbes v. Gracey*, 94 U.S. 762-765, 24 L. Ed. 313-314, 14 Mor. Min. Rep. 183. We think the agreement with the leasing company was not a sale of these tailings, but that the ownership, pending the process of reduction, remained in the plaintiff. The plaintiff, therefore, was subject to taxation upon their value, *but not as a mine, since that implies something capable of being mined, which this loose and homogeneous deposit obviously was not.*"

It can be seen from the opinion in the above-quoted case that the reason for the rule does not apply in the present instance, and furthermore, *the court, in its opinion, unequivocally states that a tailings dump is not a mine.*

The properties in question have been assessed by the State Tax Commission, and taxes collected thereon under that portion of section 80-5-56, U.C.A., 1943, as amended, which provides:

"All property * * * appurtenant to mines or mining claims * * * shall be assessed at 40% of their reasonable fair cash value."

The record shows that these properties have been assessed by the State Tax Commission and its predecessors, the State Board of Equalization, by authority of

this provision of the statute, for the 30 years last past. (R-7) The legislature has amended said provisions of the law a number of times, the most recent change being made by the 1949 Legislature, *and it has never indicated its disapproval of the manner in which the Tax Commission has made this assessment, or that the Tax Commission was making the assessment without authority of law.* Upon this basis, it is generally agreed by the authorities in the United States, and by this Court, that the legislature is presumed to have agreed with said construction, and that it is a clear exposition of the law, as they intended it. See *Utah Hotel Company v. Industrial Commission*, 107 Utah 24, 151 P. 2d 467, 153 A.L.R. 1176; *Utah Power and Light Co. v. Public Service Commission*, 107 Utah 155, 152 Pac. 2d 542; *E. C. Olsen Co. v. State Tax Commission of Utah*, 168 Pac. 2d 324; *State Board of Land Commission v. Ririe*, 56 Utah 213, 190 Pac. 59.

In the case of *Salt Lake County v. Kennecott Copper Corporation*, 163 Fed. 2d 484, 489, a decision rendered by the Tenth Circuit Court of Appeals in 1947, except for intervenor, the identical parties now before this court were before the Federal Court. The identical issue of whether or not the lands upon which plaintiff's tailings dump and mills are located should be assessed by the State Tax Commission at \$5.00 per acre, plus two times the net annual proceeds from the mine, or whether said lands should be assessed as ordinary land, was decided adversely to plaintiff. The only difference being in the nature of proof and that in the Federal case the taxes sought to be recovered were for the year 1944. (R-9-10)

The Circuit Court upheld the construction which had been placed upon this provision of the law by the taxing authority and did so on the basis of an approved administrative construction.

It is the contention of the commission that plaintiff is bound by this decision and cannot re-litigate this question at this time. That aspect of the doctrine of Res Judicata, commonly referred to as Collateral-Estoppel by judgment is applicable to the present situation.

The United States Supreme Court in the case of *Commissioner v. Sunnen*, 333 U.S. 591, 68 S. Ct. 115, 92 L. Ed. 898, gives a very fine exposition of this doctrine. Under the rule of Res Judicata, when a court, of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit are thereafter bound, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. In a tax proceeding involving a different cause or demand because of a different tax year in question, this doctrine of Collateral-Estoppel is applied. It is in this respect that where a second action between the same parties is upon a different cause or demand, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. (See, Restatement, Judgments §§ 68, 69, 70)

The plaintiff in attempting to define the term "*mine*" so as to bring the properties in question within the meaning of that term, cites from the case of *Nephi Plaster and Manufacturing Co. v. Juab*, 33 Utah 113, 93 Pac. 53 (1907). The question in this case is whether a gypsum deposit, which, being mined, comes within the provisions of the statute taxing mines and mining claims. The court held that gypsum is a mineral, and the deposit which was laid down in the earth, and which was being mined, was a *mine*. Certainly, it cannot be claimed that plaintiff's tailings dump is a *mine* within the meaning of that term as used in this case. Plaintiff attempts to effect an extension of that term by citing but a phrase from the court's opinion. The result is entirely illogical.

Further, plaintiff cites the case of *Ontario Silver Mining Co. v. Hixon*, 49 Utah 359, 164 Pac. 498. The constitutional provision and the law upon which this case was decided, have since been changed in their entirety. The particular reference made to that portion of the law pertaining to property "having a value separate and independent from such mine or mining claim" is no longer contained in the law or the Utah Constitution. Formerly a mine was taxed on the basis paid to the United States Government for the mine. There is nothing in the present law which harks back to this principle. The Supreme Court in the *Ontario* case, based its decision on that portion of the old law pertaining to whether or not the property had a separate and independent value. The court found that the drain tunnels did not have a separate and independent value from the mine;

hence, they were not assessable separately from the mine. There is no analogy between this action and the present provision of the Utah law. By no stretch of the imagination could such a construction be made. Furthermore, in the *Hixon* case, the land at and surrounding the portals of said tunnels and through which they were constructed throughout their entire length, consisted of mining claims and grounds for which the United States has issued mineral patents as such.

Plaintiff quotes from Justice Wolfe's opinion in the recent case of *Telonis v. Staley, et al*, 104 Utah 505, 106 Pac. 2d 163, to further sustain its position. The contention was made in this case that if the surface rights to property were separately assessed from the underlying mineral rights, then also under a tax sale, the two estates should be sold separately. The majority opinion, and also Justice Wolfe in dissenting, agreed that where the two estates were owned by one person, then the aggregate of taxes on all interests of the owner could be sold together, and this would give a valid tax title. That is what Justice Wolfe's phrase means and it has no bearing on the present question before this court. Plaintiff's attempt to construe this isolated phase to support its contention that the tailings dump and mill site lands should be assessed at \$5 per acre, plus a multiple of the net proceeds, the same as a mine or mining claim, is without logic and reason. The meaning of the court is plain and unambiguous, and it does not refer to the point now in litigation.

CONCLUSION

Plaintiff has failed to show that the assessments here in question were made in an arbitrary or discriminatory manner. Further, the statutory requirements in assessing the lands in question have been adhered to without question. Plaintiff's last proposition that the mill site lands and tailings pond lands should be assessed at \$5 an acre, etc., because they are "a part of the mine" disregards the express and unambiguous language of the statute.

This court has recently passed upon a question involving the use of these words in the case of *Crystal Lime and Cement Co. v. Robbins, et al*, Ut., 209 Pac. 2d 739. It is unnecessary to quote portions of that opinion, however, it is clear that the term "mine and mining claims" could never be construed to include land or property which may be "a part of the mine."

The judgment should be affirmed.

Respectfully submitted,

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