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IN THE SUPREME COURT OF THE STATE OF UTAH

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Clerk, Supreme Court, Utah

UTAH PARKS COMPANY,
a Corporation,

Plaintiff-Appellant,

vs.

IRON COUNTY, a Body Corporate and Politic, and CEDAR CITY CORPORATION, a Municipal Corporation,

Defendants-Respondents.

No. 9540
and
No. 9753

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ANSWERING BRIEF OF CEDAR CITY CORPORATION,
Case No. 9753

Appeals from the Judgments of the 5th District Court for Iron County

Hon. Will L. Hoyt, Judge, in Case No. 9540
Hon. C. Nelson Day, Judge, in Case No. 9753

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TABLE OF CONTENTS

CASES CITED

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STATUTORY AUTHORITIES CITED

TREATISES CITED

ANNOTATIONS CITED

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH PARKS COMPANY,
a Corporation,
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ANSWERING BRIEF OF CEDAR CITY CORPORATION,

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ARGUMENT

POINT I

THE CONSTITUTIONALLY ESTABLISHED TAX EXEMPT STATUS OF CEDAR CITY CORPORATION PRECLUDED THE LAWFUL ASSESS-

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MENT AND LEVY OF TAXES FOR THE YEAR 1958 ON THE EL ESCALANTE HOTEL PROPERTY CONVEYED BY UTAH PARKS COMPANY TO CEDAR CITY CORPORATION ON JANUARY 31, 1958, AND THEREFORE THE UTAH PARKS COMPANY IS NOT ENTITLED UNDER THE TERMS OF ITS DEED TO REIMBURSEMENT FROM CEDAR CITY CORPORATION FOR THE 1958 TAXES ERRONEOUSLY PAID BY UTAH PARKS COMPANY.

In Point I of its brief, Utah Parks Company has argued that the tax upon the El Escalante Hotel property which it conveyed to Cedar City on January 31, 1958 (subsequent to the tax lien date of January 1, Utah Code Anno. 1953, 59-10-3; but prior to the assessment date of April 15, Utah Code Anno. 1953, 59-5-4, and prior to the levy date which falls between the last Monday in July and the second Monday in August, Utah Code Anno. 1953, 59-9-6) was an invalid assessment and levy for the reason that Cedar City is immune from taxation under the provision of Article 13, section 2, of the Utah Constitution which provides in part ". . . The property of the state, counties, cities, towns, school districts, municipal corporations . . . shall be exempt from taxation."

It is on this basis that Utah Parks Company seeks a refund of the taxes from Iron County to whom it made payment. Utah Parks Company cites various authorities for the proposition that the tax was invalid, including *Gillmor v. Dale,* 27 Utah 372, 75 P. 932 (1904). It is Cedar City's position that this case represents the law

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of this state, that the overwhelming weight of authority is in accord with this case and that this is the only logical conclusion to be reached in view of the immunity granted by the constitution.

The reasoning underlying *Gillmor v. Dale* is that there is no valid tax and no valid tax lien unless the property concerned is in a taxable status while the statutorily required steps, particularly assessment and levy, are performed. Prior to that time, the property may be subject to an inchoate security right but this right does not vest unless the tax is finally and lawfully determined by the various tax steps required by statute.

In its attempt to navigate a safe passage between Scylla and Charybdis, Utah Parks Company has presented its case for the invalidity of the tax with some understandable restraint. Therefore Cedar City feels that an additional submission of authorities and discussion may be helpful.

Several courts have examined the tax implications involved where property comes into the hands of a tax exempt entity subsequent to the tax lien date but prior to the completion of the assessment and levy. Of such cases decided by courts with the authority to speak for the state concerned, the following support the theory that such a transfer prevents the relation back of the assessment and levy to the lien date with the result that no valid tax is imposed:

Territory v. Perrin, 9 Ariz. 316, 83 P. 361 (1905);

City of Laurel v. Weems, 100 Miss. 335, 56 So. 451 (1911);

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Madison County v. School District No. 2, 148 Neb. 218, 27 N.W.2d 172 (1947);

Gachet v. New Orleans, 52 La.Ann. 813, 27 So. 348 (1900);

State v. Champion Fibre Co., 204 N.C. 295, 168 S.E. 207 (1933);

City of Portland v. Multnomah County, 135 Or. 469, 296 P. 48 (1931);

City and County of Denver v. Tax Research Bureau, 101 Colo. 140, 71 P.2d 809 (1937).

While it would be foolish to warrant that it does not exist, research has failed to reveal any presently reliable case in point from a court with the power to speak for its state that holds to the contrary. In addition, it appears that the great weight of authority goes even one large step further. The following cases support the proposition that even where a valid tax lien has accrued by virtue of the accomplishment of all needed tax processes prior to the acquisition of the property by a tax exempt entity, such acquisition voids the prior valid lien:

State v. Maricopa County, 38 Ariz. 347, 300 P. 175 (1931);

People v. Chambers, 37 Cal.2d 552, 233 P.2d 557 (1951);

Board of Capital Managers v. Brasie, 72 Colo. 153, 210 P. 63 (1922);

State v. Canyon County, 181 P. 2d 196 (Idaho 1947);

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State v. Minidoka County, 50 Idaho 419, 298 P. 366 (1931);

Harlan v. Blair, 251 Ky. 51, 64 S.W.2d 434 (1933);

Collector v. Revere Bldg., 276 Mass. 576, 177 N.E. 577 (1931);

Davis v. Biloxi, 183 Miss. 340, 184 So. 76 (1938);

McAnally v. Little River Drainage District, 28 S.W.2d 650 (Mo. 1930);

Housing Authority v. Bjork, 109 Mont. 552, 98 P.2d 324 (1940)

Schmitz v. New Mexico State Tax Commission, 55 N.M. 320, 232 P.2d 986 (1951);

State v. Divide County, 68 N.D. 708, 283 N.W. 184 (1938);

State v. Snohomish County, 71 Wash. 320, 128 P. 667 (1912).

The per curiam opinions in *State v. Salt Lake County,* 96 Utah 464, 85 P.2d 851 (1938) and *State v. Duchesne County,* 96 Utah 482, 85 P.2d 860 (1938) do hold to the contrary, but as pointed out by Utah Parks Company at pages 20 and 21 of its brief, these cases are readily distinguishable from the present controversy for there all the tax acts had been accomplished prior to the time the state acquired title to the property. Research suggests that Utah has little company in the position taken in these two cases. See, Annotation, 158 A.L.R. 563, 565, 569. Even *State v. Salt Lake County,* at 858, points out

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the distinction between it and the present type of controversy.

In the face of the almost nonexistent authority and reasoning to support the view that the tax was valid, Utah Parks Company suggests that the case of *United States v. Alabama,* 313 U.S. 274 (1941), if controlling, would require a finding that the tax was valid. (Utah Parks Company brief, page 17.) We submit that it is clear that the *Alabama* case is not controlling for it does not and cannot purport to state the law of Utah.

With all due regard for the august body which uttered that decision, we respectfully point out that in a case turning on state law, the Supreme Court of the United States is in no stronger position than any state court purporting to divine the law of a sister jurisdiction. Even the Alabama authorities relied on by the Supreme Court are not in point, one dealing with railroads and the date an exemption begins, another dealing with a constitutional prohibition against remission of taxes. The court, without giving persuasive reasons, declines to follow the prevailing view cited to it by the government. Although the court did not invalidate the liens involved, it did hold that the tax sales and certificates were invalid. Since the United States had not conveyed the property to others and since the state of Alabama was, by the effect of the decree, prevented from enforcing its lien, the true effect of the court's purported holding that the liens survived is open to conjecture. One wonders if the court's philosophy concerning state-federal relationships did not prompt this part of the decision — a political consideration not germane to the instant case.

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In any event, we respectfully submit that a careful comparison of the cases, including the *Alabama* case, will show that the overwhelming weight of authority and the better reasoning support the view that in the instant case there was no lawfully assessed and levied tax on the property in question for the year 1958 and that Utah Parks Company is not entitled to reimbursement from Cedar City for the tax it negligently paid to Iron County.

POINT II.

ASSUMING, ARGUENDO, THAT THE TAX MAY HAVE BEEN LAWFULLY ASSESSED AND LEVIED, CEDAR CITY CORPORATION IS NOT OBLIGATED TO REIMBURSE UTAH PARKS COMPANY FOR THE ERRONEOUS PAYMENT OF SUCH TAX FOR UTAH PARKS COMPANY PAID AS A VOLUNTEER, THE PAYMENT DID NOT BENEFIT CEDAR CITY CORPORATION AND SUCH REPAYMENT MAY BE BEYOND THE SCOPE OF AUTHORITY OF CEDAR CITY CORPORATION.

Without diminishing to any extent the contention that the tax was not lawfully assessed and levied, even if it were lawfully assessed and levied Utah Parks Company is still not in a position to demand reimbursement from Cedar City. Utah Parks Company did not give notice to Cedar City that it was going to pay the tax and demand reimbursement. Had it done so, Cedar City could have tested its rights in an entirely different legal environment and the tax could have been paid, if need be, with protest. Failure to notify Cedar City that Utah Parks Company

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intended to make a payment which it was not obligated to make and failure to pay under protest has placed Cedar City in an unasked for undesirable situation attributable solely to, we must assume, negligence on the part of Utah Parks Company employees or officers. The argument on page 22 of its brief that Utah Parks Company was justified in making the payment as it did is not persuasive because the deed places the burden on Cedar City directly and not upon anyone else, particularly a negligent volunteer. Nor does Utah Code Anno. 1953, 59-10-1 assist them. It reads:

> Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.

Mr. Justice Wolfe's unfortunate digression in his concurring opinion in *Hayes v. Gibbs,* 110 Utah 54, 169 P.2d 781, 788 (1946) wherein he opines that the above statutory provision may serve to make the tax obligation more than a lien or a charge on the land seems to ignore the last sentence of the provision which sets forth in the disjunctive two means of removing any such lien or obligation in the nature of a judgment against the delinquent -- payment of the taxes or sale of the property for payment of the taxes. Title 59 of Utah Code Anno. 1953, sets forth a detailed procedure for the collection of delinquent taxes by sale of the property concerned. We have not found, nor has Utah Parks Company cited,

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any authority which permits any other type of action for the collection of delinquent taxes on realty. In view of the fact that the foreclosure procedure provided by law extinguishes any judgment or lien effect of the tax, it is difficult to think that Utah Parks Company had any justifiable reason for making payment of the tax at all, let alone without first notifying Cedar City. Utah Parks Company's assertion in the first full paragraph of page 23 of its brief that it may have had ample justification for paying the tax first and a asking reimbursement later is not supported by the law. To the extent its statement seeks to bring in factual justification it is dehors' the record.

Under these circumstances it is clear that Utah Parks Company was not required to make the payment to protect itself, that it jeopardized Cedar City's position by its voluntary payment without protest and that it is now asking Cedar City to act as an *ad hoc* insurer against negligence or mistake on the part of its employees or officers. It is quite possible that such a payment by Cedar City would be beyond its authority. See, for example, 10 McQuillin, Municipal Corporations, §29.06 (3d ed. 1950).

CONCLUSION

Regardless of the decision of this court with reference to Utah Parks Company's request for a refund from Iron County, it is respectfully submitted that (1) the tax in dispute was not lawfully assessed and levied and therefore it does not come within the purview of the deed provision concenred and (2) even if it be deter-

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mined that the tax was lawfully assessed and levied, payment by Utah Parks Company without prior notice to Cedar City was the act of a volunteer which jeopardized Cedar City's position rather than benefiting it and repayment may be beyond the authority of the city. The judgment in favor of Cedar City should be affirmed.

Respectfully submitted,

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