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Utah Parks Co. v. Iron County and Cedar City Corp. : Brief of Appellant

Utah Supreme Court

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In the

Supreme Court of the State of 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

APPELLANT'S BRIEF

Court, Utah

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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In the Supreme Court of the State of 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

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a suit pursuant to Section 59-10-14, Utah Code Annotated, 1953, for a refund of property taxes illegally collected from plaintiff by Iron County; or in the alternative, a reimbursement to plaintiff of said tax payment from Cedar City Corporation, pursuant to a provision in a warranty deed wherein plaintiff transferred the El Escalante Hotel and underlying realty at Cedar City, Utah, to Cedar City Corporation, which deed provided that Cedar City would assume and pay all taxes lawfully levied upon or assessed against said premises.

DISPOSITION IN LOWER COURT

The court granted Iron County's motion to dismiss for failure to state a claim upon which relief can be granted and awarded a judgment of dismissal in favor of Cedar City Corporation on an agreed statement of facts. Plaintiff appeals from both judgments.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment of dismissal in favor of Iron County and a judgment in its favor as a matter of law, or that failing, a reinstatement of its complaint against Iron County in the trial court for further proceedings; or in the alternative, a reversal of the judgment of dismissal in favor of Cedar City Corporation and judgment in favor of plaintiff as a matter of law.

PRELIMINARY STATEMENT

The brief of appellant covers both Case No. 9540 and Case No. 9753. When this lawsuit was initially filed in the trial court it included both respondent parties as defendants and relief was sought against said defendants in the alternative, the causes of action against each being mutually exclusive. The action against Iron County was concluded in the trial court approximately one year before the action was concluded against Cedar City Corporation. As a result, two separate appeals became necessary, and upon perfection of the second appeal, an order of consolidation was entered in this court. In the Statement of Facts, none of which were in issue, the

citations to the two records will be distinguished by placing an asterisk following the record citations from Case No. 9753 involving Cedar City Corporation.

STATEMENT OF FACTS

Plaintiff is a Utah corporation, Iron County, a body corporate and politic and a political subdivision of the State of Utah, and Cedar City Corporation is a municipal corporation organized and existing by virtue of the laws of the State of Utah. All three entities were duly constituted as such during all times mentioned herein. On January 1, 1958, plaintiff was the record and actual owner of the El Escalante Hotel, together with all furniture and fixtures and underlying realty, at Cedar City, Iron County, State of Utah. On January 31st of that year, and prior to the tax levy for the year 1958, plaintiff transferred and conveyed title to said hotel, furnishings and underlying realty, by warranty deed to defendant, Cedar City Corporation, a municipality exempt from taxation pursuant to the Utah State Constitution. (R. 1) and (R. 21)*

The warranty deed transferred title to the hotel and underlying realty to Cedar City Corporation free of all liens and encumbrances, except as specifically contained therein, and Cedar City Corporation also accepted said property subject to the following covenant:

“All taxes and all assessments, general and special, and all installments of assessments lawfully levied upon or assessed against the premises hereinbefore described which become due and payable subsequent to the date hereof, which taxes and assessments the grantee (Cedar City Cor-

poration) hereby assumes and agrees to pay.”
(R. 2) (R. 12-15, 21)*

As the record owner of said hotel and underlying realty on January 1, 1958, the ad valorem tax assessment and levy for that year was made and processed in the name of plaintiff, and plaintiff also received the valuation and tax notices on said property. The total assessed valuation for the year 1958 on the El Escalante Hotel building, the underlying realty and the furniture and fixtures, was \$110,670. That valuation was subjected to a 64 mill levy, making the tax for the year 1958 the sum of \$7,082.88. On or about November 26, 1958, plaintiff paid the Iron County Treasurer, without protest, the 1958 taxes assessed and levied against said property in the total sum of \$7,082.88. (R. 2) (R. 11, 22)*

Thereafter, and based upon Cedar City Corporation's covenant and obligation under the warranty deed to pay all taxes and assessments lawfully levied or assessed against said premises which became due and payable subsequent to January 31, 1958, plaintiff requested reimbursement of said tax payment from Cedar City Corporation. By letter dated November 11, 1959, Cedar City Corporation advised plaintiff that it refused to make such reimbursement. (R. 16, 22)*

Plaintiff also made written application for a refund of said taxes to the Board of County Commissioners of Iron County on or about July 30, 1959, acting pursuant to Section 59-10-14, Utah Code Annotated, 1953, which provides in part, as follows:

“Any taxes, interest and costs paid more than once, or erroneously or illegally collected,

may, by order of the board of county commissioners be refunded by the county treasurer * * *’.

Plaintiff’s application to the Board of County Commissioners of Iron County was denied on or about September 17, 1959, on the ground said taxes had been lawfully assessed, levied and collected. (R. 2)

Following the refusal of Cedar City Corporation to make reimbursement under the provision in the warranty deed, and the denial of plaintiff’s application for a refund by the Board of County Commissioners of Iron County, plaintiff commenced suit against both parties seeking relief against Iron County on the ground said taxes were erroneously or illegally collected, and, in the alternative, against Cedar City Corporation on the ground said taxes were collected pursuant to lawful assessment and levy.

ARGUMENT

POINT I.

THE PROPERTY TAXES PAID BY UTAH PARKS COMPANY TO THE IRON COUNTY TREASURER ON THE EL ESCALANTE HOTEL AND UNDERLYING REALTY FOR THE YEAR 1958 WERE ERRONEOUSLY AND ILLEGALLY COLLECTED AND SHOULD THEREFORE BE REFUNDED BY IRON COUNTY PURSUANT TO SECTION 59-10-14, UTAH CODE ANNOTATED, 1953.

In view of the trial court’s order granting Iron County’s motion to dismiss plaintiff’s complaint, this court on review is obliged to survey the allegations set

forth therein in the light most favorable to plaintiff and to indulge in its favor all reasonable inferences as to proof that may be adduced thereunder. It is the policy of this court to be reluctant to turn a party out of court without trial and it can be done justifiably only if the party could not in any event establish a right to recover. *King Bros., Inc. vs. Utah Dry Kiln Company*, Utah (2d), 374 P. (2d) 254, (1962).

Plaintiff's theory of an erroneous and illegal collection by Iron County under the provisions of Section 59-10-14, Utah Code Annotated, 1953, is predicated upon the exemption status afforded Cedar City Corporation by Article 13, Section 2, of the Constitution of Utah, upon all tangible property owned by the said Cedar City Corporation.

That Section provides in part:

“All tangible property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The property of the state, counties, cities, towns, school districts, municipal corporations and public libraries, lots with buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation.”

The exempt status of property owned by municipal corporations, or other public entities, for the entire taxable year, is not questioned. The difficulty arises in this case from the fact that the transfer of the property involved, from a taxable grantor to an exempt grantee,

occurred during the taxable year. The tax status of that property under such a transfer, is the real crux of this lawsuit.

Constitutional exemption from taxation as a basis for refund of taxes paid to a county on a voluntary basis, on the theory the collection was illegal, is not unprecedented in this state. The point was ruled upon in *Neilson vs. Sanpete County*, 40 Utah 560, 123 P. 334, (1912). There an action was commenced against Sanpete County to recover taxes which had been voluntarily paid, on the ground the assessment, levy and collection of the tax was illegal and invalid. The tax was upon certain real estate mortgages for the years 1907, 1908 and 1909. Prior to 1906 the legislature was authorized by the State Constitution to provide for taxation of mortgages. However, in that year the Constitution was amended to eliminate and exempt mortgages from taxation. The taxpayer alleged that since the mortgages were exempt from taxation by the State Constitution, the taxes assessed and levied thereon were illegal and void. The Supreme Court agreed. It also held that the proper recourse for recovery was pursuant to the voluntary refund statute and that payment under protest was unnecessary.

It seems clear from the holding in the *Neilson* case that if property enjoys a tax exempt status during the entire taxable year, any attempt at assessment, levy or collection of the tax thereon would be illegal and void, and that a refund from a Board of County Commissioners under the voluntary refund statute, upon proper demand therefor, would be mandatory. In this regard the only material variation between the *Neilson* case and

the present case is the fact that the exempt entity did not acquire the property until January 31, 1958, one month after January 1, 1958, the date upon which the County Assessor must assess all property subject to taxation to the person by whom it is owned and at its value on that date (Section 59-5-4, Utah Code Annotated, 1953), and one month after the inchoate tax lien had attached to said property. (Section 59-10-3, Utah Code Annotated, 1953). Therefore, it must be determined whether the acquisition of title to the hotel property by Cedar City Corporation on January 31, 1958, would defeat the application of the *Neilson* holding, and prevent plaintiff from making a recovery from Iron County. See also *Wey vs. Salt Lake City*, 35 Utah 504, 101 P. 381 (1909).

There appears to be two arguments under Utah law for concluding that the collection of the tax in this case by Iron County was illegal and void and that a refund from the County should be allowed:

(1) The inchoate lien created by statute on January 1, 1958, at the time of assessment never matured into a valid and enforceable lien prior to acquisition of title to the property by the exempt grantee;

(2) The title to property transferred to an exempt entity in Utah is subject to taxes only when said taxes have been both lawfully assessed and lawfully levied against the property prior to acquisition by the exempt entity.

Numerous cases have held that the validity of an inchoate lien which attached to property on a given date provided by statute is wholly dependent upon a sub-

sequent lawful levy. The lien matures and becomes enforceable only after a lawful levy on the theory of a relation back to the statutory lien date. Thus, by virtue of the property passing into tax exempt hands before the levy takes place, the attempted levy and subsequent collection, if any, of the tax, has no legal effect. It is completely void. No tax lien ever matures. This is because the creation of a valid tax lien presupposes the existence of a susceptible subject of taxation at every stage of the process of creation.

The principle of relation back was applied and followed in *Gillmor vs. Dale*, 27 Utah 372, 75 P. 932 (1904). In that case action was commenced to recover taxes collected by the Treasurer of Salt Lake County and paid to Salt Lake City Corporation. The property involved had been assessed pursuant to statute as of the first Monday in February and, also pursuant to statute, an inchoate lien attached at that time. On May 20, 1902, a portion of the territory of Salt Lake City was disconnected and discharged from payment of taxes to Salt Lake City. Thereafter on July 28, 1902, the Salt Lake City Council levied a tax on the property owned by plaintiff which was located in the disconnected area. The Treasurer contended that the tax for 1902, although not levied until after the detachment of the territory from the City, was, nevertheless, a valid unpaid lien upon the property prior to detachment by virtue of the tax lien statutes. The Supreme Court disagreed. It held that by disconnection the property was no longer subject to a tax levy or any jurisdiction whatever by the City and the property involved never became subject to the tax

lien contended for by the County Treasurer by virtue of the state taxation statutes. The court cites with approval the rule that no tax or assessment can exist so as to become a lien or encumbrance upon real property until the amount thereof is ascertained and determined, and then states:

“Under the provisions of the Revised Statutes a city tax does not become a lien on real estate until the rate thereof is fixed, and the tax levied, in pursuance of sections 239, 2694; but when the rate is so fixed, the amount determined and levied, a lien on each tract of real estate assessed by the assessor attaches, by relation, for the amount of the tax thereon ‘as of the first Monday of February’ preceding the levy. (Citing cases).

“The city council was not authorized, either under the Constitution or by the provisions of the Revised Statutes, to levy a tax, except on property within its corporate limits, and any levy upon property not within such limits is without authority and void. As no lien can exist for taxes illegally levied, the appellant’s (treasurer’s) contention in respect to the lien claimed in this case is untenable.”

The relation back principle was also mentioned in *Anson vs. Ellison*, 104 Utah 576, 140 P. (2d) 653 (1943). In that case an action to quiet title to property was commenced and Salt Lake City was made a party defendant on the ground it claimed an interest in the property by virtue of a special assessment which it claimed constituted a lien on the property.

On the principle of relation back, the court said:

“... a valid lien will not arise from an invalid levy and assessment. Although it may be that

when a tax is subsequently properly levied the lien may relate back to the 1st day of January of the year in which the proper levy should have been made.”

A case similar on its material facts to the one before us on the question of relation back is *State vs. Snohomish County*, 71 Wash. 320, 128 P. 667 (1912). In that case the State of Washington commenced action to cancel tax certificates and to quiet title to lands which it had purchased from private owners as a site for the Washington State Reformatory. A portion of the property was purchased on May 8, 1907, and two other parcels on August 9, 1907. After purchase the Snohomish County Treasurer issued delinquency certificates for failure to pay the 1907 taxes in the name of the record owner as of March 1, 1907.

The State Constitution exempted all property belonging to the State from taxation and the state statute establishing the tax lien provided that taxes assessed upon real property on March 1st were a lien from that date until paid. The levy did not take place until after title to the property had passed to the State. The issue was whether real estate in private ownership on March 1, 1907, but in public ownership when the taxes for that year were levied, was subject to the payment of such taxes.

The court held that the statute declaring taxes assessed upon real property was a lien from March 1st of the year in which they are levied, makes the lien incipient and inchoate and becomes a mature and enforce-

able lien as of that date only by relation back upon the making of a valid levy.

In support of its holding the court cites the Utah case of *Gillmor vs. Dale*, *supra*. The following language at page 669, states the doctrine clearly:

“Obviously the doctrine of relation presupposes a valid creation. It seems equally plain that the creation of a valid tax implies the existence of a susceptible subject of taxation at every stage of the process of such creation. Since, on general principles of public policy and by both constitutional declaration and statutory enactment, lands while held in public ownership are exempt from taxation, the land here in question was not, during any step in the proceedings creating the tax after August 9, 1907, when it passed to the state, a susceptible subject of taxation. It follows that at that time the developing process of imposing the tax as a valid creation was arrested. * * * ‘Lands acquired for public purposes during the period between the first and final steps of taxation are exempt from taxes levied during the year in which they are acquired.’ *Territory of Arizona vs. Perrin*, 9 Ariz. 316, 320, 83 Pac. 361, 362; *United States v. Pierce County*, *supra*; *Bannon vs. Burnes*, *supra*; *Gillmor vs. Dale*, *supra*.

“There is no distinction in this respect between purchases by the United States and purchases by the state or a municipality for strictly public uses, as is shown by the Louisiana and Utah cases above cited. We are constrained to hold that the statute (Rem. & Bal. Code Sec. 9235) creating the lien as to real property taxes makes the lien only incipient or inchoate on March 1st to become a complete and enforceable lien as of

that date by relation only upon the making of a valid levy."

In support of this view, see also *City of Portland vs. Multnomah County*, 135 Or. 469, 296 P. 48 (1931); *City and County of Denver et al. vs. Tax Research Bureau*, 101 Colo. 140, 71 P. (2d) 809 (1937); *City of Laurel vs. Weems*, 100 Miss. 335, 56 So. 451 (1911); and *United States vs. Certain Lands*, 29 F. Supp. 92 (1939).

In Utah the County Assessor must, before April 15th of each year, assess all taxable property as of January 1st (Section 59-5-4, U.C.A., 1953); the tax becomes a lien against the property assessed as of that day (Section 59-10-3, U.C.A., 1953); the county levy occurs between the last Monday in July and the second Monday in August (Section 59-9-6, U.C.A., 1953); and thereafter the County Treasurer furnishes the taxpayer with notice of the amount of tax assessed against him (Section 59-10-10, U.C.A., 1953). In this case the title passed to Cedar City Corporation on January 31, 1958, prior to the tax levy and prior to notice to the plaintiff of the amount of tax assessed against it. Under the principle of the *Gillmor* case, *supra*, no valid tax lien ever attached to the hotel property in 1958 and the levy upon the property and collection of the tax by Iron County was without authority, and, therefore, illegal and void. With no basis to relate the inchoate lien back to January 1st, the exempt status of the property prevailed for the entire year and the holding in the *Neilson* case, *supra*, would be applicable.

In this case plaintiff did not pay the taxes under protest, pursuant to Section 59-11-11, Utah Code Anno-

tated, 1953. If payment under protest was necessary under the facts of this case, plaintiff concedes that it has no remedy against Iron County. However, we believe the facts and circumstances of this case properly qualify it for a refund under the voluntary payment statute, Section 59-10-14, Utah Code Annotated, 1953.

Both provisions were construed in detail in the *Neilson* case, *supra*. After a lengthy analysis of the proper scope and application of each, the court concluded that taxes assessed and levied upon exempt property, even though in the regular manner, are absolutely illegal and void, and are properly recoverable by the taxpayer from the county pursuant to Section 59-10-14, U.C.A., 1953.

The question of whether special taxes assessed by a city against exempt property must be paid under protest was before the court in *Wey vs. Salt Lake City*, 35 Utah 504, 101 P. 381 (1901). In that case Salt Lake City levied a special tax on lands abutting on a street to pay for the expense of paving and improving it. The Board of Education owned land abutting on the street and failed to pay the assessment. By statute all property owned by the Board was exempt from special taxes. It later sold the property involved to the plaintiff who filed suit against Salt Lake City to annul the assessment on the ground the property was exempt from the special tax. The trial court granted judgment to the plaintiff and on appeal the Supreme Court affirmed.

Among its defenses the city urged that if the property was exempt from the assessment, the Board's

only remedy was to pay the tax under protest and bring action for a recovery pursuant to what is now Section 10-7-39, U.C.A., 1953. That provision requires a taxpayer assessed with a special tax by a city or town to pay the same under protest and file notice that he intends to sue to recover the payment. It further provides that such remedy is exclusive. The court, however, held that such statute had no application where the property involved was exempt from the assessment.

Under the *Gillmor* principle no valid tax lien ever attached to the property in the present case and, therefore, as a matter of law, it was not subject to taxation for the year 1958. The exempt nature of the grantee, who acquired the property after January 1st, but prior to the levy, impressed that property with complete tax immunity for the entire year and the collection thereof was illegal and void. Therefore, this case falls within the holdings of the *Neilson* case and the *Wey* case as to the nature of plaintiff's claim against Iron County, and plaintiff is entitled to proceed against Iron County under the voluntary payment statute. See also *Wilson vs. Weber County*, 100 Utah 141, 111 P. (2d) 147 (1941); and *Shea vs. State Tax Commission*, 101 Utah 209, 120 P. (2d) 274 (1941).

It is true that in the *Gillmor* case the taxes were paid under protest. However, the issue of whether or not the suit could have been commenced and recovery made under the voluntary payment section was never considered or ruled upon. That case, therefore, does not answer the question of whether a recovery can be made for such taxes not paid under protest.

One final comment seems appropriate. The word “may” in Section 59-10-14, U.C.A., 1953, does not allow a county commission any discretion in refunding taxes illegally collected. The *Neilson* case, *supra*, holds that after a demand in writing for the return of the tax has been made, and the county commission refuses to order a refund, the taxpayer may commence action to recover the tax together with legal interest from the date of the demand. The purpose of the word “may” in the refund statute is to provide the county commission with an opportunity to refund the tax without the necessity of court action by the taxpayer to enforce such a payment. See also *Wilson vs. Weber County*, *supra* (Wolfe, Justice, concurring in part, dissenting in part).

POINT II.

IN THE ALTERNATIVE TO POINT I, THE PROPERTY TAXES PAID BY UTAH PARKS COMPANY TO THE IRON COUNTY TREASURER ON THE EL ESCALANTE HOTEL AND UNDERLYING REALTY FOR THE YEAR 1958 WERE LAWFULLY ASSESSED AND LEVIED, AND THEREFORE THERE SHOULD BE A REIMBURSEMENT FROM CEDAR CITY CORPORATION PURSUANT TO ITS LEGAL OBLIGATION UNDER THE WARRANTY DEED.

Plaintiff’s theory against Cedar City Corporation is based upon the warranty deed covenant wherein the grantee agreed to pay all taxes lawfully assessed or levied on the hotel property which became subsequently due and payable.

If the *Neilson* and *Gillmor* cases, *supra*, are controlling in this lawsuit, under the analysis heretofore presented for recovery against Iron County, there would be no lawful assessment or levy in this case, and no right of recovery from Cedar City Corporation under the deed. However, there is a decision from the United States Supreme Court which, if controlling, would appear to allow recovery from Cedar City Corporation. In *United States vs. Alabama*, 313 U. S. 274, 85 L.Ed. 1327, 61 Sup. Ct. 1011 (1941), the court held that the transfer of property from a taxable grantor to the United States following the tax day but prior to the day of levy did not transfer the title to the United States free of the inchoate lien. In that case the United States filed a suit to quiet title to certain property in Alabama. The state claimed that tax liens attached to said property on October 1, 1936, for state and county taxes for 1937. The United States had obtained title to the three tracts of land involved on October 1, 1936, December 10, 1936, and March 10, 1937. In Alabama, from and after October 1st of each year property becomes assessable and the state has an inchoate lien thereon for the payment of all taxes until such taxes are paid. Thus the process of assessment for 1937 commenced on October 1, 1936.

The government claimed that the lands could not be taxed because when the United States acquired title, the amount of taxes had not been ascertained as the values had not been assessed and the rate of taxation had not been fixed. It further claimed that the lien matured under such circumstances only when the taxes had been ascertained by completion of levy and assess-

ment. The Supreme Court refused to accept this argument. Beginning at page 279 the court states:

“There is no question however, as the Government concedes, that the state statute purports to impose a lien as of October 1, 1936, for the taxes which by the process of assessment were to become payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes for the ensuing year as these are fixed by the defined statutory method. This lien by the state law is made effective not only as against the owners on the tax day but also as against subsequent mortgagees and purchasers. * * * We find nothing in the Federal Constitution which invalidates such a statutory scheme. Subsequent lienors and purchasers have due notice of the tax liability imposed as of the tax day and of the process of assessment, and that liability, when its amount is definitely ascertained, relates back to the day specified.”

The court continues on page 281, as follows:

“* * * The Government brings this suit in the view that it is entitled to have a marketable title and it seeks to remove the liens in question as clouds upon that title which would interfere with the disposition of the lands in the future. From that standpoint the Government asks a decree declaring the invalidity of the liens and enjoining the State from asserting any claim in the lands either adverse to the United States or to its successors in title. We think that the United States is not entitled to that relief. The

United States took the conveyance with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date. It is familiar practice for grantees who take title in such circumstances to see that provision is made for the payment of taxes and the Government could easily have protected itself in like manner. Finding no constitutional infirmity in the state legislation, we think that the liens should be held valid."

Cedar City Corporation acquired title to the property involved here with the same notice and knowledge the United States had in the *Alabama* case with respect to the tax day. Both were aware of the statutory provisions which imposed an inchoate lien on all taxable property on said day and that the taxing authority, if not legally restricted from doing so, would, in due course, perfect the lien through subsequent levy, and when ascertained would relate the liability back to the tax day.

The scope of constitutional exemption of property from taxation in this state, where acquisition is made by a public entity during the taxable year, has never been completely defined. Under the rationale of the *Gillmor* case, *supra*, it appears that the critical point in the taxing process is the date of levy, and that if an

exempt entity acquires the property before that date the taxing process is stopped; however, if it acquires the property subsequent to that date the tax lien survives the transfer. Nevertheless, in *Gillmor* the power to tax was lost because the property was disconnected from the territory of the taxing power, not because it was acquired by the state or one of its political subdivisions. In addition, neither that case nor any other Utah case to our knowledge, has considered the effect of statutory notice to an exempt grantee, upon its acquisition of property from a taxable grantor during the taxable year, of an inchoate lien impressed on said property by the tax day provision. Such knowledge on the part of the United States was the primary reason for the holding in the *Alabama* decision, *supra*. In our view, the Supreme Court's analysis in that case deserves consideration here.

The Utah Supreme Court recognized that there are limitations on the scope of constitutional tax immunity for public entities in *State vs. Salt Lake County*, 96 Utah 464, 85 P. (2d) 851 (1938). There the county bid in certain property for delinquent taxes during the time when the property was mortgaged to the state. After the final tax sale, the state acquired title by a warranty deed from the mortgagor and thereafter commenced quiet title proceedings against the county. The court held that the tax lien survived the acquisition of title by the state and the state's constitutional exemption from taxation would not apply. One issue presented was whether the constitutional exemption of state property

from taxation could be made to cover property which was in private ownership at the time it was assessed for taxation, the tax levied, the tax lien attached and the property sold for unpaid taxes. Under these circumstances the court concluded that the state acquired only the title that its grantor had at the time of transfer by deed, and this was a title encumbered by taxes therefore lawfully assessed and levied against the property. To hold otherwise would constitute abatement of taxes, not exemption of taxes.

See also *State vs. Duchesne County*, 96 Utah 482, 85 P. (2d) 860 (1938), and the annotation in 158 ALR beginning at page 563.

While the facts in the *Salt Lake County* case, *supra*, are readily distinguishable from those present here, and the court speaks of the levy as the critical date for establishing a valid lien, the case does illustrate that constitutional tax immunity for public entities is not absolute for all acquisitions, and that unless property is clearly exempt it cannot escape the burden of taxation. It also clearly sets forth the requirement of strict construction against exemptions of property from taxation under the Utah Constitution and that all doubts must be resolved against the exemption. Under such circumstances, and even though the present Utah law appears contrary, the rationale of the *Alabama* case has been presented in this lawsuit. It would appear that the application of that decision would make the entire taxing process in this case legal in all respects. In that event that collection of the tax by the County would be lawful under a valid levy and assessment, and a re-

covery under the warranty deed from Cedar City Corporation would be proper.

It is true that there is no provision in the warranty deed wherein Cedar City Corporation explicitly agrees to reimburse plaintiff for taxes paid to Iron County. Neither is there a provision in the deed expressly requiring Cedar City to pay the taxes directly to Iron County. The deed merely requires the City to assume and pay said taxes. The means of payment are not spelled out. Therefore, if the taxes on the hotel were lawfully assessed and lawfully levied, elements which are indispensable for plaintiff to recover from Cedar City Corporation, then the payment by plaintiff to Iron County and reimbursement from Cedar City, or in the alternative, a direct payment to the County by Cedar City, would both constitute performance of the clear intention of the parties to the deed.

And, if Cedar City had refused to pay the tax, plaintiff, as record owner on January 1, 1958, was under some risk in not doing so by virtue of Section 59-5-12, U.C.A., 1953, which provides that where the name of the owner of any property is known, or appears of record, it must be assessed to such name, and also by virtue of Section 59-10-1, U.C.A., 1953, which provides that every tax has the effect of a judgment against the person, and every lien created thereby has the force and effect of an execution duly levied against all personal property of the delinquent. See also the concurring opinion in *Hayes vs. Gibbs*, 110 Utah 54, 169 P. (2d) 781, 788 (1946), where Justice Wolfe points out that Section 59-10-1 seems to make the tax a debt against the individual

owning the property and a lien on his personal property rather than a charge against the property alone.

The possible legal effect of the foregoing statutory provisions, together with plaintiff's contractual rights with Cedar City Corporation under the deed, provide it with ample basis for paying the tax and then securing reimbursement for the taxes so paid. See *Franklin Building & Loan Co. vs. Peppard*, 97 Utah 483, 93 P. (2d) 925 (1939).

We recognize that Cedar City Corporation's ownership of property is all that is necessary to remove it from a taxable status even though the City may use the property in a nongovernmental capacity such as operating a hotel. *Springville vs. Jensen*, 10 Utah 351, 37 P. 577 (1894), and *Duchesne vs. State Tax Commission*, 104 Utah 365, 140 P. (2d) 335 (1943). Therefore, plaintiff makes no attempt to recover from Cedar City on the nature of the use to which it has put the property involved.

CONCLUSION

The holdings of this court in *Neilson* and *Gillmor*, supra, may well be dispositive on the question of the legality of the taxes involved in this case. In that event plaintiff's remedy is against Iron County. However if the levy and lien are valid against the property involved in this case for the year 1958 regardless of the transfer to an exempt grantee, under the views expressed in the *Alabama* case, supra, it is our contention that Cedar City Corporation should be required to live up to its covenant under the deed.

Respectfully submitted,

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