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San Juan County and State Tax Commission of Utah v. Jes, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

SAN JUAN COUNTY and STATE TAX COMMISSION OF UTAH,

Plaintiffs and Appellants,

vs

JEN, INC., a corporation,

Defendant and Respondent.

Case No. 10146

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF DISMISSAL OF THE DISTRICT COURT OF SAN JUAN COUNTY, HONORABLE F. W. KELLER

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STATEMENT OF FACTS

Defendant and respondent (hereinafter the parties will be referred to as plaintiffs and defendant) agrees with the Statement of Facts by plaintiffs so far as stated. For convenience defendant will briefly summarize the procedure and include a brief statement of admitted facts.

The case as argued before the trial court was on a motion to dismiss plaintiffs' complaint. The memorandum decision written by Judge Keller (and which is a part of the record) held for the defendant on the ground that there could be no personal liability for real property

taxes. Thereafter, additional facts not set forth in the complaint were stipulated, and the formal judgment of the court was entered as on a motion for summary judgment. (All emphases are added by defendant unless otherwise indicated.)

The admitted facts are:

1. The defendant owned and operated The Jen, The Jackie, Uncle Ben, Pasco, and a part of the Enigma Fraction mining claims during 1957, 1958, and a part of 1959.

2. In December of 1959, the mining claims were worked out, had no further value and were formally abandoned by defendant. Defendant's title thereupon ceased and defendant has not owned said mining claims at any time during the years 1960, 1961, and 1962.

3. Defendant filed the required reports on forms furnished by the tax commission for all of the years it operated, the 1959 operations being reported in 1960. The 1960 report expressly stated that it was filed without admission of any liability for the payment of the ad valorem tax for the year 1960.

4. The state tax commission assessed the ad valorem tax for 1960 based upon the average net proceeds for the years 1957, '58, and '59 at $288,204.50.

5. This tax was not paid and there was an automatic sale of the property in January of 1961, pursuant to Section 59-10-33 Utah Code Annotated, 1953.

6. Similar assessments were made for the years 1961 in the amount of $222,240.66 and 1962 in the amount of $113,661.96 with the consequent tax sales the following January, these taxes being calculated upon a three-year average, the operations for 1960 and 1961 being calulated at zero.

STATEMENT OF POINTS

Defendant relies upon the following points to sustain the judgment of the trial court:

POINT I

ASSUMING A "PERSONAL LIABILITY," THE STATE TAX COMMISSION HAS NO RIGHT TO SUE.

POINT II

ASSUMING A "PERSONAL LIABILITY," SAN JUAN COUNTY HAS NO RIGHT TO SUE.

POINT III

THERE IS NO "PERSONAL LIABILITY" FOR REAL PROPERTY TAXES, INCLUDING REAL PROPERTY TAXES BASED UPON NET PROCEEDS.

POINT IV

EVEN IF THE PLAINTIFFS OR ANY CONSTITUTED AUTHORITY IS ENTITLED TO A JUDGMENT FOR TAXES, THAT JUDGMENT HAS ALREADY BEEN ENTERED AND THERE MAY NOT BE ANOTHER JUDGMENT.

POINT V

THE JUDGMENT PROVIDED FOR BY SECTION 59-10-1 WAS SATISFIED BY THE TAX SALE TO SAN JUAN COUNTY PURSUANT TO SECTION 59-10-33.

POINT VI

IN THIS CASE THERE CAN BE NO VALID AD VALOREM REAL PROPERTY TAXES FOR 1960, 1961, AND 1962 FOR THE REASON THAT THERE WAS NO PROPERTY VALUE AT ANY TIME DURING SAID THREE YEARS.

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ARGUMENT

POINT I

ASSUMING A "PERSONAL LIABILITY," THE STATE TAX COMMISSION HAS NO RIGHT TO SUE.

This is the question argued as Point I by plaintiffs. Plaintiffs cite only statutory provisions. We call attention to Section 59-8-2, U.C.A., 1953, which provides:

> ". . . and the whole tax shall be carried into a column of aggregates, and *shall be collected by the county treasurer* at the time and in the manner

> provided by law for collecting state and county taxes."

See more particularly as to net proceeds tax, Section 59-5-65, which provides:

> "The tax mentioned in the preceding sections on mines and mining claims, and mining property, shall be collected and the payment thereof enforced in the manner provided for the collection and enforcement of other taxes; . . ."

This, it seems to us, is a sufficient answer to the argument that the tax commission has the right to a judgment against the defendant. Plaintiffs' sole authority appears to be Section 59-5-46, U.C.A., 1953, which is a general right in the tax commission to sue and to be sued in its own name. Certainly this general power does not entitle the state tax commission in its own name to perform the functions expressly given to the taxing authorities of the counties. The state tax commission is not authorized to collect the taxes in question with or without suit or to give a receipt therefor. As above-mentioned and stated by plaintiffs, the taxes on mines, though the mines are assessed by the tax commission, are collected by the *county treasurer.*

Other sections show that though the tax commission makes the assessment, the assessed valuation is given by the tax commission to the county assessor and the procedure for collection is entirely by the county treasurer. See Sections 59-5-2; 59-6-2, where the county assessor must enter the amount assessed by the tax commission on the assessment roll of the county; 59-8-8, where the

county auditor charges the county treasurer "with the full amount of taxes levied except for taxes of car companies and automobiles, motor stages, motor transports and trailers employed in common-carrier business;" 59-10-12, which requires the county treasurer to give a receipt to all persons paying taxes; 59-10-13, which requires the county treasurer to make settlement with the county commission for all monies collected. If these things must be done by the county officials, how can the money be collected by or paid to the state tax commission? A judgment by the commission requires payment to the tax commission.

It may be interesting and helpful to note other sections of the statute expressly conferring upon the state tax commission the right to collect other taxes or take action with respect thereto. Under Sections 59-10-20 and 59-10-30 the tax commission is given express authority to collect taxes on the property of "car companies and the owners of automobiles, motor stages, motor transport and trailers employed in common-carrier business." Under Sections 59-10-23, 24 and 25, the state tax commission is empowered to take certain action in case of threatened depletion of mines or mining claims. Certain specific steps must be taken by the tax commission. That procedure is not involved in this case. Even if it were, it does not provide for personal liability.

The failure of plaintiff to cite a single case where the state tax commission or a county of this state has been permitted to sue to collect ad valorem taxes is the answer

in itself to this question. There is no statutory authority for either the state tax commission or a county to sue.

POINT II

ASSUMING A "PERSONAL LIABILITY," SAN JUAN COUNTY HAS NO RIGHT TO SUE.

Plaintiffs at the outset concede that suit in the name of the county treasurer "perhaps would have been more appropriate." The sections relied upon for the right of San Juan County to sue are 17-4-3; 17-5-24; 17-5-50; and 17-5-54. These are all general statutes not specifically relating to the right to bring a suit to collect taxes. That such statutes do not mean that in every circumstance the county can sue and be sued is stated in *Shaw v. Salt Lake County,* 119 Utah 50, 224 P.2d 1037. In referring to Section 17-4-3(1), which gives the county the power "to sue and to be sued," the court said

> "Subdivision (1) of this section is but a general grant constituting the county an entity to sue and be sued, *where it may under other applicable statutes or principles,* properly be sued or sue; it is not a blanket authorization for suits to be brought against counties."

The other section noted by plaintiffs is 59-10-16, which, as pointed out by plaintiffs, gives the county treasurer the right to sue in the name of the county where personal property, after being assessed, is removed from one county to another. Plaintiffs state on page 5 that there is no other provision "allowing the treasurer to sue or be sued." Plaintiffs have omitted to mention

Section 59-11-11 which permits suit against the treasurer of the county where taxes have been paid under protest.

The argument seems to be that since the statute does not specifically give the county treasurer the right to sue to collect taxes on the basis of a "personal liability," therefore, the suit may be brought in the name of San Juan County. Admittedly, our statutes do not give the county treasurer the right to sue for a personal judgment. This does not mean, however, that the county has the right to sue. It rather indicates that there can be no suit. In addition to sections relating to the duties of the county treasurer with respect to taxes, cited under Point I, we call attention to Section 17-16-11 which places the county treasurer under bond for the safe-keeping of all monies and Section 17-24-1 to 17-24-21 which give to the county treasurer full responsibility for county funds.

That the county cannot take over the responsibility of statutory county officers is indicated in the case of *Sheriff of Salt Lake County v. Board of County Commissioners of Salt Lake County,* 71 Utah 593, 268 Pac. 783. In this case the county commission attempted to remove a deputy county sheriff. The statute provided that deputies could only be appointed with the consent of the county commissioners. Nevertheless, it was held that the discharge of a deputy was the sole responsibility of the county sheriff, and that the county commission could not upsurp that function. The court said:

> "The sheriff's office is an elective office of the county, as is also the office of a county commissioner, and is a coordinate office or branch

> of our county government. His powers and duties are prescribed by statute and are similar to those generally prescribed by other western states. *In performing them, he, generally speaking, acts independently of the board of county commissioners except as otherwise restricted and specified by statute.*"

At this point we call attention to the fact that the complaint is in the form of two causes of action, one by the state tax commission and the other by San Juan County. The complaint prays for judgment for the full amount of the tax in both causes. In other words, it asks for a judgment in favor of the state tax commission for the full amount of the taxes and for another judgment in favor of San Juan County for the full amount. Plaintiffs do not state or claim to know which plaintiff should have judgment.

Plaintiffs' brief claims only that the state tax commission *may* join in "an attempt to collect taxes due for and on behalf of San Juan County." (page 5) With respect to the right of San Juan County to sue it is conceded in plaintiffs' brief as above mentioned, that suit in the name of the treasurer "perhaps would have been more appropriate." (page 5)

POINT III

THERE IS NO "PERSONAL LIABILITY" FOR REAL PROPERTY TAXES, INCLUDING REAL PROPERTY TAXES BASED ON NET PROCEEDS.

It should be kept in mind that the so-called "net proceeds tax" is an ad valorem real property tax. The net proceeds formula is merely a means by which the

value of the property is assessed. Should this court hold that there is "personal liability" for real property tax, then all property owners may be sued. We submit that this would be a very far reaching decision, would give rise to many difficulties, and be a deterrent to the ownership of real property. *The question of who is the owner is sometimes a difficult one and calls for judicial determination, not administrative.* Be that as it may, the question is whether or not our tax laws as now constituted do provide for "personal liability."

An interesting statement in plaintiffs' brief is found on page 6 where it is stated:

> "The primary question presented to the Court is whether a mining company incurs personal liability by depleting mineral assets, paying no tax thereon, and then abandoning the depleted mining claim, the fee title to which was never owned by it."

This suggests that the plaintiffs have in mind some special "personal liability" with respect to real property taxes on mining claims which do not apply to taxes on real property generally. We submit that there can be no different rule with respect to ad valorem real property taxes on unpatented mining claims than on patented mining claims or all other real property. Authorities relied upon by plaintiffs must apply equally to all real property taxes.

The only Utah statute relied upon by plaintiffs is Section 59-10-1 quoted at page 7 of their brief and the only Utah cases are *Hayes v. Gibbs,* 110 Utah 54, 169

P.2d 781; *Crystal Car Line et al v. State Tax Commission of Utah*, 110 Utah 426, 174 P.2d 984; and *Crismon, Assessor, and Salt Lake County v. Reich*, 2 Utah 111.

The earliest Utah case on the subject is *Crismon, County Assessor, et al v. Reich*, 2 Utah 111, cited by the plaintiffs. In that case, the plaintiffs asked for a personal judgment. The court expressly held that no personal judgment could be taken. Plaintiffs' attempt to take comfort from this case because in making its ruling the court stated that:

> ". . . when ample powers and means are afforded by statute for the collection of taxes without suit, and when there is no statute providing for suit to be brought for taxes, no action can be maintained therefor." (page 5 of plaintiff's brief)

The court did not hold that just because the state, the county, or the county treasurer has not been able to collect taxes that there is then created a personal liability.

Another early case following the Reich case is *Kerr v. Wooley*, 3 Utah 456, where it is simply stated in the headnote reflecting the decision of the case that "Suit is not the proper remedy for the collecting of a tax unless expressly given by statute."

In the case of *Richards v. State Tax Commission*, 92 Utah 503, 69 P.2d 515, the plaintiff brought suit against the tax commssion and others for the purpose of quieting title to property which plaintiff had purchased from the county after the receipt by the county of a tax deed. Apparently the purchase price from the

county was for less than the taxes, and it was claimed by the defendant tax commission that the taxes were not extinguished by a sale to the county. The court said:

> "*Taxes are levied against the property.* The property against which the levy is made is subject to the processes and procedure relating to the collection, and disposition of the property in event the owner or any one interested in the property neglects or refuses to pay taxes properly assessed. *When the tax law remedies have been exhausted, there is no debt or liability existing due to the state or any subdivision thereof from the former owner, or for that matter, from a purchaser after he has paid the agreed price and accepted conveyance.*"

Plaintiffs place some reliance upon the concurring opinion of Mr. Justice Wolfe in the case of *Hayes v. Gibbs,* 110 Utah 54, 169 P.2d 781. After quoting from statutes Mr. Justice Wolfe stated:

> "Certainly this smacks of an assessment against the person rather than a charge against the realty alone — the tax debt being a lien against the realty of the owner."

An analysis of the Hayes v. Gibbs case clearly indicates that Mr. Justice Wolfe was only speculating and he was not determining that a personal judgment could be taken against the owner of real property for taxes. The question in the case was whether or not, when the defendant Gibbs purchased the property at tax sale from the county, certain building restrictions in the chain of title continued or whether the restrictive covenants no longer existed. In other words, did the tax title create an en-

tirely new fee simple title. The majority opinion by Mr. Justice Larson and concurred in by Justices Wade and McDonough simply held that the restrictive covenants were not extingished by the tax sale. It was pointed out that the assessed valuation was based on the fact that there were restrictive covenants which applied to the entire area and that the restrictive covenants therefore constituted a part of the title sold at the tax sale. See headnotes 11, 12, and 13.

Mr. Justice Wolfe wrote a concurring opinion pointing out the danger of putting decisions on any particular theory. He stated:

> "While I am in agreement therefore with the result that easements and building restrictions are not extinguished by valid tax foreclosure procedure, I am doubtful as to the reason given for that result. In order to assure myself of the correct basis I would be compelled to make an exploration which would consume much effort and time. *After all, the holding in this case* rather than the ascertainment of the correct reasons for it *is of paramount importance.*" (page 71)

Mr. Justice Wolfe expressly pointed out that statutes permitting a personal liability were repealed by the 1933 revision of our statutes. He stated at page 76 of the Utah report:

> "Section 6090-6092, Compiled Laws of Utah 1917, provided for personal suit against a tax debtor for the delinquent tax when there was no sale of the property upon which the tax was a lien when said property was once offered for tax sale. These sections did not survive the 1933 revision of the statutes."

Mr. Justice Wolfe further stated:

> "It may be that the tax is one against the person *but the procedure to collect it confined to the sale of his property and in that sense a proceeding in rem* although Sec. 80-10-3 and some of the other sections would seem to be somewhat against that view." (page 76)

From the foregoing, it is clear that Mr. Justice Wolfe in the Hayes v. Gibbs case did not conclude that there could be a "personal liability." He rather leaned to the theory that the only procedure to collect the tax was against the property itself. His final conclusion was that:

> "Because of public necessity, I agree that mortgages and most other liens, including tax liens and most likely dower and some other interests, are extinguished by *valid* tax foreclosure procedure but not easements." (page 77)

Plaintiffs cite and rely upon the case of *Crystal Car Line et al v. State Tax Commission,* 110 Utah 426, 174 P.2d 984. This case was decided November 29, 1946, approximately six months after Hayes v. Gibbs. Plaintiffs' brief contains two quotations from this case. The first from the majority opinion, by Mr. Justice Wade, that:

> "The statutory provision that 'every tax has the effect of a judgment against the person' means *that the tax shall be collected in the same way as a judgment unless otherwise expressly provided and limited.*" (page 8 plaintiff's brief)

The second is from the concurring opinion of Mr. Justice Larson wherein he states:

> ". . . I see no reason why an action may not lie for unpaid taxes on *personal property* where the summary proceeding of seizure under the tax laws is not practical." (pages 8 and 9 plaintiff's brief)

Neither of these quotations, even if they represented the holding of the case, apply to the present situation. If the first quotation is applied to the present case, someone, possibly San Juan County, has a judgment as provided for in Section 59-10-1, and this judgment must be collected as provided for in Chapter 10 of Title 59. There is already a judgment which must be collected as therein provided and there is no provision for a deficiency judgment. The second quotation by Mr. Justice Larson relates only to unpaid taxes on personal property.

The Crystal Car Line case did not hold that a personal judgment was possible even for personal property taxes, and certainly did not hold that there could be personal liability for real property ad valorem taxes. The case arose upon the seizure by the tax commission of cars of the Crystal Car Line to satisfy taxes imposed under our statute by the tax commission and collectible by the tax commission under the then Section 80-10-29, U.C.A., 1943, now Section 59-10-30, U.C.A., 1953. The court having held that the cars were properly seized, the question was then whether or not the action was barred by the statute of limitations. On this point, the problem before the court was stated as follows by Mr. Justice Wade:

> "However, unless the seizure of this car for the purpose of sale, under section 80-10-29, U.C.A.,

> 1943, by the tax commission was "an action" as that term is used in section 104-2-24.10, the commission has not brought nor is it attempting to maintain an action in this case and it is not barred by that section. In *Crismon v. Reich,* 2 Utah 111, we held that in the absence of an express statutory provision to that effect the county assessor may not bring an action to collect taxes but is limited to the summary proceedings provided by statute for that purpose. *It is immaterial here whether or not the tax commission may bring a separate action to collect this tax.* Our problem is whether or not the proceeding to seize and sell one of the cars of one of the plaintiffs which the tax commission is attempting constitutes an action. If so, then such proceeding is barred by section 104-2-24.10—otherwise it is not barred." (pages 438 and 439)

The opinion of the court held that the action brought to collect the taxes by seizure was barred in eight years, the court applying the statute of limitations with respect to judgments. The court quoted Section 80-10-1, U.C.A., 1943, now Section 59-10-1, U.C.A., 1953, that "Every tax has the effect of a judgment against the person, . . ." Since the question was only the application of the statute of limitations, the point now before the court was not decided. Recognition was given to Crismon v. Reich that in the absence of express statutory provision no personal action can be brought for the collection of taxes.

Mr. Justice Wolfe dissented on the ground that the judgment referred to in Section 59-10-1 was not the ordinary judgment which was barred by the eight year

statute of limitations. Whatever Mr. Justice Wolfe said in the case of Hayes v. Gibbs that the statute "smacks of an assessment against the person" was cleared up by his contrary conclusion in the dissenting opinion of the Crystal Car Line case. The following quotations from the dissenting opinion demonstrate this point:

> "*But our tax statute providing for ad valorem taxes on real and personal property do not contain any general provision for bringing an action for the tax and thus obtaining a judicial judgment for it* although there was at one time in our statutes provision for suit (Sections 6047, 6090-6092, Compiled Laws of Utah, 1917) and there is now provision for the court foreclosure on real estate under certain circumstances (Sections 80-10-41 to 46, U.C.A., 1943), and for suit to collect taxes on livestock in special circumstances (Section 80-5-27, U.C.A., 1943). (p. 448)
>
> "I do not think a legislative pronouncement that a tax shall have the effect of a judgment means the same thing as saying that it shall be a judicial judgment which can only be obtained by starting a court action. (p. 450)
>
> "And since there is no statutory provision for obtaining a judgment for taxes in a case like this a judicial judgment cannot be had. Consequently, there is no way in which to obtain a judgment which would make the type of execution provided for in Chap. 37 of Title 104 applicable. Hence the eight years limitation which is part of Sec. 104-37-1 does not apply." (p. 450)

As pointed out by Mr. Justice Wolfe if there ever was any effective statutory authority for the filing of a

suit for a personal judgment, such statutes were repealed in 1933. Section 88-1-2 Revised Statutes of Utah, 1933 provides:

> "All acts of a general and permanent nature passed by the legislature of the State of Utah prior to its twentieth regular session are hereby repealed, saving and excepting the following, subject to the limitations and exceptions herein expressed, to wit:"

Plaintiffs on page 7 of their brief cite 51 Am. Jur. Section 984 (erroneously cited 251 Am. Jur.). American Jurisprudence in laying down the rule on this question clearly favors the defendant. We quote from Section 984 as follows:

> "§ 984. Personal Action against Taxpayer.—In many jurisdictions, taxes are by statute declared to be debts due by, or are made the personal obligation of, the person or corporation owning the property or doing the business upon which the tax is levied or imposed, and are recoverable by action;[8] *however, unless declared so by statute, a tax is not a debt in the sense in which the word "debt" is ordinarily used.*[9] In many cases it is stated broadly that no personal action will lie for the recovery of taxes, in the absence of express statutory authority therefor.[10] Usually, however, the rule is stated in a more guarded form that *where the statute which creates the tax provides a special remedy for its collection, such remedy is exclusive and precludes the bringing of a common-law action for the recovery of taxes.*[11]"

Plaintiffs rely upon the case of *City of Anchorage v. Baker,* 376 P.2d. 482. A reading of that case indicates

that the personal liability arose out of a tax on a leasehold interest where the government was the owner of the property and was the lessor. Footnotes 2 and 3 on page 482 and the body of the opinion clearly show that the personal liability was based upon an amendment to the statute specifically allowing the personal action. The footnote states:

> "In 1962 the statute was amended so as to specifically allow a personal action to recover a tax on a leasehold interest in real property. SLA 1962, Chapter 117."

Plaintiffs cite and quote at page 10 of their brief from 84 Corpus Juris Secundum Section 643 to the effect that in many jurisdictions the owner of real estate is personally liable for the taxes. Plaintiffs omitted the preceding portions of that section. The preceding portion of the text is as follows::

> "At common law there is no personal liability on the part of an owner for taxes levied on his property, and under many taxing systems there is no personal liability for taxes imposed on real property, although such taxes may constitute a personal obligation which is satisfied and extinguished when the property is taken for the amount due as taxes."

If there were cases cited by Corpus Juris Secundum which are decided favorable to plaintiffs under statutes similar to Utah, it is presumed plaintiffs would have specifically cited the cases. It is well established that at Common Law there was no personal liability. A specific statute is necessary to change that law.

Counsel for both sides argued this case before the trial court principally on statutory construction and the decisions of our own Supreme Court which are cited above and in plaintiffs' brief. The learned trial judge wrote a memorandum decision in favor of the defendant there being at the time nothing before the court except the plaintiffs' complaint and the motion to dismiss. The question of "personal liability" was the principal question before the court and this was the principal point upon which the decision was rendered in favor of the defendant. The learned trial judge stated at page 7: (Tr. P. 16)

> "In reaching the conclusions that I have expressed in this memorandum I have read the various cases cited by counsel and have made my own individual search. I list now a few of them without stating to which particular point they apply."

There are then cited seventeen cases, five from the State of Utah and the balance from other jurisdictions. They all support the proposition that there is no personal liability for real property taxes. There is one Utah case not hereinabove mentioned, *Peterson v. Ogden City*, 111 Utah 125, 176 P.2d 599. As stated in headnote 1, the case held that Ogden City was restricted to the ordinance for the procedure to enforce a special assessment and could not foreclose a special assessment lien in a judicial procedure.

For the court's information, the following are the cases cited by Judge Keller, which we think are particu-

larly in point and which we cite herein in support of Point III:

Board of Commissioners of Ness County v. Hooper et al, 110 Kan. 501, 204 Pac. 536
Hawkins v. Smith, 106 Mont. 453, 78 P.2d 74
State ex rel. Spokane and Eastern Trust Co. v. Nicholson, County Treasurer, 74 Mont. 346, 240 Pac. 837
Santos v. Simon, 60 Ariz. 426, 138 P.2d 896
Maricopa County v. Arizona Tractor & Equipment Co., 57 Ariz. 49, 109 P.2d 618
McDonald v. Duckworth, 197 Okl. 576, 173 P.2d 436
Allen v. Henshaw, 197 Okl. 1123, 168 P.2d 625
City of Salem v. Marion County, 171 Ore. 254, 137 P.2d 977
Puget Sound Power & Light Co. v. Cowlitz County, 38 Wash. 2d 907, 234 P.2d 506.

We acknowledge our indebtedness to the learned trial judge for this research and the many cases in other states supporting his decision and the defendant's view. While each case could be analyzed, to do so would probably extend this brief beyond its proper size. However, we will take the liberty of quoting from the case of *Board of Commissioners of Ness County v. Hooper et al,* 110 Kan. 501, 204 Pac. 536:

> "It is argued for the county that although there is no statute covering this subject the principle involved in the statutes relating to the disposition of personal property without the payment of taxes can be invoked to help perfect a liability on defendant in this case. In short, by a plausible course of reasoning, the county board argues that this court, by principles of analogy and deduction,

should declare the law to be what the Legislature itself could declare, but what the Legislature has not yet declared — that where the owner of property willfully damages the realty by removal of improvements therefrom he is personally liable in damages to the county if the realty thus damaged will not sell for enough to pay the county's lien for taxes. It can hardly be said that the want of legislation on this subject arises through mere oversight. More likely it arises through studied restraint. Having the matter of loss of taxes and evasion of taxes in mind, and having legislated repeatedly touching the making away with personal property without payment of the taxes thereon, the Legislature must have had its eyes open to the fact that taxes on real estate are occasionally lost or rendered uncollectable by the destruction or removal of improvements from the freehold. So frequently have owners of real estate removed improvements therefrom without paying the accrued and delinquent taxes that it cannot be said that the Legislature has never considered the subject. As early as 1889 the removal of improvements from mortgaged property to the prejudice of the mortgagee had become sufficiently grave to justify the fixing of statutory liabilities, both civil and criminal, for such misdeeds. Gen. Stat. 1915, §§ 6479-6481. The whole matter of taxation is statutory; the means for the recovery of delinquent taxes is prescribed by statute, and does not exist apart from the statute.

"Whatever the abstract merit of the county's contention, it is one which should be addressed to the Legislature, and not to the judiciary. The judgment of the trial court was correct." (pp. 536-537).

POINT IV

EVEN IF THE PLAINTIFFS OR ANY CONSTITUTED AUTHORITY IS ENTITLED TO A JUDGMENT FOR TAXES, THAT JUDGMENT HAS ALREADY BEEN ENTERED AND THERE MAY NOT BE ANOTHER JUDGMENT.

Plaintiffs strongly rely upon Section 59-10-1, U.C.A., 1953, for their right to sue in this case. Plaintiffs quote the statute as follows:

> "Every tax has the effect of a judgment against the person. . . . The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof."

It seems obvious that whatever judgment is authorized by the foregoing section, that the judgment is already entered. A second judgment cannot be based upon a statute that says a judgment already exists. The learned trial judge well stated his position on this question, as follows:

> "Furthermore, if the tax has the effect of a judgment what, one may ask, gives rise to the necessity of bringing a suit before a judicial tribunal to get another judgment." (page 5 of the memorandum decision Tr. P. 14)

POINT V

THE JUDGMENT PROVIDED FOR BY SECTION 59-10-1 WAS SATISFIED BY THE TAX SALE TO SAN JUAN COUNTY PURSUANT TO SECTION 59-10-33.

With respect to the judgment provided for by Section 59-10-1, we quote again that "the judgment is not satisfied nor the lien removed until the taxes are paid *or the property sold for the payment thereof.*"

Certainly there is clear intent that the judgment upon which plainiffs rely (and which existed without the necessity of filing this action) was satisfied when "the property (was) sold for the payment thereof." The trial court in its memorandum decision gave this as one of its reasons for judgment in favor of the defendant. The proposition is well stated in the following language: (Page 5 memorandum decision, Tr. p. 14)

> "In the interest of brevity I state merely the sections, to wit; 59-10-3, 59-10-29, 59-10-33 and 59-10-35 from which in my judgment one must conclude that the judgment referred to in 59-10-1 is satisfied and which supports the position of the defendant; namely, that the taxes claimed have been paid by a sale of the property."

Plaintiffs claim that the remedy provided for by the statutory provision cited by the trial court is "only a cumulative remedy," citing Section 59-10-47, U.C.A., 1953. An examination of the tax statutes clearly shows that the remedy referred to by Section 59-10-47 as cumulative is a complete independent remedy not involved herein. See Sections 59-10-42 through 59-10-47. It is a remedy by foreclosure. It is cumulative to the remedy set forth in the sections referred to in the above quotation from the opinion of the trial judge. It is significant that no deficiency judgment is permitted in such proceedings.

Following the quotation from Section 59-10-47, plaintiffs (at pages 13 and 14) cite as apparent additional authority as to cumulative rights the cases of *Fisher*

v. *Wright*, 101 Utah 469, 123 P.2d 703, and *Anson v. Ellison et al*, 104 Utah 576, 140 P.2d 653.

In the Fisher case a purchaser of a tax title was attempting to foreclose a tax lien apparently pursuant to Sections 59-10-42 through 59-10-47, U.C.A., 1953, the sections at the time of this case being 80-10-41 through 80-10-46 R. S. U., 1933. The court held that since the plaintiff had received a tax title he could not again have further proceedings by way of foreclosure. Speaking as if the plaintiff were in the position of the county (and this is the best position the plaintiff could claim), the court said:

> "If the county proceeds to satisfy its lien in the ordinary way — by auditors deed and May sale — there is no necessity for even considering the foreclosure procedure as the latter is just another way of accomplishing the same objectives — collection of taxes."

The reasoning of this court, far from holding that there is an alternative remedy by an action for "personal liability," holds that if there is a sale to the county and the county receives a deed there cannot also be an action to foreclose. Applying this reasoning to our case, if the tax constitutes a judgment there cannot be a second judgment. Furthermore the judgment is satisfied by the sale to the county. The fact that there was a tax deed as well as a preliminary sale in the above case does not necessarily mean that the sale alone does not satisfy the judgment, as that is what Section 59-10-1 says.

In the case of Anson v. Ellison the plaintiff was attempting to quiet title based upon an invalid tax deed. Salt Lake City was a party defendant and claimed a lien on the property for a special assessement. With respect to the right of the county and the question of the tax debt and the right of the plainiff to have foreclosure, the court said:

> "The lien which is given to the county is a right to resort to the property for the tax debt, but where the tax debt is paid by a sale to a private purchaser, the debt is paid and the right to resort to the property (by the City for special assessment) is gone."

If this case is to be taken for anything, it is that a sale of the property to the county pays the debt just as stated in Section 59-10-1. It is submitted that authorities cited under Point IV in plaintiffs' brief fall far short of indicating any statutory authority or precedent by judicial decision for an action involving "personal liability."

POINT VI

IN THIS CASE THERE CAN BE NO VALID AD VALOREM REAL PROPERTY TAXES FOR 1960, 1961, AND 1962 FOR THE REASON THAT THERE WAS NO PROPERTY VALUE AT ANY TIME DURING SAID THREE YEARS.

The statutory provsion under which the taxes in question were levied is contained in Section 59-5-57. Until 1953 that statute provided as follows:

> "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."

The 1953 legislature, because of the fluctuation in proceeds from year to year amended Section 59-5-57 so as to assess the mine on the basis of the average net proceeds for the 3 preceding years. The statute as amended then read as follows:

> "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 average net annual proceeds thereof for the three calendar years next preceding or for as many years next preceding as the mine has been operating, whichever is less." (Session Laws 1953, Chapter 107)

The result of this amendment as it has been interpreted has had the effect of imposing upon worked out mines, taxes, for 2 additional years. The actual effect in this case has been to impose an ad valorem tax for 3 years after the property has become valuelss. (Attempted relief by the tax commission with respect to the second and third years is outlined under Point VIII hereafter.)

It is alleged in the complaint and agreed by the stipulation that the property in question had no value on January 1, 1960, or from that time on. See paragraph 5 (Tr. P. 2) of plaintiffs' first cause of action and paragraph 5 (Tr. P. 19) of the stipulation. The allegation with respect to the fact that the property had no value appears to have been omitted from plaintiffs' second cause of action, but the stipulation still applies.

While our constitutional provision, Section 4, Article XIII provides that mining claims "shall be assessed as the legislature shall provide," it does not state that mining property or property of any kind can be assessed for ad valorem tax purposes where the property has no value whatsoever in the year of the tax. The Constitution does not say or even suggest that the legislature shall provide for the taxation of mining claims based upon net proceeds in years prior to the tax. It is the legislature which decided, in carrying out the constitutional provision, to assess the property on the basis of net proceeds in prior years. On the contrary, the Constitution, Sections 2 and 3 of Article XIII, require value in the year of the tax.

ARTICLE XIII

> Section 2. "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.*"
>
> Section 3. "The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the State, *according to its value in money,* and shall prescribe by law such regulation as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax, in proportion to the value of his, her, or its tangible property, ..."

An exact case in point and which has held that there can be no tax where there is no value on January 1, of the year of the tax of mining claims, is *South Utah Mines*

and Smelters v. Beaver County, 262 U.S. 325, 67 L. Ed. 325. That case arose upon the attempt of Beaver County to tax South Utah Mines and Smelters for the year 1919 upon net proceeds in the prior year. South Utah Mines and Smelters had net proceeds for the year 1918 from workings of a tailings dump. The mine itself was worked out as of January 1, 1919. The United States Supreme Court held such tax on the mine invalid because the net proceeds formula bore no relation to value on January 1, 1919, which value was zero. Mr. Justice Sutherland delivered the opinion of the court stating:

> "The Constitution of Utah declares (§§ 2 and 3, art. 13) that all property in the state shall be taxed in proportion to its value, and requires the legislature to provide a uniform and equal rate according to its value in money, and prescribe such regulations as shall secure a just valuation for the taxation of all property, so that every person and corporation shall pay a tax in proportion to such value. By an amendment to § 4, art. 13, adopted in 1918, it is provided that all metalliferous mines or mining claims, in addition to an arbitrary valuation of $5 per acre, shall be assessed 'at a value based on some multiple or submultiple of the net annual proceeds thereof. All other mines or mining claims and other valuable mineral deposits, including lands containing coal or hydrocarbons shall be assessed at their full value.'
>
> * * *
>
> "The state Constitution plainly contemplates that all property, irrespective of its character, shall be taxed 'according to its value in money.'

"The provision with reference to the taxation of metalliferous mines does not mean to depart from this rule, but recognizes that their value cannot be determined in the ordinary way, since the ores which constitute the wealth of such property are hidden in the earth, and, as a general thing, disclosure of their extent and character must await extraction. The Constitution, therefore, provides not for disregarding value in the assessment of taxes upon mines, but for arriving at it in a special manner, — that is, by a measurement proportioned to the net annual proceeds derived from the property. The value of property bears a relation to the income which it affords. If it be property whose production is uniform and of indefinite duration, the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value. The life of a mine, however, is limited. The extraction of ores from year to year constitutes a constant drain upon the capital, which, in course of time, will be exhausted. It follows that a given multiple of the net proceeds, which may be a fair measure of value in the early part of a mine's development, will become excessive as the stage of exhaustion approaches. The constitutional provision, therefore, at best, will produce only approximate equality. Undoubtedly, in fixing the multiple of (331) the net annual proceeds upon which the value of metalliferous mines is to be calculated, a good deal of latitude must be allowed the legislature and the taxing authorities, but the power is not unbounded. *Without attempting to delimit the boundaries,—a matter primarily for the state courts,—it is sufficient for present purposes to say that, in our opinion, they have been clearly exceeded in the instant case.* The net proceeds here involved

arose from a lot of refuse material, which, long prior to the imposition of the tax, had been severed from the mining claims, removed to a distance, submitted to the process of reduction, and stored upon lands separate and apart from the claims. Moreover, but one tenth of the amount of these net proceeds was realized by the owner of the mining claims. To treble the total of these proceeds for the purpose of basing thereon an altogether fictitious value for a mine worked out and worthless years before the adoption of the statutory provision supposed to confer the authority to do so results in such flagrant and palpable injustice as would cast the most serious doubt upon the constitutionality of such provisions if thus construed.

* * *

"While the taxing authorities cannot be held to an inflexible rule of equality, even in respect of properties in the same classification where their nature is such as to practically preclude the application of such a rule, it does not follow that all distinctions are to be ignored and indubitably dissimilar and readily distinguishable things treated as though they were the same. It may well be that the taxable value of mines differing in extent of development or in degree of exhaustion, and relatively of different actual values, must, from the practical necessities of the case, be subjected to the same rule of measurement, although it may work inequality to some extent. *But the difference between a mine from which ore is still being or still may be extracted and net income derived, and one conceded to be an empty shell, with no present or prospective value whatsoever, is so obvious that the imposition of a tax upon the basis of their being, nevertheless, one*

and the same, cannot be sustained with due regard for either law or logic."

Section 4 of Article XIII of our Constitution in effect at the time of that case read as follows:

> "Sec. 4. All metalliferous mines or mining claims, both placer and rock in place shall be assessed at $5.00 per acre, and in addition thereto at a value based on some multiple or sub-multiple of the net annual proceeds thereof." (1917 Session Laws P. 474)

The present Section 4, Article XIII of our Constitution provides:

> "All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide; provided, the basis and multiple now used in determining the value of metalliferous mines for taxation purposes and the additional assessed value of $5.00 per acre thereof shall not be changed before January 1, 1935, nor thereafter until otherwise provided by law. . . ."

Sections 2 and 3 of Article XIII relied upon by Mr. Justice Sutherland in the South Utah Mines case that there must be value in the year of the tax are the same now as then.

In addition to Sections 2 and 3 of Article XIII, we call attention to Section 1 which provides with respect to revenue and taxation that the fiscal year "shall begin on the first day of January unless changed by the Legislature."

POINT VII

IN THIS CASE THERE CAN BE NO VALID AD VALOREM REAL PROPERTY TAXES FOR THE YEARS 1960, 1961 AND 1962 FOR THE REASON THAT THERE WAS NO

OWNERSHIP BY THE DEFENDANT DURING THE YEARS IN QUESTION.

A mining claim is a possessory right resulting from compliance with Federal and State laws with respect to the location of mining claims. It is this possessory right that plaintiffs are claiming to tax. There must be ownership of property before there can be taxation. In fact, there cannot be property in the legal sense without there being ownership. Black's Law Dictionary defines "Property" as follows: (4th Edition page 1382)

> "That which is peculiar or proper to any person; that which belongs exclusively to one; in the strict legal sense, an aggregate of rights which are guaranteed and protected by the government."

Section 59-3-1 in describing real estate provides:

> "(a) The possession of, claim to, ownership of or right to the possession of, land.
>
> "(b) All mines, minerals and quarries in and under the land, all timber *belonging* to individuals or corporations growing or being on the lands of this state or the United States, and *all rights and privileges appertaining thereto.*"

It is stipulated (paragraph 5 of the stipulation Tr. P. 19, 20) that the mining claims in question had no value in the years of the purported tax, that the last mining operations were in December, 1959, and that in December, 1959, defendant abandoned the claims and "has not claimed ownership therein since before January 1, 1960." That a mining claim ceases to exist on abandonment, see 2 Lindley on Mines page 1593 where it is stated: "Abandonment terminates a right." Also in

Section 642 of 2 Lindley on Mines at pages 1589 and 1590, there is a discussion "as to the character of the right which is granted by the United States to a locator." One of the characteristics of this right is stated as follows:

> "(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. *It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.*"

It follows from the stipulated fact of abandonment in 1959 that at no time during the three taxable years in question did defendant have any ownership in the mining claims in question. The mining claims as such ceased in December of 1959.

Because there was no ownership, nor property belonging to the defendant, on or after January 1, 1960 there could not be a tax constitutionally imposed under Article XIII, Sections 2 and 3, supra.

POINT VIII

THE REGULATIONS OF THE TAX COMMISSION AND SUBSEQUENT LEGISLATION BY THE 1963 LEGISLATURE ARE RECOGNITIONS OF THE INEQUITY OF THE TAX AND ITS INVALIDITY UNDER SECTIONS 2 AND 3 OF ARTICLE XIII UTAH CONSTITUTION.

The position of the defendant in this case may cause some anxiety with respect to the loss of taxes. If this be so, we may likewise say that these taxes running for

years after a mine is worked out have been the cause of anxiety on the part of the defendant. Anxiety on either side or both should, of course, play no part in the decision of this case, but there is some history, of which we believe this court may take judicial notice, and remedial legislation which we also believe should be called to the court's attention.

In 1959 the tax commission had promulgated the following regulation with respect to the assessment of unpatented mining claims:

> "The computation of net proceeds valuation will be handled as in the past, i.e., the prior three years' production will be considered in arriving at value even though mining has ceased and in all cases a value will be assessed for three years following the year in which production has ceased; however, in the case of *unpatented claims,* if a timely protest is made by the taxpayer, and if in the opinion of the Commission the mineral values have been removed, the Commission may order suspension of valuation based on prior net proceeds in years following the *first* year immediately subsequent to that year in which production ceased. It is the intention of the Commission to apply a net proceeds valuation for the same number of years that the mine produced ore.
>
> "There is no change in the methods used in the case of patented mining claims."

By an opinion dated September 29, 1959, the Attorney General held this regulation invalid.

The 1963 legislature, amended Section 59-5-57 by inserting the following:

> ". . . provided, however, there shall be no valuation based upon net annual proceeds of uranium or vanadium mines for the purpose of assessment of any such mine or mining claim for any one year in which there were no gross proceeds realized in the year next preceding the year of assessment."

This amendment, if in existence at the time of the taxes in question, would have relieved the defendant of the tax for 1961 in the amount of $222,240.66 and the tax for the year 1962 in the amount of $113,661.96. Assuming but without admitting the net proceeds tax to be valid in a case where the mine has been worked out and legally abandoned the liability of the defendant under the regulation of the tax commission cited above would only be the first year's tax of $288,204.50 instead of the total amount sued for ($624,107.12). Plaintiffs have, nevertheless, stood firm on their claim under the statute for three years' taxes of $624,107.12. Defendant does not criticize the tax commission for its attempt to enforce the statutory provisions as interpreted by the Attorney General. Defendant asks only that it not be criticized or prejudiced for standing upon its legal rights.

Another amendment, not pertinent to this case, but which will hereafter give relief to the State and counties where ore bodies are of short duration was passed in 1963 amending Section 59-5-65. That amendment provided:

> ". . . that the tax commission, in order to insure the payment and collection of the ad valorem property tax imposed against uranium and vala-

> dium mining properties, may require the owner or the person engaged in mining the same to deposit with it such security as the tax commission shall determine."

The section further provides for the sale of the security when necessary. It would seem that this very provision is contrary to the idea of "personal liability" in the sense that an action can be maintained against the owner.

POINT IX

A PROPER CONSTRUCTION OF SECTION 59-5-57 REQUIRES THE ELIMINATION OF THE TAXES FOR 1961 AND 1962.

It is the defendant's contention that there should have been no 1961 or 1962 tax under the statute prior to the 1963 amendment. The language of Section 59-5-57, as it existed in those years (and still exists for that matter) was that metalliferous mines should be assessed,

> ". . . at a value equal to two times the average net annual proceeds thereof for the three calendar years next preceding *or for as many years next preceding as the mine has been operating,* whichever is less; . . ."

It is our contention that under that language it was the intention of the legislature that for there to be an assessment based on net proceeds the mine must have been in operation in the year "next preceding." This construction would allow only a tax for one year after closing operations.

CONCLUSION

In order to reverse the decision of the trial court, this court must determine all of the following propositions to be true and correct:

1. Either the state tax commission or San Juan County has the right to sue the defendant in this case for a tax which is payable only to the county treasurer of San Juan County and for which payment only the treasurer of San Juan County can give a receipt.

2. There is a "personal liability" for real property taxes by the owner.

3. Section 59-10-1, providing that "Every tax has the effect of a judgment against the person . . . " may be construed to mean that *an additoinal* judgment for personal liability can be entered.

4. Even though Section 59-10-1 provides that "the judgment (therein provided) is not satisfied nor the lien removed until the taxes are paid *or the property sold for the payment thereof,*" such judgment continues even though the property has been sold pursuant to Section 59-10-33, U.C.A., 1953.

5. There may be a valid ad valorem real property tax when in the year of the tax it is admitted that the property taxed had no value.

6. There may be a tax on real property when in the year of the tax the defendant owned no property.

7. There is no violation of either Sections 2 and 3 of Article XIII of the Utah Constitution which requires all tangible property in the state to be taxed on "a uniform and equal rate of assessment" in cases where the property has no value and the defendant doesn't own it.

Conversely, if this court finds that any one of the foregoing propositions is not true and correct, the judgment of the trial court must be affirmed.

The most novel question in this case is the attempt by the State Tax Commission to impose personal liability upon a taxpayer for failure to pay real property taxes. A decision on this point alone is sufficient to dispose of this case.

Respectfully submitted ,

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