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Roosendaal Construction & Mining Corporation v. Vernon L. Holman, Chairman Of Utah State Tax Commission, Paul T. Fordham, G. Douglas Taylor And R. Milton Yorgason, Commissioners of the Utah State Tax Commission, The State of Utah, State Tax Commission Of Utah, And Norman Daniels : Brief of Defendants-Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

ROOSENDAAL CONSTRUCTION & MINING CORPORATION, a Utah corporation,

Plaintiff-Appellant

vs.

VERNON L. HOLMAN, Chairman of Utah State Tax Commission; PAUL T. FORDHAM; G. DOUGLAS TAYLOR and R. MILTON YORGASON, Commissioners of the Utah State Tax Commission; THE STATE OF UTAH; STATE TAX COMMISSION OF UTAH, and NORMAN DANIELS,

Defendants-Respondents.

Case No. 12504

Brief of Defendants-Respondents

Appeal from the Order of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable D. Frank Wilkins, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Page

CASES CITED

TABLE OF CONTENTS (Continued)

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STATEMENT OF THE NATURE OF THE CASE

This is an action filed by the plaintiff who alleges a "wrongful taking, impounding and confiscation of plaintiff's vehicle, and the arbitrary cancellation of plaintiff's special fuel permit," (R. 6) by the defendants. The plaintiff prays for $25,000 general damages and $100,000 punitive damages against the defendant, Norman Daniels, and for $25,000 general damages and $100,000 punitive damages against the defendant Tax Commissioners.

DISPOSITION IN THE LOWER COURT

After defendants filed certain Affidavits along with their Motion to Dismiss, Judge D. Frank Wilkins granted said Motion to Dismiss for all five reasons alleged in the Motion to Dismiss filed by the defendants. (R. 69-70). Those reasons were, as follows:

> "1. The complaint fails to state a claim upon which relief can be granted.
>
> "2. The corporate powers of plaintiff corporation have been suspended by the Utah Secretary of State under the provisions of Section 59-13-61, Utah Code Annotated 1953, which suspends all of the powers, rights and privileges of said corporation; and one of the powers, rights and privileges thereby suspended, and which was suspended upon the day the above entitled action was filed, is the right to bring lawsuits in the courts of the State of Utah.
>
> "3. The acts complained of fall within Section 63-30-10, Utah Code Annotated 1953, and are immune from private suit for injuries, both as to all of the defendants individually and collectively.
>
> "4. That the effect of governmental immunity cannot be circumvented by suing the individuals in their private capacity.
>
> "5. That the questions and issues raised in the complaint are moot because plaintiff corporation had filed, at the time said motion was heard, the required bond with the defendant, Utah State Tax Commission, and defendants had released each and every vehicle which had been impounded at the time said complaint was filed."

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal of the Order of the lower court, and the defendants ask that the Order of Judge D. Frank Wilkins be affirmed.

STATEMENT OF FACTS

The Motion to Dismiss, which was granted by Judge D. Frank Wilkins, was heard on May 20, 1970. At that time, the only evidence before the court was contained in the Affidavits filed on behalf of the defendants. Although the plaintiff presented to the court at the time of said hearing a Reinstatement for plaintiff corporation (R. 75), and it is believed that plaintiff's "Affidavit in Opposition to Defendants' Motion to Dismiss" (R. 62-65) was also presented at the time of said hearing, Rule 6(d) of the Utah Rules of Civil Procedure requires opposing Affidavits to be served not lated than one day *before* the hearing.

Therefore, it is submitted that the only facts to be considered by the court were those contained in the Affidavits submitted by defendants. A summarization of those facts, in chronological order, is as follows:

1. Norman Daniels is the supervisor of the Miscellaneous Tax Division of the Utah State Tax Commission, and his duties include the supervision over special fuel tax collections.

2. Prior to the incidents which precipitated the present lawsuit, the plaintiff's history with the Tax Commission is replete with failures to file required tax returns, failures to post required bonds, and returned and "bounced" checks which were issued for payment of taxes.

3. Plaintiff operated his trucks the entire year of 1968 without the special fuel permits which he was required by law to obtain prior to the operation of his vehicles upon the roads and highways of the State of Utah.

4. In March of 1968, at the insistence of the State Tax Commission, plaintiff did post a $100 cash bond.

5. On February 17, 1970, plaintiff applied for special fuel permits for eight (8) vehicles, and permits were issued for two (2) of those vehicles. Further, because of plaintiff's history with the Tax Commission, the bond requirement was increased from $100 to $500. Plaintiff agreed to furnish the $500 bond and left a check for $500 which was to be used for the bond if plaintiff did not promptly furnish a proper corporate surety.

6. On March 2, 1970, the corporate charter of plaintiff's corporation was suspended for failure to pay its corporation franchise tax.

7. On March 3, 1970, the Tax Commission issued the remaining six (6) permits to plaintiff, being unaware that the corporate charter had been suspended the previous day and having relied on the $500 check as sufficient security.

8. On approximately March 17, 1970, after waiting one month for plaintiff to post a corporate surety, the Tax Commission deposited in the bank the $500 check which had been left with them for a bond. Said check was dishonored and returned by plaintiff's bank.

9. On March 24, 1970, the first special fuel tax report was due to be filed for the two permits which were issued to the plaintiff on February 17, 1970. That report was not filed,

and because of the failure to file, and, further, because of the dishonoring of plaintiff's $500 check, the bond was increased from $500 to $1,000. An Impound Order was then issued to the Utah Highway Patrol by the Utah State Tax Commission, and a member of the Highway Patrol called plaintiff and advised him of the Impound Order. An officer of plaintiff corporation then called Norman Daniels and asked him not to have the Impound Order carried out and made additional promises to meet the bond requirements.

10. Because of the additional promises made by plaintiff's president, Ronald C. Van Roosendaal, the Impound Order was not carried out, but on April 10, 1970, more than two weeks after the promises of plaintiff corporation's president that the matters would be taken care of, the Impound Order was carried out on one of the plaintiff's vehicles.

11. Five days after the Impound Order, plaintiff filed his first special fuel report, showing that 6,000 gallons of special fuel had been consumed by plaintiff's vehicles.

12. The next day, on April 16, 1970, a Notice of Revocation of Special Fuel Permits for failure to post the required bond was served on plaintiff, and plaintiff then filed his Complaint, Order to Show Cause, and other pleadings.

13. The following day, April 17, 1970, the revocation of plaintiff's special fuel permits became effective.

14. On May 6, 1970, the Motion to Dismiss was filed by the defendants, and on May 18, 1970, the plaintiff corporation was reinstated by the Utah Secretary of State.

15. On May 20, 1970, the defendants' Motion to Dismiss was argued, and the Certificate of Reinstatement was filed with the court, as it is believed was the Affidavit signed by Ronald C. Van Roosendaal, the president of plaintiff, even though the record reflects a much later date (March 23, 1971).

ARGUMENT

POINT I

THE ACTS COMPLAINED OF ARE IMMUNE FROM PRIVATE SUIT BECAUSE OF THE PROVISIONS OF THE "UTAH GOVERNMENTAL IMMUNITY ACT."

The relevant portions of Section 63-30-10, Utah Code Annotated, 1953, provide, as follows:

> "Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment *except* if the injury:
>
> "(1) arises out of the exercise or performance or the failure to exercise or perform *a discretionary function, whether or not the discretion is abused,* or
>
> "(2) arises out of . . . a malicious prosecution, intentional trespass, abuse of process, . . . invasion of . . . civil rights, or
>
> "(3) arises out of the *issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license,* certificate, approval, order, or similar authorization, or
>
> * * * * *

"(5) arises out of the institution or prosecution of any judicial or *administrative proceeding,* even if malicious or without probable cause, or

* * * * *

"(8) arises out of or in connection with the *collection of and assessment of taxes,* . . ." (Emphasis added.)

On page 14 of the appellant's Brief, it is admitted that "the State of Utah and the State Tax Commission as a political subdivision of the State of Utah could not be held liable for the acts complained of."

The acts complained of are clearly a discretionary function with the employees of the State Tax Commission, and this court, in *Velasquez v. Union Pacific RR Co.,* 24 U.2d 217, 469 P. 2d 5, affirmed the Summary Judgment of the lower court in refusing to permit liability of a State political subdivision in the performance of a discretionary function. It is, therefore, submitted that under the above statute, the facts alleged in plaintiff's Complaint, and the Affidavits filed in the lower court, there is no legal theory under which the State of Utah, or the State Tax Commission, could possibly be liable to the plaintiff.

If the plaintiff's theory of the case is that the acts of the defendants constituted malicious prosecution, intentional trespass, abuse of process, or invasion of the plaintiff's civil rights, subsection (2) of Section 63-30-10 would also eliminate any possibility of liability on behalf of the State of Utah, or the State Tax Commission.

This action also arose in part out of the suspension and revocation of plaintiff's special fuel permits, as is shown in paragraph 4 of the Affidavit of defendant, Norman Daniels (R. 45). It was not until after the revocation of said licenses that defendant, Norman Daniels, issued the Impound Order on plaintiff's trucks because said trucks were being operated without the required special fuel permits. Therefore, any actions taken by a State employee as a result of the revocation of a license are immune from suit because of the provisions of subsection (3) of Section 63-30-10, *supra.*

Paragraph 21 of plaintiff's Complaint (R. 4-5) alleges that the acts performed by the defendants were judicial functions, and if that allegation were true, then subsection (5) of Section 63-30-10, *supra,* would prevent suit by plaintiff even if the acts of defendants were "malicious or without probable cause."

Finally, the acts complained of were in connection with the collection of special fuel taxes, and subsection (8) of Section 63-30-10, *supra,* would make those acts immune from suit. This provision is especially important because of the hostilities which are so often encountered by public employees charged with the protection of public revenues.

Not only do the above provisions of Section 63-30-10, *supra,* absolutely prohibit suit against the State of Utah and the State Tax Commission, but there is no showing in the file, nor is there an allegation in plaintiff's Complaint that the procedural requirements of the Governmental Immunity Act have been complied with (Section 63-30-11 to 63-30-15).

Therefore, because of the provisions of the Governmental Immunity Act, it is respectfully submitted that there is no possible basis for a recovery against the State of Utah or the State Tax Commission, and Judge D. Frank Wilkins was correct in granting the Motion to Dismiss.

POINT II

THE CHAIRMAN AND COMMISSIONERS OF THE UTAH STATE TAX COMMISSION COULD NOT BE PERSONALLY LIABLE TO THE PLAINTIFF FOR DAMAGES CAUSED BY AN EMPLOYEE OF THE TAX COMMISSION.

Even without the protective shield of the Governmental Immunity Act, the only possible legal theory under which the Chairman and Commissioners of the Utah State Tax Commission could be found liable to the plaintiff would be if there were malice towards the plaintiff by the Chairman or Commissioners.

Under Rule 12 (b), Utah Rules of Civil Procedure, the Motion to Dismiss filed by the defendants could have been, and probably was, treated as a Motion for Summary Judgment and disposed of as provided in Rule 56, Utah Rules of Civil Procedure. For purposes of such a Motion, the only matters before Judge Wilkins were those which were set forth in the Affidavits filed with defendants' Motion to Dismiss, because under Rule 56 (e), Utah Rules of Civil Procedure, "When a motion for summary judgment is made and supported . . . (by affidavits) an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial." Rule 56 (e), *supra,* then continues and emphatically requires, "If he does not so respond, summary judgment, if appropriate, shall be entered against him." Based on the facts set forth in the Affidavits filed by defendants, in the absence of any timely Affidavits from the plaintiff, Judge Wilkins had no alternative but to grant the Motion to Dismiss. There was then no genuine issue as to any material fact, and there were no facts before Judge Wilkins which could have entitled the plaintiff to relief.

Further, even if Judge Wilkins did consider the untimely Affidavit in Opposition to Defendants' Motion to Dismiss (R. 62-65), there would not have been a genuine issue as to any material fact relating to the possible personal liability of the Chairman and Commissioners of the Tax Commission. The Affidavits of the Chairman and Commissioners (R. 36-43) clearly establish that they did not have any personal knowledge of the transactions and occurrences between the plaintiff and defendant, Norman Daniels, and it would have been impossible for them to have been guilty of malice towards the plaintiff. The Affidavit of plaintiff's president (R. 62-65) does not even allege any malice by the Chairman and Commissioners, nor does it even allege any contact with, nor actions by, the Chairman and Commissioners.

Based on the facts set forth in the Affidavits, the case of *Sheffield v. Turner,* 21 U.2d 314, 445 P.2d 367 (1968), would preclude any liability in this case. In the opinion written by Chief Justice Crockett, this court said:

> "Upon our consideration of the various aspects of the problem and an examination of the authorities which have dealt with it, it is our opinion that in a

situation such as this, where one inmate has injured another, *the warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence so long as they are acting in good faith and within the scope of their duties,* and that *they could not be held liable unless they were guilty of some conduct which transcended the bounds of good faith performance of their duty by a wilful or malicious wrongful act* which they know or should know would result in injury." (Emphasis added.)

The Affidavits before Judge Wilkins did not show any possibility that any actions by the Chairman and Commissioners "transcended the bounds of good faith", and it is therefore respectfully submitted that they could not have been personally liable to the plaintiff and the ruling of Judge Wilkins was correct.

POINT III

PUBLIC OFFICERS ARE NOT LIABLE IN A PRIVATE ACTION FOR GOOD FAITH ACTS PERFORMED WITHIN THE SCOPE OF THEIR AUTHORITY.

The courts are unanimous in their decisions that a public officer is not liable in a private action for acts performed in good faith within the scope of his authority. 67 C.J.S., Officers, Section 125 et seq., Utah law conforms to this general law as has been shown above by the citation from *Sheffield v. Turner, supra.* Also, see *Sehy v. Salt Lake City,* 41 Utah 535, 125 P. 691, 42 L.R.A., N.S., 915.

In *Kelley v. Dunne,* 344 F.2d (1965), 129 at 131, (1st Cir. 1965), the court said:

> "A long line of decisions has, both before and since, recognized that in many instances the protection of the public interest by shielding responsible government officers against the harassment and *inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities* 'outweighs the protection of the individual citizen against damage caused by oppressive or malicious action on the part of public officers'." (Emphasis added.)

As Chief Judge Learned Hand said in *Gregoire v. Biddle, et al.,* 177 F.2d 579 (2nd Cir. 1949), Cert. Den. 339 U.S. 949, 70S Ct. 803, 94 L.Ed 1963, at page 581:

> "The justification [for denying recovery] . . . is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

In *Kelley v. Dunne, supra,* at 132-133, the court set forth the following common denominators in disallowing private suits against public officers:

1. The conduct of the defendant-official was within the scope of agency powers.

2. The act complained of was prima facie in accordance with the officers' duties and customary behavior.

3. The free exercise of the public function outweighed private interests.

This case clearly fits the standards set forth in that case for governmental immunity.

The conduct of the defendants was within the scope of the powers and duties of the Tax Commission, because they must administer the special fuel tax laws, including the issuance and revocation of licenses, setting the bonding requirements, and keeping vehicles off of the highways if they do not have the proper permits, either by failing to obtain permits or by having them revoked.

The actions of Norman Daniels were prima facie in accordance with his duties and customary behavior. He was the supervisor of the Division charged with the collection of special fuel taxes and any bonds required to be posted therefor. He had experienced many persistent problems in attempting to encourage plaintiff to comply with the special fuel tax laws of the State of Utah. He had made many endeavors to make some arrangement for plaintiff to comply with said laws, and after continually being ignored by plaintiff and after the continual failure of plaintiff to comply with the promises made, the defendant, Norman Daniels, had no alternative but to use more aggressive methods to collect the taxes and bond due to the State of Utah. Every action taken by the defendant, Norman Daniels, was in accordance with his duties of insuring compliance with the special fuel tax laws of the State of Utah, as is set forth in his Affidavit (R. 47), as follows:

> "Affiant further states, under oath, that every act which he performed in connection with the above named case was done in good faith and without any malice or wrongful intent or any intent other than his desire to fulfill his administrative duty, to collect the tax and bond which were just and legal obligations due

> to the State of Utah, and that each and every act performed was his best judgment as to the best and correct way to fulfill his administrative duty and to collect the tax and bond due to the State of Utah, and was his understanding that said procedure was the legal and correct method of fulfilling his duties."

In this case, the free exercise of the public function clearly outweighs the private interests. The defendants are charged with administering the tax laws of the State of Utah, a most necessary but sometimes unpleasant assignment, and the protection of public moneys must always be their paramount consideration. Filing tax returns and paying taxes is not highly anticipated under the best of circumstances, and it can seem excessively oppressive to any taxpayer who is unfamiliar with the tax laws, does not have the money with which to pay taxes due, or is just rebellious and refuses to pay; but for whatever reason a taxpayer has not complied with the tax laws, more aggressive methods must be used to insure compliance with those laws, and when those more aggressive methods are used, the taxpayer will frequently feel that the whole world is against him; that the Tax Commission is not sympathetic with his problems, or that it is a personal act of malice by a particular individual. Nevertheless, such feelings have been created by a public servant attempting to perform his duty as he understood it. To impose personal liability on a public servant in such circumstances would clearly be a deterrent to his future duties of protecting the public moneys, and it was specifically for that reason that Section 63-30-10, *supra*, was enacted to protect the State. For these reasons, the free exercise of the public function clearly outweighs the private interests.

The Montana Supreme Court has followed this line of reasoning and has held that immunity from personal liability is not extended to the official for his own sake, but because the public interest requires full independence of action and decision on his part, uninfluenced by any fear or apprehension of consequences personal to himself. *Meinecke v. McFarland,* 206 P.2d 1012 at 1014 (1949).

One of the best statements of the rule of law which speaks against the plaintiff in the instant case is in *Lipman v Brisbane Elementary School Dist., S.C. of California,* 359 P.2d 465, at 467 (1961):

> "Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority *even though it is alleged that their conduct was malicious.* (Citations omitted.) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation." (Emphasis added.)

The Utah Supreme Court recently considered this problem when construction of a junior high school resulted in destruction of an irrigation ditch and landowners in Utah's Granite School District instituted suit against the school district and the individual board members. The defendants' Motion to Dismiss was granted by the Third District Court, and the Supreme Court affirmed:

> "In common with other public officials, they [school board members] *have authority to do whatever is reasonably necessary* in carrying out the duties imposed upon them. It would be quite impractical and

> unfair to require them to act at their own risk. This would not only be disruptive of the proper functioning of public institutions, but undoubtedly would dissuade competent and responsible persons from accepting responsibilities of public office. Accordingly, it is the settled policy of the law that *when a public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment.*" (Emphasis added.)

Anderson v. Granite School District, 17 Utah 2d 405, 413 P.2d 597 (1969) at 599. Citing: *Roe v. Lundstrom*, 89 Utah 520, 57 P.2d 1128 (1936).

The case at hand appears to be one of the specific type for which the rule is intended, i.e., to permit any possibility of personal liability would be disruptive to the proper functioning of the State Tax Commission and would definitely dissuade competent and responsible persons from accepting the responsibilities of public office and would further dissuade such public officers from using their best efforts in the performance of their duties. It is, therefore, respectfully submitted that Judge D. Frank Wilkins was correct in granting the Motion to Dismiss.

POINT IV

THE PLAINTIFF CANNOT AVOID THE IMPACT OF GOVERNMENTAL IMMUNITY BY SUING A PUBLIC OFFICER IN A PRIVATE SUIT.

The doctrine named above in Point III, that a public officer is not liable for his good faith acts performed within the scope of his authority, is a form of the common-law doc-

trine of sovereign immunity. That doctrine, of course, prevents any private suit against the State or Federal governments without the consent of the government to be sued. However, many attempts have been made to circumvent this rule by bringing the action against the individual, employee, or public official to indirectly achieve what could not be achieved directly. Because of this, the courts subsequently adopted the doctrine that the impact of governmental immunity could not be avoided by bringing the suit against the employee or public official in his individual capacity. This principal and the reasons therefore are well explained in 160 A.L.R. 332 at 333, wherein it says:

> "However, while a suit against state or Federal officials is not necessarily a suit against the state, within the rule of immunity of the state from suit without its consent, that rule cannot be evaded by bringing an action nominally against an officer or a board, commission, or department in his or its official capacity when the real claim is against the sovereign itself, who is the party vitally interested. . . . While formerly, in determining whether a state was a party to controversy, the court would look only to the record to see who were the parties, that is, the court would not consider the state a party unless nominally so, this view has long since been discarded. The rule is now well settled that a suit against an officer as representing the sovereign in action and liability, where the state, although not a party to the record, is the real party against which relief is sought, and where a judgment for the plaintiff, although nominally against the officer as an individual, could operate to control the action of the state or subject it to liability, is to be deemed a suit against the state, and is not maintainable unless the state has consented to be sued."

The Utah Supreme Court has recently discussed this principle in *Sheffield v. Turner*, 21 U.2d 314, 445 P.2d 367 (1968), which was a private action against the warden of the Utah State Prison by an inmate who had been stabbed by a fellow prisoner. The complaint alleged that the warden had permitted his employees to supervise the inmates in a negligent manner, which enabled the fellow prisoner to enter the plaintiff's quarters and stab him. Justice Crockett wrote the opinion of the Utah Supreme Court and stated:

> "The anciently established and almost universally recognized general rule which this court has consistently announced and adhered to is that the government, its agencies and *officials performing governmental functions are protected by sovereign immunity.*" (Emphasis added.)

The authorities cited by the Court for that statement were:

> "*Sehy v. Salt Lake City*, 41 Utah 535, 125 P. 691, 42 L.R.A., N.S., 915; *Bingham v. Board of Education of Ogden City*, 118 Utah 582, 223 P.2d 423; *Niblock v. Salt Lake City*, 100 Utah 573, 111 P.2d 800; *Springville Banking Co., v. Burton*, 10 Utah 2d 100, 349 P.2d 157."

The Court did delve into the question of whether the Utah Governmental Immunity Act (Sec. 63-30-1, et seq., Utah Code Ann., 1953), had any influence on the above-stated principles and cases, but the Court finally concluded, at page 369:

> "Upon our consideration of the various aspects of the problem and an examination of the authorities which have dealt with it, it is our opinion that in a situation such as this, . . . *the warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence so long as they are*

acting in good faith and within the scope of their duties, and that *they could not be held liable unless they were guilty of some conduct which transcended the bounds of good faith performance of their duty by a wilful or malicious wrongful act which they knew or should know would result in injury."*

The Court indicated that the reason for its holding was "the imperative need for those in a supervisory capacity to have reasonable freedom to discharge (their) burdensome responsibilities . . . . If such officials are too vulnerable to lawsuits for anything, . . . capable persons would be discouraged from taking such public positions." *Id.* at 369.

The above reasons are also clearly present in the case at hand, and it is respectfully submitted that the Court should hold similarly to *Sheffield v. Turner, supra.*

POINT V

THE PLAINTIFF CORPORATION MAY NOT BRING THIS ACTION BECAUSE OF THE SUSPENSION OF ITS CORPORATE POWERS.

At the time plaintiff filed its Complaint, its corporate powers had been suspended by the Utah Secretary of State under the provisions of Section 59-13-61, Utah Code Annotated, 1953, which reads, in part, as follows:

> "If a tax computed and levied hereunder is not paid . . . the corporate powers, rights and privileges of the delinquent taxpayer, if it is a domestic corporation, shall be suspended, and if a foreign corporation, it shall thereupon forfeit its rights to do intrastate business in this state.
>
> * * * * *

> "The suspension or forfeiture herein provided for shall become effective from the time such record is made, and the certificate of the secretary of state shall be prima-facie evidence of such suspension or forfeiture."

Immediately following that provision, Section 59-13-62, Utah Code Annotated, 1953, provides, in part:

> "Any person who attempts or purports to exercise any of the rights, privileges or powers of any such domestic corporation, or who transacts or attempts to transact any intrastate business in this state in behalf of any such foreign corporation, is guilty of a misdemeanor and shall be punished by a fine of not less than $250 and not exceeding $1,000, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment. . . . . Every contract made in violation of this section is unenforceable by such corporation or person."

Section 59-13-63, Utah Code Annotated, 1953, provides for the issuance of a Certificate of Revivor and reinstatement of the corporation rights, privileges and powers after they have been suspended. The defendants do not dispute that such a Certificate of Revivor had been issued at the time of the hearing on defendants' Motion to Dismiss, nor does the plaintiff dispute that the corporation's rights, privileges and powers had been suspended at the time of the filing of the Complaint in this action as well as at the time when plaintiff was still carrying on business when defendant, Norman Daniels, issued the Impound Order on plaintiff's vehicles. It is respectfully submitted that the relevant times in this case are the time when the Complaint was filed and the time when the actions complained of occurred, and that the time of hearing the Motion to Dismiss is immaterial for purposes of this argument.

The plaintiff's Brief cites the cases of *M & S Construction and Engineering Co. v. Clearfield State Bank,* 24 U.2d 139, 467 P.2d 410, and *Mackay and Knobel Enterprises, Inc. v. Teton Van Gas, Inc.,* 23 U.2d 200, 460 P.2d 828, for the proposition that a suspended corporation still has full authority to bring any action in the courts of this State. However, it is respectfully submitted that this Honorable Court did not intend those cases to receive such a broad interpretation.

In the case of *Mackay and Knobel Enterprises, Inc. v. Teton Van Gas, Inc., supra,* the plaintiff corporation was in good standing at the time of filing its Complaint but was thereafter suspended for failure to pay its corporate franchise taxes. The district court then dismissed the action on the ground that the plaintiff corporation lacked the legal capacity to *maintain* the suit, and this court reversed that decision. It should also be pointed out that the acts of which the plaintiff complained had apparently occurred prior to the suspension of the plaintiff's rights, powers and privileges. Therefore, the claim of the plaintiff against the defendants would have been a valid claim at the time of said suspension and attempting to reach a settlement of that claim was merely a portion of "winding up" the affairs of the corporation.

In the case of *M & S Construction and Engineering Co. v. Clearfield State Bank, supra,* the district court had again dismissed an action in which the cause of action had arisen and a Complaint had been filed before the suspension of the plaintiff corporation's powers, rights and privilege, and it is suggested that this was another case where the action was a necessary ingredient for "winding up" the affairs of the corporation.

In the case at hand, the acts complained of, and the filing of the Complaint all occurred *after* the suspension of all corporate rights, powers and privileges. At those times, the plaintiff's rights, powers and privileges had all been suspended and it had no right whatever to be operating a business within the State of Utah. There simply was no legal corporate entity in existence to which the defendants could have caused any damage or injury. If there were no corporation in existence, how can the plaintiff claim that this "ghost" corporation was injured?

It is not contended here that either the *Mackay* case or the *M & S Construction* case, *supra,* reached the wrong conclusion. A careful reading of those cases clearly discloses that they were both in the process of "winding up" the affairs of the corporation in bringing those actions in court. In both of those cases the causes of action had arisen prior to the suspension of the corporate rights, powers and privileges, and also both of the Complaints were filed prior to such suspensions.

What is being suggested here is that after the corporate rights, powers and privileges have been suspended, a corporation may not then bring an action in the courts of this State for a cause of action which arose because of the active continuing conduct of the corporation's business after the suspension of all corporate rights, especially when the conduct of business constitutes a criminal offense. To rule otherwise would be to grant a suspended corporation all of the protective corporate rights, powers and privileges without any of the attendant responsibilities which attach to individuals who elect to do business under the protective shell of a corporate entity.

The interpretation of the law suggested here is in conformity with current statutory and case law.

Section 16-10-101, Utah Code Annotated, reads:

> "Notwithstanding the dissolution of a corporation . . . the corporate existence of such corporation shall nevertheless continue *for the purpose of winding up its affairs* in respect to any property and assets which have not been distributed or otherwise disposed of prior to such dissolution, and *to effect such purpose* such corporation may sell or otherwise dispose of such property and assets, sue and be sued, contract, and exercise all other incidental and necessary powers." (Emphasis added.)

That statute does not give dissolved corporations the right to continue business for all purposes, but only for the purpose of winding up its affairs.

In the case of *Prudential Federal Savings and Loan Ass'n. v. Hartford Accident & Indemnity Co.,* 7 U.2d 366, 325 P.2d 899, at p. 375 this Court held:

> "The logical conclusion . . . is that 59-13-61 would not prevent Felt from bringing suit to enforce the rights growing out of business transacted while it was franchised here, even though its franchise had been revoked, . . ."

Also, in the case of *Houston v. Utah Lake Land, Water and Power Co.,* 55 Utah 393, 187 P.174, at p. 399; 47 A.L.R. 1282, this Court emphasized the importance of the distinctions between actions to wind up the affairs of a corporation, and actions to further the regular business of a corporation when it said:

> "Whatever may have been Mr. Whitney's purpose, his acts were designed and calculated not to wind up the affairs of the company, but to enlarge and extend its field of operation. To contend that these transactions had any tendency to close or wind up the busi-

ness affairs of the Utah corporation is a mere juggle with words. It is utterly fallacious to say that a corporation by its corporate death is given everlasting corporate life; that a defunct corporation is endowed by law with enlarged and limitless powers, and that it may enter into realms of speculation from which it was excluded while it had full corporate existence. . . . . If the theory plausibly presented by appellants is tenable, a private corporation in this state desiring to enlarge and extend its powers may have its charter forfeited by failing to pay its annual state corporation license tax and then become a law unto itself, engage in any kind of business that may suit the fancy of its officers, and become a buccaneer on the high seas of finance. Such is not the purpose of the law. The evidence shows that the president of the respondent corporation was in 1911 given power by the board of directors to borrow money and execute notes and mortgages, and it is claimed that under those resolutions, which were never rescinded, he had authority to execute the notes and mortgages sued upon. How an authority conferred during the lifetime of a corporation can be invoked as a justification for its acts after its corporate death, and while lingering only for the purpose of being wound up, is a question that is answered by its mere statement. Whatever authority the president of the corporation had by virtue of the resolution of the board of directors died with the corporation, and the fact that the officer could do those things necessary to wind up the affairs of the corporation does not justify the assumption that he had the power and authority that may possibly have vested in him before the charter of the corporation was forfeited."

In that case, this Court also cited with approval 8 Fletcher's Cyc. Corp., Section 5572, which reads:

"It is hardly necessary to state that a corporation which has been dissolved cannot continue business as

a going concern. This is so, even though a statute continues its existence for a definite or indefinite time to wind up the business."

This Court also said in that case:

> "Where a corporation's charter is forfeited in this state, it is the duty of the directors, who are trustees for the stockholders and creditors, to assemble its assets, liquidate its indebtedness, and generally conduct its affairs in such manner as will properly expedite the winding up of the corporation's business. No such course was pursued in this case."

It is respectfully submitted that Judge D. Frank Wilkins was correct in dismissing the action on the grounds that the corporate powers of plaintiff corporation had been suspended which suspended all of the powers, rights and privileges of said corporation. It is apparent that Judge Wilkins determined the actions of plaintiff corporation to be outside its authority to wind-up its affairs.

CONCLUSION

It is respectfully submitted that Judge D. Frank Wilkins was correct in granting the Motion to Dismiss of the defendants for the reasons stated in the Order, and it is, therefore, urged that said decision be affirmed with costs to the appellant.

Respectfully submitted,

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