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A. Foss Peterson, Et Al. v. Bountiful City, A Municipal Corporation And Da Vis County, A Body Politic of the State of Utah : Appellant, Bountiful's Brief On Appeal

IN THE SUPREME COURT OF THE STATE OF UTAH

A. FOSS PETERSON, et al.,

Plaintiffs-Respondents,

- vs. -

BOUNTIFUL CITY, a Municipal Corporation and DAVIS COUNTY, a Body Politic of the State of Utah,

Defendants-Appellants.

Case No. 12045

APPELLANT, BOUNTIFUL'S, BRIEF ON APPEAL

Appeal from a Judgment of the Second District Court
of Davis County
Hon. John F. Wahlquist, Judge

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STATEMENT OF KIND OF CASE

Plaintiffs-Respondents are owners of eighteen parcels of land which were part of a 108 acre tract annexed by Bountiful, Utah, but which annexation ordinance was declared invalid by this Court, whereupon the respondents commenced an action to recover the portion of the 1967 tax levied by Bountiful, Utah, prior to the decision of this Court. The lower court granted judgment to the respondents for their respective portions of the taxes paid together with interest.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's judgment and a dismissal of the complaint.

STATEMENT OF FACTS

The complaint alleged that the plaintiffs are owners of real property in Davis County, Utah, which at all times was outside the corporate boundaries of Bountiful, Utah, and that during 1967, Bountiful, improperly and unlawfully levied a property tax upon their eighteen parcels of land which tax was collected by Davis County. It was further alleged that the suit was to recover an improper and illegal tax paid under protest pursuant to Section 59-11-11, Utah Code Annotated, 1953, in the amounts recited as to each plaintiff ranging from $33.33 to $293.70, involving a total of all claims of about $1,221.01.

This case is a sequel to *Jensen vs. Bountiful City*, 20 Utah 2d 159, 435 P.2d 284, December 12, 1967, wherein this Court held that where there were 373 owners shown on the assessment rolls of whom 199 had signed a petition for annexation but 26 of whom had the right to withdraw their signatures before the council acted upon the petition leaving but 173 valid signatures of a required 187 to constitute a majority, the annexation ordinance was invalid even though the remaining signatures after allowing the withdrawal of 26 names would constitute a majority of the owners of record as shown in the office of the County Recorder.

At the trial of the instant case, the plaintiffs made an opening statement, offered no testimony, but submitted Exhibit "A," a letter dated October 27, 1969, from respondent's counsel to appellant's counsel stating the evidence of protest given by each claimant and it was stipulated by both parties that this was the extent of the evidence of protest (tr. 4). An analysis of Exhibit "A" shows that with the exception of the protest of Hayward, all other protests amount to a notation on the check to the Davis County Treasurer to the effect "Paid under Protest," without specifying whether all or part was paid under protest or any reason therefor. Hayward's protest identified the portion paid under protest in a separate letter to the Davis County Treasurer.

The respondents rested after offering Exhibit "A," whereupon appellant moved to dismiss for reasons among others, that insufficiency of the protest and de facto existence prior to the decision of this Court constitute a defense to the claims. The court denied the motions to dismiss except that as to de facto existence the court stated this matter was open to further evidence (tr. 6).

Appellant called Grant Petersen, City Manager of Bountiful, Utah, who testified that the total area comprised by the subject annexation ordinance was about 108 acres of a total city area of 4,346 acres or 2.4% (tr. 9). That the total taxes collected from the 108 acre area for the city was $8,539.93 (tr. 10). That city services made available to the separated area included police — $3,358.20, fire protection — $833.45, administrative —

$3,416.50, street maintenance — $6,730.40, or a total of $14,338.55 calculated by taking a 2.4% of the budget for such items except that street maintenance was based upon 3.2 miles of a 75 mile total system. His testimony was summarized in Defendant's Exhibit 1. He further testified that the annexation ordinance was adopted in December 1966 and that thereafter the city endeavored to serve the area on an equal basis with other areas of the city until the decision of this Court after December 12, 1967 (tr. 11). Other services such as water, sewer and power were supplied the area by separate districts and a private utility which were already established and serving the area.

The court took the matter under advisement and invited briefs from counsel on the issue of de facto existence of the city until the decision of this Court, December 12, 1967 (tr. 30). About five weeks later the trial court directed counsel for the plaintiffs to prepare findings and judgment for the plaintiffs (tr. 28).

ARGUMENT

POINT I

A CITY WHICH EXTENDS ITS BOUNDARIES UNDER CONSTITUTIONAL AND STATUTORY AUTHORITY ENJOYS DE FACTO EXISTENCE IN THE ANNEXED AREA UNTIL OUSTED THEREFROM BECAUSE OF IRREGULARITIES IN ANNEXATION PROCEDURES, AND TAXES THERETOFOR COLLECTED ARE VALID.

The controlling distinction in the cases which allow or disallow de facto existence to a city in an annexed

area, is whether their attempted annexation was authorized by the provisions of constitution and/or statute but failed to conform to the technical requirements thereof, or was an attempt to annex an area when by constitution or statute no provision existed to authorize such an extension of boundary.

The proposition is well stated in the case of *Town of Largo vs. Richmond,* 109 F2d 740, (Fifth Circuit Court of Appeals):

> "The Florida decisions all point out that while the excessive extension of territory by the legislature may subject the municipality to a judgment of ouster and prevent it as to the future, from exercising jurisdiction over the improvidently annexed territory, it does not prevent the municipality from being one, at least de facto, from the time of the extension until the ouster as to all the territory, they settle it to that too, as to the bonds and obligations created to exist after the ouster is liable."

An annotation in 136 ALR 187 reviews several cases and the text at the bottom of page 195 states:

> "In I Dillon on Municipal Corporations, 5th Edition, Sec. 67, it is said that 'Where a reputed corporation is acting under forms of law, unchallenged by the state, neither the nature nor the extent of any illegality in the organization can effect the existence of the reputed corporation. Where these requisites occur there is a de facto corporation.' And it would seem to be the general rule that municipal corporations, particularly

> those whose existence is consistent with the paramount law and the general system of law in the state, are corporations de facto, even though organized under an unconstitutional statute."

The annotation commences a review of cases and under the last paragraph on page 196 "United States" refers to *annexations* wherein the municipality is deemed a de facto municipality in the area from the time of the extension to the time of ouster. Between pages 196 and 202 several cases acknowledging the de facto existence are cited. Then in the conclusion on page 204 in the last paragraph the author states that while private corporations are rarely given a de facto status, nevertheless,

> *"When it comes to municipal corporations, however, it can be said without fear of successful contradiction that the cases denying a de facto status are in the minority and that the general rule is in favor of such status on the grounds of public policy and expediency."*

Some courts relate the matter to the power of the acting body under constitution or statute. At the time of trial the defendants cited to the court the case of *City of Winterhaven vs. Gillespie,* 5th Circuit, 84 F2d 285 at page 287. This Florida city consisted of 1430 acres and under a new statute annexed 9410 acres. The annexation statute was held not broad enough to allow annexation of more than 800 acres. The issue here was whether the newly annexed territory would be liable for its share of $3,320,000.00 bonds. The circuit court held that:

> "Under these circumstances it may not be doubted that under both state and federal decisions the annexed territory remains liable for those bonds and must pay them; for the defect for which the judgment of ouster was entered went, not at all to the power of the legislature under the Constitution, but to a defect in the form the extension of the power took. The ouster proceeding was therefore without effect as to these bonds."

The court further held that the Florida Supreme Court's decision directing the entry of a judgment of ouster was not retroactive and was directed to the future and that any obligations incurred prior to the ouster were properly chargeable against the annexed territory.

The Winterhaven case was cited and distinguished in the case of *Ocean Beach Heights, Inc. vs. Brown-Crummer Inv. Co.,* 302 U.S. 614 (1938). In this Ocean Beach case a Florida town on one side of a river attempted to annex land on the other side of the river but since the annexations were required to be contiguous the courts held that the town was without power to annex land on the other side of the river. It was held in this instance that because the attempted annexation was unauthorized, void and without color of title there could be no de facto corporation which would render the disconnected lands liable. However, it cites the Winterhaven case and other cases as good faith attempts to organize municipalities which are presumed valid until adjudged repugnant to law.

The respondents' letter to the trial court as a "Memorandum of Authorities" quoted what was termed a statement of the general law from 37 Am. Jur., Municipal Corporations, Section 33, as follows:

> "If territory is improperly sought to be annexed by a municipal corporation, and the annexation proceedings are successfully attacked by the state in quo warranto proceedings, the annexation does not acquire a de facto status so as to give the municipal corporation any rights thereunder."

However, as pointed out by appellant's response thereto (R 29), the foregoing quotation from 37 Am.Jur. is supported by only one case, *Balkan v. Buhl,* 158 Minn. 271, 197 N.W. 266, 35 A.L.R. 470. The annotation in 35 ALR states that the case of Balkan v. Buhl is the only one of its kind, with one exception, and both cases involve disputes between municipalities wherein the contested extension of boundaries were without statutory authority.

Balkan v. Buhl was an attempt by the town of Buhl to annex a rich ore area which was already within the corporate limits of the town of Balkan. The county auditor had placed the disputed area on the tax records for Buhl which received the tax money. Balkan sued to recover the taxes collected by Buhl from this ore area. The court, while recognizing the doctrine of de facto existence stated that since the disputed area was already a part of the municipality of Balkan, it could not under the Minnesota statute be annexed to Buhl. This decision is consistent with the cases cited by appellants in

support of de facto existence where the annexation is under power or authority of statute but fails for some irregularity.

Another case cited and relied upon by respondents was *Barton v. Stuckey,* 121 Okl. 226, 248 P. 592, where the city's attempted annexation was under its home rule charter which differed from statutory requirements, and the court held that since there was no attempt to follow the statutory requirements the annexation ordinance was deemed a nullity and void. However, in this decision and many subsequent cases the Oklahoma courts recognize that where the city council reasonably attempts compliance with statute, but fails because of informalities or irregularities, the city nevertheless acquires authority and jurisdiction over the area, which precludes collateral attack, although the issue of de facto existence is not mentioned by the court.

De facto existence is not recognized in those instances where if the city had complied with all known requirements of statute or constitution there still would be an absence of authority to complete a de jure annexation.

POINT II

WHERE STATUTE REQUIRES PAYMENT UNDER PROTEST AS A CONDITION PRECEDENT TO AN ACTION TO RECOVER TAXES UNLAWFULLY ASSESSED, SUCH PROTEST MUST IN SUBSTANCE DESCRIBE THE PORTION OF THE TAX PROTESTED AND THE REASON THEREFOR.

The statute relating to actions to recover taxes paid under protest is as follows:

> "59-11-11. Payment under protest—Action to recover.—In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, *or any part thereof deemed unlawful,* to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or *any portion thereof paid under protest.*"

In this case all of the protests, except that of Haywards', were short notations on the check to the Davis County Treasurer to the effect "Paid under Protest."

As stated in *Albro v. Kettelle,* 107 Atl. 198, a general protest is not sufficient and "should point out with reasonable certainty the defect or error upon which protest is based." It is further stated therein that the danger of allowing a general protest is that no opportunity to cure the defect is allowed and any subsequent determination of illegality would be within the general protest and could bankrupt a community. A more recent example of the

peril of allowing a general protest such as "Paid under Protest" is that relating to taxation for payment of bonds where the election authorizing the bonds may not have been conducted according to constitutional requirements. If the Treasurer were informed by the protest that it related to the bonds, he could withhold expenditure thereof pending a final determination of the legality of the tax; however, in the absence of an explanation, the Treasurer does not know what portion is claimed to be illegal and is faced with the decision to withhhold all or transmit all of the tax collected.

The form of the protest does not appear to be as important as the substance and may even be oral if properly noted by the Treasurer. In the case of *Murdock v. Murdock,* 38 U. 373, 113 U. 220, the taxpayer, Murdock, brought suit against the Treasurer of Wasatch County, Lavina Murdock, and Heber City, to recover taxes paid upon sheep, since the sheep at no time were in Heber City and were not subject to the levy of Heber City. The County Treasurer answered that she received the money and is holding the same in trust to pay it as the court may direct. No formal proof of protest was offered at the trial but the Supreme Court held that this was not necessary in view of only a general denial by Heber City of the allegation that payment had been made under protest. We quote the pertinent portion of the opinion:

> "Further, we are of the opinion that under the provisions of section 2684, Comp. Laws 1907, the payments as made by appellant and his assignors

> as the same were by the treasurer noted on the tax records constituted a payment under protest. No particular form of protest is required by the statute. Nor is it required that a protest be in writing. From the facts as admitted by the treasurer, she clearly understood that that portion of the taxes which were claimed by Heber City were paid under protest because they were claimed to be illegal for the reason that the sheep upon which they were levied at no time were within the territorial limits of said city. What more could be required? When the statute prescribes no special conditions in making a protest, it would seem that the courts can require none."

While the foregoing case dispenses with the necessity of any special form of protest, it emphasized that the substance of the protest was sufficient.

By way of contrast, in the instant case the respondents' proof shows nothing more than the notations on the checks. There is no indication that the treasurer ever noted the same in the record, or could have known what portion of the tax was protested nor the reasons therefor, nor did he retain any portion of the tax in trust or notify Bountiful of any payment under protest.

This court has commented on the propriety of an explained protest in the case of *Neilson v. San Pete County*, 40 U. 560, 123 Pac. 334 (1912). The appellants Neilson and another brought suit against San Pete County to recover certain taxes which they alleged were illegal, void and illegaly collected by the county by levying and

collecting taxes upon personal property, mortgages, in absence of any law allowing the taxation of mortgages. Appellants alleged that they paid the taxes "but that said payment was not voluntariy made." The trial court sustained a demurrer to the complaint. On appeal, the appellants claimed their action is sustained by Section 2642 of Compiled Laws of 1907, which is the same as 59-10-14, Utah Code Annotated 1953, and as stated by the court, relates to recovery of taxes to which the county "has no right whatever because they were already paid, or because they should not have been collected, or because absolutely illegal and void for other reasons," in which event no formal or verified claim need be filed with the county commissioners and it is only necessary that a demand in writing for the return thereof be made. San Pete County contended that the appellants were suing under Section 2684 which is the same as 59-11-11, Utah Code Annotated 1953, and are precluded by not having sufficiently protested. This court stated in comment 3, page 567, that the taxes were not paid under protest as required by Section 2684 (59-11-11) but that appellant's had not elected to proceed under this section and could rely upon Section 2642 (59-10-14). The court then made this important observation concerning the extent of protest required, and we quote comment 6:

> "Giving the language used in both of those sections its ordinary meaning, it is clear that the purpose of section 2684 is to give the taxpayer an opportunity to contest the right of the county to collect certain taxes, licenses, or demands for revenue, or any portion thereof, by paying the

> whole under protest, and then sue to recover all or any portion that he may be entitled to. It is also clear that the taxes, licenses, or demands referred to in that section are such as are "deemed unlawful" by the taxpayer before payment is made. *Such taxes, licenses, or demands may, however, not be deemed unlawful by the officers who are required to collect them, and hence the taxpayer is required to indicate to the officers what portion he deems unlawful, and thus pay such part under protest for the purpose of laying a foundation for an action to test their legality. Under such circumstances, it is fair and just that the taxpayer be required to indicate what portion of the tax he will contest on the ground of illegality, so that the officers can govern themselves accordingly in making the proper apportionment of the taxes.*

In the case at bar, the respondents did not meet the minimum requirements as to protest as reviewed herein.

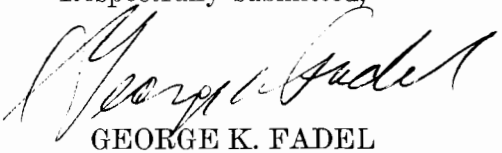
A protest is a remonstrance or objection. It could take many forms for many reasons, some of which would have no relationship to the validity of the tax. Just as an objection or exception to evidence, rulings and instructions, is required by court decisions to state a reason for the objection or exception to give the court an opportunity to correct an error, so for similar purposes the protest to a tax should specify the basis for the protest.

CONCLUSION

The appellant having proceeded in good faith to annex the respondent's property by authority of statute

but failing in procedure caused in part by a late withdrawal by some of the petitioners for annexation, and having expended proportionately more for the annexed area than was collected, should be deemed to have been a de facto city until ousted by decision of this Court. Also the failure to file a sufficient protest is a bar to the respondents' claims. The decision of the trial court should be reversed and the complaint dismissed.

Respectfully submitted,



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