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Reservation of Minerals by Wyoming Counties

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tenant¹⁵ to account to the out-tenant for mere use and occupation. The right of one tenant in common is to an undivided share of the whole.¹⁶ and this right to occupy and use the common property does not depend on the joint occupation of all the cotenants. The very nature of a cotenancy makes it impossible for a tenant in possession to use the property without benefiting from the out-tenant's undivided interest. If an out-tenant does not want to take advantage of the property there is no just reason why the tenant in possession should be penalized for exercising his own right. Tenants in common should not be required to let their property stand vacant under penalty of paying rent to their out-tenant.¹⁷ The out-tenant can at any moment enter into equal enjoyment of the property and his neglect to do so may be regarded as an assent to the sole occupation of the in-tenant.¹⁸ The tenant in possession receives in truth the return of his own labor and capital to which his out-tenant has no right. If he should happen to lose money in the cultivation of the property he cannot call on the out-tenant for a share of the losses as he would be able to do if the land had been cultivated by the mutual agreement of the cotenants.¹⁹ The fact that the cotenant's occupancy prevents the property from being adversely possessed seems to be a fair recompense for any profits that he might receive.

The rule adopted by many jurisdictions that a cotenant in possession of the common property is not required to account to his out-tenant for mere use and occupation would appear to be the more equitable rule. Such a result can be reached under the Wyoming statute but if it is treated as a new legislative act there is no need to proclaim hard and fast rules of interpretation as developed in construing the statute of Anne. The wording of the statute is such that it will allow the court to make a decision according to the equities of each case, taking into account the feasibility of all the cotenants occupying the common property.

RICHARD J. MACY

RESERVATION OF MINERALS BY WYOMING COUNTIES

The county of Albany, after bidding for certain lands at a tax sale, received a certificate of purchase for the land. Pursuant to statute,¹ four years after the certificate had been issued, the county treasurer issued a tax deed of the delinquent tax land to the county. Subsequently, the county board sold the land to Morgan Probasco, reserving to itself a part of the mineral rights. Probasco later brought an action to quiet his

15. Cotenant in possession of the common property.

16. *Whitton v. Whitton*, 38 N.H. 127, 75 Am.Dec. 163 (1859).

17. *Mastbaum v. Mastbaum*, 126 N.J.Eq. 366, 9 A.2d 51 (1939).

18. *Henderson v. Easen*, L.R. 17 Q.B. 701 (1851); *Pico v. Columbet*, 12 Cal. 414, 73 Am.Dec. 550 (1859).

19. *Ibid.*

1. Wyo. Comp. Stat. § 32-1703 (1945).

title to the minerals. In that action, he contended that when he received the deed from the Board of County Commissioners of Albany County, he received the right to all the property and that the county had no right to reserve the minerals. On February 26, 1957, the Wyoming Supreme Court, in the case of *Probasco v. Sikes*, answered the question of whether or not the Board of County Commissioners may adopt its own manner, method, terms, and conditions by and under which it may dispose of property at such private sale.² The court recognized the general rule that public officers have only such power and authority as are clearly conferred by law or necessarily implied, but went on to say that the statutes of Wyoming give the Board of County Commissioners the power to do anything with property to which it has acquired title as long as it is done for the public good. In defining what was meant by the term "public good," the court said, "What a private party may do is not an unfair criterion of what a county may do, in the absence of legislation to the contrary."³

Such a criterion sharply focuses attention on the broad grant of power given to counties in existing statutes and gives cause for inquiring whether such broad discretionary authority is desirable or necessary. It would seem, under the broad and unlimited powers decreed by the Wyoming court, that counties have the right to actively compete with private owners in the open market. A Nebraska decision,⁴ emphasizing the public interest made it imperative that there be a limitation placed on the county's power to sell, said that the statute authorizing counties to hold realty necessary for use of the county was enacted to prevent counties from indulging in the real estate business on a competitive basis. Chief Justice Blume, in the *Probasco* case, made it plain that the court was merely interpreting the statute and recognized a need for limitation, but stated that if a limitation is to be placed on the counties in the sale of land it must be done by the legislature, and cannot be done by the court.⁵

A look at the statutes of other jurisdictions shows that some, like the Wyoming statutes, also fail to limit the authority of a county to deal with land acquired as a result of tax sales, and give their counties powers as broad and unlimited as those given in Wyoming.⁶ Mississippi decisions, like those of Wyoming, hold that an act on the part of a county is limited only by the interest of the public welfare.⁷ A Wisconsin court, in construing a statute⁸ merely outlining the type of deed that a county

2. _____ Wyo. _____, 307 P.2d 817 (1957).

3. *Id.* at 821.

4. *City of Grand Island v. Willis*, 142 Neb. 686, 7 N.W.2d 457 (1943).

5. *Supra* note 2 at 822.

6. *E.g.*, Idaho Code § 31-604 (1947): "To make such orders for the disposition or use of its property as the interest of its inhabitants require."

7. *Fredric v. Board of Supervisors*, 197 Miss. 293, 20 So. 92 (1944).

8. Wis. Stat. § 75.16 (1947). "Now, therefore, know all men by these presents that the county of . . . in said state, and the state of Wisconsin in consideration of said money aforesaid and the premises, and in conformity to the law, have given and hereby do give, grant and convey the tract (or several tracts) of land above described."

must give, held that the statute does not charge the county with a duty to sell.⁹ This is left to the discretion of the county. The discretion being legislative, not legal, it cannot be controlled by the court. The court in that case also intimated that if it had the power it would restrict the county, but went on to say that to hold that the statute requires the county to sell under any particular circumstances is to amend the statute, to exercise legislative power, which the court cannot do. The Washington statute¹⁰ states that "Where no bidder appears [the county] acquires title thereto as absolutely as if purchased by an individual under this act." The Washington court, however, in construing this statute, limited the county by saying that such property once acquired and devoted to a public use could not be alienated without legislative authority, either express or implied.¹¹ This holding although rather broad, seems to vest in the court the discretion of determining the definition of public use and could allow it a small measure of control over the disposal of tax lands purchased by a county.

Other states have adopted legislation which places limitations on the powers of a county to dispose of land acquired pursuant to tax sales. The Louisiana court¹² in construing its statute¹³ said that as a result of a tax sale, the county is never vested with title to the involved property and cannot and does not itself grant one. Rather it possesses only a lien on and privilege over the property to secure the payment of delinquent taxes and in the enforcement of that security can, pursuant to legislative authority, cause a sale. The purchaser at the sale acquires all of the tax debtor's title to and rights in the property. This holding appears to be more in accord with what one would consider to be the rights of counties when they were first established as an arm of the government. The North Dakota legislature, in keeping with this theory, outlined certain specifications that must be followed in the deed given to the purchaser.¹⁴ When a question arose about the rights of the county to withhold a portion of the land acquired by them at a tax sale, the court said:

Where a statute prescribes the form of a tax deed whereby a county must convey, to the purchaser of land acquired by the county for nonpayment of taxes, all the right title and interest of the county in such land, a deed attempting to reserve mineral rights of land conveyed by the tax deed is void as to the rights retained, since authority to convey is created by statutes. It is the authority under which the officers act and not the recitals in the deed that determines its scope and validity.¹⁵

9. *Town of Remington v. Wood County*, 238 Wis. 172, 298 N.W. 591, 595 (1941).

10. *Rev. Code of Wash.* § 84.64.200 (1948).

11. *Carpenter v. Okanogan County*, 163 Wash. 18, 299 Pac. 400 (1931).

12. *Dyer v. Wilson*, 190 So. 851 (La. 1939).

13. *La. Rev. Stat.* § 47-2190 (1950).

14. *N.D. Rev. Code* § 57-2815 (1943). "Upon the payment of the purchase price in cash, or the payment in full of all installments, with interest to date of payment, the county shall execute and deliver to the purchaser a deed conveying to him all right, title and interest of the county in and to such property."

15. *Kopplin v. Burleigh County*, 77 N.D. 942, 47 N.W.2d 137, 140 (1951). See also *Stien v. Fay*, 77 N.D. 942, 66 N.W.2d 528 (1954).

The reason for allowing counties to purchase land sold at tax sales is to enable them to collect the taxes owed on the land.¹⁶ The county has no right to bid in at a tax sale unless no bid is given that covers the delinquent taxes. A Texas case,¹⁷ exploring this theory, stated that a city may exercise proprietary functions, while a county, as a mere subdivision of the state, can exercise only governmental functions. It seems then, if a county is intended to exercise only governmental functions, that once the taxes, interest, and such costs as have been a necessary part of the sale have been realized, all of the county's right title and interest to the land should be extinguished.

Since the legislature should prescribe the functions and purposes of the counties, and since the *Probasco* decision clearly invites review by the legislature of the present statutes, it would seem that the legislature would want to review the statutes to determine whether they, as interpreted, provide a definition of the power of counties to deal with land which is in accord with contemporary thought.

LESA LEE WILLE

RIGHTS OF WAY TO MINING CLAIMS ACROSS PUBLIC LANDS IN WYOMING

A person or association of persons carrying on a mining business in the state of Wyoming often finds it necessary to secure rights of way across public lands in order gain access to its claims. Since the power to dispose of the state public lands is vested with the board of land commissioners,¹ subject to direction of the legislature;² and since the power to dispose of the federal lands is vested in Congress,³ it is necessary to comply with some statutory authority in order to secure rights of way across these lands.⁴

An examination of the state and federal legislation regarding rights of way across public lands, discloses four possible statutes under which a grant of this nature may be procured.

Beginning with the state statutes, the first provision to come under consideration is Section 44-136.⁵ This statute purports to grant to corporations the right to build roads across the "public domain," which has been defined as land belonging to the state or federal government,⁶ or those lands which are subject to sale or other disposal under the general

16. *Supra* note 2.

17. *Miller v. El Paso County*, 136 Tex. 370, 150 S.W.2d 1000 (1941).

1. Wyo. Const., Art XVIII, § 3.

2. Wyo. Const., Art. XVIII, § 4.

3. U.S. Const., Art. IV, § 3, cl. 2.

4. *United States v. Utah Power & Light Co.*, 209 Fed. 554 (8th Cir. 1913).

5. Wyo. Comp. Stat. § 44-136 (1945).

6. *Sullivan*, Handbook of Oil and Gas Law, 422 (1955).