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Erl H. Ellis

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## THE TAX REFUND STATUTE SPEAKS

*(As told to Erl H. Ellis of the Denver Bar)*

I AM known casually to attorneys as Section 7447 of the Compiled Laws of Colorado of 1921. But I want you to know me better, for I think I have enough of a history now to lay claim to being quite a distinguished character. I wish we statutes were not treated like criminals by you lawyers and always designated by a number. Behind every criminal lies a human interest story. Behind many a statute lies a tale of conflicting ideas and often of class struggles.

'Way back in 1870 I was born in the territorial legislature, in the following language:

"In all cases where any person shall pay any taxes, . . . that shall thereafter be found to be erroneous or illegal . . . the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

Since then I have not suffered any serious amputations so my appearance has not changed much through the years. But my "inside" story is what I want to tell you. Of course, I cannot tell you too accurately of the circumstances of my birth, but I imagine that it was argued to the legislature in 1870 that, inasmuch as the county was collecting taxes for the territory and might collect taxes for other subdivisions of the government, and as there might be cases where illegal taxes would be collected, it ought to be settled just who should refund these illegal taxes to the taxpayer. It was natural, therefore, for the legislature to declare that the county itself, having been made the collector of all taxes, should in turn be the official "refunder."

I have often wondered what this paternalistic legislature of mine meant by the word "found." They were saying that an illegal tax should be refunded by the county, but how was the illegality to be determined? Did it simply mean that the taxpayer discovered that he had paid an illegal tax, or did it mean that some court would first have to make a legal finding of illegality?

You will remember that in those days the lawyers in the state were following common law procedure pretty closely. At common law the taxpayer had the established right of suing for illegal taxes, if the taxpayer had paid the money

involuntarily and under protest, and the taxpayer had to further show that the particular party made defendant still had the tax money. So the lawyers in those days might well have concluded that the only purpose in mind when I was written was to say that the county commissioners should always be the defendants and that the plaintiff taxpayer no longer had to prove that the county had all of the tax money collected. You will find in 2 Colo. 628, and in 3 Colo. 349, two actions in *assumpsit* evidently based on the theory, in the '70s, that the taxpayer's right was still a common law right despite my existence. It was not until about 1890 (see 15 Colo. 90) that the first reported action was brought which seemed to be based on the theory that through me there was created a new cause of action and an entirely new statutory procedure for the refunding of taxes.

Now, peculiarly, my experiences have been even more interesting in equity than in law. You might imagine that a court of equity would have little interest in my simple person as apparently I only have to do with a legal proceeding against the county for the recovery of money illegally exacted by the county. But you must remember that the taxpayer often feels that the imposition of an illegal tax is a very great burden and the taxpayer is not a bit anxious to turn over this money to the government and take the chance of recovering it back. I was not very well known to the taxpayer in the early days, and he naturally did not place a great deal of confidence in me.

This led the taxpayer to go to a court of equity and seek an injunction against the collector of taxes. But immediately the equity court asked the taxpayer, do you not have an adequate remedy at law?—and that is where I naturally came into the picture. The equity court, as early as 1879 (4 Colo. 546 and 580), looked me over and said that I afforded "a full and adequate remedy at law." From then on I have taken the leading role in a good many decisions in injunction cases decided by the Supreme Court of Colorado and by the Federal Courts.

It has never been very clearly explained to me just how I happened to assume such a stellar role, but I have necessarily reached the decision that the equity judges felt that the old common law right of *assumpsit* was not an adequate remedy

at law because of the various conditions and difficulties surrounding recovery thereunder. So from the very first the courts looked upon me with a favorable eye and decided that my purpose was not merely to define the proper party defendant in an assumpsit action but that through me there was created a completely new statutory right to test the legality of all kinds of taxing statutes and procedure. Let me emphasize this by telling you, with due modesty, what some of the courts have said about me.

I will cite first the case of Singer Sewing Machine Co. vs. Benedict (1913), 229 U. S. 481, as a clear statement of the idea that the Colorado statute, in imposing upon the county commissioners "the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal," *also* thereby "confers upon the taxpayer a correlative right to enforce that duty by an action at law." Now the Eighth Circuit Court of Appeals did not at first realize my potentialities and importance (see 173 Fed. 456), but after the United States Supreme Court had spoken so definitely the Eighth Circuit quickly joined in singing my praises in the cases of Union Pacific vs. Weld County, 217 Fed. 540, and 222 Fed. 651. You will pardon this further quotation which refers to me:

"Its object was to give an action at law for the recovery of sums paid on account of invalid taxes in place of a suit in equity to restrain their collection. . . . It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer. . . . The taxpayer is given the remedy of paying his taxes and recovering back any sum which the court shall hold to have been illegally exacted. . . . A legal remedy has been substituted by statute for the remedy in equity. . . . This is substantive law. It gives a new right. That statute has nothing to do directly with the law of procedure. . . . It is remedial only in the sense of a substantive law which corrects a known evil. . . . The statute of Colorado simply grants to a property owner the right to have any sum exacted from him by an illegal tax refunded."

Perhaps it might be suspected that the Federal Courts had been a little presumptuous in declaring so explicitly just what was my place and meaning in the Colorado law, but if so, it developed that the Colorado Supreme Court had exactly the same idea as shown by the later decisions of that court. Again I quote:

"Recovery is sought in this case under a specific and unqualified statute commanding a refund by the county of every erroneous or illegal tax paid, and does not involve the general law on that subject. . . . The action here is based upon a statutory right." (From 63 Colo. 438.)

"This court has repeatedly construed this section as giving him (the taxpayer) a cause of action against the county for any tax, the validity of which he, at that time, has the right to question." (From 64 Colo. 268.)

"The true meaning of Sec. 5750 (my number in 1908) is to impose a liability upon the county in favor of a taxpayer who pays an illegal or erroneous tax, and a corresponding duty upon the commissioners, as agents of such county, to refund the same. The effect of the new section (a tax commission statute) in nowise removes that liability, or deprives the taxpayer of his right to maintain a suit therefor." (From 65 Colo. 166.)

You may feel that the courts have been pretty nice to me in thus defining my dignity and importance but there is naturally some limitation to my powers. You will notice that the legislature has said that if any tax is due to an erroneous assessment or to an improper levy or to clerical errors, then the tax must be refunded. Now the courts have been presented with two general types of complaint about erroneous taxation. In the one case the taxpayer may claim that there is some legal question as to the right to levy any tax upon his property or as to the right to levy a tax for a specific purpose. This involves a true illegality of the tax. On the other hand many taxpayers have complained that the assessment of their property was too high. This latter sort of complaint involved simply the judgment of the assessor in fixing the appraisal of the property for tax purposes.

My idea is that I am concerned chiefly in those cases involving true illegality and that an erroneous tax is not much different from an illegal tax as far as I am concerned. (See 51 Fed. (2d) 703.) I am inclined to say to my taxpayer friends that they can rely upon me if they have a real case of illegality and that they can pay the tax and then sue the county to recover back the same without worrying very much about the so-called administrative remedies. But if the taxpayer is really fundamentally complaining that his assessment is too high and there is involved fundamentally simply the judgment of the assessor in making the appraisal then I must say that I am not of very great help and that certainly every effort should

be made to obtain relief from the various administrative bodies, including the assessor, the county commissioners, the tax commission, and perhaps even other bodies. It may be that after exhausting all such remedies a court would in some instances let the taxpayer then go into court in reliance upon my provisions and urge illegality on the theory that the assessment was so high as to be lawfully erroneous, or that the various reviewing bodies had acted arbitrarily, or something of that sort. (For further illustrations see 15 Colo. 90 and 18 Pac. (2d) 323.)

The poor taxpayer at common law, and at present in a great many states, had and has a great difficulty in getting taxes paid back because the taxpayer had to show that he had not made a *voluntary* payment of the tax. The decisions of most of the states are full of erudite discussions of whether or not the tax payment was or was not voluntary. I feel that I have made such discussions in Colorado entirely irrelevant. Perhaps I cannot cite a case from the Colorado Supreme Court definitely passing on this point but you will, I hope, agree with me that it has been well established that through me was created an entirely new self-contained statutory right and so why should it be assumed that some old common law weakness impairs my constitution. The Eighth Circuit Court of Appeals (in 222 Fed. 651) has passed upon this point in the following language:

"In the absence of a statute, the payment of a tax, with few exceptions, is held to be voluntary and, though the tax may be invalid, the money paid cannot be recovered. This is especially true of taxes upon real property. The process by which such taxes are collected is so gradual and offers so many opportunities of resistance that the courts have almost uniformly held that there can be no such duress as to such taxes as to render their payment involuntary. The statute of Colorado here under consideration changes that law."

Again I might warn you that I operate on a cash basis and that when I talk about a person *paying* a tax I mean a real payment in money. I am sorry, but I cannot go on to the scrip basis or anything of that sort even in these days. One of my friends got into a little trouble (see 15 C. A. 274) trying to claim that an uncashed check was a payment of a tax. But if the county takes the taxpayer's property and sells it that is just the same as the taxpayer paying the tax in money and the taxpayer can rely upon me for recovery; even

though the county treasurer embezzles the money from the tax sale. (See 63 Colo. 438.)

And somewhat along the same line I am forced to remind those who purchase at tax sales that they are tax purchasers and not taxpayers and if they pay money at a tax sale for land being sold under an illegal taxing statute they cannot rely upon me to get their money back for them from the county for I protect only taxpayers. (See 14 Pac. (2d) 493.)

Of course you will not fail to keep in mind that while the county may collect taxes for the state, the school districts, the cities and the towns as well as for the county, nevertheless if any of those taxes are illegal the county is the proper party defendant and you only have to bring one suit to get all parts of the illegal tax back. (See 217 Fed. 540, and 247 U. S. 282.) The Colorado Supreme Court has said (65 Colo. 166) about a Greeley bank: "Therefore, in a single action at law under the statute, it could protect itself and its shareholders."

A good many of my friends who support the public treasury have asked me about the necessity of paying their taxes "under protest" if they want to later rely upon me in bringing a suit for the recovery back of the illegal tax. My inclination has been to point out to such inquirers that I am in nowise qualified in my statutory definition, that that statute does not say that the tax must have been paid under protest but says simply that it must be an illegal tax, that this idea of paying under protest is probably a "hang over" from the days when the taxpayer had to prove that his tax was paid absolutely involuntarily, and therefore I have not felt that if the taxpayer did not "pay under protest" he had lost his rights. I think there is some suggestion of this in the case in 35 Colo. 490, because there a part of the assessments were said to have been paid without protest and yet the court seems to have allowed recovery without comment as to that possible defense. I might say further that the county is not harmed by any lack of notice of the contention of the taxpayer that the tax is claimed to be illegal because the county will probably distribute the money out to the state, school districts and municipalities anyway and then if there is a later recovery the county can charge back the money it has had to refund

against these other departments of the government on later distributions. (See 217 Fed. 540.)

However, it is quite customary and perhaps the better practice to give the county some notice at the time the tax is paid that the taxpayer considers the exaction illegal.

You might also think of this duty of the county to refund the tax as creating in the taxpayer a claim against the county and that therefore the taxpayer should file a claim or demand for repayment before starting suit inasmuch as one of my fellows (Section 8697) requires that all claims and demands against the county shall be presented for audit and allowance before any action in court shall be maintainable thereon. This matter has been definitely settled by the Colorado Supreme Court in the case of Boyer Bros. vs. Routt County, 87 Colo. 275, the court holding that the filing of a claim was unnecessary. When the taxpayer relies upon me he has more than an ordinary claim. He has a real right to go immediately to the judicial branch of the government and say to the county, "Refund this most iniquitous tax."

But I try to be fair to both sides. I say that the refund shall be without abatement or discount of the amount paid in and found illegal, but I also am not permitted by the court to force the county to pay any interest on the tax money. (See 75 Colo. 131.)

Now I hope that I have succeeded in justifying my own egotistic feeling that I am an "interesting statute." As further justification of my feeling of self-importance I could give you a list of about twenty-five decisions of the Supreme Court of Colorado in which the action was based upon my existence.

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### WE THANK YOU *(Dictaphun please note)*

Mr. Dunbar F. Carpenter of the Boston Bar, a classmate at Harvard of Mr. Peter H. Holme of the Denver Bar, in a recent letter to Mr. Holme states:

"As editor of the Bar Bulletin published by the Bar Association of the City of Boston, I receive a good many exchanges. One of the best of the law journals which come to me is your "Dicta." I am reminded of this because I find on my desk this morning the April issue. Perhaps it is because I have a particular affection for Colorado and Colorado lawyers, but at any rate "Dicta" interests me more than any other journal. It avoids the cut and dried style of the ordinary law journal, and is full of what might be termed 'human interest.' "

(We have applied for a substantial increase in salary.)