



156 N.W.2d 53

Page 1

9 Mich.App. 157, 156 N.W.2d 53  
**(Cite as: 9 Mich.App. 157, 156 N.W.2d 53)**

**C**

Fidlin v. Collison,  
 Mich.App. 1967.

Court of Appeals of Michigan, Division No. 3.  
 Eldon FIDLIN and Emma Fidlin,  
 Plaintiffs-Appellants,  
 v.  
 William T. COLLISON, Defendant-Appellee.  
**Docket No. 1880.**

Dec. 7, 1967.  
 Released for Publication Feb. 19, 1968.  
 Leave to Appeal Denied March 6, 1968.

Taxpayers' action against city treasurer for conversion of personal property. The Circuit Court, Saginaw County, James E. O'Neill, J., found for defendant and plaintiffs appealed. The Court of Appeals, Holbrook, P.J., held that where city treasurer made no demand upon property owner for payment of personal property taxes and there was no evidence of neglect or refusal by taxpayer to pay prior to seizure of personal property, execution of levy upon statutory lien was without authority and violated constitutional provision mandating due process of law where there is taking of property. The Court further held that where city treasurer seized personal property assessed at \$10,500 for jeopardy assessment of \$629.32 seizure was excessive and therefore unlawful.

Reversed and remanded for new trial.  
 West Headnotes

**[1] Statutes 361 ↪210**

361 Statutes  
 361VI Construction and Operation  
 361VI(A) General Rules of Construction  
 361k204 Statute as a Whole, and Intrinsic Aids to Construction  
 361k210 k. Preamble and Recitals.  
 Most Cited Cases  
 In case of doubt as to proper construction of body

of statute, resort must be had to preamble or recitals, for purpose of ascertaining legislative intent.

**[2] Taxation 371 ↪2445**

371 Taxation  
 371III Property Taxes  
 371III(H) Levy and Assessment  
 371III(H)2 Assessors and Proceedings for Assessment  
 371k2444 Powers and Proceedings in Making Assessments in General  
 371k2445 k. In General. Most Cited Cases

(Formerly 371k319(1))  
 Affidavit of city treasurer in support of jeopardy assessment of personal property taxes substantially complied with requirements of statute. M.C.L.A. § 211.692(b).

**[3] Taxation 371 ↪2885**

371 Taxation  
 371III Property Taxes  
 371III(K) Collection and Enforcement Against Persons or Personal Property  
 371III(K)3 Remedies for Wrongful Enforcement  
 371k2885 k. Actions for Damages.  
 Most Cited Cases  
 (Formerly 371k613)

Evidence established that city treasurer substantially complied with requirements relating to filing of affidavit in support of jeopardy assessment of personal property taxes. M.C.L.A. § 211.693.

**[4] Taxation 371 ↪2572**

371 Taxation  
 371III Property Taxes  
 371III(H) Levy and Assessment  
 371III(H)5 Valuation of Property  
 371k2572 k. Notice of Assessment.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

9 Mich.App. 157, 156 N.W.2d 53  
**(Cite as: 9 Mich.App. 157, 156 N.W.2d 53)**

Most Cited Cases

(Formerly 371k363)

City treasurer, who mailed copy of jeopardy assessment affidavit to owner of personal property levied against, substantially complied with statutory notice to taxpayer. M.C.L.A. § 211.693.

**[5] Taxation 371 ↻2760**

371 Taxation

371III Property Taxes

371III(J) Payment and Refunding or Recovery of Tax Paid

371k2760 k. Time for Payment. Most

Cited Cases

(Formerly 371k526)

Statute providing for jeopardy assessment of personal property taxes authorizes acceleration of date for payment of personal property taxes whereby specified amount of tax becomes immediately due and payable. M.C.L.A. § 211.694.

**[6] Taxation 371 ↻2731**

371 Taxation

371III Property Taxes

371III(I) Lien and Priority

371k2731 k. Statutory Provisions. Most

Cited Cases

(Formerly 371k502)

Statute imposing lien for payment of tax will be strictly construed and will not be enlarged by construction. M.C.L.A. §§ 211.40, 211.694.

**[7] Taxation 371 ↻2801**

371 Taxation

371III Property Taxes

371III(K) Collection and Enforcement Against Persons or Personal Property

371III(K)1 In General

371k2801 k. Nature of Power to Enforce Collection. Most Cited Cases

(Formerly 371k544)

While jeopardy assessment procedure accelerates personal property tax so that it becomes immediately due and payable, collection of such tax is to be consonant with collection procedure authorized under general property tax statutes.

M.C.L.A. §§ 211.44 et seq., 211.46, 211.47, 211.691 et seq.

**[8] Taxation 371 ↻2802**

371 Taxation

371III Property Taxes

371III(K) Collection and Enforcement Against Persons or Personal Property

371III(K)1 In General

371k2802 k. Statutory Provisions.

Most Cited Cases

(Formerly 371k545)

Statute providing for jeopardy assessment of personal property taxes must be construed as adopting and incorporating, with reference to collection procedures, powers and duties of tax collectors as found in general property tax statutes to extent such powers and duties are harmonious and not inconsistent with its provisions. M.C.L.A. § 211.44 et seq., 211.46, 211.47, 211.691 et seq.

**[9] Taxation 371 ↻2801**

371 Taxation

371III Property Taxes

371III(K) Collection and Enforcement Against Persons or Personal Property

371III(K)1 In General

371k2801 k. Nature of Power to Enforce Collection. Most Cited Cases

(Formerly 371k544)

Procedural mechanics of general property tax collection, such as payment and extension of payment dates, necessity of warrant, receipt of tax roll, etc., are inconsistent with provisions relating to jeopardy assessment of personal property taxes and are not applicable to such procedure. M.C.L.A. §§ 211.44 et seq., 211.46, 211.47, 211.691 et seq.

**[10] Taxation 371 ↻2801**

371 Taxation

371III Property Taxes

371III(K) Collection and Enforcement Against Persons or Personal Property

371III(K)1 In General

371k2801 k. Nature of Power to Enforce Collection. Most Cited Cases

9 Mich.App. 157, 156 N.W.2d 53  
(Cite as: **9 Mich.App. 157, 156 N.W.2d 53**)

(Formerly 371k544)

Procedure to be followed in general property tax collection, absent specific provision in jeopardy assessment act, is the procedure to be followed in collecting personal property taxes pursuant to jeopardy assessment. M.C.L.A. §§ 211.46, 211.47, 211.691-211.697.

**[11] Constitutional Law 92 ↪284(1)**

92 Constitutional Law  
92XII Due Process of Law  
92k282 Taxation of Property  
92k284 Assessment and Collection  
92k284(1) k. In General. Most Cited Cases

**Taxation 371 ↪2842**

371 Taxation  
371III Property Taxes  
371III(K) Collection and Enforcement Against Persons or Personal Property  
371III(K)2 Summary Remedies and Actions  
371k2842 k. Levy of Warrant, Execution or Other Process. Most Cited Cases (Formerly 371k578)

Where city treasurer made no demand upon property owner for payment of personal property taxes and there was no evidence of neglect or refusal by taxpayer to pay prior to seizure of personal property, execution of levy upon statutory lien was without authority and violated constitutional provision mandating due process of law where there is taking of property. U.S.C.A.Const. Amend. 14, § 1; M.C.L.A.Const.1963, art. 1, § 17; M.C.L.A. §§ 211.691-211.697.

**[12] Taxation 371 ↪2842**

371 Taxation  
371III Property Taxes  
371III(K) Collection and Enforcement Against Persons or Personal Property  
371III(K)2 Summary Remedies and Actions  
371k2842 k. Levy of Warrant,

Execution or Other Process. Most Cited Cases

(Formerly 371k578)

Where city treasurer seized personal property assessed at \$10,500 for jeopardy assessment of \$629.32 seizure was excessive and therefore unlawful. M.C.L.A. §§ 211.47, 211.691-211.697.

**\*159** Floyd T. Fuss, Saginaw, for plaintiffs-appellants.  
Francis B. Drinan, Smith, Brooker, Harvey & Cook, Saginaw, for defendant-appellee.

Before HOLBROOK, P.J., and BURNS and WISE, FN\* JJ.

FN\* JOHN M. WISE, Circuit Judge for the County of Wayne, appointed by the Supreme Court for the hearing month of June, 1967, pursuant to s 306 P.A.1964, No. 281.

**\*\*55** HOLBROOK, Presiding Judge.  
Plaintiffs, Eldon Fidlin and his wife, Emma Fidlin, brought suit against William T. Collison, treasurer for the city of Saginaw, alleging conversion of personal property. From a jury verdict of no cause of action, plaintiffs appeal.

There appears to be no dispute between the parties as to the following pertinent facts: Eldon Fidlin (hereinafter referred to as plaintiff) owned and operated Mel's Hamburg Kitchen, located at 313 South Michigan avenue in Saginaw, a well-established business. In October of 1957, plaintiff ventured into the take-out food and restaurant business and leased a corner lot at 2700 State street for 10 years at \$200 per month and constructed thereon a cinder block building. The cost of the building, with utilities, equipment and surrounding pavement, according to plaintiff, was approximately \$29,000. The building remained personal property and was assessed as such.

Plaintiff operated a take-out restaurant at the 2700 State street premises from April 1958 until May of 1961, when he closed the business on the advice of his county of Saginaw; that said deponent help. On cross-examination, plaintiff stated that the changing

9 Mich.App. 157, 156 N.W.2d 53  
(Cite as: **9 Mich.App. 157, 156 N.W.2d 53**)

of the street fronting the premises from a two-way to a one-way street in November of 1958, hurt his business. Plaintiff was breaking even at the time the business was closed.

Plaintiff continued to use the building in connection with his other business by storing food and maintaining ice-making facilities in it; the electricity and water supply were operative. The building was \*160 put up for sale as a take-out restaurant business, with equipment.

On July 19, 1961, defendant learned that plaintiff's take-out business was closed and personal property was being removed from the premises. That same day, defendant went to 2700 State street and on looking through a doorway window observed that 2 stoves or grills had been removed from underneath their hoods.<sup>FN1</sup> Defendant went to the county assessor's office, found out that the take-out business was being operated by plaintiff and the personal property including the building was assessed at \$10,500. He then proceeded to the office of the city attorney where a jeopardy assessment affidavit was made out claiming the amount of \$629.32. After filing a copy of the jeopardy assessment affidavit<sup>FN2</sup> with the register of deeds' office, defendant proceeded to Mel's Hamburg Kitchen. Plaintiff was not there. Defendant then went \*\*56 directly to 2700 State street, padlocked both doors and posted the following notice:

FN1. Plaintiff admitted taking out 2 deep fryers (valued at \$275) for use elsewhere. Also, a coffee urn had been returned to its seller. Also a cigarette machine was removed.

FN2. William T. Collison, being first duly sworn, deposes and says that he is the treasurer of the city of Saginaw, a municipal corporation in the county of Saginaw and State of Michigan, and that Eldon Fidlin, doing business as Take Out Restaurant, 2700 State street, Saginaw, Michigan, owned certain personal property consisting of restaurant equipment and

building on the tax day, December 31, 1960; that said property had its situs within the city of Saginaw, Michigan, on said tax day; that the assessed value thereof is \$10,500; that the amount of the jeopardy tax rate is \$59.84 per thousand dollars of evaluation; that the tax due is \$629.32; that the names of the taxing units on whose behalf such jeopardy assessment is made are the city of Saginaw, the school district of the city of Saginaw, and the county of Saginaw; that said doponent has good reason to believe that said taxpayer has closed his business and is about to assign and dispose of said personal property, thereby tending to jeopardize the collectibility of any personal property tax, assessed and levied by the regular assessment and collection procedures.

'Further deponent says not.'

**\*161 'NOTICE**

'To whom it may concern:

'This is to certify that I, William T. Collison, treasurer of the city of Saginaw, Michigan, have this day seized the personal property of Eldon Fidlin, doing business as Take Out Restaurant at 2700 State street, Saginaw, Michigan, due to jeopardy assessment.

'All persons are warned against removing or disturbing this property or notice in any way.

's/William T. Collison

'City Treasurer

'Dated July 19, 1961.'

Defendant returned to his office and mailed a copy of the jeopardy assessment affidavit to plaintiff at 313 South Michigan avenue. Plaintiff received the copy the following day, July 20.

The charter of the city of Saginaw provides for the payment of city and school taxes on July 1, at which time they are normally billed. However, in 1961, the billing did not take place until September 1 due to an appeal to the board of State tax commissioners; thus plaintiff had no notice of a tax payment being due prior to receiving a copy of the jeopardy assessment affidavit.

9 Mich.App. 157, 156 N.W.2d 53  
(Cite as: **9 Mich.App. 157, 156 N.W.2d 53**)

Plaintiff telephoned defendant on July 20 and inquired as to the personal property seizure. Defendant informed plaintiff that by paying the \$629.32 assessment the padlocks would be removed. Plaintiff chose not to pay the jeopardy assessment because he claimed the seizure was improper. The building remained locked from July 19 to September 1 at which time defendant conducted a tax sale. Prior to the sale, plaintiff on request, and in the company of defendant or employees of the city treasurer's office, was permitted to remove food and obtain ice from the building.

**\*162** Six items were sold at the tax sale: a small safe (\$50); a milk machine (\$280); a thermostat griddle (\$30); a fan (\$40); a cash register (\$150); and an electric over (\$115). These items individually brought a total of \$665. They were offered as a unit and brought \$675. Defendant subsequently sent plaintiff a check for the excess obtained on the tax sale over the jeopardy assessment. Plaintiff refused to cash this check and brought suit, alleging conversion of his personal property by defendant.

The primary issue on appeal is as follows: Did defendant, in seizing plaintiff's personal property, act in compliance with the applicable statutory provisions providing for personal property tax collection?

In the case of *Consolidated Paper Co. v. Department of Revenue* (1943), 306 Mich. 216, 221, 10 N.W.2d 833 several principles of law, applicable to the instant case, were quoted from previous Michigan cases by Mr. Justice Bushnell:

'We also said in *Michigan Allied Dairy Ass'n v. State Board of Tax Administration* (1942), 302 Mich. 643, 650, 5 N.W.2d 516, 518:

"We have repeatedly held that the scope of the tax laws may not be extended by implication or a forced construction. We held in *In re Dodge Brothers* (1928), 241 Mich. 665, 669, 217 N.W. 777, 779, as follows:

"Tax exactions, property or excise, must rest upon legislative enactment, and Collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express

authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer.'

"We have since adhered to this principle in **\*\*57J**. *B. Simpson, Inc. v. O'Hara* (1936), 277 Mich. 55, 61, 268 N.W.2d 809, **\*163** and *Star Steel Supply Co. v. State of Michigan* (1939), 290 Mich. 378, 383, 287 N.W. 544, and adhere to it again in the case at bar." (Emphasis supplied)

We are unable to find where P.A.1956, No. 55 has been construed by an appellate court in this State; and while the privilege of coming first may be enviable, it is not without its own onus of responsibility, especially where construction of legislative intent is involved.

[1] The purpose and intent of P.A.1956, No. 55<sup>FN3</sup> is stated in its preamble<sup>FN4</sup> which reads as follows:

FN3. C.L.S.1961, ss 211.691-211.697 (Stat. Ann. 1960 Rev. ss 7.51 (1)-7.51 (7)).

FN4. 'In cases of doubt as to the proper construction of the body of a statute, resort must be had to the preamble or recitals, for the purpose of ascertaining the legislative intent.' 82 C.J.S. Statutes s 349, p. 730. See, also Const. 1963, art. 4, s 24.

'An act to authorize the jeopardy assessment of personal property taxes; to establish the terms, limitations and conditions upon which the date for payment of personal property taxes may be accelerated; to provide for the collection of such taxes, and to establish a lien therefor; and to establish the liability of the purchaser of personal property for personal property taxes.'

Section 1 of the act provides in part as follows:

'The treasurer of any township, city or village is authorized to accelerate the date on which any personal property tax collectible by him would otherwise be due Upon the terms, limitations and conditions set forth in this act.' (Emphasis

9 Mich.App. 157, 156 N.W.2d 53  
(Cite as: **9 Mich.App. 157, 156 N.W.2d 53**)

supplied)

[2][3][4] The affidavit of defendant complied Substantially with the requirements of section 2 relating to the contents of the jeopardy assessment affidavit; the language of the affidavit indicated reliance on subsection (b) of section 2 which reads as follows:

**\*164** 'That the taxpayer has assigned, disposed of or concealed, or is about to assign, dispose of or conceal any of this property, thereby tending to jeopardize the collectibility of any personal property tax, assessed and levied by the regular assessment and collection procedure.'

Also, from the facts, the defendant complied Substantially with the requirements of section 3, relating to the filing of the affidavit and notice to the taxpayer.<sup>FN5</sup>

FN5. Defendant gave 'notice' to plaintiff by mailing him a copy of the jeopardy assessment affidavit. This section specifies 'to which notice shall be attached a copy of the affidavit filed with the register of deeds.'

[5][6] It is in the requirements of section 4, that the issue before us takes focus and for this reason it is set forth in full:

'Upon the filing of such affidavit with the register of deeds, a personal property tax in the amount specified therein shall be immediately due and payable from the taxpayer therein named and shall be a lien against the property therein described to the same extent and of the same character as the lien provided in section 40 of Act No. 206 of the Public Acts of 1893, as amended, being section 211.40 of the Compiled Laws of 1948. The treasurer shall have the same powers and duties in the collection of the tax so assessed as in the collection of personal property taxes regularly assessed under the general laws of this state.'

There can be no argument that the act authorizes acceleration of the date for payment of personal property taxes whereby the specified amount of

personal property tax becomes 'immediately due and payable.' To this end A lien of 'the same extent and of the same character as the lien provided in section 40 of act No. 206 of the Public Acts **\*\*58** of 1893, as amended, being section 211.40 of the Compiled **\*165** Laws of 1948', attaches against the taxpayer's personal property.<sup>FN6</sup> The last sentence of said section 4, gives the tax collector 'the same powers and duties \* \* \* as in the collection of personal property taxes regularly assessed under the general laws of this state.' (Emphasis supplied)

FN6. 84 C.J.S. Taxation s 585, p. 1181, states in part that 'a statute imposing a lien for the payment of a tax will be strictly construed, and will not be enlarged by construction.'

[7][8][9] While jeopardy assessment procedure accelerates the personal property tax so that it becomes immediately due and payable, the collection of such tax is to be consonant with the collection procedure authorized under the general property tax statutes; viz.: C.L.S.1961, s 211.44 et seq. (Stat.Ann.1965 Cum.Supp. s 7.87 et seq.). Thus, C.L.1948, s 211.46 (Stat.Ann.1960 Rev. s 7.90) and C.L.1948, s 211.47 (Stat.Ann.1960 Rev. s 7.91) must be examined and P.A.1956, No. 55 applied thereto. In other words, P.A.1956, No. 55 must be construed as adopting and incorporating with reference to collection procedures, the powers and duties of tax collectors as found in C.L.1948, s 211.46 (Stat.Ann.1960 Rev. s 7.90) and C.L.1948, s 211.47 (Stat.Ann.1960 Rev. s 7.91) to the extent such powers and duties are harmonious and not inconsistent with its provisions.<sup>FN7</sup>

FN7. The procedural mechanics of general property tax collection, such as payment and extension of payment dates, necessity of warrant, receipt of tax roll, etc., are inconsistent with the provisions of P.A.1956, No. 55. Therefore such are not necessary nor applicable where jeopardy assessment procedure is utilized.

9 Mich.App. 157, 156 N.W.2d 53  
**(Cite as: 9 Mich.App. 157, 156 N.W.2d 53)**

[10] C.L.1948, s 211.46 (Stat.Ann.1960 Rev. s 7.90) requires the tax collector to 'call personally upon each person liable to pay such taxes, if a resident of such township, or at his usual place of residence or business therein, And demand payment of the taxes charged against him.' (Emphasis supplied.) C.L.1948, s 211.47 (Stat.Ann.1960 Rev. s 7.91) states the next step of tax collection in the following language:

**\*166** 'If any person, firm or corporation shall neglect or refuse to pay any tax assessed to him or them, the township or city treasurer, as the case may be, shall collect the same by seizing the personal property of such person, firm or corporation, to an amount sufficient to pay such tax, fees and charges for subsequent sale, wherever the same may be found (in the state), and from which seizure no property shall be exempt.'

This is the procedure to be followed in general property tax collection, and absent a specific provision in the jeopardy assessment act, we assume the same procedure is to be followed in collecting personal property taxes pursuant to a jeopardy assessment.

[11] The facts in this case disclose no demand by the defendant city treasurer of plaintiff for payment nor a neglect or refusal by the plaintiff taxpayer to pay prior to the seizure of the personal property. Such execution of levy upon a statutory lien without a prior demand for payment or the providing of an opportunity for making such payment, is without statutory authority and violates the constitutional provision mandating due process of law where there is a taking of property.<sup>FN8</sup> 84 C.J.S. Taxation, s 689, p. 1367.

FN8. U.S.Const. Am. 14, s 1; Const.1963, art. 1, s 17.

Defendant urges as controlling the cases of Thompson v. Wordeman (1936), 64 S.D. 261, 266 N.W. 142 and Metzger v. Quick (1955), 46 Wash.2d 477, 282 P.2d 812. The Thompson case is inapplicable in that it **\*\*59** deals with delinquent taxes. The Metzger case is more on point-however, Washington statutory authority, as indicated therein,

specifically provided for Jeopardy distraint (as opposed to jeopardy assessment) where personal property was about to become unavailable as a means of satisfying the personal property taxes due or about to become **\*167** due. No such statutory authority exists in Michigan.

[12] Defendant's seizure was unlawful in another regard-the seizure was excessive with reference to the amount of personal property tax immediately due and payable. Defendant knowingly seized personal property assessed at \$10,500 for a jeopardy assessment of \$629.32.

C.L.1948, s 211.47 (Stat.Ann.1960 Rev. s 7.91) limits the seizure of personal property 'to an amount sufficient to pay such tax.' 84 C.J.S. Taxation s 694, p. 1371 states as follows:

'The officer authorized to distraint for taxes must exercise a sound discretion as to the property to be seized to satisfy the tax and the amount, and, where different articles of property are available, he is bound to select that which will best satisfy the tax with the least expense and inconvenience to the taxpayer. The amount of property distrained must not be excessive and, if it is, the seizure is illegal.' (Footnotes omitted) (Emphasis supplied)

Defendant's seizure of plaintiff's personal property was unlawful for 2 reasons-(1) a failure to follow authorized statutory collection procedure and (2) an excessive distraint.

Other matters raised by plaintiff need not be considered in view of our determination.

Reversed and remanded for new trial not inconsistent with this opinion. Costs to plaintiffs-appellants, assessment to await determination on the merits.

Mich.App. 1967.  
 Fidlin v. Collison  
 9 Mich.App. 157, 156 N.W.2d 53

END OF DOCUMENT