

County Board of Equalization, Power to Subpoena Witnesses.
Mines. Assessment of Rents and Royalty. Taxation.
Net Proceeds of Mines, Assessment Of.
Lien for Taxes.

The Board of County Commissioners, when sitting as a County Board of Equalization, has the power to subpoena witnesses.

Royalty, when paid as rent, cannot be assessed to the owner of a mine as a part of the net proceeds.

Net proceeds of a mine operated under lease should be assessed to the lessee and the tax is not a lien against the mine.

Helena, Montana, June 30, 1906.

Hon. William D. Clark, Chairman, Board of County Commissioners,
Butte, Montana.

Dear Sir: We are in receipt of your letter submitting for the consideration of this department two questions, to-wit:

1. "Has the County Board of Equalization power to subpoena witnesses to give testimony concerning property they or others may own and which is subject to taxation?"
2. "When mines are operated under lease by parties other than the owners who pay to the owners a royalty, is such royalty taxable to such owner and a lien against such property?"

These questions will be considered in their order:

1. If the county board of equalization is a separate and distinct organization from the board of county commissioners and is vested with different power and authority, then the law creating and governing the board of equalization must alone be looked to, but if the duties of the board of equalization are only a part of the duties of the board of county commissioners, then the law relating to the board of county commissioners may also be consulted.

Sec. 15 of Art. 12 of the State Constitution provides that:

"The board of county commissioners of each county shall constitute a county board of equalization."

Sec. 3780 of the Pol. Code says:

"The board of county commissioners is the county board of equalization."

Neither this constitution, nor this statute, *supra*, designates the individuals composing the board of county commissioners as the county board of equalization, but the constitution says that the board of county commissioners shall constitute a board of equalization, and the statute says that the board of county commissioners is the board of equalization. No additional bond or additional oath of office is required of the members of the board of equalization but they act under the official oaths and official bonds taken and given by them as county commissioners.

Sec. 4230 of the Pol. Code, as amended, enumerates the general and permanent powers and duties of the board of county commissioners, and sub-division 14 of this section distinctly says that the board of commissioners has the power "to equalize the assessments."

The board of county commissioners and the board of equalization are not separate entities, and when the board of commissioners sit as a board of equalization it is only to discharge one of the duties incumbent upon it by law, and by discharging this duty it is not divested of its power and authority as a board of county commissioners. The board of county commissioners when sitting as a board of equalization is given the authority to increase and lower assessments and the power to make this investigation necessarily includes the power to get information from the supposed owner and other witnesses.

Sec. 3784 of the Pol. Code distinctly confers upon the board of equalization the power to "subpoena such witnesses, hear, and take such evidence in relation to the subject pending as is in its discretion it may deem proper." And Sec. 4252 of the Pol. Code also provides, in speaking of the board of county commissioners: "The board may, by its chairman or the chairman of any committee, issue subpoenas to compel the attendance of any person and the production of any books or papers relating to the affairs of the county for the purpose of examination upon any matter within its jurisdiction." The equalization of assessments is certainly a matter relating to the affairs of the county, and the board of county commissioners sitting as a county board of equalization at the time and place designated by law for the transaction of that particular business, has the power and authority to issue subpoenas and to compel the attendance of witnesses. This question is discussed in *Satterwhite v. State*, 40 N. E. 64, 142 Ind. 1, and in *State v. Wood*, 10 N. E. 639, 110 Ind. 82, where, after a full discussion by the court, a like conclusion is reached.

As a matter of precaution, and to save any question as to authority, we would recommend that papers issued by the county board of equalization bear the designation "Board of County Commissioners, sitting as County Board of Equalization", and the same be attested by the clerk in the usual manner, with the seal of the county placed thereon.

On this question, we desire to acknowledge the assistance we have received from the discussion and citations contained in the letter addressed to your board by Mr. Scallon, and which you enclosed with your enquiry. Mr. Scallon also cites *Treadwell v. United Verde Copper Company*, 62 N. Y. Sup. 708.

2. Sec. 3, Art. 12 of the State Constitution provides that:

"The annual net proceeds of all mines and mining claims shall be taxed as provided by law."

Sec. 3760 et seq., Pol. Code provides for the assessment of the net proceeds of mines and the manner of collecting the taxes. Aside from the statement that "every person * * * engaged in mining, etc.," the statute appears to pre-suppose that all mines will be worked only by the owners and makes no specific provision in name where the same are worked by lessees.

It is fundamental that when the ore is segregated from the ground it becomes personal property, and where cash rent is paid such ore is the personal property of the lessee of the mine over which the owner of the mine has no control and to which he has no title.

In *Western Ranches v. Custer County*, 26 Mont. 278, 72 Pac. 859, the Supreme Court of Montana said:

"It is fundamental that a tax cannot be lawfully levied against a person for property which he does not own."

It follows as a necessary corollary from this proposition that a tax upon one person's property cannot be made a lien against the property of another person, for that is, in affect, compelling one person to pay taxes on another person's property.

If, therefore, the lessee is the owner of the ore and the proceeds therefrom, the same cannot be assessed to the lessor and the tax thereon made a lien against the mine.

It is almost universally held that "Royalty reserved on the amount of ore taken from the land * * * is, however, properly rent."

18 Am. & Eng. Ency. of Law, 261.

20 Am. & Eng. Ency. of Law, 782.

Lindley on Mines, Sec. 1, et seq.

Raynals v. Hanna, 55 Fed. 783.

The terms of the lease fixes the amount of royalty or rent or specifies the means of ascertaining it, and where the lease provides that the lessee shall pay the lessor a certain percentage of the proceeds of the ore as ascertained by the smelter returns, it is, in the absence of other provisions, only a method of ascertaining the amount of the rent or royalty due from the lessee to the owner and does not have the effect of retaining title in the lessor to any part of the ore mined. Under such a lease, the lessor could not at any time maintain an action at law for any portion of the ore, for it is the property of the lessee; neither would the lessor have any right of action against the purchaser of ore, for the lessor is a stranger to the contract between the purchaser and the lessee.

It is true that equity might, in a proper case, intervene to aid the lessor in collecting the amount due him from the lessee, but the law would

leave the lessor to pursue his legal remedy, which would be a straight action against the lessee for money due, and which might be aided by attachment or a garnishment proceeding, in which it would be necessary for the lessor as plaintiff, to file his affidavit to the effect that he had no lien.

It necessarily follows that the lessee is the owner of the ore and, as lessee, the owner of the proceeds therefrom, and he should make return thereof as provided by statute. The "net proceeds", as between the parties, is determined in accordance with the terms provided in the contract, as was done in *Yank v. Bordeaux*, 23 Mont. 205, and in *Maloney v. Love* (Col.) 52 Pac. 1029, but "net Proceeds" under the statute must be determined in accordance with the provision of the statute relating thereto.

Centennial Eureka Mining Co., v. Juab County, (Utah) 62 Pac. 1024.

Mercury Gold Min. & Mill'g Co. v. Spry (Utah), 52 Pac. 382.

The Sections of the statute above referred to provide that every person, etc., engaged in mining must make a statement of the gross yield of the metals and minerals and shall be taxed on the net proceeds, but Sections 3761 and 3762 contain specific directions as to how the net proceeds shall be ascertained by specifically naming just what shall be deducted from the gross yield. In none of the specified deductions is royalty or rent mentioned, nor is anything named under which they can be classed. The mine itself is assessed to the owner as real estate, but the net proceeds thereof, when operated under a lease should be assessed to the lessee as personal property, and the tax due thereon is not a lien on the mine.

The royalty, or rent, may be assessed to the owner as provided in Sec. 3701 of the Pol. Code, but cannot be assessed to him as "net proceeds" under Sec. 3760, et seq. It must be kept in mind that the lease is a private agreement and all rights of the parties may be protected by provisions inserted therein. We are not informed as to the particular terms and provisions of the lease referred to in the question, and our answer is, therefore, general rather than specific. We have supposed the lease to be the usual mining lease, containing no provisos or special provisions.

We return you herewith, the letter of Mr. Scallon.

Very truly yours,

ALBERT J. GALEN,
Attorney General.