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Doris Cypert v. Board of Education of Washington County School District, Sheldon B. Johnson, Findly M. Judd, Fredrick R. Brueck, Gary T. Moore, Dr. Walter H. Snow, Ronald v. Mcarthur and T. Lavoy Esplin : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ORRIS CYPERT
Plaintiff and Respondent,

vs.

OARD OF EDUCATION OF ASHINGTON COUNTY SCHOOL STRICT, SHELDON B. JOHN-N, FINLEY M. JUDD, FRED-ICK R. BRUECK, GARY T. OORE, DR. WALTER H. SNOW, ONALD V. McARTHUR and T. AVOY ESPLIN,
Defendants and Appellants.

Case

BRIEF OF RESPONDE

Appeal from Judgment of the
District Court of Washington Coun
Honorable James P. McCune, Distri

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CASES

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IN THE SUPREME COURT OF THE STATE OF UTAH

DORRIS CYPERT
Plaintiff and Respondent,

vs.

BOARD OF EDUCATION OF WASHINGTON COUNTY SCHOOL DISTRICT, SHELDON B. JOHNSON, FINLEY M. JUDD, FREDERICK R. BRUECK, GARY T. MOORE, DR. WALTER H. SNOW, RONALD V. McARTHUR and T. LAVOY ESPLIN,
Defendants and Appellants.

Case No. 12071

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action brought to enjoin the issuance and sale of school building bonds authorized at a bond election held May 27, 1969 brought by Plaintiff and Respondent on behalf of herself and a class of others similarly situated who are all qualified electors of Washington County School District but who did not pay a tax on property located therein within the twelve months preceding the election.

DISPOSITION IN THE LOWER COURT

After the trial of the case including the taking of testimony, arguments by counsel and submitting of briefs, the District Court rendered its Memorandum Decision (R. 83-87) and entered detailed Findings of Fact and Conclusions of Law (R. 88-97) and final Judgment (R. 99-100). The defendants were enjoined from issuing or selling any of the bonds authorized at the May 27, 1969 bond election. In addition, the property tax requirement for voting at bond elections provided for in Article XIV, Section 3, Utah Constitution, Section 11-14-2 and 11-14-5, Utah Code Annotated 1953, and any other Utah constitutional or statutory provision containing similar provisions was declared unconstitutional as a violation of the United States Constitution. The court further declared such property tax limitation was severable from the remainder of the bond election provisions so as to permit a future bond election to be held where property tax payment is not a prerequisite to voting. Finally, the court determined that the decision would apply prospectively only and would not affect the validity of any bonds issued in this state when the period for contesting the validity of the bond election had expired prior to June 16, 1969.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmance of the Judgment of the District Court in its entirety.

STATEMENT OF FACTS

Plaintiff-Respondent accepts the Statement of Facts of Appellants.

ARGUMENT

POINT I

THE PROPERTY TAX LIMITATION IN BOND ELECTIONS FOR ALL TYPES OF BONDS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The essential problem of this case is a limitation on voting, a limitation which amounts to a state classification of qualified resident voters between those who pay real or personal property taxes and those who do not pay such taxes. Because of the decision of this court in *Thompson v. City of Centerville,* 18 U.2d 174, 417 P.2d 670 (1966) our present statutes and State Constitution make an even stricter classification by allowing the vote only to those persons in whose name on the assessment list real or personal property taxes are assessed and denying the vote to spouses of such taxpayers and to persons in whose name taxes are not assessed even though such persons in fact pay the tax on the property that is assessed (for example, contract purchasers of real property).

We rely principally on three recent decisions of the United States Supreme Court: *Harper v. Virginia State*

Board of Elections, 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966); *Kramer v. Union Free School District,* 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969); *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969).

The three cases above referred to establish three general propositions. First: The political subdivision or the state may not rely upon the alleged "reasonableness" of the classification of voters in bond elections or any presumption of constitutionality of such classification. Second: Is the classification "necessary" to promote a compelling state interest? Third: If the classification is necessary, is there a compelling state interest which overcomes the presumption that denial of the right to vote on grounds of wealth is "invidious discrimination" under the Equal Protection Clause of the Fourteenth Amendment?

The Supreme Court in the *Kramer* case, *supra,* held that the right to vote is such a fundamental right under our system of government that any denial of such right is carefully scrutinized and the normal presumption of constitutionality does not apply. The court noted that the basis for the presumption of constitutionality is the assumption "that the institutions of state government are structured so as to represent fairly all the people." When this basic assumption is challenged as it is in contesting legislation which denies some people the right to participate in important public decisions, the assumption cannot be used as a basis for presuming constitu-

tionality of the questioned statute. (*Kramer, supra*, 23 L.Ed.2d at 590).

Again in the *Harper* case, *supra,* the Supreme Court stated (16 L.Ed.2d at 173):

> Lines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored.

As Circuit Judge Wisdom stated it in *Stewart v. Parish School Board of the Parish of St. Charles* (U.S.D.C., E. Dist., La; February 25, 1970), 310 F.Supp. 1172:

> In other situations, . . . the defenders of a statutory classification have the light burden of finding that the legislative scheme has a rational basis. Here they must meet "the exacting standard of precision" required of "statutes which selectively distribute the franchise."

Thus the rule established by these cases is that limitations on the right to vote and denials of the right to vote will be carefully scrutinized and must be fully justified.

The second proposition — whether the classification is necessary to promote a compelling state interest — has been the principal area for examination in recent cases. The basis for this proposition was stated in the *Kramer* case as follows:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine

whether the exclusions are necessary to promote a compelling state interest. (23 L.Ed.2d at 589)

The *Kramer* case involved a challenge to a New York Statute providing for school district elections. In the type of school district operating under the law in question, a person could vote at the school election only if he was an owner or the lessee, or the spouse of an owner or lessee, of taxable real property, or was the parent or guardian of children currently enrolled in the public school system. The plaintiff in the *Kramer* case was a bachelor who owned no property rendered for taxation but was an otherwise qualified elector of the school district. The thrust of the statute went to the right to vote at the annual meeting of the school district at which eligible voters who were present could vote on matters of local taxation, could approve the school budget and in certain instances could vote taxes for school building purposes.

The arguments articulating the state interest were first, since it could be reasonably concluded that property taxpayers, and lessees who have the tax burden through rental payments, would be more interested because of the effect on their pocketbook, those were the persons who were primarily interested, plus the parents of children. Second, it was argued that only those two classes of persons could be expected to understand the complex questions dealing with school problems which were to be voted upon, because non-parents were not as well informed about school problems as were parents with children in the school system. It was ar-

gued that those electors who paid taxes or rented property, even though they might not have children in school would see to it that they obtained the necessary information to intelligently vote on the questions presented at the school meetings. In discussing the arguments offered on behalf of the state in defense of its classification, the court stated:

> Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of law depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standards of precision we require of statutes which selectively distribute the franchise. The classifications in Section 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.

The court then enumerated other classes of persons who were also denied the right to vote under the New York law and held that there were others who were also interested in the school meeting decisions and who were not permitted to vote, and concluded that since those denied the right to vote were not substantially less interested or affected, the statute was unconstitutional. It is to be noted that the court specifically stated that it did not reach the question of whether the interest pro-

moted by the state in excluding non-taxpayers from voting constituted a compelling state interest which would escape the taint of "invidious discrimination."

The holding in the *Kramer* case was a development of the principle of the *Harper* case decided in 1966 where a state poll tax was declared invalid. The Supreme Court there stated:

> We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate (16 L.Ed.2d at 172).

The *Cipriano* case, decided on the same day as *Kramer,* comes closest to the facts of this case in that a bond election was involved, there a city electric revenue bond. The applicable Louisiana Statute required approval by a majority in number and amount of the taxpayers qualified to vote who chose to vote at the bond election. The court, relying principally on the *Kramer* case, held that it violated the Equal Protection Clause of the Fourteenth Amendment to deny the vote to non-taxpayers. This determination was based on the principle that those excluded from the vote were not substantially less interested or affected than those permitted to vote. For these types of bonds payable from utility rates and only indirectly affecting property val-

ues and property taxes, there is no justification for differentiating between property taxpayers and non-property taxpayers. This is not to say that property taxpayers have no interest, but only that there is no justifiable reason for excluding non-property taxpayers when both groups are substantially affected by the operation of the city-owned electric system.

Coming now to the facts of this case, we are dealing with a classification under Utah law which allows some persons to vote at bond elections who have a remote and indirect interest in school affairs and excludes other persons, like plaintiff, who have a distinct and direct interest. Is such a classification "necessary"? Under the Utah statutes and Constitution, spouses, contract purchasers, senior citizens, and others living with children, or relatives living with children or other relatives, lessees of property, clergy, military, and others living on tax-exempt property who are not also assessed with personal property, and the parents of children enrolled in the public school system who neither own real or personal property like the plaintiff are prevented from voting at either a revenue bond or general obligation bond election. Can it be seriously argued that such persons enumerated above have no interest worth Constitutional protection in the outcome of a bond election? Each of the classes are substantially interested in and substantially affected by the question of the issuance of bonds to build school buildings.

Under the classifications drawn by the Utah Constitution and statutes, a person owning an automobile

and paying a personal property tax thereon in a significantly small amount may vote at a school bond election, whereas parents who do not own an automobile and who rent their residence and have children in the public schools may not vote at the school bond election, even though they ultimately pay a property tax because the rental which they pay for their housing includes a portion of the tax burden. An even greater anomaly is the contract purchaser of property who in fact pays taxes on the property but, because the property is not assessed in his name, is not entitled to vote. See *Thompson v. City of Centerville, supra.* The court can take judicial notice of the fact that the customary form of uniform real estate contract in this state requires the buyer to pay the property taxes and can further take notice of the significant number of real estate transactions handled under such a form of contract.

The plaintiff has rented a residence in St. George within the boundaries of the Washington County School District. The property in which she resides is listed on the tax rolls of Washington County, Utah. Real property taxes on such property have been paid to Washington County and a portion of these remitted to Washington County School District as provided by Utah law. Plaintiff pays state income and sales taxes, a portion of which are returned by the State Legislature to the Washington County School District.

The Supreme Court in the *Kramer* case specifically recognized the interest of lessees of real property, such

as plaintiff, in the payment of taxes indirectly and also the interest of non-property taxpayers in the effect on the general price level of taxes levied by political subdivisions. It is not sufficient therefore to argue that because those electors who are listed on the tax rolls and who pay a property tax are the electors who are "primarily" affected by a bond issue or tax, such state classifications are valid under the requirements laid down by the Supreme Court of the United States in the *Kramer* and *Cipriano* cases, *supra*. The owners of property may have only a slight and minimal interest in the outcome of a bond election or the levy of taxes, whereas non-property owning spouses, contract purchasers, lessees and non-property taxpaying parents of children may have a vital interest in the outcome of the election and in the quality and structure of public education. In addition to the question of whether or not the bonds shall be issued, bond elections present to communities basic decisions which can vitally affect the future of the public education system in the school district. For example, the passage of a bond election to build a particular school or to complete a particular building program may, because of the status of the debt limit of the school district under the Utah Constitution, mean that for many years in the future that school district will not be able to incur additional bond indebtedness, therefore precluding the issuance of additional bonds for different or additional building projects. The question presented to the voters at a school bond election results in bringing into focus the interests of parents of children concerning the wise expenditure of the debt incur-

ring power of the school district for one as against another school project. The decision called for at a bond election can have a substantial effect on the classes of persons listed above who are now excluded from voting under the Utah law.

The principal argument of Appellant is that because property taxpayers can be subjected to a tax to pay the bonds which are being voted on, there is a compelling state interest in limiting the vote to such property taxpayers. It is the familiar argument that the one paying the bill should decide whether the bill should be incurred. The argument has three basic fallacies: First, that property taxpayers in Utah in fact pay the bill, second, that all property taxpayers are permitted to vote, and, third, that the interest of non-property taxpayers in the outcome of bond elections can be ignored.

With regard to the first fallacy, property taxes have ceased to be the principal support for school districts and for cities, towns and counties in the state. Schools in the state receive substantial amounts of state aid and the source of this state money is largely due from the Uniform School Fund which is made up of a number of sources including all of the revenues from the corporate franchise tax, all of the revenues from the individual income tax, a portion of rentals due the state from federal mineral leases and by appropriations from the general fund of the state for which sales tax revenues provide a major source (See Article X, Section 3, Utah Constitution; 53-7-1 U.C.A. 1953).

According to the publication of the Utah State Board of Education dated June 25, 1969 entitled Annual Estimated Minimum School Report of Utah School Districts 1969-70, it was estimated that the state supported minimum school program in the Washington County School District would be financed 82% by state funds and approximately 18% by local funds (See also R. 41). Cities, towns and counties have authority to impose license taxes and fees (10-8-39, 10-8-80, 17-5-27 Utah Code Annotated 1953), impose sales taxes (Chapter 9, Title 11, U.C.A. 1953) and receive some forms of state aid themselves (See 27-12-129, 32-1-24 and 41-11-11(2), U.C.A. 1953).

Thus it is the plaintiff and others who don't pay property tax but who pay state income taxes, sales taxes and license fees and other charges to local governmental units who pay a very significant part of the bill for the support of these local governments including moneys which may in fact be used for payment of principal and interest on bonds (approximately $50,000 of state bonding aid funds usable solely for redemption of general obligation bonds was expected by the Washington County School District for the 1969-70 fiscal year, Tr. 9; Findings of Fact 9 and 10, R. 91).

Now it is said that it is only the property taxpayers whose property will be subject to tax to pay the bonds. It is true that general obligation bonds in Utah contain a covenant that a property tax sufficient to pay the principal and interest on the bonds shall be levied (See Section 6 of the Bond Ordinance here, R. 36). But this is not the full story because the same section provides that

other funds that may be in the treasury can be used to pay the principal and interest on the bonds and to that extent the levy of property tax can be diminished. In many cases the governmental entity issuing the bonds fully intends to pay for the bonds out of other revenues without the levy of the property tax, but issues general obligation bonds to obtain the lower interest rate such bonds will command in the marketplace. A recent example is the issue by Salt Lake City of general obligation bonds for the Hogle Zoo. The bonds will be paid from gate receipts at the Zoo. Similarly, airport bonds, electric system bonds, and water and sewer bonds are often issued as general obligation bonds even though the revenues from these facilities will in fact be used by the issuer to pay the principal and interest on the bonds. In such a case is there not a direct violation of the *Cipriano* case if only property taxpayers are permitted to vote on such a bond?

Consider also that Utah general obligation bonds typically provide on the face of the bond form itself (See R. 34) a covenant that the "full faith and credit" of the issuer is pledged to the payment of the principal and interest on the bond. It is not simply a pledge of the property tax revenues of the issuer or a requirement that a property tax be levied. *All* of the credit of the issuer is obligated. Thus, Utah by tradition in its bonding practices and under its bond election laws is different from Oklahoma, Idaho and Louisiana where property taxes apparently *must* be levied in order to pay for the bonds. Where Article 10, Section 27, and Article 10, Section 35

of the Oklahoma Constitution specifically require the imposition of a property tax to pay the principal and interest on the types of bonds referred to in those sections, it is perhaps not surprising that the property tax requirement for voting was sustained in *Settle v. The City of Muskogee,* (Okla., 1970) 462 P.2d 642 and *Settle v. The Board of County Commissioners of the County of Muskogee,* (Okla., 1970) 462 P.2d 646. There the imposition of not only a tax but a new tax is a legal requirement. Similar provisions of Idaho and Louisiana law were the basis for the holdings in *Muench v. Paine,* (Ida., 1970) 463 P.2d 939 and *Handy v. The Parish School Board of the Parish of Acadia,* (Ct. App. La., 1970). While we question these rulings and consider them contrary to the Supreme Court decisions, they are certainly not direct precedents against our contentions because Utah has no such requirement. The three judge District Court in *Kolodzjejski v. City of Phoenix,* (U.S.D.C. Ariz., Nov. 17, 1969) ..... F.Supp. ....., had no difficulty in arriving at a contrary result and applying the *Cipriano* rule to general obligation bonds issued in Arizona. Note the similarity between Title 9, Sec. 782 Arizona Revised Statutes and the wording of the first sentence of 11-14-2, U.C.A. 1953.

The second fallacy in the argument of Appellants is assuming that all bill payers for the bonds (which Appellants equate with property taxpayers) are permitted to vote. This must be the assumption because it makes little sense for Appellants to claim that only part of the bill payers are the only ones entitled to decide whether the bill should be incurred. Yet this is the dilemma in which

Appellants are placed. It must be conceded that a corporation cannot vote because it is not a qualified elector but it is well known that corporations pay most of the property taxes in this state. It is clear from *Thompson v. City of Centerville, supra,* that the fact of payment of the tax itself by a contract purchaser or by a wife or husband is not sufficient if the tax is not assessed in the name of the one who pays. This leads to the further absurdity that one in whose name a tax is assessed can vote even though he pays no tax and will not in the future. Consider also the non-resident of Washington County School District who cannot vote even though he is assessed for a tax and pays it.

The third fallacy in Appellants' basic argument is ignoring the very substantial interest of non-property taxpayers in the outcome of the bond election. It seems to be assumed that because the property taxpayers may be taxed to pay for the bond, that it follows as night to day that only they should be permitted to vote on the bonds. If pecuniary interest is the only constitutionally significant interest, how can the sales taxes, income taxes, license fees and other types of revenues paid by non-property taxpayers be ignored? But we contend other interests must also be weighed in the balance. The interest, here, of plaintiff with a son in junior high school, concerned with the quality of education her son is to receive and with the school facilities he is using, is an interest that cannot be ignored. As the Supreme Court said in the *Harper* case:

> Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the

> electoral process . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.

When one is concerned with the proper expenditure of funds for which bonds are to be issued, the concern does not originate only because of the potential imposition of a property tax. Of much greater interest to the intelligent citizen is that the new school buildings, the improvements to the airport, the extensions to the electric system, the new reservoirs for the water system, the new sewage treatment plant are needed at the time and that the funds authorized will be wisely used for such purposes. For such considerations, past payment of property taxes or future imposition of additional property taxes is completely irrelevant. This is not to minimize the interest of the property taxpayer in general obligation bond elections, but only to suggest that under the principles of the Supreme Court cases this interest is not the exclusive interest in determining the constitutionality of the classification. The non-property taxpayers are as much and in many cases more interested in the outcome of the election than the property taxpayer.

But if the court should find that the classification is "necessary," is there such a compelling state interest which justifies a denial of the vote? Circuit JudgeWisdom set this question to rest by stating in *Stewart v. The Parish School Board of the Parish of St. Charles, supra*:

> The State's compelling interest in fixing the qualifications of voters in school bond elections is to delegate to the voters in each school district the

> authority to improve public education in their district. That objective is certainly not promoted by excluding parents and guardians of school children and others who cannot be characterized as having a substantially less interest in public education than property taxpayers. In terms of the effect of the . . . election, the excluded groups may be more seriously affected than the taxpayers, many of whom have a proper interest in avoiding arbitrary taxes but little or no interest in public schools.

Finally, we note that the *Cipriano* case has already invalidated the Utah constitutional and statutory provisions as they relate to voted revenue bonds. The cases of *Fjeldsted v. Ogden City,* 83 Utah 278, 28 P.2d 144 and *Wadsworth v. Santaquin City,* 83 Utah 321, 28 P.2d 161, established what is known as the restricted special fund doctrine by requiring an election pursuant to Article XIV, Section 3 of the Utah Constitution for revenue bonds if the bonds purported to pledge revenues which theretofore went into general funds of the issuer and could have been used to reduce property taxes or other taxes on residents of the issuer. A property taxpayer election would be required even though only revenues and not property taxes are obligated for payment of the bonds. As conceded by Appellants (Brief p. 22), such a requirement is contrary to the direct holding of the *Cipriano* case. It appears to Respondent that since *Cipriano* voids the Utah property tax requirement for Utah revenue bonds, the same rule should be applied for Utah general obligation bonds since it is the identical constitutional and statutory provisions and the identical limitation of those provisions which apply in both cases.

POINT II

THE ACTION IS NOT BARRED BY THE 40-DAY ELECTION CONTEST PERIOD PROVIDED BY SECTION 11-14-12, UTAH CODE ANNOTATED 1953.

The court below concluded (R. 95) that the 40-day contest period of Section 11-14-12, Utah Code Annotated 1953, had not expired on June 16, 1969 when the *Cipriano* case was decided. Appellants first argue that because the *Cipriano* case applies only to revenue bonds, this conclusion is erroneous or, I suppose more accurately, immaterial. But as we have pointed out in Point I and will not repeat here, the principles of the *Cipriano* case apply to Utah general obligation bonds as well as to Utah revenue bonds. Knowing that such principles could affect outstanding bonds and pending plans of governmental units proposing to issue bonds, the court in *Cipriano* was careful to state that the decision would not apply retroactively either to bonds which had been sold or issued prior to the decision or "where, under state law, the time for challenging the election result has not expired . . ." (23 L.Ed.2d at 652). But it follows that the decision will be applied where, as here, the time for contesting the bond election had not expired on the date of the *Cipriano* decision.

Appellants next point to the Louisiana cases applying a short statute of limitations to bond election contests. The basis for any limitation statute is the desire to prevent stale claims from being raised. A short statute of limitations for election contests has the further important

purpose of making certain the results of an election at an early date after the election is held so that public action can be taken based on the election, such as the taking of office of the official elected or, in a bond election, the issuance of the bonds. While fully recognizing the importance of such a principle in the ordinary bond election where within the 40-day period the United States Supreme Court has cast Federal constitutional doubts on the validity of the election, plaintiff here should certainly be permitted to bring these Federal constitutional questions to the attention of the State courts of Utah. Because of these constitutional doubts, no bonds have been issued and no investors have been or will be hurt by the issuance of the injunction. The school district here involved has been given new guidelines for the holding of a valid new election and can now proceed to do so. The purpose of the short statute of limitations is to safeguard bonds that have been issued and such purpose is not violated. It was perhaps because of this that the court in *Kolodzjejski v. City of Phoenix, supra,* noted non-compliance with Arizona's 5-day statute but nevertheless decided the case. Also note *Handy v. Parish School Board of the Parish of Acadia, supra,* where the court determined the constitutional issues even though holding that the action was not timely filed.

Furthermore, limitation statutes of this sort do not bar constitutional claims. *Board of Education of City of Aztec v. Hartley,* 74 N.M. 469, 394 P.2d 985; *Board of Education of Gallup Municipal School v. Robinson,* 57 N.M. 445, 259 P.2d 1028; *Taos County Board of Education v. Sedillo,* 44 N.M. 300, 101 P.2d 1027; *White v.*

Board of Education of Silver City, 42 N.M. 94, 75 P.2d 712. *Benedict v. City of New York,* 247 Fed. 758, cited by Appellants (Brief p. 27), is not, when properly analyzed, a contrary holding. There the action was filed seventeen years after the cause of action had accrued. While the court threw out the case because of the equitable doctrine of laches and chose not to apply the State six or ten year statute of limitations, this is a far different case than the 40-day statute of limitations here involved.

Finally, and most importantly, the application of the contest period at most only bars the part of the court's decision granting the injunction against issuance of the bonds. It certainly does not bar the relief sought by plaintiff and granted by the court below declaring the property tax requirement at bond elections to be unconstitutional. (See Complaint, paragraph B, page 10, R. 10) The question is an important one to resolve because of the great public interest in this question. The Idaho Supreme Court in *Muench v. Paine, supra,* noted the continuing need of school districts in Idaho for additional buildings, classrooms and other new construction which can only be met by raising funds from the sale of bonds. The Idaho Court specifically noted that "at present, the bond issues of the State that have been approved are not salable in the open market." The same facts apply with equal force in Utah.

POINT III

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE PROPERTY TAX

REQUIREMENT FOR VOTING IN BOND ELECTIONS IN THE UTAH CONSTITUTIONAL AND STATUTORY PROVISIONS ARE SEVERABLE AND THAT DEFENDANTS AND APPELLANTS ARE AUTHORIZED TO HOLD GENERAL OBLIGATION BOND ELECTIONS AS LONG AS THE PROPOSITION IS NOT LIMITED TO TAXPAYERS.

We agree with the argument of Appellants in Point III and refer the court to Appellants' argument in their Brief, pages 31-34.

In addition, we wish to point out to the Court the importance of a determination of this severability point. A holding that the property tax requirement for voting is unconstitutional, standing alone, leaves open the question "where do we go from here?"

One alternative is that no bond elections can be held and no bonds issued by any city, town, county or school district because the source of authority for such bond elections and, indeed, for the very issuance of the bonds themselves is compliance with Article XIV, Section 3, Utah Constitution. That being impossible because the property tax limitation is in violation of the Federal Constitution, the only alternative is to amend the Utah Constitution to delete the unconstitutional portion.

The second alternative is to adopt the more rational approach of the trial court that the property tax limitation itself is severable and the remaining portions of Article XIV, Section 3 and of our statutory provisions

can still be used as the source of authority for the issuance of bonds and the holding of bond elections. The only difference will be that the unconstitutional part, the property tax limitation, will be eliminated and bonds which formerly could only be authorized at property tax bond elections can now be authorized at elections at which any qualified voter may vote. It is as if Article XIV, Section 3 is treated as reading as follows (omitted matter shown in brackets — added words italicized):

> No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this state; unless the proposition to create such debt, shall have been submitted to a vote of *the* [such] qualified electors *thereof* [as shall have paid a property tax therein, in the year preceding such election,] and a majority of those voting thereon shall have voted in favor of incurring such debt.

In this manner will be retained the essential purpose of the framers of the Constitution — that bonds may be issued by cities, towns, counties and school districts but only after long term bonds are authorized at an election by a majority vote of those voting. It would seem unrealistic to assume that the property tax requirement was so fundamental that the framers would rather have had no bonds at all rather than bonds issued after an election at which all qualified electors voted. The severability rule has been long recognized and applied by all courts (See 16 Am. Jur.2d 409, Constitutional Law, Section 181) and recognized by this Court (See *Smith v. Carbon County,*

95 Utah 340, 81 P.2d 370; *Stillman v. Lynch,* 56 Utah 540, 192 Pac. 272, 12 A.L.R. 552; *Riggins v. District Court,* 89 Utah 183, 51 P.2d 645).

If the contrary result is reached, Article XIV, Section 3, will require amendment. At present our Constitution can be amended only at a general election after two-thirds of all the members elected to each of the two houses of the Legislature shall have voted in favor of submitting the proposed amendment to the electors and after the proposed amendment has been published for two months immediately preceding the general election. The next general election is November 1970 and an amendment would require a special session of the Legislature to be called in August or prior thereto (presumably following the decision of this Court). The Legislature would then pass the proposed amendment and it would be promptly published so that it could be submitted in November. If this strict time table is not reached, no amendment could be considered until November 1972. In the meantime, public projects would languish because no general obligation bonds and many revenue bonds could not be issued by any city, town, county or school district. If for no other reason than to avoid this result, the declaration of severability should be affirmed.

POINT IV

ANY DECISION OF THIS COURT WITH RESPECT TO THE VALIDITY OF THE BONDS SHOULD BE MADE PROSPECTIVE ONLY.

We agree with Appellants Point IV and the reasons for it except that we see no reason to have a different date than June 16, 1969 as the applicable date for the decision. This was the date adopted by the trial court and, of course, coincides with the date of the *Cipriano* decision.

As to bonds which have been issued and are in the hands of holders, we join in the request that this Court specifically state that any decision will not affect such bonds which have been actually issued and delivered prior to the date of this Court's opinion.

CONCLUSION

For the foregoing reasons, we respectfully request this Court to affirm the decision of the trial court in its entirety to the end that the uncertainties presently surrounding the authorization and issuance of general obligation bonds in this State are resolved at the earliest possible date. Important public projects are being delayed and will be delayed for an indefinite period in the future if this Court does not recognize the applicability of the *Cipriano, Kramer* and *Harper* decisions to the Utah situation.

Respectfully submitted,

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