1948

Lynn Johnstun v. J. H. Harrison : Brief of Respondent

Utah Supreme Court

Dillman and Dillman; Attorneys for Plaintiff and Respondent;

7174

In the Supreme Court of the State of Utah

LYNN JOHNSTUN,
Plaintiff and Respondent.

vs.

J. H. HARRISON
Defendant and Appellant

Case No 7174

Brief of Respondent, Lynn Johnstun

DILLMAN and DILLMAN,
Roosevelt, Utah
Attorneys for Plaintiff and Respondent

INDEX

In the Supreme Court
of the
State of Utah

LYNN JOHNSTUN,
Plaintiff and Respondent.

vs.

J. H. HARRISON
Defendant and Appellant

Case No.
7174

Brief of Respondent, Lynn Johnstun

STATEMENT OF FACTS

This cause was tried before the court, on complaint filed in election contest. To the complaint filed the defendant, filed answer and admitted the first 6 paragraphs of the complaint. He denied paragraphs 7, 8 and 9, which were directed to the acts done in violation of law in casting and counting ballots.

Defendant sets forth in his statement of fact, part of the allegations denied in his answer, but leaves out a part of paragraph 7 which excluded portion reads as follows:

> "That by reason of the failure of the judges of election to count and tally such votes for plaintiff, and to which plaintiff was entitled to have counted for him, more than 10 votes in each of said election districts were withheld from plaintiff, to which ballots and votes plaintiff was entitled, and if said ballots to which plaintiff was entitled to have counted for him, had in fact been counted and registered on the tally sheet, plaintiff would have received more than 18 votes more than were cast for de-defendant.

Hearing was had before the court, and from the evidence submitted the court made its preliminary finding that a sufficient showing had been made disclosing there was error committed in counting the ballots sufficient to change the result of the election, the ballot pouch was ordered opened for counting.

When the ballots were opened for counting, the council for plaintiff and defendant personally examined the ballots (Tr. 68) stipulated to the court the number cast for plaintiff and the number cast for the defendant, and the court took such statment, and himself did not examine or count the ballots, except for five ballots that were marked, as exhibits, and presented for the ruling of the court on their admissability. One other ballot with the identifying number attached, was later marked and presented to the court for ruling on its admissability. This ballot was taken from a separate pouch, and not that from

which the cast ballots were taken. (Tr. 79) By stipulation with the court, these marked exhibits were retained in the files, and the balance of the ballots were returned to the City Recorder of the City of Roosevelt, Utah. These ballots so marked as exhibits K, L and M, and offered by Defendant were received. (Tr. 68) That exhibits 1 and 2 were offered by contestant, and were received. The three K. L. M. were thus counted for contestee, and 1 and 2, were received for contestant. Each and all of these five exhibits were objected to on the ground of improper marking by voter. By numbers agreed upon by counsel added to those marked as exhibits, and received by the court, contestant was by the court declared elected. Findings of fact, Conclusions of Law, and Decree were thereupon filed.

ARGUMENT

Appellant in his assignments of error No. 1. (Page 8 Brief) presents overruling of his demurrer, and then in argument (Page 14 Brief) also argues assignments 2 to 7, upon the sufficiency of the complaint. Section 25-14-1, Sub 5, Utah Code Annontated, 1943, as grounds for contest provides:

> "For any error of the board of canvassers, or of the Judges of election, in counting the votes or ***if the error would change the result."

Section 25-14-4, Sub. 4. Utah Code Annotated 1943, after providing general requirements of complaint, reads:

> "The particular grounds of contest."

Section 25-14-5, Utah Code Annotated 1943, on sufficiency of statement provides:

"When the reception of illegal votes or the rejection of legal votes is alleged as cause of contest, it is sufficient to state generally that one or more specified districts of polls illegal votes were given to some other person whose election is contested, which if taken from him would reduce the number of legal votes below the number of legal votes given to some other person for the same office."

Section 25-14-6, provides:

"No statement of grounds of contest shall be rejected, nor proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested."

The complaint alleges clearly and concisely the following alleged facts:

a. Judges failed to count for plaintiff ballots marked X in the square by his name, when no line was drawn thru name of opponent, whose name was opposite his.

b. That voters would vote the emblem for Progressive Ticket, then the voter would make an x in square opposite name of plaintiff, and judges did refuse to count such for plaintiff. That there were more than 10 votes cast which were withheld from plaintiff.

c. That ballots were marked in the Progressive Party emblem circle, and such voter would mark an x in the square opposite one of the candidates under the Peoples Party Ticket, but nothing disclosed which of the candidates under the Progres-

> sive Ticket such voter intended to vote, and the judges would in some instances count it for the person so voted for under the Peoples Ticket, and eliminate the vote for the person whose name appeared opposite the one voted for on the Peoples Ticket.

In each instance it is alleged that the illegal counting was sufficient in number to change the result of the election in favor of plaintiff.

Surely such statements with supplemental allegations are sufficient under our laws.

Appellants Exception No. 2. is in two parts, the first of which is directed to the matter of the sufficiency of the complaint. The second part (Page 8. Brief) challenges the evidence, as insufficient. George H. Harrison, an official watcher in voting District No. 2, testified (Tr. 17) as to illegal counting, and the number of such illegal votes. Eugene Harmston, official watcher in District No. 1, testified as to illegal counting, (Tr. 8) and gave number so erroneously counted (Tr. 10-16-17-18). Lynn Orser, Election judge in voting district No. 1, said they eliminated entirely ballot where it was marked in the square opposite name of contestant, if no line was drawn thru name of person opposite his name, when the Progressive emblem was voted. That there were several of such ballots. (Tr. 57, 58)

Appellants exception 8, is evident on the pleadings to be without merit.

Appellants exception 9, goes to the marking of exhibits 2 and 3, with a check mark instead of a cross. This exception is rather strange for he offers exhibits K. L. M. which

are much more seriously marked with identifying marks, and persuades the court to admit them for himself. If his exception is good as to exclusion, then these three votes given him under similar interpretation of the law must of necessity be eliminated from his count. (Tr. 68)

Exception 11, goes to a ballot called to the attention of the court not by evidence, but by rumor to counsel, and which was not otherwise identified, and the court permitted pouch containing spoiled ballots to be opened and examined, and this ballot, still contained therein had detachable portion containing the ballot number attached (Tr. 73). Nothing was presented to the court to identify it, to disclose how it was so marked or left; that no substitute ballot was given and voted by the same person voting it, if they did vote it. Election judges were there and nothing presented to explain or qualify it, and surely with a distinguishing number still attached, even had it been in the pouch with ballots legally counted, would have disqualified it.

Exception No. 2 of appellant, requires the interpretation of those amended sections of our election laws, dealing with marking and counting ballots. They are Sections 25-6-20, and 25-6-21, of the 1947 Laws of Utah, or session laws. Clearly the intention of the legislature was to liberalize the existing laws, and to allow greater freedom in counting when the intent of the voter was manifest. The Legislature provided that the voter need not draw a cross thru the name of a candidate he had voted for in voting the party emblem, when he made an individual x after the name of a person on some other ticket. This may have application in this cause, and will probably require interpretation. Does

the making of an x after an individual name sufficiently express the wishes of the voter, that it nullifies his mark in the emblem circle? Such seems to be the intent of the Legislature. If as in the instant case, the emblem is voted, and the voter then votes in the individual square for a person under some other ticket, and there are more than one person to be elected to the same office, does the vote so cast under the emblem count for any candidate for the same office, in as much as vote has been given individually for a person on the other ticket? It is impossible then to determine which candidate the voter wished to eliminate from those under the emblem running for the same office.

While the answer to the above questions may not be required in this cause, for the reason that ballots were examined by counsel themselves (Tr. 68), and the totals for each candidate herein stipulated to the court except for the six ballots marked as exhibits, yet such issues are alleged as the basis for error in asking a recount, and nothing has been preserved in this record, except marked ballots, to present to the Supreme Court.

There is also a manifest error (Tr. 5) and also (Tr. 16), also (Tr. 19), wherein the writer of the appellant brief refers to items as "stipulations."In each of these cases items so dignified, are not and were not stipulations, but are and were mere contentions of counsel for appellant, not in any manner agreed to or stipulated by respondent's counsel, or at all.

Appellant's exception 10, goes entirely to what might be legislative policy, but such matter of costs is controlled by Section 25-14-13, Reserved Statutes Annotated 1943.

From the evidence submitted and received in evidence, and from the stipulations so entered in court, there is nothing preserved in the record that would warant any change in the result found and declared by the trial judge. There are five ballots on which the marking of the voter has been preserved and submitted. There is one ballot with the original designating number, not found with the ballots, and not identified that is preserved. From an interpretation of the markings on the ballots, no result could be reached other than declared by the court, or the rejection of all of the ballots, and this would not change the result of the election recount, as stipulated in court by the parties.

The only other legal question submitted, is the sufficiency of the allegations of complaint, and we submit that the complaint does state a cause of contest.

We therefor very respectfully submit that the decision of the trial court should be confirmed.

DILLMAN and DILLMAN

by Ray C. Dillman

Roosevelt, Utah

Attorneys for Plaintiff and Respondent