

1951

# Mark Nasfell v. Ogden City, Utah : Brief of Appellant

Utah Supreme Court

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Hugh E. Dobbs; Dobbs and Dobbs; Attorneys for Appellant;

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Case No. 7628

IN THE SUPREME COURT  
of the  
STATE OF UTAH

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MARK NASFELL,

Plaintiff,

- vs -

OGDEN CITY, UTAH,  
a municipal corporation

Defendant.

Case No.  
7628

APPELLANT'S BRIEF

FILED  
APR 5 - 1951

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7628

APPELLANT'S BRIEF

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## STATEMENT OF FACTS

This case came up for hearing upon stipulated facts which are on file in this action:

1. That on July 12, 1950, an automobile owned by Mark Nasfell and registered in his name was permitted to remain in a space upon 24th Street in Ogden City, Weber County, State of Utah, such street being part of State Highway #89, within a parking meter zone, adjacent to which parking meter #157 was established.

2. That said vehicle was permitted to remain in said space at a time when said meter #157 displayed a signal indicating that said space was illegally in use, between the hours of 9:00 o'clock a.m. and 8:00 o'clock p.m. on said day of July 12, 1950.

3. That at said time and place, and when said parking meter was so displaying the signal indicating that the space was illegally in use, a police officer of Ogden City placed upon the windshield of said vehicle a notice of violation.

4. That thereafter, and on the 19th day of August, 1950, Ogden City caused a complaint to be issued and filed with the Clerk of the Court of Ogden City, and after the filing of said complaint, caused a summons to be issued.

5. That said summons ordered the appellant Mark Nasfell, to appear in the City Court of Ogden City on August 25, 1950, to answer the charges in the complaint theretofore filed. That said summons was served upon

said appellant, Mark Nasfell, on the 22nd day of August, 1950.

6. That on the 25th day of August, 1950, as afore-said, appellant entered his general appearance by his attorney, *Hugh E. Dobbs, Esq.*, of the law firm of Dobbs and Dobbs, who appear as appellant's counsel in connection with this action, and by said attorney entered a plea of "*not guilty*" to said complaint.

7. That thereafter, and on the 7th day of November, 1950, such time being prior to any decision being rendered by the said City Court of Ogden City, appellant filed this action for declaratory judgment, in the Second District Court in and for Weber County, State of Utah.

8. That thereafter, and on the 20th day of November, 1950, the said District Court, upon motion of the respondent, for dismissal of the said action, rendered its order dismissing the said action on the grounds that the complaint failed to state a claim against the respondent upon which relief might be granted, and that it is from such order that the appellant now appeals to this Court.

9. The action of respondent is based on the following Ordinances or part thereof as follows:

- a. Ordinance #154: The General Parking Meter Ordinance.

"2. He shall attach to such vehicle a notice that it has been parked in violation of this ordinance and instructing the owner or operator to report at the Desk Sergeant's office at the Police Department of the City of Ogden in regard to such violation. Each such owner or operator may, within twenty-four (24) hours after the time

when such notice was attached to such vehicle, pay to the Desk Sergeant or other officer in charge at his office, in full satisfaction of such violation the sum of fifty cents (\$ .50) which shall be remitted by the Chief of Police to the city treasurer.

“(k) Any person who shall violate any of the provisions of this ordinance and any person who aids, abets or assists therein, shall, upon conviction thereof, be subject to a fine of any amount not exceeding Fifty Dollars (\$50.) for each offense or violation or be imprisoned in the city jail for a term not exceeding one hundred days, or both. A judgment that a fine be paid for a violation of this ordinance shall provide that the person against whom it is directed shall in default of its payment serve one day in the city jail for each \$2.00 of the fine.”

b. Ordinance #343: An ordinance declaring certain facts to be prima facie evidence of guilt in connection with parking meter violations:

“An Ordinance of Ogden City amending Section 27G67 of the Revised Ordinances of Ogden City Utah, 1933, relating to the responsibility of owners of vehicles found illegally parked.

“Be it ordained by the Board of Commissioners of Ogden City, Utah:

Section 1. Section 27G67, Revised Ordinances of Ogden City, Utah, 1933, is amended to read as follows:

Section 27G67. Owner prima-facie responsible for illegal parking. The presence of vehicle in



or upon any public street or highway in Ogden City stopped, standing or parking in violation of any ordinance of Ogden City, shall be prima-facie evidence that the person in whose name such vehicle is registered as owner committed or authorized the commission of such violation.

Section 2. In the opinion of the Board of Commissioners of Ogden City a public emergency exists with respect to the matter contained, and it is necessary for the immediate peace, health and preservation of the safety of Ogden City that this ordinance shall take effect upon its adoption and publication.

Section 3. This ordinance shall take effect upon its adoption and publication.

Passed and adopted and ordered published by the Board of Commissioners of Ogden City this 1st day of March, 1950.

R. H. White, *Mayor*

Attest:

Elizabeth M. Tillotson,  
*City Recorder*

Publish March 2, 1950."

## STATEMENT OF POINTS

1. That Ogden City has neither an express or implied power to enact any ordinance which purports to determine what quantum of evidence shall be sufficient to warrant the conviction of a person charged with an offense against its ordinances.

2. That the presumption, which such ordinance #343 attempts to give the effect of evidence in such cause, bears no such reasonable relationship to the question of guilt of one charged with a breach of such ordinance by illegal parking of a motor vehicle, as to raise any presumption of guilt in fact; and such ordinance in such respect is an unreasonable and arbitrary exercise of the police powers granted, with respect to control of public streets and traffic thereon, to said Ogden City, and therefore unconstitutional.

3. That such ordinance, attempting to define the quantum of evidence requisite to convict in a case arising thereunder, upon a charge of unlawful parking in a restricted zone of said city, is an encroachment upon the functions of the judiciary, and the state of legislature.

4. That the city has never received the authority from the State Road Commission to place parking meters upon Washington Boulevard and 24th Street in said city, such streets being part of State Highways 89 and 87.

5. Appellant was not given due notice of any action contemplated by the city until such time as he received a summons issued by the city, and the practice of the city in merely placing upon the windshield of a vehicle a purported notice of violation is not sufficient notice, under the laws of this state, to vest jurisdiction upon the city court, nor to give the appellant notice that he should pay a certain fine, and that in case he does not pay such fine upon such notice he will be fined in a sum ten times the amount that would have been assessed if he had received the said ticket.

## ARGUMENT

### POINT I.

THAT IT IS BEYOND THE POWER OF OGDEN CITY TO PASS SUCH ORDINANCE #343.

It is general law in this nation that the city has only those powers as are given them directly by the constitution or statute or such powers as may be reasonably implied as being necessary in the enforcement of such powers. This has been so held in literally scores of cases, and it would be a waste of the court's time to cite all such cases. A few on this point are:

10 → *Bohn v. Salt Lake City* - 79 U 121; 8 P 2nd 591;  
81 A. L. R. 215.

*Neldon v. Clark* - 20 U 382, 59 P 524;

*Ogden City v. Bear Lake & River Waterworks & Irrig. Co.*, 16 U 440; 52 P 697 41 L. R. A. 305;

1 *City of Price v. Jaynes, et al.* - 191 P(2) 606; —

9 → *Salt Lake City v. Bennion*, 15 P (2) 648; —

7 ~~Utah~~ *Rapid Transit Co. v. Ogden City* - 58 P (2) 1 —

6 ~~American Petroleum Co. v. Ogden City~~, - 62 P(2) 557;

5 *Walton v. Tracey Loan & Trust Co.* - 92 P (2) 724;

4 1/2 *Salt Lake City v. Kusse*, 93 P (2) 671

7 *Wadsworth v. Santaquin City* - 28 P (2) 161;

8 *American Fork City v. Robinson* - 292 P. 249;

*Salt Lake City v. Sutter*, 216 P 234; —

2 *Nance v. Mayflower Tavern* - 150 P (2) 773;

3 ~~*Salt Lake City v. Revene*~~, - 124 P (2) 537; —

4 *Tooele City v. Elkington*, 116 P (2) 406

All such cases cited being cases decided by this court as to the powers of the cities and all such cases limiting the cities as above set forth.

In this state the power of cities to regulate parking is found in Title 57, Chapter 7, Section 85, Utah Code Annotated, 1943, and provides as follows:

"(a) The provisions of this act are intended to confer upon local authorities the right of, and shall not be deemed to deprive said authorities of existing powers with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power; "

"(1) Regulating the standing or parking of vehicles including the requirement for payment of a parking fee which fee may vary in order to relieve traffic congestion in designated areas. "

This is the only place under the Codes of this state where the power to regulate parking by the city is found, and it is beyond the perspective powers of counsel to see where such a statute in the least implies a power to the city to pass ordinances setting out the quantum of evidence which shall be sufficient to warrant the conviction of a person charged of an offense under an ordinance passed under the authority of the above quoted statute.

Nor can counsel find any other statute in the Codes of this state, including the powers of police granted to the cities, where an implication might be drawn granting the city power to pass such an ordinance. The Courts of this state are created by the constitution and by statutes passed by the state legislature, and cities are not given power of any sort over such courts, not even to the slightest degree, either expressly or impliedly.

In point with this argument and by way of comparison consider the prima facie ordinance as concerns drunken driving. The city of Ogden has been given the power to

pass ordinances making it a misdemeanor to drive while drunk, but before they presumed to pass an ordinance determining that a certain alcoholic content in the blood of a person arrested for drunken driving was prima facie evidence of such drunken driving they waited for the state to pass such a statute. Now it is admitted that where the state has acted on matters such as this, the city may act, within certain limits, but in the case before us the state has failed to enact any law placing responsibility upon the owner of an automobile under most circumstances. Therefore it is felt by counsel that until the state legislature acts placing the responsibility contained in this ordinance upon the owner of an automobile that the city does not have the power, express or implied, to pass such an ordinance as this.

It is therefore felt by counsel that the district court erred in sustaining the respondent's motion as against this part of the appellant's complaint in holding that the city had the power to pass such an ordinance.

## POINT II.

THAT SUCH ORDINANCE #343 IS UNCONSTITUTIONAL UNDER THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF UTAH IN THAT IT DENIES HIM CERTAIN PRIVILEGES GRANTED HIM UNDER SUCH CONSTITUTIONS.

All defendants in criminal actions have two rights which since the conception of Anglo-Saxon Law have been granted him, these rights being: (1) the right to be considered innocent of the crime with which he is charged until it has been proven that he is guilty beyond a reasonable doubt; and (2) that no law shall be passed which

would require a defendant to take the witness stand on his own behalf against his will. It is the contention of counsel that both of these rights have been derogated by ordinance #343.

In what way are these basic rights violated by this ordinance? To determine this the ordinances must be analyzed. This ordinance says that the mere fact of ownership, and that fact alone, is enough without further evidence on the part of the city attorney to set up a prima facie presumption of guilt, in other words, the defendant is guilty before he is proven so beyond a reasonable doubt. The only method in which the defendant can combat this presumption is by taking the stand in his own behalf, and stating unequivocally that he did not so place the car in the parking stand. Now it is common knowledge, and therefore a matter of which this court could take judicial knowledge, that no family man drives his automobile at all times, in fact the matter is that in the majority of the cases his wife or child drive it most of the time. Even in the case of a single man there are many times in which the car is driven by mechanics of the garage in which he left it or by some friend. Now under these circumstances can an owner of a vehicle state unequivocally, 'I did not place the vehicle in that parking stall'? The time in this case must be considered. One month elapsed between the time in which the records of the city show that a ticket was placed upon the windshield of the appellant's automobile and the time in which he received a notice informing him of the fact. No man keeps a record which shows that he drove the automobile on this day, that his wife drove it on this day, little Johnnie drove it that day, and this day it was in the garage being repaired. If this burden

was placed upon him part of the convenience of his ownership of the automobile would be denied him. Yet under this ordinance can he be put in jeopardy of committing perjury by stating that he did not so park the automobile when in fact he did but did not remember doing so. Most persons who possess automobiles are responsible citizens of a community, and would rather pay the fine in connection with this law, no matter how unjust it may be, than to take a chance on committing perjury. Now this might be different if there were some assurance that he, or the person who parked the automobile, as the case may be, received the notice of violation therefore placing the incident in his mind, but as will be discussed under Point #5 there is no assurance that the said notice is received.

It is obvious that the district court erred in upholding this ordinance as constitutional. Here we have two substantive and vested rights being denied, by the promulgation of a clearly unreasonable and arbitrary ordinance. An ordinance that says to the defendant, you are guilty and will be considered so until you present the proof which will make it appear that you are innocent, and the only method in which you have of proving yourself innocent is to take the witness stand and make an unequivocal statement that you did not park the car in the parking meter stall as you are charged with doing. What would be the position of a defendant on the stand? Could he overcome the presumption of guilt by stating, "I don't believe I parked the car there", or "to the best of my knowledge I did not park the car there." No, I believe not. His only method is to say "I did not park the car there." As pointed out above in this brief a statement of that sort, considering the passing of time and the lack of

notice which would fix the date, time and circumstances in the defendant's mind, would put him at a great risk of committing perjury even though he did not believe that he parked the car there. It is felt by counsel, that unless further protection than is given by this ordinance, is given the defendants substantive rights are being abused, and even destroyed.

This court in the case of *State v. Potello* (119 P. 1023, and the Supreme Court of Oklahoma in the case of *Simkins v. State*, 249 P 168, have discussed what must be found in a prima facie statute to take it out of the range of the unreasonable and arbitrary exercise of the police power of the state. Because of the limited power of cities, discussed under Point I, the limits stated in those cases are A fortiori when applied to municipal ordinances.

### POINT III.

THAT THE CITY IS ENCROACHING UPON THE FUNCTIONS OF THE JUDICIARY, AND THE STATE LEGISLATURE.

In the case of *State v. Potello*, (supra) this court held: "Should the Legislature declare, that, on mere proof of a larceny and recent possession, in the accused, and nothing more, a jury is required, or bound, to convict, though it may not, on such evidence adduced, be convinced beyond a reasonable doubt of the defendant's guilt, such legislation would be an encroachment upon the prerogatives of the judiciary." The Court then goes on to point out that, with the additional requirement that the defendant must have given some unsatisfactory account



of how he came into possession of the property -- must have lied about it in other words -- the defect is cured, since to have stolen property in his possession, and to tell some farfetched tale, which lacks indicia of truth when asked to account for his possession, does create a state of evidence upon which reasonable men might conclude that the defendant was guilty.

Ogden City's ordinance stops just where the legislation, assumed in the language of the court in the *Potello* case, stopped. It makes the mere ownership of the car, and proof that the car was illegally parked by someone, proof of the guilt of the owner. This clearly then is an attempt by the city to impose upon the courts of this state a substantive rule of evidence, which the state legislature, even with its much broader powers, could not do under the language of the above quoted case, without imposing upon the functions of the judiciary.

Even if this ordinance met the requirements of the *Potello* case the city would not, under its limited powers, be entitled to pass such a law. If this ordinance was merely a procedural rule, and not substantive, as counsel contends that it is, the city's attempt to pass such a rule must fail. The Courts of this state are constituted by the Constitution and by State Statute. In no place in the Codes of this state is the power given to any city to make rules concerning the courts. That power has been found in many cases to be either in the Supreme Court of the state or in the legislature. Though there is a conflict as to which of the above branches has the power, there is no conflict with fact that the city, unless such power is given expressly or impliedly by statute, does not have

any such power. It would seem that in the state of Utah the Legislature has recognized the power of the Supreme Court to make such rules by their enactment of Title 20, Chapter 2, Section 410, Utah Code Annotated, 1943. Therefore removing from the legislature the power to pass procedural rules.

There is no doubt, if all requirements are met, that the state legislature would have power to pass such a substantive rule of evidence and thereby bind all the Courts of this state by such a statute, but in this ordinance we have an attempt by the City of Ogden to take over the functions of the state legislature. It has been stated before that in no place in the Codes of this state have the cities of this state been granted any control over the functioning of the courts, therefore, this ordinance amounts to the fact that the city of Ogden has assumed a power which has not been delegated to it. It must also be stated that in any case arising in the City Court where an appeal is taken from the judgment of such court to the district court, the case being there tried De Novo, this ordinance to be effective must be able to bind the district court, and in an extreme case the Supreme Court. Therefore we have an attempt by a body of government, which is low on the scale of the legislative and administrative branches of the government, a body constituted of merely delegate powers, to dictate to a branch of government, the judicial branch, a branch of which it is not even a member.

✓ The district court by its order, for which this appeal is taken, impliedly held that the city of Ogden has the right to pass an ordinance which will bind all the courts of this state to a substantive rule of evidence, and also

that it was within the power of the city to pass an ordinance setting forth this matter of substantive law.

This was clearly error on the part of the court as set forth in the argument. It is clear that the city cannot, under its limited powers, control the evidence, nor set forth what shall be evidence in the courts of this state, and it is clear also that where the state has not acted specifically the city cannot act unless it can be found that the city, under some of its stated powers, has the direct or implied power to pass such an ordinance.

#### POINT IV.

THAT THE CITY HAS NEVER RECEIVED AUTHORITY FROM THE STATE ROAD COMMISSION TO PLACE PARKING METERS UPON STATE HIGHWAYS WITHIN ITS BORDERS.

Title 57, Chapter 7, Section 84, Utah Code Annotated, 1943, states that "No local authority shall enact or enforce any rule or regulation in conflict with the provisions of the Motor Vehicle Act unless expressly authorized by such act". Section 88 (b) of the same Title and Chapter states, "no local authority shall place or maintain any traffic control device upon any highway under the jurisdiction of the State Road Commission except by the latter's permission." Washington Boulevard and 24th Street, located in Ogden City, are state highways under the jurisdiction of the State Road Commission. As a matter of judicial notice it should be recognized by the court that the City of Ogden has failed to receive such permission from the State Road Commission.

## POINT V.

THAT THE PLAINTIFF, IN THIS ACTION, WAS NOT GIVEN DUE NOTICE OF ANY ACTION CONTEMPLATED BY THE CITY.

This point goes to the city court's jurisdiction. By the stipulated facts in this case it will be found that the only notice which the appellant herein received, prior to service of summons upon him, was a so-called "ticket" placed upon the windshield of his automobile. It is felt by counsel herein that such a method is insufficient to give the owner of an automobile notice of any action being contemplated against him. Let us examine the procedure here. If a person receives the so-called "ticket" and pays his fine at that time the fine is \$ .50, but if he does not receive the so-called "ticket" and the city serves a summons and complaint upon him the fine is then \$5, or a sum ten times as great. There are only three methods of service of summons in this state, either by personal service, by substituted service upon a person at the residence or office of the defendant other than the defendant himself, and service by publication. It is beyond the powers of counsel to see under which category of service this method of placing a ticket upon an empty automobile will fall.

## CONCLUSION

Under the above points it must be concluded that:

- (1) the City does not have the express or implied powers to pass such an ordinance under the police power;
- (2) the ordinance has the effect of removing certain

protections given a defendant by the Anglo-Saxon Law, the Constitution of the United States, and the Constitution of the State of Utah; and

(3) such an ordinance is an encroachment by a body of government, which has only delegated powers, upon the functions of the judicial and legislative branches of the government.

(4) that the city has received no authority to place parking meters upon public highways, and

(5) that the method used by the city in giving notice of a violation is not sufficient to vest jurisdiction in the City Court.

This court is therefore called upon to determine that the district court erred in sustaining the motion of the respondent as to all of the points above set out.

Respectfully submitted

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