

1952

Ogden City v. Clyde C. Patterson : Appellant's Reply Brief

Utah Supreme Court

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Paul Thatcher; Attorney for Appellant;

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No. 7823

IN THE SUPREME COURT
of the
STATE OF UTAH

OGDEN CITY, a Municipal Corporation,
Plaintiff and Appellant,

vs.

CLYDE C. PATTERSON,
Defendant and Respondent.

APPELLANT'S REPLY BRIEF

FILED

JUN 2 1952

Clk. Supreme Court, Utah

PAUL THATCHER,
Ogden City Corporation Counsel
Attorney for Appellant

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IN THE SUPREME COURT

of the

STATE OF UTAH

OGDEN CITY, a Municipal Corporation,
Plaintiff and Appellant,

vs.

CLYDE C. PATTERSON,
Defendant and Respondent.

REASON FOR REPLY BRIEF

Point II of Respondent's brief sets forth new material to which Appellant replies, as authorized by Rule 75 (p) 1 and 2, Utah Rules of Civil Procedure.

Respondent's Point II reads:

“Appellant Ogden City is without right to raise the question of Respondent's right to hold the office because

- (A) Respondent's right to the office can be raised only by the Attorney General on behalf of the state, or by another claimant to the office; and
- (B) Ogden City cannot attack the constitutionality of the law which vested Respondent with the office.”

POINTS RELIED ON

Appellant's reply is four-fold:

POINT I.

THIS ACTION IS FOR DECLARATORY JUDGMENT UNDER RULE 57, UTAH RULES OF CIVIL PROCEDURE AND SECTION 104-33-2, UTAH JUDICIAL CODE, NOT FOR RELIEF PROVIDED UNDER RULE 65B (b) (1).

POINT II.

EVEN IF THE COURT CONCLUDES THAT THIS ACTION IS UNDER RULE 65B (b) (1) THAT PARAGRAPHS (c) AND (d) OF THAT RULE APPLY, PARAGRAPH (d) AUTHORIZES THE APPELLANT TO RAISE THE QUESTION OF RESPONDENT'S RIGHT TO THE OFFICE.

POINT III.

APPELLANT'S RIGHT TO QUESTION THE CONSTITUTIONALITY OF THE LAW IS RAISED FOR THE FIRST TIME ON APPEAL AND THEREFORE MUST BE DISREGARDED BY THE COURT..

POINT IV. .

APPELLANT HAS A RIGHT TO RAISE THE CONSTITUTIONALITY QUESTION EVEN THOUGH IT IS NOT A VOTER.

FILED

JUN 13 1952

No. 7823

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

--- --
OGDEN CITY, a Municipal Corporation, ^{PLAINTIFF}
Plaintiff and Appellant,

-vs-

THE CODE, NOT
UNDER RULE

CLYDE C. PATTERSON,
Defendant and Respondent.

--- --
IT IS ORDERED THAT
IN ADDITION TO APPELLANT'S REPLY BRIEF FILED
ON JUNE 10, 1952, APPELLANT SHALL FILE
A SECOND BRIEF WITHIN THE NEXT SEVEN DAYS.

On Page Two immediately preceding "POINT
I" insert the following:

POINT A-I

THE TRIAL COURT HAVING DECREEED THAT
DECLARATORY RELIEF IS GRANTED, AND
NO CROSS APPEAL HAVING BEEN TAKEN,
RESPONDENT CANNOT HERE ATTACK APPEL-
LANT'S RIGHT TO A DECLARATORY JUDG-
MENT ON THE MERITS.

POINT IV.

APPELLANT HAS A RIGHT TO RAISE THE
CONSTITUTIONAL QUESTION EVEN
THOUGH IT IS A CROSS MOTION.

JUN 13 1952

No. 7823

IN THE SUPREME COURT OF THE STATE OF ~~Utah~~ ^{Clerk Supreme Court} Utah

OGDEN CITY, a Municipal Corporation,

Plaintiff and Appellant,

-vs-

CLYDE C. PATTERSON,

Defendant and Respondent.

ADDITION NUMBER TWO TO APPELLANT'S REPLY BRIEF

On Page Three immediately following "The Argument," and immediately preceding "POINT I" insert the following:

POINT A-I

THE TRIAL COURT HAVING DECREED THAT DECLARATORY RELIEF IS GRANTED, AND NO CROSS APPEAL HAVING BEEN TAKEN, RESPONDENT CANNOT HERE ATTACK APPELLANT'S RIGHT TO A DECLARATORY JUDGMENT ON THE MERITS.

It is to be observed that the court below entered its judgment and decree in two separable parts. In effect it entered two judgments: the first in favor of plaintiff and appellant upon the question of whether declaratory relief should be granted, and the second a declaratory judgment in favor of defendant and respondent on the merits.

The judgment and decree states:

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The motions of the Attorney General of the State of Utah and of the defendant to dismiss the complaint are denied and declaratory relief is granted." The court then added separate paragraphs numbered two and three to its judgment deciding the merits against the plaintiff and appellant. There were two judgments, or at least the judgment is clearly separable into two parts.

Appellant's Notice of Appeal appealed only "from the judgment in favor of defendant and against plaintiff, and the whole thereof." It is clear that appellant brought before this court only the judgment included in paragraphs two and three.

Under these circumstances respondent's Point Two is not before this court, as the judgment in favor of appellant in the court below is final and judicially established Ogden City's right to declaratory relief on the merits.

If respondent desired to have this court review the judgment of the court below, which was in appellant's favor, he should have cross appealed. The modification of an independent portion of a decree not touched by the appeal is not the office of mere cross-assignments, but is the peculiar province of a cross-appeal.

Rosenthynne v. Matthews-McCulloch Co.
51 Utah 38, 168 Pacific 957

**Commercial Block Realty Co. v.
Merchants' Protective Association
71 Utah 505, 267 Pacific 1009**

See also Rule 73(b) and 74(b) of the Utah Rules of Civil Procedure.

It is submitted that appellant's right to a declaratory judgment on the merits is res judicata and is not before this court for review. Point 1, this action was...

On that date, the Respondent had been sworn in as a city judge but he had not assumed the duties of that office and his term (assuming there is an office, and assuming he is the lawful holder thereof) did not start until 12:00 o'clock noon on the first Monday of January, 1952. The first Monday of January, 1952, was January 14, 1952. Thus on the date the action was filed, the Respondent did not "hold" or "exercise" a public office and he had not "usurped or intruded" into a public office. Under such circumstances, there is considerable doubt that the extraordinary writ of quo warranto would lie.

This is clearly a case for a declaratory judgment. Quo waranto can be used only "when no other plain, speedy and adequate remedy exists". (Rule 65B (a)). The declaratory judgment gives adequate relief and raises all the questions of the case. No extraordinary writ is here desired or necessary. Particular mention is made of that part of Rule 57 which reads, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate".

THE ARGUMENT

POINT I.

THIS ACTION IS FOR DECLARATORY JUDGMENT UNDER RULE 57, UTAH RULES OF CIVIL PROCEDURE AND SECTION 104-33-2, UTAH JUDICIAL CODE, NOT FOR RELIEF PROVIDED UNDER RULE 65B(b)(1).

As to Point I, this action was filed on January 5, 1952. On that date, the Respondent had been sworn in as city judge but he had not assumed the duties of that office and his term (assuming there is an office, and assuming he is the lawful holder thereof) did not start until 12:00 o'clock noon on the first Monday of January, 1952. The first Monday of January, 1952, was January 7, 1952. Thus on the date the action was filed, the Respondent did not "hold" or "exercise" a public office and he had not "usurped or intruded" into a public office. Under such circumstances, there is considerable doubt that the extraordinary writ of quo warranto would lie.

This is clearly a case for a declaratory judgment. Quo waranto can be used only "when no other plain, speedy and adequate remedy exists". (Rule 65B (a)). The declaratory judgment gives adequate relief and raises all the questions of the case. No extraordinary writ is here desired or necessary. Particular mention is made of that part of Rule 57 which reads, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate".

Had the Appellant brought this case under Rule 65B, undoubtedly the Respondent would be now asserting that the form of the action is incorrect because of adequate remedy by declaratory judgment and because he had not taken office when the action was filed. This case should not be decided on the form of the action, but the merits of the case should be considered and decided.

PART II

EVEN IF THE COURT CONCLUDES THAT THIS ACTION IS UNDER RULE 65B (b) (1) SO THAT PARAGRAPHS (c) AND (d) OF THAT RULE APPLY, PARAGRAPH (d) AUTHORIZES THE APPELLANT TO RAISE THE QUESTION OF RESPONDENT'S RIGHT TO THE OFFICE.

As to Point II, Respondent contends on page 21 of his brief, "Thus, it is apparent that under this rule only the attorney general, in the name of the state, or an individual himself claiming the office, can challenge respondent's right to the office". He quotes paragraph (c) and part of paragraph (d) of Rule 65B to support this contention. The whole of paragraph (d) of said Rule reads:

"(d) Action by Private Person Under Subdivision (b) (1) of this Rule.

A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may bring an action upon any other ground set forth in subdivision (b) (1) of this rule only if the attorney general fails to do

so after notice. Any such action commenced by a private person shall be brought in his own name. Upon filing the complaint, such person shall also file an undertaking with sufficient sureties in the same form required of bonds on appeal under the provision of Rule 73 and conditioned that such person will pay any judgment for costs or damages recovered against him in such action.”

It thus appears that in addition to the attorney general and a person claiming the office, a private person may bring an action, even though he does not claim a public or private office, if the attorney general fails to bring the action after notice.

The rule does not say what “notice” need be given to the attorney general. However, in this case the record itself shows that the attorney general had notice of this condition and that he failed to bring any action to test the question. This is shown by the fact that the attorney general appears in the case and he attempts to support the Respondent’s position. It would be impossible for the attorney general to appear herein unless he had notice. The fact that he appears to support the Respondent rather than to test the validity of the office and of Respondent holding the same conclusively shows that any other or different notice or request to the attorney general to bring the action would have been a useless gesture. Since the law does not require the doing of useless acts, the Appellant herein has complied with Section (d) of Rule 65B so that the Appellant itself can bring this action in its

own name, even if it is assumed that this is an action under that rule rather than an action for declaratory judgment under Rule 57.

Since the office of city judge is here involved, it might be argued that the City Attorney of Ogden City is as to city officers comparable to the attorney general as to state officers. There is much more reason for allowing the city, by and through its legal officers, to test the legality of one holding a city office than there is for allowing other private persons or corporations to test the same.

POINT III.

APPELLANT'S RIGHT TO QUESTION THE
CONSTITUTIONALITY OF THE LAW IS
RAISED FOR THE FIRST TIME ON APPEAL
AND THEREFORE MUST BE DISREGAR-
DED BY THE COURT.

Respondent's Point II (B) reads:

“Ogden City cannot attack the constitutionality of the law which vested Respondent with the office.”

The argument seems to be that since Ogden City is not a voter, it has no standing in contesting the constitutionality of the law under which Respondent claims to be elected.

This argument is made and this question is raised for the first time on appeal. A fundamental rule of appellate practice, and under decision of this Court, matters cannot be raised for the first time on appeal, and this argument must therefore be disregarded by

this Court. *In Re Jones Estate*,—*Utah*—, 104 P. (2) 210; *American Digest, Appeal and Error, Key Number* 173 (1) and (2).

POINT IV.

APPELLANT HAS A RIGHT TO RAISE THE CONSTITUTIONALITY QUESTION, EVEN THOUGH IT IS NOT A VOTER.

Should it be held Respondent can raise this question for the first time on appeal, the answer to the argument is that one does not need to be a voter to be in a position to raise this question. Ogden City is materially affected by whether or not Section 104-4-3.10 is constitutional, in its provision for the issuance of a certificate of election to an uncontested candidate. Ogden City certainly has a right to know who the judges of the city court of Ogden City are and whether or not they lawfully hold office. Ogden City pays the city judges, its officers and agents appear before him and execute and act under the apparent protection of his orders, writs and judgments. Thus, the city and its officers and agents are vitally concerned about whether or not Respondent is a duly elected, qualified and acting judge of the city court of Ogden City, and the city is a proper party to raise the question.

In addition, the corporation, Ogden City, is the instrument by which the citizens of the territorial limits of Ogden exercise governmental and other activities. In a way, Ogden City, the Appellant herein, in fact represents all the voters of Ogden City, and while technically the city itself is not a voter, it may well be said

that in its representative capacity, it has standing in this action to protect the rights and prerogatives of the voters it represents.

It should be further observed that this controversy has been heard in toto by the district court and decided by it and it is now on all questions before the Supreme Court. There is no question of this Court's jurisdiction; there is a real controversy which is being actively and thoroughly litigated by both parties, and if this Court on mere technicalities refuses to hear and consider the whole controversy on all its parts and aspects, it will thus be handling this matter piecemeal, and it has been the policy of the Court to fully hear and to fully decide, rather than to leave undecided, a critical part of a controversy which duly and regularly comes before it.

Respondent observes on page 25 of his brief that Ogden City may not question the constitutionality of this statute because it accepted the benefits thereof. This is a novel concept of constitutional law.

Is it not the duty of citizens, and particularly of a city, to comply with a law which is not clearly unconstitutional as it is enacted until that law is declared unconstitutional by a court of competent jurisdiction? To say that one is precluded to raise the constitutionality of a law merely because he has complied with it invites disobedience of law.

What benefit accrued to Ogden City by the recorder thereof issuing a certificate of election to the Respondent? The printing saving mentioned by Respondent might pay Respondent's salary as judge for a day, or maybe two.

By what authority could Ogden City place the name of Respondent on the ballot when the statute expressly controlling directed otherwise?

The constitutionality of this statute cannot be affected one way or the other by Ogden City acting or failing to act thereon or by Ogden City ignoring the statute and in violation thereof placing Respondent's name on the ballot.

The arguments raised by Respondent as his Point II are mere technical objections without substance and without merit.

On the other hand, the rights and legal relations of Ogden City are materially affected by the statutes in question, both from a financial and from a legal point of view. Section 104-33-2 of the Utah Judicial Code is obviously designed for just such a situation. It reads as follows:

“Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.”

Section 104-33-13 of the Utah Judicial Code declares that the word “person”, as used in that Chapter, includes a municipal corporation. It is clear that Ogden City has a right to the decision of this Court upon the merits.

The Appellant respectfully urges the Court to decide this case and all the particulars thereof on its merits, and in so doing, to reverse the judgment of the lower court.

Respectfully submitted,

PAUL THATCHER,
Ogden City Corporation Counsel
Attorney for Appellant