

1953

J. M. Palmer et al v. L. V. Broadbent : Plaintiffs' Brief

Utah Supreme Court

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In The Supreme Court of the State of Utah

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LEY, W. S. LEIGH and CLARENCE
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Plaintiffs and Petitioners,

VS.

L. V. BROADBENT, Mayor of Cedar
City, Utah, J. L. FAKLER, KEITH
SMITH, WILLARD LUNT, FRANK
MILNE and MARION GRAMES, City
Councilmen of Cedar City, Utah and
ELLEN A. SIMKINS, City Recorder of
Cedar City, Utah.

Defendants.

FILED * * * *

MAY 20 1953

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Clerk, Supreme Court, Petitioners.

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PLAINTIFFS'

BRIEF

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STATEMENT OF FACTS

This is an action for a Writ of Mandamus to be issued out of this court in the exercise of its original jurisdiction. The general authority for such a writ is Rule 65B (3) of the Rules of Civil Procedure and the specific authority for this particular type of action is set forth in Section 20-11-16, Utah Code Ann. 1953.

The petition for the writ, including all of the attached exhibits filed in this court generally set forth the facts involved in this case. Some facts as are seriously in issue have been settled by the stipulation of the parties which is on file herein.

On February 19, 1953 the City Council of Cedar City, Utah duly passed an ordinance granting to Southern Utah Power Company a twenty year electric franchise within Cedar City, Utah. This ordinance which is set forth as Petitioners' Exhibit "A" was published February 26 and by its terms would become effective March 21, 1953. On March 7, 1953 nine residents of Cedar City, Utah who acted as "sponsors" filed an application for petition copies with the City Recorder in order to have petitions printed so that the ordinance could be referred to the people for their approval or rejection at the next city election. Five copies of the proposed Petition for Referendum were filed with the application and the application was duly verified as provided by law. Upon the filing, the City Recorder gave a receipt therefor and also signed a certificate that the petition following was a true and correct copy. The sponsors then had the petitions and circulation sheets printed up themselves at the Iron County Record, a publishing and printing company of Cedar City, Utah. There were printed up fifteen sections of the petition, with each section having a cover sheet of the Referendum Petition, together with the printed certificate of the City Recorder, and also six circulation sheets attached. On March 10, 1953 after the petitions had been printed by the sponsors, all fifteen sections were taken to the City Recorder for her inspection and for her to sign her name in ink over her printed signature and to

attach the corporate seal of Cedar City Corporation. This she declined to do and on March 12 notified the sponsors that the fifteen sections of the petition could be obtained at her office but that that they would not be signed and sealed by her. They were later received back by the sponsors, unsigned but since the City Recorder had notified the sponsors that she would not sign them, the sponsors, who had had printed originally sufficient petitions and circulation sheets for fifteen additional identical sections, commenced the circulation of the petition in Cedar City, Utah, and 449 signatures were obtained.

The fifteen sections were then taken to the County Clerk of Iron County, Utah on March 20, 1953 for checking against his official registration list of registered and qualified voters in Cedar City, Utah. He duly certified that in 1952 at the general election, 3122 persons of all parties voted for all candidates for Governor in Cedar City, Utah and that the Referendum Petition presented to him for checking had the names of 430 duly registered and qualified voters of Cedar City, Utah. The Clerk also certified as shown in Exhibit "E" that 430 qualified and registered voters appeared on the petition and that he had placed a check mark before each name of a qualified and registered voter. Actually the check marks were placed after the name and there were 430 such checked names. The County Clerk subsequently on March 27, 1953 certified as shown in Exhibit "E-1" that actually he had placed the check mark (✓) after the name and that those not so checked with the check mark (✓) did not appear to be duly registered. There were 19 of these names.

On March 20, 1953 during the afternoon of said day, which was a day before the franchise ordinance would have become effective, all fifteen sections of the Referendum Petition, together with the County Clerk's certificates, were delivered to the City Recorder's office in the County Clerk's sealed envelope. On March 24, 1953 the sponsors were notified that the City Recorder had

found the petition insufficient for the reason that it carried NO names of registered voters. According to Section 20-11-22, Utah Code Ann. 1953, the required number of signers of a referendum petition in Cedar City, Utah based upon the vote in 1952 for Governor would be 390 names. The County Clerk has certified that there were 430 names of registered and qualified voters on the petition.

STATEMENT OF POINTS

1. The Referendum Petition, although printed and paid for by the sponsors themselves is entirely legal and proper and would have to be accepted by the City Recorder provided it carried the required number of qualified signers.
2. That the Referendum Petition circulated was duly certified to and the fact that each section of the petition was not signed in the hand-writing of the City Recorder cannot be relied upon by the defendants as any defense.
3. Any deficiencies in the County Clerk's Certificate as to how the names of the registered voters were checked is immaterial, particularly in view of the fact the clerical error was corrected and in any event, the sponsors were not notified of any deficiency until it was too late to correct it.

ARGUMENT

The procedure for direct legislation, or Initiative and Referendum, is set out in Title 20, Chapter 11, Utah Code Ann. 1953. The right of direct legislation is probably one of the most fundamental rights of the people under democratic government. In fact this right is preserved by our State Constitution at Article VI, Section 1. Direct legislation by Initiative and Referendum by the people is actually encouraged in our governmental and judicial system because in the last analysis, all governmental power still resides in the people. Although Chap-

ter 11 of Title 20 sets out the procedure, it is clear from reading the chapter and also from several decisions handed down by this court, that many of the requirements are matters of form only and are directory and are not to interfere with the rights of the people to vote in direct legislation elections. The general rule of law is that these statutes should be liberally construed so as to preserve this valuable right and this court in the case of *Halgren vs. Welling*, 63 Pac. 2nd. 550 and *Allen vs. Rasmussen*, 117 Pac. 2nd. 287 has adhered to this general rule. The reasons are aptly given in the *Halgren* case; to quote.

“The right of direct legislation is in the people. It is the duty of officers charged with administration matters relating to the Initiative and Referendum Law to make it effective and operative if possible. Technical and restrictive constructions placed upon such laws would tend to defeat the purpose and policies governing the submission of such measures to the people for adoption. With the best safeguards that can be thrown around the preparation, circulation, assembling, and submitting of petitions relating to the Initiative or Referendum Law, inaccuracies, and at times technical departures from prescribed forms, are likely to occur. The rigid application of technical constructions relating to the law, if made by officers charged with the administration thereof, may effectively defeat the purposes of the law. Officers should interpret the law, if possible, so as to sustain it and make its purposes effective, and bring about the purposes intended by the legislature. As heretofore indicated, the forms prescribed are not mandatory, and if they are substantially followed the petition should be held to be sufficient notwithstanding merely technical errors as to form.”

There is one unfortunate feature in Chapter 11 of Title 20 in that the entire act is drawn primarily for Initiative measures, as distinguished from merely local Referendums of City Ordinances. Since a statewide Initi-

ative is a considerable undertaking on the part of a group of citizens who usually have no personal motive or nothing to gain by the action and would be at considerable expense, in fact so much that in many instances the cost would discourage the use of the direct legislative machinery, the statute has attempted to make the procedure within the financial reach of all. Section 20-11-13 provides that when an application for Petition copies is filed, the Secretary of State shall within ten days solicit "bids from not less than three competent printers for the printing of the petitions." The Secretary of State shall notify the sponsors within the ten days of the lowest and best bid and request the cost to be paid to him by the sponsors. The printing is to be in six point type which is admittedly quite small, but this surely is only to keep the cost of printing down. Within ten days after the cost of printing is received from the sponsors, the Secretary of State is to have the petitions and circulation sheets printed and bound and ready for delivery to the sponsors. The provisions of this particular section are obviously only directory and for the protection of the sponsors themselves. In a statewide initiative procedure, where a lengthy law is proposed, it is conceivable that the cost of printing the sufficient petitions could run into hundreds of dollars and this statute is obviously enacted to keep the cost to a minimum. Chapter 20, Section 21 provides that cities and towns may adopt the statewide procedure and in such cases, the City Recorder performs the functions of the Secretary of State.

In this particular case, instead of having a statewide initiative measure, we have only a local city referendum. The printing cost is a minor item and since the statute in question is only for the protection of the sponsors themselves, they could waive it if they so chose. It is elementary that any person or group can waive a contract provision or statute which is entirely for their own protection if other rights are not involved. On this point 56 Am. Jur. Page 109 provides:

"Statutory rights may be waived or surrendered

in whole or in part by the party to whom or for whose benefit they are given, if he does not thereby destroy the rights, and benefits flowing to another . . . ”

Since the sponsors have to pay the cost of printing in any event, regardless of what the cost may be, and no part comes from public funds, it would make no difference if the city or the sponsors printed up the petitions. It is submitted that the statutory procedure is only set out as a guide to get the work done and to make it as cheap for the sponsors as possible. Surely the City Recorder or city officials would have no cause to complain if the sponsors handled this themselves, so long as it was done according to law.

To further show that the failure of the city to have these petitions printed is a matter of minor importance is the fact that the City Recorder in fact did solicit bids for the printing and received only one bid, one from the printing firm which had previously printed them. It is of interest to note that the City Recorder sent out the request for bids on the same day the printed petitions were presented to her for signature. The petitioners contend that this is truly being a slave to the statute. It is of further interest to note that the bid actually received from the one printer was in the small sum of \$8.65 and it is submitted that the payment of this small sum by the nine sponsors would not and did not strain their finances. If the City had been prejudiced in any way by the printing of this petition by the sponsors themselves and paying for its cost, then the situation might be different.

Since the City could in no way be prejudiced by the fact that the sponsors immediately went ahead with the printing upon filing the application with the City Recorder, waiting for a possible twenty days for the printed petitions to be delivered to them by the City Recorder would be needless and foolish to say the least. Under the statute, the City Recorder could have taken a minimum of twenty days to get this all done and since the petitions as actually printed conform to the law in every way,

except possibly the fact that they were printed in 5½ point type instead of 6 point type, which objection is entirely groundless, no one has any right now to complain.

At this point attention should be called to one glaring deficiency in the direct legislation statute, which is the shortness of time for a referendum petition to be filed, particularly on a city ordinance. Initiative creates no problem as it can be done at any time but a city referendum petition must be filed before the ordinance becomes effective which is by law twenty days after publication or thirty days after passage, whichever of said days is the most remote from final passage. In this instance there was only the thirty days from passage which would be March 21, 1953. If the sponsors must file their application for petitions and wait for a possible twenty days before they can start circulating their petition, in many cases there would be no referendum at all because an unfriendly City Recorder can take the full time allowed by law and there would be little if any time to circulate, check and file the petition. It must be admitted that occasions when opponents of a city measure can file an application for a petition, immediately after the passage of the act are rare. A committee must first organize and this normally would take several days. Furthermore, the City Recorder could if she so desired, wait for ten days or longer before he delivered the adopted ordinance to a publisher for publishing, in which event there would be only twenty days in which opponents could organize, file an application for petition copies and have them printed, circulated and checked and filed and as noted, under the procedure the city recorder can legally take at least twenty days to get this done if she so desires, leaving no time to obtain any signatures.

It is true as pointed out in the case of *Allen vs. Rasmussen*, *supra*, when this shortness of time in a city referendum was considered by this court, the court remarked that it could not be said that the sponsors could not have sufficient time, but the point which the petitioners wish to make is this—in view of the general rule of

law that these statutes should be liberally construed, is it more important to follow the statute strictly even on immaterial and directory matters than it is to afford the citizenry of the right to vote on measures? It most certainly would be wrong to have an unco-operative City Recorder or City Administration foil an attempt to question a city measure by merely taking the time allowed by law, but this could be done in many instances.

It is admittedly disturbing to the writer that cases cannot be found in the reports in which sponsors of a referendum petition did not want to wait on the public official to have the printing done, but did it and paid for it themselves. It appears to the writer that the question is so obvious that no case has been tried and appealed where this situation was involved. There is one Arizona case, however, that of *Kerby vs. Griffin* 62 Pac. 2nd 1131 where a related problem arose. In that case an initiative petition had been filed with the Secretary of State. Under the Arizona law, as in ours, the Secretary of State had the duty of printing up and mailing out publicity pamphlets for and against the measure and this had to be done within a certain time before election. In this case, the defendant Secretary of State maintained that the reason he had not complied with the law was because as the law was written, there was not sufficient time to comply, particularly when he would have to solicit bids for the printing of the pamphlet and then get it printed and mailed. Soliciting of bids for the printing was not directly required in the Arizona Initiative and Referendum law. The Arizona court said that although the practice of soliciting bids on state printing was commendable and under all ordinary circumstances should be done, still, where it interfered with the getting of the direct legislation question before the people, it should be by all means dispensed with. And in this instance, public funds were being used for the printing of this pamphlet and not private funds from the sponsors themselves, as in the present case.

There are cases in which certain requirements of

the statute have not been complied with but the writer has found none on the specific question here involved. In the case of *Halgren vs. Welling*, *Supra*, there were many irregularities pointed out and the court said they were merely matters of form and were disregarded.

Therefore, it would seem that the fact that the sponsors handled and paid for their own printing is immaterial in this case for two reasons, (1) that the statute is for the protection of the sponsors themselves and they could waive if they so desired and (2) this is only a directory requirement and not mandatory and to hold that it is mandatory would require a useless act and would prohibit, in many cases the use of our direct legislation statute.

The second point raised by the answer of the defendants is the fact that the petition circulated did not have a certified copy of the referendum petition attached thereto. Section 20-11-12 and 20-11-13 Utah Code Ann. 1953 provide that the petition for circulation can be divided into sections but that each section of circulations sheets must have attached a certified copy of the referendum petition. This is only as it should be because it would be wrong for circulators of the petition to merely take around circulation sheets asking people to sign without the signers knowing what they were signing. It is common knowledge that people will sign any kind of petition or anything requested of them and the statute requires that a copy of the petition must be attached to each section. Defendants appear to be raising the question that the copies were not properly certified and by this it is presumed that they mean that each certificate attached to the petition was not signed in ink over the printed signature of the City Recorder and because such was not the case, the petitions were not certified. Each bore the printed name of the Recorder and she had previously signed a certificate that the petition was a true and correct copy of the petition filed with her and this certificate is before the Court as Petitioner's Exhibit "H". The petitioners maintain, that this signing was not necessary in order to have a certified copy of the petition

with each section circulated. The Recorder had in fact signed such a certificate and the petition copies were as they are designated, "petition copies". Furthermore, no claim is made that the form or substance of the petition would in any way mislead any signer and if a signer was willing to sign the petition as presented to him and which is before the court, no one would have any cause to complain.

It should also be noted that there is no allegation of fraud or wrongdoing on the part of the sponsors in circulating the petition. The ordinance asked to be referred is correctly described on the face of the petition and there is no claim that signers did not have full knowledge of what they were requesting the City Officials to do. It is submitted that the very form of the petition circulated speaks for itself as to its full validity.

Defendants appear to be making capital of the fact that the petitions signed were not the ones presented to the City Recorder for her signing, sealing and inspection. Actually they were not but were identical copies as they were all printed up at the same time and this could not possibly make any difference. Furthermore, there is no claim on the part of the defendants there was any difference or that the sponsors wrongfully substituted something else. At any rate, the sections originally delivered to the Recorder for signing and sealing were actually returned unsealed and unsigned so that they were identical in every way with the ones circulated.

But it ill-behooves the defendants to now assert that the petitions were not signed by the Recorder, or numbered or authorized by her. After the petitions and circulation sheets had been printed by the sponsors according to the statutes they were in fact presented to the Recorder for her inspection and for the express purpose of having her sign them in ink and to affix the corporate seal. This she declined to do and returned the petitions unsigned. The defendants certainly cannot now be heard to complain that other identical copies were circulated or that they were not signed in ink.

The third point to be made by the petitioners raised by the defendants is the fact that the certificate of the County Clerk of Iron County as to the number of registered voters is erroneous. This appears to have even less weight, if possible, than the other points raised. Let us look at the facts. Section 20-11-16, Utah Code, Ann. 1953 requires that the names on the petitions be checked by the County Clerk in order to determine if the signers are registered voters. The case of *Allen vs. Rasmussen*, *supra*, held that the sponsors had the obligation of getting this done themselves before filing the petition with the City Recorder. This was complied with. The case of *Halgren vs. Welling*, *supra* also held that the word "check" as used in the statute means that the County Clerk shall compare the names on the referendum petition with the names on his registration lists to determine if the signers are duly registered. This was all done in the County Clerk's office March 20, 1953. Plaintiffs submit that as to where on the petition the Clerk designated the registered voters or whether he made such designation is entirely immaterial. So long as he certified that there were names of 430 registered voters is the important thing. Merely placing a check either after or before the name of each person as appeared to be registered was merely for the convenience of the City Recorder when she checked over the signatures. But the City Recorder has chosen to refuse the petition in toto. To now hold that merely because the Clerk said he placed a check mark in front of each name of those who appeared to be registered whereas the check mark appears after the name invalidates the petition, would be fantastic to say the least. The petitions are before the court and it should be perfectly obvious from them that the names of the persons duly registered were marked and that there should be no room for doubt in the matter. To now say that because they were not checked where the County Clerk said they were, would be allowing an innocent mistake on the part of a public officer to vitiate the entire proceeding to the detriment of all of the hundreds of people who wanted to vote on

the measure. It would be a monstrosity indeed to deprive the public of this right merely because of a simple clerical error on the part of the public official. But at any rate, when this was discovered by the County Clerk upon notification by the City Recorder on March 24th, the County Clerk submitted another certificate, marked Exhibit "E-1" clarifying his action if such were in fact needed. A California case, *Willett vs. Jordan*, 35 Pac. 2d 1025 is particularly apt on this point. There the County Clerk certified to the Secretary of State that on the petition filed in his office there were the names of so many duly registered voters but the amount certified to was incorrect as actually there were several thousand more names, and four days later, but after the filing deadline, the County Clerk discovered his error and made a new certificate of the correct number. The new certificate was made three days after the filing deadline. It so happened that the mistake was very material because the difference in the count made the difference of whether there were sufficient names or not. The court said that the last certificate related back to the first so that it would be on time. The court said further.

"To refuse its application under the facts disclosed would countenance a palpable injustice to those who, at great expense and effort, did all that was required of them by law, and had established the antecedent right to have their petition recognized as sufficient. The correction of the admitted mistake of the public officer, the County Clerk, and the amendment of the original certificate by him must therefore be deemed to date back to the time of the filing of the certificate originally filed."

Added to this is the fact that the City Recorder, as held in the case of *Allen vs. Rasmussen*, *supra*, owes the duty to notify the sponsors before the filing deadline of any deficiency in signatures, but waited for four days to do so, the City Recorder cannot now be heard to say that the certificate of the County Clerk was insufficient.

The plaintiffs maintain that the defendants cannot rely

now upon any deficiency they claim existed in the County Clerk's certificate for two main reasons, first, because the Defendants had an opportunity to recount the signatures after the new or supplemental certificate of the County Clerk was filed with the City Recorder but still failed to change their count, and second, because the City Recorder had the opportunity to notify the sponsors of any deficiency in the County Clerk's Certificate but failed to do so until four days after the filing of the petition and three days after the filing deadline. Petitioner's exhibit "F" which is the certificate of the City Recorder in which the referendum petition was designated as insufficient for the reason that it contained NO names of registered voters, was delivered to the sponsors on March 24th or three days after the filing deadline. The *Allen vs Rasmussen* case held that the City Recorder owed a duty to notify the sponsors in sufficient time, if any there was, for them to correct any insufficiency. In fact Section 20-11-16 so states. If there was any doubt in the mind of the City Recorder as to the County Clerk's certificate, she had the duty to notify the sponsors and they would then have had an opportunity to correct or rectify any deficiency. When they were not notified until three days after the filing deadline they had no opportunity to get a corrected certificate from the County Clerk and file it prior to the expiration of March 21st. It would have been a simple matter to rectify this had the sponsors been so advised.

CONCLUSIONS

Therefore, plaintiffs argue that their prayer for a Writ of Mandamus, compelling the defendants and in particular the City Recorder to accept the referendum petition should be granted for the following reasons:

1. The Referendum petition, although completely printed and paid for directly by the sponsors rather than waiting for the City Recorder to do so, was entirely legal as to form and substance. That the only statute not followed to the letter is the one pertaining to the manner of

soliciting bids on the printing and this is entirely for the benefit and protection of the sponsors themselves and it could therefore be waived. To hold otherwise would mean that sponsors have to comply with a useless restriction which would make the submission of referendums to the people very difficult and this right should not be allowed to be abrogated by unfriendly city officials.

2. The petitions circulated were properly certified copies of the petition filed with the City Recorder and the defendants cannot now be heard to say they are not when they failed to comply with the sponsors' request to sign and seal them. Furthermore, there is no claim that any signer was misled in any way by the petition circulated, or that there was any fraud.

3. The mere clerical errors of the County Clerk in his certificate as to the checking of the names is immaterial as the petition itself is clear on its face who are the registered voters and the certificate of the Clerk as to the number is the important thing anyway. No one in Iron County was better qualified to know who were registered voters and he has certified that there are sufficient names on the petition. If there is any deficiency in his certificates, the City had the duty to notify the sponsors so that they could rectify any mistake, if any there be, which the defendants failed to do.

Petitioners contend that the defendants have not in fact shown any valid cause for not accepting as sufficient the referendum petition proffered to them and that their refusal to accept it is capricious and arbitrary to say the least, and that a peremptory writ should issue.

In support of the plaintiffs' prayer and motion for an attorney fee for their counsel in this matter in the event the Court sees fit to issue a Writ of Mandamus, the plaintiffs call attention to the affidavit of the sponsors and also their counsel. The court has before it ample evidence of the reasonableness of an attorney fee. If the Court grants this writ, it will only be because the action of the defendants and particularly that of the City Recorder was arbitrary and capricious and the failure to perform a

public duty enjoined by law. The plaintiffs as sponsors have been forced to compel the defendants to do what the law requires them to do. In this they have suffered damage, particularly in the incurring or paying of an attorney fee. The sponsors and plaintiffs have no pecuniary interest in this proceeding and are only pursuing this remedy as citizens and voters in Cedar City, Utah. The proof shows that the sponsors have agreed to pay a reasonable attorney fee as set by their counsel and their counsel has shown the services rendered and their reasonable value. It is true that the granting or refusing an attorney fee is discretionary with the court but it would appear that the action of the defendants as the duly elected officials of Cedar City, Utah is so arbitrary and capricious that there is little room to doubt their motives in this matter. The court has statutory authority to grant an attorney fee by Section 78-35-9, Utah Code Ann. 1953 which provides.

“If judgment is given for applicant, he may recover damages which he has sustained as found by the jury or as may be determined by the court or referees upon a reference ordered, together with costs and for such damage and costs an execution may issue and a peremptory mandate must be awarded without delay.”

This court, in the case of the Colorado Development Co. vs. Creer, 80 Pac. 2nd 914 has held that in mandamus proceedings, damages properly include attorney fees, where properly shown. Therefore, the court has authority for the award of such a fee and it is submitted that the right for it is properly shown.

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