

1956

Nelson Clayton v. Hal S. Bennett et al : Brief of Appellant

Utah Supreme Court

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Clyde & Mecham; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NELSON CLAYTON,
Plaintiff and Appellant,
— vs. —

HAL S. BENNETT, STEWART M.
HANSEN and DONALD HACK-
ING as members of the Department
of Business Regulation of the State
of Utah, DEPARTMENT OF
REGISTRATION and FRANK E.
LEES as Director of the Depart-
ment of Registration,
Defendants and Respondents.

Case No.
8477

FILED
MAR 7 1956

Appellant's Brief

CLYDE & MECHAM

By Edward W. Clyde
James L. Barker, Jr.

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Appellant's Brief

STATEMENT OF FACTS

This is a suit for a declaratory judgment to determine the constitutionality of the Architect's Licensing Law. The District Court held the licensing law to be constitutional, and this appeal is taken from that judgment.

The present controversy arose out of an examination given by the Registration Department of the State of

Utah to the plaintiff-appellant, and others, on November 27, 28, 29, and 30, 1951, for the purpose of ascertaining the qualifications of the examinees to practice the profession of architecture. The examination was conducted pursuant to the provisions of Chapter 1, Title 58, Utah Code Annotated, 1953, which was formerly Chapter 1, Title 79. (R. 1, 13.)

Chapter 1, Title 58, Utah Code Annotated, 1953, purports to create a Registration Department within the Department of Business Regulation of the State of Utah, and to set up rules and regulations for the licensing of members of the various professions, including architects. Sections 7 and 13 of that Chapter provide for "representative committees" for each one of the various professions. Each such committee is to be selected from the practicing members of the particular profession it is to represent. Each committee is given the sole responsibility for establishing the qualifications to be met by the applicants desiring licenses in the profession represented, as well as the sole discretion to set the standards for the examinations given such applicants.

At the time of the examination herein referred to, plaintiff-appellant was a duly licensed professional engineer and had degrees in both engineering and architecture from the University of Utah. His educational qualifications to take the examination were admitted and accepted by the Department of Business Regulation. (R. 16.)

After the examination the "architect's representative committee" held that plaintiff-appellant had failed

to meet the standards fixed by said committee and he was refused a license to practice as an architect in the state of Utah. Subsequently, upon the petition of the plaintiff-appellant, and after a hearing on the matter, the Department of Business Regulation held that the "architect's representative committee" had violated certain of its rules in the conduct of the examination and granted plaintiff-appellant an opportunity for re-examination under the provisions of section 58-1-16, Utah Code Annotated, 1953. (R. 15, 16.)

Plaintiff-appellant did not avail himself of the opportunity for re-examination, and on June 16, 1953, he brought an action in the District Court of the Third Judicial District in and for Salt Lake County, state of Utah, praying for a declaratory judgment construing Chapter 1, Title 58, Utah Code Annotated, 1953, to be invalid. Among other things, he contended that there was an improper delegation of legislative powers insofar as it places on the "architect's representative committee" the sole responsibility for establishing the qualifications for applicants for architects' licenses, and the sole discretion to determine the standards for the examinations given such applicants. The amendment to the Complaint further petitioned the court for an injunction permanently enjoining the defendant-respondents from interfering in any manner with the plaintiff-appellant in the practice of the profession of architecture. (R. 5, 8.)

The cause came on for pre-trial on the 18th day of October, 1955, and, counsel having stipulated to the facts,

the court entered judgment for the respondents. This appeal is from the judgment so entered. (R. 16.)

STATEMENT OF POINTS

POINT I.

THE RIGHT TO ENGAGE IN THE PROFESSION OF ARCHITECTURE IS A PROPERTY RIGHT WHICH APPELLANT IS ENTITLED TO PROTECT BY RECOURSE TO THE COURTS.

POINT II.

AN ADMINISTRATIVE AGENCY HAS NO POWER TO PASS ON THE CONSTITUTIONALITY OF A LEGISLATIVE ACT.

POINT III.

THE DECLARATORY AND INJUNCTIVE PROCEDURE IS A CORRECT PROCEDURE FOR CHALLENGING THE CONSTITUTIONALITY OF THE STATUTES IN QUESTION.

POINT IV.

SECTIONS 7 AND 13 OF CHAPTER 1, TITLE 58, UTAH CODE ANNOTATED, 1953, CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWERS.

ARGUMENT

POINT I.

THE RIGHT TO ENGAGE IN THE PROFESSION OF ARCHITECTURE IS A PROPERTY RIGHT WHICH APPELLANT IS ENTITLED TO PROTECT BY RECOURSE TO THE COURTS.

In his complaint, appellant alleges that he is competent to engage in the profession of architecture, that he desires to engage in that profession, that the respondents are threatening to prosecute him criminally if he does so without a license, that the statute requiring a license is void, and that the appellant is being required by the respondents to forego the practicing of a lawful profession or run the hazards of a criminal prosecution. He asks the court to enjoin the defendants from enforcing or attempting to enforce the void statute, so that he can engage in a lawful occupation.

The right to engage in the profession of architecture or to engage in practically any other type of business is a property right protected by the due process clauses of the State and Federal constitutions. This has been the consistent ruling of both the Utah Supreme Court and the United States Supreme Court. A recent pronouncement by the Utah Supreme Court, which collects and cites many authorities on the subject, is *Ruckenbrod v. Salt Lake County*, 102 Utah 548, 113 P. 2d 325. The court said at page 560 of the Utah Reports:

“The United States Supreme Court has consistently held that citizenship in the United States carries with it certain privileges which are protected by the Fourteenth Amendment. Thus an American citizen has the right ‘to life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law.’ *Cummings v. Missouri*, 4 Wall 277, 321, 71 U.S. 277, 18 L. Ed. 376.”

The Utah Court also quoted with approval from *Smith v. Texas*, 233 U.S. 630, 34 S. Ct. 681, 682, 58 L. Ed. 1129, as follows:

“ ‘Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.’ ”

The appellant is attempting to practice a lawful calling. His right to practice that calling is a property right which is entitled to protection from the courts.

POINT II.

AN ADMINISTRATIVE AGENCY HAS NO POWER TO PASS ON THE CONSTITUTIONALITY OF A LEGISLATIVE ACT.

Section 36 of Chapter 1, Title 58, Utah Code Annotated, provides for a court review of any action taken by the Department of Business Regulation adversely affecting any applicant for an Architect's License. This section provides as follows:

“58-1-36. Recourse to the Courts. Any applicant for or holder of a license, certificate, permit, student or apprentice card or any person directly affected and aggrieved by any ruling of the de-

partment of registration, may within thirty days after notice of such ruling institute an action in the district court of the county at the seat of government, or in the county of the aggrieved person's residence, against the director in his official capacity setting out his grievance and his right to complain. In his answer the director may set out any matter in justification; and the court shall determine the issues on both questions of law and fact and may affirm, set aside or modify the ruling complained of."

A review taken pursuant to this section can only embrace such matters as were within the power of the Administrative Agency to decide. The administrative agency could not have decided the constitutional questions involved in this action, and therefore, a statutory action to review that administrative agency's ruling could not embrace these constitutional questions. This is squarely set out by our Utah Supreme Court in the case of *Eardley v. Terry*, 94 Utah 367, 77 P. 2d 362. That was an action to review a decision of the State Engineer. The authority for court review of the State Engineer's action is contained in Section 73-3-14, U.C.A. 1953. A comparison of that language with the language of section 58-1-36 (above quoted) will show that the scope of the review is in both cases essentially a trial de novo. In the *Eardley v. Terry* case, the Supreme Court said:

"... When an appeal is taken from the decision of the State Engineer in such a case, the trial court is required to determine the same questions de novo. It determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter. The issues remain the same upon

an appeal to this court. All that the district court or this court, on appeal from the district court, is called upon to do is to determine whether the application should be rejected or approved . . .”

* * *

“It is not for the court, on an appeal from the decision of the State Engineer rejecting respondent’s application to decree to him any waters which he may be able to obtain by conserving and increasing the flow of the stream involved. It should simply determine whether the application was rightly rejected. In determining that question, the court stands in the same position as the State Engineer did . . .”

* * *

“As above noted, the proceeding in the district court was by way of an appeal from the decision of the state engineer in rejecting respondent’s application to appropriate water. Under the statute, section 1000-3014, R.S. 1933, when an appeal is taken from a decision of the state engineer, it is the duty of the court to try the cause de novo. The court had no power in the cause to decree to the respondent any water he may be able to obtain in the future by conserving and increasing the flow of the streams involved.”

POINT III.

THE DECLARATORY AND INJUNCTIVE PROCEDURE IS A CORRECT PROCEDURE FOR CHALLENGING THE CONSTITUTIONALITY OF THE STATUTES IN QUESTION.

There is a square Utah holding to the effect that declaratory and injunctive procedure is a correct procedure to be followed in challenging statutes of the kind here under dispute. The case is *Broadbent v. Gibson*, 105

Utah 53, 140 P. 2d 939. There the defendant was attempting to challenge the constitutionality of the Sunday Closing Law. The defendants were threatening to prosecute plaintiff criminally for keeping his store open on Sunday. Plaintiff contended that the law was unconstitutional and, therefore, that he had a right to stay open on Sunday and to not be harrassed by criminal actions. The plaintiff filed what he entitled a petition for a writ of prohibition to prohibit the various official from molesting his operation. The action was filed in the District Court. On appeal the propriety of using the writ was challenged. The Supreme Court devoted a major portion of its decision to the procedure which should be followed in challenging statutes of this type, and held that a suit for a declaratory judgment or for an injunction would probably have been a better remedy than the writ of prohibition. Its reasoning was that the writ is to be used only in extraordinary circumstances when no other remedy is available. The court said that the remedy of a petition for an injunction was available, and that these forms (injunction and declaratory judgment) provided adequate remedies. The court then said that since this action was filed in the District Court, it could be treated as though it had been erroneously designated as a petition for a writ of prohibition. The court, thereupon, proceeded on appeal as though the petition had been one for injunctive and declarative relief, and proceeded to consider the constitutionality of the statute. In so ruling, the Supreme Court said:

“The defendants contend that if the writ may be issued under the facts presented, injunction is ob-

tainable. Thus they argue, the petitioners do have an adequate remedy without the issuance of a writ of prohibition. While as a general rule the enforcement of a criminal statute would not be enjoined by injunction (28 Am. Jur. 372) there is one exception to this rule. An injunction will issue to restrain the enforcement of an unconstitutional statute when such restraint is necessary to prevent irreparable damage to property."

* * *

"Another limitation to the use of injunction is suggested in a recent article by Borchard, 'Challenging Penal Statutes by Declaratory Action,' Vol. 52, Number 3, June, 1943, Yale Law Journal, in which the thesis is developed that the declaratory judgment is in certain cases superior to injunction for challenging the constitutionality of penal statutes."

* * *

"In the instant case the action was commenced in the district court and came to this court by appeal. It raised substantially the same points as a petition for an injunction would have done. Under the holding of *Hoffman v. Lewis*, 31 Utah 179, 87 P. 167, and *Clark v. Bramel*, 57 Utah 146, 192 P. 111, we may disregard the form and consider this as though it were an appeal from an order refusing injunctive relief, we believe that the various factors involved are sufficient to justify an examination of the merits of the case on this appeal. We, therefore, proceed to the merits."

Of course, the tests for issuing a writ of prohibition are similar to those for issuing injunctive relief, in that in both cases the ordinary remedy at law must be inadequate. In addition, the writ of prohibition generally

would require that there be a lack or excess of jurisdiction, which is not required in the case of an injunction. There have thus been three methods of challenging the constitutionality of statutes. The ordinary citizen need not violate a criminal action and run the hazard of criminal punishment in order to determine whether or not he must comply with a statute, which he thinks is void. The Supreme Court has upheld in several cases the use of the writ of prohibition, but in *Broadbent v. Gibson*, supra, where the matter was thoroughly examined, the court indicated that the declaratory procedure or the injunctive procedure might be better, and in the *Broadbent* case, the court turned an action which was entitled as a writ of prohibition into an injunctive suit, and treated it as a petition for an injunction and proceeded to determine the merits of the controversy.

The use of declaratory and injunctive or prohibitive procedures for testing the constitutionality of statutes is well accepted and often followed. See *Wallberg v. Utah Public Welfare Commission*, 115 Utah 242 (declaratory judgment used to challenge validity of Utah's old age lien law); *Slater v. Salt Lake City*, 115 Utah 456 (declaratory judgment used to challenge validity of city ordinance prohibiting sale of magazine subscriptions). See also *Masich v. U. S. Smelting*, 113 Utah 101 (declaratory judgment to have plaintiff's right to file common law action for disability from silicosis); and *Gubler v. Utah State Teachers' Retirement Board, et al.*, 113 Utah 118 (declaratory action to determine validity of statute relating to retirement benefits); *Grenlund v. Salt Lake City*,

113 Utah 284 (declaratory action to determine validity of Sunday closing law.

Plaintiff has no adequate remedy at law. The amendment to the complaint alleges that plaintiff must either comply with a void statute or in the alternative run the risks of criminal prosecution and punishment. This problem was considered by the Supreme Court in the case of *Adolph Coors v. Liquor Control Commission*, 99 Utah 26, 105 P. 181. In that case, the Supreme Court issued a writ of prohibition to prohibit the enforcement of an unconstitutional statute relating to the bottling of beer. The propriety of using the writ was challenged, with the State contending that the petitioner had an adequate remedy. In answer to this the Supreme Court said:

“The corporation here, if forced to its remedy by appeal, must enter upon a course of conduct which will subject it to criminal prosecution throughout the state, subject it to fines, if convicted, and to a possible forfeiture of its license, if it fails to pay the fines (sections 114, 150 and 161). Should a forfeiture occur, it would mean the loss of the right to make sales held lawful by the Commission as well as those held illegal. Under such circumstances we feel that to force the case through ordinary channels of procedure would be an injustice.”

Since the statutory procedure for a review of the Commission's action could not have determined the constitutional questions involved, and since plaintiff had no adequate remedy at law, the proper procedure was to seek declaratory and injunctive relief.

POINT IV.

SECTIONS 7 AND 13 OF CHAPTER 1, TITLE 58, UTAH CODE ANNOTATED, 1953, CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWERS.

The present licensing laws for architects in the state of Utah have caused a great deal of dissatisfaction. On various occasions bills have been introduced in the legislature in an attempt to improve the licensing procedure. For example, such a bill was introduced in the House of Representatives, H.B. 81, during the 1953 legislative session. In 1954, H.B. 126 was introduced for the purpose of "enacting a new chapter relating to architects, the qualifications and examination of applicants for licenses to practice architecture . . . etc." This bill, as amended, passed the House of Representatives and subsequently passed the Senate. However, in the Senate the bill was amended, and, while the House voted to concur in the Senate amendments, it subsequently killed the bill on a voice vote. The entire matter has now been referred to the Legislative Council for study.

The particular code sections presently complained of are cited for the convenience of the Court:

"58-1-7. General duties.—It shall be the duty of the several representative committees to submit to the director standards of qualifications for their respective professions, trades or occupations requisite in applicants for license, and methods of examination of applicants. They shall conduct examinations at the request of the director to ascertain the qualifications and fitness of applicants to practice the profession, trade or occupa-

tion for which the examination may be held, shall pass upon the qualifications of applicants for licenses, certificates or permit and shall submit in writing their findings and conclusions to the director.”

“58-1-13. Action by committee prerequisite to exercise of certain functions.—The following functions and duties shall be exercised or performed by the department of registration *but only upon the action and report of the appropriate representative committee:* (Italics added)

- (1) Defining for the respective professions, trades and occupations what shall constitute a school, college, university, department of university or other institution of learning as reputable and in good standing.
- (2) Establishing a standard of preliminary education deemed requisite to admission to any school, college or university.
- (3) Prescribing the standard of qualification requisite in applicants for licenses before license shall issue.
- (4) Prescribing rules governing applications for licenses, certificates of registration, permits, student cards or apprentice cards.
- (5) Providing for a fair and wholly impartial method of examination of applicants to determine their qualifications to exercise the respective professions, trades or occupations.

These sections violate the limitations imposed on the delegation of legislative powers in three respects: 1) The director of regulation can only make provision for the qualification of architects if a board created from practicing architects first acts; 2) The licensing power

is delegated to an administrative agency without any standards having been prescribed; 3) Neither the director nor the architects' representative committee are required to give each applicant uniform and equal protection.

It is well established that the power to issue licenses may be delegated to an administrative body. However, there are well defined limitations to this power of delegation. The general law, which is in accord with the Utah decisions, is stated in 53 Corpus Juris Secundum, Sec. 15, page 508, as follows:

“Licensing enactments may validly establish a properly constituted body of officials for administrative purposes and may validly confer appropriate duties on such bodies or officials. The vesting of duties in administrative officials by an act or ordinance requiring a license or imposing an excise or license tax, however, must not amount to an unlawful delegation of legislative or judicial power, but in the application of this rule the conferment of merely administrative duties is not objectionable. Where discretion is to be exercised by administrative officials, proper standards or guides for the use of such discretion may, and, as a general rule, must be established by the enactment . . .”

In this regard the Utah Supreme Court in the case of *Rowell v. State*, 98 Utah 353, 99 P. 2d 563, stated as follows:

“In *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579, 584, 71 A.L.R. 604, the court said:

“It is a fundamental principle of our system of government that the rights of men are to be

determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether state or municipal, to determine and declare what the law shall be, and the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers.'

"The court further said:

" 'The majority of the cases lay down the rule that statutes or ordinances vesting discretion in administrative officers and bureaus must lay down rules and tests to guide and control them in exercise of the discretion granted in order to be valid . . . '

"And in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, 239, 35 S. Ct. 387, 392, 59 L. Ed. 552, Ann. Cas. 19160, it is said:

" 'The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply.'

"But in the delegation of such authority the legislature must clearly mark the course to be pursued, and the principles, facts, and purposes to serve as guide to enable the officer to carry out, not his own will or judgment but that of the legislature."

It is also clear under the Utah cases that the discretion to prescribe the qualifications and standards must reside in the administrative agency and not in some segment or group of society. This was the square holding

of the case of *Revne v. Trade Commission*, 113 Utah 155, 192 P. 2d 563. In that case an administrative agency could only act to fix prices if 70 per cent of the barbers initiated a plan for fixing minimum wages, hours, etc. The court, in holding such provision unconstitutional, stated as follows:

“... No doubt it can be said that no harm to the public can occur, as the board stands between the 70% and that public, but, the law was not passed to grant a class certain benefits so long as the public was not injured. The law was passed to protect the public health and safety by authorizing the establishment of certain prices and hours in the public interest, and yet there is no way, on behalf of the public, to initiate such security if the specified majority of the barbers refuse, for selfish reasons, to act. No other group of citizens may initiate the schedules. The board is not given power to act for the public upon its own initiative ...”

The discussions in both of the cases cited clearly demonstrate also that the provision for licensing must be such that the law itself will govern and so that each man will be treated equally and identically by the law.

One of the fundamentals of constitutional law is that by reason of the Fourteenth Amendment to the constitution of the United States no state may deny to any person within its jurisdiction the equal protection of the laws. 16 *Corpus Juris Secundum* at page 995, in discussing this question, states as follows:

“State and municipal legislation is subject to the constitutional requirement that no state shall deny the equal protection of the laws to any person

within its jurisdiction; and it is valid as complying with, or invalid as violating, this requirement accordingly as it does or does not, within the sphere of its operation, affect and treat alike, with equality and uniformity and without arbitrary or unreasonable distinction or discrimination, all persons similarly situated.”

And the following is taken from the same article, 16 Corpus Juris Secundum, Page 1014:

“... a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or impose unreasonable or unnecessary restrictions thereon. Any classification or discrimination must not be arbitrary or unreasonable; and the legislation must not be discriminatory in the sense of applying unequally to persons pursuing or engaged in the same calling, profession, or business under the same or like conditions and circumstances. The object of legislation regulating a business must be the public good and not benefit to individuals or classes; and a statute allowing one class of persons to engage in what is presumptively a legitimate business, while denying such right to others, is unconstitutional unless it is based on some principle which may reasonably promote the public health, safety, or welfare.

“Legislation may be sustainable even where the enjoyment of certain rights is limited to persons thereafter to be selected by the legislature or other governmental agency, or at least this is so where the legislation fixes standards and vests an official or department with quasi-judicial power to determine whether the requirements of the statute have been met; *but it is otherwise as to a statute or ordinance which does not prescribe any uniform rules, conditions, or regulations and confers on an officer, commission, or tribunal*

arbitrary authority and discretion to discriminate in favor of or against persons engaged in legitimate business or occupation.” (Italics added.)

The statutes in question are fatally defective in all three of the particulars above listed. There is absolutely no statutory standard prescribed to guide either the director or the architects' committee in fixing qualifications for persons to be licensed. The statute merely says :

“It shall be the duty of the several representative committees to submit to the director standards of qualifications for their respective professions, trades or occupations requisite in applicants for license, and methods of examination of applicants”

As was the situation in the *Rowell* case, the statute is utterly barren of any suggested standard of qualification which the administrative agency is to attempt to adhere to. Without legislative standard, the administrative agency can enforce its own will—not that of the legislature. It can have a changing standard of qualification, changing from applicant to applicant and from day to day. Further, the act expressly provides that the director may fix the qualifications and do the other things enumerated in Section 58-1-13 “*only upon the action and report in writing of the appropriate representative committee.*” There is thus no initiative left in the director. He cannot initiate standards of qualification, but only may establish such standards upon the action and report of a committee of architects. If the board of architects takes no action at all, the director could not prescribe any qualifications. It

was this very thing which induced the court in the *Revne* case to hold that law void.

It is, therefore, respectfully submitted that the statute in question is not constitutional because a) it sets forth no legislative standards, b) it makes the action of the director dependent upon the action of a committee of architects, and c) it has no assurance of equal and identical treatment to each applicant.

CLYDE & MECHAM

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