

1962

La Mar Peay v. Board of Education of Provo City School District et al : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

LA MAR PEAY,

Plaintiff and Appellant,

vs.

**BOARD OF EDUCATION OF PROVO
CITY SCHOOL DISTRICT, a body corpo-
rate and politic, and MERRILL CHRIS-
TOPHERSON, RAY MURDOCK, SHIR-
LEY PAXMAN, WILFORD E. SMITH,
and LA MAR EMPEY, Members of said
Board,**

Defendants and Respondents.

**CASE
NO. 9722**

RESPONDENTS' BRIEF

**Appeal from Judgment of the Fourth District Court
of Utah County
HON. R. L. TUCKETT, Judge**

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Board,

Defendants and Respondents.

**CASE
NO. 9722**

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

This action contests the validity of a special election held in Provo City School District February 6, 1962, called by the Board of Education, pursuant to Section 11, Chapter 104, Laws of Utah 1961, now identified as Section 53-7-24. Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

The appeal is taken from an order of the lower court granting respondents' motion to dismiss the complaint for failure to state a claim for which relief may be granted.

STATEMENT OF FACTS

Because it appears to us that the statement of facts in Appellant's brief inadvertently omitted certain facts and is, we believe, unduly condensed, we shall present our statement of the facts before the court.

This case was determined in the lower court on the pleadings. To the amended complaint (R. 6 ff) respondents addressed three motions: a motion to strike, a motion to dismiss the amended complaint for failure to state a claim upon which relief may be granted, and a motion for summary judgment (R. 18).

After making these motions, not before, as stated page 3 of Appellant's brief, respondents filed an answer to the amended complaint (R. 21ff) and notice of readiness for trial (R. 25). The court then set the matter for pre-trial and argument on the motions (R. 26).

The undisputed facts as shown from the pleadings are that the Board of Education of Provo City School District, pursuant to Section 11 of Chapter 104, Laws of Utah, 1961 (53-7-24, Utah Code Annotated 1953), called a special election for February 6, 1962, to vote on the following question:

"Shall the Board of Education of Provo City, State of Utah, be authorized to maintain a 'voted leeway' program as provided in Section 11, Chapter 104, Laws of

Utah 1961, not to exceed ten per cent of the minimum basic program provided by law."

The election thus called was held, the votes cast were thereafter canvassed, and the proposition declared passed by a vote of 2,224 for, and 1,829 against.

No question is raised as to the procedural manner in which the Board called the election. Except as pointed out hereafter, no question is raised as to the sufficiency of the notice of election, nor are questions raised concerning the length of time between first publication of the notice and date of the election, location of the polls, names of judges, hours during which the polls shall remain open, and the like. Except as further pointed out hereafter, no question is raised as to the conduct of the election or the canvass of returns.

The amended complaint, without citation to specific constitutional provisions, asserted that the statute under which the election was called and held is unconstitutional (a) because it is vague and uncertain, and (b) because it permitted qualified electors, without reference to whether they had paid a property tax in the preceding year, to vote on the proposition. It further alleged that the notice calling the election was insufficient to inform the electors as to the proposition they were called to vote upon.

The Appellant's pleadings nowhere raise the issue as to sufficiency of the title to Chapter 104, Laws of Utah 1961, under the mandate of Section 23, Article VI, Utah Constitution.

Respondents' answer raises a question of fact. It denied that non-taxpaying electors voted, or in the alternative,

that if they so did, there were insufficient such votes to change the result. Under the ruling of the trial court, this issue became immaterial.

Three issues of law were raised and argued at the pre-trial and argument on the motions (R. 28):

(1) Is Section 11, Chapter 104, Laws of Utah 1961 rendered unconstitutional for vagueness and uncertainty, by reason of its reference Section 53-2-12, U.C.A. '53 (which would render it unintelligible)?

(2) Is it further unconstitutional because the questioned statute does not require a property qualification of electors?

(3) Was the notice of election sufficient to inform the electors as to the proposition they were to vote upon?

The trial court found against appellant on all three issues (R. 28) and entered its order dismissing the complaint for failure to state a claim upon which relief may be granted (R. 29). The appeal is from this order.

The additional issue argued by appellant—that the questioned statute violates Section 23, Article VI, Utah Constitution—was found by the court not to have been raised in the pleadings. However, the trial court opined that the statute was not violative of that section. Though not thus raised in the pleadings, appellant argues the point in his brief, page 12, point II. We will meet that argument without a quibble on procedural grounds.

Issue number (2) above, is the questioned statute unconstitutional because it requires no property qualifications of electors voting on the proposition, was argued extensively before the trial court. It is not cited by Appellant here as a ground for reversal, nor is this point argued. We

therefore take it to be abandoned on this appeal and shall not belabor the question further. **Reid v. Anderson**, 116 Utah 455, 211 P. 2d 206.

ARGUMENT

POINT I

THE COURT CAN CORRECT THE PATENT TYPOGRAPHICAL ERROR IN SECTION 11, CHAPTER 104, LAWS OF UTAH 1961 THUS REMOVING ANY POSSIBLE QUESTION OF ITS BEING VAGUE, INDEFINITE OR UNCERTAIN.

Chapter 104, Laws of Utah 1961, establishes the method of financing operations of public elementary and secondary schools in this State. After making provision for a uniform basic minimum school program, and providing for certain other permissive sources of additional operating revenue to local boards, the Act, in section 11, here questioned, purports to give local boards of education, upon grant of authority by the electorate, power to raise yet additional revenue locally by means of additional ad valorem levy. This is referred to as the "voted leeway" program. It is this provision, invoked by respondents, which appellant here questions.

The first paragraph of section 11 states:

"With the consent of a majority of the electors of the district voting at an election or elections held for that purpose in the manner set forth in Section 53-2-12, Utah Code Annotated, 1953, any district may maintain a school program in excess of the cost of the program referred to in Sections 9 and 10 above. Said

additional program shall be known as the 'voted leeway' program of the district. Said voted leeway program shall not exceed an amount equal to 20% of the basic program of the district."

Our position is that the reference to Section 53-2-12, Utah Code Annotated 1953, for the manner of calling the election is a patent typographical error, which the court can correct, substituting therefor Section 53-7-12, Utah Code Annotated 1953.

The statute erroneously cited treats of the general powers and duties of the State Board of Education, having nothing to do with the financing of local school districts or elections. On the other hand, section 53-7-12, Utah Code Annotated 1953, treats specifically the calling of special elections by local boards of education.

Chapter 104, Laws of Utah 1961, repealed the former statutory provisions for financing public school operations, a system which also embraced the "voted leeway" theory. Among the provisions thus repealed was section 53-7-8, Utah Code Annotated 1953, which provided in part:

" With the consent of a majority of the electors of the district voting at an election or elections held for that purpose in the manner set forth in Section 53-7-12, Utah Code Annotated 1953, any district may maintain a school program in excess of the above mentioned cost in an amount not exceeding an additional 25% of the cost of the basic program"

The statute here attacked replaces this section. It makes sense, fits the over-all financing plan, and has been followed by several local districts. To refuse to read Chapter 7 in lieu of Chapter 2 in the questioned statute is to

end with a non sequitur; to read it as Chapter 7 makes the act harmonious and avoids nonsense. The legislative intent is clear. The trial court merely corrected an obvious typographical error. The rule of construction we invoke is found in 2 Sutherland, Statutory Construction (3d Ed.) pages 460-462, Sec. 4925:

"Courts have permitted the substitution of one word for another: where it is necessary to make the act harmonious or to avoid repugnancy or inconsistency, . . . where it is obvious that the word used in the act is the result of clerical error, or mistake, where the substitution will make the act sensible

"Courts have denied the power: where the word to be substituted affects the essence of the act and there is an ambiguity as to what was intended, where it would involve the exercise of a legislative function, where the act is ambiguous, where two legislative purposes are suggested and both render the act 'effective.'"

This court has followed that rule. In the case of *People vs. Hill*, 3 Utah 334(353), 3 Pac. 75, the court read a criminal statute containing a reference to a section 152 as though it were 151 in order to carry out the manifest intention of the legislature. See also *Morrison-Merrill & Co. vs. Industrial Commission*, 81 Utah 363, 18 P. 2d 295; *Chez ex rel Weber College vs. Building Commission*, 93 Utah 538, 74 P. 2d 687; *Norville vs. Tax Commission*, 98 Utah 170, 97 P. 2d 937; 126 ALR 1318.

Appellant appears to take the position that the statute in question, though read as urged by the respondents and as corrected by the trial court (R. 28), still contains an ambiguity in that the statutes referred to for the manner

of calling and conducting the election refer to taxpayers ad qualified electors who shall have paid a property tax.

We again state that though the appellant urged before the trial court that the act was unconstitutional because it provided for the voting of qualified electors in the school district without regard to property qualifications, he has abandoned this argument on appeal. He cites the references to property qualifications only on the issue of vagueness, indefiniteness and uncertainty.

It is remembered that we deal here solely with the manner of calling the election. Section 53-7-12, Utah Code Annotated 1953, provides:

“ . . . the Board of Education shall give such reasonable notice of such submission as it may deem proper and shall follow the rocedure in elections for the issuance of bonds so far as applicable.....” (Emphasis added)

The procedure for the calling and conducting of bond elections is set forth in Sections 53-10-3 to 6 inclusive, Utah Code Annotated 1953.

Appellant does not assert that respondents failed to follow the mechanical procedure set out in those sections, he merely asserts that an ambiguity exists because a property qualification is interposed on bond elections but is not interposed in “voted leeway” elections.

Under the provisions of Chapter 104, Laws of Utah 1961 we assert that we see no ambiguity; no debt is created by reason of the voted leeway election. All that was sought and all that was given by the electorate was permission or authority to operate the school system at a higher budgetary level, from local sources of revenue, than the board could otherwise provide.

POINT II

THE TITLE TO CHAPTER 104, LAWS OF UTAH 1961, MEETS THE STANDARD REQUIRED BY ARTICLE VI, SECTION 23, UTAH CONSTITUTION.

The pertinent Constitutional provision referred to states:

" . . . No bill shall be passed (by the Legislature) containing more than one subject, which shall be clearly expressed in its title."

Violation of this provision by Chapter 104, Laws of Utah 1961 is not asserted in the pleadings. However, as stated earlier, we will not belabor this question. The trial court considered it, stating "that the law is not invalid on the above grounds.' (R. 28)

This court has had several occasions to examine legislative acts in the light of that constitutional limitation. In the case of *Kent Club vs. Toronto*, 6 Utah 2d 67, 305 P. 2d 870, the court upheld a statute amendatory of the corporation code which dealt with the regulation, control and revocation of charters of non-profit social clubs, although the Act, in effect, also amended the Liquor Control Act. We quote from the opinion the court's statement defining the extent of the constitutional interdiction:

"(1) The title and the act should be surveyed in the light of the purpose of the above quoted section of the Constitution, which is to guard against the surreptitious or inadvertent inclusion of subjects in legislation without legislators and the public being aware of its contents;

“(2) Due consideration should be given to the fact that legislation is often necessarily comprehensive in covering a whole subject and that it is not invalid simply because certain portions, if considered in isolation, would seem unrelated, but is proper so long as all the provisions have a direct relationship to the subject legislated upon;

“(3) A liberal view should be taken of both the act and the constitutional provisions so as not to hamper the law-making power, but to permit the adoption of comprehensive measures covering a whole subject;

“(4) That each Act must be viewed in its entirety and upon the basis of the circumstances and conditions peculiar to it, and must be regarded as constitutional unless it plainly appears that the basic purpose of the constitutional provision is violated.”

See also **State vs. Twitchell**, 8 Utah 2d 314, 333 P. 2d 1075, and **State vs. Barlow**, 107 Utah 292, 153 P. 2d 647.

We quote the title to Chapter 104, Laws of Utah, 1961: “AN ACT ESTABLISHING THE STATE-SUPPORTED MINIMUM SCHOOL PROGRAM, STATING THE COSTS THEREOF, PRESCRIBING THE AMOUNT OF THE CONTRIBUTIONS TO BE MADE BY THE STATE AND THE VARIOUS SCHOOL DISTRICTS TOWARD THE PAYMENT OF THE COSTS THEREOF AND THE MANNER IN WHICH THE VARIOUS SCHOOL DISTRICTS MAY QUALIFY FOR PARTICIPATION THEREIN; ENABLING SCHOOL DISTRICTS TO PROVIDE ADDITIONAL SCHOOL SERVICES AND PROGRAMS; PRESCRIBING THE MANNER IN WHICH TAX LEVIES BY THE STATE SHALL BE MADE FOR PURPOSES OF MAKING SAID CONTRIBUTIONS; ENABLING THE SCHOOL

DISTRICTS TO MAKE TAX LEVIES; PROVIDING FOR THE COLLECTION OF SAID TAX LEVIES BY THE RESPECTIVE COUNTIES; PROVIDING FOR THE DISTRIBUTION OF FEDERAL FUNDS AND REPEALING SECTIONS (named sections) . . .”

It is observed from the title and from the Act itself that the Act deals comprehensively with the subject of school district operating revenue. It deals with nothing more than that. Most assuredly no one can with reason assert that the Act, in view of the title, contains the evil calculated to be avoided by means of the constitutional provision here invoked—the misleading of the public and legislature by inserting intentionally or inadvertently any provision touching upon subject matters not disclosed in the title.

The title to Chapter 104, Laws of Utah 1961, touches directly upon the subject matter contained in section 11. We quote from that title:

“ . . . ENABLING SCHOOL DISTRICTS TO PROVIDE ADDITIONAL SCHOOL SERVICES AND PROGRAMS; . . . ENABLING THE SCHOOL DISTRICTS TO MAKE TAX LEVIES . . .”

Article VI, Section 23, Utah Constitution, does NOT require the act to be restated in the title.

Appellant would have us believe that Chapter 104, Laws of Utah 1961, deals only with what is denominated the “Minimum School Program,” or that the “voted leeway” provision of section 11 does not bear upon the general subject of school district operating revenue. If this is not his position (and his position, incidentally, is not clear), then he would have us believe that the subject of a basic or mini-

mum school financing plan cannot be combined with provisions for permissive additional school operating revenue in the same act. We submit these positions are untenable.

POINT III

THE PROPOSITION SUBMITTED TO THE ELECTORS WAS CLEAR AND UNAMBIGUOUS.

The proposition placed on the ballot and published in the notice of the special election reads:

"Shall the Board of Education of Provo City, State of Utah be authorized to maintain a 'voted leeway' program as provided in Section 11, Chapter 104, Laws of Utah 1961, not to exceed ten per cent of the minimum basic program provided by law "

Appellant attacks this proposition under Point III of his brief for the reason that it does not inform the voter of "the purpose or cost of the proposed program." (Appellants brief p. 16). Authorities cited are propositions to create debt and are, we therefore submit, not in point. This litigation deals solely with maintenance and operating revenues for schools. No debt is incurred by the action of respondents here under attack.

In adopting Chapter 104, Laws of Utah 1961, the Legislature proceeded under two constitutional provisions, Article X, Section 3, Utah Constitution, and Article XIII, Section 7, Utah Constitution. These provide for the Uniform School Fund and its administration. It behooves us to review briefly these provisions and legislation adopted thereunder.

The 1946 Amendment to Article XIII, Section 7, Utah Constitution, established a policy of the State to underwrite, with limitations, a "minimum school program" throughout all districts of the State, and directed that the Legislature implement this policy by law. The original legislative pronouncement thereunder, Chapter 80, Laws of Utah 1947, established the pattern material here, and though practically each general session of the Legislature since then has amended or substituted Acts on this subject, the policy and mechanics have remained essentially the same.

The Legislature establishes a minimum school program expressed, not in rate of taxation, but in monetary cost according to the school population of the district, expressed in "distribution units," arrived at by a formula calculated to equalize certain administrative and overhead cost differentials between large and small districts. Suffice it here to point out that the determination is the operating cost or amount to be disbursed, NOT the rate of taxation.

The local board of education is then required to fix a stated levy and the additional amount, if any, required to meet the minimum school program fixed by the Legislature is then contributed from the Uniform School Fund. Since 1947, variations have been built upon this procedure, but the theory has remained constant.

By way of illustration only, a chart is included at the end of this brief, demonstrating the manner of operations of Chapter 104, Laws of Utah 1961. The minimum school program is determined by the Legislature to be \$5,400.00 per distribution unit. The local board must fix a levy of 12 mills. The difference, if any, between the sum this will

raise and \$5,400.00 per distribution unit, is contributed to the district from the Uniform School Fund.

The remainder of Chapter 104, Laws of Utah 1961, is permissive. Should the local board wish, it *may* participate in an additional state supported "leeway" operating program, expressed in monetary cost, not a fixed levy, by fixing an additional four mill ad valorem levy, the State making up the difference. At this level, the State's contribution ceases.

The Act then gives the local board the authority, should it wish to expand the operating school program further, to raise additional funds by means of an additional local ad valorem levy of six mills or a levy which will raise a sum equal to thirteen per cent of the basic program, \$5,400.00 per distribution unit.

The Act then permits the local board to establish an operating school program in addition to sums raised by the means set forth above, up to 20% of the basic program cost, \$5,400.00 per distribution unit, but to do this, the board of education must have the authority conferred by the electors of the district. This provision is contained in Section 11 of the Act, here attacked.

The proposition voted upon is definite and clear—should the board of education have authority to establish a school operating program for the district, costing an additional 10% of the basic program, \$5,400.00 per distribution unit. The mill levy could not be fixed. The election was held February 6, 1962. The assessed valuation of the district is not determined until August. The board's budget is fixed in June. Assessed valuations and school censuses change. The Legislature changes the sum per distribution unit to

be apportioned from the Uniform School Fund. The authority sought by the board from the electors is a continuing one. To attempt to phrase the proposition otherwise than done would not only be ridiculous, it would be impossible.

Neither the act nor the constitutional provisions undertake to fix levies. They merely limit the power to do so. Most of the levies for school operation, at least for the poorer districts, are not even fixed by the local boards of education. Levies, if any, for the Uniform School Fund are determined by the State Tax Commission based upon estimates of that Commission as to other available revenue sources and upon estimates of the State Board of Education as to needs. Levies to carry out the purely local efforts of boards of education above the State supported school program, are fixed by the Board of County Commissioners.

We see nothing wrong with this. Appellant points out nothing. In this State levies are generally fixed administratively, subject to limitations contained in the enabling legislation. The Legislature could as well have given the board of education the power conferred in Section 11, Laws of Utah 1961, without prior authority from the electors. It chose this additional limitation upon the additional expansion of the school program. The proposition submitted, as found by the trial court, adequately informed the electors of the authority sought by the board of education.

CONCLUSION

We are not here concerned with the wisdom or unwisdom of the Legislative arrangement for financing operations of the public schools. That is a political question not

subject to judicial review. **Allen vs. Merrell**, 6 Utah 2d, 32, 305 P.2d 490. Rather, we are concerned with the validity of an act of the Legislature and actions taken by respondents pursuant thereto.

We take it to be fundamental legal axioms that, first, a state constitution is a limitation upon the power of a legislature, and not a grant of power, second, all presumptions and intendments are resolved in favor of validity of legislative acts, and third, that a questioned statute will be given a construction consistent with validity if at all possible.

Viewed thus, and in the light of previous pronouncements of this Court, the Act here questioned is valid, the action of respondents taken thereunder proper, and appellants position is, we submit, untenable.

Respectfull submitted,

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