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Eldred R. Hamilton et al v. Salt Lake County Sewerage Improvement District No. 1 et al : Brief of Appellants

Utah Supreme Court

Golden W. Robbins; Attorney for Plaintiffs-Respondents;
J. Lambert Gibson; Attorney for Defendants-Appellants;

IN THE SUPREME COURT
of the
STATE OF UTAH

ELDRED R. HAMILTON, et al,
Plaintiffs and Respondents,

vs.

SALT LAKE COUNTY SEWERAGE IMPROVEMENT DISTRICT NO. 1, et al,
Defendants and Appellants.

Case No. 9910

BRIEF OF APPELLANTS

Appeal from a Judgment of the District Court of Salt Lake County

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STATEMENT OF CASE

This is an action to declare null and void a bond election held in Salt Lake County Sewerage Improvement District No. 1 for the purpose of raising money to construct a sewer. The case was heard in Salt Lake County, the Honorable A. H. Ellett presiding.

STATEMENT OF FACTS

The Board of Trustees of the Salt Lake County Sewerage Improvement District No. 1 voted to have a bond election, said election to be at the same time, November 6, 1962, and in the same polling places, as the general election. The Board appointed the regular registration agents of the general election to act also as registration agents for the special election and appointed separate judges of election for the bond election. The County Clerk did not furnish to the district a certified copy of registered voters residing in the Improvement District although he was so requested. He stated that it was impossible for him to do so. The County Clerk also did not furnish a list of people who had paid a property tax in the year next preceding the election. (Record 64). Some of the regular election districts were divided by the Improvement Districts.

No one was allowed to vote who was not registered and no one was allowed to vote until he had signed a statement that he had resided in the district and had paid a property tax in the District during the year next preceding. (See Exhibit D-3). Many of the voters do not appear on the tax rolls but are purchasing the property under a real estate contract and are paying the taxes. A number of wives of taxpayers were permitted to vote although the property was in the name of the husband only. The attorney for the district had ruled that such wives were not entitled to vote, but the county attorney ruled that they were entitled to vote. The bond

election was declared carried and plaintiffs' brought this action to declare the election null and void.

DISPOSITION OF CASE

The District Court ruled that the election was null and void

> "inasmuch as the County Clerk did not furnish to the defendants or any of their agents or anyone at any time, prior to the bond election, 'a certified copy of the list of registered voters residing in the improvement district outside of any municipality or incorported area', or any list of the qualified registered voters residing within such improvement district; and the inability of the County Clerk to furnish such list for lack of information as to which of the voters in regular districts 423, 436 and 444 resided within "the sewerage improvement district and which voters resided outside the boundaries of such improvement district, did not dispense with such statutory requirement nor dispense with compliance with the provisions of the resolution of the Board of Trustees substantially incorporating into the resolution the statutory requirements; and that such special bond election held November 6, 1962, was therefore null and void." (Record 78).

Defendants appealed.

ARGUMENT

POINT I

MATTERS THAT MAY BE MANDATORY BEFORE AN ELECTION OFTEN BECOME DIRECTORY AFTERWARDS.

The District Judge ruled that the provision o statute that the County Clerk prepare lists of qualifie voters was mandatory and his failure to do so mad the election void.

In the first place appellants submit that such a re quirement was not mandatory. The County Clerk hac no funds and no way of determining (1) who livec within the Sewer District in the divided districts anc (2) who had paid property taxes in the preceding year Nothing can be mandatory that is impossible. Substan tial compliance with the theory of the statute was had No person was allowed to vote who was not registered and no person was allowed to vote who did not sign the statement

> "and I am a registered voter of ..... Voting Precinct in Salt Lake County Sewerage Improvement District No. 1, Utah, and that I have paid a property tax in Salt Lake County Sewerage Improvement District No. 1 during the year next preceding November 6, 1962." Exhibit "D3".

Even if the requirement is mandatory substantial compliance rather than literal compliance is the most that can be required. State vs. Salt Lake City, 99 Pac. 255.

> "We are of the opinion that in this case there has been a substantial, if not a literal, compliance with the statute."

In the case of Morgan vs. Board of Supervisors, 192 Pacific 2nd 236, the court held that the action of

the election judges in requiring affidavits of voters to the effect that they were real property taxpayers was not an unreasonable procedure for testing voter qualifications. Another issue was whether the election judges should have required voters to produce tax receipts. The language of the opinion indicated that the court did not believe the law required such action, but did indicate that the obtaining of affidavits was in harmony with the procedure of retaining tax receipts thus suggesting that substantial compliance was had even if tax receipts were not obtained.

The case of Christensen v. Felton, 295 SW 2nd 361, holds that failure to perform a mandatory election duty does not vitiate an election unless the results of the election are affected by the failure.

It has not been shown that the results of the election would have been changed.

The case of Marks v. Jackson, 130 SW 2nd 925, is very closely in point with the instant case. In that case the statute required that properly certified lists of qualified voters be furnished the election judges and this was not done. The court held that the challenger had the burden of showing that the results of the election were changed by the illegal omission.

See also Brown v. City of Atlanta, 109 SE 666, and People v. Wilson, 62 N.Y. 186, which hold that even though proper registration is generally considered a mandatory prerequisite in a general election, chal-

lengers must show that failure to comply would affec the results.

The only purpose of the certified lists is to show prima facie the qualified voters. Even if a person were shown disqualified by such a list, he may none the less prove his qualification on the true facts. See Commonwealth v .Shrontz, 62 Atl. 910. In the Morgan case (supra) tax receipts appeared to be the proper prima facie evidence, yet the court upheld reliance on affidavits alone.

POINT II

CHALLENGERS IN AN ELECTION CONTEST MUST SHOW THAT ERRORS OR ILLEGALITY IN THE CONDUCT OF THE ELECTION SUFFICIENT TO CHANGE THE RESULTS.

The cases of Johnstun v. Harrison, 197 P 2nd 470, and Evans v. Reiser, 2 P 2nd 615, indicate the theory followed by your Honorable Court that before an election may be set aside the challengers must show that the errors are sufficient to change the results. 29 CJS 394, states

> "Where an election is contested on the ground of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result and of showing for whom or for what they were cast . . . A vote accepted by an election officer is presumed to be legal and

the burden is upon the attacking party to show illegality."

All cases cited under Point I are also applicable to Point II.

CONCLUSION

Appellants submit that the requirement that the County Clerk furnish a certified list of qualified voters within the District is merely directory and not mandatory; that substantial compliance with the wording of the law was had and complete compliance with the theory of the law was had; that no evidence was adduced to show that the results of the election would have been different if strict compliance with the terms of the law was had; that this case should be reversed and remanded for further proceedings.

There are several points which are not at issue in this appeal, but which will become vital if this case is remanded or if a new election is called. Appellants would appreciate any indication by this court for their guidance in the future.

The first such point is whether wives of taxpayers may vote. The attorney for the district ruled "No" and the County Attorney ruled "Yes." There are at least two theories to support the County Attorney (1) That all real estate is encumbered with a contingent dower interest which is included in the assessed valuation and tax paid thereon and (2) The personal property (fur-

niture, TV, stoves, etc.) are as much the wives' as the husbands' and a tax paid thereon amounts to tax or and payment by the wife.

The second such point is where property is under a contract of sale and the payments by the purchaser include the tax money which is paid in the name of the seller. Which one, (the buyer or the seller or both) is the taxpayer and entitled to vote? The State of Arizona seems to hold that the buyer only is entitled to vote. Junker v. Glendale Union High School District, 236 Pac. 2nd 1010.

Respectfully submitted,

J. LAMBERT GIBSON
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