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Ned C. Jensen, Woodrow E. Hayward, Ray F. Croshaw, A. Foss Peterson And Lowell D. Oswald v. Bountiful City : Appellant's Brief On Appeal

IN THE SUPREME COURT OF THE STATE OF UTAH

NED C. JENSEN, WOODROW E. HAYWARD, RAY F. CROSHAW, A. FOSS PETERSON and LOWELL D. OSWALD,
Plaintiffs-Appellants,

vs.

BOUNTIFUL CITY, a municipal corporation,
Defendant-Respondent.

Case No. 10930

Appellants' Brief on Appeal

Appeal from a Judgment of the
Second District Court of Davis County
HON. THORNLEY K. SWAN, *Judge*

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STATEMENT OF THE KIND OF CASE

This is an action in the nature of quo warranto filed by plaintiff property owners for a determination that a purported annexation proceeding of Bountiful City was void and invalid, and to enjoin Bountiful City from exercising any municipal powers over the territory of the purported annexation.

DISPOSITION IN THE LOWER COURT

Both parties filed motions for summary judgment supported by affidavits. The matter was heard before

the Honorable Thornley K. Swan, District Judge of the Second Judicial District, who granted defendant's motion for summary judgment and denied plaintiffs' motion for summary judgment. The effect of the trial court's decision was to uphold the validity of the annexation ordinance of Bountiful City.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the decision of the District Court and a determination that the annexation was void and invalid.

STATEMENT OF FACTS

The facts in this case are not in dispute and are set forth in the various affidavits filed by the parties in support of their respective motions for summary judgment. The material facts are as follows:

On December 7, 1966, at a regular meeting of the Bountiful City Council, an annexation petition covering the territory described in defendant's Exhibit "F" was considered by the Bountiful City Council. Following the meeting, the petition for annexation was permitted to be withdrawn because a majority of names of property owners did not appear on the petition. The petition was later recirculated, and new names obtained thereon, after which said petition was refiled on December 14, 1966 (R-42).

On December 14, the same day that the annexation petition was filed, the Bountiful City Council, in a meet-

ing designated in its minutes as a "special meeting" (R-20), acted upon the petition and passed an ordinance annexing the involved territory (R-5, 6, 7). At the December 14 meeting, a written request was filed on the part of 31 property owners that their names be removed from the annexation petition (R-38-41). This request was presented prior to the time that any action was taken on the petition by the Bountiful City Council (R-43).

The 1966 assessment rolls for Davis County (being the last assessment rolls) show the names of 373 property owners in the area covered by the purported annexation. The petition as filed on December 14, 1966, contained the names of 199 property owners whose names appear on the 1966 assessment rolls. Of the 31 persons who requested that their names be removed from the petition, it was determined that only 26 had signed the petition. Thus if the 26 names were permitted to be withdrawn from the petition, it would leave 173 names of property owners on the petition, or less than a majority as shown by the last assessment rolls (R-36).

After the annexation ordinance had been passed, Bountiful City caused to have a title search made covering the record ownership of the involved territory as of December 14, 1966. In doing so, the title searcher commenced with the 1966 assessment rolls; then added the names of all persons acquiring property in the area but whose names did not yet appear on the assessment rolls; then subtracted the names of persons whose names appear on the assessment rolls but who divested them-

selves of title as of December 14, 1966. After going through this process, it was determined that there were 431 owners of record of whom 243 signed the annexation petition (R-11). Using this formula, if the 26 withdrawing names are permitted, it leaves Bountiful City with 1.5 names over a majority.

Following the passage of the annexation ordinance, an additional petition was signed and filed in this action by some 44 additional property owners who had signed the original petition for annexation stating that they had been misinformed as to the facts concerning the advantages and disadvantages of annexation, that they desired their names to be removed from the annexation petition, that had they been given an opportunity to sign the withdrawal petition filed with the Bountiful City Council on December 14, 1966, they would have done so, and that they are opposed to the annexation (R-44-50).

Additional facts which would invalidate the annexation are as follows: The annexation petitions as they were being circulated contained no plat, map or description of the property proposed to be annexed (R-42), although said petitions referred to an attached plat (R-27). Further, the circulators of the petition misrepresented the area to be included, and descriptions of the property given by the circulators to local newspapers and published during the time of circulation were different from the property actually included in the annexation ordinance (R-43).

Plaintiffs in this action are all property owners in the area covered by the annexation. Before commencing the action, they complied with Rule 65 B (d) Utah Rules of Civil Procedure, in that they requested the Attorney General of the State of Utah to bring and maintain this action, and the Attorney General has failed and refused to do so (R-43).

ARGUMENT

POINT I.

PLAINTIFFS AS PROPERTY OWNERS HAVE STANDING TO MAINTAIN THIS ACTION.

While the authorities are divided, plaintiffs recognize that there is a line of authority holding that once an annexation ordinance is passed, the State alone may question the validity of the ordinance, the remedy being that of quo warranto. Am. Jur. Municipal Corporations, §65; 13 A.L.R.2d 1279; 18 A.L.R.2d 1255.

Under the Utah Rules of Civil Procedure, special forms or writ have been abolished, however, the old form of quo warranto is now covered by Rule 65 B (b) 1. Whereas prior to the time of the adoption of the Utah Rules of Civil Procdure the remedy of quo warranto rested solely with the State, Rule 65 B (c) now provides that the action may be brought by the Attorney General, and Rule 65 B (d) provides that a private person may bring an action in his own name if the Attorney General fails to do so after notice. Thus in Utah the

remedy of quo warranto, formerly available only to the State, is by statute given to an individual if the Attorney General fails to act. The affidavits filed in the case clearly show that plaintiffs have complied with the requirement of giving notice to the Attorney General and his refusal to act, and said facts remain undisputed.

The case of *State* vs. *Ryan,* 41 Utah 327, 125 Pac. 666, decided prior to the adoption of the Utah Rules of Civil Procedure, held that an individual property owner could not maintain an action in quo warranto to test the validity of an entity known as the "Wasatch High School District." This case was controlled by a then existing statute compelling the Attorney General to bring and maintain actions in quo warranto. The court held in the absence of a statute permitting an individual to bring an action that his remedy would be to file an action against the Attorney General, and if good cause were shown, the court would compel the Attorney General to bring an action of quo warranto on the relation of such individual. The case recognizes that an individual could maintain an action in his own name if a statute gave him said right, and the purpose of Rule 65 B (d) Utah Rules of Civil Procedure, was to provide said right and to permit a private individual to commence an action where the Attorney General fails to do so after notice (See Compiler's notes, Rule 65B (d) Utah Rules of Civil Procedure).

Although not involving similar issues, this court in the case of *Sjostrom vs. Bishop,* 15 Utah 2d 373, 393 P.2d

472, entertained an action in the nature of quo warranto. The action was filed by an individual and his capacity was not questioned either by the defendants or by the Utah Supreme Court.

The above would seem to answer any question regarding plaintiffs' capacity to maintain this action, even assuming that the least favorable authorities were applicable in Utah. It is to be noted, however, that another line of authorities as referred to in the annotations cited herein, recognize the right of an individual to maintain an action in any event, and particularly in cases where it is shown that the annexation proceedings are void. It is stated in 13 A.L.R.2d 1292 as follows:

> "In what appears to be a recognized exception to the general rule that a private individual is without capacity to attack the alteration of municipal limits or bounds, the view has been taken that where the act of alteration is absolutely void, because not authorized by law nor under color of law, it is subject to attack by anyone, whenever and wherever its validity is questioned (Numerous authorities cited)".

It appears from all of the above that regardless of what rule is adopted in Utah, the plaintiffs have full standing to maintain this action. The position of the respondent that if the plaintiffs have been wronged they have no remedy is completely untenable.

POINT II.

THE STATUTORY TEST FOR DETERMINING WHO IS ELIGIBLE TO SIGN AN ANNEXATION PETITION IS DETERMINED BY THE LAST ASSESSMENT ROLLS.

Section 10-3-1 Utah Code Annotated, 1953 sets forth the procedure for annexation and provides as follows:

> "*Whenever a majority of the owners of real property and the owners of not less than one-third in value of the real property, as shown by the last assessment rolls,* in territory lying contiguous to the corporate limits of any city or town shall desire to annex such city or town, they shall cause an accurate plat or map of such territory to be made under the supervision of the city engineer or of a competent surveyor, and a copy of said plat or map, certified by said engineer or surveyor as the case may be, shall be filed in the office of the recorder or town clerk of the city or town, *together with a petition in writing, signed by a majority of the real property owners and by the owners of not less than one-third in value of the real property, as shown by the last assessment rolls,* of the territory described in said plat; and the board of city commissioners or the city council, or board of trustees, *at the next regular meeting* thereof shall vote upon the question of such annexation. If two-thirds of all the members of the board of city commissioners or the city council or board of trustees, vote for such annexation, an ordinance shall be passed, declaring the annexation of such territory and the extension of the limits of such city or town accordingly. A copy of the map or plat duly certified shall at once be filed in the office of the county recorder, together with a certified copy of the ordinance declaring such annexation, and thereupon such annexation shall

be deemed complete, and the said territory shall be deemed and held to be a part of said city or town, and the inhabitants thereof shall thereafter enjoy the privileges of such annexation and be subject to the ordinances and regulations of said city or town." (Emphasis supplied)

It is clear from the placement of the commas in the above statute that the phrase "as shown by the last assessment rolls" applies to both the majority of owners and the one-third valuation requirement. Otherwise, the punctuation would have been "Whenever a majority of the owners of real property, and the owners of not less than one-third in value of the real property as shown by the last assessment rolls." Thus, a petition must be signed by a "majority of the owners . . . *as shown by the last assessment rolls.*"

While it is true that punctuation marks are not conclusive in the interpretation of a statute and that a court will disregard the same if there is an obvious error in punctuation, nevertheless it is presumed that the legislature in phrasing a statute knows the ordinary rules of grammar and that the grammatical reading of a statute gives it correct sense; accordingly an interpretation is to be avoided which is contrary to the grammatical construction of the statute. Am. Jur. Statutes, §252. The fact that the same punctuation is used in two places in the statute would seem to discount the possibility of a legislative error in punctuation.

Further, as a matter of policy, it would seem that the assessment roll test has great merit and would consti-

tute the most practical and better rule. Reference to the assessment rolls sets up an objective and easily determined formula by which the city authorities, the circulators of the petition, those objecting thereto, and any other interested parties, can quickly determine how many signatures are required and upon which they can rely. Plaintiffs in this case did in fact rely upon the assessment rolls and did not have time, nor did they deem it necessary, to make a complete search of the county records in determining the number of signatures necessary for the withdrawing petition. After the annexation ordinance was passed another petition was signed by some 44 additional property owners showing that they would have signed the withdrawing petition had they been given an opportunity to do so, and that they are opposed to the annexation.

It would create a very cumbersome procedure to adopt the rule suggested by defendant which requires (1) reference to the assessment rolls, (2) a search of all county records covering all of the property in the proposed area to be annexed, (3) computation of additional names of new purchasers from the time of the last assessment rolls, and (4) subtraction of those who have sold property from the time of the last assessment rolls.

Defendant argued to the trial court that the assessment roll test might under certain conditions produce an unreasonable result and suggested a hypothetical fact situation where a subdivider could subdivide his property in the early part of the year, sell all the lots, and not permit the new owners to have any voice in an annexa-

tion if a petition were filed before the end of the year. While it is true that ownership may change during the year and between the preparation of the annual assessment rolls, it is also true that there are often drastic changes in valuation. Defendant might just as well argue that if a property owner were to build a skyscraper and thus increase his valuation to the point of being 90% of all surrounding properties, that his neighbors ought not to be permitted to file an annexation petition based upon the valuation as determined by the last assessment rolls. The equitable argument of defendant when applied to both hypothetical fact situations may be equally the same, however, defendant apparently would urge the court to make inconsistent interpretations of the annexation statute. It is not uncommon in our society for an individual to temporarily lose his voting franchise for a short period when he changes his residence. Sometimes the privilege of voting must be sacrificed in favor of providing a workable and practical method of procedure to carry out the functions and processes of government. It would appear that this is what the legislature did in the instant case.

A further protection against the result of defendant's hypothetical is the statute permitting disconnection by petition to the District Court of a majoriy of real property owners where justice and equity require disannexation (See 10-4-1, 2 Utah Code Annotated 1953).

Respondent also argued to the trial court that prior to 1957, §10-3-1 Utah Code Annotated 1953, the annexation statute, did not contain a valuation requirement and

that reference to the assessment rolls was first inserted into the statute in the 1957 amendment requiring those petitioning for annexation to meet the one-third valuation requirement; it was argued from this premise that the reference to assessment rolls only applies to valuation and not ownership. This argument is without merit. In amending the statute, it would be completely unreasonable to assume that the legislature ever intended to set a different time for determining ownership from that of determining value. It would seem that any presumption in statutory interpretation should be in favor of consistency rather than inconsistency on the part of the legislature.

The legislature could have set up any number of tests for determining eligibility to sign an annexation petition. Such test might have been a majority of taxpayers. It might have been a majority of registered voters. It might have been a majority of residents in the area. Or it might have been a majority of record title owners on the date of the ordinance as defendant is attempting to assert in this case. The fact remains, however, that the legislature did not adopt any of these tests, but provided that the annexation petition must be signed by a majority of property owners "as shown by the last assessment rolls." At C. J. S. Municipal Corporations, §44, it is stated as follows:

> "In the absence of constitutional restrictions, the legislature has discretionary power to determine the conditions or circumstances under which annexation of territory to a municipal corporation may be had, and where it prescribes conditions,

> those conditions must be met before territory can be annexed."

In the instant case, the legislature in the exercise of its discretionary power, set forth the conditions which must be met for an annexation. The conditions as prescribed by statute must be met, and defendant cannot change the conditions or prescribe a different test or rule.

In the recent case of *Thompson* v. *City of Centerville,* 18 Utah 2d 174, 417 Pac. 670, the Utah Supreme Court in determining who was eligible to vote in a local bond election was called upon to determine the constitutional definition of "such qualified electors as shall have paid a property tax." In answering this question, the court stated as follows:

> ". . . so far as this act is concerned, means and since statehood has meant, those who have appeared as legal owners of real property, as is reflected on the official assessment and tax rolls, no matter who paid the taxes."

The court went on to hold that a wife, conditional sales vendee, mortgagee, mechanics lien claimant, heir or others who claim an equitable or inchoate interest in property were not eligible to vote in the election. While it could have been argued that a conditional sales vendee, for example, is a beneficial owner of property in the broad sense, the court's definition was in accordance with the language used in the Constitution.

Thus in the instant case, an owner "as shown by the last assessment rolls" must be defined and limited in accordance with the statutory language used.

POINT III

A SIGNER OF AN ANNEXATION PETITION HAS THE RIGHT TO REMOVE HIS NAME AT ANY TIME PRIOR TO THE TIME THE PETITION IS ACTED UPON.

At 27 A.L.R. 2d 604 and 126 A.L.R. 1031 are extensive annotations relating to the right of a signer of a petition to withdraw his name from the petition. The authorities are in agreement that signers may withdraw their names at any time before filing; the authorities are also in agreement that signers may not withdraw names after an ordinance goes into effect. As to the time after a petition is filed and before it is acted upon, the authorities are in disagreement. Some say that a signature cannot be withdrawn after filing, however, the majority rule is to the effect that a person may withdraw his name from a petition after filing, without any reason whatsoever, any time before the petition is acted upon. Utah is among those jurisdictions adopting the majority rule, the leading case being *Halgren* v. *Welling,* 91 Utah 16, 63 P.2d 550. This case involved an initiative petition rather than an annexation petition, but the same principle is involved. The court in its opinion stated as follows:

> "In some cases the matter of protest of withdrawal is a matter of statutory regulation. There is no provision in the initiative and referendum law of the state of Utah relating to the withdrawal of names from a petition after it has been once signed. There is no substantial reason why a person who has once signed a petition may not, at any time before the petition has been acted upon,

> withdraw his name, and if timely done, his name should not be counted. There is a division in the authorities as to whether the withdrawal must be made before the petition is filed or before it has been acted upon. The weight of authority is that the withdrawal may be made at any time before the petition has been acted upon."

The cases give many reasons for the adoption of the majority rule. Courts recognize that signers of petitions sometimes do so hastily or unthinkingly and without consideration of the results. A person's second thoughts are apt to be more deliberate and as a result of considering both sides of the issue, and would normally represent a person's best judgment.

No contractual relation is involved. There is no consideration given for any signatures and a petition contains no promise. One signature is not a consideration for another.

Analogy has been made to a civil action. After filing, a plaintiff in a civil action may withdraw or dismiss a complaint as a matter of right unless affirmative relief is sought. Courts recognize that one cannot attach more importance to a petition than to a summons and complaint in a civil action.

Cases restricting the right of withdrawal generally deal with statutory procedures where there has been reasonable opportunity to withdraw.

Applying the Utah rule and the rule adopted by a majority of courts to the instant case, if the 26 names

were removed from the annexation petition pursuant to the request of the property owners made prior to the time the petition was acted upon by the Bountiful City Council, the petition would not have contained a majority of owners as shown by the last assessment rolls and the annexation ordinance is thus invalid.

POINT IV.

THE ANNEXATION ORDINANCE WAS NOT ACTED UPON AT A "REGULAR MEETING" AS REQUIRED BY STATUTE, AND IS THEREFORE INVALID.

Section 10-3-1 Utah Code Annotated states that when an annexation petition is filed, it must be acted upon at the "next regular meeting."

Excerpts from the minutes of the meetings of Bountiful City Council held on December 7 and December 14, 1966, show that even the city itself referred to the December 14 meeting as a "special meeting" as opposed to a regular meeting (R-18, 20). It was admitted that this meeting was not held at the time Bountiful City normally and regularly schedules its City Council meetings (R-12).

The annexation ordinance was passed on the very day the petition was filed and at a special meeting. The people were not given an opportunity to fully consider the matter, and many more would have signed the withdrawing petition, as indicated by their affidavits, had there been time an opportunity to do so. It is submitted

that perhaps the very reason why the legislature required that action be taken at the next regular meeting and not at a pre-scheduled special meeting was to avoid the results of what happened in this case.

It has been held that statutory requirements in effecting annexation must be complied with strictly, particularly where a statute permits a city governing body to annex territory in direct opposition to the wishes of those whose interests are to be affected. Rhyne, *Municipal Law*, Section 2-34.

POINT V

THE ANNEXATION PETITIONS DID NOT CONTAIN A DESCRIPTION OF THE PROPERTY WHEN THEY WERE CIRCULATED, AND THUS CANNOT SUPPORT A VALID ORDINANCE.

The annexation petitions described the property by a plat, referring to "a copy of which plat is attached hereto and made a part of this petition," and also refer to "the attached map." The uncontroverted facts show that such a map was in fact not attached to the petitions and that signers were misled as to the areas to be included in the annexation. Thus the petition by its very terms was not complete when signed and circulated.

It would seem under the rule previously referred to under Point IV requiring a strict adherence to statutory requirements in annexation proceedings, that this defect would be fatal. Particularly should this rule be

applied where the defendants will be subjected to increased property taxation of Bountiful City, as is the case here.

POINT VI.

AN ANNEXATION ORDINANCE IS NOT AN EMERGENCY ORDINANCE.

The annexation ordinance of Bountiful City provided by its terms that it was a measure "necessary for the immediate preservation of the peace, health and safety of the city" and thus was to take effect immediately (R-7) rather than in the normal fashion as provided by Section 10-6-12 Utah Code Annotated 1953. It is difficult to conceive how under any stretch of the imagination an annexation ordinance would be necessary for the peace, health and safety of the city. This is but another indication of the way in which the ordinance was quickly railroaded through, contrary to the wishes of the people.

Whether or not an emergency exists would only make a difference if the court should rule against plaintiffs, in that the effective date of the ordinance would be extended beyond January 1, 1967, and the residents in the area would not be subjected to city property taxes for the year 1967.

This point is moot if the court rules with plaintiffs on the main issues, which plaintiffs respectfully urge the court to do.

CONCLUSION

Based upon all of the foregoing authorities, plaintiffs respectfully submit that the decision of the trial court in this action be reversed.

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