

1964

Harvey A. Sjostrom v. Theral V. Bishop and Ross L. Covington : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

HARVEY A. SJOSTROM,

Petitioner,

vs.

THERAL V. BISHOP and
ROSS L. COVINGTON,

Respondents.

APR 1 - 1964

Supreme Court, Utah

Case No. 10054

UNIVERSITY OF UTAH

JUN 30 1964

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BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

ADDITIONAL STATEMENT OF FACTS

The only additional facts which we wish to convey is that we cannot agree (p. 5 of petitioner's brief) that the Attorney General gave permission to bring this suit. As we read these exhibits, the most that can be said for them is a refusal by that office to bring suit, and telling petitioner, in substance, to take any action, or seek any relief he desired.

ARGUMENT

POINT 1. THE EXTRAORDINARY REMEDY (IN THE NATURE OF QUO WARRANTO), SOUGHT HEREIN IS NOT A WRIT OF RIGHT, BUT IS ADDRESSED TO THE SOUND DISCRETION OF THIS COURT.

(Note: on all points herein, and at the outset hereof it is requested that the typewritten brief heretofore submitted by respondents be considered in conjunction herewith.)

One of the most compelling reasons why this matter is discretionary with the Court is that, if such was not the case, it is not improbable that a rash of vexatious suits might develop all over the State. We think it worth while to again quote from the Idaho case of *Toncray vs. Budge*, 95 P. 26:

“The principle is now firmly established that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the Court to which the application is made, even though there is a substantial defect in the title by which the office or franchise is held. In the exercise of this discretion, upon the application of a private relator, it is proper for the Court to take into consideration the necessity and policy of allowing the proceeding, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed to gratify a relator who has no interest in the subject of the inquiry. The Court will also weigh the consideration of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application.”

In applying the doctrines above set out it seems pertinent to inquire: what public good can be accom-

plished by ousting the two respondents? On the other hand it is not difficult to imagine great public damage, inconvenience and confusion in such an ouster at the petition of any member of the public, who qualifies as to residence, etc. This theory is well put in 74 C.J.S. 184.

“The proceeding does not lie merely to establish, determine, and vindicate private rights and interests, or to redress private grievances in which the public has no interest, unless it is so provided by statute”.

We are not unmindful that some states expressly provide by statute that any member of the public (who qualified otherwise) may bring such an action. In reviewing the cases in the few jurisdictions which hold that it is not a matter of discretion we find that these cases are decided under specific statutes which gives a private citizen such right, without qualification. (Except requirements of residence, being a tax payer, etc.). We have no such statute in Utah.

We remember at the first oral arguments one member of the Court asked Mr. Sjoström who he represented, and the reply: “myself and the public. Q. No one else? A. No one else”. (This, of course from memory, and does not purport to be literal). It is inconceivable just how a private, practicing attorney can designate himself as being the legal representative of “the public.” We have elected or appointed officers for this purpose.

This Court said in the early Utah case of *People ex rel. Young et al. vs. Cohn et al.* 26 P. 928:

(*Quo Warranto*). "This is an action wherein the people must necessarily be Plaintiffs, and it is difficult to see in what other mode this particular action could be commenced and maintained so as to do substantial injustice to none."

Even in that case all the parties were contenders for the same offices, and the action was brought by the State of Utah

Thus, we contend that regardless of any other considerations treated in Mr. Sjoström's brief, the ultimate treatment of this matter rests with the discretion of the Court.

POINT 2. THE PETITIONER, IN HIS PRIVATE CAPACITY, HAS NO LEGAL AUTHORITY TO BRING THIS ACTION.

Petitioner cites the case of *State vs. Christensen*, 84 Ut. 185, 35 P. 2d 775. Members of the Court will recall this case, without extensive quotations therefrom. However, we feel that petitioner overlooked the most important portion of the opinion, as it applies to this case:

"(p. 782, bottom of left column) In a proceeding wherein the relator seeks possession of the office, he may recover only upon the strength of his own title, and not upon any infirmity or weakness in the title of defendant or respondent."

We think that case has not been overruled or modi-

fied. It does, however, place petitioner in the peculiar position of claiming greater rights as a member of the general public, than he would have as a contender for the same office.

When the District of Columbia enacted its quo warranto law the first case heard under it was *Newman vs. United States, ex rel. Frizzell*, 238 U. S. 537, 59 L. ed. 1446, 35 S. Ct. 881, it said:

“But that general interest is not a private but a public interest . . . That general public interest is not sufficient to authorize a private citizen to institute such proceedings; for if it was, then every citizen and every taxpayer would have the same interest and the same right to institute such proceedings, and a public officer might, from the beginning to the end of his term, be harassed with proceedings to try his title.”

It appears from our research that the most extensively quoted case coming from this Court is that of *State ex rel. Murdock vs. Ryan et al*, 125 P. 666, 41 Ut. 327. We have studied that case carefully and have read it many times, and we think that it is still the law of Utah:

“It is not necessary for us to pause at this time to show the nature and history of an action or proceeding in the nature of quo warranto. It must suffice to say that such a proceeding always was, and still remains, a proceeding for the purpose of determining or vindicating rights of a public, and not those of a private, nature. It is true that there are instances where statutes like ours permit a private person to bring the action

in the name of the state to determine his right to public office. Even in such a case the state or public is interested, and, unless there be a statute expressly *permitting the claimant of a public office to bring the action* (ours), it must be brought by some state official on the relation of the claimant of the office. To this effect is the great, we may say the overwhelming, weight of authority . . . By referring to the information or complaint filed by the respondent in this proceeding, it becomes apparent that he did not claim the right to any public office, nor, so far as the statements in the information are concerned, does it appear that he had any interest in the controversy except such as any other citizen and taxpayer has. Such an interest under the almost uniform holdings of the courts is entirely insufficient to sustain an action in the nature of quo warranto."

In that case it was the respondent who sought the ouster. So the parties appear in reverse to our case, but the principles announced are exactly the same.

POINT 3. LACHES. It is now more than two years since respondents took office, and the petition was filed with this court on January 9, 1964; more than two years after respondents took office, and a little more than one year and eleven months after the time specified in Title 10-6-18, 1953, even though that act be in force as claimed by Mr. Sjostrom, and which claim we dispute. The Oregon case of *State vs. School District*, 172 P. 2d 655 handles the situation in this fashion:

“In exercising its discretion, the Court may and should consider all the circumstances of the case, the motives of the relator in having the proceedings instituted, the time which has elapsed since the cause of complaint occurred, and whether the public interest will be served by allowing the information to be filed; and it may refuse leave, or decline to entertain the proceedings upon consideration of public policy, interest, or convenience or because of long, unexcused and prejudiced delay or acquiescence on the part of the person complaining.” (The delay in that case was for one year.)

That case was brought by the State, ex rel. one Hallgarth. The U. S. Frizzell case, supra, was brought ex rel., so in our case it is no excuse to say when or how the matter was brought to the attention of the Attorney General.

CONCLUSION

We conclude by reference to the various Acts under discussion, with some historical documentation and comments.

In the 1943 Utah Code under the title QUO WARRANTO, 104-66-5 in part provided:

“WHEN PRIVATE PERSON MAY BRING ACTION. A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action therefor in the name of the State, as provided in this chapter.”

That section was restricted to the writ of quo warranto. Then when our present Rules of Civil Procedure were drawn up, all of the extraordinary writs were grouped together under rule 65B.

Grounds for relief were set out in (b) (1). Then under (d) are found the provisions for actions by private persons, as follows, in part:

(d) "ACTION BY PRIVATE PERSON UNDER SUBDIVISION (B) (1) OF THIS RULE. A PERSON CLAIMING TO BE ENTITLED TO A PUBLIC OR PRIVATE OFFICE UNLAWFULLY HELD AND EXERCISED BY ANOTHER MAY BRING AN ACTION THEREFOR." (mine)

There can be no question but that this quoted portion refers to the common law remedy of quo-warranto, and it is to be specifically noted that it only refers to those who themselves claim the office, who may be entitled to bring the action. This conclusion is inescapable because of the wording of the very next sentence which commences:

"A private person may bring an action UPON ANY *OTHER* GROUND set forth in subdivision (b) (1) of this rule, only if the attorney general fails to do so after notice."

Thus, a PERSON WHO CLAIMS THE RIGHT TO HOLD OFFICE, AND TO OUST ONE WHO HAS TAKEN POSSESSION OF IT, may do so without the consent of the attorney general, and in all other cases

he must seek the consent of state authorities (the A. G. or the Governor.)

The history of 10-6-18, UCA 1953, which we understand Attorney Sjöström is relying on may throw some light on the matter at hand.

So far as we are able to determine, the contents of this section do not appear in the Compiled Laws of Utah for 1907. In later legislation it was referred to as Sec. 213, but in Compiled Laws for 1907 no mention is made in 213 of filing expense accounts, and 213 is carried under the heading: "CERTAIN CITY OFFICERS TO BE ELECTED."

There appears to be no CORRUPT PRACTICES ACT then. In the session laws, 1909, Sec. 213 was amended, but only with relation to election of certain officers, classified on a population basis, and no mention was made as to expense filings.

Then in the session laws of 1911, (page 224) Chapter 125 specifically provides for an Amendment of Sec. 213 C. L. 1907, as amended by Chapter 107, and Section 213, as amended by Chapter 107, Laws of Utah, 1909. Here for the first time appears the following:

(213. P. 228-9) "Every elective officer of cities of the first and second class shall, within thirty days after qualifying, file with the city recorder and publish at least once in a daily newspaper of general circulation within the city, the sworn

statement of all of his election and campaign expenses, *AND* (ours) by whom such funds were contributed. Upon failure to do so, the office of said officer shall become vacant, and he shall upon failure so to do, be guilty of a misdemeanor.”

The heading is CERTAIN CITY OFFICERS TO BE ELECTED. APPOINTIVE OFFICERS.

The Compiled Laws of Utah for 1917 carried the above quotation verbatim, and still carried the above underlined word, and.

The Session Laws of Utah for 1917 contains the first Act defined as a Corrupt Practices Act (p. 258) and it specifically repeals Sec. 897, Compiled Laws of Utah, 1907, and all other conflicting Acts. However, 897 of the 1907 Compiled Laws, only refers to “Betting on Election”.

It was this Act that made the provision to the effect that a candidate who fails to file his election report, be given notice of his delinquency in filing election expenses, and is given time to cure such delinquency. The Act of 1917 defines elections as follows:

(6) (page 259) “The term ‘election’ shall mean and include all general, special, or other elections provided for under the general election laws of this State, or under the election laws governing an election in any district, county, *CITY* (ours), town, or other municipality therein.”

The substance of the Corrupt Practices Act remains practically the same today. It should be remembered that at least up till 1917 the provision pertinent to this matter was carried under the general heading CERTAIN CITY OFFICERS TO BE ELECTED. APPOINTIVE OFFICERS.

In the revised Statutes of Utah, 1933, this portion of the laws was segregated as previously carried, and arranged under Sec. 15-6-18, but note on page 240 the word *and* was dropped so that the statute then read:

“A sworn statement of all his election and campaign expenses, showing by whom such funds were contributed.”

Such is the wording of Sec. 10-6-18 today, but it does make one wonder just why the word *and* was dropped.

It would not be difficult to reconcile the provisions of 10-6-18 with the provisions for notice as carried under the Corrupt Practices Act, were it not for the automatic forfeiture of office and criminal provisions, but it seems unthinkable that the law would point its finger only at the elective officers of cities of the first and second class, disqualify them from office and punish them criminally, and exempt every other elective officer in the State, counties, cities, towns, districts “or other municipality therein.”

The present UCA, 1953, 20-14-1 (6) defines election only slightly different than the 1933 Act:

“The term ‘election’ shall mean and include all general, special or other elections provided for under laws governing any election in any district, county, city, town or other political subdivision.”

We believe that the Act of 1917, which by its provision repealed “all other conflicting Acts” repealed the Act pertaining to elective officers of cities of the first and second classes, and that these Acts have been carried on the books by inadvertance or oversight.

We, therefore, respectfully submit that the petition of Harvey A. Sjostrom be dismissed, and that the alternative writ be dissolved, and for costs of court in favor of respondents and against petitioner.

Respectfully Submitted,

Preston & Harirs
31 Federal Avenue
Logan, Utah
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ERRATUM- The name of the firm of Respondent should read Preston Harris

JUN 30 1964

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Additional Authorities,
on behalf
of Respondents.

Since submitting Respondents brief we have discovered the recently decided case by this Court of Gertrude H. Snyder, v. Robert James Clune and Roy M. Stokes, No. 9936. We located this case in the green sheets, but apparently it has not yet appeared in either the Advance Sheets, nor the Reports.

This case is cited for the proposition as stated by this Court:

"When the reason for the rule is gone, the rule should vanish with it". (Also, the quotation therein from Oliver Wendell Holmes.)

Under the first corrupt practices act (page 10), presently carried under Chapter

rule carried under 10-6-18 disappears.

I, Patsy Pehrson, hereby certify that I am a secretary at the office of Preston & Harris, 31 Federal Avenue, Logan, Utah, and that on the 16th day of April, 1964, I mailed 10 copies of the Additional Authorities on behalf of Respondents to the Clerk of the Supreme Court of the State of Utah, State Capitol Building, Salt Lake City, Utah, and that on said date I also mailed two copies of the said Additional Authorities to Harvey A. Sjostrom, Attorney for Plaintiff, 375 West Center, Logan, Utah.

Patsy Pehrson