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

Utah Supreme Court

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In The Supreme Court of the
State of Utah

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HARVEY A. SJOSTROM,
Petitioner,

vs.

THERAL V. BISHOP and
ROSS L. COVINGTON,
Respondents.

Clerk, Supreme Court, Utah

Case No. 16654
UNIVERSITY OF UTAH

JUN 30 1964

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Reply Brief of Petitioner

ORIGINAL PETITION TO THE SUPREME COURT
FOR EXTRAORDINARY WRIT

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ARGUMENT

Point 1. REPLY TO RESPONDENTS POINT 1
"THAT REMEDY IS NOT A WRIT OF RIGHT BUT IS
ADDRESSED TO THE SOUND DISCRETION OF THE
COURT."

In point 1 of respondent's brief, respondents say that the extraordinary remedy is not a writ of right, but is addressed to the sound discretion of the court and quote an Idaho case in support of that proposition as well as 74 C.J.S. 184. Respondents further say that it is not hard to imagine great public inconvenience and confusion that would ensue should respondents be ousted. But they do not point out in what manner the public would be harmed

and they cannot do so. Do they mean to say that we have in this case two indispensable officers and that unless they are retained the people of Logan will suffer even though they are usurpers. But even though it is conceded (for the purpose of argument only and not admitting the same) that there would be some confusion, that is no ground that can be considered by this court to ignore 10-6-18. In 59 Corpus Juris pp. 968, Sec. 574, it is said "as courts are not at liberty to construe a statute when the language is plain, but must give effect to the legislative intent as expressed by the language, it follows that where the language adequately expresses the intention of the legislature, it must be given effect regardless of the consequence, and the fact that such effect cause hardship, or inconvenience, or even injustice, or will render another statute redundant cannot be considered by the Court." What the respondents are really asking, is for this Court to refuse to uphold a most positive and mandatory law. They further say under this point that the public has no interest in this action. In this they are mistaken for the public has great interest in upholding the law as should the individual and if the public should ever become indifferent in so doing, our nation as we know it today would not long survive.

It seems to petitioner that the authority to file this petition was given on the 19th day of January, 1964, and it was on that day that the petition was filed. If we are right in this then the merits of the case are before this Court. Counsel says that we have elected or appointed officers to look after the interest of the public. Public officers, however well intentioned, are not immune from

oversight, mistake or prejudice and therefore (b) (1) under Rule 65 B.

But what is "sound discretion." Sound discretion is discretion as settled by rules, otherwise it is sound only when the court decides as the party seeking the decision wants, and hence in practice it will come to mean a notion, whim or caprice of the judge who exercise it. So holds the court in the case of Margaret vs. the Connestgo, 2 Wall Jr. 116, 16 Federal 716, 718. And see Words and Phrases, Vol. 39, page 497.

What the respondents are really asking for is for this Court to re-in-install them in office for the law which they failed to conform to was both mandatory and self executing. They now ask this Court to make them officers de jure with all the powers that such officers have. Need we say anything more on this phase of the case?

POINT 2. REPLY TO RESPONDENTS POINT 2
"THAT PETITIONER HAS NO LEGAL AUTHORITY
TO BRING THIS ACTION."

The answer to point 2 of respondents brief is that by and through said (b) (1) under d, 65B, petitioner is given the right to bring this action.

Under this Rule a person claiming a public office in himself would be the party to bring the action. Under the old common law he evidently could not do this and it was only under Rule 104-66-5, Vol. 6, pp. 631, Utah Code Annotated 1943 that he was so allowed and under that Rule he had to bring it in the name of the state. Under

the present rule he may bring it in his own name and without security for costs. However, we do not proceed under this rule, but under the rule which says that a person may bring action upon any other ground set forth in subdivision (b) (1) of that rule, only if the Attorney-General fails to do so after notice. The words ANY OTHER means that not only may a private party bring the action if he claims the office on that ground for himself but in ADDITION to that ground he may bring action if any person usurps or unlawfully holds and exercises said office as where he has forfeited the same. All he seeks is the enforcement of 10-6-18. Not only have we been authorized by this Rule here discussed, but have the consent of the Attorney General as can easily be gathered from the exhibits in our petition for an Extraordinary Writ. In the case of First National Bank and Trust Co. of Port Chester vs. New York Title and Insurance Company 12 N.Y.S. (2) 703, 709, 171 Misc. 854, wherein it is held that: a "permit" in one sense connotes something less than consent, but in another sense may mean an authorization, it may mean consent, and may mean grant, to give leave.

About the case of State vs. Christensen, 84, Ut. 185, 35P. (2) 775, cited by petitioner — it was only cited by petitioner for the purpose of showing that statute on which the defense was based was mandatory in nature and self-executing as is 10-6-18. It was a case where a party claimed the office for himself. It would seem that the rule which we contend gives petitioner the right to proceed was spawned or brought about by the case of State vs. Elliot 13 Utah 200, 44 P. 248.

Point 3. REPLY TO RESPONDENTS PLEA OF
"LACHES."

Under point 3 respondents discuss laches and seek to maintain that there was laches. In this we disagree. May we say that the Oregon case mentioned is based on facts and law entirely different from the instant case as is the other case cited as may be gathered from our previous briefs and it would serve no useful purpose to repeat. And we further point to our argument in this brief as further reply to this point of laches as also the previous brief and typewritten brief. We know of no case where "laches" is either pleadable or provable against the enforcement of a public law such as 10-6-18. See *United States vs. Northern Pac. Ry. Co.* U.S. Wash. 61 S.C. 264, 283. And see *Words and Phrases* Vol. 24 pp. 79 and Vol. 15 page 265. Before we leave this subject we would ask this: Suppose that respondents failure to publish had not been discovered until 3 years after their qualification or had been discovered within 3 months and action immediately brought upon such discoveries, would the respondents still plead "laches." Of course not, if they follow common reason and logic. Yet the result to the respondents and public would be the same as if there had been a lapse of time in bringing action after such discovery. "Laches" is not mere delay in bringing action, but delay inducing change of position of defendants or injuriously affecting his legal rights." *Shea vs Shea* 4 N.E. (2) 1015, 1018. In what way was the position of respondents or the public altered to detriment of either by the alleged laches. None at all. The public wants the law upheld, and we ask what could be more important than that?

REPLY TO RESPONDENTS "CONCLUSION"

In respondents conclusion they say that the Act of 1917 repealed "all other conflicting Acts," but they fail to point out any conflict. And Sutherland Statutory Construction Vol. 1, pp. 466, Sec. 2013 says: "An express general repealing clause to the effect that all inconsistent enactments are repealed, is in legal contemplation a nullity." We maintain that the Act of 1917 did not repeal 10-6-18, but if it did then it has been re-enacted again and again and we do not believe it can be successfully charged that this statute has been inadvertantly left in the Code when we consider upon whom the legislature relies in the formation of these statutes.

We believe that one of the purposes of this statute requiring publication within 30 days after qualification was and is that inasmuch as all appointments are generally made within the first 30 days after an administration takes office that the people be informed as to who contributed to the campaign of the officers elected. Being so informed, the public would be alerted to see if there was any improper connection between those who contributed and appointments.

We believe it would really be "news" if the legislature and those on whom they rely be informed they have been so negligent as respondents infer and for a period of 50 years.

Counsel in his conclusion, discusses the right of petitioner to bring this action. We believe we have sufficently

answered this in the previous brief, the typewritten brief and this one and ask the Court to consider these in connection with this point so we do not repeat.

The fact remains that respondents are not even de facto officers and have no right to act as Mayor and Commissioner of Logan City in making contracts and in general have no right to carry on the city's business and submit they should be ousted as Mayor and Commissioner of Logan City.

Dated this 9th day of April, 1964.

Respectfully submitted,

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