

1952

# Ogden City v. Clyde C. Patterson : Brief of Appellant Ogden City

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Paul Thatcher; Attorney for Appellant;

---

## Recommended Citation

Brief of Appellant, *Ogden City v. Patterson*, No. 7823 (Utah Supreme Court, 1952).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1725](https://digitalcommons.law.byu.edu/uofu_sc1/1725)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

No. 7823

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

---

OGDEN CITY, a Municipal  
Corporation,

*Plaintiff and  
Appellant,*

vs.

CLYDE C. PATTERSON,

*Defendant and  
Respondent*

---

BRIEF OF APPELLANT  
OGDEN CITY

**FILED**

APR 18 1952

~~Clerk, Supreme Court~~ Paul Thatcher  
Corporation Counsel  
of Ogden City  
Attorney for Appellant

# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	5
ARGUMENT .....	6
Point 1. By the terms of Section 104-4-2 of the Judicial Code, as amended, there is no pres- ently existing office of city judge or ex- officio justice of the peace of Department No. Two of the Ogden City Court.....	6
Point 2. Even if such office exists, the defend- ant is not legally elected or appointed to such office and has no right thereto.....	30
A. A judge of the city court is ex-officio a precinct justice of the peace and no one may hold such office except by election on secret ballot by the electors of the city.....	30
(1) The office of justice of the peace is an elective constitutional office under Con- stitution of Utah, Article VIII, Sec- tions 1 and 8 .....	30
(2) Under Constitution of Utah, Article IV, Sections 2 and 8, the provision for election without secret ballot by the city electors is unconstitutional and void.....	30
B. The office of judge of a city court is an elective office and the defendant, not hav- ing been elected thereto by secret ballot of the electors, has no valid claim to such office .....	37
C. Defendant has no valid claim to the office of judge of the city court as by an appoint- ment .....	38

(1) The filing of an unopposed declaration and petition for candidacy for such office cannot be deemed a valid appointment thereto, as new Section 1 of the Judicial Code as enacted by Section 2, Chapter 26, Laws of Utah, 1951, is void for violation of the Constitution of Utah, Article V, Section 1, and Article VI, Section 29 .....	38-39
(2) Such office can be filled in the first instance only by appointment by the Mayor with the consent of the City Council, and defendants holds no such appointment .....	44
GENERAL OBSERVATION ON THE PUBLIC INTEREST .....	46
CONCLUSION .....	47

## AUTHORITIES CITED

### Court Decisions

Board of Commissioners vs. Mathews 296 Pac. 481 (Okla., 1931) .....	20
Cache Auto Company vs. Central Garage 63 Utah 10; 221 Pac. 862; 30 A.L.R. 1217 .....	9
Carter vs. Huett 259 S. W. 1057 .....	20
Childers vs. Duvall 63 S. W. 802 .....	23
City of Compton vs. Adams 203 Pac. 2nd 745, 746 .....	10-16
City of Huntington vs. Cast 48 N. E. 1045 .....	11

	Page
City of Twin Falls vs. Koehler 123 Pac. 2nd 715 (Idaho).....	21
Elliott vs. State 1 Pac. 2nd 370 (Oklahoma).....	20
Emmertson vs. State Tax Commission 93 Utah 219; 72 Pac. 2nd 467; 113 A.L.R. 1174 .....	8
Ervin vs. State 44 S. W. 2nd 280 (Texas).....	20
Excise Board of Washita County vs. Lowden 116 Pac. 2nd 700 (Oklahoma).....	20
Garrett vs. Anderson 144 S. W. 2nd 971 .....	20
Greenough vs. Town Council 71 Atlantic 594 .....	22
Gunsul vs. Ray 45 Pac. 2nd 248, 249.....	12
Herndon vs. Excise Board of Garfield County 295 Pac. 293 (Oklahoma).....	20
Holcomb vs. Spike 232 S. W. 891 .....	10-20-24
Kay vs. Moniteau County 134 S. W. 2nd 81 (Missouri).....	20
Lancaster vs. Owensboro 72 S. W. 731 (Kentucky).....	23
Leatham vs. Reger 54 Utah 491 182 Pac. 187.....	31
Lewis vs. Lackawanna County 17 Pa. Super. Ct. 25, affirmed in 50 Atl. 162.....	11-20

Love vs. Liddle	
26 Utah 62, 72 Pac. 185.....	32
Nephi Plaster and Manufacturing Company vs. Juab County	
33 Utah 114; 93 Pac. 53; 14 A.L.R. (NS) 1043.....	8
Ohio & M. Ry. Co. v. Todd	
91 Ky. 175; 15 S. W. 56.....	43
Osborn vs. Rogers	
19 N. J. Equity 429.....	14
Palka vs. Walker	
124 Conn. 121, 198 Atl. 265.....	14
Park vs. Rives	
40 Utah 47, 119 Pac. 1034.....	34-38
In re Park	
8 Fed. 2nd 544 .....	14
People ex rel. Shumway vs. Bennett	
29 Mich. 451; 18 Am. Rep. 107.....	43
People vs. Wong Wang	
28 Pac. 270 (California).....	21
Puterbaugh vs. Wadman	
123 Pac. 804 (California).....	21
Rice vs. Foster	
4 Hav. 479 .....	43
Rich vs. Industrial Commission	
80 Utah 511; 15 Pac. 2nd 641.....	36
Rouse vs. Thompson	
288 Ill. 522; 81 N. E. 1109.....	43
Sandy vs. Thomas	
66 S. W. 2nd 449.....	14
State vs. Asbell	
57 Kan. 403; 46 Pac. 770.....	18

	Page
State vs. Braskamp	
54 N. W. 532 (Iowa).....	21
State ex rel. Brunjes vs. Bockelman	
240 S. W. 209 .....	15-17-18-19-29
State vs. DeHart	
131 Pac. 2nd 156 (Washington).....	21
State ex inf. Hadley v. Washbury	
167 Mo. 680; 67 S. W. 592; 90 Am. St. Rep. 430.....	43
State vs. Hendrickson	
57 Utah 15; 245 Pac. 375; 57 A.L.R. 786.....	9
State vs. Schorr (Delaware, 1948)	
65 Atl. 2nd 810 .....	42
State vs. Wooten	
122 S. W. 1101, 1103.....	11
In re. Thompson's Estate	
72 Utah 17; 269 Pac. 103.....	8
Tucker vs. State (Indiana, 1941)	
35 N. E. 2nd 270, 301, et seq.....	41
Underwood vs. Hickman	
39 S. W. 2nd 1034.....	11-21-24
Varble vs. Whitecotton	
190 S. W. 2nd 244.....	21
Winters v. Hughes	
3 Utah 443; 24 P. 759.....	43
Wolfe vs. City of Moorhead	
107 N. W. 728 .....	22

## STATUTES CITED

*Federal Constitution and Statutes*

Constitution of the United States, Article I, Section 2.....	9
Constitution of the United States, Article I, Section 9.....	9
13 U.S.C.A. 4 and 213.....	2
13 U.S.C.A. 21 and 42.....	18
13 U.S.C.A. 202 .....	2
13 U.S.C.A. 206 .....	2-12
13 U.S.C.A. 218 .....	26

*Utah Constitution and Statutes*

Constitution of Utah, Article IV, Sections 2 and 8.....	5-30-33-34
Constitution of Utah, Article V, Section 1 .....	6-39
Constitution of Utah, Article VI, Section 29 .....	6-39-40
Constitution of Utah, Article VIII, Sections 1 and 8.....	5-30-32-33
Chapter 112, Laws of Utah, 1947.....	25
Chapter 26, Laws of Utah, 1951.....	1-3-4-33-45
Chapter 56, Laws of Utah, 1951.....	22
Judicial Code, Section 1 (Enacted by Chapter 26, Laws of Utah, 1951) .....	4-6-38-44



Judicial Code, Section 104-4-2 (Amended by Chapter 26, Laws of Utah, 1951) .....	3-5-6-28-29-37
Judicial Code, Section 104-4-3 (Amended by Chapter 26, Laws of Utah, 1951) .....	28-29-44
Judicial Code, Section 104-4-4 (Amended by Chapter 58, Laws of Utah, 1951) .....	32
Section 15-8-68 U. C. A. 1943.....	17-27
Section 19-22-1 U. C. A. 1943.....	36
Section 20-4-2 U. C. A. 1943 Amended by Chapter 35, Laws of Utah, 1943).....	3
Section 25-6-5 U. C. A. 1943.....	34
Section 25-11-1 U. C. A. 1943.....	34
Section 25-11-3 U. C. A. 1943.....	34
Section 88-2-11 U. C. A. 1943.....	9
 TEXTS AND LEGAL ENCYCLOPEDIAS CITED	
4 A. L. R. 205.....	31
172 A. L. R. 1366.....	31
18 Am. Jur. "Elections" Section 191, Page 307, Note 9.....	35
50 Am. Jur. "Statutes" Section 28, Page 228, Note 17.....	8
91 American State Reports 682.....	35
Annotated Cases, 1913D 614.....	35
Black's Law Dictionary, Second Edition, Page 817.....	18
67 C. J. S. Page 121, Note 49.....	31
15 Cyc. 289 .....	34

# IN THE SUPREME COURT of the STATE OF UTAH

---

OGDEN CITY, a Municipal  
Corporation,

*Plaintiff and  
Appellant,*

VS

CLYDE C. PATTERSON,

*Defendant and  
Respondent*

---

## STATEMENT OF FACTS

This action was brought by the Appellant Ogden City seeking a declaratory judgment declaring, first, that no office for a second judge of the Ogden City Court and ex-officio justice of the peace presently exists under Chapter 26, Laws of Utah, 1951, and, second, that even if such office exists the defendant is not legally elected thereto and entitled to hold the office and receive the emoluments.

Appellant appeals from an adverse judgment on both issues.

There is, we believe, no dispute on the facts. They are set out in the Findings of Fact as amended. (R 013 to 021).

The defendant is an attorney possessing all qualifications to entitle him to aspire to office as a judge of the City Court of Ogden City. (R 013.)

The population of Ogden City as determined by the official United States Census for 1940 was, at the date of that census, 43,688. (R 014.)

On April 2, 1950, the U. S. Bureau of the Census, pursuant to Federal law to take the 1950 census, including an official census of Ogden City. In accord with Federal law the returns reflecting the count of the population of Ogden City were forwarded to the District Supervisor, and the enumeration was in due course forwarded to the Director of the Census at Washington. (R 014.)

Under Federal law the enumeration was taken as of April 1st, and returns sent to the supervisor within 30 days of April 2nd. (13 U. S. C. A. 206). The tabulation of total population by states was required to be completed by December 2, 1950. (13 U. S. C. A. 202).

On or about June 14, 1950, the District Supervisor of the Census at Ogden by letter addressed to the Mayor of Ogden, in form illustrated by Exhibit C, advised the Mayor that a preliminary count showed Ogden's population as of April 1, 1950, at 56,908. (R 030-031.)

On August 25, 1950, the Director of the Census, pursuant to the provisions of 13 U. S. C. A. 4 and 213, issued a preliminary bulletin and report announcing, subject to later revision, the result of a preliminary count of the Census returns of the population of Ogden

and other places in Utah. That bulletin stated that the population of Ogden on April 1, 1950, was 56,910. (R 014, Exhibit B.)

On March 8, 1951, the Legislature passed the Bill appearing as Chapter 26, Laws of Utah, 1951, which became effective May 8, 1951. By Section 104-4-2 of the Judicial Code, as amended by that law, it is provided that at the 1951 Municipal Election and thereafter city judges shall be elected as follows: "In cities having a population, as determined by the next official census and each official census thereafter of 50,000 and less than 100,000 there shall be two city judges;" in cities with a larger population 3 or 4 judges; "and in other cities having a city court there shall be one city judge.."

Ogden, of course, then had one city judge. (Section 20-4-2, U. C. A. 1943, as amended by Chapter 35, Session Laws of Utah, 1943.)

Then, on June 17, 1951, the Director of the Census issued his final bulletin and report on the population of Ogden on April 1, 1950. By that report the population was shown to be 57,112. (R 014, Exhibit B.)

On July 31, 1951, the defendant filed with the Ogden City Recorder a declaration of his candidacy for the office of Judge of the Ogden City Court "created by Chapter 26, Laws of Utah, 1951," supported by the required petition of one hundred voters. (R 002, paragraph 7; \*\*6; 010, paragraph 6; 014-5.)

At about the same time several other judicial candidates filed for the office of City Judge then held by the incumbent. This office the Recorder designated as Judge

of the First Division; the office sought by defendant was designated as Judge of the Second Division of the City Court. (R 015.)

On August 7, 1951, no other candidate for Judge of the Second Division having filed within the statutory time limit, the defendant, pursuant to Section 1 of the Judicial Code as enacted by Chapter 26, Laws of 1951, demanded and received of the City Recorder a certificate of election to the office of Judge of the Second Division. (R 015; 003, paragraph 10; 008; 010, paragraph 6.)

The Municipal Election was held on November 6, 1951, but at that election the only judicial selection ballot submitted to the electors was the ballot for election of a judge to Department No. 1 of the City Court. No ballot for election of a judge of Division No. 2 was ever submitted to the electors, and defendant's name was never submitted to the voters at any election or on any ballot. (R 019-20; 015-16.)

On December 4, 1951, the Council of Ogden City, feeling that there was no need for a second judge, as the court seemed able to keep its work current with one judge, took the position that they would, as an economy measure, refuse to create the second job if that was legally possible (R 025-6, Exhibit A), and directed a letter to defendant inviting him to present his point of view. (Ibid.)

On December 27th, after hearing Mr. Patterson, the Council defeated a motion to strike the salary of

the second judge from the proposed budget, but unanimously passed a motion directing the institution of this action for a declaratory judgment to settle the legal problems involved. (Ibid.)

On December 31, 1951, the Council adopted the proposed budget, which included an item of \$5,000.00 as salary for the second judge. (R 028-9.) On the same day the defendant presented to the Recorder his oath as judge of the disputed Division No. Two, and the Recorder accepted and filled it. (R 029.)

## STATEMENT OF POINTS

1. By the terms of Section 104-4-2 of the Judicial Code, as amended, there is no presently existing office of city judge or ex-officio justice of the peace of Department No. Two of the Ogden City Court.

2. Even if such office exists, the defendant is not legally elected or appointed to such office and has no right thereto.

A. A judge of the city court is ex-officio a precinct justice of the peace and no one may hold such office except by election on secret ballot by the electors of the city.

(1) The office of justice of the peace is an elective constitutional office under Constitution of Utah, Article VIII, Sections 1 and 8.

(2) Under Constitution of Utah, Article IV, Sections 2 and 8, the provision for election without secret ballot by the city electors is unconstitutional and void.



- B. The office of judge of a city court is an elective office and the defendant, not having been elected thereto by secret ballot of the electors, has no valid claim to such office.
- C. Defendant has no valid claim to the office of judge of the city court as by an appointment.
- (1) The filing of an unopposed declaration and petition for candidacy for such office cannot be deemed a valid appointment thereto, as new Section 1 of the Judicial Code as enacted by Section 2, Chapter 26, Laws of Utah, 1951, is void for violation of the Constitution of Utah, Article V, Section 1, and Article VI, Section 29.
- (2) Such office can be filled in the first instance only by appointment by the Mayor with the consent of the City Council, and defendant holds no such appointment.

## ARGUMENT

POINT 1. *By the terms of Section 104-4-2 of the Judicial Code, as amended, there is no presently existing office of city judge or ex-officio justice of the peace of Department No. Two of the Ogden City Court.*

Whether or not the office claimed by defendant has legal existence depends upon the interpretation of the language the Legislature used in Section 104-4-2 of the Judicial Code, as amended. The key phrase, as appellant sees it, is the following:

*“In cities having a population, as determined by the next official census and each official census thereafter of 50,000 and less than 100,000 there*

shall be two city judges; . . . and in other cities having a city court there shall be one city judge.” (Italics added.)

It is submitted that under this provision Ogden City has only one city judge until it appears by an official census taken *subsequent* to May 8, 1951, (the effective date of the Act) that Ogden City has a population between 50,000 and 100,000. It is not enough that by an official census taken *prior* to May 8, 1951, the city had a population in excess of 50,000.

In the interpretation of this statute it must be considered that there are at most only three possible meanings of the phrase “population as determined by . . . . census.” They are:

1. The actual number of people living in the city;
2. The actual number of people listed on the enumeration sheets of the census; and
3. The official announcement by an officer or employee of the Census Bureau of the count of the number of names listed on the census sheets.

It is very apparent that the Legislature was not referring to the actual population, first, because such an interpretation would make the reference to the official census meaningless, and, second, because as a practical matter determination of actual population is an almost impossible task.

It is the city’s position that the second alternative, namely, the number of people listed on the census enu-



meration sheets is the correct one and it is submitted that this position is supported by reason and the cases hereinafter referred to.

In the court below the respondent chose the third alternative. However, it is submitted that this alternative does violence to the language used by the Legislature and adherence to that alternative would amount to judicial legislation.

It is, of course, fundamental that in construing a statute an attempt must be made to arrive at the intention of the Legislature. That intention is to be derived from the words and language used in the light of the surrounding circumstances. The general rule is that the words used by the Legislature must be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them.

50 Am. Jur. "Statutes"

Section 28, Note 17, Page 228;

Emmertson vs. State Tax Commission

93 Utah 219; 72 Pac. 2nd 467;

113 A. L. R. 1174;

Nephi Plaster and Manufacturing

Company vs. Juab County

33 Utah 114; 93 Pac. 53;

14 A. L. R. (NS) 1043.

Also, "words in common use are to be given their natural, plain, ordinary and commonly understood meaning."

59 C. J. 975, Note 20;

In re, Thompson's Estate

72 Utah 17; 269 Pac. 103;

State vs. Hendrickson  
57 Utah 15; 245 Pac. 375;  
57 A. L. R. 786;

Cache Auto Company vs.  
Central Garage  
63 Utah 10; 221 Pac. 862;  
30 A. L. R. 1217.

The Legislature also has spoken on this subject:

“Words and phrases are to be construed according to the context and the *approved usage of the language* . . . .”

Section 88-2-11, Utah Code Annotated, 1943.  
(Italics added).

What then is the meaning of the keys words used by the Legislature? Let us consider each of them in its natural, plain ordinary and commonly understood meaning.

First, what is a census?

The Federal Census is taken pursuant to the requirements of the Constitution of the United States. Article I, Section 2 provides that representatives and direct taxes shall be apportioned among the several states according to their respective “numbers” and that “The actual enumeration shall be made within three years after the first meeting of the Congress of the United States” and every ten years thereafter. Article I, Section 9 of the Federal Constitution provides that no direct tax shall be laid “unless in proportion to the census or enumeration hereinbefore directed to be taken.” There

is no other reference to the census and the Federal laws do not define a census. Apparently the drafters of the Constitution used the word census as the equivalent of the word enumeration.

Webster's New International Dictionary, Unabridged, Second Edition, defines a census as:

“An official enumeration of the population of a country or a city or other administrative district, generally with classified information relating to social and economic conditions.”

The same work defines “enumeration”, in the sense in which it is obviously used in the above definition, as

“An itemized list or catalog; a census.”

The California Court in

City of Compton vs. Adams  
203 Pac. 2nd 745, 746,

says that:

“A census is an official enumeration of the population of . . . . . a city.”

Again in the case of

Holcomb vs. Spike  
232 S. W. 891,

decided by the Texas Court of Civil Appeals in 1921, it is said:

“A census must be an official enumeration of the people, and as such a public record containing not merely a sum total, *but an official list of the names of all inhabitants.* . . .”

And again in the case of

State vs. Wooten  
122 S. W. 1101, 1103,

it is said that:

“A census of a city is an official enumeration of the inhabitants with details of sex, age and family. It is a public document to be preserved in the archives of the city, *rather than a mere sum total of the inhabitants.*” (Emphasis added).

And in an Indiana case,

City of Huntington vs. Cast  
48 N. E. 1045,

it is said:

“A census is not merely a sum total, but an *official list* containing the names of all the inhabitants.”

Again in

Lewis vs. Lackawanna County  
17 Pa. Super. Ct. 25,  
affirmed in 50 Atl. 162,

the court said:

“The census is the enumeration of the population, *not the announcement of the result.*”

This definition was quoted with approval by the Tennessee Supreme Court in the case of

Underwood vs. Hickman  
39 S. W. 2nd 1034.

It seems clear from a reading of the Federal Statutes relating to the census that the Congress used the

term to refer to the enumeration and not to the bulletins announcing the results of the statistical survey of the enumeration. See for example,

13 U. S. C. A., Section 206  
where it is said:

“The census of the population . . . shall be taken as of the first day of April, and it shall be the duty of each enumerator to commence the enumeration of his district on the day following”

The census, then, is *the list of the population taken by the enumerators during the thirty (30) days beginning April 2, 1950, and forwarded to the census supervisors before the end of that period.*

Next what is meant by the word “official” as used in referring to the census?

Webster’s New International Dictionary, Unabridged, Second Edition, defines the word in the following terms:

“Of or pertaining to an office, position or trust; connected with holding an office; as *official* duties or routine.

“Derived from the proper office or officer, or from proper authority; made or communicated by virtue of authority; authorized; authoritative; as, an *official* statement.

“Prescribed or recognized as authorized, as, an *official* ballot.”

See also:

Gunsul vs. Ray  
45 Pac. 2nd 248, 249,

decided by the California Appellate Court.

It is apparent that the word "official" as used in the statute refers to *a census taken by a public officer under authority of law*. It might be either a census taken by Federal officers or by state or city officers, so long it is authorized by law.

We come then to a consideration of the word "next", which may well be the crux of the matter when used as a modifier of the term "census" in the statute in question. The word "next" has several meanings and the meaning to be ascribed to a particular use of the term must be ascertained from the context. Webster defines it as follows:

"Nearest; having nothing similar intervening; as: *a.* adjoining in a series; immediately preceding or following in order . . .

"*b.* Following that approaching (as a season), or in progress (as a piece of work); as, I cannot go this Christmas, but I hope to go *next* (Christmas)."

The definition of the term as an adverb also sheds some light upon its ordinary meaning. Webster gives this definition:

"1. In the time, place or order nearest or immediately succeeding; as, *next we* drove home; . .

"On the first occasion to come; as, when *when* we meet."

It is apparent that in the ordinarily accepted meaning of the word "next," when used without some other qualifying term, means the next hereafter or the next succeeding. In ordinary conversation referring

to events occurring in a series the use of the word "next" to refer to the last preceding event is practically unknown. When the ordinary person speaking English says "next day" he does not mean yesterday, he means tomorrow, unless he qualifies next by saying "next preceding." "Next" used alone and without qualifiers in ordinary usage refers to the future and not to the past as indicated by the quoted definitions.

The cases in which the problem has been considered in a situation like this are in accord:

"Next" means that which comes after.

Sandy vs. Thomas

66 S. W. 2nd 449.

"Next" means subsequent.

Osborn vs. Rogers

19 N. J. Equity 429.

"Next" means nearest immediately following.

In re Park

8 Fed 2nd 544.

See also the case of

Palka vs. Walker

124 Conn. 121,

198 Atl. 265.

There, under a constitutional provision giving the governor power to grant reprieves after a criminal conviction until the end of the "next" session of the General Assembly and no longer, it was held that the word "next" did not refer to a session of the Assembly in existence when the reprieve is granted, but referred to the session which begins thereafter.



See also the case of

State ex rel. Brunjes  
vs. Bockelman.  
240 S. W. 209,

hereafter more fully discussed.

If then the Legislature had intended the census of April 1, 1950, to be the criterion for the classification of cities as to the number of city court judges, it would normally have said:

“As determined by the *last preceding* official census and each official census thereafter.”

It did not do so.

As will appear later in this brief, many legislatures have taken that natural and easy step when referring to a census taken prior to the effective date of the law and it certainly should not be presumed that the Legislature turned its back upon these precedents and used a different word without intending a different meaning.

The Legislature, if it intended the act to be immediately effective, could have said with equal ease and definiteness that the classification of the city should be “determined by the United States Decennial Census for the year 1950, and by each official census thereafter.” It did not do so. It chose to use the phrase “next official census.” It must then have intended a different meaning by the use of the different term. The Legislature knew when it sat that the census for 1950 had been completed. The fact that Ogden City, which is the only city within the population range specified,



had a population of approximately 57,000 as determined by that census was a matter of common knowledge. Official notice thereof had been given by the preliminary announcements of the District Supervisor and the Director of the Census himself issued many months before the Legislature convened. When it used the term "next" under these circumstances it could not, it is submitted, have referred to anything except a census in which the enumeration should be taken after the effective date of the law on May 8, 1951.

If the query be raised as to why the word "next" was used instead of the phrase "United States Decennial Census for 1960 and each official census thereafter," the answer is obvious: There may be other official censuses between May 8, 1951 and the decennial census of 1960. The Legislature intended that the next official census after May 8, 1951, should establish the class. The Constitution of Utah itself provides for an official state census to be taken in 1905 and and every tenth year thereafter, and although such census has not been taken in the past it is not to be presumed that it will not be taken in 1955, especially in the light of the agitation for a re-apportionment of State Senators and Representatives. It is a general rule of law that public officers will be presumed to perform their official duties.

Moreover, there may be other official censuses than the state and Federal Decennial censuses. See.

City of Compton vs. Adams  
203 Pac. 2nd 745,

decided by the Supreme Court of California in 1949.

See also section 15-8-68, U.C.A. 1943, authorizing the city itself to provide for a census.

It is submitted then that under the generally accepted meaning of the words used, the phrase "next official census" as used by the Legislature refers to an enumeration of the population taken by a public official under authority of law at a time subsequent to May 8, 1951. It does not and cannot refer to the report of the final audit of the population of Ogden issued on June 17, 1951.

Such is the decision in the only case directly in point which the plaintiff has been able to find by a prolonged and diligent search. The case is

State ex rel. Brunjes  
vs. Bockelman  
240 S. W. 209,

decided by the Missouri Court. In that case a statute passed in 1919 and approved May 27, 1919, provided that "on and after the first day of January, 1921, the prosecuting attorney shall receive for his services" certain specified sums graduated according to the population of the county in which he served. The statute further provided that:

"The number of inhabitants . . . . shall . . . be ascertained by multiplying the whole number of votes cast at the last preceding presidential election by five until after the population . . . . shall have been ascertained by the *next decennial census* of the United States."

The court first held that under the provision first above quoted the statute was effective and spoke as of January 1, 1921. The 1920 census was taken as of January 1, 1920. See

13 U. S. C. A., Sections  
21 and 42.

The final results apparently were not announced until after that effective date. It was argued that the words "next decennial census" of the United States used in the act of 1919 (which became effective January 1, 1921) under these circumstances referred to the 1920 census. The court rejected this contention, saying (Page 212):

"Bearing in mind that the law became effective January 1 1921, the words 'last preceding presidential election would mean and apply to the election in November, 1920 and the words 'next decennial census of the United States' would not refer to the census taken in 1920, but to the one to be taken in 1930. The word 'next' used in a law passed or becoming effective in 1921, could not refer to the census of 1920. As used in statutes of this character, the word has the meaning of 'following' or 'immediately following'. Black's Law Dictionary, Second Ed., Page 817; State vs. Asbell, 57 Kan. 403; 46 Pac. 770. It at least could not refer to something that had gone before."

The plaintiff respectfully submits that this case is exactly in point and should be followed here.

While State vs. Bockelman, supra, is the only case the city has found which is exactly in point, there are a number of cases arising under the exact converse of

the statutory situation, that is, in cases where the Legislature directed that official action be taken depending upon population as shown by the "last" or the "next preceding" census. The reasoning used by the courts in these cases is very helpful, for in many of them the time when official action was taken fell, as here, between the "preliminary" announcement of census results, and the "final" announcement by the Director of the Census.

In these cases it was held that the Federal Census is complete and "official" not later than the day the Director of the Census issues a *preliminary* report on the count of the political unit in question. By some of the cases it is even held that the census when taken relates back to the date as of which the enumeration is made and is effective for all official purposes from that time.

Under these decisions it is very clear that the 1950 census was complete and official not later than August 25, 1950 when the Director's official bulletin of the preliminary count was issued. As of that date, if not earlier, the 1950 census became official history, and when the Legislature, in an act taking effect nine months later, referred to the "next" official census it could not possibly refer to the "last" official census which was already history. These cases therefore give strong support to the Bockelman case and to the position of the city in the case at bar.

It is also interesting to note that many of these cases hold that public administrative officials are bound

to take official notice of the population as disclosed by the Federal Census at least from the date of the issuance of a preliminary bulletin.

For the sake of brevity no attempt will be made to discuss these cases individually. They are the following:

Lewis vs. Lackawanna County  
17 Pa. Super. Ct. 25,  
Affirmed 50 Atl. 162;

Ervin vs. State  
44 S. W. 2nd 280 (Texas);

Holcomb vs. Spike  
232 S. W. 891;

Garrett vs. Anderson  
144 S. W. 2nd 971;

Elliott vs. State  
1 Pac. 2nd 370 (Oklahoma);

Herndon vs. Excise Board  
of Garfield County  
295 Pac. 293 (Oklahoma);

Board of Commissioners vs.  
Mathews  
296 Pac. 481 (Okla., 1931);

Excise Board of Washita  
County vs. Lowden  
116 Pac. 2nd 700 (Oklahoma);

Carter vs. Huett  
259 S. W. 1057;

Kay vs. Moniteau County  
134 S. W. 2nd 81 (Missouri);

Underwood vs. Hickman  
39 S. W. 2nd 1034 (Tennessee);

City of Twin Falls vs. Koehler  
123 Pac. 2nd 715 (Idaho);

State vs. DeHart  
131 Pac. 2nd 156 (Washington);

State vs. Braskamp  
54 N. W. 532 (Iowa);

Puterbaugh vs. Wadman  
123 Pac. 804 (California);

People vs. Wong Wang  
28 Pac. 270 (California).

There are a number of cases dealing with the general subject of the effective date of a census which neither aid nor hamper the City's case. The respondent relied on some of them in the court below. However, it is submitted that all of them are distinguishable. In an effort to be of some assistance to the court brief consideration will be given to these cases.

The first is the Missouri case of

Varble vs. Whitecotton  
190 S. W. 2nd 244,

decided in 1945. There the manner of impanelling a petty jury depended on the population of the county "according to the last national census." The taking of the 1930 census, as of April First, was begun April Second. In June and July newspaper releases declared the results in round numbers. In November a jury was impaneled. On December Twenty-second, for the first time, a population bulletin was released by the Census Bureau itself. It was held that for the purposes of

the statute there under consideration the census was not in effect until December Twenty-second. It is to be observed, however, that the Varble case differs from the case before this court because, at the time the petty jury was there drawn, there had not even been a preliminary bulletin issued by the Bureau of the Census, while in the case before this court at the time Chapter 56, Laws of Utah, 1951, became effective the preliminary official bulletin had been issued and promulgated many months previous thereto and in fact many months prior to the time the Legislature convened. The Varble case is not in point.

Another distinguishable case is

Wolfe vs. City of Moorhead  
107 N. W. 728,

decided by the Supreme Court of Minnesota in 1906. That arose under a census conducted pursuant to a state statute. Apparently Section 18 of the Act specified when the census went into legal effect for the court says:

“The census went into legal effect upon its compilation and publication by the superintendent. *Section 18.*”  
(Italics supplied.)

Of course, if a statute provides when the census is effective, the statute must be followed.

The case of

Greenough vs. Town Council  
71 Atlantic 594,

decided by Rhode Island in 1909 is not helpful because there the critical action was taken after the *final* returns of the census had been compiled and filed so that no question in fact arose.



Again the case of

Lancaster vs. Owensboro  
72 S. W. 731 (Kentucky)

is not in point because, as is very apparent, in that case the ordinance under which the city census was taken provided that the enumeration would not be complete until the Council disclosed the result and adopted the work of the enumerators after it had been filed with the Council.

Again the case of

Childers vs. Duvall  
63 S. W. 802,

decided by the Arkansas Court in 1901 is distinguishable. Moreover, it would appear that what the court had to say on the point here involved was obiter dicta. In that case the constitution provided that until the county exceeded 15,000 inhabitants the circuit clerk should be ex-officio clerk of the county and probate courts, but when the population exceeded that figure "as shown by the last Federal Census" there should be a separate county clerk who would be ex-officio clerk of the county and probate courts. In March, 1900, the Democratic Party, anticipating a population of more than 15,000 nominated Duvall as county clerk. The 1900 census was taken as of June First and enumeration completed before July First. On September 3, 1900, Duvall was elected county clerk. On October 3, 1900, the Census Director published a bulletin announcing that the population exceeded 15,000. On October 31, 1900, the governor *appointed* Duvall to be county clerk so that it appears that Duvall claimed the office both by election



and by appointment. Childers, the circuit clerk brought this action to test Duvall's right to the offices of clerk of the county and probate courts.

The Arkansas court held that Duvall properly held the office. It, of course, was unnecessary to decide whether he held the office by virtue of his election or by virtue of his appointment, although the court observes by way of dicta that the census was not effective until the director's bulletin, as no official notice could be taken of the results until then, and commented that in its opinion Duvall held by virtue of the appointment and not the election. This, however, seems clearly dicta as it is entirely unnecessary to the decision. Moreover, it might have been held that the election was void because the nomination election was held even before the census enumeration took place, and of course, the census was not effective then. Incidentally, the cases of *Holcomb vs. Spikes* and *Underwood vs. Hickman*, *supra*, both distinguished the Childers case.

It is submitted that none of the cases relied on by respondent in the court below are in point. And we submit that there is no judicial authority contrary to the position maintained by Ogden City in this case.

It is also interesting to observe that on August 1, 1950, the Attorney General of Utah officially advised the Governor of Utah that preliminary reports issued by the Bureau of the Census may be relied upon in issuing proclamations changing the classification of cities. Obviously the Attorney General was referring to the preliminary reports issued locally by District Supervisors similar to that issued with respect to Ogden

under date of June 14, 1950, for this was some three and one-half weeks before the Director of the Census had issued his preliminary report from Washington.

Moreover, under date of December 26, 1950, the Attorney General of Utah rendered his official opinion to the State Auditor advising him that "official actions based upon a Federal Decennial Census need not await the final 1950 population figures which will be published early in 1951, even though not final and expressly subject to correction." Pursuant to that rule the Attorney General advised the State Auditor that the distribution to counties, cities and towns of money available from the Liquor Control Fund under the provisions of Chapter 112, Laws of 1947, should be made according to the population disclosed by the 1950 Federal Census.

It is very clear that all public officials of Utah were taking official notice of the results of the 1950 census even before the Legislature convened and that the Legislature must have understood that the 1950 census had already become a matter of past history. When the Legislature used the phrase "next official census" it therefore must have referred to a census to be taken subsequent to the already established 1950 census.

It has been suggested that the census should not be held to be complete until the final announcement of the results of the count thereof for the reason that until the final verified count has been made and issued the results might change and so present an intolerable uncertainty. This is very definitely not true under the present status of the Census Law, even though it may have been true during the past century.

By 13 U.S.C.A., Section 218, it is provided that:

“The Director of the Census is authorized at his discretion upon the written request of the governor of any state or territory of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agriculture returns as may be requested . . . and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes . . . and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for state or local officials, private concerns or individuals . . .”

Under this law at any time after May 1, 1950, when the enumeration sheets of the census were completed and filed with the District Supervisor, the city recorder or any other interested official or person whose duties require a determination of the population of Ogden could obtain a special preliminary count and certificate from the Director of the Census to guide official action. The fact of the population of Ogden “as determined by the official census” was finally and forever fixed as soon as the names were written down on the enumeration sheets, and there remained only the purely clerical job of counting those names. The statute last quoted provides the means for settling any doubt that might exist as to the correctness of any preliminary announcement.

It is also worthy of note that the Federal Statutes referred to in the statement of facts require the count to be complete not later than December 2, 1950. The

court, we think, will take judicial notice that the total by states is reached by adding the totals for the various subdivisions and that therefore the final official report of the population was required to be completed for the various subdivisions before that time, which was more than a month before the Legislature met to draft the Utah law in question. The Legislature must be presumed not only to have the means of knowledge, but to have the actual knowledge of the fact that the 1950 census was complete and official, and of the results of that census as to the population in Ogden.

It has also been suggested that it is unreasonable to suppose that the Legislature intended in 1951 to pass a law which would not be effective until the taking of the census in 1960. We submit that in the light of legislative history it is reasonable to suppose that the Legislature may sometimes be unreasonable. However, it is not necessary to suppose that the Legislature was being unreasonable in making a provision in the terms in which it did. It has already been pointed out, first, that the Constitution of Utah requires a census in 1955, and second, that special official censuses can be conducted by the Bureau of the Census. Certainly the Legislature convening in 1953 could provide for a census if it were so advised. Moreover, the City itself is authorized by Section 15-8-68 U.C.A. 1943, to take a census, if it should desire to accelerate the effective date of the law. In the third place it is submitted that it would be even more unreasonable to suppose that the Legislature intended immediately to saddle Ogden City with an expensive office which is not needed for the administration of the city court. It appears from the minutes of the

Ogden City Council that it has found that a second judge in the city court is not necessary and it must be presumed that that finding was based upon a reasonable investigation. An extra and unneeded city judge for his own salary will cost the city \$5,000 per year, to which would be added the necessary costs for clerks and other administrative officers and the cost of providing and maintaining the required court room facilities. It is submitted that it would be unreasonable to suppose that the 1951 Legislature intended any such judicial feather bedding.

It has also been suggested that Section 104-4-3 of the Judicial Code as amended by Chapter 26, Laws of Utah, 1951, has a bearing upon the problem hereinbefore discussed and that by construing the two sections together the intention of the Legislature to create the office of a second city court judge in Ogden becomes clear. That is not the case. In Section 104-4-3 it is provided that:

“Whenever it shall appear by official census that any city has attained sufficient population *to place it within the class of cities* for a city court, or *to raise it to a class* entitled to have an additional judge or judges, the mayor of such city, with the consent of the governing body thereof, shall appoint a city judge or judges . . .”

It is submitted that this section adds nothing to the one already considered. It must be observed that this section cannot stand alone in this regard: *there is no provision in this section classifying the cities*. The classification of cities for purposes of determining the number of city court judges rests entirely upon Section 104-4-2. It must also be observed that Section



104-4-3, by the reference to the "class of cities," is obviously intended to be made dependent upon the preceding section wherein the cities are classified for that purpose.

As has already been demonstrated, the raising of a city to a *class*, under the provisions of the preceding section, does not depend upon the 1950 census but depends upon some subsequent census yet to be taken. It is not sufficient under that section to show what the population is by the 1950 census. A population in excess of 50,000 "as determined by the next official census" to be taken hereafter is necessary before Ogden will attain that class of cities. By the terms of Section 104-4-2 the 1950 census is excluded from those censuses which are to affect the classification of cities for the purpose involved. It follows that Section 104-4-3 has no influence upon the interpretation of 104-4-2; the exact contrary is the case, and Section 104-4-3 depends upon the preceding section. The reclassification of Ogden for the purpose of ascertaining the number of city judges cannot be effected until some census hereafter taken shows a population of more than 50,000 and less than 100,000.

The City Council of Ogden, the governing and policy making body of Ogden City resists the establishment of the office of a second city judge for reasons of efficiency and economy. On reason, on the direct authority of State vs. Bockelman, supra, and on the direct and indirect authority of the other cases and statutes hereinbefore considered, it is submitted that the "next official census" referred to by the 1951

Legislature refers not to the 1950 census, but to a census taken and enumerated at sometime subsequent to May 8, 1951, and that, as no such census has yet been taken, there is no provision in law that Ogden City shall now have two city court judges. It follows that the office which the defendant claims to hold does not exist.

POINT 2. *Even if such office exists, the defendant is not legally elected or appointed to such office and has no right thereto.*

A. *A judge of the city court is ex-officio a precinct justice of the peace and no one may hold such office except by election on secret ballot by the electors of the city.*

(1) *The office of justice of the peace is an elective constitutional office under Constitution of Utah, Article VIII, Sections 1 and 8.*

(2) *Under Constitution of Utah, Article IV. Sections 2 and 8, the provision for election without secret ballot by the city electors is unconstitutional and void.*

The above matters are all part of the same proposition, and it is felt they can best be considered together.

Under the provisions of the Constitution of Utah, Article VIII, Sections 1 and 8, the office of justice of the peace is created as a constitutional elective office. It is a general rule followed in Utah that an office which has been provided for by the Constitution may not be abolished by an act of the Legislature. See

67 C.J.S., Page 121,  
Note 49.

See also the annotation in

4 A.L.R. 205,

supplemented by the annotation in

172 A.L.R. 1366.

See also

Leatham vs. Reger  
54 Utah 491,  
182 Pac. 187,

where the Utah Court says:

“No one contends that courts created by the Constitution may be abrogated by Legislative Act.”

In that case the Supreme Court ruled that the city court act did not attempt to abrogate the office of justice of the peace, but that the justice's court continued under the city court act with each city judge made ex-officio justice of the peace with power to discharge all the powers and duties pertaining to that office. The court commenting said:

“There is, however, still another cogent reason why the foregoing construction of the act in question should prevail. It is this: If the construction contended for by the defendants be adopted, then it is probable that some of the provisions of the act would conflict with one or more provisions of the constitution.”



The provisions of the Constitution referred to were Sections 1 and 8 of Article VIII by which the office of justice of the peace was created as a constitutional office.

The present city court act follows that case and philosophy. Section 104-4-4 of the Judicial Code (Chapter 58, Laws of Utah, 1951) provides that:

“In cities where city courts are established *no justice of the peace* shall be elected or appointed, *and the judge or judges of the city court shall be ex-officio justices of the peace for the precinct*, and as such shall perform the duties of such office.” (Italics added)

It must be observed that under this statute a city judge is also, *by virtue of his office*, justice of the peace for the *precinct*. There are two offices, but the Legislature has made it abundantly clear that a city judge must also be, and qualify as a Justice of the Peace. This was obviously done to insure the continuation of the constitutional office of justice of the precinct, as the Legislature recognized then than an attempt to abolish that office would render the act void. Respondent cannot claim to be elected city judge without being also elected justice of the peace. The first carries with it the other. This being the case, the manner of election to the first must conform to constitutional requirements for election to the second.

In the case of

Love vs. Liddle  
26 Utah 62,  
72 Pac. 185,

the court held that justices of the peace of a city precinct are precinct officers and that they are one distinct class of judicial officer established by the constitution.

It must again be emphasized that clearly under the Constitution the justices of the peace are established as elective officers and are so referred to in Article VIII, Section 8 of the Constitution where it is said that the Legislature may determine how many justices of the peace may be *elected*. All of the statutes relating to justices of the peace provide for their election. The city court act, until the enactment of Chapter 26, Laws of Utah, 1951, specifically provided that the city judges and ex-officio justices of the peace should be elected.

However, by that last piece of legislation the Legislature provided that if any one candidate filed for office, he should “forthwith” be issued a certificate of election for the ensuing term. It is under this provision that the defendant claims to have been elected to the office of city court judge and ex-officio justice of the peace, if such office exists. It is to be noted that the defendant does not claim under any of the provisions of the law authorizing interim appointments, but only as an *elected* official.

It is submitted that the provision of the law referred to is void and unconstitutional because it is contrary to the provisions of Article IV, Section 2 and 8 by which it is provided that every qualified citizen shall be entitled to vote by secret ballot at every election.

Defendant does not contend that anyone cast any secret ballot for him or that his name was submitted to the voters upon any official ballot for vote.

Moreover, it must be observed that the law not only requires that the name of a candidate be submitted to the voters upon a secret ballot, but that a blank ticket be provided wherein the voters may write in the name of any candidate of their choice even though he has not been nominated and his name printed on the ballot. See Sections 25-11-1 as amended and Sections 25-11-3 and 25-6-5, as amended, Utah Code Annotated, 1943. See also the case of

Park vs. Rives  
40 Utah 47,  
119 Pac. 1034,

in which Utah's non-partisan ballot in municipal elections was attacked upon the ground that in failing to provide for a blank ticket for writing in a candidate of a voter's choice it violated the provisions of Article IV, Section 2 and 8 of the Constitution of Utah because it impaired the franchise guaranteed by the Constitution. The court said:

“Let it be conceded that, if the *act* so restricts and prohibits a voter (restricts him to vote for one or two candidates named on the ballot and prohibits a write-in of another choice), such legislation would, as is urged, be an improper interference with the elective franchise. 15 Cyc. 289.”

The court then held that in order to bring the act into harmony with the Constitution the provisions of the

general election law, incorporated by reference in the act providing for non-partisan municipal ballots, would apply. The general law requires that the ballot contain a blank ticket where any voter may vote for any person of his choice whether or not he was nominated at the primary.

See also

18 Am. Jur. "Elections",  
Section 191, Page 307,  
Note 9,

where it is said:

"The majority view, however, seems to be that a statute prohibiting the writing in of names of candidates upon the ballot is unconstitutional."

See also the annotations in

Annotated Cases, 1913D 614

and

91 American State Reports 682.

The annotation last cited contains an excellent editorial analysis of the cases decided up to that time and of the reasoning behind the majority rule. It is respectfully recommended for the court's especial attention.

It is interesting to note that very few cases seem to have been decided on this point during the last twenty or thirty years. Apparently most legislatures, sensitive to the sacredness of the franchise, have regarded

the matter as settled and have not attempted to disenfranchise the citizens as to an elective office as the Legislature of Utah, apparently without sufficient consideration, attempted to do in the last quoted provision of the City Court Judicial Selection Bill.

It is common knowledge that electors not infrequently elect write-in candidates. The write-in franchise and privilege is a very real and important one in our form of government. The Eisenhower vote in the recent Republican primaries illustrates the possibilities.

It has been suggested that this court's decision in

Rich vs. Industrial Commission  
80 Utah 511; 15 Pac. 2nd 641,

by implication holds that notwithstanding the city court statute providing that the city judge is ex-officio justice of the peace, they are separable and that the respondent lawfully holds the office of city judge even though he is not legally elected as a justice of the peace. It is submitted that this is not the case. The decision referred to was made under a special statute relating to the duties of constable in the city precinct and was concerned only with the problem of whether the constable or the sheriff was the officer required by law to serve process from the city court. It was held that under the peculiar statute in question (Section 19-22-1, Utah Code Annotated, 1943) the constable was required to serve process from justice's courts but only permitted, though not required, to serve process from city courts. This,

of course, has nothing to do with whether or not the presiding offices in the two courts are merged in one man as above outlined. The case is not in point. Neither is there any analogy to be drawn therefrom.

It seems very clear from the authorities mentioned that the provision of the statute under which the defendant claims the office of judge of the Second Department of the Ogden City Court and ex-officio justice of the peace for Ogden Precinct is unconstitutional and void and defendant cannot claim or acquire any rights whatsoever thereunder. The provision that a candidate shall be elected to an elective office by the mere process of filing his uncontested candidacy and without ever having been submitted to the voters upon a secret ballot with provision for a write-in opposition candidate, is unconstitutional and void. Out of that void statute no rights can accrue to the defendant and he cannot claim election to the office if it exists, by virtue of an unconstitutional procedure. Even if the office exists, the defendant is not legally elected thereto and should not be permitted to attempt to discharge the power and duties incident to the office. The judgment and declaration of the court should be entered accordingly.

*B. The office of judge of a city court is an elective office and the defendant, not having been elected thereto by secret ballot of the electors, has no valid claim to such office.*

This argument needs little elaboration. By Section 104-4-2 of the Judicial Code, as amended, it is provided that city judges "shall be elected by the qualified electors of their respective cities." This, of course, is in

accordance with practice and tradition in a free republic and confirms to constitutional requirements. The provision that an unopposed candidate shall be issued a certificate of election without being placed on the ballot, is, of course, diametrically opposed to the provision quoted. It is not possible to reconcile them. One or the other must fall.

Under these circumstances the one which violates the constitution and the tradition of government should and must give away, and it should be held that no one may be "elected" to the office of city judge, except by the electors in the secret ballot at a regularly called free election.

The case of Park vs. Rives, *supra*, points the way. As there it was held that a blank space must be provided on the ballot, even though not required by the particular statute, so here it should be held that even an unopposed candidate must be submitted to the voters on a secret ballot with a blank ticket provided for "write-in" candidates.

As the respondent here was not elected by the electors by any ballot, he is not legally elected and has no right to the office of Judge of Department No. Two of the Ogden City Court, if that office does exist.

- C. *Defendant has no valid claim to the office of judge of the city court as by an appointment.*
- (1) *The filing of an unopposed declaration and petition for candidacy for such office cannot be deemed a valid appointment thereto, as new Section 1 of the Judicial Code as enacted by*



*Section 2, Chapter 26, Laws of Utah, 1951, is void for violation of the Constitution of Utah, Article V, Section 1, and Article VI, Section 29.*

It was suggested in the court below that as the office of judge of a city court is one created by the Legislature, the Legislature has power to provide for the appointment of the city judge by any method it deems proper, and that the provision of the statute for the issuance of a certificate of election when it is made to appear that a candidate is unopposed, is the legal equivalent of an appointment by the candidate and his one hundred supporting petitioners and the city recorder. There are two reasons why this cannot be the case.

First, as hereinbefore demonstrated, the office of city judge carries with it ex-officio the office of justice of the peace which is an elective constitutional office not subject to appointment in this manner.

Second, the Legislature under our Utah Constitution has no authority to authorize an unofficial private association of citizens to a public municipal office. Any statute which attempts to grant such a right and privilege is unconstitutional and void for violation of Article V, Section 1 and Article VI, Section 29 of the Constitution of Utah.

The first section of the Constitution referred to vests all of the powers of government of the State of Utah in three departments, the Legislative, the Executive and the Judicial. No exceptions are made. The people by

their Constitution have delegated all powers of government to the state and the Legislature may not re-delegate any governmental function to any private person or association of persons.

The whole theory of the Republican form of government, which is guaranteed to the State of Utah by the Federal Constitution, is that government powers shall be exercised only by public officers duly selected to represent the sovereign people. While it is recognized that public offices can be created and filled by appointment, it is fundamental that no person may exercise the sovereign power of filling a public office except by election by secret ballot as provided in the Constitution, or through appointment by a public officer or public body to whom the people have delegated that official power and authority. The public officers may not redelegate that sovereign power to any private person or association of persons. To permit them so to do would be to authorize them entirely to abrogate their own functions and duties and to appoint a dictator for the state.

This they cannot do.

The Constitution of Utah is specific on this point as regards municipal functions. Section 29 of Article VI provides that "the Legislature shall not delegate to any special commission, private corporation or association, any power . . . . to perform any municipal functions." It is obvious that the selection of a city judge to administer a city court having exclusive jurisdiction of criminal actions under city ordinances and who is a city officer paid out of the city treasury is a municipal function. It is equally obvious that the Legis-

lature cannot delegate this function to any self-appointed "private association" of one hundred electors, responsible to no one but to themselves and associated on their own motion only for the purpose of selecting a judge. This is exactly what the statute in question attempts to do. It clearly violates the express prohibition of the Constitution and is void.

If it should be argued that it is the city recorder who issues the certificate of "election," and that the city recorder is a public officer, it need only be observed by way of answer that the city recorder under the statute has no discretion but is required by the statute as a ministerial act to issue the certificate if the candidate is unopposed. Thus the act is not the recorder's but is the act of the candidate and his one hundred petitioners. That argument can avail the respondent nothing.

This conclusion is supported by well reasoned cases from other jurisdictions and by a decision of the Supreme Court of Utah.

In the case of

Tucker vs. State (Indiana, 1941)  
35 N. E. 2nd 270, 301, et seq.,

it was held that while the legislature might create new offices and provide for the selection of officers to operate them, it has no power or discretion to vest a part of the sovereign power in some agency outside the government as set up and established by the Constitution, and that power of appointment to public office is a sovereign power which cannot be delegated to any private agency.

Indeed the Indiana court indicated that under the constitutional division of power the legislature could not appoint an officer to an executive or judicial position and that except as expressly authorized by the Constitution the executive could not be authorized to appoint to a judicial or legislative position, etc. However, it is not necessary to go this far to sustain the position of Ogden City in this case.

And in the case of

State vs. Schorr (Delaware, 1948)  
65 Atl. 2nd 810,

it appeared that the legislature had created a county department of elections, and provided that five members should be nominated by the chairman of each of the two leading political parties. These parties were held not to be state agencies or connected with the state government, but were only voluntary associations of individuals. The statute further made it mandatory that the governor appoint the nominees of the respective political parties. This provision the court very properly considered to be a vesting of the power of appointment in the party chairman. The governor's position there was exactly that of the city recorder in the case at bar.

The Delaware Court held that:

“ . . . the legislature cannot delegate to the State Chairman of a political party, which is a voluntary organization of individuals, accountable to no one except its own organization, having no connection with the three branches of government in which the sovereign power of Government is lodged by the Constitution, the power to

appoint the members of a state agency . . . Rice v. Foster, 4 Hav. 479; Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; People ex rel. Shumway vs. Bennett, 29 Mich. 451, 18 Am. Rep. 107; State ex inf. Hadley v. Washbury, 167 Mo. 680, 67 S. W. 592, 90 Am. St. Rep. 430; Ohio & M. Ry. Co. v. Todd, 91 Ky. 175, 15 S. W. 56; Winters v. Hughes, 3 Utah 443, 24 P. 759.”

This case seems to be exactly in point.

Then the Utah case of

Winters vs. Hughes  
3 Utah 443,  
24 Pac. 759,

although not exactly in point, is exactly analogous. The problem involved in that case developed when the Legislature passed an act directing that on petition of one hundred voters in any judicial district, the judge should hold a special session of court at the time and place specified in the petition. This court held that the legislative act was void as an attempted, unlawful delegation of governmental legislative power conferred by the organic act on the legislature and the governor, which provided that courts should be held at times and places “prescribed by law.” This court there pointed out that if the power to delegate to any one hundred petitioning citizens the authority to determine where and when sessions of court are to be held, a single individual may equally be vested with such power by legislative act, “and the strange spectacle would be presented of courts, officers and suitors becoming subject to the caprice of one man.” In other words if any sovereign governmental function can be delegated to a private in-

dividual or association, then all such governmental functions can be so delegated, and our Republican form Government could be swallowed up by a dictatorship. This certainly is contrary to our theory of government as set up in our Constitution. The very idea is repugnant to Americans and violative of the clear intent and express provisions of the Constitution of Utah.

It is submitted that the respondent here cannot validly claim the office of city judge as by an appointment through the procedure followed.

- (2) *Such office can be filled in the first instance only by appointment by the Mayor with the consent of the City Council, and defendant holds no such appointment.*

Even if it were to be conceded that the office of judge of a city court can be filled by appointment, the appointing power is by the terms of the statute itself vested exclusively in the Mayor of the city acting with the consent of the governing body.

By Section 104-4-3 of the Judicial Code as amended by Chapter 26, Laws of Utah, 1951, when a city has entered a class entitled to have an additional judge, the Mayor is authorized to appoint one.

On the other hand the new Section 1 of the Judicial Code as enacted by said Chapter 26 provides for the nomination and "election" of a judge of a city court only "*at the expiration of the term of a judge of a city court.*" (Italics supplied). In such event the judicial candidate may fill his declaration of candidacy with a supporting petition of qualified voters. No provision



is made for the election of a judge except to fill the vacancy created by the expiration of the term of one already in office.

It is obvious from a reading of the various provisions of the statutes in *pari materia*, as required by the rules of construction, that the Legislature intended that a new office of city judge should be filled in the first instance only by appointment by the Mayor. At the termination of his term he would be the incumbent retiring, and both he and other candidates could then aspire to election for the second and succeeding terms of the new office.

It is also interesting to note from the title of Chapter 26 as well as from the body of the statute that it is intended thereby to provide a non-partisan method of selecting judges of the city courts. We think the court will take judicial notice of the history of the movement for non-partisan selection of the judiciary. It is to be recalled that the Legislature first proposed a constitutional amendment to the sections of the Constitution which required the election of Supreme Court Justices and Judges of the District Courts—but made no such proposal as to the section referring to the election of Justices of the Peace. The people ratified this proposal and the legislatures for the past several sessions have been concerned with the implementation of the constitutional amendmets. Chapter 26 apparently was primarily concerned with bringing the city court into harmony with the legislation adopted at the same session for district and supreme court justices.



The philosophy of the act as disclosed by the provision that incumbents shall have a definite advantage is to obtain and retain in the judiciary judges of adequate training and experience. Other acts passed by previous legislatures but vetoed by the governor provided for appointment of district and supreme court justices in accordance with the new philosophy as to judicial selection. Apparently the Legislature considered that responsible public officers would be more likely to select a man who was good judicial timber than would the general population in an election where partisan politics and the "vote getting" personalities of the several candidates would obscure the real issue of judicial qualification,

Considering the words used and the purpose of establishing an improved non-partisan method for selecting the judiciary, it seems clear that the Legislature intended the first incumbent in office should be appointed by the Mayor. If the office in question exists, the current term is the first term thereof so that the only way defendant could lawfully claim that office would be by appointment from the Mayor. He makes no claim to such appointment. He has no right to the office even under the terms of the statute under which he claims.

## GENERAL OBSERVATION ON THE PUBLIC INTEREST

Perhaps it is not improper in the light of the public interest involved to observe that the decision here sought by Ogden City will not cause difficulty or confusion in the city courts of other cities in the state. The number

of judges serving in other city courts was not changed by the amendment to the statute so that there is no question in other cities as to the number of judges. As to the election procedure, it appears that all other judges of city courts who receive certificates of election without being voted upon were the incumbents during a previous term, so that if their present certificates of election are invalid for the reasons herein discussed, nevertheless the judges in question lawfully continue to hold their respective offices because their respective successors have not yet been elected and qualified.

## CONCLUSION

Upon the facts and authorities hereinbefore discussed it is respectfully submitted, first, that the office to which respondent aspires does not exist in law, and secondly, that even if such office exists, the defendant has not been legally elected or appointed thereto. The judgment of the lower court should be reversed and the lower court should be directed to enter judgment in favor of appellant as prayed in its complaint.

Respectfully submitted,

PAUL THATCHER

Corporation Counsel of

Ogden City

Attorney for Appellant