

1952

Ogden City v. Clyde C. Patterson : Brief of Respondent

Utah Supreme Court

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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 RESPONDENT

FILED

MAY 12 1952

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IN THE SUPREME COURT of the STATE OF UTAH

OGDEN CITY, a Municipal Corporation,
Plaintiff and Appellant,

vs.

CLYDE C. PATTERSON,
Defendant and Respondent.

NATURE OF THE CASE

Appellant sought by way of declaratory judgment in the lower court (1) that court's determination that under Chapter 26, Laws of Utah, 1951, now commonly referred to as Section 104-4-2, Utah Code Annotated, 1943, as amended, Ogden City qualifies for but one city judge, and (2) that if it be determined that under such section Ogden qualifies for two city judges, still the respondent Patterson is not lawfully a city judge of Ogden City.

The chronology of events leading up to the present litigation are as follows:

On March 8, 1951, the Legislature enacted what is now known as Chapter 26, Laws of Utah, 1951, and which we hereinafter refer to as Sections 104-4-2, 104-4-3, 104-4-3.10, 104-4-3.11, and 104-4-3.12, U.C.A. 1943, as amended. These enactments became effective May 8, 1951. So far as here pertinent they read as follows:

“104-4-2. Judges—Election of—Number of
Judges—Term and Tenure of Office.

At the municipal election to be held in the year 1951, and sexennially thereafter, city judges shall be elected by the qualified electors of their respective cities in the manner provided by this act. 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; * * *.”

“104-4-3. Id. Appointment by Mayor Pending Election.

Whenever it shall appear by official census that any city has attained sufficient population to place it within the class of cities having city courts, 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 who shall be entitled to serve until twelve o'clock noon on the first Monday of January succeeding the next municipal election after said appointment or appointments are made, at which city judges are elected, and until their successors are elected and qualified.”

“104-4-3.10. Declaration of Candidacy.

* * *.

(a) * * *.

(b) * * *.

(c) * * *. If only one candidate files for any specific office, such person shall forthwith be issued a certificate of election by the city recorder. * * *.”

On July 31, 1951, and within the time allowed by law therefor, Patterson filed his declaration of candidacy, supported by the required petition of one hundred voters, for the office of Judge of the Second Division of the Ogden City Court (the office held by the then incumbent city judge being designated by the City Recorder as Judge of the First Division). No other candidates filing for Judge of the Second Division within the time allowed by law, the City Recorder, on August 7, 1952, issued to Mr. Patterson a certificate of election to this office as provided by Section 104-4-3.10, *supra*, and duly advised the governing body of Ogden City that she had done so. (Exhibit 1).

On November 6, 1951, Ogden City held its regular municipal election, and it did not submit to the voters the office of Judge of the Second Division of the City Court.

On December 4, 1951, as an "economy measure" the Ogden City Counsel decided to refuse to create the job if that was legally possible.

On December 27, 1951, the emoluments of the office of Judge of the Second Division were included by Ogden City in its budget, and the City Manager was "authorized" to take whatever steps were necessary to determine "the legality of this case" by declaratory action. (Exhibit A).

On December 31, 1951, Ogden City adopted its budget, which included the salary for the second judge. On the same day its City Recorder received for filing and filed Patterson's oath as judge of such second division.

On January 5, 1952, Mr. Thatcher, as attorney for Ogden City, filed a complaint herein, by which not only the question of the existence of the office was raised, but the second question—purely gratuitous as we view it—of Patterson's right to hold the office, assuming it does exist. Respondent will develop its views under four points of argument, as follows:

POINT I:

THE OFFICE FOR WHICH PATTERSON HOLDS A CERTIFICATE OF ELECTION AND FOR WHICH HE QUALIFIED BY TAKING THE REQUIRED OATH OF OFFICE DOES EXIST.

- (A) BECAUSE IT WAS CREATED BY THE PROVISION OF SECTION 104-4-2, and
- (B) REGARDLESS OF THE INTERPRETATION TO BE GIVEN SECTION 104-4-2 THE OFFICE HERE IN QUESTION CAME INTO BEING BY VIRTUE OF SECTION 104-4-3.

POINT II:

APPELLANT OGDEN CITY IS WITHOUT RIGHT TO RAISE THE QUESTION OF RESPONDENT'S RIGHT TO HOLD THE OFFICE BECAUSE

- (A) RESPONDENT'S RIGHT TO THE OFFICE CAN BE RAISED ONLY BY THE ATTORNEY GENERAL ON BEHALF OF THE STATE, OR BY ANOTHER CLAIMANT TO THE OFFICE; and
- (B) OGDEN CITY CANNOT ATTACK THE CONSTITUTIONALITY OF THE LAW WHICH VESTED RESPONDENT WITH THE OFFICE.

POINT III:

SECTION 104-4-3.10 IS NOT UNCONSTITUTIONAL IN ITS PROVISIONS FOR THE ISSUANCE OF A CERTIFICATE OF ELECTION TO AN UNCONTESTED CANDIDATE.

POINT IV:

GENERAL OBSERVATION ON THE PUBLIC INTEREST.

THE ARGUMENT

POINT I.

THE OFFICE FOR WHICH PATTERSON HOLDS A CERTIFICATE OF ELECTION AND FOR WHICH HE QUALIFIED BY TAKING THE REQUIRED OATH OF OFFICE DOES EXIST (A) BECAUSE IT WAS CREATED BY THE PROVISION OF SECTION 104-4-2, AND (B) REGARDLESS OF THE INTERPRETATION TO BE GIVEN SECTION 104-4-2 THE OFFICE HERE IN QUESTION CAME INTO BEING BY VIRTUE OF SECTION 104-4-3.

(A) THE OFFICE WAS CREATED BY VIRTUE OF SECTION 104-4-2.

Appellant Ogden City's position with respect to this phase of the matter is summed up concisely by the allegation of its complaint (Par. 13) (a) that the office in question will not come into being

“Until it shall be determined by the official census next hereafter ensuing”

that Ogden has a population of fifty thousand. On the contrary, respondent's position is that the office was in existence on July 31, 1951, when he filed his declaration of candidacy therefor, and has been ever since.

This point of argument does not concern itself with the question of whom, if anyone, holds the office, but with the sole question of whether the office exists. The answer lies with the interpretation to be given to Chapter 26, Laws of Utah, 1951, enacted March 8, 1951, effective May 8, 1951, and particularly the two sections thereof known as 104-4-2 and 104-4-3, *supra*. Both of these sections of the statute are self-executing. As and when the conditions required by either exist the office as such comes into being without anything further required. We accordingly examine the provisions thereof in the light of the known facts to the end of determining if either have become operative insofar as Ogden City is concerned.

The pertinent language, insofar as Section 104-4-2 is concerned, is:

“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.”

Ogden City contends that the key words “next official census” mean the number of people listed on the census enumeration sheets officially taken next after the effective date of the act. Respondent contends that it means the official announcement of the

correct enumeration, which announcement occurs next after the effective date of the act, and as the official announcement of the 1950 count was not made until subsequent to the effective date of the act, that announcement here controls.

What is a census? Is it the actual count, as claimed by appellant? Or is it the official announcement as to the results of that count after duplications, omissions, mistakes and other errors have been eliminated?

Authorities probably are not in complete agreement upon the subject, but a careful reading and analysis of each case actually results in fairly complete reconciliation. A general legal definition of the meaning of the word "census" is found in 14 *C.J.S. (Census) Section 1, Page 101*:

"In general, 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 the inhabitants preserved in the public archives. . ."

And in 14 *C.J.S (Census) Section 6, Page 103*:

"In the absence of a statute requiring any formal action by the census board or the legislature, a census goes into legal effect, as such, on its compilation and publication by the census superintendent or board. It is generally held that a census, after it has been officially determined or ascertained and published does not relate back and give the fact force as of the date of which the census was to be taken; but it has also been held that a census, being the enumeration of the population and not the announcement

of the result, becomes effective as of the date taken. An authorized announcement of a federal census is official, even though not final, and expressly subject to correction.”

Cases supporting this general statement of the law include the following:

Lewis v. Lackawanna County (Pa) 50 A. 162 (1901)

The second syllabus reads:

“Under act March 31, 1876, providing for salaries of county officers in counties with more than 150,000 inhabitants, county offices do not become salaried offices immediately on the county attaining such population, *but only when such fact is legally ascertained by the census bureau making returns of the population to congress, or making final report*; and such ascertainment does not relate back, and give the fact force as of the date of which the census was to be taken.”
(Italics added)

And from the opinion:

“It is of general knowledge that the results of the census have not been promptly reached; that of 1880 not having been officially announced until 1883, and that of 1890 not until 1895. On the argument of appellee everything dependent on the census would be kept in a state of suspension, or in danger of being turned topsy-turvy, for an indefinite period. *The only escape from such intolerable inconvenience and confusion is by adherence to the logical principles of the law that the fact becomes applicable only from its legal ascertainment.*” (Italics added).

Wolfe v. City of Moorhead (Minn.) 107 N. W. 728 (1906)

The third syllabus reads:

“CENSUS—TIME OF TAKING EFFECT:

The fifth decennial census of Minnesota went into legal effect upon its compilation and publication by the superintendent of the census, and not upon the deposit of the enumeration in his hands.”

And from the opinion:

“The plaintiff argues that, inasmuch as the enumeration was required to be completed on or before the 1st day of July, and to be placed in the hands of the superintendent of the census not later than the 10th of July, therefore the election held in October was governed by statutes applicable to cities of more than 4,000 inhabitants. That enumeration did not constitute the census in law; on the contrary, it was but a step in its creation. The census went into legal effect upon its compilation and publication by the superintendent. Section 18. Until that time, the various municipal corporations of the state were governed by the laws applicable to cities of the class determined by the previous census.”

Broyles v. Mahaska County (Ia.) 239 N. W. 1 (1931)

In this case, as in the preceding one, the statute directed publication of the figures, which is what the federal law requires.

The first syllabus reads:

“Since publication of census is to be under secretary of state’s certificate, date of certificate determines when census becomes effective.”

The second syllabus reads:

“Where secretary of state did not certify 1925 census of Iowa until February 1, 1926, census did not become effective until such date.”

And from the opinion:

“It is apparent from these provisions of the Code that it was the intent of the Legislature to fix a time when said census report should become effective. Such things are matters which courts cannot determine, as they vary from time to time with the change in population, and it was the evident intent of the Legislature, as shown by the requirements in these sections, that the publication of this census was to be under the certificate of the secretary of state, which must be dated, and it must therefore follow that the date of the certificate is the day on which the census becomes effective.

“As applied to this case, the evidence shows this certificate was dated February 1, 1926. It must be held, therefore, that the new 1925 census was not effective until the last-named date, and prior to that the city of Oskaloosa had, in law, a population of less than 10,000. This is in line with the holdings in other states. As throwing light on this question, see *State v. Smith*, 149 Wash. 173, 270 P. 306; *Holcomb v. Spikes* (Tex. Civ. App.) 232 S. W. 891; *Wolfe v. City of Moorehead*, 98 Minn. 113, 197 N. W. 728; *State v. Brooks*, 58 Wash. 648, 109 P. 211.”

Also we refer to the following:

Holcomb v. Spike (Tex.) 232 S. W. 891:

“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 . . .”

State v. Wooten (Mo.) 122 S. W. 1101:

“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.”

City of Hungington v. Cast (Ind.) 48 N. W. 1045:

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

The above three cases and the excerpts therefrom are cited and quoted by appellant as support for its position that it is the actual count that is important, but the language imports the contrary. They say that the census is the “official list” which obviously is not the tally of the enumerators, but rather a document prepared therefrom and reflecting the correction of all errors and mistakes made by the enumerators.

Applying this to our own situation. There is a discrepancy of 204 between the first preliminary announcement of 56,908 (R. 030-031) and the final listing of 57,112 (R. 014, Exhibit B). Obviously, the official census is the final corrected list of 57,112 as announced by the Director on June 17, 1951, and not the actual count made by the enumerators during April, 1950, which

patently was erroneous, or the equally erroneous preliminary announcement of 56,908 made on June 14, 1950, or of 56,910 made on August 25, 1950.

Further reference should perhaps be here made to the case of *Lewis v. Lackawanna*, *supra*, and quoted from by appellant at page 11 of its brief as follows:

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

We have carefully examined this case as it appears in 50 Atlantic 162, and find no such statement as that therein. On the contrary the case holds that it is the *final report of the census bureau which controls*, and which report does not relate back to the date of actual taking.

We do come, however, to a group of cases holding that preliminary announcements have their place in the overall scheme, and may be used as “*guideposts*” for official action. Cases of this type are

State v. Ryan (Mo.) 133 S. W. 8 (1910)

Ervine v. State (Tex.) 44 S. W. (2) 380 (1931)

Herdon v. Garfield County (Okla.) 295 P. 223 (1931)

Childers v. Dewall, 62 S. W. 802 (Ark.)

Elliot v. State (Okla.) 1 P. 2d 370 (1931)

Gross v. Ross (Ky.) 185 S. W. 2d 547 (1945)

Washita County v. Lowden (Okla.) 116 P. 2d 700 (1941)

Forde v. Owens (S. C.) 158 S. E. 157 (1931)

These cases are all to the effect that the preliminary report may be used as a guide in determining a status. In other words, the preliminary report may be relied upon until the final report is made.

Examples of this type of case are:

Ervin v. State (Tex) 1931. Page 1 of the syllabus states:

“Preliminary announcement of census showing city over 20,000 should have been guide of officials concerning mode of drawing jury (Vernon’s Ann. Civ. St. art. 2094; 13 U.S.C.A. Sections 4, 205, 213, and 210 et seq.).”

Washita County v. Lowden (Okla.) 1941.

“1. CENSUS

In determining classification into which county should be placed for county officers’ salary purpose, a census bulletin officially issued, though a preliminary report, was a guide for official action with respect to population.”

These cases are of little actual value in the determination of what is a census, because that question was not there involved. The inference to be gathered therefrom, however, is that if the preliminary announcements are but guideposts, they are guideposts to the census, which of necessity must be the final official announcement.

There are a group of cases, however, which may appear at first blush to support appellant’s position that the effective date of the census was the date as of which it was taken, rather than the subsequent official announcement. These cases are

Underwood v. Hickman (Tenn) 39 S. W. 2d 1034

Twin Falls v. Koehler (Ida) 123 P. 2d 715

Jordan v. DeHart (Wash.) 131 P. 2d 156.

However, in each of these cases the question involved was the time of the fact itself, rather than the time of determination of the fact. In other words, if the words "as determined" were eliminated from the phrase "as determined by the next official census" appearing in our statute, the cases would be more in point. In the recent case of *Varble v. Whitecotton* (Mo) 190 S. W. 2d 244 (1945) the Supreme Court of Missouri analyzed and distinguished these three cases. This Missouri court said:

"(3, 4) There is no statutory provision, either Federal or State, which sets the time when the results of a census shall become official. In such a situation the general rule is that a census becomes official as of the date of its official publication. 14 C.J.S., Census, Section 6. This court has always taken judicial notice of "the official records of the census" and we find no case where the fact of population has been proved by other means. *State ex rel. Harris v. Herrman*, 75 Mo. 340; *State ex rel. Martin v. Wofford*, 131 Mo. 61, 25 S. W. 851; *State ex inf. Crow v. Evans*, 166 Mo. 347, 66 S. W. 355. In *State ex rel. Major v. Ryan*, 232 Mo. 77, 133 S. W. 8, a quo warranto to remove the jury commissioners of St. Joseph because the population fell below the applicable limit, the national census of 1910 '*as officially promulgated*'" was the basis of the decision. And in *Jerabek v. City of St. Joseph*, 159 Mo. App. 505, 141 S. W. 456, which considered a motion to

quash a panel selected by the above jury commissioners, the court of appeals in sustaining the motion pointed out the jury had been selected after "the federal census of 1910 *was officially announced.*" To the same effect was Childers v. Duvall, 69 Ark. 336, 63 S. W. 802; Holcomb v. Spikes, Tex. Civ. App. 232 S. W. 891; Lewis v. Lackawanna County, 17 Pa. Super. 25; Id., 200 Pa. 590, 50 A. 162. There are contrary rulings mainly in cases where the *fact* of population rather than its determination by the census controls. See Underwood v. Hickman, 162 Tenn. 689, 39 S. W. 2d 1034; State ex rel. Jordan v. Hart, 15 Wash. 2d 551, 131 P. 2d 156; City of Twin Falls ex rel. Cannon v. Koehler, 63 Idaho 562, 123 P. 2d 715; Forde v. Owens, 160 S. C. 168, 158 S. E. 147.

"(5) The application of the statute we are considering is governed by the official records of the census. The statute itself denotes this. According to its terms the mere fact of the population in and of itself does not determine the statute's relevancy. The determining factor is something more. It is the population as enumerated "according to the last preceding national census." Thus the operation of the statute is based on the record of the census. *The record of the census furnishes the evidence under which the statute shall be operative.* Dunne v. Kansas City Cable R. Co., 131 Mo. 1, 32 S. W. 641. This appears to us to be an added reason why the application of the statute to Jackson County could not change at least until the official record of the "last preceding census" was promulgated disclosing Jackson County had a population which was without the limits set by the statute."

We cannot close our discussion of the authorities dealing with the question of what is the effective date of a census without comment upon the case of *State ex rel Brunjes v. Brockleman* (Mo) 240 S. W. 209, which appellant holds up to this court as being “the only case directly in point”. (Page 17 of appellant’s brief).

In that case the statute, effective as of January 1, 1921, spoke of the “next decennial census of the United States”, and the court held that it could not refer to the 1920 census, *which was then complete*, but must of necessity refer to a subsequent one. This begs the question so far as we are concerned, because in our case the census was not completed until the enumeration was corrected, which was *subsequent* to the effective date of our act.

Further than that, we have the case of *Varble v. Whitecotton*, *supra*, decided by this same Missouri court some twenty-three years later, specifically holding that it is the official *record* of the census which governs the application of the statute.

We submit, accordingly, that under the law the legislature, in speaking of the “next official census”, spoke of the official announcement yet to be made of the results of the 1950 count. Otherwise we have a situation where it must be said that the Legislature in 1951 was legislating for the future without regard to the present. An hypothesis will demonstrate the fallacy of construing the word census to mean the count made as of April 1, rather than the subsequent official report of the results of such count. Assume that through an error in assignments duplicate enumerators were sent into

one section of the city, and as a consequence their tally sheets listed 55,000, and the preliminary announcement so showed. Subsequent review by the census bureau disclosed the error, and the final official report showed 45,000. What was the official census? Was it the false and faulty count of the enumerators? Or was it the accurate list as reported officially by the Director? Obviously it is the latter.

In March, 1951 the 1950 count had been made, some preliminary announcements had been given out which were faulty and incomplete, but the legislature was not advised as to what the official reports might show. Accordingly, when the legislature spoke of the "next official census" it must have referred to the official reports of the 1950 count yet to be announced.

The official announcement of June 17, 1951, accordingly, rendered Section 104-4-2 operative, and there was, accordingly, thereafter the offices of two judges of the Ogden Court to be filled in the manner provided by Section 104-4-3.10.

(B) REGARDLESS OF THE INTERPRETATION TO BE GIVEN SECTION 104-4-2 THE OFFICE HERE IN QUESTION CAME INTO BEING BY VIRTUE OF SECTION 104-4-3.

Section 104-4-3 provides as follows:

“Whenever it shall appear by official census that any city has attained sufficient population to place it within the class of cities having city courts, 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 who shall be entitled to serve until twelve o'clock noon on the first Monday of January succeeding the next municipal election after said appointment or appointments are made, at which city judges are elected, and until their successors are elected and qualified."

It is to be noted that here we have an entirely different condition than in the preceding section, which spoke of "as determined by the next official census". Here the condition is "whenever it shall appear by official census". Not the next census, and not the last census, but *any* official census. It is not denied, nor can it be, that as of June 25, 1951, the date of final publication of the 1950 count, *an official census* showed Ogden with a population in excess of 50,000. Thus, even though it be held that the provisions of the preceding section are not operative, the provisions of the second are, and the office exists, and has existed since at least June 17, 1951.

Appellant suggests as its answer to the plain and unequivocal language of Section 104-4-3 that this Section does not become operative until after 104-4-2 becomes operative, which may not be until 1960. In other words, that the Legislature not only enacted 104-4-2 to become operative some nine years hence, but went to still further extremes and enacted 104-4-3 to become operative at some still later date. This to us is pure sophistry, and akin to the reflection cast upon our law-making body by the assertion (page 27 of appellant's brief) that:

“in the light of legislative history it is reasonable to suppose that the Legislature may sometimes be unreasonable.”

It is one thing to torture 104-4-2 into a construction that the Legislature in 1951 was legislating for the future, and not for the present. To go to the still greater extreme and argue that this same Legislature in enacting 104-4-3, and in using the phrase “an official census”, not only did not have in mind a present census, or the official announcement of the 1950 census, but had in mind an official census after the next official census (which, in the normal ~~cause~~^{course} of events, means 1970, for history shows that the federal decennial census is the only one that is ever taken) requires, in our judgment, just some such concept of legislative endeavors as is evidenced by the foregoing observation of legislative unreasonableness.

We submit, accordingly, that from and after June 25, 1951, the office here in question existed,

(a) Because that is the date of the “next official census” referred to in Section 104-4-2, and which rendered Section 104-4-2 operative; and,

(b) Regardless of when the so-called 1950 census became effective, certainly from and after June 25, 1951, an “official census” showed Ogden with a population in excess of 50,000. This is all that was required to make Section 104-4-3 operative, and bring the office into existence.

Appellant’s contention that the office did not exist, either at the time of trial or theretofore, and does not now exist, cannot be sustained.

POINT II.

APPELLANT OGDEN CITY IS WITHOUT RIGHT TO RAISE THE QUESTION OF RESPONDENT'S RIGHT TO HOLD THE OFFICE BECAUSE (A) RESPONDENT'S RIGHT TO THE OFFICE CAN BE RAISED ONLY BY THE ATTORNEY GENERAL ON BEHALF OF THE STATE, OR BY ANOTHER CLAIMANT TO THE OFFICE; AND (B) OGDEN CITY CANNOT ATTACK THE CONSTITUTIONALITY OF THE LAW WHICH VESTED RESPONDENT WITH THE OFFICE.

Appellant's second point of argument is that even if the office does exist the respondent has no right thereto. Respondent's answer is two-fold; first, that this is a question which cannot be raised by appellant; and second, it is without merit. The second answer will be considered under point III of this brief.

(A) RESPONDENT'S RIGHT TO THE OFFICE CAN BE RAISED ONLY BY THE ATTORNEY GENERAL ON BEHALF OF THE STATE, OR BY ANOTHER CLAIMANT TO THE OFFICE.

Appellant here seeks by Declaratory Judgment to have determined a question which is quo warranto in character. While the extraordinary writ of quo warranto as such has been abolished by Rule 65B, Utah Rules of Civil Procedure, nevertheless the courts are given the power to grant appropriate relief where a question as to the right to hold public office arises. A

casual reading of the rule discloses, however, that such remedy is not open to appellant. Rule 65B (b), (c) and (d), so far as pertinent, provides:

“(b) Grounds for Relief. Appropriate relief may be granted:

(1) Where any person usurps, intrudes into, or unlawfully holds or exercises a public office, * * *.”

“(c) Action by Attorney General Under Subdivision (b) (1) of this Rule.

The Attorney General may and when directed so to do by the Governor shall commence any action authorized by the provisions of subdivision (b)(1) of this rule. Such action shall be brought in the name of the State of Utah.”

“(d) Action by Private Person Under Subdivision (b)(1) of this Rule.

A person desiring to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. * * *.”

Thus, it is apparent that under this rule only the attorney general, in the name of the state, or an individual himself claiming the office, can challenge respondent's right to the office. Ogden City does not so qualify and neither the attorney general, nor any individual, has sought to invoke the remedy. As a matter of fact, and indicative of the position of the attorney general's office, is the fact that he appeared in this action and in the name of the State of Utah moved to dismiss appellant's complaint.

However, it may be suggested that the remedy under Rule 65B is but an alternative remedy, and respondent's right to hold the office may nevertheless be challenged by the City in a complaint for declaratory judgment, despite the fact that no one else lays claim thereto. The answer to that is that neither the language nor the purpose of the act lends itself to such construction. If the office exists, and we are here assuming that it does, it should be filled. To the end of filling it Ogden City has issued its certificate of election to respondent, and has accepted and filed his oath of office. No dispute exists as between Ogden City and respondent as to who is entitled to hold the office, if it exists. The certificate of election issued by Ogden City evidences complete agreement between the parties to this action as to who holds the office. If more than one person was claiming the office, and Ogden City thus found itself in the middle of the controversy, or if, as in the case of *Lockler v. West Palm Beach (Fla)* 51 So. 2d 291, the city had a vacancy to fill by appointment, and was uncertain as to which of two men the law contemplated should receive the appointment, we could conceive of relief by way of declaratory judgment being proper. But when, as here, there is but one claimant to the office, and he is admittedly qualified, has acquired the office in the manner provided by law, and taken the required oath, absent a claim by someone else thereto there is no controversy to be determined by way of declaratory judgment, or at all. And that a justiciable controversy is essential to the entertaining of an action for declaratory relief is well settled.

(B) OGDEN CITY CANNOT ATTACK THE
CONSTITUTIONALITY OF THE LAW
WHICH VESTED RESPONDENT WITH
THE OFFICE.

The second reason why Ogden City cannot here raise the question of respondent's right to this office (still assuming that it does exist) is because it does so solely upon the ground that Section 104-4-3.10 is unconstitutional in its provisions for the issuance of a certificate of election to an uncontested candidate for the office.

We say that Ogden City cannot so challenge the unconstitutionality of that law for the reason that this court has held and reiterated that the constitutionality of a statute cannot be raised by one whose rights are not directly affected thereby.

11*Am. Jur.* 748:

“One of the elementary doctrines of constitutional law, firmly established by the authorities, is that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby. Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights. Assailants must therefore show the applicability of the statute and that they are thereby injuriously affected. The burden of proof is upon those who claim themselves harmed by a statute to show how, as to them, the statute is unconstitutional. Thus, one who invokes the power of the court to declare an act of Congress to be

unconstitutional must be able to show not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”

State v. Kallas, 97 *Utah* 492, 98 *P. 2d* 414.

State ex rel, Johnson v. Alexander, 87 *Utah* 376, 49 *P. 2d* 408.

Utah Mfgs. Assn. v. Stewart, 82 *Utah* 198, 23 *P. 2d* 229.

The statute provides (Section 104-4-3.10) in effect that if but one candidate files for the office of city judge he should forthwith be issued a certificate of election for the ensuing term. With regard thereto appellant says:

“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.”

In other words, the statute is unconstitutional because it deprives the citizens of their right to vote. But how, we ask, does this adversely affect the municipal corporation of Ogden City? If this proviso deprives the citizens of Ogden City of a constitutional right to vote, they, or any one of them, might in appropriate proceedings challenge its validity. But Ogden City has

no right of ballot, and having no such right it is deprived of nothing, and hence is in no wise adversely affected.

We restate the proposition in still another way. As noted above, it is fundamental that for one to raise a constitutional question he must show that the alleged unconstitutional feature of the statute so operates as to deprive him of a constitutional right. *Likewise, it is a prerequisite that he establish in himself the claimed right which is alleged to be infringed.*

16 C.J.S. (*Constitutional Law*) Page 162.

Thus, as a condition to raising the constitutional question that the statute deprives the voters of a right to vote for the office, Ogden City must establish that it has a right to vote, and that right is infringed.

So analyzed it is apparent Ogden City cannot as a matter of law challenge the constitutionality of the law upon the ground it does.

At least one other reason suggests itself in further support of respondent's position in this regard. However, as the foregoing is conclusive of the matter we mention it but briefly.

One who has accepted the benefits of a statute may not thereafter question its constitutionality. Here Ogden City has accepted and acted upon all of the provisions of this statute. When no other candidate filed for the office it issued its certificate of election. When election time came it relied upon the statute and saved itself the added costs and expenses incident to placing respondent's name upon the ballot. Thence,

while the constitutionality is open to challenge by an elector, it is not open to challenge by Ogden City whose own conduct in not putting respondent's name on the ballot gives rise to the only constitutional question involved.

POINT III

SECTION 104-4-3.10 IS NOT UNCONSTITUTIONAL IN ITS PROVISIONS FOR THE ISSUANCE OF A CERTIFICATE OF ELECTION TO AN UNCONTESTED CANDIDATE.

Appellant's argument in substance on this phase of the matter is that a city judge is ex-officio a precinct justice of the peace, and being such he is a constitutional officer and must be elected by reason of Section 1 and 8, of Article VIII, Constitution of Utah.

For the sake of the argument let it be assumed for the moment that the office of precinct justice of the peace is a constitutional office and cannot be abolished by legislative enactments. It does not follow, however, that the judge of a city court, which is not a constitutional office, becomes a constitutional officer by reason of being vested ex-officio with the duties of a constitutional office.

To the end of rationalizing this matter in the light of past decisions of this court, which are referred to willy-nilly by appellant, without regard to changing statutes, we review the history of city court legislation and pertinent decisions by this court with respect thereto.

By Section 213, Revised Statutes of Utah, 1898, the legislative office of city justice of the peace was created. That this was purely a legislative office was held by this court in the case of *State ex rel v. Howell*, 26 *Utah* 53, 72 *P.* 187, in the following language:

“The office of city justice of the peace is not among the offices created by the Constitution, and, as it is purely statutory, the Legislature, in its discretion, under the authority conferred by Article VIII, Section 1 of the Constitution, may before the expiration of the term of the incumbent, alter or abridge the term, or abolish the office entirely; or, when deemed necessary to the public interest, may abolish said office in particular localities of the State, and establish other and different courts therein.”

At this point it is interesting to note that this office of city justice of the peace, which could be created, altered or abolished by the legislature at will, had *concurrent jurisdiction* with the office of precinct justice of the peace. (Section 239, Rev. St. of Utah, 1898).

By Section 1, Chapter 112, Laws of Utah, 1901, Municipal courts were created by the Legislature and by Section 6 and 7 of such chapter given all of the civil jurisdiction of justices of the peace, and criminal jurisdiction equal to that of city and county justices of the peace.

At about the same time as the case of *State ex rel v. Howell*, *supra*, which held that city courts, whether they be city justices' courts or municipal courts, are purely legislative, this court decided the case of *Love v. Liddle*, 26 *Utah* 62, 72 *P.* 185, holding therein that

legislation affecting the jurisdiction of constitutional justices' courts must apply to all such courts alike, and could not be limited to but some. As that case concerned what was strictly a justices' court under the constitution it is of little value for present purposes.

The next change of any significance came about in 1919 (Chapter 34, Laws of 1919) when Section 1701, Com. Laws of Utah, 1917, was amended, and by virtue thereof

Section 1701

“the city courts, municipal courts, the offices of city justices of the peace, and justices' courts in all cities where city courts are hereby created shall be united and shall constitute the city courts of such cities, the judges of which shall be ex-officio justices of the peace in such cities * * *.”

Section 1712

“In cities where city courts are hereby created no justice of the peace shall be elected or appointed, and the judge of the said city court shall be ex-officio city justice of the peace and precinct justice of the peace and as such shall perform the duties of the said offices. Said city judge, as ex-officio justice of the peace as provided in this title is hereby made the successor of the justices of the peace now qualified or acting in the city or precinct where city courts are created.”

In the case of *Leatham v. Reger*, 54 Utah 491, 182 P. 187, this court held the effect thereof was not to abolish the constitutional justices' court, but rather to continue it with but a single individual, namely, a so-called judge, discharging the duties of both the city

court and justices' court. In other words, the two courts, while administered by a single judge, remained distinct.

That city courts as such under such statute were separate and distinct from justices' courts is further evidenced by this court's decision in the case of *Rich v. Industrial Commission*, 80 *Utah* 511, 15 *P. 2d* 641, in which this court pointed up the distinction by observing that constables were required to serve processes out of justices' courts, but not out of city courts:

“Before that amendment, as well as since, he was required to serve process issuing out of the courts of the justices of peace. Since that amendment, but not before, he is clothed with authority but not required to serve process out of the city court.”

Thus the law continued — two separate and distinct offices administered by a single individual — until the 1933 revision, at which time what had formerly been Section 1701 became Section 20-4-2, Revised Statutes of Utah, 1933, and Section 1712 became Section 20-4-4. Section 20-4-2 provided as follows:

“At the general election to be held in the year 1932, and quadrennially thereafter, there shall be elected by the qualified electors of their respective cities in the manner provided by the general election laws, in cities having a population of 50,000 or more, four judges, and in other cities having a city court, one judge, to be known as judges of the city court, for a term of four years beginning at 12 o'clock noon on the first Monday of January succeeding their election.”

Thus it is to be seen that former Section 1701 was drastically amended, and among other things the provisions of old Section 1701 for the "uniting" of the justices' courts with the city courts were deleted. The effect thereof was to do away completely with the justices' courts in cities where city courts were established, and continue only a city court.

Old Section 1712 was continued in substantially its former state as Section 20-4-4, as follows:

"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. As such ex-officio justices of the peace they shall be the successors of the justices of the peace acting in the city where such city courts are established."

The next change was in 1941, when Section 20-4-2 was amended by changing the figure 50,000 to 75,000. (Chapter 25, Laws of Utah, 1941). By the 1943 revision Section 20-4-2 was continued as amended in 1941, that is, identical with the 1933 provision, *supra*, but with the figure 50,000 now reading 75,000. Section 20-4-2 was continued as in the 1933 revision, *supra*. No further significant changes occurred until 1951, when by Chapter 26, Laws of Utah, 1951, the amendments which gave rise to this litigation were adopted.

To properly interpret the present status of city courts and justices in cities where city courts are located, the effect of the various statutory changes must be analyzed. Certainly as late as the decisions in the cases

of *Leatham v. Reger*, and *Rich v. Industrial Commission*, *supra*, which interpreted Section 1701, Revised Statutes of Utah, 1917, as amended by Chapter 34, Laws of 1919, the city court was separate and distinct from the justices' court, albeit administered by a single individual as judge.

But by virtue of the 1933 revision of the Laws (Section 20-4-2), the statutory provisions theretofore existing, and which resulted in the continuance of the justices' court in cities where city courts existed through their *unification* with city courts, were deleted, and thence from there have been no justices' courts where city courts exist. Section 20-4-4 of the 1933 Revision, which was continued down to the enactment of the present law in 1951, took care of that in the following language:

“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. As such ex-officio justices of the peace they shall be the successors of the justices of the peace acting in the city where such city courts are established.”

True it is that this section in substance existed under old Section 1701, but the then effect thereof was in the light of a city court *united* with the justices' court. Since 1933 a city court is not a justices' court, nor any part thereof, but exists purely and simply as an inferior court created by the legislature and exercising jurisdiction prescribed by the legislature.

Since the abolition from the statutes of the provisions of old Section 1701 uniting the courts, it might be suggested that Section 20-4-4 is unconstitutional in that it in effect abolishes the constitutional office of justice of the peace in cities where city courts exist. As this point is not here involved, nor the constitutionality of that section directly challenged, we make but the single observation that even if it has the effect of abolishing justices' courts in cities where city courts exist it is not unconstitutional for that reason.

Article VIII, Section 8 of the Constitution of Utah provides:

“The Legislature *shall determine the number of justices of the peace* to be elected, and shall fix their powers, duties and compensation.”

Here is an express grant of power to the legislature to determine where justices' courts shall and shall not exist. In determining that justices' courts need not exist where city courts have been created the legislature has acted within the constitution.

In *State v. Beckman*, (Mo.) 1945 185 S. W. 2d 810, it was held:

“While the office of justice of the peace is a constitutional office, there is nothing in Article VI, Section 37, limiting the power of the legislature in determining how many justices of the peace the public good requires.”

And in *State v. Gibbons* (Minn. 1938) 278 N. W. 578:

“Under section 8 of article 6 of the Constitution, the Legislature has the power to ‘provide for the election of a sufficient number of justices of the peace in each county * * * whose duties and compensation shall be prescribed by law.’ Under this provision the Legislature has the power to determine how many justices there shall be in any county and what shall be their duties. The Legislature may determine that there shall be no justice of the peace in any given county or portion thereof and it may restrict the constitutional jurisdiction of justices of the peace.”

Our interpretation of the statutes, accordingly, leads to the conclusion that at least since the 1933 Revision the city courts have been wholly separate and distinct entities created by the Legislature and existing by legislative grace under Article VIII, Section 1 of the Constitution. The legislature in creating them has likewise fixed their jurisdiction. In so doing the legislature has given them jurisdictional powers in many respects similar to that of justices of the peace, but in so doing the judges thereof have not been made justices of the peace, but rather independent judicial officers whose powers and functions are solely as the legislature has determined.

This interpretation is not without benefit of judicial support. The same conclusion was reached by the Supreme Court of Oregon in the case of *Ex parte Boalt*, (Ore.) 260 P. 1004.

There the constitution of Oregon provided for the election of justices of the peace for six year terms. The

legislature, however, created a municipal court for the city of Portland, and vested the judge thereof with the

“jurisdiction and authority of a justice of the peace.”

and further provided for his election by the city counsel for a four year term. In answering the contention of the constitutional conflict the Supreme Court of Oregon held:

“While it has been held that justices of the peace should be elected for the term of six years, there is nothing in the language of the constitution indicating that it was intended to apply to municipal judges clothed with the powers of a justice of the peace.”

Thus it is apparent that the legislature has the *power* to create a city court and the *power* to fix the manner of how the judge thereof shall be selected — whether by election, or appointment, or any other manner. Thus it has the *power* to provide for the issuance of a certificate of election to an uncontested candidate for the office.

We submit, accordingly, that the office of judge of the city court is not a constitutional office, but is strictly a legislative office, and Section 104-4-3.10 is not unconstitutional in providing for the manner of selection of city judges in the manner it does.

POINT IV GENERAL OBSERVATION ON THE PUBLIC INTEREST

Under this point of argument appellant seeks to lull the court into a sense of security and well being

by observing that this court can hold 104-4-3.10 unconstitutional, and deprive Respondent Patterson of his office of City Judge, without disturbing the situation as to all of the other city judges who hold certificates of election as uncontested candidates under this same Section 104-4-3.10. Appellant's premise is that each would thus hold over until his successor is elected and qualified.

The difficulty with the argument lies in the possible unsoundness of the premise that they hold over beyond the term for which they were elected. The history of this law becomes curiouser and curiouser.

Old Section 1701, Revised Statutes of Utah, 1917, as amended by Chapter 34, Laws of Utah, 1919, in providing for the election of city judges, fixed their term at four years,

“and until their successors are elected and qualified.”

When this section was amended by Section 20-4-2, Revised Statutes of Utah, 1933, this was deleted, and their terms fixed simply at four years. Section 20-4-2, U.C.A., 1943 was the same as in 1933, with no provisions for holding over.

By Chapter 36, Laws of Utah, 1943, Section 20-4-2 was amended—the principal effect thereof being to change the terms from four to six years—but the legislature there specifically provided

“Incumbents to hold office until successor is elected and qualified *at the municipal election in 1945.*” (Emphasis added)

Thus the law stood at the time of the enactment of Chapter 26, Laws of 1951, (now Section 104-4-3.10) under which the judges of other city courts hold certificates of election as uncontested candidates, the same as respondent Patterson.

Now the interesting thing is that not only does the last law in effect prior to the 1951 amendment not provide for a general carry over, but specifically limits carry over rights to incumbents in office at the time of passage in 1943, and further limits their rights to the time of the 1945 election.

We appreciate there is some conflict of authority as to whether, absent specific statutory carry over rights, an officer continues in office beyond his fixed term and until his successor is qualified, and that this court, by dictum at least, has approved the principle that where the statute is silent the incumbent may hold over beyond his term and until his successor is elected and qualified. As to whether during such carry over period he is "defacto" or "de jure" is another debatable question, which we won't dwell upon because our statute here is not silent, but specifically fixes and limits carry over rights to incumbents at the time the law was passed (Chapter 36, Laws of Utah, 1943), and then only to the 1945 elections.

We submit, accordingly, that everything is not in the clear insofar as other city judges who hold certificates of election as uncontested candidates are concerned, and that this court cannot hold this law un-

constitutional and thus deprive the respondent Patterson of his office without jeopardizing the position of every other city judge who holds such a certificate of election. It is, at least, highly questionable as to whether any city judge who was incumbent at the time of the 1951 election has any hold over rights as such whatever.

CONCLUSION

We submit, accordingly, that the judgment of the lower court be affirmed.

Respectfully submitted,

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