

1953

J. M. Palmer et al v. L. V. Broadbent : Defendants' Brief

Utah Supreme Court

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In The Supreme Court of the State of Utah

J. M. PALMER, G. R. PARRY, J. S.
PRESTWICH, LEATHA PREST-
WICH, CHARLES B. COOLEY, W. S.
LEIGH and CLARENCE E. MILLER,
Plaintiffs and Petitioners,

vs.

DEFENDANTS'
BRIEF

L. V. BROADBENT, Mayor of Cedar
City, Utah. J. L. FAKLER, KEITH
SMITH, WILLARD LUNT, FRANK
MILNE and MARION GRAMES, City
Councilmen of Cedar City, Utah
and ELLEN A. SIMKINS, City Re-
corder of Cedar City, Utah,

Defendants.

FILED

JUN 2 - 1953

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Cedar City, Utah.

Clerk, Supreme Court, Utah

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STATEMENT OF FACTS

At a regular meeting of Cedar City Council on 19 February, 1953 said City Council duly passed an ordinance entitled "An Ordinance granting to Southern Utah Power Company an electric light, heat and power franchise and repealing an ordinance granting to Southern Utah Power Company an electric light, heat and power franchise dated the 23rd day of March, A. D. 1944." This ordinance was duly published in the Iron County Record, a newspaper of General Circulation in Iron County, Utah including the City of Cedar City, Utah on the 26th day of February, 1953. By the terms of said ordinance it became effective on the 20th day after publication or the 30th day after final passage, whichever was most remote from the date of final passage in compliance with section 10-6-12, U. C. A. 1953. That said Ordinance became effective on the 21st day of March, 1953.

That on the 7th day of March, 1953, 16 days after the final passage of said ordinance and only 14 days prior to the effective date of said ordinance, and 9 days after the publication of said ordinance, attorney for the Sponsors served upon the City Recorder of Cedar City, Utah an Application for Petition copies, dated and signed by the applicants on the 7th day of March, 1953 as set forth in Petitioners "Exhibit B". That this act took place 16 days after the final passage of said Ordinance. That same was receipted for on that date by the City Recorder of Cedar City, Utah as shown by "Defendants Exhibit 1". That said application for Petition Copies petitioned and requested that said referendum petition, for the purpose of circulation, be divided into 15 sections, each section to contain 6 circulation sheets, and to have attached to the front sheet thereof, a certified petition copy of said referendum petition copy to be printed in six-point type, single leaded, to be securely bound at the top thereof, in the style and form provided by law.

That in accordance with said request and with Section 20-11-13 U. C. A. 1953 the City Recorder of Cedar City, Utah on the 10th day of March, 1953 requested bids

from 3 competent printers for the printing of said petition copies and said circulation sheets. That on the same date, but after requests for bids had gone to three printers, attorney for the sponsors presented to the City Recorder of Cedar City, Utah 15 alleged petition copies for her certification and signature and stated that he would be back for them in 15 minutes. The City Recorder of Cedar City, Utah requested legal advice on these matters.

Without waiting for this decision the sponsors commenced circulating for signatures various documents which had never been presented to the City Recorder of Cedar City, Utah, which did not bear her signature, Seal, or certification, as required by law, which had not been prepared by said City Recorder of Cedar City, Utah, which the City Recorder of Cedar City, Utah, had not numbered or made a record thereof as required by law and had had no opportunity to do so, and which documents had no force or effect whatsoever.

That on the 12th day of March, 1953 Sponsors received notice to the effect that the City Recorder of Cedar City, Utah had been advised not to sign the instruments left with her on the 10th day of March, 1953 by and for the reason that they did not substantially conform to the statute and that same were available at the office of the City Recorder of Cedar City, Utah as set forth in "Defendants Exhibit 3."

That on or about the 15th day of March, 1953 Sponsors at the office of the City Recorder of Cedar City, Utah accepted delivery of the items that had been left with the City Recorder of Cedar City, Utah on the 10th day of March, 1953.

That on the 17th day of March, 1953 the City Recorder of Cedar City, Utah notified the Sponsors of the lowest bid that had been received for the publication of the Petition Copies and Circulation sheets as requested by the Sponsors and required by law. That said notice is set forth in "Defendants Exhibit 4."

That on the 20th day of March, 1953 J. R. Palmer and Orville Isom, Attorney for the Sponsors, delivered to the

office of the City Recorder of Cedar City, Utah certain documents which they represented to be petition copies that had been previously circulated, which had never been previously exhibited to the City Recorder of Cedar City, Utah and which were of no force or effect whatsoever. That with said alleged petition copies were two certificates prepared by the Sponsors and signed by the County Clerk of Iron County, Utah. That the first of these . . . certificates is set forth as "Petitioners Exhibit D" and the second of same is set forth as "Defendants Exhibit 7."

That on the 23rd day of March, 1953 the City Recorder of Cedar City, Utah, after receiving advice from her duly authorized council and from the City Council of Cedar City, Utah declared said documents insufficient for a referendum election as set forth in "Defendants Exhibit 9" and that on the 24th day of March, 1953 duly notified the Sponsors of her action. That the receipt of said notice is also set forth in "Defendants Exhibit 8."

That on the 24th day of March, 1953 Sponsors requested a recount. That on the 28th day of March, 1953 Sponsors were notified of the results of the recount and invited to have a representative present for a further recount. That the Sponsors did not send a representative to the further recount.

That when the items which were delivered to the City Recorder of Cedar City, Utah on the 20th day of April, 1953 were on that date checked in the office of the Clerk of Iron County, Utah that a deputy of the clerk was present but that the Sponsors did any checking that might have been done that day and that a sponsor or a representative of the sponsor made all marks that were made on the alleged petition copies. That after so doing the County Clerk merely signed the certificates previously prepared by the sponsors. That said county clerk signed same in the presence of the Attorney for Sponsors who had been present and participated in the checking that was done on said alleged petition copies.

That on the 30th day of March, 1953, 9 days after the Ordinance in question had become effective, the

Sponsors delivered to the City Recorder of Cedar City, Utah a Certificate from the County Clerk of Iron County, Utah as set forth in "Petitioners Exhibit E-1" which purported to supplement the former certificate.

STATEMENT OF POINTS

1. Before a writ of Mandamus will issue there must be shown a clear right to the relief sought and a clear duty of performance resting on the one whom it is sought to compel to do the act.

2. That the instrument presented to the City Recorder of Cedar City, Utah on 20 March, 1953 was of no force or effect whatsoever and placed no duty upon the City Recorder of Cedar City, Utah or any other official of Cedar City, Utah.

3. That a supplementary certificate submitted 9 days after the effective date of an ordinance cannot have any effect on said ordinance being effective.

4. That the said certificate, purporting to supplement a former act of the sponsors, only added to the confusion and made it more difficult for the City Recorder of Cedar City, Utah to determine the number of qualified voters, if any, on said alleged Petition Copies.

ARGUMENT

1. It is a well established rule established over a long period that "Mandamus will issue only where there is a clear right to the relief sought and a clear duty of performance resting on the one whom it is sought to compel to do the act." This is upheld in the Utah cases decided by the Supreme Court of the State of Utah over a considerable period of time. A few of the Utah Authorities on this item are as follows: Board of Education of Ogden City vs. Anderson, 74 Pac. (2d) 681, 93 Utah 522 which holds as follows:

The right to require a person or a court to proceed and legal duty to do so must be free from doubt, oth-

erwise remedy by writ of Mandamus must be denied. *Colorado Development Co. vs. Creer*, 80 Pac. (2d) 685, 96, Utah 1 holds as follows:

In Mandamus, the plaintiff must show plain right for which the law gives no adequate remedy, except Mandamus, and duty in defendants to perform a ministerial act, including a showing of authority, ability and means to perform that act.

Harris vs. Turner, 85 Pac. (2d) 824, 96 Utah 342 holds: Whenever action by a court or other officer is sought to be compelled by Mandamus, it must be shown that there is a clear legal duty to act as requested, free from doubt, imperative, and without discretion to act or refuse.

This view is upheld by neighboring jurisdictions in the following cases *Grable vs. Childers*, 56 Pac. (2d) 357, 176 Okl. 360; *McDonald vs. Pritzl*, 93 Pac. (2d) 11, 60 Idaho 354; *State ex rel. Conklin vs. Buckingham*, 83 Pac. (2d) 462, 58 Nevada 450; and *State ex rel. Moore vs. Nan Tassel Real Estate & Livestock Co.*, 79 Pac. (2d) 276, 53 Wyo. 89

In the present case being considered there is no showing of any right for the relief sought nor is there any showing of any duty of performance resting on the City Recorder of Cedar City, Utah or any other official of Cedar City, Utah.

2. The facts as stipulated and the law governing Referendum Petitions in cities in the state of Utah show definitely that the instrument presented to the City Recorder of Cedar City, Utah on 20 March, 1953, alleged to be a Referendum Petition, was of no force or effect whatsoever and placed no duty upon the City Recorder of Cedar City or any other official of Cedar City, Utah.

The basic law in the state of Utah stems from Article VI, Section 1, Subsection 2 of the Constitution of the State of Utah which clearly places upon the legislature of the state of Utah a duty to state what percentage of the people of a city may initiate a Referendum on an Ordinance of said city and also places a duty on said legis-

lature to state the manner and time in which said Referendum may be had. In response to this Constitutional Requirement the legislature has enacted Chapter 11, Title 20 of the Utah Code Annotated, 1953, consisting of 25 sections which is the law as required by said constitutional provision that states the proportion of the people that may cause a referendum of a city Ordinance and the time and manner in which same can be performed. The Sponsors have stated in their brief to the effect that this is very unsatisfactory legislation concerning this matter of Referendum in cities. However there is no question to the effect that this is not the legislation that governs Referendum in cities and while the Sponsors in the case at hand may not approve of the legislation never the less said Sponsors, and the City Officials of Cedar City, Utah, are admittedly bound by this legislation, and must conform to this legislation for a Referendum and are not allowed to initiate a proceeding of their own for this matter.

Our basic law is well settled to the effect that there is no authority for Initiative and Referendum procedures in cities except as stated by Constitution, Statute, or Charter. It is also well settled that where so stated by Constitution, Statute, or Charter, that the Initiative and Referendum procedure therein stated is exclusive and Mandatory. For the basic law on this matter see 43 Corpus Juris, at page 583, Section 946. ORDINANCES UNDER INITIATIVE AND REFERENDUM LAWS, and continuing sections thereafter, as follows:

Section 948. Source of Power. Unless authorized by organic law or by charter or general statute, a municipal council is without authority to pass ordinances providing for a referendum of any kind.

Section 950. Method of Exercising Power. The method of exercising initiative and referendum powers must conform to, and comply with, the mode presented in the constitution or statute conferring the power.

Section 956. Petition, in General. The petition must

comply in all respects with the statutory requirements, which are construed as being mandatory. A petition which measures up to this standard is sufficient.

Section 956. Amendments. An insufficient petition for a referendum cannot be amended after the ordinance has gone into effect, and does not necessarily operate to suspend the ordinance.

Section 959. Time of Filing. After the time limited for filing a petition has expired a defective petition cannot be amended and such amendments are of no effect to suspend the ordinance.

In view of this the action of Sponsors in entirely ignoring the statutory procedure and initiating a procedure that substantially differs from that set forth in the statute that produced an unofficial document of no force or effect whatsoever. As a matter of fact that Sponsors waited until they had only 14 days in which to accomplish the statutory procedure and then violated the mandatory statutory procedures in substantial ways and have now brought this mandamus proceeding asking the Supreme Court of the state of Utah to require the City Recorder of Cedar City, Utah to endorse a referendum procedure that materially differs with mandatory statutory requirements and place on a ballot a Unofficial Referendum. In view of the long established authority that these statutory proceedings are mandatory there can be no conclusion on this matter except to deny the Petition and order the City Recorder of Cedar City, Utah not to put said Unofficial Referendum on the ballot.

That the procedure of the Sponsors did not substantially comply with the statutes of the state of Utah cannot be denied by the Sponsors. After presenting to the City Recorder of Cedar City, Utah, their Application for Petition Copies specifically requesting that the statute be complied with the Sponsors apparently immediately ordered printed their own version of the Petition. On 10 March, 1953 this was presented to the City Recorder of Cedar City, Utah for signature. She took time to obtain

legal counsel on this matter and without waiting for her decision the Sponsors commenced circulation of a spurious and unofficial document that the City Recorder of Cedar City, Utah had never seen and had never had the opportunity to see. At this point an unanswered question that this writer has it this, "If the City Recorder of Cedar City, Utah had signed the matters presented to her, how would the Sponsors have gotten the signature they had already obtained upon the circulation sheets attached to the Petition Copies signed by the City Recorder?" Of course this answer lies with the Sponsors and not with this writer, but the Sponsors have stipulated that they circulated the sheets presented to the City Recorder of Cedar City, Utah on 20th March, 1953 prior to the receipt of notice from the City Recorder of Cedar City, Utah that the items left with her on 10 March, 1953 would not be signed. If the Sponsors had not commenced the circulation for signatures of some unofficial document prior to the receipt of notice that the alleged copies left with the City Recorder on 10 March, 1953 would not be signed they should have brought an action for Mandamus at that time. The Supreme Court of the State of Utah has so held in the case of Coleman vs. Bench, 84 Pac. (2d) 412, 96 Utah 1943 as follows:

The processes of initiation and referendum are exposed to act of judiciary at certain points along the way because they are not in control of a single agency, but depend on certain ministerial officers doing their duty, and, therefore, resort may be had to judiciary for mandamus for purpose of enforcing processes of initiation which might not be enforced in any other way.

This writer cannot understand the total disregard of the Sponsors for commencing circulation for signature of unofficial spurious documents without waiting for the decision of the City Recorder, and certainly had they waited for the decision of the City Recorder and had been unsatisfied with said decision their remedy should have been a resort to mandamus at that time and not the cir-

ulation of unofficial, uncertified, spurious documents of no legal effect whatsoever.

But the fact of the matter is that the Sponsors condoned and approved the action of the City Recorder of Cedar City, Utah and continued the circulation of said unofficial, uncertified, spurious documents of no legal effect whatsoever and presented to the City Recorder of Cedar City, Utah on 20 March, 1953 a document which said Sponsors allege to be a good and sufficient Referendum Petition even though it had never been previously seen by the City Recorder of Cedar City, Utah, and even though she had never had an opportunity to see said document and even though she had never had an opportunity to do those things by law required of her to be done in connection with a Petition for Referendum.

Therefore the questions actually before the court are not concerning the action of the City Recorder of Cedar City, Utah in connection with the matters presented to her on 10 March, 1953 but are questions concerning the validity of the document presented to said City Recorder on 20 March, 1953 and its sufficiency as a Petition for Refendum.

The defendants contend that same was not a valid Document and that same was insufficient for a Petition for Referendum for the following reasons:

I. Their is no question but that the Constitution of the State of Utah and Chapter 11 of Title 20 of U.C.A. 1953 control this matter. The previously cited matters in Corpus Juris state the existing law in relation to substantial compliance with the law being mandatory This has been upheld in the case of Allen vs. Rasmussen, City Recorder, 117 Pac. (2d) 287, as follows:

This is so because while, Section 25-10-23 (now 20-11-23) prescribes that the manner of exercising the referendum powers reserved to the people of cities and towns shall be "similar" to the procedure prescribed for state initiative and referendum the deviation, if any other than that elsewhere expressed in the statute, which might be suggested by the use of the

word "similiar", is limited by the other provision of such section wherein is expressed legislative intention to make the procedure in referring a municipal ordinance "as nearly as practicable" the same as that prescribed for reference of an act of the legislature.

This very definitely established that substantial compliance with the statutes of the state of Utah is required for the production of an effective Referendum Petition.

II. In the case at hand the Provisions of Law relating to Referendum Procedure, and the Conditions precedent to the Acceptance, by the City Recorder of Cedar City, Utah, of the Alleged Petition copies had not been complied with in the following particulars:

A. The Alleged Petition Copies presented to the City Recorder of Cedar City, Utah had never been printed under the authority or directions of the City Recorder of Cedar City, Utah as required by law.

Section 20-11-13, U.C.A. 1953 puts a number of duties on the City Recorder in a City Referendum, to-wit: to determine the number of petition copies desired, to determine the number of circulation sheets required, solicit bids from not less than three competent printers for the petition copies and circulation sheets and for the printing of the certificate that the title of the ordinance contained thereon is the true and correct number of the title of this law as proposed for referendum, notification of the lowest and best bid received, the payment of the bid for the printing of the petition copies and of the sum of 50 cents per hundred for the circulation sheets, making up the petition copies. Of the items thus required of the City Recorder not one had been performed by the City Recorder of Cedar City, Utah on the spurious and unofficial document delivered to her office by the Sponsors on 20 March, 1953. Certainly the Sponsors do not contend that this section of the law has been substantially complied with. Certainly leaving of the certificate required by this section is not substantial compliance with the law on this matter. In this section of the statute there is

shown a legislative intent that a person asked to sign a petition may have the assurance that same is the correct number and title of the Ordinance. Can this assurance be given if the certificate to this effect is left off entirely.

Sponsors contend that they have the right to have these petition copies printed to suit themselves. Is that the legislative intent of the statutes on this matter? Do these statutes at any place state to the effect that if the Sponsors sleep on their rights until such time as the time is very short on this matter then and in that case they may bypass the statute and prepare some document to their own satisfaction and then circulate same and represent that it is an official act of the City Recorder of Cedar City, Utah and that same is an official Document? Certainly this action was not the intent of the legislature at the time the statute was adopted nor is it the intent of Article VI, Section 1 of the Constitution of the State of Utah.

In their brief the Sponsors contend that that portion of the statute requiring the bids is for their protection. Is that the case. Sponsors cite 56 Am. Jur. Page 109 for their authority in this matter. Continuing the citation of the Sponsors we find as follows:

Because requirements of a statute enacted for the public good may not be nullified or varied by private contract, the donee of a private right created by statute for the public good does not have the legal power to make an anticipant waiver of such right. 56 Am. Jur. 115. Intention to Relinquish. A prerequisite ingredient of the waiver of a right or privilege consists of an intention to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive and that fact that he knows his rights, and intends to waive them, must plainly appear. As in other situations the question whether waiver will be found in any particular case depends not upon the secret information of the party against whom it is asserted, but upon the effect

which his conduct has had upon the other party. There is no waiver unless the waiver is so intended by one party and so accepted by the other.

Can it be said that the Sponsors had any rights in this matter that they could waive. Certainly if they had any rights that they might waive the delivery to the City Recorder of Cedar City, Utah of a written application for Petition Copies in conformity with the law cannot now be construed as an intention to waive any rights under the law. Also if the Sponsors had any rights in this matter they must of necessity be a right in connection with a public good and cannot be waived therefor. Thus the statement of the Sponsors to the effect that they waived their rights, if any, after failing to comply with the statute in a substantial manner, after requesting the City Recorder, in writing, to comply with said statute seems to present the Sponsors in inconsistent positions. Can any person request that a law be complied with, then fail to substantially comply with the same law and make substantial changes in the contents of the item they have just requested be furnished to them in compliance with the law, and then take the position that they have waived their rights? Or is compliance with the law to be deemed a matter of convenience.

B. The Alleged Petition Copies that were circulated for signatures were never signed by, or issued by the City Recorder as required by law, and no record thereof was kept in the City Recorder's office, and said Alleged Petition Copies and circulation sheets were wholly unofficial and void.

The Sponsors have stipulated that the items presented to the City Recorder of Cedar City, Utah had never been previously seen by her, or previously presented to her. Is this substantial compliance with the statute. Did the statute intend that the City Recorder should prepare these petition Copies, and circulation sheets, and keep a record of them, and have them go out for signature as official documents under her certificate and seal or did the statute intend that any one that felt so inclined

might prepare and put out for circulation and signature any document and represent that this is a referendum petition? Did the statute intend that any one that desired might take a blank sheet of paper and circulate for signature and state that this is a referendum petition on some sort of a subject? Absurd! Of course this contention is absurd. But it is exactly what has happened in this case. It is certainly not possible that this is what the Constitution of the State of Utah provides for when it states "within such manner and within such time as may be provided by law." Certainly there is no intent in our constitution of any sort of a referendum petition being circulated for signature except as provided by law. Certainly there is no intent in our statute of petitions being printed independently of the City Recorder and being completely circulated for signature without the certificates required by law, without the signature of the city recorder required by law. Is this circulation of a spurious, unofficial, and unlawful document substantial compliance with the statute. These defects are not defects of form but are material and substantial defects that cannot be overlooked.

C. The Alleged Petition Copies and Circulation sheets were wholly unofficial and unauthorized when circulated for signature.

There is no authority for the preparation of Petition Copies and Circulation Sheets as in this case prepared by the Sponsors. The statute is definite that this is the duty of the City Recorder. For the Sponsors simply to print and circulate same without regard to the requirements of the statute was certainly not contemplated by the Constitution of the State of Utah nor the statute controlling this function.

D. The alleged Petition Copies and Circulation Sheets when construed in the light of the formula set-forth in the sworn certificate of the County Clerk of Iron County, contained the signatures of no registered voters of Iron County.

The controlling law on this matter in this jurisdic-

tion is the case of *Halgreen vs. Welling* 63 Pac. (2d) 550, which has been affirmed by *Allen vs. Rasmussen*, 117 Pac. (2d) 287. The *Halgreen vs. Welling* case holds:

We think that the statute is clear that the clerk should indicate by appropriate marks, explained, or by words such as "registered" or "not registered" or the equivalent thereof by abbreviations or otherwise so the Secretary of State can determine from an inspection of the petition copies "whether or not each name is that of a registered voter."

The county clerks are required to certify that the signers are or are not registered voters. The Secretary of State is to determine how many qualified registered voters have signed the petition—it is a matter of counting qualified registered voters' names on the assembled petition copies.

The Secretary was without the necessary information and therefore without jurisdiction to say that he had "received, counted, and found sufficient" the number of qualified signers on the initiative petition as a whole. The names could be counted, but it could not be determined whether they were qualified signers. Only qualified signers make a "sufficient" petition.

By taking this formula, that the certificate of the county clerk as to the number of qualified voters cannot be considered by the City Recorder but she must make an independent verification of the number of qualified voters based upon the formula of the County Clerk we reach an amazing result with the case at hand. The certificate of the County Clerk as shown in "Defendants' Exhibit 7" states "And I further certify that I have indicated such names appearing thereon as are registered voters in Cedar City, Utah, by placing before each of said names a check in the column where the name of such registered voter appears; I further certify that all the names on said sheets not marked with a check either are not registered voters in Cedar City or are the names concerning which I have some question which prevented my certifying

that they are registered voters in Cedar City, Utah." Examination of the spurious document which accompanied said certificate reveals that in front of the names of the supposed signers are various numbers, behind said names are various marks, including five different types and styles of check marks, some crosses, some circles, and many without a mark of any kind. Examination reveals that there are some that have no marks in front. When the City Recorder makes an independent application of the formula of the county clerk she can arrive at only one result. That there is not a registered voter of Cedar City, Utah with signature on said alleged petition copies.

On the 30th day of March, 1953 the Sponsors confirmed the finding of the City Recorder of Cedar City, Utah by submitting a Supplementary Certificate on the same subject. This certificate is identical except it states that the check marks are behind the names. It also states that it is a certificate to supplement the original certificate. This supplementary certificate is set forth in "Petitioner's Exhibit E-1". Certainly if the original certificate was correct and merely applied wrongly by the City Recorder of Cedar City, Utah then there would have been no need to submit the supplementary certificate. Remembering that the certificate submitted 30 March, 1953 states that it is supplementary to the certificate of 20 March, 1953 it does not clarify the subject, if it could be accepted, but further confuses same and makes it that much harder to get a determination. The original certificate states that the check marks are in front. A supplement thereto merely states that they are behind and that this is a supplementary certificate. Which Certificate is correct? One does not correct the other but by its contents merely supplements the other. Construing the two together is there any way that a City Recorder or any other official can determine the number of registered voters on the Alleged Petition Copies? Are the check marks behind or in front? Which certificate is correct. What effect does a supplementary certificate that states

something contrary to the certificate it supplements have on the original certificate? These are the questions that the City Recorder is expected to answer. These are the questions that the City Recorder would have to answer prior to a determination of the number of registered voters on the alleged petition copies. With the information thus available she cannot determine the number of registered voters on the alleged petition copies and therefore there could be no change in her result concerning the number of voters and concerning the sufficiency of said alleged petition copies.

The sponsors cite a California case on this matter to the effect that the late certificate can be considered by the City Recorder. The case that they cite, Willett vs. Jordan, Secretary of State, 53 Pac (2d) 1025 is on a statute entirely different than our statute. In the California statute the county clerk is required to determine the actual number of registered voters on each petition copy and so certify. Our statute requires the county clerk to identify the registered voters and the City Recorder to make the determination of number based on this identification. The statutes involved are entirely different. Especially significant in this matter is 43 Corpus Juris 589 concerning amendments which reads as follows:

As insufficient petition for a referendum cannot be amended after the ordinance has gone into effect, and does not necessarily operate to suspend the ordinance.

Of greater interest to this jurisdiction is the case of Allen vs. Rasmussen, 117 Pac. (2d) 287, which reads as follows.

The time when it is obligatory to have before the filing officer a sufficient petition to require submission has been by the legislature keyed to the effective date of such law, absent such a petition then filed. But here we are asked to vary the procedure clearly indicated by the legislature in such a way as to defeat some of its salutary features. This we are not at liberty to do.

Thus in the Allen vs Rasmussen case the Supreme Court

of the State of Utah clearly holds that it is necessary for a sufficient petition to be filed prior to the time that the ordinance becomes effective. This the Sponsors admit that they have not done because 9 days after the ordinance became effective the Sponsors felt that it was necessary to submit a supplementary certificate on the matter.

Sponsors contend that the City Recorder had a duty to notify them of the Insufficiency in time to correct same. This is not necessarily true. On this subject 43 Corpus Juris 591 states:

Time of certification. Although the statute does not fix the time within which certification must be made, this duty must be performed within a reasonable time.

Now the question of what is a reasonable time as answered in 102 A.L.R. 51 to the effect that 5 days from the time a petition was submitted until it was set for hearing concerning its sufficiency was reasonable and that 10 days was reasonable. The same annotation indicates that 30 days has been held reasonable. In the case at hand the Sponsors contend that an Alleged Petition submitted in the late afternoon of 20 March, 1953, actually determined by the City Recorder to be insufficient on 23 March, 1953 of which said Sponsors received notice on 24 March, 1953 is an unreasonable period of time for the determination and that there was a duty to make a determination so that they could remedy the defects prior to the ordinance becoming effective 21 March, 1953. Certainly the above quoted authority on this subject does not consider a time of three days in arriving at the determination of sufficiency an unreasonable length of time.

E. The Alleged Petition Copies did not contain the Certificate required by Section 20-11-12, U.C.A. 1953

This section contemplates that each Petition Copy circulated shall have a certificate to the effect that it is a full, true and correct copy of said Petition. This was not done nor was there an opportunity to do so. The Sponsors have admitted circulating alleged Petition Copies

that the City Recorder had never seen or never had an opportunity to see, and Sponsors have Stipulated to the effect that this was done prior to the receipt of the notice on 12 March, 1953 that others would not be signed. This means that the items circulated for signature may or may not have been correct Petition Copies. Certainly this was not and is not the intent of the legislative act controlling Referendum and certainly this is a mandatory requirement.

F. The alleged Petition Copies and Circulation sheets were not printed in 6 point type as required by Section 20-11-13, U.C.A. 1953.

There is not a question but that this is one of the requirements of the statute. The Sponsors have stipulated that this was not complied with. This seems to be in the spirit of the entire action of the Sponsors in this matter.

CONCLUSIONS

Therefore Defendants are convinced and argue that the Plaintiffs' action for a writ of mandamus should not be allowed for the following reasons:

1. That the plaintiffs have failed to show a clear right to the relief sought and have failed to show a duty of performance resting on the City Recorder of Cedar City, Utah or any other official of Cedar City, Utah.

2. That the instrument presented to the City Recorder of Cedar City, Utah on 20 March, 1953 was of no force or effect whatsoever and placed no duty upon the City Recorder of Cedar City, Utah or any other official of Cedar City, Utah.

3. That a Supplementary certificate submitted 9 days after the effective date of an Ordinance cannot have any effect on said ordinance being effective.

4. That substantial compliance with the Constitution of the State of Utah and the statutes of the State of Utah governing the procedure for Referendum of a city Ordinance is a prerequisite of a valid referendum petition and failure to substantially comply with same prevents the

alleged referendum petition from being effective, and failure to substantially comply with same will not prevent said ordinance from becoming effective.

5. That because of the failure of the Sponsors to substantially comply with the Constitutional and statutory requirements concerning a municipal referendum the Ordinance in question became effective on the 21st. day of March, 1953.

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