JUDGE WILLIAM L. WINDOM

[June 1, 1860 – July 20, 1935]

William Lincoln Windom was admitted to the Illinois bar in 1881 at age twenty-one. In 1887, after a few years pursuing adventure in the West, he opened a law practice in Ashland, Wisconsin. Nine years later he moved to Duluth and formed a partnership with M. H. McMahon. As the nephew of the late William Windom, who had served as Secretary of the Treasury under Presidents James Garfield and Benjamin Harrison, he already connections in the Republican Party.[1] He became a favorite stump speaker for the party and in 1900 was elected President of the State League of Republican Clubs.

He was a fierce opponent of capital punishment. On October 9, 1899, he appeared before the state Pardon Board and delivered a powerful plea for mercy for eighteen-year-old George J. Ferguson, who had been sentenced to death for murder in Itasca County. He made an impassioned argument against the death penalty in general while also mentioning Ferguson's youth and other mitigating circumstances.[2] His client's

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[1] William Windom (1827-1821), a Winona lawyer, served in the House of Representatives, 1859-1869, and as United States Senator from Minnesota, 1870-1871, 1871-1881 and 1881-1883; he also served as Secretary of the Treasury in 1881 and from 1889 to death on January 29, 1891. For a study of his public life, see Grace Anne Wright, "William Windom (1821-1890): His Public Service" (MLHP, 2017) (published first, 1911). For his memorial services, see "Memorial Tribute to the Character and Public Service of William Windom" (MLHP, 2017) (delivered first, 1891).

[2] Windom's appearance before the Pardon Board was described in the *St. Paul Daily Globe* on October 10, 1899, and is posted in the Appendix, at 15-19. The Board's reasons for commuting the sentence to life imprisonment were reported in the *Globe* on October 15, and are posted in the Appendix, at 19-22.

life was spared.

In 1900 he placed an unusually long profile in Charles E. Flandrau's *Encyclopedia of Biography of Minnesota*. He listed several of his courtroom victories and took pleasure in noting his successful eleventh hour appeal in the *Ferguson* case:

> **William Lincoln Windom, a prominent attorney of Duluth, was born at Sterling, Illinois, June 1, 1860. On the paternal side he is extracted from Quaker stock, which is traceable to a remote English ancestry, while his mother, whose maiden name was Ruth H. Lumm, was descended from a distinguished Virginia family. His father, Jonas Windom, was a native of Ohio, and removed, in 1845, to Sterling, Illinois, where he died in the year 1887. In his lifetime he was an energetic and prosperous business man, and was an enthusiastic Abolitionist during the times of our Civil strife, although never identifying himself with politics. His son, William Lincoln, of whose life this sketch will now treat, was reared in his native town of Sterling, from whose public schools he graduated at the age of eighteen. He then studied law under Col. William M. Kilgore and Frederick K. Sackett, and at the age of twenty-one was admitted to practice at the**

The name of Ferguson's victim has various spellings in newspaper accounts of the case. In the *Globe* on October 10, 1899, he is identified as "Naugle" while in the October 15th edition, he is "Noggle." In the October 26, 1899, issue of the *Warren Sheaf*, he is "Boggle."

The Pardon Board had three members: The governor, the chief justice and the attorney general.

bar of Illinois. But he was compelled, by a derangement of the eyesight, to postpone the pursuit of his profession, and, going west, he led an active out-of-door life until 1887, in which year he located, in a professional capacity, at Ashland, Wisconsin, where he enjoyed prompt and abundant success. The last case tried by him in that State was the noted one of *Pool vs. Thirty-one Separate Insurance Companies*, which was pending for two years. Mr. Windom handled the case in a masterly manner, securing one of the largest verdicts ever obtained in an insurance cause in Wisconsin.

In 1896 Mr. Windom came to Duluth, where he formed a partnership, which still continues, with M. H. McMahon; and during the last four years his firm has built up a very lucrative practice, and become conspicuous in its connection with many distinguished cases. On the criminal side may be mentioned the case of the *State vs. Ferguson*, into which the services of Mr. Windom were called after the death sentence had been pronounced upon the defendant, and the day of execution set by the Governor. Desperate as the situation appeared, Mr. Windom did not despair, and his efforts resulted in the reprieve of the condemned man. On the civil calendar, our subject has been successful in numerous cases involving large sums of money, and on the occasion of the application before the State board for the division of St. Louis county he stood as the sole attorney for the opposition, winning the

case against heavy odds. [3]

October 3, 1893, at St. Paul, Mr. Windom was married to Lotta Cornelia Gardner, daughter of John E. Gardner. The Hon. William Windom, deceased, late Secretary of the United States Treasury, was an uncle of William L., and the nephew has given ample evidence of abilities which qualify him, also, for high official duties. Heretofore, however, he has not permitted his name to be proposed as candidate for any office whatsoever, though from present indications it seems probable that, in the approaching campaign, he may be made Republican nominee for Congress from the Sixth District. Whether or not he will accept the compliment, he alone is in a position to determine. Mr. Windom is much in favor with the Republican State Central Committee, in whose service he has done most effective work since 1892. Previously—in 1894-5—as chairman of the Ashland County Central Committee of Wisconsin, he endeared himself to his constituency by his sagacious and irreproachable conduct of the campaign to a complete victory, the general approbation finding ardent expression through the press.

As a stump speaker Mr. Windom has few equals in the State, and his eloquence has been felt on occasions other than political. In a speech delivered at Duluth on Decoration Day, 1898, he paid a fervent tribute to the sleeping patriots of our Civil War, according honor and reverence alike to all, regardless

[3] **Reports of this case have not been found.**

of whether their resting places are marked with imposing monuments or wooden slabs, or are the unmarked common trenches. He dwelt with touching eloquence upon the part played by the women of our Nation in the great sacrifice, pronouncing them patriots no less than the brave soldiers themselves. He strengthened in his hearers the realization of their blessings as citizens of the United States—blessings purchased at the awful price of seven hundred and fifty thousand lives—and impressed upon them the magnitude of their debt to that martyred multitude and to our veterans. Continuing, he said in part:

> **"When President Lincoln called upon them they responded, from all political parties, from all walks in life—one grand blue line! They knew only one thing: the Government was in danger; 'Old Glory' had been fired upon. Home was nothing, associations were nothing, life was nothing. The Union was in danger, which had been established by their fathers; and asking God's blessing upon their cause, their parents, their wives, their children, they left all, and, amidst the smoke of battle, the shrieks of bursting shell and the diseases of the camps, hundreds of thousands of men laid down their lives, until finally Providence smiled upon our arms, the last shot was fired, Appomattox was reached and the Union was saved. The Union was saved because the fires of patriotism had been kept lighted; it was saved because the spirit of liberty which animated the**

> **Revolutionary sire still burned within the bosom of the son. And the same spirit is manifest to-day. when our boys in blue again go forth for freedom and humanity, not in the spirit of conquest, but in the same old cause, liberty, not for themselves—they have that now—but for others who have never enjoyed liberty, and want it. Their time for our honor and praise will soon come; perhaps some of their graves will be included in the decorations on next Memorial Day. But 'sufficient unto the day is the evil thereof.' The old Veterans now deserve our undivided attention. All honor in the past, now and forever, to the dead soldier martyrs, and the living soldier heroes of the Union army!" [4]**

In this self-portrait, Windom prophesizes, "that, in the approaching campaign, he may be made Republican nominee for Congress from the Sixth District [in 1900]." The party that year used a primary to select delegates to the county convention. Windom, an insurgent,[5] challenged Page Morris, a well-organized, two-term incumbent supported by the local "machine" of L. M. Willcuts.[6] In the primary election on May 7, 1900, Morris won seven of Duluth's eight wards, received 1308 votes to Windom's 813 and had over 60 delegates to the county convention.[7] The following

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[4] Charles E. Flandrau, 1 *Encyclopedia of Biography of Minnesota* 355 (1900) (italics added).

[5] *Duluth Evening Herald*, April 21, 1900, at 12 ("Willcuts is alarmed. Popular uprising against machine rule seems to be behind Windom and Morris managers are nervous. Fight getting warm").

[6] The phrase "Willcuts-Morris machine" was used frequently by the *Herald.* E.g., in a pre-primary editorial, May 7, 1900, at 4, and in an account of the primary results, May 8, 1900, at 1.

[7] Precinct and ward votes are listed in the *Duluth Evening Herald*,

morning Windom defiantly told a *Herald* reporter:

> **I think I have given them a good fight, considering the fact that I was in it single-handed. Of course this fight is all in the party, and I am for the nominee of the party and will work for his election. But I am not through with the fight in the party. I will fight the ring until it is downed. I do not mean to say that I shall fight it as a candidate, but I shall be found against it every time.[8]**

In 1902 the post of Duluth Municipal Court Judge fell vacant upon the resignation of William D. Edson. To succeed him, Windom and Daniel Waite were mentioned and Judson D. Holmes, an assistant city attorney, applied directly to Governor Van Sant for the post. Their supporters sent endorsements to the governor emphasizing their party loyalty as much as their legal talents.[9] Appreciating Windom's tireless work for the party and perhaps seeing an opportunity to rid the local "machine" of this thorn in its side,[10]

May 8, 1900, at 3. They were not totaled. The results listed above have been hand counted. Windom only won the Sixth Ward.

[8] *Id.* Morris was endorsed at the Sixth Congressional District convention in Duluth on May 15, 1900, and elected to a third term in November.

[9] Governor Samuel R. Van Sant Papers, General Correspondence, Box 53, 1901-1905 (U-Z). Posted in the Appendix, at 22-32.

[10] In its report of the appointment, the *Herald* concluded:

> **Mr. Windom has been a prominent factor in Republican politics in this city for several years. Two years ago he was urged strongly for the Republican congressional nomination against Page Morris. He has fought the old Republican machine some bitter battles, but today some of the politicians that were most strongly against him two years ago are commenting on the wisdom of Governor Van Sant's choice.**

***Duluth Evening Herald*, June 27, 1902, at 4 ("A judge is named").**

the governor appointed him judge of the Duluth Municipal Court on June 26, effective August 1, 1902.[11] The *Evening Herald* applauded the selection:

> **The appointment of William L. Windom as judge of the municipal court to succeed Judge Edson, who has resigned in order to devote his whole time to his congressional candidacy, has met with a considerable degree of approval, as Mr. Windom is personally popular and has many friends among the politicians who have been much interested in the outcome of the little contest for the position.**
>
> **For a political appointment, Mr. Windom's selection is a very good one, and he has been heartily congratulated upon obtaining the governor's favor in this respect. The un-expired term of Judge Edson covers about a year and a half, but Mr. Windom's tenure of office under this appointment extends only until the next municipal election.[12]**

At this time judges on all levels ran on party tickets for election or re-election. In his first election on February 3, 1903, he was unopposed, as reported in the *Duluth Evening Herald*:

> **It is about the quietest city election on record.**
>
> **The polls opened at 6 o'clock this morning. One minute and thirteen seconds later Fred Voss, Democrat, was re-elected**

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[11] The appointment can be found in State Archives, Governor Appointment Files, 1898-1982, Agency Officials and Judges, Volume A (1898-1911), at 154. Posted in the Appendix, at 33. Windom's acceptance is in the Appendix, at 34.

[12] *Duluth Evening Herald*, June 28, 1902, at 6.

city treasurer.

A moment or two after that William L. Windom, Republican, was elected judge of the municipal court.[13]

That year he placed an odd biographical sketch in *The Book of Minnesota*. He devoted as much space to his political activities—he remained president of the State League of Republican Clubs—as his service on the bench:

WILLIAM L. WINDOM, judge of the municipal court of Duluth, has done notable service for the Republican party but during his whole public experience, which includes the campaigns of twenty-one years, this is the first time that he has held office. Judge Windom has administered the affairs of the municipal court with fairness, intelligence and uncommon discrimination. The unfortunate receive mercy at his hands, but cruelty and brutality do not go away unscathed. He was elected president of the Minnesota State League of Republican Clubs in 1900, and put up an organization double the size of any previous organization ever effected in the State, both in number of members and clubs. He has organized over 270 clubs with over 40,000 members. He is still president.[14]

Duluth municipal court judges held three-year terms

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[13] *Duluth Evening Herald*, February 3, 1903, at 11 ("Making No Stir. City Election Today Quietest on Record"). The next day, the *Herald* reported that Windom "received the greatest vote" of any candidate in that election. *Duluth Evening Herald*, February 4, 1903, at 8.

[14] *The Book of Minnesota* 49 (1903). A fragile copy can be found at the Historical Society.

until 1913. In his next election on February 6, 1906, he was opposed but the result was not close, as reported by the *Herald*: "Judge Windom buried his opponent under an avalanche, and piled up a plurality of nearly 2,000, carrying all but three precincts and every ward."[15] In 1909 he was re-elected without opposition.[16] On February 6, 1912 he was again re-elected to a three-year term.[17]

Things changed in 1913 when the municipal court act was amended to provide for a new "preferential system" of voting for the municipal court judge, who would have a four-year term. A new election day of April 6, 1915, was set. This system, somewhat like the "ranked voting system" now used in some Minnesota cities, provided for a "first choice," a "second choice" and other choices by voters. Seeing that the new system gave them a better chance of unseating Windom, three candidates entered the race. Windom received the most "first choice" votes but not a majority. William H. Smallwood received a majority of the combined "first" and "second choice" votes and was declared the new judge by the city council. Here are the results:

	First Choice.	Second Choice.	1st & 2nd Choice.	Add'l Choice.	1st, 2nd & Add'l Choice
Louisell	992	734	1,726	402	2,128
Norton	3,417	1,501	4,918	167	5,085
Smallwood	3,496	2,845	6,341	240	6,581
Windom	4,408	604	5,012	54	5,066
Totals	12,313	5,684	17,997	863	18,860

[15] ***Duluth Evening Herald*, February 7, 1906, at 1.**
[16] ***Duluth Evening Herald*, February 3, 1909, at 6 ("In the re-election of Municipal Judge W. L. Windom the people of Duluth are practically a unit.").**
[17] **He defeated his opponent, W. B. Moer, a Democrat, 6,262 to 2,577, carrying all 8 wards. *Duluth Herald*, February 7, 1912, at 1 and 9. In these elections, Windom was always identified as a "Republican."**

The new system was challenged by John Brown, a voter. A split panel of three district court judges upheld Smallwood's election but the state Supreme Court declared the "preferential system" unconstitutional in *John Brown, Jr. v. W. H. Smallwood* on July 30, 1915.[18]

Windom thereupon brought a *mandamus* action against Mayor William I. Prince and other city officials to be declared municipal court judge because he had received a plurality of the "first choice" votes, but a panel of three district court judges "quashed" or dismissed his suit. On appeal the Supreme Court affirmed, holding that Windom had not been elected [19]

Meanwhile on September 13, 1915, Governor Winfield Scott Hammond appointed Smallwood to the municipal bench.[20] But Windom claimed he still held office because of a "hold-over" provision in the municipal court act. Smallwood, claiming the judgeship because of his appointment, thereupon initiated a *quo warranto* proceeding in the Supreme Court for an order that he was judge of municipal court.[21] In a lengthy

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[18] *John Brown, Jr. v. W. H.* Smallwood, 130 Minn. 492, 153 N.W. 953 (July 30, 1915), is posted in the Appendix, at 36-54. The table of votes on page 10 is from this case.

A multi-judge panel for the Eleventh Judicial District was authorized by Stat. c. 5, §188, at 45 (1913). Well into the twentieth century, it seems, Duluth judges used "joint sessions" or panels more than any other district in the state.

[19] *State ex rel. William L. Windom v. William I. Prince, and Others*, 131 Minn. 399, 155 N.W. 628 (December 17, 1915), is posted in the Appendix, at 55-57.

Here a writ of mandamus was an order from a court to Duluth officials to restore Windom, the complainant, to his office.

[20] *Duluth Herald*, September 14, 1915, at 1 ("Police called to keep order when Judge Smallwood tries to take charge of his office").

[21] A *quo warranto* proceeding is used today to determine the rightful holder of a public office.

For a history of this extraordinary writ, see Jason Taylor Fitzgerald, "The Writ of Quo Warranto in Minnesota's Legal and Political

opinion on December 17, 1915, the Court, with Justice Hallam concurring, declared the "hold-over" provision unconstitutional, and "the Governor's appointment of Judge Smallwood gave him title to the office."[22]

Windom then sued the city for his salary for acting as judge at various times in May, 1915, August and the first 13 days of September. District Court Judge Herbert A. Dancer awarded him $1,108.33, a ruling affirmed on June 8, 1917, by the Supreme Court, which found that he was "in possession" of the office of municipal judge during these periods.[23] And so the saga ended.

He never ran for office again. He died on July 20, 1935, at age seventy-five. The Duluth *News-Tribune* carried the story:

JUDGE WINDOM
DIES AT AGE 75
Former Municipal Jurist
For 15 Years Noted in
G.O.P Circles.

———

Judge William Lincoln Windom, municipal judge in Duluth for 15 years, a direct descendent of the first Earl of Egremont, England, died yesterday in his home, 101

History: A Study of its Origins, Development and Use to Achieve Personal, Economic, Political and Legal Ends" (MLHP, 2015).

[22] *State ex rel. W. H. Smallwood v. William L. Windom*, 131 Minn. 401, 155 N.W. 629 (December 17, 1915), is posted in the Appendix, at 57-79.

It also held that Smallwood's appointive term expired in April 1917. In the election on April 3, 1917, he was re-elected. *Duluth Herald*, April 4, 1917, at 10. Windom did not run.

[23] *William L. Windom v. City of Duluth*, 137 Minn. 154, 162 N.W. 1075 (June 8, 1917), is posted in the Appendix, at 80-83.

East Perry street [Fond du Lac]. He was 75 years old June 1.

He came to Duluth 38 years ago. He received his appointment to the bench in 1901 and served until 1916. He was the nephew of the late William Windom, Secretary of the Treasury under Presidents Garfield and Harrison. He had been ill for some time.

He was prominent in Republican circles throughout the state, serving at one time as president of the state central Republican committee of both Minnesota and Wisconsin. He ran for Congress here but was defeated. He practiced law in Ashland, Wis., before coming to Duluth. He was born in 1860, in Sterling, Ill. His father, a close friend of Abraham Lincoln, named his son Lincoln for the great emancipator. For several years, Judge Windom served as president of the State Welfare society.

He leaves his wife and a niece, Mrs. Howard Deyer, Sterling, Ill. He was a member of the First Presbyterian Church. [24]

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[24] ***Duluth News-Tribune***, **July 21, 1935, at 1 (funeral services and photograph omitted). See also *Duluth Herald*, July 22, 1935, at 11 ("Judge Windom Rites Tuesday"). A bar memorial has not been located.**

Appendix

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Article/case **Pages**

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St. Paul Daily Globe
Tuesday, October 10, 1899 Page 9

. . . . .

STRONG PLEA FOR LIFE

WILLIAM WINDOM MAKES A DRAMATIC APPEAL TO THE PARDON HOARD TO SAVE YOUNG FERGUSON

Decries Capital Punishment in Strong Terms, and Says Himself and his Hearers Would be Elsewhere if They All Had Their Deserts- Case Taken Under Advisement.

The life of George J. Ferguson, of Itasca county, still hangs by a slender thread. The state board of pardons at its meeting yesterday afternoon took the matter of his application for a commutation of sentence under advisement, but after a brief executive session announced that the matter had not been decided.

This gave the friends of the young man some hope, and it is expected that the board will announce its decision within a few days. Ferguson is to hang Oct. 27 for murder, unless the pardoning board extends executive clemency. The hearing at times was somewhat theatric. Young Ferguson's mother sat through the session with moist eyes and bowed head

William Windom made a strong appeal for Ferguson's life, and during the progress of his address made some drastic criticisms of capital punishment.

"If every man in this room had justice meted out to him according to his deserts we would all have been in hell ten years ago," was the statement which preceded the somewhat sensational address which followed.

"I am admitably (sic) opposed to the death penalty. I swear before this board that I will go before the next legislature, and try and have it stricken off the statute books. The law of England 100 years ago recognized twenty crimes for which the death penalty could be attached. We have been gradually drifting nearer and nearer an advanced civilization until at present there is but one, and in many states none. At that time women and children were burned at the stake for witchcraft. It was the law. But it was murder just the same, and those judges who sentenced innocent women and children were murderers. The law of the Bible does not permit us to take the life of our fellow beings. If you hang this boy he will suffer all through immortality for the recompense of his sin. There is no chance hereafter, if you kill him now. He will go to his eternal punishment, as he is incapable of appreciating the enormity of the crime. He is but nineteen years of age, a mere child. He has not the strength of an ordinary man. Some will say we must make an example of this case. Why is this necessary? In Wisconsin, where the people are just as good and moral as they are in this state, they have no capital punishment. I say that fifty years from now there will be no need of this board, as there will be no capital punishment in any of the states. The law has no right to take life, God alone reserves that right. I am told that the

sheriff will resign his office rather than hang this young boy. But, instead, he goes down to Minneapolis and gets a murderer to do the job for him for $1,000 or $1,200. What kind of a law is it that your sheriffs refuse to carry out, and have to go miles away to hire a common murderer to do the work that is properly theirs. This boy has no moral conception whatever. The very circumstances of the crime substantiate this. The boy is insane."

Judge Start here asked why the plea of insanity was not entered. Mr. Windom explained that it could be easily proven. The crime was deliberate, and Ferguson made no attempt to cover up his tracks. He told beforehand that he was going to do it, and later, when discussing it, talked of it in the most commonplace manner. There was not the slightest feature of the crime that exhibited the cunning of the criminal, but on the contrary, the wantonness of the crime and the unconcern of the prisoner was evidence that there was something wrong in his make up."

"Your sheriffs are more merciful than your laws. How many men would be hung if the judges had to execute the sentences themselves. Mercy is the grandest element in man's heart. I hope the board will pardon me if I have over stepped myself. I love justice, but I love mercy more. If this board will commute his sentence to life imprisonment, I will not come before the board at any time and ask for his release. I maintain that this board has no right to take life no matter what the crime. No man can take the decrees of God and execute them."

"I wish we could get them direct," put in Gov. Lind.

"The people who burned innocent people for witchcrafery (sic) were merely executing lawful decrees. But it was nevertheless murder," asserted Mr. Windom."

"Well, these men acted at least on the best of their judgment," said the governor.

"The conditions have changed in several hundred years," said the attorney general.

"If you commute this man's sentence," said J. R. Donohue, county attorney of Itasca county, "you should commute the sentence of every other murderer in the state."

"Why is it that you single out this boy and make him a mark when you let three or four murderers go before up in your county?" warmly interposed Mr. Windom.

Mr. Windom here presented a petition signed by six of the jury asserting a belief that Ferguson was guilty, but that a life sentence should be imposed. Petitions were also read from D. M. Gunn and a number of other prominent citizens.

P. F. Price also appeared in Ferguson's behalf. He related the circumstances of the crime, showing that the prisoner deliberately planned the crime and executed it. The body of Naugle, his victim, was found on a road a short distance out of Grand Rapids, thirty days after the man had been killed. Ferguson cashed a time check due Naugle the next day, representing himself at the bank as Naugle, and then proceeded to have a good time with the proceeds.

Mr. Price's argument, while not denying the guilt of his client, was submitted with a view to proving that the boy had

accomplices. There was an indication from the body and its surroundings when found that it had been placed near the road very shortly before it was found, although the man had been dead at least thirty clays. The coroner testified that he saw the body from his team in the road when it was discovered. Mr. Price argued that the remains could not have laid in so conspicuous a place for thirty days without being seen. The claim was made that the body was placed where it was found by a second party.

There were a great many points that did not appear clear in the testimony, and they were dwelt upon at some length by Mr. Price to prove that a second party or parties were implicated.

The board took no action last evening.

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St. Paul Sunday Globe

October 15, 1899 **Page 3**

. . . . .

NOT TO STRETCH ROPE

STATE BOARD OF PARDONS SAVES GEORGE J. FERGUSON'S NECK

MURDERER WILL NOT HANG

He is Considered by the Board to Be Morally Incapable—He is Defective Physically Also—Dr. Tomlinson, of the St. Peter Insane Hospital, Called into the Case, Reports on Condition of Prisoner.

George J. Ferguson, sentenced to hang for the murder of a man named Noggle in Itasca county, will go to the state prison for life, the state board of pardons having commuted his sentence yesterday in special session. His youth, the boy being but a few months past eighteen, was a powerful factor in securing the commutation.

Gov. Lind stated that the man was not insane because he was incapable of insanity. He practically had no mind; he was afflicted with curvature of the spine and other physical defects, and his normal sensibilities were a complete blank.

The fact that he had left his lumberman's sack by the body and a paper trail leading to it, and had taken no pains to conceal his crime, convinced Attorney General Douglas that he had no conception whatever of its enormity; that the killing of his companion was nothing to him, as shown by his conduct since his arrest.

The reasons for the pardon were officially stated by the board as follows:

A careful examination of the evidence, and of such of the exhibits in the case as were deemed material, convinces the board of pardons that the defendant is technically and legally guilty of the crime of which he stands convicted, and this notwithstanding the fact that the board is of the opinion that other persons, whose identity is unknown, were either parties to the crime or cognizant of its commission. The defendant is a mere boy, past eighteen. The record and other information before the board also discloses that he is defective physically, mentally and morally. This is evidenced in part by the utter

absence of any effort, design or act on his part to conceal his connection with the crime, or to remove the evidence of his connection with its commission, except his bare denial of the killing, and also by the utter absence of moral judgment as to the character of his act from that standpoint, and the consequences of it. Convinced of these facts, the board nevertheless desired the guidance of such further light as scientific investigation might afford, and accordingly requested Dr. Tomlinson, superintendent of the St. Peter hospital for the insane, to carefully examine and report upon the prisoner's condition. Such examination was made, and a report of the same has been filed with the board.

In his report Dr. Tomlinson, after explaining the physical defects of the defendant (among which curvature of the spine), and mental peculiarities, corroborates the conclusions of the board previously formed, by the following statement in his report: "So far as any one is justified in saying so of another. I believe him to be fully able to appreciate the consequence of his acts: but morally incapable of appreciating anything except in its relation to his own comfort, pleasure or convenience, and that he cannot understand any rule of conduct which would require anything else of him."

Believing that it is not the design of the law that capital punishment should be inflicted upon a being lacking the facility of forming or exercising a moral judgment upon the character and consequences of his acts, and in view of the defendant's age and all the circumstances of the case as disclosed by the

evidence before the board, his sentence is commuted to imprisonment for life.

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The following are endorsements to Governor Van Sant from supporters of William L. Windom, Daniel Waite and Judson D. Holmes for the office of municipal court judge. Only Holmes made a direct application to the governor for the appointment.

Each recommendation mentions the lawyer's work and loyalty to the party. Only a few mention the lawyer's legal abilities.

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Duluth Minn 23

Hon S R VanSant Stpaul Minn

we would be pleased if you can see your way clear to appoint W L Windom municipal judge

H B Daugherty
E B Hawkins

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RECEIVED at Fourth and Robert Streets, St. Paul, Minn. 15 DH Standard Time

Duluth Minn 23

S R VanSant Stpaul Minn

W L Windom is the man for the Judgeship and should be appointed at once

Geo J Malloy

LAW OFFICES OF
WILLIAM C. WHITE,
706-708 TORREY BUILDING,
DULUTH, MINN.
Telephone No 244.

June 23rd, 1902.

Hon. Samuel R. VanSant,
Executive Office,
St. Paul, Minn.

Dear sir:-

There is a large and somewhat powerful element of the Republican party of St. Louis County, which is also generally silent in all of its party's campaigns, as far as public utterances and demonstration are concerned. It watches closely and is glad to sustain the honest and independent leaders of its own party. A majority of the lawyers of the City of Duluth may be classed with this strong though silent element.

I think it will please this body of lawyers if in filling the vacancy caused by the resignation of Judge Edson from the Municipal bench, you shall give some heed to its wishes, so far as you may reasonably do without harm to the party. I am confident that the large majority of the good lawyers of this city would be better pleased to have Daniel Waite named for this position, than any other candidate that has thus far been mentioned; not because he is any cleaner man perhaps, but because he is a better lawyer and will make a better judge; which should (other things being equal) be conclusive; at least so it seems to me.

It may well be added that Mr. Waite has also been an active Republican and done much here for the party.

Very truly yours,

Wm C. White

Duluth, Minn., June 23, 1902.

Hon. S. R. Van Sant,

St. Paul, Minn.

My Dear Governor:-

Hon. W. E. Edson having announced his intention of resigning the position of Municipal Judge of Duluth, I presume it is in order for the friends of candidates for appointment to the vacancy thus created to voice their sentiments in their behalf.

Under these conditions I desire to heartily endorse Mr. Wm. L. Windom for the place and to urge his name upon your consideration with all the strength I may dare to use.

Mr. Windom's qualifications are unquestioned and his personal character is, as you well know, of the very highest order. In addition to this, his appointment would be really good politics. It would please our friends here and no exception could be taken to it by any one.

He is known as a faithful, consistant and life-long republican and a tireless worker for the interest of the party, as well as a clean reputable gentleman and a good lawyer.

I sincerely hope you will be able to reward his long and excellent service to the cause, and let me add, with all possible deference, at the same time do honor to the appointing power.

Very truly yours, S. A. Rugh

P.S. St. Louis County sends a solid delegation to the State convention for Van Sant and Halden and somewhere from 150 to 250 friends will be along to hold up their hands. S.A.R.

C. H. GRAVES, PRESIDENT. D. R. McLENNAN, VICE PRESIDENT. L. B. MANLEY, SECY. & TREAS.

Insurance and Bonds.

Graves-Manley Agency,

TORREY BUILDING, FIRST FLOOR.

ESTABLISHED 1869.

Duluth, Minn. June 24th, 1902.

Hon. S. R. Van Sant,

St. Paul, Minn.

Dear Sir:-

I understand that Daniel Waite is an applicant for the appointment as Municipal Judge succeeding Judge Edson, whose resignation is to be effective August 1st.

Mr. Waite has the confidence of the people of this city, and is considered in all respects trustworthy and capable to fill this important position. He is a man against whom nothing derogatory can be said, either with reference to his ability or character, and I am satisfied that his appointment to this office will add strength to the Party in this city.

Mr. Waite was Chairman of the City Republican Committee last year and handled the campaign in a very satisfactory manner.

There are some half a dozen men who are being mentioned for this place, and it seems to me it would be wise to make a selection before the various factions here get into a wrangle over this appointment.

Yours very truly,

D. R. McLennan

June 25" 1892

Hon S. R. VanSant
St Paul Minn

Dear Sir & Comrade,

Comrade J. D. Holmes will probably be an applicant for the office of Municipal Judge of this City, vice Edson, resigned. Comrade Holmes is, and has been for some time, Asst City Atty. and every way I think competent and worthy of the place, he feels confident, after investigation, that if he secures the appointment, he will have no trouble in securing the nomination and election next spring. - We have heard of no other Comrade who is an applicant and we think Gov. this would be a splendid opportunity to recognize the veterans, many of whom I know feel quite sore, that some have not been. Comrade Holmes is an ardent and active republican "from a way back." We believe his appointment at this time would be a wise move for you.

We trust you may be able to see the matter as we do, and show some of the doubting ones. 'tis no draw back, politically, to be a G. A. R. man.

Your friend & Comrade
C. T. Clement
(Com'dr Arlow Post)

He is now S. V. C. of 128)

OSCAR MITCHELL,
CITY ATTORNEY,

JUDSON D. HOLMES,
ASSISTANT CITY ATTORNEY.

City of Duluth
CITY ATTORNEY'S OFFICE

Duluth, Minn.

June 25th, 1902.

To His Excellency,

Samuel R. Van Sant,
Governor of the State of Minnesota,

Sir:

I have the honor to make application to be appointed judge of the municipal court of Duluth, which position is to become vacant, as I am informed, on the 1st day of August next, by reason of the resignation of the Hon. W. D. Edson, judge of said court.

With the exception of two and a half years, I have been engaged in the active practice of the law since 1869; for over eighteen years at Alpena, Mich., and since 1890, at Duluth. For the year 1896-7 I was assistant city attorney in Duluth under Mr. Benham, and since March 1st, 1900, have been assistant under Mr. Mitchell,- which office I hold at present. Am familiar with the present city charter and the ordinances, from the fact that my present office requires me to be; and have had almost entire charge of the business of this office before the above named court, and am familiar with the practice, both civil and criminal, and the rules governing said court; and believe that I thoroughly understand the duties and requirements of the judge.

During the past few days I have made careful inquiry among my friends and citizens and members of the Bar, and believe that my appointment would give general satisfaction. My age and experience has matured my judgment so that I believe I can approach the decision of

OSCAR MITCHELL,
CITY ATTORNEY,

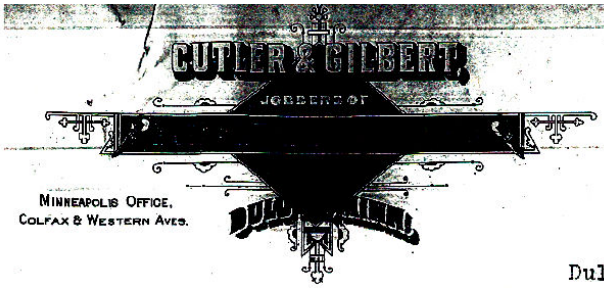
JUDSON D. HOLMES,
ASSISTANT CITY ATTORNEY.

Duluth, Minn.

questions that would be presented before the court, impartially and with earnest desire to do justice and not to act hastily. I realize that it is an important position,- liable to touch the liberty of any or all citizens, who may be, either justly or injustly, brought before said court upon criminal charge,- and should view the appointment, should I receive it, as one of great honor and trust, and the duties thereof to be performed fearlessly, impartially, and with an earnest desire to do justice, as near as possible, between man and man and the public.

Yours very truly,

Judson D. Holmes



Duluth, Minn., June 27th, 1902.

To the Hon. Samuel VanSant,

Governor State of Minnesota,

St. Paul, Minn.

Dear Sir:-

I take the liberty of calling your attention to Mr. Judson D. Holmes, our present Asst. City Attorney. There is a feeling among his neighbors and members of the party in our ward that he would be a deserving candidate to succeed the Hon. W. B. Edson.

I have known Mr. Holmes for many years. He has always been a staunch supporter of the party, not of the passive kind, but a man always present when he is needed. He is a man of good ability, a good neighbor and a good citizen and the writer hopes that you may be able to favor him.

Yours very truly,

C O Magnes

Law Offices of
Searle & Spencer,
705-707 Board of Trade Building
F. C. Searle,
H. R. Spencer.

Duluth, Minn. June 27. 1902

Hon S. R. Van Sant
Governor of Minnesota

Dear Governor,

Yours yesterday received. When I indorsed Mr Waite I was not aware that Mr Windom was a candidate, had been away for a week not posted. Mr Windoms appointment is not only quite satisfactory to me but, in my judgement a proper recognition of his services -

Very Sincerely
F C Searle

TOWNE & MERCHANT,
ATTORNEYS AT LAW.
DULUTH TRUST COMPANY BUILDING,
DULUTH, MINNESOTA.
Edward P. Towne. Humington W. Merchant.

June 28th, 1902.

Hon. S. R. Van Sant,

State Capital,

St. Paul, Minn.

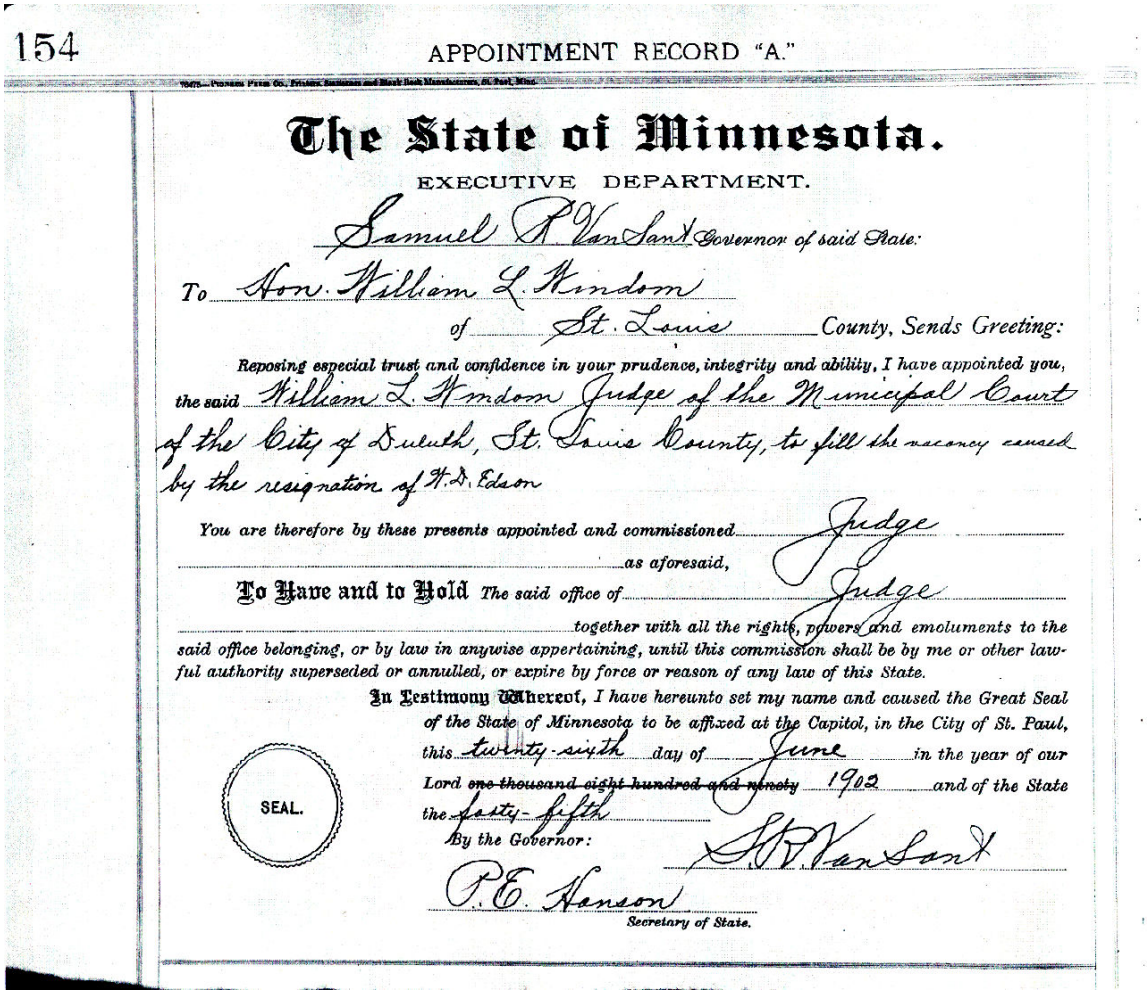
Dear Sir;-

I am in receipt of yours of recent date, and although my choice for the Municipal Bench would have been Mr. Waite, I am willing to bow to your wisdom in the matter. You can always be assured of my support here.

Yours very truly,

E. P. Towne

Governor's appointment of Windom



154 APPOINTMENT RECORD "A."

The State of Minnesota.

EXECUTIVE DEPARTMENT.

Samuel R Van Sant Governor of said State:

To Hon. William L. Windom

of St. Louis County, Sends Greeting:

Reposing especial trust and confidence in your prudence, integrity and ability, I have appointed you, the said William L. Windom Judge of the Municipal Court of the City of Duluth, St. Louis County, to fill the vacancy caused by the resignation of W. D. Edson

You are therefore by these presents appointed and commissioned Judge as aforesaid,

To Have and to Hold The said office of Judge together with all the rights, powers and emoluments to the said office belonging, or by law in anywise appertaining, until this commission shall be by me or other lawful authority superseded or annulled, or expire by force or reason of any law of this State.

In Testimony Whereof, I have hereunto set my name and caused the Great Seal of the State of Minnesota to be affixed at the Capitol, in the City of St. Paul, this twenty-sixth day of June in the year of our Lord ~~one thousand eight hundred and ninety~~ 1902 and of the State the ~~Sixty-fifth~~

SEAL.

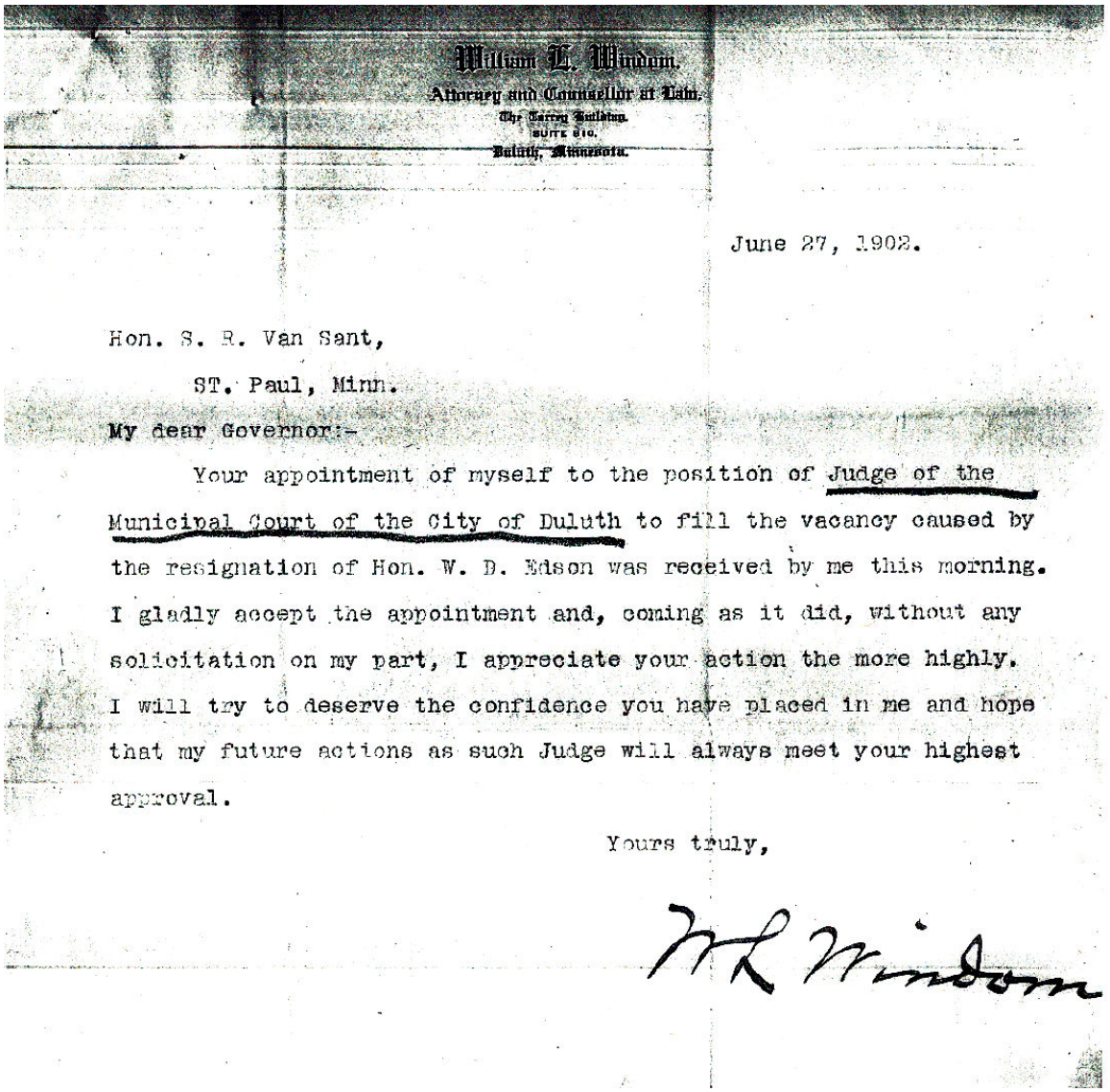
By the Governor:

S. R. Van Sant

P. E. Hanson

Secretary of State.

Windom's acceptance letter.



William L. Windom.
Attorney and Counsellor at Law.
The Torrey Building.
SUITE 210.
Duluth, Minnesota.

June 27, 1902.

Hon. S. R. Van Sant,

ST. Paul, Minn.

My dear Governor:-

Your appointment of myself to the position of Judge of the Municipal Court of the City of Duluth to fill the vacancy caused by the resignation of Hon. W. D. Edson was received by me this morning. I gladly accept the appointment and, coming as it did, without any solicitation on my part, I appreciate your action the more highly. I will try to deserve the confidence you have placed in me and hope that my future actions as such Judge will always meet your highest approval.

Yours truly,

W L Windom

••••

Four decisions of the Minnesota Supreme Court follow. They are posted by the dates they were issued:

JOHN BROWN, Jr. v. W. H. SMALLWOOD.[1]

July 30, 1915.

Nos. 19,447—(259).

Home Rule Charter — preferential voting.

1. It was the intention of Laws 1913, c. 102, that the preferential system of voting for which provision was made in the Duluth Home Rule Charter of 1912, should apply to the election of the municipal judges of the city; and said act, though not passed by a two-thirds vote, legally provided an assistant judge, and a branch or division of the court, and fixed the terms of office and times of election of the judges and otherwise regulated the court and proceedings therein.

Preferential voting — violation of Constitution.

2. The preferential system of voting provided by the Duluth charter,

[1] Reported in 153 N. W. 953.

whereby first choice, second choice and additional choice, votes are permitted, and are counted in a manner therein provided, is unconstitutional as in contravention of article 7, section 1 and section 6, of the Constitution.

John Brown, Jr., a citizen and voter of the city of Duluth, gave notice of contest and appeal from the resolution of the city council of the city of Duluth acting as a canvassing board, by which it decided and certified that W. H. Smallwood was elected judge of the municipal court of that city for the term of four years, on the ground that more first choice votes were cast for William L. Windom than any other candidate at that election and that Windom having received the highest number of first choice votes was elected to that office. The respondent made answer and prayed that the contest be dismissed. The matter was heard before Cant, Dancer and Fesler, JJ., who made findings and ordered judgment, Cant dissenting, in favor of contestee. From the judgment entered pursuant to the order for judgment, contestant appealed. Reversed.

Fryberger, Fulton & Spear, for contestant.

H. H. Phelps, for respondent.

DIBELL, C.

At the general municipal election held in Duluth on the first Tuesday of April, 1915, the contestee, W. H. Smallwood, was a candidate for the office of municipal judge, and was declared elected by the city council. The contestant, John Brown, Jr., is an elector of Duluth, entitled to contest the election. On the hearing of the contest there were findings and judgment for the contestee. The contestant appeals from the judgment.

There are two questions:

(1) Whether the preferential system of voting provided by the Duluth charter applies to elections of the municipal judge.

(2) Whether the preferential system provided by the Duluth charter is constitutional.

1. It is contended that the municipal judge is a state officer and that for this reason the legislature did not intend his election by the preferential system. It is conceded that the municipal judge is a

state officer in certain senses of the term. State v. Fleming, 112 Minn. 136, 127 N. W. 473. In the case cited it was so held where there was an attempt to legislate an incumbent, a municipal judge under the general laws, out of office upon a change to a home rule charter. The municipal court is a state court within the meaning of Const. art. 6, § 1, providing that all inferior courts shall be established by the legislature by a two-thirds vote. The state does not pay the municipal judge. He is paid by the city of Duluth. The city furnishes him quarters. He is elected by the electors of the city. Const. art. 6, § 9. His jurisdiction is limited.

The Duluth Home Rule Charter of 1912 undertook to provide an assistant judge and a branch of the court in the territory known as West Duluth. The municipal court act was a special act. Sp. Laws 1891, p. 595, c. 53. It provided for a municipal judge and a special judge. The home rule charter of 1900 took no notice of the municipal court.

There was a well-founded doubt as to the constitutionality of the charter of 1912, insofar as it attempted to provide a branch court and create the office of assistant judge, or otherwise legislate as to the municipal court. By chapter 102, p. 107, Laws of 1913, approved March 24, 1913, which amended the original municipal court act of 1891, provision was made for a municipal judge, a special municipal judge, and an assistant municipal judge, with a branch of the court at West Duluth. It was provided that at the general municipal election, on the first Tuesday in April, 1913, there should be elected a successor to the then special judge, and at the same time an assistant municipal judge, both of whom should hold office for four years. It was provided that the municipal judge should be elected at the general election on the first Tuesday in April, 1915.

The act of 1913, for one thing, intended to put the constitutionality of the municipal court, and the provision for a branch court and a new judge, beyond doubt. It intended, further, to do away with annual elections, and make the election of the judges biennal to correspond with the biennial election system of the city. It was enacted March 24, 1913, and the general municipal election, to which it

referred, was on the first Tuesday in April following. We take judicial notice that in April, 1913, a special judge and an assistant municipal judge were elected under the preferential system; and the legislature, when it enacted the act of March 24, 1913, providing for their election, knew of the general municipal election to be held in the following April under the preferential system, and knew that there was no law, except that provided by the charter, under which an election could be had. There was no time for a primary under the general law prior to the election and no method of putting candidates before the people, except by the preferential system which the city had provided.

We are of the opinion that it was the intention of the legislature that, commencing with 1913, the three judges for whom provision was then made should be elected at the general municipal election of Duluth, in the manner provided for elections by the charter. The election was a local one, of no particular concern to the rest of the state, and there was no reason why it should not be conducted by the local machinery. There was every reason why it should intend to avoid annual elections, or a primary for the judges alone, and afterwards an election either by a separate ballot or by a ballot combined with the preferential ballot. The fact that the election was of a judge is, in itself, of no significance. If the preferential system of voting was constitutional, there is no reason why it should not be applied to the judges. There is nothing peculiarly sacred about the method of their election and by chapter 102 the legislature manifested no intent that a different method of election should be accorded them. If a preferential election was good for commissioners, it was not necessarily bad for judges. We think the court was right in holding that the preferential system was intended; and if constitutional the apparent result of the election is right.

In speaking of the effect of Laws 1913, p. 107, c. 102, we have not overlooked article 6, § 1, of the Constitution, requiring that all inferior courts must be established by a two-thirds vote, nor have we neglected to notice that chapter 102 was not enacted by such a vote. All objection to the lack of such vote is answered by Dahlsten v. Anderson, 99 Minn. 340, 109 N. W. 697.

2. The next question is whether the preferential system of voting, for which provision is made in the Duluth charter, is constitutional.

The general scheme of the preferential system is this:

All candidates go upon the official ballot by petition. The ballot provides for first choice, second choice and additional choice, votes. If the result of the first choice is a majority for a candidate, he is elected. If a count of the first choice votes brings no majority, the second choice votes are added to the first choice votes, and if a candidate then has a majority of the first and second choice votes, he is elected. If there is not a majority, the first and second choice votes are added to the additional choice votes, and the candidate having a plurality is elected. Each voter may vote as many additional choice votes as he chooses, less the first and second choice votes; that is, he may vote as many additional choice votes as there are candidates, less two. In this case, there were four candidates, each voter had two additional votes, or a total of four votes. No voter can vote more than one vote for any one candidate. He is not required to vote a second choice or additional choices. The following is the official ballot used at the election:

MUNICIPAL BALLOT.

General Municipal Election, City of Duluth, April 6th, 1915.

INSTRUCTIONS.

To vote for any person mark a (x) in the square in the appropriate column according to your choice at the right of the name voted for.

Vote your first choice in the first column.

Vote your second choice in the second column.

Vote for all other candidates which you wish to support in the third column.

Vote 2 first choices for Commissioners or ballot will be void as to Commissioners.

Don't vote more than one choice for any candidate as only one choice will count for any candidate.

Any distinguishing mark makes the ballot void.

If you wrongly mark, tear or deface this ballot return it and obtain another from the election officers.

FOR COMMISSIONERS. Vote two (2) first choices or ballot will be void as to Commissioners.	First Choice.	Second Choice.	Additional Choices.
William L. Bernard	.....	.....	.....
Chris E. Lewis	.....	.....	.....
James A. Farrell	.....	.....	.....
W. A. Hicken	.....	.....	.....
R. E. McFarlane	.....	.....	.....
Roderick Murchison	.....	.....	.....
Jas. L. Norman	.....	.....	.....
Bernard Silberstein	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

FOR JUDGE OF MUNICIPAL COURT. Vote for one only on first choice. Vote for one only on second choice.	First Choice.	Second Choice.	Additional Choices.
M. E. Louisell	.....	.....	.....
John H. Norton	.....	.....	.....
W. H. Smallwood	.....	.....	.....
William L. Windom	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

The following tabulation shows the result of the election of municipal judge.

	First Choice.	Second Choice.	1st & 2nd Choice.	Add'l Choice.	1st, 2nd & Add'l Choice.
Louisell	992	734	1,726	402	2,128
Norton	3,417	1,501	4,918	167	5,085
Smallwood	3,496	2,845	6,341	240	6,581
Windom	4,408	604	5,012	54	5,066
Totals	12,313	5,684	17,997	863	18,860

There was no majority of first choice votes. There was no majority of first and second choice votes. There was of course a plurality of first choice, second choice, and additional choice, votes.

The Constitution provides as follows:

"Every male person of the age of twenty-one years or upwards * * * shall be entitled to vote at such election * * * for all officers that now are or hereafter may be, elective by the people." Const. art. 7, § 1.

There is this further provision:

"All elections shall be by ballot, except for such town officers as may be directed by law to be otherwise chosen." Const. art. 7, § 6.

When the Constitution was framed, and as used in it, the word "vote" meant a choice for a candidate by one constitutionally qualified to exercise a choice. Since then it has meant nothing else. It was never meant that the ballot of one elector, cast for one candidate, could be of greater or less effect than the ballot of another elector cast for another candidate. It was to be of the same effect. It was never thought that with four candidates one elector could vote for the candidate of his choice, and another elector could vote for three candidates against him. The preferential system directly diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. Another elector may vote for three candidates opposed to him. The mathematical possibilities of the application of the system to different situations are infinite.

Naturally enough we have little direct authority upon the constitutionality of this method of voting. In some states cumulative or restrictive voting is allowed by the Constitution. When the voting is cumulative, and there are sufficient candidates, the voter votes for as many candidates as there are offices to be filled, or votes all his votes for one candidate, or otherwise distributes them. Under the restrictive system he is permitted to vote for only a portion of the candidates to be elected, for instance, for two when there are four offices to be filled. Cases under these systems are of some present value. In Illinois the Constitution provides for cumulative voting. Const. art. 4, § 7. This is a right which the legislature may not interfere with under the Illinois Constitution, and the voter has the constitutional right to cumulate his votes. Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; People v. Deneen, 247 Ill. 289, 93 N. E. 437. Attempts have been made to provide for cumulative voting by legislation without direct constitutional authority. An account of one such attempt is given in Maynard v. Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L.R.A. 332. It was held unconstitutional. The court said:

"The Constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. * * * It is the constitutional right of every elector, in voting for any person to represent him in the legislature, to express his will by his ballot; and such vote shall be of as much influence or weight in the result, as to any candidate voted for, as the ballot and vote of any other elector. The Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. The prohibition is implied from the system of representative government provided for in that instrument. * * * Giving to the language of the Constitution its ordinary signification, it declares the principle that each elector is entitled to express his choice for Representative, as well as all other officers, which is by his vote, and the manner of expressing such choice is by ballot. When he has expressed his preference in this manner, he has exhausted his privilege; and it is not in the power of the legislature to give to his preference or choice, without conflicting with these provisions of the Constitution, more than a single expression of opinion or choice. * * *"

In State v. Thompson, 21 N. D. 443, 131 N. W. 239, there was involved the cumulative voting for commissioners under a commission form of city government. There was language in the statute easily susceptible of the construction that cumulative voting was intended. The court, with effort, held that the statute did not contemplate cumulative voting. Mr. Justice Fisk dissented, holding that cumulative voting was intended, and that the statute was unconstitutional, adopting the views of the Maynard case, supra. Mr. Justice Spalding, while concurring in the opinion, held that, if the statute provided for cumulative voting, it was unconstitutional. In the course of his opinion he said:

"Our system of government is based upon the doctrine that the

majority rules. This does not mean a majority of marks, but a majority of persons possessing the necessary qualifications, and the number of such persons is ascertained by the means of an election."

In the case at bar it may be noted that the number of persons who voted were 12,313, and the number of cross marks considered on the plurality election were 18,860. It was not a voting of man against man.

In State v. Constantine, 42 Oh. St. 437, 51 Am. Rep. 833, the statute under consideration authorized the election of four members of the police board, but denied to an elector the right to vote for more than two members. This was held unconstitutional. The court said:

"No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state at the time of the adoption of this Constitution in 1851. The right of each elector to vote for a candidate for each office to be filled at an election had never been doubted. No effort was made by the framers of the Constitution to modify this right, and we think it was intended to continue and guarantee such right by the provision that each elector 'shall be entitled to vote at all elections.'"

In Opinion to the House of Representatives, 21 R. I. 579, 41 Atl. 1009, a like opinion was given by the justices. The same holding was made in McArdle v. Jersey City, 66 N. J. Law, 590, 49 Atl. 1013, 88 Am. St. 496, and Bowden v. Bedell, 68 N. J. Law, 451, 53 Atl. 198.

Attention is called to some cases involving primary elections where departures from what seemed to be mandates of the Constitution have been upheld. Usually it will be found that the courts upheld them upon the ground that primary elections are not elections within the Constitution. This is likely true of Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280; and is certainly true of State v. Nichols, 50 Wash. 508, 97 Pac. 728; upon which the Idaho case seems to rest. In referring to these two and other cases, the supreme court of Tennessee, in Ledgerwood v. Pitts, 122 Tenn. 570, 595, 125 S. W. 1036, said that the decisions in such cases were rested upon the prop-

osition "that such primaries are not in reality elections, but merely nominating devices."

Our own court has made a distinction between provisions which might not be fatal in primary statutes, which would be fatal in election statutes. In State v. Johnson, 87 Minn. 221, 91 N. W. 604, 840, Mr. Justice Lewis, in referring to a primary election, said:

"If the election of candidates to the position of nominees is an election within the meaning of article 7 of the Constitution, then the primary law, as above construed, is unconstitutional. It would, in certain cases, deprive the voter of his privilege to exercise the elective franchise."

And in State v. Erickson, 119 Minn. 152, 137 N. W. 385, Chief Justice Start said that "statutory regulations applicable only to a primary election, which might be repugnant to the Constitution if extended to elections, are not necessarily invalid."

The quotations made from the different cases are not chance expressions. They are indicative of the idea, which permeates all legal thought, that when a voter votes for the candidate of his choice, his vote must be counted one, and it cannot be defeated or its effect lessened, except by the vote of another elector voting for one. A qualified voter has the constitutional right to record one vote for the candidate of his choice, and have it counted one. This right is not infringed by giving the same right to another qualified voter opposed to him. It is infringed if such other voter is permitted to vote for three opposing candidates.

We know of but two cases involving the preferential system. One is State v. Portland, 65 Ore. 273, 133 Pac. 62. The Constitution of Oregon distinctly authorizes such system and it is of course valid. The other is Orpen v. Watson (N. J.) 93 Atl. 853. The court there reached a conclusion directly opposed to our views. We have given it full consideration. It does not accord with our views, and we do not follow it.

Men of serious purpose have given thought to the preferential and other systems of voting, and are of the opinion that the prevailing system of voting by ballot is not effective. Some of the various systems are referred to in the Maynard case, supra, McCrary,

Elections, note pp. 158–162; Sixty-third Cong. Sen. Doc. 142, 359; and the libraries are replete with contemporaneous literature treating of the subject. We have no quarrel with them. Our concern is with the constitutionality of the act before us and not with the goodness of other systems or with defects in our own.

We are making no narrow construction of the Constitution. In Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A. (N.S.) 621, 9 Ann. Cas. 270, the constitutionality of a statute authorizing voting by machine instead of by ballot was upheld. Mr. Justice Brown, the present Chief Justice, said:

"Constitutions are not made for existing conditions only, nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men."

There the purpose was to use a machine which answered all the purposes of the Constitution—secrecy and a correct count. It was another method of reaching a correct result. Here the purpose is to adopt a different plan of voting, necessarily affecting what we think to be the clearly granted constitutional rights of the citizen. If the preferential system is adopted, it must be after a constitutional sanction by the people.

It is fair to say that the question of the constitutionality of the preferential vote was not suggested to the trial judges; and their attention was asked only to the point first made.

Judgment reversed.

HALLAM, J. (dissenting in part).

I dissent from the second proposition stated in the opinion.

The constitutional question is, does this system of preferential voting violate the constitutional guaranty of a right "to vote" at an election "for all officers * * * elective by the people?" Const. art. 7, § 1. The question is a new one in this state. It was not considered in Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815.

This charter was drafted by a commission appointed pursuant to the provisions of the Constitution and statutes of the state, and

was adopted by the people of Duluth. It is legislation and as legislation it is to be enforced unless its unconstitutionality appears beyond a reasonable doubt. Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 451; Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 208, 68 N. W. 53, 33 L.R.A. 437, 60 Am. St. 450. The membership of the commission embraced lawyers of recognized ability. This court has entertained three election contests prior to this one, all of them arising out of the first election under this charter. Farrell v. Hicken, 125 Minn. 407, 147 N. W. 815; McEwen v. Prince, 125 Minn. 417, 147 N. W. 275; Silberstein v. Prince, 127 Minn. 411, 149 N. W. 653. All were conducted with ability. In one case McEwen and Prince, and in another Silberstein and Prince, contended for the office of mayor. In both cases Prince was solemnly declared elected. None of these men had a majority or even a plurality of first choice votes. If the majority opinion in this case is right none of them had a semblance of a right to the office. They were all "fighting windmills." In the McEwen case another candidate, Fay, with the highest number of first choice votes, presented in the trial court the claims sustained by the majority opinion in this case. The decision was against the contention, and Fay timidly submitted and did not follow the other contestants to this court. In Farrell v. Hicken, too, this contention was presented in the trial court. Here also if sustained its application would have been decisive against the contestee. It was not sustained in the trial court and it was abandoned by the able counsel for contestant on appeal to this court. In this case I have looked in vain through the record as made in the trial court for any suggestion that there was any constitutional question in the case. Of course no one of these facts, nor all of them together, are decisive of the constitutionality of this legislation, but this train of circumstances, of *nisi prius* decisions deliberately acquiesced in, and of positions deliberately taken by able lawyers, should cause this court to exercise much caution before holding that these positions all voluntarily abandoned were safe beyond a reasonable doubt. No voter of Duluth has ever complained of restriction of his right to vote or of any advantage, real or supposed, of any other voter. The only complaint has come from those

who claim the right to be voted for in a particular way. This is not decisive, but it is significant. Neither is there anything decisive in the fact that if this decision is right Duluth has, all the time since this charter went into effect, lived its municipal existence under a *de facto* mayor, and, for part of the time at least, under *de facto* councilmen. Yet these conditions, generally acquiesced in for more than two years, are entitled to some thought in coming to a conclusion upon the crucial question in the case, the constitutionality of this election law.

Many reasons might be given why this legislation should not have been passed by the people of Duluth. With its wisdom we are not concerned. The only question is whether this community had the constitutional right to adopt this plan of election. The authorities elsewhere are few, but they are in favor of the constitutionality of this law.

Orpen v. Watson, (N. J. Sup.) 93 Atl. 853, is directly in point.

Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280, presented a similar situation, except that the case involved a primary election. Had the court been of the opinion that the provisions of the Consituation of that state as to elections do not apply to primary elections, it might have disposed of the case on that ground. It did not do so. Perhaps it entertained the same opinion as some other courts (Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L.R.A. 196; The People v. Election Commrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562), that the constitutional provisions as to elections do apply to primary elections. At any rate it so treated the case. The court recited the contention made that the second choice feature was violative of the provision of the Constitution which forbids any power, civil or military, to "interfere with or prevent the free and lawful exercise of the right of suffrage" in that it would "interfere with or prevent the free and lawful exercise of the right of such voter." And it holds that the enactment of the second choice feature was "a reasonable exercise of the power of the legislature" to make regulations in regard to the conduct of elections and the exercise of the right of suffrage, and that it did not unreasonably interfere with the freedom of the elector in exercising that right.

State v. Nichols, 50 Wash. 508, 527, 528, 97 Pac. 728, 733, also involved a primary election. In one part of the opinion it is said that the constitutional provision as to qualification of voters does not apply to primary elections, but in discussing the second choice provisions of the statute no such distinction is drawn. The court, pages 527, 528, says:

"The principal argument against the second choice provision is that it interferes with the freedom of election guaranteed by the Constitution and compels the elector to vote for a person other than the candidate of his choice. This contention is untenable. The elector has the utmost freedom of choice in casting his first choice ballot, though his choice will not avail him unless at least forty per centum of his party agree with him. It was entirely competent for the legislature to provide that a candidate receiving less than forty per centum of his party vote should not be deemed its nominee, and with such a provision in the law it was incumbent on the legislature to provide some other method of nomination whenever a candidate failed to receive the required vote at the primary."

Statutory provisions giving voters the option to cumulate their votes upon less than the whole number of candidates to be elected have been held valid under constitutional provisions similar to our own. People v. Nelson, 133 Ill. 565, 596, 27 N. E. 217. This case distinguishes cases like State v. Constantine, 42 Oh. St. 437, 51 Am. Rep. 833, decided under a statute denying the right to vote for as many candidates as there are persons to be elected. The Illinois Constitution permits cumulative voting for legislative officers, but there is not in the Constitution of Illinois any provision authorizing cumulative voting in elections of the kind considered in the case cited. The Pennsylvania court sustained a statute limiting the right to vote for six candidates where seven were to be elected, and declined to follow State v. Constantine. The same question was raised under a statute in New York. In one case it was said, the question is "a very grave and interesting one." People v. Kenney, 96 N. Y. 294, and in another case it was said to be a question "about which there is room for difference and debate." People v. Crissey, 91 N. Y. 616. We need not go so far as the Illinois and Pennsyl-

vania courts have gone. For purposes of this case it may be conceded that no voter can give more than one vote for any candidate. The legislation before us does not do this.

The guaranty of the Constitution of this state that every male person a citizen of the United States "shall be entitled to vote" at an election "for all officers * * * elective by the people," had at the time of its adoption only one meaning. At the time the Constitution was adopted there was restricted suffrage in many states. In some there were racial disqualifications, and in others property and educational qualifications. My opinion is that the framers had in mind only the matter of defining what persons should be entitled to vote. The debaters in both constitutional conventions make this clear. They intended to guarantee to the persons named in the Constitution the right to vote, and the same right to vote as every other elector. Methods of voting never entered their minds, and they never supposed they were prohibiting any method of election which did not deny equality of right among voters. The provision should be so construed as to give effect to their purpose. Whatever the Duluth charter does do, it does not infringe on the right to vote. Every citizen has the same right as every other citizen. The thought running through all the decisions is that the right to vote is a political privilege which the legislature may regulate to any extent not prohibited by the state or Federal Constitution. "Whether such regulation be reasonable or unreasonable is for the determination of the Legislature, and not for the courts, so long as such regulation does not become destruction." Common Council v. Rush, 82 Mich. 532, 46 N. W. 951, 10 L.R.A. 171. As said by Elkin, J., in Winston v. Moore, 244 Pa. St. 447:

"In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him."

Under our system of government, where every voter has a right to run for office, and where the number of candidates is often large, it is not practicable or wise to settle the right to office by a single ballot of first choice votes and to give a certificate of election to the candidate receiving the highest number of first choice votes. Even the highest may sometimes receive but a small fraction of the total vote. The common method of elimination is now by means of a primary election. The people of Duluth proposed to dispense with the machinery of an extra primary election and to accomplish the same result by permitting an expression of second and additional choice votes all at once. Without regard to the merits of their plan, it appears to me that the plan was within their constitutional power to adopt. No voter has a constitutional right to say that his candidate shall be declared elected without a majority of first choice votes, and, if such candidate receives less, the voter who supports him has no constitutional right to say that the election shall be void and no further expression of the electorate shall be received. In my opinion the voters of Duluth did not, by the adoption of their charter, infringe upon their "own" right "to vote."

On August 27, 1915, the following opinion was filed:

PER CURIAM.

The contestee petitions for a rehearing. The city of Duluth, though not a party, asks for a rehearing, to the end, we take it, that it may appear as a friend of the court and file a brief or make an argument if a rehearing is granted. We treat its petition as one proper to be considered.

It is not suggested that there has been a failure to bring any fact to the attention of the court; nor that there are other pertinent authorities which might be cited; nor that arguments which might have been made were omitted; nor that anything new bearing upon the case is at hand. Indeed, the claim is that the court went wrong upon a plain proposition involving no difficulty; or, to put it in the language of one of the petitions, "If one will put the proposition up to good lawyers, * * * who have examined into the question,

five out of six will say that the statute does not violate the Constitution." With the viewpoint of the petitioners in mind, we have re-examined the one question here important, viz., the constitutionality of the preferential system of voting used in the election of the municipal judge.

In reaching our decision we proceeded studiously and with deliberation, and conformably to the settled policy of this court in favor of a liberal construction of the Constitution. It is serious to declare a piece of legislation unconstitutional. It is a matter for deliberate consideration when it is seriously asserted that a piece of legislation impairs the constitutional right of suffrage of a citizen. We reached the conclusion that a system of voting, giving the voter the right to vote for the candidate of his first choice, and against the first choice of another voter, and, in addition, by a manipulation of second and additional choice votes, vote for different candidates all against the first choice of such other voter to a number of times limited only by the number of candidates, was contrary to the intent of the Constitution; and that it was none the less so because such other voter was permitted to engage in a like manipulation of second and additional choice votes. Our further examination confirms us in our view. The decision is sound; and we do right in upholding the right of the citizen to cast a vote for the candidate of his choice unimpaired by second or additional choice votes cast by other voters.

Since nothing has been overlooked and there is nothing new to be presented and upon a re-examination we are confident of the correctness of our decision, a rehearing should not be granted. We respect the opinions of others, those who framed the charter and those who have thought upon it, but our own judgment, reached after much labor and deliberation, and with the aid of the arguments of able counsel, must determine the decision as in other cases; and the fact, evident when the opinion was written, and made prominently plain in both petitions, that the decision is unpopular, had no consideration when the decision was reached and receives none upon the petitions for a rehearing.

Perhaps all has been said that need be; but it is claimed that con-

fusion has come because of the decision, and, if so, we should help in its elimination so far as we properly can; and it is proper enough to remark upon some of the grounds urged for a rehearing for they are properly before us.

The petition says:

"Necessarily untold litigation will arise over salaries of officers, title to office, and the effect of official acts. Claims are already made by different parties for the same salary and the city knows not who to make payment to. As to the status of the city government, and the powers and rights of its officials opinions among lawyers even are almost as divergent as the number of lawyers at the bar. The credit of the city is liable to be seriously affected by this decision. * * * The result is that bankers are already expressing the fear that the obligations of the city created since the adoption of the present charter are invalid."

It is further suggested that certificates of indebtedness issued by the city and assessments for public improvements will be affected. It is suggested that one or more commissioners, holding under the 1913 election, are without title under the late decision; that the acts of the commissioners may be held invalid; that the right to hold office may still be involved in judicial investigation; and that the city may be involved in litigation for salaries of officers claiming to have been elected though they never entered office.

We assume that these suggestions are seriously made. They are easily answered. The decision does not invite, nor require, nor permit, the city to disavow its obligations. The credit of the city is not affected. The time for contest of the results of the 1913 election has gone. It is hard to imagine a case where a court would give one searching office a remedy by *quo warranto*. The acts of the commissioners holding and exercising office are valid. Public improvements or assessments for them are in no wise affected. The government of the city is not gone. Its commission form of government is still with it. No calamity has befallen the city. The commissioners holding office under the 1913 election are just as truly commissioners as if they had been elected under another system of voting. There is no reason for confusion. There may be litigation.

Anyone may commence a lawsuit. But all these grounds suggested in support of the petitions for a rehearing are without merit and tend only to suggest a fanciful basis for fruitless litigation.

Complaint is made that the opinion fails to advise the city of the various complications which may arise in the future. We do not see them. We do not know that there will be any or why there should be. The only question brought to us was whether the contestee was elected municipal judge and it arose upon a contest instituted by an elector and not by a candidate for the office. We can decide no questions not involved in the broad question stated. The appeal was from the judgment adjudging the contestee elected. The judgment was reversed. The law fixes the effect of a reversal.

Petitions for rehearing denied.

STATE EX REL. WILLIAM L. WINDOM v. WILLIAM I. PRINCE AND OTHERS.[1]

December 17, 1915.

Nos. 19,501—(23).

City of Duluth — election of municipal judge.

1. The relator, a candidate for the office of municipal judge under the provisions of the city charter of Duluth determining the election by a preferential system of first, second and additional choice votes, held unconstitutional and void in Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, was not elected to the office because of having received a plurality of first choice votes, though under the constitutional general election law a plurality elects.

Election — de jure officers.

2. The holding that the preferential election was unconstitutional and void does not affect officers elected under the preferential system, or their terms, no contest having been instituted or equivalent remedy sought.

Upon the relation of William L. Windom, the district court for St. Louis county granted its alternative writ of mandamus directed to William I. Prince, mayor, Roderick Murchison, William A. Hicken, and Leonidas Merritt, commissioners, the city council of the city of Duluth, commanding them to declare relator the person who received the highest number of votes at the municipal election in Duluth on April 6, 1915, for the office of judge of the municipal court, to declare him elected and to issue to him a certificate of election, or show cause why they had not done so. Respondents' motion to quash the writ was granted, Cant, Dancer and Fesler, JJ. From the judgment entered pursuant to that order, relator appealed. Affirmed.

Fryberger, Fulton & Spear, for relator.

H. H. Phelps, for respondents.

DIBELL, C.

Proceeding by the relator, William L. Windom, by mandamus against the respondents, commissioners of the city of Duluth, and by law the

[1]Reported in 155 N. W. 628.

canvassing board, to compel the issuance to him of a certificate of election to the office of municipal judge. The court granted respondents' motion to quash the writ. From the judgment entered the relator appeals.

1. At the April 6, 1915, election, relator and three others were candidates for the office of judge of the municipal court. The votes cast at the election are shown in Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953. It was there held that the preferential system of voting was unconstitutional.

At this election the relator received a plurality of the first choice votes. Captain Smallwood received a plurality of the total of the first, second and additional choice votes. Under the preferential system a candidate was elected by first choice votes only when he received a majority, and by first and second choice votes only when he received a majority; and, if no candidate was so elected, the one receiving a plurality of the total of first choice votes, second choice votes and additional choice votes was elected. For the reasons stated in Brown v. Smallwood, supra, the preferential system was unconstitutional and Captain Smallwood was not elected. This being so the relator claims that he was elected since he received a plurality of the first choice votes.

The preferential system of election was unconstitutional and the election was void. The election should have been held pursuant to the provisions of the general election law as prior thereto it had been. If it had been so held, there would have been only single choice votes, and if the relator had received a plurality he would have been elected. If the general election law had been used there would have been a primary, all candidates except two would have been eliminated, and a nonpartisan judicial ballot would have been used and two official candidates would have had places on it. If so used, as it should have been, not one of the preferential ballots could have been counted. What would have been the result of the election had the constitutional system been used we do not know. No constitutional system of election having been used, no one was elected. If the preferential system had been constitutional Captain Smallwood would have been elected. It not being constitutional, and the constitutional system not being used, Judge Windom was not elected

because of receiving a plurality of the first choice votes cast for four candidates under the unconstitutional law.

We dispose of the question upon the merits, without reference to the propriety of mandamus as a remedy, as did the court and as counsel argue it.

2. To avoid a possibility of misunderstanding we add that nothing here said relative to the invalidity of the preferential election affects those holding under it without a contest, or the terms of their offices. An election was proper to be held, at the time it was held, and officers were to be elected for the terms fixed by law. Those who were elected, the time for contest having gone, are secure in their offices for the terms for which they were elected as they should be. They are *de jure* officers beyond the reach of *quo warranto* or other proceeding.

Judgment affirmed.

STATE EX REL. W. H. SMALLWOOD v. WILLIAM L. WINDOM.[1]

December 17, 1915.

Nos. 19,563—(22).

Election — surrender of office not an abandonment.

1. An incumbent of an office, failing of re-election, may abandon his right, if such is given by statute, to hold over until his successor is elected and qualified; but an incumbent claiming such right, willing to perform the duties of the office making his willingness known, may peaceably surrender possession to one having a certificate of election, without a demonstration of force, and without thereby working an abandonment; and it is found from the evidence that the respondent, claiming the office of municipal judge of Duluth under a hold-over provision of the statute, did not abandon his claim to the office though he surrendered it to the relator who had the certificate of election.

Term of office — vacancy.

2. Under a statute creating an office, fixing the term, and making no provision for holding over until a successor is elected and qualified, the term is definite and a vacancy exists upon its expiration.

[1]Reported in 155 N. W. 629.

Note.—As to purpose and effect of provision that incumbent shall hold his office until his successor is elected and qualified, see note in 50 L.R.A. (N.S.) 365.

As to power to extend term of office by postponing time for election, see note in 3 L.R.A.(N.S.) 887.

Officer — holding over until election of successor.

3. Under a statute providing that the incumbent of an office shall hold until his successor is elected and qualified, the Constitution not prohibiting such a provision, effect is given to the word "elected;" and, if a successor is not elected, the incumbent holds over and there is no vacancy to be filled by appointment.

Vacancy in office.

4. The provisions of R. L. 1905, § 2667 (G. S. 1913, § 5723), relative to vacancies in office upon the decision of a competent tribunal declaring the election of an incumbent void, do not prevent the prior incumbent from holding over, he not having waived or surrendered or abandoned his right, nor do they create a vacancy to be filled by appointment, though the former incumbent has given actual possession to the incumbent holding the certificate of election; and the statute cited did not create a vacancy in the office of municipal judge upon which the relator can base a claim to it by appointment.

Municipal judge — term of office.

5. Under article 6, § 9, of the Constitution, by virtue of which the municipal court of Duluth is created, the office of municipal judge is elective and the term of office, fixed by the legislature, cannot exceed seven years, the maximum period allowed by the Constitution.

Same — change in date of election.

6. The legislature may change the date of election for the purpose of adjusting terms of office, this being the genuine purpose, though such change incidentally operates to extend the period of office of an incumbent of the office of municipal judge holding for a definite period, and until his successor is elected and qualified, by giving him the right to hold until a date beyond the expiration of his fixed term, if, by so doing, it does not extend it unreasonably, and if such change does not infringe upon the requirement of the Constitution that the office be elective, and that the term shall not exceed seven years. Jordan v. Bailey, 37 Minn. 174, followed.

Same — enactment invalid.

7. The legislature cannot change the date of an election and thereby, or by other means, increase the term of a municipal judge beyond the term of seven years fixed by the Constitution; and under Sp. Laws 1891, p. 596, c. 53, § 4, providing that the municipal judge of Duluth shall "hold his office for a term of three (3) years and until his successor shall be elected and qualified," under which the respondent was elected on the first Tuesday in February, 1912, and the amendatory act of 1913 (Laws 1913, p. 107, c. 102), changing the term from three years to

four years, and providing that "the present judge of said court shall continue in office during the term for which he was elected, and until his successor shall be elected and qualified," and providing for the election of a municipal judge on the first Tuesday in April, 1915, "and on the day of the general municipal election every fourth (4th) year thereafter," and not providing for a biennial election of the municipal judge, but industriously providing against it, the effect of the statute being to extend the term of the respondent, the then incumbent, beyond a term of seven years, if no successor was elected on the first Tuesday in April, 1915, and, none being elected, the necessary result was a term of more than seven years, the hold-over provision was unconstitutional, and a vacancy was created.

Vacancy in office — appointment by Governor.

8. There being a vacancy in the office of municipal judge, because of the unconstitutional statute, the Governor, by virtue of article 5, § 4, of the Constitution, was authorized to make an appointment; and by his appointment the relator obtained title to the office.

Term of office.

9. The intent of the statute of 1913 was to make the term of office four years, commencing in April, 1915; but such statute, when the term of office of an appointee is involved, is in contravention of the constitutional provision (article 5, § 4), that the Governor shall appoint until a successor is elected, and must yield to it, and the appointive term of the relator will continue only until the April, 1917, election, when an election will be held for a four-year period.

Election of municipal judge.

10. If no change is made in the statute or the charter, the provisions of the general election law will be followed at such election.

Acts of incumbents valid.

11. The official acts of the relator and respondent in their several incumbencies since the April, 1915, election are valid.

Upon the relation of William H. Smallwood this court granted its writ of *quo warranto* directed to William L. Windom. Respondent filed his answer and prayed that the writ be discharged and the state by the attorney general and the relator filed a reply to the answer of respondent. A referee was appointed and the testimony taken before him was returned to the court. Writ of ouster.

Lyndon A. Smith, Attorney General, and *H. H. Phelps,* for relator.

Fryberger, Fulton & Spear, for respondent.

DIBELL, C.

Quo warranto on the relation of William H. Smallwood to try the title of respondent William L. Windom to the office of municipal judge of Duluth.

The proceeding is original in this court. Evidence has been taken and is before us.

The respondent, Judge Windom, was elected municipal judge in February, 1912, for a term of three years, and until his successor was elected and qualified. In 1913, the municipal court act was amended so that it provided for a four-year term, and further, that the then incumbent should continue in office until the election which was to be held on the first Tuesday in April, 1915, and until the election and qualification of his successor. Laws 1913, p. 107, c. 102. At this election Judge Smallwood was declared elected by the canvassing board. On appeal in a contest proceeding it was held that the preferential system of voting used at the election was unconstitutional and that Judge Smallwood was not elected. Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953. Judge Windom brought mandamus soon after the election to compel the canvassing board to issue to him a certificate of election upon the theory that he was elected because of having received a plurality of the first choice votes. The trial court held that he was not elected. This holding was correct. State v. Prince, supra, page 399, 155 N. W. 628. On September 13, 1915, the Governor appointed the relator municipal judge and on the following day he qualified. He claims the office by virtue of his appointment. Judge Windom claims it because of the hold-over provision of the municipal court act.

The final question is whether there was a vacancy at the time of the appointment of Judge Smallwood. There are many connected and incidental ones.

1. The contention is made by the relator that Judge Windom abandoned his right to the office under the hold-over provision of the municipal court act.

An incumbent of an office may abandon it. To constitute an abandonment, limiting our consideration to the present case, the evidence must indicate that the officer intended to abandon, and one who voluntarily surrenders a public office to another cannot afterwards assert title to it. At-

torney General v. Maybury, 141 Mich. 31, 104 N. W. 324, 113 Am. St. 512; State v. Moores, 52 Neb. 634, 72 N. W. 1056. But one who is in possession of an office, and is apparently defeated for re-election, still claiming his right to the office by virtue of the hold-over provision, and having and expressing a willingness to perform its duties, may surrender the office peaceably to one having the certificate of election without incurring a conclusive charge of abandonment. State v. Frantz, 55 Neb. 167, 75 N. W. 546.

The evidence shows beyond genuine controversy that Judge Windom at all times after the municipal election in April, 1915, was willing to assume the duties of the office and made his willingness known. To protect his right to the office under the provision for holding over, he was not obliged to use physical force to keep it. It would have been unseemly indeed had Judge Windom, who had held the office many terms, and Judge Smallwood, who had been chosen under the preferential system, engaged in a physical contest for an important judicial office vitally affecting in both its civil and criminal branches the interests of the community, or have done otherwise than submit their claims to an orderly judicial investigation. We find from the evidence that Judge Windom did not abandon his claim of title to the office under the hold-over provision of the municipal court act.

2. When the term of office is fixed by statute, and there is no provision in the Constitution or statute for holding over, the term is definite and a vacancy exists upon the termination of the period. This is settled in this state, in accordance with authority elsewhere, in State v. O'Leary, 64 Minn. 207, 66 N. W. 264, where the office of clerk of the district court, a constitutional office, was involved. It was there held that the term of office of the clerk, fixed by article 6, § 13, expired at the end of the four-year period, and that there was then a vacancy to be filled by the district judges as provided by statute. See R. L. 1905, § 114 (G. S. 1913, § 230). The same principle was held in State v. Sherwood, 15 Minn. 172 (221), 2 Am. Rep. 116; Crowell v. Lambert, 10 Minn. 295, (369), and State v. Frizzell, 31 Minn. 460, 18 N. W. 316. The question is not an open one in this state.

From what is said a holding should not be inferred that one in office for a definite term, without a hold-over provision, may not, upon the

occurrence of a vacancy, continue to perform the duties of his office until action by the appointing power. See Robb v. Carter, 65 Md. 321, 4 Atl. 282; State v. Clark, 87 Conn. 537, 89 Atl. 172, 52 L.R.A.(N.S.) 912; Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891. There is still a *de jure* office, and in the interest of the public service it may be that the incumbent should continue the performance of his duties. The question is not before us. We mention it to avoid a misunderstanding of what we do hold.

3. When the statute creating an office provides that the incumbent shall continue in office until his successor is elected and qualified, such hold-over provision, if not in contravention of the Constitution, is valid, and a vacancy does not exist upon a failure to elect.

In County of Scott v. Ring, 29 Minn. 398, 405, 13 N. W. 181, the court stated that such hold-over provisions "have been generally considered as establishing, as the proper term of an office, the period specifically named. The provision for a contingent holding over that time is a precautionary one, to prevent a possible vacancy or lapse in the office, and is not intended to create an unlimited term, or to indefinitely extend the prescribed term." The question there was upon the liability of the bondsmen of a county treasurer re-elected for a term of two years but who did not qualify for his second term. The loss was in the hold-over period. The statute further provided that a failure to qualify within a designated time created a vacancy and the treasurer did not qualify within the time fixed. The language of the court is cited by relator in support of his contention that, under the hold-over provision of the municipal court act, there is a vacancy which may be filled by appointment, in the event of which the respondent is without right to the office. A number of cases are cited in the Ring case. Upon an examination of them we find that they refer to the liability of the bondsmen of corporate or public officers for the period which the officer held over. None are in point on the proposition now under consideration.

The usual phrase found in statutes and constitutions is "until his successor is elected and qualified." Under such phrase, and under similar ones, it is held that there is no vacancy upon a failure to elect and that the incumbent holds until his successor is elected and qualified, the courts giving its natural meaning to the word "elected". Oppenheim v.

Pittsburgh, C. & St. L. R. Co. 85 Ind. 471; State v. Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. 663; Kimberlin v. State, 130 Ind. 120, 29 N. E. 773, 14 L.R.A. 858, 30 Am. St. 208; People v. Burch, 84 Mich. 408, 47 N. W. 765; Andrews v. State, 69 Miss. 740, 13 South. 853; State v. Dabbs, 182 Mo. 359, 81 S. W. 1148; State v. Foster, 39 Mont. 583, 104 Pac. 860; State v. Moores, 61 Neb. 9, 84 N. W. 399; People v. Hardy, 8 Utah, 68, 29 Pac. 1118; State v. Tallman, 25 Wash. 295, 65 Pac. 545; State v. Meilike, 81 Wis. 574, 51 N. W. 875. Additional and similar cases are cited in 37 Cent. Dig. p. 1872, § 69; 29 Cent. Dig. p. 1586, §§ 25, 27, 29; 15 Dec. Dig. p. 706, §§ 49-54.

The rule stated is without substantial dispute, and its correctness is necessarily implied in State v. O'Leary, supra, and in other cases cited in connection therewith.

The result is that Judge Windom is entitled to hold office until his successor is elected and qualified, and the appointment of Judge Smallwood by the Governor is ineffective, unless the effect of the general statute was to create a vacancy when Judge Smallwood's election was held invalid, or unless the hold-over provision of the municipal court act offends the provision of the Constitution; and to these questions we now give attention.

4. The statutory provisions as to vacancies are as follows:

"Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:

1. The death of the incumbent.

2. His resignation.

3. His removal. * * *

6. His refusal or neglect to take the oath of office. * * *

7. The decision of a competent tribunal declaring his election or appointment void."

R. L. 1905, § 2667 (G. S. 1913, § 5723).

The relator claims that under subdivision 7 there was a vacancy when it was determined in Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, that he was not elected because the preferential system of election was unconstitutional. We do not concur in this view. The legislature did not intend to render nugatory, in such a case, the provisions as to holding over. The legislative disposition is against a vacancy and re-

sultant appointment. One reason for the provision for a hold-over is that it is thought better in the case of an elective office to take the judgment of a prior electorate rather than that of the appointing power. Judge Windom was right in giving possession of the office to Judge Smallwood, who held the certificate of election. In doing this he did not abandon his office or waive his right to hold over. Nor do we think he did so by claiming, though erroneously, that he was elected because of receiving a plurality of the first choice votes. The provision in the municipal court act for holding over is not affected by article 7, § 9, of the Constitution making the first Monday in January the beginning of the official year. It may be conceded that the provisions as to holding over are unavailing to county officers under this constitutional provision where the term is fixed by statute. In State v. Billberg, 131 Minn. 1, 154 N. W. 442, it was held that a county office became vacant in accordance with the constitutional provision cited, the court following State v. McIntosh, 109 Minn. 18, 122 N. W. 462, 126 N. W. 1135. Reference was made to the case of Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802, 11 L.R.A. 272, 22 Am. St. 729. There, apparently not having in mind the constitutional provision, it was held that the relator, the prior incumbent of the office of county attorney, had the right to hold over against the respondent, who was adjudged in *quo warranto* ineligible because not an elector, and the court said: "If the election of the respondent was not legally authorized, the relator would continue to hold the office by force of this express provision of the statute." This case is direct authority for a holding under the municipal court act, which the constitutional provision cited does not affect, that the former incumbent held over upon the judicial determination that the respondent was not elected. The holding in Taylor v. Sullivan was followed in State v. Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. 630, and a judgment of ouster was entered. At the time of both these decisions the vacancy statute was in force. No reference to it was made. We are of the opinion that the adjudication that Judge Smallwood was not elected did not create a vacancy as against the claim of one under a hold-over provision. We do not attempt to define a "void" election such as creates a vacancy; but we apprehend that it has not been the understanding of the bar or of the courts that an otherwise effective hold-over provision is rendered ineffective by the vacancy

statute upon it being judicially determined that the election of a candidate, who had taken possession, was invalid, because of his ineligibility, or because the election was in itself invalid, or because for other similar reason the incumbent was not legally elected. Instances should be considered as they arise.

In leaving this feature of the case we pass without comment the suggestion that the statute of 1913 is subsequent to the statute relative to vacancies; and that it amends a special act affecting only the municipal court of Duluth and providing specially that the municipal judge shall hold his office "until his successor shall be elected and qualified."

We think the statute is without application; and to sustain his appointment Judge Smallwood must look to the Constitution.

5. The municipal court of Duluth was created by the legislature under authority of article 6, § 9, of the Constitution which is as follows:

"All judges other than those provided for in this Constitution shall be elected by the electors of the judicial district, county, or city, for which they shall be created, not for a longer term than seven years."

This provision does not call for interpretation. Its meaning is plain. The municipal judge is *elective*. He cannot be elected for *a longer term than seven years*. So, if the effect of the legislation of 1913 was to make the office other than elective, within the constitutional sense, or to make Judge Windom's terms exceed seven years, it was unconstitutional. This is our next inquiry.

6. The legislature, in adjusting terms of offices, may change the date of the election, if the real purpose be an adjustment, and the change be not unreasonable, though it thereby incidentally extends the period of service of the incumbent, without offending the command of the Constitution that the office be elective. This was definitely held in Jordan v. Bailey, 37 Minn. 174, 33 N. W. 778. No more than this was involved and no more was decided. The rule stated is not universal but probably it is the prevailing one. People v. Bull, 46 N. Y. 57, 7 Am. Rep. 302, is a leading case opposed to it. Since Jordan v. Bailey requires discussion in another connection we pass it with the remark that it is controlling against the relator upon its contention that the statute of 1913, by changing the date of election, affected the elective character of the office.

Of course a change in the date of the election must not contravene the limitation as to the length of the term.

7. Whether the legislature by changing the date of election to a time beyond the term fixed by the statute, providing that the incumbent shall hold until his successor is elected and qualified, and thereby, if there is a failure to elect, give the incumbent a term of office in excess of the constitutional period, is the question determinative of this proceeding; and it is the one which has chiefly engaged the attention of counsel and is most discussed in their briefs. Its consideration requires a reference to certain statutes relative to the organization of the municipal court, and a consideration of the few cases which have a helpful application.

The municipal court was created by Sp. Laws 1891, p. 595, c. 53, though there was a prior municipal court act not necessary to be considered here. There have been amendments. Judge Windom was last elected in 1912. The municipal court act then provided as follows:

"Sec. 4. There shall be one judge of said municipal court to be called municipal judge. The present judge of said court shall continue in office during the term for which he was elected, and until his successor shall be elected and qualified. The qualified electors of the city of Duluth shall, at the general city election to be holden on the first (1st) Tuesday in February, in the year one thousand eight hundred and ninety-two (1892), and on the day of the general city election every third (3rd) year thereafter, elect a suitable person, with qualifications hereinafter mentioned, to the office of municipal judge, who shall hold his office for a term of three (3) years, and until his successor shall be elected and qualified." Laws 1907, p. 324, c. 239, § 4.

Prior to the expiration of Judge Windom's last term and on March 24, 1913, the municipal court act was amended. Laws 1913, p. 107, c. 102. This amendment provided for a four-year term to commence in April, 1915, in lieu of the three-year term, the incumbent, Judge Windom, to hold until such time and until his successor was elected and qualified, and the judge then elected to hold until his successor should be elected and qualified; and it further provided for an election to fill such office at each fourth year thereafter, commencing with the first Tuesday in April, 1915. After the amendment of 1913, section 4, so far as here important, was as follows:

"Sec. 4. There shall be one judge of said municipal court, to be called municipal judge. The present judge of said court shall continue in office during the term for which he was elected, and until his successor shall be elected and qualified. The qualified electors of the city of Duluth shall, at the general municipal election to be holden on the first (1st) Tuesday in April, in the year one thousand nine hundred and fifteen (1915) and on the day of the general municipal election every fourth (4th) year thereafter, elect a suitable person, with qualifications hereinafter mentioned, to the office of municipal judge, who shall hold his office for a term of four (4) years, and until his successor shall be elected and qualified." Laws 1913, p. 107, c. 102, § 1.

The effect of this piece of legislation, changing the time of election from February to April, was to permit Judge Windom to hold beyond his three-year term, and until his successor was elected on the first Tuesday in April, 1915, and if none was then elected, until the election on the first Tuesday in April, 1919, assuming as we now do that an election could not be held in April, 1917. The necessary effect of this hold-over provision was to give Judge Windom, in case a successor was not elected at the April, 1915, election, more than a seven-year term. The statute extended his three-year term. It is not fair reasoning to say that by virtue of the hold-over provision prior to the 1913 act Judge Windom would have held over in the same way. The statute did extend the three-year period by postponing the election to a date subsequent to the expiration of his term. Of necessity if Judge Windom held until the election on the first Tuesday in April, 1915, his term was extended, and if he then held over until his successor was elected and qualified, and none was elected or could be elected for four years from April, 1915, the legislation resulted in a term two months in excess of seven years. The question is upon the constitutionality of such legislation.

The respondent relies upon Jordan v. Bailey, 37 Minn. 174, 33 N. W. 778, referred to in the preceeding paragraph and left for further discussion here.

The case cited was a proceeding in *quo warranto* original in this court. The respondents, Judge Bailey and Judge Mahoney, were elected municipal judges of Minneapolis in April, 1883, for the term of four years, and until their successors were elected and qualified. The act of 1885,

(Sp. Laws 1885, p. 237, c. 74, § 3), amending Sp. Laws 1874, p. 362, c. 141, § 2, as amended by Sp. Laws 1883, p. 182, c. 48, § 2, by virtue of which the respondents were elected and were entitled to hold for four years, until their successors were elected and qualified, provided for an election every six years, commencing with the city election in 1883, that is, in 1889, and extended the respondents' term until that time. The relators, claiming that the amendatory act of 1885 was invalid, were elected in 1887, and claimed title to the office. It was held, and the holding went quite far enough, that the statute changing the term and rearranging the time of elections and conveniently extending the respondents' terms was not unconstitutional. The case was instituted prior to the election of 1889 and the only question involved was whether the respondents' terms could be extended from four years to six years without affecting the elective character of the office within the meaning of Const. art. 6, § 9. There was no question as to the constitutionality of the hold-over provision of the old four-year term, or of the new six-year term, or of any hold-over provision. There could not be. The respondents were not claiming the right to hold so long as seven years. They only claimed the right to hold the two years added to the four years against the contention that such addition destroyed the elective character of the office. Judge Windom is claiming to hold in excess of seven years.

An examination of the brief of counsel for the relators in the case cited is proof that only the question of the extension of the term of an incumbent, so as to offend the provision of the Constitution making the office elective, was in mind. The brief says [pp. 2-4]:

"The intention of the framers of the Constitution is clear and unmistakable to place the election of all judges in the hands of the people. The election of judges by the people is rigidly preserved, and especially in the clause set forth above. [Const. art. 6, § 9.] * * * The legislature had the undoubted power to create the office; to fix the period of service of the judges; to regulate their compensation and everything incidental thereto; but having prescribed a fixed term of four years, and having authorized the people to elect for that term, they could not legally extend the term as applied to present incumbents."

No reference is made to the constitutional question now under consideration. It was not of consequence in the case. The relators relied

upon People v. Bull, supra, which the court refused to follow, and this case bore only upon the elective character of the office as fixed by the Constitution. Jordan v. Bailey is not authority for a holding that the legislature may constitutionally extend the period of office beyond seven years by changing the date of election and continuing the incumbent in office until the next election with a hold-over provision. Indeed, we may justly infer that had the term there involved been extended beyond seven years by the change in the date of the election the holding would have been different; for the court, when it says that the office is within the control of the legislature, says it is so subject to the provisions of the Constitution *"making the office elective,* and *limiting the term to seven years."*

It seems quite clear that the legislature cannot extend an office beyond the constitutional term by a hold-over provision. Thus, in State v. Clark, 87 Conn. 537, 89 Atl. 172, 52 L.R.A.(N.S.) 912, the facts were about these: The Constitution, article 5, § 3, provided that "judges of the City Courts and Police Courts shall be appointed for terms of two years." The charter of Hartford provided "that the judge and associate judge of the city police court within and for the city of Hartford shall each hold office for the term of two years * * * and until his successor shall be duly appointed and qualified." The court held that the words "until his successor is duly appointed and qualified" were in contravention of the Constitution and that a vacancy existed. In Commonwealth v. Sheatz, 228 Pa. St. 301, 77 Atl. 547, 50 L.R.A.(N.S.) 374, 21 Ann. Cas. 54, these facts appear: Sheatz was state treasurer and his term was fixed by the Constitution at two years. There was no hold-over provision. The Governor had authority to fill a vacancy. The assembly passed an act providing that "the term of office of the state treasurer shall hereafter commence on the first Monday of May next succeeding his election, and shall continue for two years, or until his successor shall be duly qualified." It was held that the attempt to extend the office beyond two years was unconstitutional. And see State v. Brewster, 44 Oh. St. 589, 9 N. E. 849, and note to State v. Plasters, 74 Neb. 652, 105 N. W. 1092, 13 Ann. Cas. 154, in 3 L.R.A.(N.S.) 887.

The case of State v. Compson, 34 Ore. 25, 54 Pac. 349, is cited by respondent. Section 2 of article 15 of the Oregon Constitution provided

that "the legislative assembly shall not create any office, the tenure of which shall be longer than four years." The board of railroad commissioners, by legislative act, held their offices "for and during the term of two years and until their successors are elected and qualified." The legislative assembly chose Compson on February 17, 1893, for a two-year term and in 1895 there was a failure to appoint a successor so that Compson held two years longer, or a total period of four years. The argument was made that, at the expiration of four years, the office became vacant under the Constitution, notwithstanding the provision of the statute that the incumbent should hold until his successor was elected and qualified. The court said:

"The logic of the argument is that the legislature may create an office the term of which shall be four years, and may reserve to itself the right to select the incumbent; but it is inhibited, as between the officer and the appointing power, from providing that the incumbent of such office shall hold after the expiration of that time, or until his successor is elected and qualified. This position is probably sound, unless Section 1 of Article 15 of the Constitution, which provides that 'All officers, except members of the legislative assembly, shall hold their offices until their successors are elected and qualified,' applies to the office of railroad commissioner."

The court held that the Constitution applied to this office and, therefore, construing the two provisions of the Constitution, that the incumbent could hold until his successor was qualified. This case gives no support to the respondent. By implication it supports the relator. The respondent relies upon Spencer v. Knight, 177 Ind. 564, 98 N. E. 342. The Constitution of Indiana (article 15, § 2), provided that the general assembly should not create any office "the tenure of which shall be longer than four years." Section 3 of the same article provided that whenever the Constitution or any law fixed a term of office other than a member of the general assembly for a given term it should be construed to mean that "such officer shall hold his office for such term and until his successor shall have been elected and qualified." Construing together these two provisions there was no difficulty in holding that a legislative extension of a term of office beyond four years by a provision for hold-

ing over would not conflict with the Constitution. The court referring to article 2, § 15, said:

"This provision * * * adds an additional contingent and defeasible term to the original fixed term, and the right to hold over comes from it and not from the act regulating the time of holding the election for the office except as it opens the way for the operation of the constitutional provision."

The court, it is true, refers to statutes postponing elections and providing for the incumbents holding over as if constitutional and cites cases; but no case among those cited supports the proposition that the legislature may, by a hold-over provision, increase the constitutional term; and we take it that the supreme court of Indiana, under the statute and constitutional provision quoted, is committed to the doctrine that the holding over finds its justification in the Constitution and not in the statute. State v. Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L.R.A. 408, 418. The case of People v. Tilton, 37 Cal. 614, seems to support respondent's contention and it is followed in People v. Edwards, 93 Cal. 153, 28 Pac. 831. We do not see that Crowell v. Lambert, 9 Minn. 267 (283), aids respondent. Some loose language in it favors him but no law.

The limitation of the Constitution upon the right of the electors to elect a municipal judge is that he shall not be elected "for a longer term than seven years." Prior to the legislation of 1913 the term of office was three years, with a provision that the judge elected should hold until his successor was elected and qualified. In no case was the result of this legislation to give the judge elected a term longer than seven years. It may be conceded, in harmony with the general policy of the law, that, if no election was had in a particular year and the judge held over, he would hold only until the next annual election, for until 1913 Duluth had annual elections; and there was nothing in the municipal court act which prevented a judge holding over from being elected at the next annual election. In 1913 the act was so changed as to make the term four years, and it was studiously provided—so studiously that we cannot ignore the intent of the legislature—that this four-year term should commence in April, 1915, the obvious purpose being to provide for the election of the municipal judge at one biennial election, and the

election of the special judge and the assistant judge at a different biennial election. There was not to be a time when all three judges would be elected at the same election. The commission charter of Duluth adopted in December, 1912, provided for biennial elections only.

That the term cannot constitutionally extend beyond seven years we must concede, if we yield obedience to the limitation of the Constitution. The difficulty comes in ascertaining the precise effect of such holding on the peculiar situation before us. There are four results suggested:

(a) That while the whole term exceeds seven years, and therefore the statute is infected with unconstitutionality, it should be held unconstitutional only as to the period in excess of seven years, leaving the incumbent to hold until the expiration of that time, in this case until February, 1919, when there would be a vacancy and might be an appointment.

That this would result in great confusion is manifest. It is not a result which should be favored. That an argument may be made for it is evidenced by respondent's brief and the authorities which he cites. Sinking Fund Commnrs. v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. 454; State v. Long, 21 Mont. 26, 52 Pac. 645.

We recognize the general rule that an election or an appointment for a longer term than the Constitution fixes may be valid to the extent of the constitutional term, and we understand its application. It is suggested that our holding affects the county officers of the state who are now holding under a statute fixing their terms at four years from the first Monday in January, 1915, and until their successors are elected and qualified. Laws 1913, p. 668, c. 458, and see amendment, Laws 1915, p. 233, c. 168. This is not our understanding at all. The suggestion is based upon State v. McIntosh, 109 Minn. 18, 122 N. W. 462, 126 N. W. 1135, which, assuming to follow State v. Frizzell, 31 Minn. 460, 18 N. W. 316, construing article 7, § 9, of the Constitution making the official year commence on the first Monday of January and all offices terminate then, held that a county commissioner, because of the constitutional provision, did not hold over after such date though the statute provided for a hold-over. Our holding in no way affects county officers, nor do we understand that a hold-over provision attached to their terms of office, if ineffective, affects the original term; nor do we

understand that an election for a longer term than the Constitution provides is not an election for the constitutional term; nor should anything in this opinion be understood as questioning the constitutional validity, under Const. art. 7, § 9, of the statutes of 1913 and 1915 increasing the terms of county officers from two years to four years. We do hold that when the legislature passed the act of March 24, 1913, extending Judge Windom's term of office, with a restriction on the right to fill it by election before a date when a period in excess of seven years, would pass, it was an unconstitutional extension of his term, and that the additional period given was void. This is referred to again.

(b) That the entire statute of 1913, changing the time of election and providing for a four-year term, is unconstitutional and that the municipal court act is as it was before 1913.

If this be so the incumbent's office is for three years. The time of election is in February. The hold-over is until the next annual election. The term of office of the special judge is three years. There is no provision for annual elections in the charter. And the office of assistant municipal judge is without constitutional authority and he should be ousted. If the substance of the statute can be given effect, though it be unconstitutional in a minor particular, the court should so hold it, rather than make a holding necessitating the results just stated because of entire unconstitutionality.

(c) That the incumbent holds over, but only until the next biennial election after the failure to elect, when his successor will be elected; in this case until the biennial election in 1917.

The difficulty of such a holding is that the legislature has not provided for the election of a municipal judge at the close of the first biennial election after April, 1915, and has distinctly and industriously provided that there shall be none. There is no way of construing the statute to intend one. We cannot, in order to hold the statute constitutional, construe it to mean one, when plainly it does not—when plainly it is inconsistent with such intention. If there were two reasonable constructions the law would favor the one making the statute constitutional. Here such principle it without application. If the statute is held unconstitutional it is so held because of the hold-over provision, being uncon-

stitutional, the defeasible term dependent upon it falls with it, leaving a vacancy.

It is true that, if the incumbent involved was an appointee instead of one holding over, it might be held under the constitutional provision for an appointment by the Governor that the election of a successor be held at the next election. This matter is referred to in another connection.

(d) That the provision for a hold-over is unconstitutional and that there is a vacancy at the end of the term fixed.

There is no difficulty in holding, the term of office being unconstitutional because of the provision for holding over, that the hold-over provision is unconstitutional and that the defeasible term which it creates falls with it. The construction we adopt is that the hold-over provision is unconstitutional, that because of it the four-year defeasible term, which has no vitality except such as it derives from it, falls with it, and that a vacancy occurred upon a failure to elect in April, 1915. This is the natural and straightforward holding. It works no unnecessary confusion. It is not strained. It is simply a holding that the legislature, by the statute of 1913, by changing the date of election, and continuing the then incumbent in office, necessarily made a term in excess of seven years if he held over. It does not result in a holding that the incumbent could not rightfully continue in office until the Governor's appointment.

Briefly stated, and with some repetition, the situation is just this: On the first Tuesday in February, 1912, Judge Windom was elected municipal judge for the term of three years "and until his successor shall be elected and qualified." On March 24, 1913, the legislature provided for a municipal election to be held on the first Tuesday in April, 1915, at which the successor of Judge Windom should be elected, and provided that a municipal judge should be elected "on the day of the general municipal election every fourth (4th) year thereafter." It further provided that the then judge, which meant Judge Windom, should continue in office for the term for which he was elected and "until his successor shall be elected and qualified." If a successor was not elected in 1915, and if none could be elected in 1917, the effect of this statute was to make Judge Windom hold for a period of seven years and two

months. This was absolutely determined when the 1913 act was passed. The legislature saw that if the hold-over provision became effective because of a failure to elect in 1915 Judge Windom's term, which he was then filling, would exceed seven years, and the legislation which it enacted, if held valid, brought this result. We hold that an election of a successor to the municipal judge cannot be held under the present statute in 1917, or until 1919, if it is given effect according to its terms. We are not now referring to the election of a judge to succeed one appointed by the Governor under the Constitution. The necessary effect of the act of 1913 being to make the incumbent hold seven years and two months, if there was no election in 1915, and none for a successor could be had in 1917, it is unconstitutional.

In the investigation which has brought us to this conclusion, we have had continuously in mind the presumption of constitutionality which attends legislative acts and that, as said by Justice Philip E. Brown in State v. City of Mankato, 117 Minn. 458, 136 N. W. 264, cited by counsel for respondent, "the voice of the legislature is the voice of the sovereign people, and that, subject only to such limitations as the people have seen fit to incorporate in their Constitution, the legislature is vested with the sovereign power of the people themselves." But effect cannot be given to legislative intent which disregards the limitations of the Constitution.

8. By article 5, § 4, of the Constitution, it is provided that the Governor shall "fill any vacancy that may occur in the office of secretary of state, treasurer, auditor, attorney general, and such other state and district offices as may be hereafter created by law, until the next annual election, and until their successors are chosen and qualified."

Under this provision there is no question of the authority of the Governor to appoint upon the occurrence of a vacancy in the office of municipal judge, and, a vacancy having occurred, the Governor's appointment of Judge Smallwood gave him title to the office.

In State v. Frizzell, 31 Minn. 460, 18 N. W. 316, at page 465, the court, having in mind article 6, § 10, of the Constitution, said:

"There is no provision in the Constitution for filling by appointment a vacancy in the office of a judge caused by the expiration of the regular term for which he was elected."

The court was there considering the various amendments to articles 5, 6 and 7 of the Constitution, as proposed by chapters 1, 2 and 3, pp. 5, 6, 7, Laws 1883. What was there said has no bearing on an appointment made under article 5, § 4, of the Constitution.

9. The provision in the Constitution that the Governor shall fill a vacancy "until the next annual election" uses the word "annual" in the sense of regular—that is, an election held in usual course at which with propriety the office may be filled though no provision is made by statute for filling it then. Therefore a successor to one appointed municipal judge should be elected at the next regular election and so far the statutory provision for an election only at four-year intervals must yield. It may be noted in this connection that it is also the legislative policy to elect in case of a vacancy, at the next election. R. L. 1905, § 2671 (G. S. 1913, § 5727). Whether the legislature can so provide that the two elections, one of the municipal judge and the other of the special judge and the assistant judge, shall be held at different biennial periods, when a vacancy occurs making an election necessary out of the usual order, we do not inquire. To put it concretely Judge Smallwood's appointive term will expire in April, 1917, and the one then elected will be elected for a term of four years and not to fill the unexpired portion of a four-year term.

10. To avoid misunderstanding as to the method of electing the municipal judge it is proper to say that, the statute and the charter remaining as they now are, the election of the municipal judge should be had under the general election law with a nonpartisan ballot and the machinery which the statute provides. We do not say that a method may not be provided by the charter different from this. In Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, we held that the fact that the municipal judge was a state officer did not prevent making use of the election machinery provided by the city. This was stated broadly in view of the claim there made that the statute did not intend to apply the election machinery of the city to the election of the municipal judge, a state officer. It will not be overlooked that, by the Constitution, the commission form of charter must be consistent with and subject to the laws of the state. Const. art. 4, § 36.

11. To avoid useless controversy or litigation it is proper to say that

the official acts of the relator and the respondent in their various incumbencies of the office are valid. All the time there has been a *de jure* office of municipal judge. All the time there has been a *de facto* judge filling the office. The acts of a *de facto* judge, actually occupying the office and transacting business, are valid. State v. McMartin, 42 Minn. 30, 43 N. W. 572. In the actual incumbencies since the April, 1915, election, the official acts of the incumbent, whether Judge Windom or Judge Smallwood, occupying the office and exercising its functions, are valid.

Let a writ of ouster issue.

HALLAM, J. (concurring).

I concur in the result.

I do not concur in the proposition that the provisions of the Duluth charter that a municipal judge shall hold over after the expiration of his term until his successor is elected and qualified, is wholly void because the term and the hold-over period together might exceed the constitutional limit of seven years in the contingency of failure of election and qualification of a successor within that time. The hold-over provision is valid, except insofar as it conflicts with the Constitution. The conflict is as to any excess over seven years, and the provision is void only as to any excess. This is the rule favored by the authorities. 29 Cyc. 1396; Sinking Fund Commrs. v. George, 104 Ky. 260, 274, 47 S. W. 779, 84 Am. St. 454; State v. Long, 21 Mont. 26, 52 Pac. 645. See also State v. Bates, 108 Minn. 55, 57, 121 N. W. 225; and this seems to me to be the practical and reasonable rule. As a matter of fact county officers in every county in the state are today holding under a statute fixing their term at four years from the first Monday in January, 1915, and until their successors are elected and qualified. G. S. 1913, § 810. That term exceeds the constitutional limit fixed by section 9, art. 7, of the Constitution, which permits of no hold-over at all in such offices. State v. McIntosh, 109 Minn. 18, 122 N. W. 462; State v. Billberg, 131 Minn. 1, 154 N. W. 442. Similar statutory provisions have been common in the past. R. L. 1905, §§ 481, 494, 530, 546, 563, 582, 599. But it has never been considered that such statutes are void except as to the excess over the constitutional limit.

My opinion is that a vacancy existed in the office of municipal judge by virtue of the provisions of G. S. 1913, § 5723, that "every office shall become vacant on the happening of either of the following events * * *:

1. The death of the incumbent. * * *

6. His refusal or neglect to take the oath of office or to give or renew his official bond. * * *

7. The decision of a competent tribunal declaring his election or appointment void."

In my opinion the seventh subdivision of section 5723 is applicable to this case and its operation necessarily limited the hold-over provisions of the Duluth charter. In the absence of section 5723 failure of election or qualification of a successor would not create a vacancy, but the hold-over official would continue to hold over until another election, or as long as permitted by the Constitution.

Section 5723 was designed to prevent just such a result. Instead of leaving the hold-over official in office until a succeeding election, it provides that the office shall become vacant, if, after the election, the incumbent fails to qualify or his election is judicially declared void. This statute operates to terminate the tenancy of the hold-over officer in either of these events.

It seems to me there should be little doubt as to the meaning of this section. The language is not well chosen. Strictly speaking there cannot be such a thing as an "incumbent" who has neither taken the oath of office nor given a required official bond, nor an "incumbent" whose election is void. But the term incumbent can be given no narrow construction. As used in the sixth subdivision, it has been held to include a person elected, but not qualified. County of Scott v. Ring, 29 Minn. 398, 13 N. W. 181. As used in the seventh subdivision, it is intended to include one who is declared elected at an election but whose title is, by reason of some frailty in the election, judicially declared void.

In this case an election was held on a regular election day, for the election of a municipal judge. Judge Smallwood was declared elected by the proper election officials, and received the usual certificate of election. Under well settled rules of law he was entitled to the possession of the office until his title was found defective. State v. Sherwood, 15 Minn. 172 (221). He was an incumbent within the meaning of sub-

division 7, section 5723, and by force of that statute the judgment of the court declaring the election void created a vacancy.

What few authorities there are sustain this position.

It is held that one in office, who is a candidate for re-election and has received the certificate of election and qualifies and acts thereunder, cannot, after the election had been declared void, be heard to say either that he was holding over or entitled to hold over under a former election by virtue of the hold-over provision of a statute. 29 Cyc. 1400; Farrell v. City of Bridgeport, 45 Conn. 191; Handy v. Hopkins, 59 Md. 157; Ex Parte Gray, Bailey Eq. (S. C.) 76.

Under a statute the same as ours it has been held that the office becomes vacant on the decision of the court declaring an election void on the ground that the person declared elected was ineligible. Campbell v. Board of Suprs. of Santa Clara County, 7 Cal. App. 155, 93 Pac. 1061. A determination that the election was void because of violation of the corrupt practices act would beyond doubt have the same effect. See State v. Billberg, 131 Minn. 1, 154 N. W. 442. It can make no difference on what ground the election is adjudged void. The statute makes no distinction between an election declared void because of ineligibility or personal misconduct, and one declared void because of a wrong method of voting. It is the decision of a competent tribunal declaring the election void, and not the ground of the decision, that creates the vacancy. The purpose of section 5723 is to create a vacancy in all cases where the old official has exhausted the term for which he was elected and an election has been held to choose a successor, even though the successor chosen refuses to qualify or the election be wholly void.

Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802, 11 L.R.A. 272, 22 Am. St. 729, is not an authority against this view. In the decision in that case no mention is made of the "vacancy" statute. A constitutional provision that would have been decisive of the case was overlooked. See State v. Billberg, supra. It is quite apparent that the "vacancy" statute was likewise overlooked.

WILLIAM L. WINDOM v. CITY OF DULUTH.[1]

June 8, 1917.

Nos. 20,312—(147).

Officer — expiration of term — holding over.

1. Plaintiff claims to have held over in the office of municipal judge of the city of Duluth after the expiration of his term. The statute creating the office contained no valid holdover provision.

Same — salary while serving in office.

2. It is conceded that plaintiff is entitled to the salary of the office during such time as he was in possession and was serving the city as municipal judge.

Same — evidence.

3. The evidence sustains the finding of the trial court that plaintiff was in possession of the office and was a *de facto* officer up to May 3, 1915, during August and the first 13 days of September, 1915, and that he is entitled to the salary during that period, but the evidence shows that he was not in possession and was not a *de facto* officer from May 3 to July 30, and is not entitled to salary for that period.

Action in the district court for St. Louis county to recover $1,108.33 for salary as judge of the municipal court of Duluth. The answer set out the facts concerning the litigation mentioned in the opinion, alleged that the salary of the office for the time from April 13 to June 30, 1915, had been paid to Judge Smallwood, and prayed that defendant might bring into court the amount due for salary for July, August and the first 13 days of September, 1915, and that Smallwood be brought in as a party to the action in place of defendant. The case was tried before Dancer, J., who made findings and ordered judgment in favor

[1]Reported in 162 N. W. 1075.

of plaintiff for the amount demanded. From the judgment entered pursuant to the order for judgment, defendant appealed. Modified.

John E. Samuelson, Leonard McHugh and *H. H. Phelps,* for appellant.

Fryberger, Fulton & Spear, for respondent.

HALLAM, J.

1. This case is a sequel to Brown v. Smallwood, 130 Minn. 492, 153 N. W. 953, L.R.A. 1916B, 931, and State v. Windom, 131 Minn. 401, 155 N. W. 629. In 1912 plaintiff was elected to the office of judge of the municipal court of Duluth. His term expired at the election April 6, 1915. Laws 1913, p. 107, c. 102. By the terms of the statute, he was to hold over until his successor should be elected and qualified, but this holdover provision was held void in State v. Windom, supra. At the election April 6, 1915, an attempt was made to elect a successor. W. H. Smallwood was declared elected and a certificate of election issued to him. In Brown v. Smallwood, supra, his election was held void and the office declared vacant. The vacancy continued until September 13, 1915, when Judge Smallwood was appointed by the Governor.

In the interim between April 6 and September 13, the office was not without an incumbent. In State v. Windom, supra, it was said in substance that either Judge Windom or Judge Smallwood had been occupying the office and exercising its functions during that time, and that each during his incumbency was a *de facto* judge. This was said advisedly. In other words, it was decided that each had sufficient color of right to render him a *de facto* officer during this period, if in fact in possession of the office.

This action is brought by plaintiff to recover the salary of the office for the full period from May 1 to September 13, 1915. Plaintiff does not claim that he was a *de jure* officer. He does claim some greater rights than are accorded generally to *de facto* officers. He claims that when his term ended and no successor had been chosen it was not only his right but his *duty* to continue in possession of the office and in the discharge of its duties until a successor was regularly chosen, to the end that public business should receive attention and the court should not be left without a judge.

Some decisions give color to this claim. Robb v. Carter, 65 Md. 321, 4 Atl. 282; People v. Oulton, 28 Cal. 45; City of Central v. Sears, 2 Colo. 588; State v. Watkins, 87 Conn. 594 (599), 89 Atl. 178.

On the other hand, such an incumbent is usually spoken of in the decisions as a *de facto* officer. In re Interrogatories of the Senate, 54 Colo. 166 (175), 129 Pac. 811; People v. Beach, 77 Ill. 52; Morton v. Lee, 28 Kan. 286; State v. McJunkin, 7 S. C. 21. And it has been held that a person holding over in this manner may be ousted in proceedings in *quo warranto,* even though no successor has been chosen. People v. Bull, 46 N. Y. 57, 7 Am. Rep. 302; Hawkins v. Cook, 62 N. J. Law, 84, 40 Atl. 781. If such be the case, his incumbency while it lasts is merely permissive.

2. We need not trouble ourselves with the question of plaintiff's proper classification, nor need we determine the question upon which the courts are much divided as to when one not a *de jure* officer may recover the salary of the office. In this case the city manifests a just willingness to pay the salary of the office to plaintiff during such time as he was in possession of the office serving the city as municipal judge. Plaintiff concedes that he has no right to salary if he was not in possession. His counsel in their brief states that if Judge Smallwood was in "exclusive possession, then Judge Windom's rights were gone" and that "if Judge Smallwood was *de facto* judge, then Judge Windom's rights were gone during Judge Smallwood's incumbency." The case really narrows down to the question, who was in possession of the office during this period?

3. The finding of the trial court is not explicit on this question. The court found in substance that each of the claimants performed some of the duties of the office, but we think the decision must be construed as finding in effect that Judge Windom was in possession of the office all of the time from May 3 to September 13, and that Judge Smallwood was not in possession at all. To the extent that this finding relates to the period to May 3, to the month of August and to the first 13 days of September, the evidence is sufficient to sustain it. We are of the opinion that this finding, insofar as it relates to the period from May 3 to July 30, is not sustained by the evidence. We may take the testimony of Judge Windom on that point. He testified that

while he presented himself every day, ready and willing to perform the duties of the office, he did not in fact do so. In answer to questions from his own counsel: "The days you presented yourself there, you do not claim that you served as judge?" he answered: "No, I did not interfere with anybody, I simply retained my continuity of office, that is all." He testified further, that Judge Smallwood "was present, assuming to be judge," that he "did act as judge," tried and decided cases on the bench, presiding every day as judge of the court.

The fact is, Judge Windom, during this period, was insisting that he was the *de jure* judge. He was preserving his rights against any claim of abandonment of the office. But plainly he was not in the possession of the office. Clearly, Judge Smallwood was the incumbent of the office from May 3 to July 30. Two persons cannot hold the same office at the same time. Judge Smallwood was the *de facto* judge during that time. Judge Windom was not, during these months either a *de jure* nor a *de facto* judge of the court nor an incumbent of the office of any kind, and he cannot recover the salary of the office. Readiness to perform the duties of an office is in no sense the equivalent of possession of the office and does not avail plaintiff.

We hold that Judge Windom is entitled to recover the salary of the office up to May 3, and for the month of August and the first 13 days of September, but not for the remaining period in controversy.

Judgment may be entered in accordance with this opinion.

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