

12146

No. _____

Supreme Court of Illinois

People, ex. rel.

vs.

Kilduff

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12
People ex. rel.
Patt. ch. Kilduff.

12 P.D.

12146

1854

To the Honourable the Supreme Court of the
State of Illinois, in session at Ottawa, at the
June Term thereof A.D. 1854.

Respectfully represents to Your Honors; Theron
D. Brewster, Mayor of the City of Peru in the County
of ~~Madison~~ ^{Edgemoor} and State of Illinois, and Henry Jones Clerk
of the City Council of said City of Peru,

Upon the Affidavit of the said Theron
D. Brewster, embracing the representations
of said Brewster and Jones in the premises
as follows, that is to say

I Theron D. Brewster, being sworn on my oath say

That under the Act of the General Assembly
of this State approved April 13th 1851 entitled
"An act to charter the City of Peru" said City
was organized as therein provided, and the first
Mayor and Aldermen were elected on the
first Monday of April 1851.

That said City was in the first place di-
vided into two wards, and thence hitherto
hath remained and still continues divided
into two wards and no more.

That at the Annual City election held in
said City of Peru on the 1st Monday of
April A.D. 1854. Theron D. Brewster (this Affi-
-ant) ^{as hereinafter stated} was elected Mayor of said City in
the stead of Patrick M. Kilduff the then
Mayor whose term as such Mayor expired

at said Annual election, as provided by said Charter, upon the qualification of his successor; And at said election Anton Birkenbeul was elected Al-
-derman in the first ward of said city, ^{as herein-after stated} in the stead of John S. McGormick whose term as such Alderman then expired; And at said elections David Dana was elected Alderman in the second ward of said City, in the stead of Council A. Holmes whose term as such Alderman in the second ward then expired.

That Churchill Copping was at the time an Alderman of the first ward, and John S. Coates an Alderman of the second ward, both of whom, under said Charter would continue such Aldermen until the Annual City elections on the first Monday of April 1855.

Affiant further states that at the time of said Annual elections on the first Monday of April 1854, said Churchill Copping was absent from the State and so remained absent until on or about the 27th day of May 1854.

Affiant further states that on the 11th day of April 1854, this Affiant, having been so elected Mayor of said City, - said Birkenbeul - having so been elected Alderman of said first ward and said Dana - having so been elected Alderman of said second ward, appeared, respectively, before Warren Brown Esq, a Justice of the Peace of Sabell County, and each qualified for the offices to which they, even so respectively elected, ^{and subscribed an} by taking ~~the~~ ^{an} oath ^{of office}. The Certificates of said oaths so taken and subscribed, and signed by said Brown officially, were on the

So that they would support the Constitution of the United States and of this State and that they would well and truly perform the duties of their office to the best of their skill and ability.

same day filed with the ^{then} Clerk of the City Council, one of which the said Kilduff then or immediately ^{thereafter} was informed.

Affiant further states that within a day or two after himself and said Birkenbeim and Dana, so qualified, this affiant called a special meeting of the City Council, of which said Coates, Birkenbeim and Dana were notified (being all of the Aldermen of said City except said Copping who was ^{then} absent from the State) and that this affiant as Mayor and said Coates, Birkenbeim and Dana as Aldermen, assembled at the ^{"Council Rooms"} ~~then~~ usual place of the meeting of the City Council, but did not organize and proceed to business at that time, on account of a proposal by said Coates to adjourn ^{until Saturday the 22nd day of April 1854} ~~for a time~~, in the hope that said Copping might return to meet with them, said Coates proposing also to send a telegraphic dispatch to said Copping on the subject. That afterwards (said Copping not having returned) this affiant as such Mayor called a special meeting of the City Council to be held at said ^{said} "Council Rooms" on ~~the~~ 22nd of April 1854, at which time and place a meeting of said Council was organized and held, and at which meeting this affiant was present as such Mayor, and said Coates, Birkenbeim and Dana as Aldermen as aforesaid. But said Coates took no part in the proceedings of said meeting except to be present with the Council at and during said meeting. And at said meeting the following proceedings took place

and appear upon the records of said city, as follows, viz:

"City Council Room

"Peru, Saturday, April 22^d 1854

"City Council met on Special Call of the Mayor

"Present - J. D. Brewster Mayor

" Alderman Birkenbeul, first Ward,

" Alderman Coates and Dana, Second Ward

" David Dana appointed clerk pro tem

" The City Council proceeded to determine and

" judge upon the result of the Annual City election

" held in the City of Peru on the first Monday of

" April Inst. - Whereupon it is ascertained and

" Resolved that, at the Annual City election held in

" the City of Peru on the first Monday of April 1854,

" Tharon D. Brewster was duly elected Mayor of

" said City of Peru; And at the same election in the

" first Ward of said City, Anton Birkenbeul was

" duly elected Alderman from said first Ward, in

" the place of John E. McCormick, whose term as Alderman

" has expired; And that at said Election, in the

" second Ward of said City, David Dana was

" duly elected Alderman from said second Ward,

" in place of C. A. Holmes whose term as Alder-

" man has expired; And that at said election John

" P. Thompson was duly elected police magistrate

" without opposition, for the City of Peru.

" Thereupon it appears that said Brewster, Birkenbeul and

" Dana, respectively, have filed their several Oaths of Office, ta-

" ken before Warren Brown Justice of the peace on the 11th

" day of April Inst. - The following persons were unanim-

" ously elected Officers for the ensuing year, Henry Jones Clerk,

" George W. Gilson Treasurer, James Cahill Collector, George Sow-

" Assessor, W. H. Foster Marshal, William Schuster Superi-

" -or of Streets of the first Ward, and A. F. Powers, City Sexton.

" On motion of Alderman Dana, adjourned to

" meet at the Office of Mr. Francis

" David Dana, clerk pro tem."

This Affiant further states that ~~Sixteen~~ since 22^d of April 1854, divers meetings of said City Council were held at the office of said Francis, as the "City Council Room" and business transacted, at the following dates, viz; April 29th - May 6th - May 13th - May 20th and May 27th all in said year Eighteen hundred and fifty four. That said Coates refused to and did not attend any of said meetings after said 22^d of April. That said meetings were all attended by this Affiant as Mayor and by said Birkenbush ~~as~~ ^{as} Alderman, being the Member required by the Charter for a quorum. And that sundry meetings of said City Council, at which the same members were present, were held during the month of June 1854; And that from the 1st of April 1854 until the 1st of June 1854 - no ^{Assembly} ~~meeting~~ of persons ^{in said city} ~~except~~ ^{at} the meetings aforesaid in which this Affiant presided as Mayor) professed or pretended to be the City Council of said City of Peru.

This Affiant further states that at the meeting of said City Council, held as aforesaid on the Sixth day of May 1854 - An ordinance was adopted by said City Council and duly published, in a newspaper of said City, ^{on the 9th day of the said month} in the words and figures following, to wit;

"An Ordinance to provide for the Care and safe keeping of the seals, Records, Books, Maps, plats, papers, and Office furniture of the City of Peru"

"Section 1. Be it ordained by the City Council of the
"City of Peru, That the Seal, Records, Books, Maps,
"plats, papers, and Office furniture of the City of
"Peru, shall be kept in the charge and care of the
"City Clerk, subject to the direction of the City Council.

"Sec 2. That whenever said Seal, records, Books, maps,
"plats, papers and office furniture, or any of them,
"shall be retained by any person, or persons, other
"than such clerk, and without authority of the City
"Council, it shall be the duty of the Clerk of the
"City Council, to demand of any such person
"or persons (if found within the City) to deliver
"to said Clerk any of said articles so retained.

"Sec 3. If any person or persons shall wilfully re-
"tain from the possession of said clerk, after de-
"mand as aforesaid, or after making such demand,
"the Seal, or any record, Book, Map, plat, paper or
"Office furniture of the City of Peru, such person
"or persons shall pay a penalty of ten dollars per day
"for each days retention of such possession from the clerk,
"to be recovered by action or actions of debt, in the
"name of the City, with costs, before the police Magis-
"trate of the City of Peru.

"Sec 4. It shall be the duty of the Clerk of the City
"Council, under the direction of the Mayor, to
"institute such legal proceedings, in the name
"of the City or otherwise, as may be necessary
"or proper to recover possession of, or to recover
"penalties for retaining, any of the effects
"of the City of Peru, mentioned in the
"first section of this Ordinance."

This affiant further states that after the passage and publication of said Ordinance of May 6th 1854, and before the 15th day of May 1854, said Henry Jones, as such Clerk, demanded of said Patrick M. Kilduff the Seal of said City and the Records and papers of said City, which the said Kilduff refused to deliver up, but admitted that he had possession or controul of them, claiming a right to retain them. That afterwards, to wit, on said 15th of May 1854, in the Laramie County Court the said City of Peru upon plaint and upon an affidavit made by this affiant, commenced an action of Replevin against the said Patrick M. Kilduff and caused a writ of replevin therein to be issued for "the Seal of the City of Peru and the records and papers of said City usually kept by the clerk of the City Council, including the poll books of the annual city election held in the City of Peru on the first Monday in April 1854," which writ of replevin was made returnable to said County Court on the first Monday of June then next, and was delivered to the Sheriff of said Laramie County to be executed thereof: And thereupon said Sheriff ~~now~~ said 15th day of May 1854 made service and return of said writ as follows, to wit, "Executed this writ by reading the within to Patrick M. Kilduff & demanding the within described property which was refused, and by taking 3 Books ^{2 small books} of Record & delivering them to Theron D. Brewster. The balance of the property not found, May 15th 1854, R. Theron Sheriff." That at the time of said service of said writ by said Sheriff, said Kilduff stated to said Sheriff that he - the said Kilduff - had the Seal, books &c but that he would not give them up;

and that the elections returns were not opened and counted.

Affiant further states that so far as he knows or believes, said Kieckruff still has possession of the seal of said City of Peru and refuses to deliver the same up to said Jones as such clerk or to any person authorized by the City Council of the City of Peru (meaning the Council in which this Affiant presides) to receive the same.

This Affiant further states that he has so as aforesaid acted as Mayor of said City, and claims to have been and to be legally such Mayor, upon the following grounds, in addition to the facts hereinbefore stated, viz:

By said City Charter the inhabitants of said City of Peru are constituted "a body politic and corporate by the name and style of the City of Peru" with the powers in said act provided. ^{also said Charter provided}
That there should be a City Council, to consist of a Mayor and Board of Aldermen. That the Board of Aldermen shall consist of two members from each Ward, to be chosen by the qualified electors for two years. That at the first meeting of the City Council the aldermen should be divided, by lot, into two classes, the seats of those of the first class to be vacated at the expiration of the first year, and of the second class at the expiration of the second year, so that the half of the Board shall be elected annually. That the City Council should judge of the qualifications elections and returns of their own members, and should determine all contested

elections; That a majority of the city Council should constitute a quorum to do business; That the City Council should have power to determine the rule of its proceedings: That the Mayor and each alderman before entering upon the duties of their office should take and subscribe an oath that they will support the Constitution of the United States, and of this State, and that they will well and truly perform the duties of their office to the best of their skill and ability: That whenever there should be a tie in the election of Aldermen, the judges of election should certify the same to the Mayor, who should determine the same by lot, in such manner as ~~shall~~^{should} be provided by Ordinance: That the chief executive officer of the City should be a Mayor who should be elected by the qualified voters of the City and should hold his office for one year, and until his successor should be elected and qualified: That when two or more persons should have an equal number of votes for Mayor, the judges of the election ~~shall~~^{should} certify the same to the City Council who should proceed to determine the same by lot, in such manner as may be provided by Ordinance: That whenever any election of Mayor should be contested the City Council should determine the same as may be prescribed by Ordinance: And that, whenever any vacancy, shall happen in the Office of Mayor, it shall be filled by election. And said Charter further provided for the first election and that forever thereafter, on the first Monday of April of each year, there shall be an election held for one Mayor of the City, and

One alderman for each ward, that the first election for Mayor and Aldermen should be held, Convention, and returns thereof made as might be provided by ordinance of the then Trustees of the town of Peru. That all ^{free} white male inhabitants over the age of twenty one years, who are entitled to vote for state officers, and who shall have been actual residents of said City, ninety days next preceding said election, ^{should} ~~shall~~ be entitled to vote for City Officers - Subject to a provision that voters should vote in their own wards in which they shall have resided ten days.

And by said Charter ^{was given to the City Council} ~~power given~~ power to appoint a clerk, treasurer, assessor, Marshal, Supervisor of streets, and all such other officers as might be necessary: To regulate the election of City Officers: To make all ordinances which should be necessary and proper for carrying into execution the powers specified in said Charter, so that such ordinance should not be repugnant to nor inconsistent with the Constitution of the United States or of this State.

Again by said Charter it was further provided that the Mayor should preside at all meetings of the City Council and should have a casting vote and no other; and that in case of non attendance of the Mayor at any meeting, the board of Aldermen should appoint one of their own number Chairman, who should preside at that meeting: That the Mayor or any two Aldermen might call special meetings of the

City Council: That the Mayor should at all times be active and vigilant in enforcing the laws and ordinances for the government of the City: And that said Charter is declared to be a public Act.

elections; That a majority of the city Council should constitute a quorum to do business; That the City Council should have power to determine the rule of its proceedings; That the Mayor and each alderman before entering upon the duties of their office should take and subscribe an oath that they will support the Constitution of the United States, and of this State, and that they will well and truly perform the duties of their office to the best of their skill and ability; That whenever there should be a tie in the election of Aldermen, the judges of election should certify the same to the Mayor, who should determine the same by lot, in such manner as ~~shall~~^{should} be provided by Ordinance; That the chief executive officer of the City should be a Mayor who should be elected by the qualified voters of the City and should hold his office for one year, and until his successor should be elected and qualified; That when two or more persons should have an equal number of votes for Mayor, the judges of the election ~~shall~~^{should} certify the same to the City Council who should proceed to determine the same by lot, in such manner as may be provided by Ordinance; That whenever any election of Mayor should be contested the City Council should determine the same as may be prescribed by Ordinance; And that, whenever any vacancy, shall happen in the Office of Mayor, it shall be filled by election. And said Charter further provided for the first election and that forever thereafter, on the first Monday of April of each year, there shall be an election held for one Mayor of the City, and

And this Affiant further states that said City Council never made any Ordinance to regulate the election of City Officers, or upon that subject except ~~an~~ Ordinance to determine by lot who should be Mayor in case of a tie vote.

That all the elections heretofore held in said City have been held at the same places, viz; at the Irish School house in the first Ward and at the City Hotel in the second Ward.

That preceding the elections heretofore held in said City, the City Council have by Resolution or order, appointed three voters in each Ward, as judges of elections, for the particular election, who have held such elections, or in case of non attendance of any of the persons so appointed ~~they~~ ^{judges} present have filled the vacancy - the judges appointing a Clerk or clerks, and the votes being given by ballot; the voters consenting in & accepting this mode of holding elections.

That at all ^{annual} elections held in said City, a poll book of such election in each Ward, with a return of the votes given, certified by the judges of such election, ^{or a majority of them} have been made out and delivered to the Mayor (at the first election being delivered to the Mayor elect) and excepting the return of the Annual election of April 1854 - the Mayor has opened such returns and filed the same with the Clerk of the City Council.

That prior to the Annual City election, held in said City, ^{where notice, to be published of the time and places of said election &} on the 1st Monday of April 1854 the City Council ^{by Resolution} appointed Isaac Abraham, Noah Sapp and Guy Keblett judges of said election for the first Ward; and A. G. Rooley, John R. Merritt, and John Fitzsimmons Jr., judges of said election for the second Ward.

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That on said day of election, said Sapp not attending,
said Abraham & Heulet who did attend, ^{in said first ward} filled the
board of judges by appointing J. V. Hejuda, in the place
of said Sapp - and said Abraham, Heulet of said act-
ed as judges of said election, without objection
from the voters - and appointed two clerks - And
in the second ward the judges appointed ~~and~~
by the City Council, acted as such, and appointed
two clerks.

That at said Annual City election on the 1st Monday
of April 1854 this affiant was a candidate for Mayor
and said Kilduff was a candidate for reelection
to the same office - And said Arthur Bickenbent
was a candidate for Alderman of the 1st Ward &
said John S. McCormick was a candidate for reelec-
tion to the same office.

That at said Elections, this affiant received, for Mayor,
96 votes in the first ward, and 66 votes in the
second ward, together 162 votes and being a major-
ity of all the votes given for Mayor at said
election.

That said Kilduff, received, for
Mayor, ~~fifty three votes~~ 53 votes in the first
ward and 63 votes in the second ward,
together 116 votes, and 46 less than this affiant received.

And in said first ward said Bickenbent recei-
ved, for Alderman 77 votes, being a majority of
all the votes given for alderman in that ward,
and said McCormick in said first ward,
received 67 votes for Alderman.

This affiant further states that saids Abraham & Heulet,
two of said judges in the first ward, ^{Counted} made out and Certified
returns of said votes as above stated ~~in that ward~~;
and that all of said judges in the second ward ^{Counted}

Made out and Certified, Returns of said votes as above stated in said second ward - which returns so made ~~and~~ and Certified were delivered to said Kilduff as the then Mayor within one or two days of said elections.

And this affiant further states that all of the ballots by which the aforesaid votes were given were received by the judges of said elections in the respective wards, and deposited in the ballot boxes in the usual manner of receiving and depositing votes by ballot. That most of the ~~votes~~ ballots cast for this affiant, as well as most of the ballots cast for said Birkenbeul, were printed upon fool cap paper, ruled and of a bluish tinge, such as is commonly in use for writing upon, and that said Guy Harlett, one of the judges in said first ward, though present, refused to unite with the other judges in counting and certifying the vote, because they counted and certified the votes given upon ballots printed upon such paper as is above described.

^{said ballots cast for this affiant and said Birkenbeul}
A specimen of ~~papers which are said tickets, and to which said Harlett took exception~~ printed upon, is hereto attached, ~~and also a specimen of the ballots cast for said Kilduff and W. Cornick~~

And this affiant says that he did not select or direct the kind of paper on which said ballots were printed, and that so far as he knows or believes that kind and complexion of paper was not adopted with any idea or intention of distinguishing one ballot from another.

And this affiant further states that, if the votes given for this affiant and said Birkenbeul which were printed upon paper as above described, had not been cast at all no counties, said Kilduff & said W. Cornick would each have had a majority.

JOHN T. MCCORMICK.
For Alderman of First Ward.
P. M. KILDUFF.
For Mayor.
People's Ticket.

ANTON BERKENBUEHL.
For Alderman of First Ward.
T. D. BREWSTER.
For Mayor.
City Ticket.

And this affiant further states, that after said election returns had so been delivered to said Kilduff, and before this affiant and said Berkenbuehl & Dana had so taken said oath of Office, said Kilduff when applied to on the subject of said returns, claimed that the votes so given to this affiant and said Berkenbuehl, printed upon such paper were illegal, and also claimed that the ~~terms of the~~ two aldermen whose term was limited to that election were out of office, and that the ^{Mayor and} aldermen elected at that election - could not take office until the City Council counted and took action upon the returns of the election: that he the said Kilduff and the said Coffey & Leates were the only members of the City Council who could act and that by reason of the absence of said Coffey, no action of the City Council could be had - and for these reasons, as given by said Kilduff, he refused to open ~~the~~ the returns of said judges, or to permit those elected to do so.

And this affiant further states that the pretended objection to the legality of the votes given for this affiant and said Berkenbuehl, was not ^(the having a majority either with or without counting such ballots) applicable to the election of said Dana and that no one, so far as this affiant is aware, questioned the legality of said Dana's election.

And this affiant further states that the result of said election as above stated was well known to this affiant and to the voters of said city generally immediately after said election was held and the votes counted by said judges; that after said Kilduff had refused to open said returns, or permit those elected to do

so, this affiant and said Birkenhead and Dana, qualified as before stated, and proceeded to the discharge of their official duties as herein before stated.

And this affiant further states that the previous practice of the City Council, respecting the installation of new members of the City Council elected at Annual City elections, is shown by the following statement.

At the first city election in April 1851 the returns were ^{elect} by one of the judges in each ward handed to the Mayor, & a meeting of the Council was held - the returns entered of record - No other action was taken on the subject of the election except a statement that the members of the Council were sworn in by P. W. Kilcuff Justice of the peace.

At said first election John Morris was elected an alderman for the second ward, and by lot drew the one year, or short term - before his ~~time~~ expired he removed into the first ward - and was there at the second Annual election, elected Alderman.

~~At~~ The second Annual election was held April 1852. The first Council meeting after said election was held on the 12th of April 1852, and the record of the proceedings of that meeting commences as follows, viz;

"City Council Room, City of New April 12, 1852

"Council met. Present Theron D. Brewster Mayor.

" Aldermen Kilson & Morris 1st Ward

" Aldermen Winslow & Holmes 2^d Ward

" Theron D. Brewster Mayor elected on the 5th Instant, and

" John Morris and Conrad A. Holmes Aldermen elected at

" the same time were respectively sworn into office."

This affiant having been elected at the first election, was reelected at the second election - Holmes was an entire new member. The next proceeding in each of those years was to elect Clerk, Treasurer &c.

At the third Annual election, in April 1853; there were ^{doubtful} ~~some~~ questions ~~to be~~ solved. The Candidates for Mayor were Henry S. Beebe & Patrick W. Kilduff. One of the ballots cast for Beebe, had his name on it twice. If that vote was counted there would be a tie; if not counted Kilduff would have a majority of one. The judges of election in the ward where that vote was cast certified the fact, without deciding the effect of that vote. Morris, who had been elected the year previous in the first ward, had been removed back into the second ward - by the Charter the post was vacant, but no declaration of the vacancy had been made by the City Council or other authority; and no election had been ordered to fill the vacancy. But, most of the voters in that ward at the Annual election in 1853, voted for two Aldermen, without designating which was for the full term or which for the vacancy; and the judges of election counted the votes. The Result showed that ^{Chiefly} Coffey had the ^{highest} ~~largest~~ vote for Alderman in that ward, and John L. W. Cornick the ^{second highest} ~~second~~ vote. ^{There were doubts at the time as to who constituted the board that was to pass upon said doubtful, presiding} In the second ward John L. Coates was elected Alderman.

That after said Annual election of April 1853, and previous to any Council meeting after said election, said Coates & Coffey took an oath of Office. That the ^{pretended} first Council meeting after said election was on the 11th of April 1853, at which this affiant presided as Mayor and Geo. W. Gilson as Alderman of the 1st ward, and Erasmus Winslow as Alderman of the 2^d ward (both of whom were ^{were the Aldermen, or proposed Aldermen present} superseded by said election) - said meeting declared that by the removal of Morris from the first ward, there was a vacancy of Alderman to be filled by election; that by the returns of the judges of election on the 4th Apr. 1853 they found that Beebe & Kilduff

Bebe & Kilduff had each 144 votes, and that there was a tie; that Coffey had the largest vote in the first ward for Alderman and was elected. And a like finding as to Coates in the second ward; that no votes were cast to fill the vacancy of Alderman of the 1st Ward, occasioned by the removal of Morris from said ward, and that the vacancy still existed. No other business was done at that meeting. On the same day (Apr. 11th) the ^{certificates of the} official oaths of said Coates & Coffey were filed with the Clerk of the City Council.

On the next day (April 12th - 1852) a Council meeting was held, at which this Affiant presided as Mayor, and said Coffey & Coates were present as Aldermen. The first proceedings of said meeting were as follows, viz; "On motion of Alderman Coffey seconded by Alderman Coates
"Resolved that the board now proceed to canvass the votes
"and returns of the judges of election of the 1st & 2^d Wards
" & by comparison to declare who is elected Mayor of the City
" of Penn.

" On Motion Resolved that the ticket containing the name
" of H. S. Bebe twice, be counted as one ticket. Whereupon the
" City Council do find and declare that Henry S. Bebe received
" One hundred and forty four votes for Mayor, and Peterick W.
" Kilduff One hundred and forty four votes for Mayor, and
" that there is a tie vote between said Kilduff and Bebe."

The Council then adopted an ordinance to determine by lot who should be Mayor in case of a tie vote. No action was taken at that meeting on the election of Aldermen.

On the 20th of April 1853 - the City Council met, the question of tie was determined in favor of said Bebe by lot - when said Bebe was sworn in and took his seat. Afterwards on the same day, on motion of Alderman ~~Bebe~~ Coffey "An Ordinance declaring John S. McCormick duly elected Alderman to fill vacancy in 1st Ward" was adopted. That Ordinance

declared him to have been duly elected at the
Annual election, ^{of 1853} heretofore mentioned.

Afterwards said Beebe resigned the Office of Mayor
and said Kilduff on the 6th of June 1853 was
elected to fill the vacancy. On the next day the
four Aldermen met in Council, received the Returns
and decided Kilduff to be elected. After which
said Kilduff took the oath of Office. This Affiant
believes that he has stated above, fully, the practice of
the City Council, previous to the election of April
1854. with regard to receiving & acting upon the returns
of the elections of their own Members.

And this Affiant further states that the City Council
of said City never made any Ordinance declaring
any particular place to be the place of Meeting
of the City Council: that said Council met at differ-
ent places in said City at different times, as was
Convenient. That soon after the election of said
Kilduff in ~~the~~ June 1853 to fill a vacancy, the Council
rented a room for a year, designed to be used as
a Council room and for other purposes - that from
that time down to and including the meeting
held on the 22^d of April 1854 the Council mee-
tings were uniformly if not entirely held at said
^{room} meeting. That said Kilduff used the same room as a
justice office, and E. S. Keelbrook used the same as an
Attorneys office. And for these reasons with others the
Council deemed it best to change the meetings of the
Council to any other place, and on said 22^d of
April 1854 adjourned to meet at the office of
Mr. French in said City, which has since been
the City Council Room, and when all subsequent
meetings have been held.

And this affiant further states that after the return of said Coffey to the State on or about the 27th of May, 1854 - And some six weeks after the regular organization of said City Council with this affiant as Mayor presiding - And after six meetings of said City Council had been held for the transaction of the business of the City: The said Kilcluff pretending to be still the Mayor of said City of Peru, and pretending that said Coffey & Beates were the only Aldermen of said City who have any right to act in the City ^{at that time, published a} ~~Corner~~ ^{notice} for said Coffey & Beates to meet at the City Council Room (meaning the late City Council Room in which said Kilcluff held his justices office) on the first day of June 1854 - And this affiant is informed and believes that on said first day of June 1854 said Kilcluff, Coffey & Beates, met at said Kilcluff's office and then and there professed to be the City Council of the City of Peru, and then and there professed to enact the following pretended proceedings of the City Council viz:

- "City Council Room, ^{Peru} Thursday June 1st 54
- " Council met. Present His Honor the Mayor.
- " Alderman Coffey 1st Ward Alderman Beates 2nd Ward.
- " On motion the following preamble and resolution was adopted
- " Whereas, at an election in the first and second wards of
- " the City of Peru, holden on Monday the ^{13th} ~~12th~~ day of
- " April 1854 for Municipal Officers of the City of Peru,
- " Consisting of One Mayor, One Alderman of the 1st Ward
- " And One Alderman of the 2nd Ward, and Whereas by
- " the return of two of the judges of election in the
- " first Ward, Certified by One of the Clerks of election
- " that the number of votes polled at said election

" is entirely different from the return of the other
" judge of elections in said first Ward, Certified
" by both clerks of election, And Whereas the discrepancy
" every between the two returns is occasioned as
" it appears, from the statement of said judges, by
" the One party receiving and counting ballots, with
" ten and printed upon paper other than white while
" the other judge refused to count any ballots, printed
" or written upon any paper other than white. And
" Whereas the Statute to provide for the mode of
" voting by ballot, and for the manner of
" returning Canvassing and Certifying votes, in
" Section 15 provides that no ballot shall be received
" or counted unless the same is printed or written
" upon white paper, without any marks or figures
" thereon intended to distinguish one ballot
" from another And whereas it is evident that
" the foregoing provision was inserted in the law as
" a matter of public policy to preserve the purity and
" inviolability of the elective franchise, and guarantee to
" the elector a Secret ballot, in order that he might be
" enabled to discharge a high public duty, uninfluenced
" by bribes and undaunted by the fear of favor
" of any man: And whereas the ballots polled have
" been presented for the inspection and Canvassing of
" the City Council, the only proper Authority under the
" City Charter, to inspect Canvass and decide upon the
" legality of the same, therefore, On Motion of Churchill
" Coffey, Alderman of the first Ward, Resolved
" That the City Council now proceed to
" inspect said ballots and purge the same
" by excluding from count, all ballots that
" shall upon inspection appear, to have been

"illegally received contrary to the provisions of
"the Statute aforesaid, and after the same
" ~~same~~ have been purged as aforesaid, the
"said City Council shall proceed to count the
"ballots and declare the result of the election

"In accordance with the foregoing resolution
"the Council proceeded to canvass the votes:

"Whereupon it was found that P. M. Kilduff
"received in the first Ward, for Mayor 49 votes

"J. D. Brewster received for Mayor 26 votes

"For Aldermen of the first Ward John L.

"McCorrick received 54 votes

"Anton Birkenhead received for

"Aldermen of the first Ward 18 votes

"In the 2nd Ward, P. M. Kilduff received, for Mayor 56 votes

"J. D. Brewster received for Mayor 3 votes

"For Aldermen of the 2^d Ward, David Dana received 53 votes

" " " " " Richard A. Winston " 4 votes

" " Police Justice Magistrate, J. P. Thompson received 5 votes

" " Police Justice J. P. Thompson " 10 votes

" " " " " Warner Brown " 2 votes

"On Motion of Aldermen Copping the following

"Ordinance was adopted

"Be it Ordained by the City Council of the City of

"Perru, That at an election held under the

"Charter of the City of Perru on Monday the 3^d

"day of April 1854, P. M. Kilduff, having received

"a majority of the legal votes polled for Mayor,

"is hereby declared duly elected, Mayor of the

"City of Perru for the ensuing term.

"Also that John L. McCorrick, having received a

"majority of the legal votes polled for Aldermen

"of the first Ward, and David Dana having

"received a majority of the legal votes polled

"for Aldermen of the 2nd Ward, are hereby declared
"severally elected Aldermen of their respective wards
"for the ensuing term."

This affiant further states that he is informed and believes that said Kilduff now pretends to be Mayor of said City, by virtue of the foregoing recited proceedings of a meeting held by himself and said Kilduff and Coates.

And this affiant says that he has fully stated herein, so far as he knows, all the grounds upon which said Patrick M. Kilduff bases his pretended claim to be Mayor of the City of Peru, and to retain the Seal of said City.

Given to and Subscribed in the
Supreme Court of the State of Illinois
at Ottawas, in Open Court, this

17th day of July A.D. 1854. Before me

L. Leland Clerk.

Merion Brewster

By reason of all which, your petitioners and the City Council of the City of Peru aforesaid, are prevented from possessing and using the Seal of said City, for attesting the acts of the City Council, or for any purpose authorized by the Charter of said City of Peru.

Wherefore your petitioners pray your honors to grant a rule upon the said Patrick M. Kilduff to show Cause why an alternative writ of Mandamus should not be awarded against him by your honors, to show Cause if any there be why a peremptory writ of Mandamus should not be awarded by your honors to compel him to deliver into the Charge and Care of ~~the~~ your petitioners the said Henry Jones, ex Clerk of the City Council of the City of Peru as aforesaid.

~~So all to whom these presents shall come
Whereas satisfactory evidence
has been produced to the undersigned
Justices of the Supreme Co~~

the said seal of said city to be kept by
him "subject to the direction of the city Council;
and to do and perform all such acts and
things in the premises as the law requires, and
for such other and further relief as to the
Court may seem meet, and to Justice and
right may appertain. And as in duty
bound will ever pray &c

Theron B. Brewster

Henry Jones

By their Attorney J. D. Taylor

12
People of Ireland.

Patrick M. Kilduff

Petition

Filed July 17. 1854.
R. Ireland Clerk.

State of Illinois. Supreme Court - June Term 1854

People vs

Patrick M. Kilduff

} Application for Mandamus.
}

Patrick M. Kilduff defendant
in this proceeding - makes answer
and returns that he has not delivered
said Seal to said Henry Jones
as required - and insists that he
ought not by mandamus to be
compelled so to do - Because
1st He has not either as an individual
or as Mayor of the City of Peru
had ~~the~~ the possession or control
of said Seal nor has he claim-
ed the right of possession or control
nor had the possession or control
thereof either as an individual
or as Mayor of the City of Peru
since ~~about~~ the first day of July
1854 -

2nd -

He insists and returns that said
Henry Jones is not the Clerk of the City
Council of Peru - either de jure or de
facto - That said Theron D -
Brewster is not the Mayor of the
City of Peru either de jure or
de facto - and that said Birken-
buel is not an alderman of the 1st

ward in said City - nor a member
of the City Council - either de jure or
defacto - nor has he ever been -
That said Brewster was not elected
Mayor of the City of Peru at the last
Annual election for Mayor of
that City - That he did not receive
a majority of the votes legally cast
at that election for Mayor

That he was never declared elected
by the City Council - nor has he
had possession of said Office -

That said Anton Birkenbuel
was not elected Alderman of
the 1st Ward at said election

That he did not receive a majority
of the votes legally cast at that ward
at that election for Alderman

That he was never declared
elected by the City Council - nor
has he had possession of that office

That at the time of the pretended
election of said ~~Birkenbuel~~
^{he} was not a citizen of the United
States - and did not become so
until about three o'clock P.M.
of the day on which ^{said} election
occurred - and long after said
election had begun

That said association of persons
over which it is alleged said Brewster
presided - was not in fact or in
law the City Council of the City
of Peru - Nor was their authority
as such ever acquiesced in or
submitted to ~~by the~~ so generally
as to permit them to become so de facto.

That said John L. Coates never
did meet with said Brewster
Burkenbuel and Dana, as
a member of such meeting or
as alderman of the City - It
is true that he was present once
before the 22nd April last - when
said persons or some of them
talked of organizing themselves
into a City Council - that he
took no part save to protest
that they had no such power
and that he would not act
as one of such Council -

It is true also that on the 22nd of
April 1854. said Coates was
present when said Brewster
Burkenbuel and Dana met -
and declared themselves to
be a City Council and desired
him to act with them as a member
- but he took no part as such

and protested against their right
or authority so to act - and expressly
stated that he was not there as an
Alderman and member of
that Council - but he was there
merely to protest against their
proceeding to act as such -
Insisting that said acts whatever
they might be were and would
be invalid illegal & void -
Said Filduff further returns and
makes answer - that under said
City Charter - prior to and up to the
1st Monday of April ¹⁸⁵⁴ - The city Council
consisted of this respondent - Mayors
- Churchill Coffing Alderman of 1st
Ward - John L. Coates Alderman
of 2nd Ward - (both of said Aldermen
having been elected at Annual election
Apr - 1853 - for a term of two years) -
and of John L. McCormick Ald 1st
Ward and C. A. Holmes Ald 2nd
Ward - whose term of office
expired at the election aforesaid
Apr 1854 -

That immediately shortly
after the said Annual election in
1854 - The poll books - and election
returns of each of said wards - were

delivered to this Respondent (and by him received as Mayor of Said City) in a sealed up -

That this respondent (believing that after said election it was the duty of the City Council to judge of the election, returns - & qualifications of the Members elect - & that said City Council at that time consisted of himself as Mayor - John L. Coates as Alderman of 2nd Ward - and Churchill Coffing as Alderman 1st Ward and that it required the presence of all of them to constitute a quorum retained the custody of said poll books & election returns (on account of the absence of Mr Coffing) until the 1st day of ¹⁸⁹⁴ July. When at a meeting of the City Council of the City of Penn - (composed of this Respondent as Mayor - Churchill Coffing Ald 1st Ward and John L. Coates of 2nd Ward) this respondent ~~in connection with~~ delivered the same sealed up as he received them unto the said Aldermen - while thus

in Council - and the same were
opened and canvassed by Simeon
Coffing & Coates - with the agent
and in the presence of this
respondent - - and the proceedings
of said City Council were
recorded - and are and were
as follows - viz -

Proceedings of City Council.

CITY COUNCIL ROOM,

PERU, THURSDAY, June 1, 1854.

Council met. - Present, his Honor the Mayor; Ald. Coffing, First Ward; Ald. Coates, Second Ward.

On motion, the following preamble and resolution were adopted:

Whereas, At an election in the 1st and 2d wards of the city of Peru, holden on Monday, the 3d day of April, 1854, for Municipal Officers of the city of Peru—consisting of one Mayor, one Alderman of the 1st ward, and one Alderman of the 2d ward;

And whereas, by the returns of two of the judges of election in the 1st ward, certified by one of the clerks of election, that the number of votes polled at said election is entirely different from the return of the other judge of election in said first ward, certified by both clerks of election;

And whereas, the discrepancy between the two returns, is occasioned, as it appears, from the statement of said judges, by the one party receiving and counting ballots written or printed upon paper other than white, while the other judge refused to count any ballot printed or written upon any paper other than white;

And whereas, the Statute to provide for the mode of voting by ballot and for the manner of returning, canvassing and certifying votes, in Section 15, provides "that no ballot shall be received or counted, unless the same is printed or written upon white paper, without any marks or figures thereon, intended to distinguish one ballot from another";

And whereas, it is evident that the foregoing provision was inserted in the law as a matter of public policy, to preserve the purity and inviolability of the elective franchise, and guaranty to the elector a secret ballot, in order that he might be enabled to discharge a high public duty, uninfluenced by bribes, and unswayed by the fear or favor of any man.

And whereas, the ballots polled have been preserved for the inspection and canvassing of the City Council, the only proper authority under the City Charter to inspect, canvass and decide upon the legality of the same;

Therefore, on motion of Churchill Coffing, Alderman of the First Ward,

Resolved—That the City Council do now proceed to inspect said ballots, and purge the same by excluding from count all ballots that shall, upon inspection, appear to have been illegally received—contrary to the statute aforesaid; and after the same have been purged as aforesaid, the City Council shall proceed to count the ballots and declare the result of the election.

In accordance with the foregoing resolution, the Council proceeded to canvass the votes, whereupon it was found that P. M. Kilduff received, in the First Ward, for Mayor, 49 votes; T. D. Brewster received, for Mayor, 26 votes.

For Alderman of the First Ward, John L. McCormick received 54 votes; Anton Birkenbeuel received 18 votes.

In the Second Ward, P. M. Kilduff received, for Mayor, 56 votes; T. D. Brewster received, for Mayor 3 votes.

For Alderman of the Second Ward, David Dana received 53 votes; Richard A. Winston received 4 votes.

For Police Magistrate, J. P. Thompson received 5 votes.

For Police Justice, J. P. Thompson received 10 votes; Warren Brown received 2 votes.

On motion of Ald. Coffing, the following Ordinance was adopted:

Be it Ordained, by the City Council of the City of Peru. That at an election, held under the Charter of the City of Peru, on Monday the 3d day of April, 1854, P. M. Kilduff having received a majority of the legal votes polled for Mayor, is hereby declared duly elected Mayor of the City of Peru for the ensuing year. Also that John L. McCormick, having received a majority of the legal votes polled for Alderman of the First Ward, and David Dana having received a majority of the legal votes polled for Alderman of the Second Ward, are hereby declared, severally, elected Aldermen of their respective wards for the ensuing year.

On motion of Ald. Coffing, the Clerk was ordered to notify Messrs. McCormick and Dana of their election, and request their attendance at a meeting of the City Council, at the City Council Room, to be holden on Friday the 2nd day of June, at 9 o'clock A. M.

On motion, the Council adjourned to meet at the time and place above.

[Attest:] C. W. HULELT, Clerk.

Said meeting of the said City Council - was attended by C. W. Hulelt as clerk who was then and for a long time previous - and before

the election in April last - ^{had been} the Clerk
clerk of said City Council - by
appointment made by the Council
and the proceedings of said
meeting were duly recorded by said
Clerk.

Respondent insists that the result
of said City election being thus declar-
ed by the tribunal provided by law
for the determination thereof - such
decision is conclusive until it is
reversed or set aside by some
Court having authority by law
to review the same -

Defendant further insists that
said decision was right and lawful
- that the votes ^{or ballots} excluded ~~were~~
written ^{or printed} on paper commonly called
blue foolscap paper - having blue
lines thereon - the color and the
lines thereon were so palpably
different from plain white paper
that any one at a glance could
distinguish said tickets - and that
such paper with said colour and lines
was (as respondent has been informed
and believes) selected and used in
the preparation of said tickets with
the intention to enable persons
at the election to distinguish these

these tickets or ballots from others -

Respondent further answering returns, That he Patrick M. Kilduff has had possession of the Office of Mayor of the City of Peru and exercised the same for more than one year and is still acting as such - and has at all times since the 1st of April 1854 Claimed to be such Mayor -

That the question whether Theron D. Brewster and his associates or this defendant and his associates constitute the City Council of Peru has been judicially determined by a Court of competent jurisdiction - which judgment remains in full force - as follows -

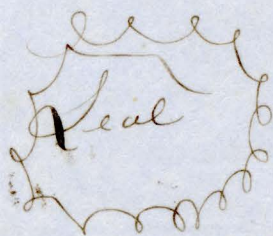
On 15th May 1854 - Theron D. Brewster sued out of the County Court of Laclede County - a writ of replevin in the name of the City of Peru - which was delivered to the Sheriff of Laclede County to be executed & which was by him returned to the office of the Clerk of said County Court - ^{a copy of} which said writ and of the Sheriff's return thereon - is here furnished and is as follows viz.

The People of the State of Illinois, To the Sheriff of our County of

La Salle—

GREETING:

WHEREAS, *The City of Peru*



the plaintiff in this suit complains that *Patrick M. Kilduff*

the Defendant in this suit,

~~do~~ unjustly detains

the goods, chattles, and Personal property, of the said Plaintiff that is to say,

The seal of the City of Peru, and the records and papers of said city usually kept by the clerk of the city council - including Poll books of the annual city election held in the City of Peru on the first Monday in April 1854

NOW if the said Plaintiff shall give you a bond with good, and sufficient security, as required by law, to prosecute ~~said~~ complaint, to effect, and without delay, and make return of the said property, if return thereof shall be adjudged, and to save and keep you, the said sheriff harmless in replevying such property—THEN WE COMMAND YOU, that you cause the said goods, chattles, and Personal property to be replevied, and delivered to the said Plaintiff without delay—AND WE FURTHER COMMAND you to SUMMON the said defendant personally, to be and appear in our La Salle County court, before our judge thereof, at the court house in Ottawa, on the first Monday in *June* next, at ten o'clock in the forenoon, to answer the said plaintiff of a plea of *unjustly detaining the goods, chattles, and Personal property aforesaid*; and have you then there the said Bond, together with this writ, and the manner you shall have executed the same.

In Witness Whereof, we have caused the seal of our said court to be hereto affixed and attested by SAMUEL W. RAYMOND, our Clerk thereof at Ottawa, *15th* day of

May

1854

S. W. Raymond

Clerk.

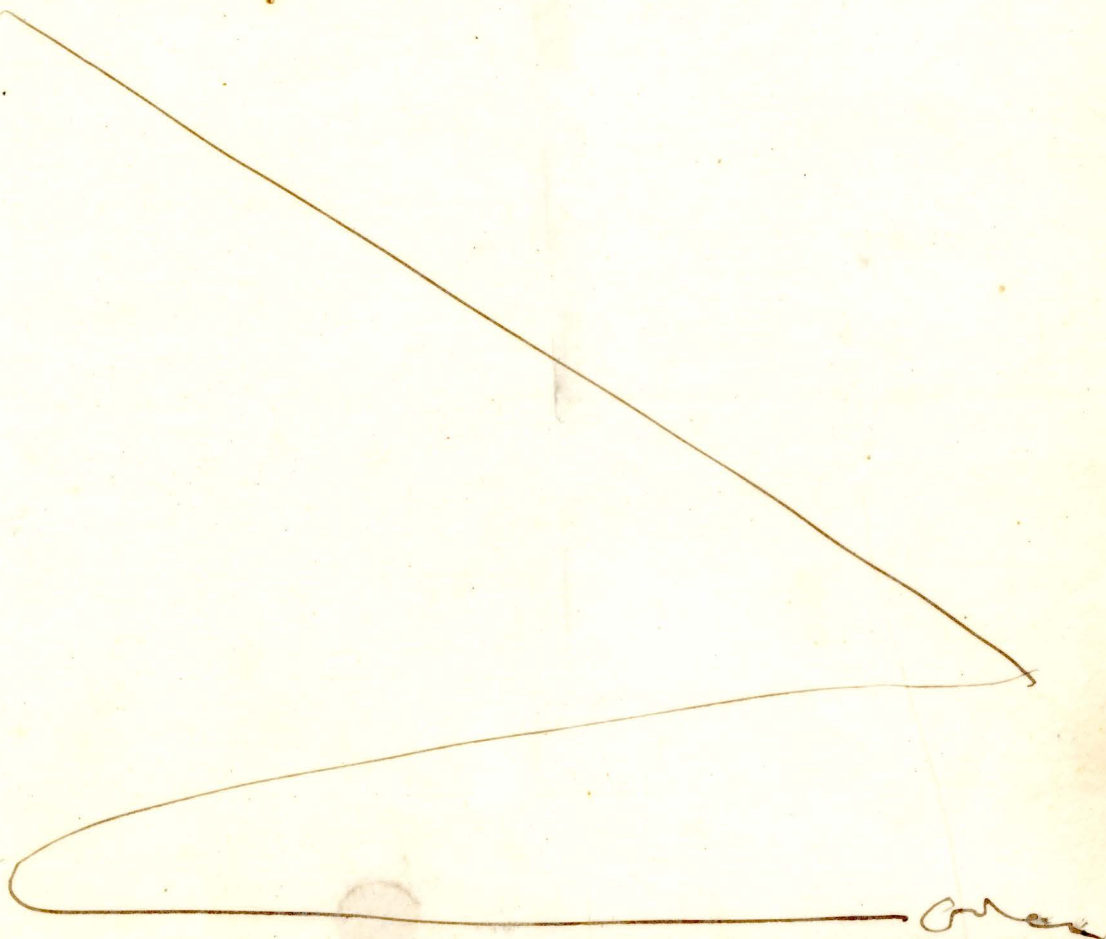
Copy-

No 18
City of Paris
as
Patrick M. Willoughby
Writ of Reprieve
to June Term 1852
Lafayette Co. Gaunt

Copy Shipp. Ret.
Entered this writ of Reading
the within to Patrick M.
Willoughby & commanding the
within describe property
which was refused, and by
taking 3 Books & 2 small
books of Record & delivering
them to Thomas D. B. & co. Es.
The Balance of the property
not found

May 15th 1852
W. Thomas Shoff.

Respondent further returns that after
the issuing of said writ - ^{by} J. D. Taylor
As attorney of the City of Peru (at the
instance of said Brewster and his
compeers claiming to constitute
the City Council) filed a declaration
in said cause - and afterwards
on the 7th day of June 1854 - The
real City Council of Peru held
a meeting and thereof consisting
of this defendant as Mayor - Churchill
Coffins and John L. McCormick
Aldermen of 1st Ward and John
L. Coates ^{alderman} of the 2nd Ward - at
which the following proceedings
were had - viz -



Mayor's Office, Perry June 7th 1854
The City Council met pursuant to call of His
Hon. the Mayor P. M. Wilduff -

Present Churchill offering and John L. McConnell
Aldermen of the first ward and John L. Leatz Alder-
men of the second ward - And on motion of Churchill
offering the following Preamble and Resolution was adopted
and ordered the same or a certified ^{copy} of the same with
the seal of the ^{City} attached to be forwarded by the clerk to the said
E. S. Aldbrook City attorney

Whereas a suit in equity in the name of the City
of Perry vs. Patrick M. Wilduff has been commenced and is
now pending in the Federal Circuit Court, which ought to be
discontinued. It is ordered that E. S. Aldbrook attorney
of said city have authority exclusive of all other persons to
cause said suit forthwith at his discretion to be
discontinued -

I, Charles W. Hallett clerk of the City Council
of the City of Perry do hereby certify that the foregoing is a
true copy of that portion of the proceedings of the City
Council, as above set forth

In testimony whereof I have this 7th day of June
1854 set my hand and affixed the seal of the
City of Perry
Charles W. Hallett
clerk of the City Council of the City of Perry
Copy -

Copy of Parents & Products

Apprentice of the Wood & Iron

and afterwards on the same day -
E. S. Holbrook as the attorney of the
City of Peru - appeared in the said
County Court of the County of
Ladelle - and moved that he
be substituted as attorney for said
City in said suit and that
Chumasco & Taylor who were acting
in the name of said City (at the instance
of Brewster and his associates) as the
attorneys of said City - be discharged

Thereupon divers affidavits were
produced to said County Court
touching the question of who did
constitute the City Council of Peru
and afterwards the question on
said motion coming on to be
heard - on the 12th day of June
1854 - said Court sustained said
motion of E. S. Holbrook as afore
said - The following is
a copy of the orders of said
County Court touching said
matter - also a copy of the
affidavit of C. W. Hulitt which
among others was read on
that motion - viz -

Ladale County, Ont. June Term A.D. 1854

Wednesday June 7th

City of Peru

18th 1854

Patrick M. Wilduff

Replevin

This day coming E. S. Holbrook and entering a motion herein that he be substituted as attorney for Plaintiff and that Chumars & Taylor be discharged - and withdrawing his appearance as attorney for defendant

Monday June 12th 1854

City of Peru

18th 1854

Patrick M. Wilduff

Replevin

And now on this 12th day of June aforesaid come the said Chumars & Taylor the attorneys for the said plaintiffs as well as the said Defendant by D. M. Mullett his attorney - and at the same time also appeared the said E. S. Holbrook Esqr. - and after hearing the affidavits and proofs on the motion to substitute the said E. S. Holbrook as attorney for the said plaintiff in the place of the said Chumars & Taylor - It is ordered that the said E. S. Holbrook be and he is hereby substituted as attorney for the said plaintiff in the place of the said Chumars & Taylor -

Afterward, to wit on the 12th day of June aforesaid before our Ladale County Court come the defendant by D. M.

Ullatt his attorney - And the said plaintiff did not then and there prosecute this suit against the said defendant with effect but voluntarily permitted said suit to be discontinued - Therefore it is considered that the said plaintiff {The City of Peru} take nothing by said writ - and that the said defendant have return of the good and chattels, to wit - Three Books and two small books of Record of the City of Peru usually kept by the clerk of the City Council - And it is further considered that the said defendant do recover against said plaintiff his costs and charges by him about his defence in this behalf expended - by the court here adjudged to the said defendant and that he have execution therefor -

Copy of Affidavit of C. W. Ullatt

On motion pending in the Sadall County Court in case of the City of Peru vs - Patrick M. Wilduff

The Affidavit of Charles W. Ullatt -

Charles W. Ullatt being first duly sworn says that he is Clerk of the City of Peru and acts as such, and has been such clerk from about December 1853 - That the members of the City Council of said City during the fiscal year or yearly term of 1853-4 and ending on the first Monday of April A.D. 1854 - and the persons who acted as such were Patrick M. Wilduff, Mayor, Churchill Coffing and John S. McCormick Aldermen of the first ward - and John S. Coates and L. A. Holmes Aldermen of the second ward of said City

Affiant further says that said City Council

hired a room of Phelps and Johnson of Pore for a city
Council Room for one year from about the 27 day of June
A.D. 1853 that said time is now expired, that said
City Council has held possession and now holds possession
of said office - that they have held and now hold their
meetings there in said office, and kept all their books
& papers and now keep such books and papers as they
have, in said office - that the papers and books taken
by Sheriff Thomas in the writ in this case were in said
office immediately before they were taken by him

Affiant further says that he as such clerk made copies
of proceedings of said city council filed in this cause - that
when speaking of the city council he means the city
Council composed of the persons aforesaid previous to the
first Monday of April last and since that time, the
persons mentioned in his said certificate of proceedings
as meeting at the council room, as members of said
council. That he understands there are other persons
in said city professing to act as members of the
city Council - but of their doings or their right to
act or the right of any of said persons to act - he does
not know - as he is not learned in the law -
but believing it to be true that said other persons
do not meet in said council room

Subscribed & sworn before me

Jan 10 7 854

3
3
Chas. W. Mallett

J. W. Raymond Clerk of Court
Richmond Dist.

Copy of record of Court
of Albion, N. Y. of C. W. H. H. H.

And respondent further answering returns - That the Hon Henry G. Cotton The then Judge of Sevier County Court of Sevier - upon the decision of Sevier motion delivered the following opinion upon the question -

CITY OF PERU, Notice to discharge plaintiff's Attorney, and to substitute E. S. Holbrook as Attorney, &c., and to dismiss suit.
vs.
P. M. KILDUFF.

This is an action of replevin brought to recover the possession of the records, documents, poll books and seal of the city of Peru, by the direction, and upon the plain and affidavit of T. D. Brewster, as mayor of the city of Peru.

It is admitted by the parties that the city of Peru is a regularly incorporated municipal corporation; and the question to be determined on this motion is, who are the persons comprising the City Council. By the charter the City Council shall consist of a Mayor, and Board of Aldermen. The city is divided into two wards, and the Board of Aldermen consists of two members from each ward, elected for two years—the seats of one from each ward to be vacated annually, on the first Monday of April. The charter requires that on the first Monday of April in each year, there shall be an election in each ward for one Mayor of the city and one Alderman of each ward. The officers comprising the City Council last year were P. M. Kilduff, Mayor, C. Coffing and J. L. McCormick, Aldermen of the first ward, and J. L. Coates and C. A. Holmes Aldermen of the second ward; and on the first Monday of April last an election was held for electing a Mayor, and one Alderman in each ward to supply the vacancy of McCormick and Holmes, whose terms of office then expired, and the poll-books and returns of the judges and clerks of election were delivered to the then acting City Council. It appears that on the 22d of April, 1854, there was a meeting—present T. D. Brewster, Mayor; Alderman Berkenbeuel First ward, and Aldermen Coates and Dana, Second ward—wherein the following proceedings were had—David Dana appointed Clerk pro tem.

"The City Council proceeded to determine and judge upon the result of the annual city election, held in the city of Peru on the first Monday of April, 1854—whereupon it was ascertained and resolved, that Theron D. Brewster was elected Mayor, and A. Berkenbeuel was elected Alderman for the First ward, and David Dana for the Second ward. And it further appears that the said T. D. Brewster, as Mayor, and Berkenbeuel and Dana, as Aldermen, have a number of times since met in council, for the transaction of city business.

In support of the motion, the following proceedings are shown to have been had on the first June, 1854:

"Council met—present, his honor, the Mayor; Ald. Coffing, First ward; Ald. Coates, Second Ward—C. W. Hulett, Clerk, who then proceeded to judge and determine, from the returns of the judges and clerks of election, and the votes cast, then produced, who had been elected Mayor and Aldermen, and it was adjudged and determined that P. M. Kilduff was elected Mayor, and John L. McCormick Alderman of the First ward, and David Dana of the Second ward.

Since the first of June a number of meetings have been held, at which were present P. M. Kilduff as Mayor, and Coffing, McCormick as Aldermen, and at one of said meetings Dana was present. And at a meeting held on the 7th of June, E. S. Holbrook, Esq., was appointed Attorney for the city of Peru, and determined that this suit ought to be dismissed, and authorized him, said Attorney, in his discretion, to appear and dismiss the same.

For the purpose of determining the present Motion it is not necessary that there should be a decision as to the validity of the election of one or either of the sets of persons claiming to be the Council of the City of Peru. The question is not who is Mayor and who is Aldermen *de jure*, but who is the Mayor and who are Aldermen *de facto*. The regularity of the election and the determining who were elected is not open for investigation in a proceeding of this kind; the only way in which the regularity of the election, and who are the persons legally elected and entitled to hold the offices is by proceedings by information in the nature of *quo warranto*.

At the time this suit was commenced on the 15th May, 1854, the members of the City Council for the last year still held the records, documents &c. The new officers elected on the 1st Monday in April, had not met and inspected the returns and determined who were elected. The poll-books were returned to and the records of the City Council remained with the old Board in the council room hired and occupied for that purpose.

At the meeting of April 22nd the poll-books and returns of the Election were not present, and it does not appear on what evidence the determination of that meeting was made.

At the meeting of June 1st—the Mayor of the last year P. M. Kilduff and Aldermen Coffing and Coates, whose term of office had not expired, were present, and after inspecting the returns of the judges of election adjudged and determined that P. M. Kilduff was elected Mayor, J. L. McCormick Alderman for the 1st Ward and David Dana Alderman for the 2nd Ward; who now claim to be the proper persons comprising the Council of the City of Peru.

It appears to me that the members of the old Council hold their offices until the 1st of June, when those whose terms of office had expired were succeeded—and that P. M. Kilduff who was declared to be elected Mayor, and J. L. McCormick and David Dana who were declared to be elected Aldermen, and afterwards declared such, are acting officers of the City Council.

So respondent insists that until the right of said Brewster, ^{and himself} to act as municipal officers is established and they duly installed into office their acts as such are void -

Respondent further answering returns that after the entering of said judgment he sued out a writ of returns *habendo* on said judgment for the restoration of said property taken on said writ - and that the Sheriff applied to said Brewster for the return of said property and books - which was refused by said Brewster - And said pretended City Council - of Brewster and Birkenbuel &c have never had possession of any of the muniments of office except the books taken upon said writ of replevin and since withheld in defiance of the judgment of the County Court aforesaid - Respondent further answering returns that on the 2nd & 3rd days of June the City Council held meetings - and the following is a copy of the record of their proceedings -

CITY COUNCIL ROOM,
PERU, FRIDAY, June 2, 1854.

Council met pursuant to adjournment.

Present, his Honor the Mayor; Ald. Coffing and McCormick, First Ward; Ald. Coates and Dana, Second Ward.

Minutes of preceding meeting read and approved.

On motion of Ald. Coffing, the Council proceeded to the election of City Officers.

On motion of Ald. Coffing -

Resolved, The same be made by nomination - whereupon the following officers were elected for the ensuing term:

City Clerk - Charles W. Hulett.

Treasurer - John L. Coates.

Collector - James Cahill.

Assessor - David Lininger.

Attorney - E. S. Holbrook.

Supervisor of Streets for First Ward, Jacob Croissant.

Supervisor of Streets for Second Ward, Dennis McCarty.

Marshal - William H. Foot.

Board of Health - Guy Hulett and John Higgins.

On motion of Ald. McCormick, the Mayor and Alderman Coffing were appointed a Committee to settle with the City Treasurer, and examine the report of the Clerk for the fiscal year 1853.

On motion of Ald. Coffing, David Dana and John L. McCormick were appointed a committee on Streets.

On motion of Ald. Coffing, John L. Coates, David Dana and John L. McCormick were appointed a Committee on Finance.

On motion of Ald. Coates, the Committee were authorized to confer with Mr. Hall,

Superintendent of this Division of the Chicago and Rock Island Railroad, and have the street crossings over the railroad put in thorough repair, and in case said Superintendent neglects to make such repairs, the same be done by the city, and charged to said C. & R. I. R. Co.

On motion of Ald. Coffing, the Clerk was ordered to certify to the Governor of the State of Illinois, the election of P. M. Kilduff as Mayor of the City of Peru, and request his commission.

On motion, the Clerk was ordered to notify the several officers, elected by the Council, and request them to present their bonds for the approval of the Council.

On motion of Ald. Coates, the Council adjourned to meet on Saturday, June 3d, 1854, at 3 o'clock P. M.

[Attest:]

C. W. HULETT, Clerk.

CITY COUNCIL ROOM,
PERU, Saturday, June 3, 1864.

Council met pursuant to adjournment.
Present, his Honor the Mayor; Ald. Coffing and McCormick, First Ward; Ald. Coates, Second Ward.
Minutes of preceding meeting read and approved.
An Ordinance entitled "An Ordinance to prevent the riding or driving over the bridges belonging to the Peru and LaSalle Plank Road Company, in a faster gait than a walk," was, on motion of Ald. Coates, adopted.
On motion, adjourned.

C. W. HULETT, Clerk.

"An Ordinance to prevent the riding or driving over the bridges belonging to the Peru and LaSalle Plank Road Company in a faster gait than a walk."
Be it Ordained by the City Council of the City of Peru, That no person shall ride or drive any horse, horses, team or carriage of any kind upon any bridge belonging to the Peru and LaSalle Plank Road Company in a faster gait than a walk, on penalty of forfeiting, for each offence, five dollars to be sued for and recovered in an action of debt, by the Peru and LaSalle Plank Road Company before any court having jurisdiction; Provided, always, that such corporation receiving toll on said Plank Road, constantly keep at each end of said bridges, in full view of passengers, a notification in the form following, to wit: "The riding or driving any horse, horses, team or carriage over this bridge in a faster gait than a walk is by law prohibited."

Adopted June 3d, 1864.

[Attest:] C. W. HULETT, Clerk.

Respondent further returns that on divers other occasions - He & his fellows herein alleged to constitute the City Council have met - and transacted business as such - and that on one or more of such meetings said David Duncas has met with them in Council as a member thereof as alderman in the 2nd Ward in said City Respondent further insists - that if said Brewster were Mayor and said Jones were Clerk as pretended - that the statute has given another remedy than mandamus and that in any event a mandamus will not lie - but the true writ to try the legal question is by quo-warranto -
He insists that this proceeding is

got up for the mere purpose of trying
a question of a contested election
after the time for reviewing it
by appeal had gone by -

Defendant insists that the facts alleged
in the petition for mandamus - are
contradicted - do not authorize
a writ of mandamus to issue

Respondent further answering
returns - That John L. Coates (who is the
treasurer of the city under the appoint-
ment made as aforesaid on the 2nd
day of June 1854) has the possession
of the treasurers books in which the
accounts of the City Treasurer has
heretofore been kept -

Respondent further returns that, as^t the
action of Theron D. Brewster, Anton Birken-
buel and David Dana in pretending to
rely upon the result of the election of
April 1854 - at the time of such action
the election returns were in the custody
of this defendant - sealed up as afore-
said and said persons had nothing
before them on which to decide

That at the time of the 1st election under
said Charter - Theron D. Brewster
was one of the Board of Trustees
of the town of Peru - and the returns
of said 1st election were delivered to
him - as respondent is informed and
believes - by reason of the fact that
he was one of the said Board of
Trustees of said Town of Peru -
All which is returned - and submitted
respectfully -

Patrick M. Kilduff

P. M. Kilduff being
duly sworn says on oath
that the statements in the
foregoing return are true
according to his ^{best} informa-
tion and belief - Patrick M. Kilduff

July 27. 1854. Subscribed &
sworn to before me the
day & year last aforesaid
A. Ireland C. J.

12

People &c

as } Manufactures
Kilduff are

Answer or
return of
Kilduff

Filed July 27. 1854.
J. Ireland Clerk.

The People on relation } In Supreme Court of Ill.
of Brewster & Jones } Term 1854
vs }
P. M. Kilcuff. } Mo. for Mandamus
to deliver over Seal of the
City of Peru.

Plffs Abstract and Brief.

The prominent material facts of the case are as follows.

The City of Peru is divided into two wards. By the Charter the Annual election is fixed for the first Monday in April, and it determines who shall be voters, but does not prescribe the manner of holding & returning elections.

A Mayor is to be elected Annually. Each ward has two aldermen, holding two years, to be elected alternately, one each year.

The Mayor to hold for one year and until his successor is elected & qualified. No provision for aldermen holding over.

At the Annual election in April 1854 - the judges of election - (appointed by the preceding Council) Returned a Majority vote for Brewster as Mayor, and in the first ward, a majority for Birkenbeul as Alderman. And such was in fact the vote cast. No question is made but that the votes were cast by legal voters, received by the judges, deposited in the ballot boxes, canvassed and regularly returned. Except this, that one of the three judges in the 1st ward, after receiving all the votes without objection, upon canvassing, held that most of the votes cast for Brewster & Birkenbeul, were on blue paper, and claiming

that for that reason they were void, refused to join with the other two judges in canvassing and certifying the vote.

On the 11th of April, Brewster, Birkenbeul, and Dana who was elected Alderman in the 2^d ward, took and subscribed the requisite oath & filed their certificates with the City Clerk, of which the Defendant was informed.

On the 22^d of April, Brewster, Birkenbeul, and Dana, together with Coates the Alderman holding over in the 2^d ward. met as the City Council, at the usual place, declared the result of the election ^{proceeded to elect} and Clerk and other officers for the ensuing year. The petition states that Coates took no part in this meeting except to be present. The Defendant says ~~that~~ in his ^{Return} ~~complaint~~ that Coates protested against the legality ~~character~~ of the proceedings of the Council.

Weekly meetings were afterwards held by Brewster, Birkenbeul & Dana, Coates refusing to attend them.

Coffing the Alderman holding over in the 1st ward was absent from the State, from prior to the election until the 27th of May.

On the 6th of May, the Council ~~in which~~ passed an ordinance authorizing the Selectors to adopt any legal measures necessary or proper to recover the dues, ~~the~~ ^{the} ~~Recourse~~ of the city. A writ of Replevin was brought, the Sheriff recovered some Recourse, but did not find the Seal. The defendant admitted that he had it, but refused to give it up.

The Defendant was the old Mayor, The judges of elections delivered him the returns in accordance with previous custom.

The Defendant set up a claim that the new election did not take effect until the City Council passed upon the returns; that himself and the two aldermen holding over were the only members of the City Council at that time, authorized to act; that Coffing being absent no Council meeting could be held; and refused to open the returns or to deliver them to those elected. Brewster and his associates proceeded to qualify, organize and act without having the poll books.

After Coffing's return, and after Brewster and his associates had held six Council meetings, the defendant, pretending to be still Mayor, notified Coffing & Coates to meet with him in Council on the 1st of June. The three met, professed to be the City Council - pretended that they were the proper authorities to canvass the votes, professed to canvass the votes - professed that most of the ballots cast for Brewster & Birkenbeum were not upon white paper, & to cast them out for that reason, and by so doing come to the conclusion, that the Defendant was re-elected Mayor - and that McCormick the old Alderman of the 1st Ward was re-elected, over Birkenbeum. This they followed with what professed to be an ordinance, Ordaining Kilduff to be Mayor and McCormick to be Alderman of the 1st Ward.

The City Council never passed any ordinance providing for the manner of holding elections.

All they have done, is merely to appoint judges of elections, who have acted, or if any were absent, those present have filled the vacancy. The judges have appointed one or two clerks at their discretion.

In this respect the election of 1854 was held in the usual manner, without objection from the voters.

At the 1st election, 1851, those elected met, were sworn, & proceeded to act - taking no other action on the returns.

At the 2^d election, 1852, the course was the same.

At the 3^d election, 1853 - Copping & Coates were elected, and were sworn in before any action was taken on the returns by the Council. After which the old Council professed to declare the result of the election. But when the new Council came in, they disregarded the action of the old board, and professed to compare the poll books and declare the result.

- 1st The importance of having the question settled, as one board only can be legal, or de facto, the proceedings of one or the other must be void

Grant on Corporations 216
Wilcock - 155 § 726 - Morgan 280
727

- 2^d As to the supposed specific remedy afforded by the Statute - Under title Records -
a The Act does not apply, City, ^{or Corporate} property is not public property. 3^d Harr, 294

b We seek the seal - not as property - but, as one of the necessary incidents of the Corporation. As property, it is a mere nominal matter. As property we have ample common law remedy in Trover. As property mandamus never gave a remedy. The remedy by mandamus, for seal, seems to be, is based upon their being a necessary incident of the Corporation. It is only in its quality of property that the Statute gives any remedy, and that is its unimportant quality.

- c The remedy of the Statute may be closed more expeditiously than in Replevin - But it has precisely the same scope as Replevin. If the Officer can find the property, well, if not, there is no remedy under the Statute, we have resorted to Replevin, and show that the l. remedy does not await.

As to the alleged remedy by quo warranto
Brewster claims that he is legally the
Mayor of Peru, in the actual occupancy
of the office. He can't enter a complaint
that Brewster is holding the office, whilst
he alleges that he is holding it himself.

A petition ^{making} ~~showing~~ such a ~~status~~ allegations
would be dismissed for repugnancy.

The claim that the Defendant has
not the color of right, necessary to make
him an officer defects - even if the officers
de jure were not acting. He is a mere
disturber of the quiet of the city. A mere
disturber has no right - No quo warranto is
necessary to invalidate that which is not.

To determine these questions, it is necessary
to determine who was elected.

Grant on Corporations 216

King - as Mayor of Colchester 260

At A. on corporations 63953-

Ray vs Babin J. Burleigh 1265

Ray vs Thatcher 1st Dowl & Ryland 427

People vs Corporation of New York 3. Lehigh cases 79

The pretence that the City Council must
determine the election to give it effect of
their power over the votes.

There is no such authority in the Charter

Charter - Art. 2 - § 6

Provision in U.S. Constitution

Do " Ill. Do

1st Blackstones Com. 180

1st Kents Com. 335

Smith vs Corl 4th Gill. 461

General legislative mode of using this power

The Charter itself shows that Sept has mis-
construed it. - Art. 2 § 13. Art. 3 § 4

Corporation officers have no power to set
aside an election - Conf with Council
by order of council. J. H. Carrigan 294
+ See People vs Tibbels 4th Com 358
" " Ripp " 382

5th As to the election

The Colloquy of the tickets - Unimportant question - Court can inspect. Difficult to determine which is furthest from White.

Is the effectual exercise of the right of suffrage dependant upon ~~so~~ so nice a distinction. Especially when it is well known that there is scarcely any subject upon which men's judgments are so varied as upon color.

6th If the D^{ct} has rightly construed the statute then the law is unconstitutional, ^{Constitution Article 5 - "Elections"}

After exhausting the voters right, it professes to destroy his vote. What is his right?

Rule of Construction, laid down by Chief Jus. Marshall & adopted in case of Bank of Illinois, ^{vs} Gilman.

But, is this the proper rule - Here is an Attack on the right of suffrage, the basis of Government. What is the elective franchise?

Leibers. Political Ethics - vol 2^d. p 391 - p 398

The true ~~rule~~ rule of Construction in case ^{legislative} of Attack upon the elective franchise, is to hold it void, unless clearly authorized by the Constitution

Agents of the King were construed favorably to him.
- Agent attempting to undermine principals.

7th The Defendant has misconstrued the General election Law of 1849 - Session Laws 1849 p 71

It has been said that "all the wisdom of Government depends upon a proper balance, between Confidence and distrust"

This Law throughout, shows a constant and unusual distrust of election officers.

Examine various provisions

The first part of Sec. 15 - shows care to protect the voters right of secret ballot against judges.

8th The proviso was not to ~~count~~ prevent a knowledge of how men were voting; but, to prevent the judges from distinguishing between different ballots when counting them.

It was to protect the voter against the Canvassing officers, not to enable Canvassing officers to defraud the voters - Secs - 17-18

9th If the proviso, means any thing that ~~may~~ be expected then the proper construction is that ballots not received, because not white, shall not be counted. That may be consistent with the rest of the act. But, to hold that votes received shall not be counted, is at war with the whole act.

Review of the State
Bill 326
as to the State
Green Area 325

10 The Election Law of 1849 Not applicable to Corporations - How on private corporations.

The distinction between "State", as body politic, and "State", with reference to territory

The general tenor of the law. -

Legislative Construction in Township Organization Law.

In chartering Rock Island

Penn city Charter

Republican vs Dallas J. Yates

State vs Wilmington city Council - J. Harrington 1294

10 - Brewster being elected - He had only to take the oath, prescribed, to enter on his duties. - Charter - p 116 - § 12

Angell on Corporations 357 - 370

? Read + Bouvier vs State of Georgia - 7th Geo. Reps - 478

12 Brewster, was bound to take notice of his election. - Grant on Corporations 217
City of London - vs Vancouver 1 Lord Ruff 496
S. C. 1 Salkeld 142
James vs Tatum 4th Cranch R. 497
+ Johnson, vs Wilson - 2^d New Hampshire R. 204

13 - Might be Compelled by Mandamus to qualify & accept
Angell & Ames on Corporations 636 - § 12
Hoy vs Bedford 14th East 80
Rex " " 4th Doug. 14

14 Brewster's election & qualification - and
notice to Kilduff of qualification,
ousting Kilduff totally

15 - Mandamus to deliver the seal - proper
Remedy - A & A. on Corporations 648
655
Rex vs Dublin 1 Sturge 539
" " Ipswich 2^d S^d Ray 1238
Chamferon vs Powell 2^d Burrows 1016
~~Commonwealth vs Atherton~~ 3^d Mesp 285
Rex vs Ingram 1 Blackstone R. 50
✓ Elisha Strongy Petitioner - 20 Pickering 484
+ + Commonwealth vs Etheren 3^d Mesp. R. 285
+ Sumbury vs Stearns 21 Pickering 148
Kiry vs Banks - 1st W. Blackstone 452. note

16 - Refuse Mandamus - there must be direct re-
-fusal. either in terms or circumstances
A & A - On Corporations 651
divers cases & then

17 - To constitute officer de facto - there must
be color of right

People vs White 24th Wend 520-526
People vs Cook 14th Barbours Sup. 259-282
Plymouth vs Painter 17 Conn 585
+ Rex vs Lisle 2^d Sturge 1090
+ Commonwealth vs Co. Commissioners 5th Rem 45
+ Do vs Com. of Philad^a 2^d Paines Select & Co. 220

When statute authorized oath before the Mayor
or two justices - Return to Mandamus to restore
that Retator did not take oath before Mayor,
bad, - He might have taken it before Justices.

Tapping on Mandamus 397

Ret vs Mayor &c of Onond. Sacked 428

The election and not the return is the
formation of the right:—

People vs Ferguson 8 Can 102
Sam " Vail 20 Wend 12
" vs Seaver 5 Denio 409
14th Bunboer 259

General references on Murders

+ Ex parte Heath 3^d Vail 42

+ People vs Stearns 5th Do 616

+ 1st Strange 536 - Rex vs Dublin

Olive vs Ingram 2^d Strange 1114

+ Rex vs Robbins - Strange 554

+ Rector of Wigan - Do 1207

Pointen + Walter vs Belding 24th Vermont 658

3^d Blackstones Comm. 110

See + Kendall vs W. S. 424—

Smyth vs Titcomb 31st Maine R. 272

+ 2^d Term Reps 259

Taking the Oath is an induction into
Office - Wilcox on Corporations 125 - § 575
Re vs Ellis 9th East - 252 note
(see 5th New Ed. - 137)

The Return admits, facts not
reversed. Tapping on Mandamus 349

Return must state legal facts
Ib - 371

Exercise Powers by Mandamus over
Corporation Officers Ib 165

People on relation
of us

Kil drift
Dept to Brief

Abstract - of petition

- 1st City organized under charter -
- 2nd 1st Election held 1st Apr. 1851 -
- 3rd City divided into 2 wards & so continues
- 4 At annual City election Apr 1st Mon. 1854
Theron D. Brewster elected Mayor.
Anton Birkenbuel - - Alderman 1st Ward
David Dana - - - - - 2nd Ward
5. Churchill Coffing was & is Alder^m - 1st Ward
John L. Coates - - - - - 2nd Ward
- 6th At said election Coffing was out of the
State & cont absent until about 27th May
- 7th 11th April 1854 - - Brewster. Birkenbuel
& Dana - took oaths ^{of} office
- 8th Shortly after Brewster as Mayor called a
meeting of Council & notified Coates Birken
buel & Dana
- 9th Brewster as Mayor & Coates & others as
aldermen attended - but did not organize
- 10 Brewster as Mayor called another meeting
of Council at "Council Room" on 22nd Apr. 54
- 11th Council Organized - Brewster as Mayor
Coates Birkenbuel & Dana as Aldermen
Coates taking no part in said meeting except
to be present - at & during said meeting -
- 12th Gives copy of proceedings adjudging them
selves duly elected - & appointing clerk
Treasurer - Collector - Supervisor of
streets - - -

13. That after 22nd Apr - divers meetings were held at the Office of France - Apr 29. May 6th. May 13th - May 20th. May 27th
14. Coates refused to & did not attend any of said meetings after 22nd April - Meetings all attended by Brewster as mayor - Birkenbuel and Dana as Aldermen -
15. From 1st April 1854 - till 1st of June. No assembly of persons in said City (except the meetings aforesaid) professed or pretended or were reputed to be the City Council
16. May 6th New Council passed an Ordinance touching safe keeping seal &c
17. Between 6th & 15 May Jones demanded seal of Kilduff - who refused to deliver - but admitted that he had possession or control of them and claimed a right to retain them
18. 15th May - City of Peru commenced an action of replevin against Kilduff &c to June Term County Court
19. Sheriff got books &c on writ but could not find seal
20. 15th May - Kilduff stated to Sheriff that he had seal - books &c & would not give them up and that election returns were not opened -
21. So far as Brewster knows or believes said Kilduff still has possession of the seal and refuses to deliver up the same to said Jones - or any one authorized

by Brewsters Council -

29.

Has acted as Mayor and Claims to be Mayor on following grounds

No ordinance had been made to regulate the election of city Officers - except for the case of a tie vote for Mayor

All previous elections have been held at same places with Election Apr. 1st / 1854 -

All previous elections City Council caused notice to be given - judges to be appointed -

& Judges have filled their own vacancies & appointed Clerks - Votes have been given by ballot

Poll books kept & with certified return of votes given - by the judges or a majority of them - & delivered to the Mayor (at first election to the Mayor Elect) and except in case of this election Mayor has opened the returns & filed them with the clerk -

At this election - notice - judges - Clerks Brewster & Kilduff were candidates for Mayor -

1st Ward Birkenbuhl & McCormick con- for alderman -

Brewster rec^d 1st ward 96 - 2nd 66 votes 162 in all - Kilduff 1st W - 53 votes - 2nd W^d 63 votes - together 116 - 46 left them Brewster

Birkenbuhl rec^d - 77 votes } 1st Ward
McCormick - 67 - votes }

Two of judges certified returns in 1st Ward and all in 2nd Ward - & delivered to Kilduff the then Mayor in one or 2 days

Previous
practice.

^{all} That of said ballots were received by the judges - & put in the ballot box -

Most of the ballots cast for Brewster & Birkenhead were printed on foolscap paper - ruled and of a blueish tinge - such as is commonly in use for writing upon -

Guy Hulitt one of the judges the present - refused to count and certify the votes upon such paper (Specimen given)

Brewster did not select or direct the kind of paper - that so far as he knows or believes (that may not be far ^{dukey}) that complexion of paper was not adopted with any idea or intention of distinguishing one ballot from another -

Throwing these out - elects Kilduff & McCormick

Kilduff's views of the law & his duty -

Dana's election unquestioned -

State of Illinois.

In the Supreme Court, at Ottawa
Term Term A.D. 1854

The People of the State of
Illinois, on the Relation of
Therese D. Brewster and
Henry Jones

} Application for
Mandamus.

vs

Patrick M. Kilduff

} And now comes
the said Relators,
and as to the Return

made herein by the said Patrick M.
Kilduff, demurs, and says that said Return
is insufficient in law. Wherefore they
pray judgment, and that a perempto-
ry Mandamus may issue to the
defendant.

J. D. Taylor
Plffs Atty

The people on
the Relations of
Brewster & Son

vs
Patrick M. Kilduff

Replication

Filed July 28. 1854
Leland Ch.

The People ex ^{rel.} ~~rel.~~ ^{rel.}
v.
Kilduff.

Mandamus — Supreme Court, at Albany,
June Term 1854
Points and Authorities of Respondent,

1 The application for a mandamus must give jurisdiction to the court, by averring that the complainant has no other specific legal remedy, for the wrong of which he complains; and by such other averments, as will show, ^{clearly,} prima facie, that he is ^{clearly,} entitled to the relief sought. — Tapping on Mand. 9, 10, 11, 294, 414 (2d ed.)
— Rex v. Margate Pier Co. 5 Eng. C. L. R. 266. — Grant on Corp. 271. — 2 Selw. Nis. Pr. by Wheaton, title "Mandamus", 272. — 5 — Rex v. Mayor of Exeter 5 Eng. C. L. R. 308.

2 And the complainant must have a "specific legal power properly the subject of this writ, a fulfilment of which is demandable" from the respondent, — And "there must not exist a specific legal remedy, whereby the fulfilment of such power may be compelled. — Tapping on Mand. 10. — Grant on Corp. 269. — Rex v. Hull & Shelby R. R. Co. 51 Eng. C. L. R. 60. — Rex v. Stainforth & Theaby Canal Co., 1 Maule & Sel. top page 35. — Rex v. Mayor & Citizens of Chester 1 Maule & Sel. top page 100

3 If the writ be granted, and it is ascertained that there is some other "specific legal remedy;" for the injury complained of, the writ will be quashed. — Pap. on Mand. 10, 19 — Key v. Margate Pier Co. 5 Eng. C. L. R. 200

4 But, "if a statute prescribe a particular remedy, no other remedy can be taken, and therefore, in such a case a mandamus will not lie." — Pap. on Mand. 19. — 2 Sel. Cas. Pr. by Wheaton, Title, "Mandamus," 301, 272. — Commonwealth v. The Judges of the Common Pleas, 3 Binney's R. 273.

5 The complainant has an efficacious & expeditious "specific legal remedy" by statute. — Rev. Stat. §§ 10, 11, 12.

6 And to test the right of office, the remedy by Quo Warranto is the appropriate remedy, and is given by statute. — Rev. Stat. Chap. 86. — Vid. also Pap. on Mand. 24, 26.

7 If there be an officer de facto, though both claim under the same election, — Quo Warranto is the remedy, — not Mandamus. — Grant on Mun. Corp. (55 Law Lib.) 216. — Key v. Mayor of Colchester, 2 Dionf. East, Boston paying, 200. — People v. Stevens, 5 Hill's R. 616, (vid. Bronson's opinion & law.)

Delannay v. Burnett, 4 Gil, 454 - (The partic-
ular claim found at the bottom of page 407 -
Action of register & receiver. Conclusive -

0 Whenever there is a discretionary power vested in officers, and they have exercised it, the court will not interfere with that discretion. —
— 2 Sel. Cas. Pr. 272, — Commonwealth v. Common
pleas, 3 Bin.ⁿ. 273, — Commonwealth v. Cochran, 5
Bin. R. 456 — Republica v. Clarkson, 1 Yates R. 46 —
— Commonwealth v. Guardians of the poor, 1 Yates R. 476

People ex Rel. Brumpt vs

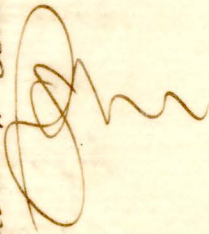
v.

Patrick Kilduff

Mandamus

Sup. Court, Lane Term 1854

Respond^{ts} by Authorities



To Patrick W. Kilduff Esq. late Mayor of the
City of Peru in the County of LaSalle and State of Illinois
Jr;

Please to take notice that at the present term
of the Supreme Court of the State of Illinois, sitting at
Ottawa in said State, Mr. Theron D. Brewster, Mayor of
said City of Peru, and Henry Jones Clerk of the City
Council of said City, will make application to said
Court for a rule on you, the said Patrick W.
Kilduff to show cause, by Monday the 17th day
of July instant why an alternative writ of
Mandamus should not be awarded against you
by said Supreme Court, to show cause if any
there be, why a peremptory writ of Mandamus
should not be awarded by said Court to compel
you to deliver into the charge and care of the
said Henry Jones as such Clerk of the City Council
of said City of Peru the seal of said City to be
kept by him subject to the direction of the City
Council: which motion will be predicated
upon an affidavit to be filed in said Court.

Theron D. Brewster

Henry Jones

By J. D. Taylor their Atty

July 6th A.D. 1854

State of Illinois ss - In the Supreme Court, at Ottawa.

I James D. Taylor on my oath state that, On the 6th day
of July A.D. 1854 I served on the above named Patrick W. Kilduff
a written notice of which the above is a true copy by de-
livering the same to him.

J. D. Taylor

Sworn to and subscribed in Open Court July 15th 1854, Before

me

L. Seland Clerk

12

People de. ex. el. Brewster

W

Dr. M. Wilder.

Notes & appd.

Filed July 12. 1854

C. Deland Clerk.

Mandamus. "Issues in all cases where the party
has a right to have any thing done,
and has no other specific means of com-
pelling its performance." 3^d Black Com 110
But this process cannot be used to review
or correct judicial errors

Kendall, 12th U.S. States 12th Peters 524-5

Ex parte Key 13 " 279

" Whitney " " 404

25th Wendell 658

Kernbeck toll Binge 11 Wain 263

A public officer has no right to refuse to
perform his ministerial duties, prescribed by
law, because he may apprehend that others may
be injuriously affected - or the law unconstitutional
or because others may question his right.

See 5th Cornys Dig 34 - 5th Term Rep 549

3^d Binney 273

5th " 87

6th " 456

3^d Dale 42

2^d J.R. 371 case requiring inference
to enter judgment on verdict.

Standen vs Nelson Circuit Court, Harmon 17

1st Johns. Cases 181

7th Eng. Law & Eq. Rep. 390.

Upon a contested election for Corporate Office, if one
of the Candidates gets a majority of votes de-facto,
is admitted and sworn in, the Court will not
grant a mandamus to admit and swear in
the other upon affidavits that he had
the majority of legal votes

2^d Term Rep 254

Longth no Lit. Com. 3rd Wain R. 272

Commonwealth vs Eltheave 3^d Mass R 285-

~~State~~ Warrant refused, & Mandamus
against old clerk to deliver over
Books, recommended,

Simbury vs Stearns 21 Pickering 148

Prover for Parish Records - Held that
Prover or Replevin may lie - but
Mandamus more appropriate.

The right to the office may be deter-
mined either by Warrant or Mandamus.

Question by what authority writ
carried on examined.

State vs Wilmington City Council, J. Harrington 294

This case holds

- 1st That Mandamus is proper remedy.
- 2^d Court has Supervisory Control over Corporations
and their jurisdiction on elections.
- 3^d A Minister might hold Corporation office
- 4th General election law does not apply
to Municipal Corporations.

Mandamus lies to the late Mayor of a City
Corporation to deliver the insignia of his office
to the new Mayor Angell & Ames on Corporations 648

In order to exclude the mandamus the
remedy must be adequate, or give
specific relief - It. - 655

Bonner vs State of Georgia 7th Geo. Repts 473

This case pointed that when justices of a court held over "until their successors are elected and qualified" is determined by successors being elected & "qualified by taking the oath of office" - p 478

Discusses where Inwarranto and where Mandamus lie.

Plymouth vs Painter 17 Conn 585

That the acts of an officer defacto are valid as to interest of public & third persons. -

But not so a mere intruder

- For careful examination with cases cited

Walter vs Belding 24th Vermont R 658

A case where sundry persons attempted to steal out the officers, much like the Bent Case - Mandamus awarded to Clerk to deliver over books.

The people vs Tibbitts 4th Conn. 358

Same " Kipp " " 382

These two cases hold that where Corporation authorities pass by laws - not authorized by the charter - before an election, by means of which they pretended to control the election, & keep themselves in office - the by laws are void, & no information in matters of government allowed, to cost the radicals.

City Mandamus Case.

Ex parte Heath et al 3. Keel 42

When inspectors of election, ^{Members} returned showing certain persons elected - but stating that they could not determine who were elected. Court held the latter clause void - and though the Mayor refused to recognize their elections. the Court awarded a mandamus to compel him to swear them into office.

Also held that the Court have power to determine who was elected, notwithstanding the jurisdiction of the City Council.

People. on relation of Woodhinson vs Stevens - 5th Keel 616

In this case a mandamus was refused by a majority of the Court - (3 to 1) on the ground that the party have an other specific remedy.

Nelson, C.J. decided in favor throughout.
Ransom J. - differed on three points.
Cowan J. - Agreed with Ransom on one point, viz - an other remedy - on other points gave no opinion. -

Rex vs Ellis 9 East 252 note - 5th New Ed. 131

Taking the oath, inducts into office
See 5th New Ed. 137 - As to administration
- tion of an oath that the Court
would here compelled by the
the writ on corporations page 125 See 575

Rex v Dublin 1 Strange 536

Held that when the right was estab-
- lished, mandamus was useless if
the party had an other remedy.
Different rule in case of insignia of
Corporation officers, after the party is
sworn in, because the officer is unus-
+ ually the Mayor should have
them immediately, in order to com-
- mand the more respect.

Oliver vs Ingram 2^d Strange 1114

Regality of an election determined
in an action of assumpsit

Rex vs Robbison - Strange 584

Mandamus to a Mayor to hold a
election - Shows bad habit of holding
overs.

Case of Rector of Wigan, Strange 1207

Mandamus to compel Burgess to attend
Court bet as jurors.

Elisha Strong Petitioner 20 Pickering 484

Where Court determines who is elected,
and award mandamus to grant Certif-
- icate of election. Notwithstanding an
other person held the office