1960

State of Utah v. Theodore I. Geurts : Brief of Appellant and Defendant

Utah Supreme Court

Calvin L. Rampton; Attorney for Defendant and Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

THEODORE I. GEURTS,

Defendant and Appellant.

No. 9281

Brief of Appellant and Defendant

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STATEMENT OF FACTS

THEODORE I. GEURTS was elected City Commissioner of Salt Lake City in the 1957 election. His term of office began on January 6, 1958, to run through January 4, 1962.

On July 13, 1959, the Salt Lake County Grand Jury returned an indictment against Commissioner Geurts, charging him with the crime of official neglect and misconduct in office,

in violation of Title 10, Chapter 6, Section 36, Utah Code Annotated 1953. The indictment contained six counts (R. 82).

On the 22nd day of October, 1959, Judge Merrill Faux granted the motion of the defendant to quash counts Nos. 1, 4, 5 and 6 of the indictment. The motion to quash was denied as to counts 2 and 3. On the 2nd day of November, 1959, the court ordered the District Attorney to furnish to the defendant a bill of particulars as to counts 2 and 3. This bill of particulars was never furnished (R. 82).

On the 15th day of February, 1960, the District Attorney filed a civil action entitled "State of Utah, plaintiff. vs. Theodore I. Geurts, Defendant," which action was brought under the provisions of Title 77, Chapter 7, Sections 1 and 2, Utah Code Annotated, 1953, for the purpose of removing the defendant from office (R. 1, 2). The accusation was in three counts. Count 1 revived Count 1 of the indictment, which had theretofore been quashed by Judge Faux. Counts 2 and 3 of the accusation were almost identical in form with Counts 2 and 3 of the indictment, which Counts were at the time of the accusation still standing against the defendant, but upon which counts no bill of particular had been filed.

We will not at this time relate the several motions and orders in regard both to the criminal case and the civil case which preceded the trial of the civil case, although these motions and orders form the basis of some of the points relied upon by the defendant in this appeal. The substance of these preliminary proceedings will be discussed fully in connection with the points to which they are applicable.

The civil case for the removal of the defendant from his

office proceeded to trial on the 2nd day of May, 1960, before the Honorable Ran Van Cott, Jr., sitting with a jury. At the close of the State's case Judge Van Cott granted the motion of the defendant to dismiss Count 1 on the ground that the evidence was insufficient to sustain a verdict of guilty (R. 276). After hearing all of the evidence the jury returned a verdict finding the defendant guilty on Count 2 and not guilty on Count 3 of the accusation (R. 58, 60). The defendant filed a motion for a new trial (R. 62), which was denied (R. 74). Subsequently the court entered an order removing the defendant from his office as city commissioner (R. 70). This appeal is taken from such order of removal.

THE EVIDENCE

Count 1

Mr. J. W. Reed, a licensed real estate broker in Salt Lake City, had had business dealings with Commissioner Geurts and his family prior to the time that Mr. Geurts was elected to the City Commission (R. 224). Early in January, 1959, Mr. Reed approached Commissioner Geurts in an attempt to sell the Commissioner and his brothers a piece of property in northwest Salt Lake City belonging to some people named Langford. Commissioner Geurts took the details in regard to the Langford property and informed Mr. Reed that he would discuss it with his brothers to see whether or not they would be interested in the purchase (R. 217). During this conversation Mr. Reed asked Commissioner Geurts whether or not the city might be interested in some property in the vicinity of the Rose Park Golf Course (R. 228). Commissioner

Geurts informed Mr. Reed that he, Commissioner Geurts, had nothing to do with the purchase of property for the golf course (R. 218). City golf courses were under the jurisdiction of City Parks Department, which was administered by Commissioner L. C. Romney. Commissioner Geurts informed Reed that if he wished to attempt to sell the city any property for this purpose, negotiations would have to be carried on with Commissioner Romney. There were no further meetings or conversations between Commissioner Geurts and Mr. Reed until May 11, 1959 (R. 229).

Reed thereafter made contact with the City Parks Department and did sell to the City a tract of land belonging to the estate of a man named Hansen (R. 219). The purchase of this land was handled by the Parks Department in the ordinary course of business. It came before the City Commission as a whole, and the purchase was approved by all of the Commissioners, including Commissioner Geurts, on April 30, 1959. Commissioner Geurts' sole connection with this deal was in voting to purchase the property (R. 230). He did not contact any other commissioner to urge the purchase, nor did he speak in favor of the purchase (R. 140).

On May 11, 1959, Mr. Reed came to the office of Commissioner Geurts, and stated that he wished to make a campaign contribution to the Commissioner. He did make the Commissioner a check in the amount of $119.00 (R. 221). Commissioner Geurts then took this check to a subordinate and asked him to cash the check at the City Treasurer's office (R. 234). Mr. Geurts then deposited this cash in his own account. In his testimony Mr. Reed was not very clear as to

why the amount of this check given to Mr. Geurts approximated 10% of the real estate commission which he had received on the sale of the Hansen property to the City. He was, however, very definite in his statement to the effect that he had never mentioned a payment, campaign contribution or otherwise, to Mr. Geurts until after the deal was entirely consummated (R. 230).

At the close of his successful campaign for the City Commissionership, Commissioner Geurts' campaign committee had a number of unpaid bills. After these bills had remained unpaid for a period of time Mr. Geurts paid them himself from his own bank account. He reimbursed himself whenever contributions were made thereafter (R. 238).

On the basis of the evidence thus introduced, the court, at the conclusion of the State's evidence, granted a motion dismissing Count 1.

Count 2

During the Spring months of 1959, a number of small trees and shrubs were taken from the City Cemetery to the home of Commissioner Geurts and to the home of his son-in-law. The shrubs and trees thus taken consisted of four arborvitae bushes, three small spruce trees, and two bridal wreath plants (R. 298). The shrubs and trees in question were not the property of Salt Lake City. They belonged to individuals from whose cemetery lots they had been removed in the course of the preparation of a gravesite (R. 286). By long time custom of the City Cemetery, whenever it was necessary to remove a tree or a shrub incident to the preparation

of a grave, the owner was notified. If he wanted the tree or shrub it was turned over to him. If he did not want such shrub or tree they were given away to anyone that desired them, or in those cases where no one desired them they were hauled directly to the city dump, if there was a large number available at one time, or were placed on a dump in the city cemetery until a sufficient number was accumulated, at which time they would be hauled to the dump in a large truck (R. 287). The uncontradicted testimony of the city cemetery employees was that it required less cemetery force labor to drop these shrubs and trees off at Commissioner Geurts' home than it would to haul them all the way to the dump (R. 288). In each instance except one, Commissioner Geurts or his son-in-law had prepared a hole for the planting of the tree or shrub, and the cemetery employees merely dropped the item off near the house (R. 190). On one occasion, however, due to a misunderstanding, the city cemetery employees did plant two arborvitae trees, and in doing so had to expand the planting hole already dug by Commissioner Geurts, but which proved too small to receive the tree (R. 207). There was also testimony to the effect that on one occasion when a truck was on the way to the city dump and dropped a tree or a shrub at Commissioner Geurts' home on the way to the dump, Commissioner Geurts ordered the city employees to load onto the truck a pile of trash which had been collected from the Church farm which adjoined Commissioner Geurts' home (R. 206). The evidence, however was that if such hauling had not been done by the city cemetery truck, it would have been done without charge on request by a truck from the City Street Department, in accordance with the policy of

the City Street Department to render such service to all citizens (R. 278). The only evidence of any city property actually received by Commissioner Geurts was some three yards of top soil which was placed on the roots of the trees in transit to his home in order to keep them from drying out. The jury found Commissioner Geurts guilty on this count.

Count 3

In the Fall of 1958 Commissioner Geurts had been approached by the City Attorney and also by an official from the City Court with a request that a pay raise be granted to certain girls doing legal stenographic work. The evidence in the case is clear that these girls were receiving somewhat less than the going pay for legal secretaries in Salt Lake City (R. 159). Commissioner Geurts informed these department heads that he felt the girls shoudl have a raise, but that no money was available until after the first of January of 1959 (R. 152-154). He promised a raise effective as of that time. Shortly after the first of January this matter was again called to Mr. Geurts' attention. In the meantime, however, there was before the State Legislature a bill which would provide for a sales tax for the benefit of city governments. The City Commissioners had informally decided among themselves that no pay raises would be granted during the session of the Legislature. Commissioner Geurts agreed to recommend the girls in question for a pay raise immediaely following the session of the Legislature and in the interim to grant them overtime checks for time not actually worked to bring their pay up to the level on which it would be after the raises were granted. This was

done (R. 165). Three girls received approximately $7.50 a week extra for a period of some six weeks. The jury found Commissioner Geurts not guilty of malfeasance for this action.

STATEMENT OF POINTS RELIED UPON

The defendant relies upon the following listed points as a basis for seeking a reversal of judgment of the court below. These points are not here listed chronologically according to the time of the occurrence of the alleged errors, but are grouped for listing and discussion according to subject matter:

1. The court erred in denying the defendant's motion to dismiss the accusation on the grounds and for the reason that Title 77, Chapter 7, Sections 1 and 2, Utah Code Annotated 1953 is so vague, indefinite and uncertain as to be in violation of Section 7, Article I of the Constitution of the State of Utah.

2. The court erred in instructing the jury as to the elements of the offense of malfeasance in office.

3. The court erred in denying the defendant's motion to dismission Count No. 1 of the accusation.

4. The court erred in denying the defendant the right to take the deposition of witnesses prior to the trial, or in the alternative, the right to have a preliminary hearing.

5. The court erred in denying the defendant's motion for a mistrial as to Counts 2 and 3, made after the dismissal of Count 1, and also in denying the motion for a new trial.

6. The court erred in denying the challenge for cause to the Juror Ray H. Wilson.

7. The court erred in denying the defendant's motion for a new trial on the grounds that the Jurors Ikeda and Jensen had answered falsely to certain voir dire questions, which false answers had prevented the defendant from taking a challenge for cause or from intelligently exercising his peremptory challenges.

8. The court erred in overruling the defendant's objections to questions on cross-examination asked by the District Attorney of the defendant's character witness Smith.

9. The court erred in denying the defendant's motion in arrest of judgment made on the grounds that Chapter 7, Section 77, Utah Code of Criminal Procedure, has been superseded by Rule 65(b)(1) Utah Rules of Civil Procedure.

ARGUMENT

I. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS THE ACCUSATION ON THE GROUNDS AND FOR THE REASON THAT TITLE 77, CHAPTER 7, SECTIONS 1 AND 2 UTAH CODE ANNOTATED 1953 IS SO VAGUE, INDEFINITE AND UNCERTAIN AS TO BE IN VIOLATION OF SECTION 7, ARTICLE I OF THE CONSTITUTION OF UTAH.

Section 7, Article I of the Constitution of the State of Utah provides:

> "No person shall be deprived of life, liberty or property without due process of law."

That this prohibition applies in civil proceedings as well as criminal proceedings was decided in the case of *Hilton Bros. Motor Company v. District Court,* 82 Utah 372, 25 P. 2d. 595.

While the right to hold public office does not have all of the characteristics of a true property right, it is such a property right as is protected by the due process clause. This matter was considered by the Supreme Court of Montana in the case of *State v. Norby,* 165 Pac. 2d. 302. Section 27, Article 3 of the Constitution of Montana is identical in wording with Section 7, Article I of the Constitution of the State of Utah. The Montana court stated in this case:

> "Of course the right to a public office is not property or an estate that may be passed by will, inheritance or other transfer. It is a public trust. However, the incumbent of an office for a definite term, carrying a fixed salary, certainly has a property interest therein within the meaning of Section 27, Article 3 of our Constitution * * *. The right of an elected public official to possess and use the office and to exercise the privilege of the rights therein to the exclusion of others and until properly removed, certainly constituted a property interest within the meaning of these sections."

Under the holding in the case of *Snowden v. Hughes,* 321 U.S. I, 88 L. ed. 497, the right to hold state office is not protected by the 14th amendment to the Constitution of the United States. In this section, however, we do cite some federal cases, because, as was pointed out by this court in the case of *Untermyer v. State Tax Commission,* 102 Utah 214, 129 P. 2d 881:

> "The due process clause of the state constitution is substantially the same as the Fifth and Fourteenth amendments to the Federal Constitution. Decisions of

the Supreme Court of the United States on the due process clauses of the Federal Constitution are 'highly persuasive' as to the application of that clause of our state constitution."

There is a well established line of cases under these provisions holding that no statute may be enforced where the language of the statute is so vague, uncertain or indefinite that a reader of the statute cannot detremine readily from the face of the statute what acts are prohibited thereby.

One of the landmarks cases in this field of the law, and a case wkhich is commonly cited by cases which follow is the case of *Connally v. General Construction Co.,* 296 U.S. 385 70 L. ed. 322, decided by the Supreme Court of the United States in 1926. This case was concerned with an 8 hour day statute of the state of Oklahoma which carried certain penal provisions. In holding this penal law in violation of the 14th Amendment, the Supreme Court of the United States stated:

" . . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen can not be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is unlawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

" * * * The result is that the application of the law depends not upon a word of fixed meaning in itself,

> or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

Another frequently cited case in this field of the law arose in regard to a Utah statute. One Joseph Musser and others were accused by the State of Utah of advocating the practice of polygamy. Evidently the State, not having sufficient evidence to prove the actual practice of polygamy by the defendants, charged them with advocating the practice in violation of Section 103-11-1, U.C.A. 1943, which made it an indictable misdemeanor for any two or more persons to conspire "to commit any act injurious * * * to public morals." A conviction was had in the Third Judicial District Court, which conviction was affirmed on appeal to the Supreme Court of the State of Utah. Certiorari was granted by the Supreme Court of the United States on the contention of the defendant that the statute he was accused of violating was so vague, indefinite and uncertain as to be in violation of the 14th Amendment of the Constitution of the United States. That court declined to interpret the Utah statute and remanded it to the Supreme Court of the State of Utah for interpretation with the following admonition:

> "It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for

health, morals, trade, commerce, justice or order. In some States the phrase 'injurious to public morals' would be likely to punish acts which it would not punish in others because of the varying policies on such matters, as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. L. Cohen Grocery Co., 255 U.S. 81, 65 L. ed 516, 41 S. Ct. 298, 14 ALR 1045. Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

This case is *Musser v. Utah,* 333 U.S. 95, 92 L. ed. 562. The Supreme Court of the State of Utah reconsidered the case in light of the decision from the Supremt Court of the United States. In a decision written by Mr. Justice Wade, the court held that they could give no narrower interpretation to the statute than the words of the statute themselves would seem to imply. The court further held that interpreted as the words of the statute must be interpreted, the statute was vague, uncertain and contrary to the provisions of the 14th Amendment of the Constitution of the United States. The conviction was, therefore, reversed. The following pertinent language is from the Utah Supreme Court decision, *State v. Musser,* 223 P. 2d 193:

"The problem which we must decide as stated above, must be answered in the negative. The argument before this court has developed no reason why we should

believe that the legislature intended, in using this language, that it should be limited to a meaning less broad than the words therein used would indicate in their ordinary sense. No language in this or any other statute of this state or other law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation thereon other than that expressed on the face of the words used. We are therefore unable to place a construction on these words which limits their meaning beyond their general meaning. The conviction of the defendants thereunder cannot be upheld. This part of the statute is therefore void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution."

In the case of *City of Price v. Jaynes,* 191 P. 2d 606, the defendant had been convicted of violation of a city ordinance of Price City; which provided in part:

> "Section 1. The right of the people of the City of Price, County of Carbon, State of Utah, to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.
>
> 'Section 2. Any person violating any of the provisions of this ordinance, or any section thereof, shall be guilty of a misdemeanor * * * ."

The court struck down this ordinance in the following language:

> "In the case of this ordinance we have a naked declaration of a policy or the recognition of a right of the people of the City of Price to be secure in their persons, houses, papers and effects against unreasonable searches and seizures without any definition of what, in the various situations, constitutes an unlawful search or seizure.

"This ordinance does not reveal whether it is directed against an unreasonable seizure of a person in his house or apart from it or both; whether it is intended to prohibit an unlawful seizure of papers or effects from the body of a person in his house or club house, or structure in the City of Price or from the home of a person independently of seizure of or from his person.

"As stated before, the Fourth Amendment has been implemented by Federal and state legislation defining reasonable searches and seizures and the basis for the same and the manner of accomplishing such search and seizure under different laws which provide for the search and/or seizure and the conditions thereof. There has usually been sufficient in the legislation to permit delineation between what purports to be a reasonable or an unreasonable search or seizure.

"The ordinance here in question is expressive only of an existing right and a declared policy. It does not set out with sufficient definiteness the act or acts prohibited or denounced.

"The declared policy is not sufficiently implemented by standards from which it can be determined what is or what is not under various situations a lawful or unlawful search or seizure. Evidently the test of what is an unreasonable search or seizure is left to standards not prescribed in the ordinance of Price City but to the exploration in fields of law which prescribe such standards for the state of Utah or the other states. This leaves the tests too much in the air and dependent in each case on what the magistrate hearing the case may within the light of his very limited or plenary knowledge conclude to be reasonable or unreasonable.

"The acts condemned as unreasonable searches and seizures are nowhere defined in reference to the results necessary to be accomplished. The ordinance is

general and vague and entirely too indefinite and uncertain. For the reasons above stated, the ordinance is a nullity."

Another Utah case setting forth this principle is the case of *Henrie v. Rocky Mountain Packing Corporation,* Utah 202 P. 2d 727. In that case the court stated:

> "It is a principle too familiar to require citation of authority, that penal statutes, to be constitutional, must be clear and definite in their terms so that there may be known exactly what conduct is prescribed."

Some cases from other states applying the same principle are *People of the State of Michigan v. Joseph Sarnoff,* 140 A.L.R. 1206:

> "It is fundamental that a penal law cannot be sustained unless its mandates are so clearly expressed that any ordinay person can determine in advance what he may or what he may not do under it. People v. Goulding, 275 Mich. 353, 359, 266 NW 378.

Another such case is *State v. Lanesboro Produce & Hatchery Co.,* (Minn.) 21 N.W. 2d. 792, 163 A.L.R. 1108. The language of the court was as follows:

> "In the Northwest Poultry case, this court stated, 203 Minn. 440, 281 NW 754: 'The uncertainty hit at is not the difficulty of ascertaining whether close cases fall within or without the prohibition of a statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved. Nash v. United States, 299 U.S. 373, 33 S Ct 780, 57 L ed 1232; United States v. Wurzbach, 280 US 396, 50 S Ct 167, 74 L ed 508.'
>
> "It was also stated at page 441 of 203 Minn., 281

NW 754: 'Due process requires that penal legislation expressed in general and flexible terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command. Collins v. Com. of Kentucky, 234 US 634, 34 S Ct. 924, 58 L ed 1510."

See also *Werner v. City of Knoxville,* 161 F. Supp. 9. A very good annotation is found on this subject at 83 L. ed., page 893.

One of the latest expressions of the Supreme Court of the State of Utah in this matter is the case of *State v. Packard,* 250 P. 2d. 561. In this case the court struck down as being too vague and indefinite a statute making a criminal offense "failure to register with the Industrial Commission before commencing employment." In striking down this statute the court, speaking through Mr. Justice Crockett, stated:

> "The limitations of language are such that neither absolute exactitude of expression nor complete precison of meaning are to be expected,and such standard cannot be required. On the other hand there is no disagreement among the courts that where a rule is set up, the violations of which subjects one to criminal punishment, the restrictions upon conduct should be described with sufficient certainty, so that persons of ordinary intelligence desiring to obey the law, may know how to govern themselves in conformity with it, and that no one should be compelled at the peril of life, liberty or property, to speculate as to the meaning of penal statutes. Price v. Jaynes, supra; State v. Musser, supra; U.S. v. L. Cohen Grocery Co., 255 U.S. 81, 41 S. Ct. 298, 65 L. ed 516; Stromberg v. People of State of Cal., 283 U.S. 359, 51 S. Ct. 532, 75 L. ed. 1117; Connally v. General Construction Co., supra;

Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. ed 888; see Law Ed. Annotations in connection with latter two cases.

"Concerning the question of uncertainty or vagueness of statutes, the authorities seem to be in accord that the test a statute must meet to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to conform to its requirements; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it."

A statute is not void for indefiniteness or uncertainty if any one of the following conditions exist:

A. The words used by the statute in describing the prohibited activity are of such well known and precise meaning that reasonable men cannot differ as to their application and all reasonable men taking any given set of circumstances could determine without doubt whether or not such set of circumstances fit within or without the prohibition; or

B. Though the words themselves may not be subject to such definiteness, the statute in question itself sets up tests and standards to aid in determining whether or not any given act may fall within or without the terms of a prohibition; or

C. The terms used in the statute are elsewhere defined in the statutes of the governing body which enacted the statute in question.

Let us examine the statute under which this defendant

was convicted to determine how it meets any of the foregoing requirements. Section 77-7-1 provides

> "All officers not liable to impeachment shall be subject to removal for high crimes, misdemeanors and malfeasance in office as in this chapter provided."

We can ignore the first two terms, "high crimes" and "misdemeanors," for the reason that the state did not accuse the defendant of such actions. The accusation clearly accuses him of "malfeasance in office in violation of Title 77, Chapter 7, Sections 1 and 2, Utah Code Annotated, 1953." We must consider this statute then as if it merely read "all officers not liable to impeachment should be subject to removal for malfeasance in office as in this chapter provided."

Neither the chapter in question nor any other provision in the laws of the State of Utah which we have been able to find purports to define the term "malfeasance." It is a term that means what the individual using or hearing it thinks it means. This is plainly evident from the Judge's instructions on the matter, which will be discussed in the next succeeding section. Nor can any help be found by resorting to the common law. "Malfeasance" merely means wrong doing, and the word "malfeasance" is just as vague, uncertain and indefinite as are the words "wrong doing." The authors of American Jurisprudence make the following statement in Vol. 43, page 39:

> "Not infrequently public officers are made removable or suspendable for malfeasance or misfeasance, or for misconduct or gross misconduct or for malconduct in office. *These terms are difficult of exact definition.*"

Perkins on Criminal Law discusses the uncertain meaning

of such terms as malfeasance and misfeasance and misconduct in office. On page 412 of this work the following statement is found:

> "Confusion has been injected into this area of the law by resorting to a multiplicity of names or terms with varying degrees of generality or specificity. Misconduct in office', for example, is used at times merely as a literal statement. In this sense it does not indicate a crime, but merely one of the ingredients of a crime and the phrase may have either one or two different meanings when employed to indicate a crime. This is because of the fact that some of the offenses of this nature have specific names of their own, such as 'extortion' or 'oppression', whereas others do not. Thus the phrase may be used in a generic sense as in a statement 'oppression is one type of misconduct in office,' or it may be used as a specific name of the crime in referring to an offense of this nature which has no name of its own, such as a case in which a prosecuting attorney corruptly procured the release of a prisoner by improper use of a bond. When used to indicate a crime in either of these two senses mentioned, misconduct in office is corrupt misbehavior by an officer in the execution of the duties of his office, or while acting under color of his office.
>
> "While misconduct in office is a term frequently employed, many substitutes have been used for this phrase in all of the meanings suggested, and the definition could be reworded by the substitution of any of the following: official misconduct, misbehavior in office, malconduct in office, malpractice in office, misconduct in office and corruption in office. No doubt others have found their way into the cases.
>
> "In addition to the terms used to represent the entire area will be found others to indicate certain parts thereof and these partitioning phrases may be based either

on the nature of the misbehavior or upon the mode of the misbehavior."

If the Legislature is going to describe an offense by such general terms, it is necessary in order to preserve the constitutionality of the provisions that the Legislature either define the term or lay down standards of conduct by which a person reading the law can detremine what is intended by the Legislature. We will submit that such has not been done in regard to this statute. Furthermore, the jury in their deliberations were not in any way helped out by the instructions of the court, as we will point out in the next succeeding section.

II. THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE ELEMENTS OF THE OFFENSE OF MALFEASANCE IN OFFICE.

Counsel does not mean to criticize the trial judge for the vague, uncertain and indefinite instructions which were given to the jury as to what constitutes malfeasance in office. The defects in the judge's instructions are inherent in the statute itself. Neither the district attorney for the defense attorney, in spite of diligent efforts, were very helpful to the court in their requested instructions. The court in telling the jury what was malfeasance had to let the jury rely upon a subjective standard, as indeed the words of the statute will permit nothing else. The court instructed the jury as follows in regard to the definition of malfeasance:

> "For the purpose of this case, malfeasance in office is defined as follows: Malfeasance is the conscious doing of a wrongful act in his official capacity with the knowledge upon his part at the time of doing the

> same that it is wrongful and that he had no right to do the same,and may consist of any one of the following, to-wit: Evil doing, ill conduct, the doing of what one ought not to do, the unjust performance of some act which the party had no right to do, or the commission of some act which is positively unlawful."

Inasmuch as the defendant was accused of no high crime or misdemeanor in the accusation itself, the last few words of the instructions seem surplusage, but let us look at the others. Malfeasance is evil doing. Evil doing by whose standards? By the standards of each individual member of the jury? Malfeasance is ill conduct. Ill conduct measured by what standards? There are no standards contained elsewhere in the instructions nor in the statute. The next few words are the most uncertain and ambiguous of all: "the doing of what one ought not to do." Perhaps one member of a jury might think a Commissioner should attend every Commission meeting, and that a commissioner was guilty of malfeasance if he were absent for a day. Perhaps another might think that a Commissioner should have decided a certain discretionary matter in one way, whereas he had decided it in another way. To hold each one of us guilty of malfeasance for "the doing of what one ought not to do" certainly imposes upon mere mortals a Christ-like standard of conduct.

The purpose of instructions to a jury is to lay down for the jury specific standards and guides for their deliberation. It is to insure that each member of the jury will approach the set of facts with the same attitude and the same standards as every other juror, with the same attitude and the same standards as the trial judge, and with the same attitude and

with the same standards as were intended by the legislature. This vague and uncertain instruction does not do that for a jury. It lays down no objective tests. It allows each member of the jury to decide for himself what is right and what is wrong. This much is certain. Between the wholly bad and the wholly good there are infinite shades of gray, one fading into the other with scarcely perceptible change. Furthermore, the degree of change is to a large extent in the eye of the beholder. That the words "evil doing," "ill conduct," "the doing of what one ought not to do" are indefinite and uncertain in their meaning is too clear to require further comment.

Instruction 3, in which the court attempts to apply tests and standards to the evidence in this case, does nothing to correct the uncertainties and ambiguities in Instruction 2, for the reason that Instruction 3 is based upon and presupposes a complete understaiding by the jury of the elements of malfeasance, which as has been pointed out, the instruction had failed to give them, because of its uncertainness and indefiniteness, and also because of the inherent inability to give any certainness and definiteness to the word "malfeasance."

In giving his definition of malfeasance, the court obviously picked the language used from certain dicta in the case of *Law v. Smith,* 34 Utah 394, at page 413. It should be pointed out, however, that *Law v. Smith* does not involve itself with the question of instructions to the jury, because that case never got to the stage of giving instructions. Furthermore, the definition of malfeasance contained in *Law v. Smith*, and which is picked up and used in the instruction in this case, is

not set forth by the court as a proper instruction. The court sets forth the language given as "the ordinary definition given to the term 'malfeasance' by lexicographers." Certainly it is not sufficient that a jury be instructed as to the elements of an offense by reading a mere dictionary definition of the offense concerned. An instruction requires more than mere lexicography. Otherwise an instruction to a jury could be brief in the extreme. Mere general definitions usually are so brief as to leave much to the subjective interpretation of the person reading the dictionary.

That the judge realized that he was leaving the matter up to the objective standards of the jury is evident from the remarks which he made during the motion for a new trial (R. 375).

> "We get down to the propostion of whether or not eight jurors in a case like this think a man should be discharged or not. After all what you are doing is discharging a man from his job. In big corporations the boss fires one and in this instance it takes eight jurors to be convinced beyond a reasonable doubt that the man should be discharged."

The judge was consistent with this throughout the instructions. He left it up to the members of the jury as to whether under their own standards of what they felt was right and what they felt was wrong, the defendant should be fired from his office of City Commissioner.

Another portion of the instructions relating to what constitutes malfeasance is highly improper. This element runs throughout the instructions and this theory is found in Instructions 2, 3 and 6. The court instructed the jury to the effect

that a person was guilty of malfeasance if he did, while holding a public office, an act which was prohibited by law, whether or not he had any evil intent or motive, and whether or not he knew of the existence of the law, because, to quote the language of the court in regard to knowledge: "This latter element the law imputes to every person, because the law conclusively presumes that all persons know the law and ignorance thereof is no defense or excuse." The presumption of knowledge of the law does not extend from the criminal law into malfeasance cases. This was clearly set out in the case of *Law v. Smith,* supra. In that case the defendant had presented a false claim which was in direct violation of law. The court, however, held that such was not enough in and of itself; that such claim must be presented "with full knowledge that he had no legal right to the money." It certainly was not the intention of the legislature to make a public officer removable from office as a matter of law any time he deviated from the law regarding the fulfillment of his duties, whether or not he knew at the time that he was violating the law. Malfeasance requires a guilty knowledge and an intent to do wrong in all cases and not mere inadvertence, negligence or even failure to know the law.

POINT III. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS COUNT NO. I OF THE ACCUSATION.

POINT IV. THE COURT ERRED IN DENYING THE DEFENDANT THE RIGHT TO TAKE THE DEPOSITION OF WITNESSES PRIOR TO THE TRIAL, OR IN THE AL-

TERNATIVE, THE RIGHT TO HAVE A PRELIMINARY HEARING.

POINT V. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL AS TO COUNTS 2 AND 3, MADE IMMEDIATELY AFTER THE DISMISSAL OF COUNT I, AND ALSO IN DENYING THE MOTION FOR A NEW TRIAL.

A. General

Counsel desires to discuss the three points listed above jointly, as they all are concerned with the rather involved story of what happened to Count No. 1 and its effect upon the deliberations of the jury in this case.

The evidence as to Count No. 1 is set out in the introductory portion of this brief. The evidence was insufficient to establish a public offense because the evidence does not show that Commissioner Geurts had received any reward, promise of reward, or had any expectation of a reward at the time he joined with the other City Commissioners in voting to purchase the Hansen property for the city. That such an element must exist in order to sustain a charge of wrongdoing on the part of a public official is well established by the decided cases, which will be hereafter reviewed.

The indictment from the grand jury on the criminal case charged the defendant with the commission of acts which constitute Count 1, as we have set it forth heretofore. This count of the indictment did not charge that Commissioner Geurts received the money or had a promise of expectation

that he would receive the money prior to the time the Hansen property was purchased for the golf course, nor did it allege that the receipt of the money in any way affected his action as a city commissioner. Counsel for the defense moved to quash this count of the indictment because it failed to so charge. After giving the district attorney an opportunity to amend the indictment, which he failed to do, Judge Faux quashed this count of the criminal indictment. When the district attorney some eight months later filed his accusation in the civil case, he recharged the allegations in Count 1 in almost the identical form as that in which they had been charged in the criminal indictment. The defendant once again moved to dismiss Count 1 from the accusations on two grounds—first, that its dismissal in the criminal action was res adjudicata; and secondly, that it still had the same inherent defect, namely, that it did not charge that Commissioner Geurts had received the money or a promise of money prior to his official action, or that the receipt of the money affected his official action (R. 3).

At the argument on this motion to dismiss, which was very heated, counsel for the defense stated to the trial court that the District Attorney did not have evidence of any promise of payment prior to the official act; that he knew he did not have it; that he knew that he could never get Count 1 to a jury. His sole purpose in attempting to reestablish this count was in the hope that the rather inflammatory nature of this evidence so far as the arousing of suspicion is concerned would aid him to get a conviction on Counts 2 and 3. The District Attorney denied this, and orally stated to Judge Van Cott during the argument that he did have evidence to show

that Commissioner Geurts had an agreement to be paid money for his vote prior to the time his vote was cast. On this oral representation Judge Van Cott denied the motion to dismiss.

Counsel for the defense was certain in his own mind that the district attorney had no such evidence, as we believed that we had talked to all of the witnesses that knew anything about this particular matter. Accordingly, we filed a demand with the district attorney for a list of all of the witnesses whom he would use to prove Count 1 (R. 8). Thereupon we gave notice of the taking of the depositions of all of these witnesses (R. 13). The district attorney moved the court for an order suppressing our right to take the depositions of these witnesses. Judge Van Cott granted this motion. Thereupon counsel for the defendant moved for a preliminary hearing as to the accusations. This motion was denied.

At the trial of this case the evidence as to Count 1 came in just as the counsel for the defense had told the court during the argument that it would come in. The district attorney had none of the evidence which he had represented he would have. The evidence was fatally defective in the same manner that the charge itself was fatally defective. The court thereupon granted the motion of the defense to dismiss Count 1 (R. 276). Thereafter counsel for the plaintiff moved the court to grant a mistrial as to Counts 2 and 3 on the ground that the evidence which they had received as to Count 1 could not help but affect the delibertions of the jury as to the other two counts (R. 318). This motion was denied. Following the verdict the counsel for the defense moved for a new trial on the ground, among others, that the jury might well have

been influenced in its deliberations by the evidence which it had heard as to Count 1 (R. 62). This motion for a new trial was denied.

The inflammatory nature of the evidence in Count 1 is quite evident. While the evidence does not prove any public offense, it is of such a nature as to give rise to a great deal of speculation and suspicion, especially in view of the well recognized tendency on the part of members of the public to suspect the worst of public officials, and the further fact that the general public regards the making of campaign contributions as a rather tainted activity. Having this evidence before the jury could not help but affect their deliberations on the other counts. It could not help but affect their general attitude toward Commissioner Geurts. The district attorney was well aware of this. His actions in this matter show a complete lack of good faith. He knew when he reinstated Count 1 by means of accusation that he could not prove an offense. He knew he could not prove an offense when he represented to Judge Van Cott at the time of the argument on the motion to dismiss that he had sufficient evidence. He wanted that count in, not because he hoped to get to a jury on it, but because he believed it would color the deliberations of the jury.

In the argument on the motion for new trial counsel for the defense called the district attorney to the stand. The district attorney was asked this question:

> "I will ask you whether or not it is true that shortly before this accusation was filed on February 15, you told Mr. Boden in substance and effect that you were filing this civil proceeding for the purpose of reinstating

Count I because you knew, without that, you couldn't hope for a conviction?" (R. 369).

After a number of evasive answers and repetitions of the question, the district attorney finally admitted:

"A. Well, I could have made that statement to him. However, I maintain that I could get a conviction on aonther count—Count 2" (R. 370).

Apparently the district attorney achieved his purpose. He did not get before the jury the evidence in Count 1, even though he did not get that count to the jury, and he did get his conviction on Count 2.

B. Point III

We maintain that the court erred in denying the motion to quash Count 1 for two reasons: First, the action of Judge Faux in the criminal case was res adjudicata; and second, the same reasons for dismissal that were present in the criminal case were present in the civil case.

1. Res Adjudicata

It is a fundamental principle of law that there can be only one action for the redress of one wrong. Once a matter has been determined and the parties have had their day in court, the matter is settled and ended. In civil practice this principle is referred to as "red adjudicata," and in criminal law it is referred to as "double jeopardy." However, the principle is the same in each case.

In order for this doctrine to have application, three conditions must exist:

(a) The actions must be between the same parties or between parties having a privity with each other.

(b) The issues must be the same, and

(c) The relief sought must be the same.

It matters not that one action may be criminal in nature and another civil in nature if in fact the above conditions are met. There is no hard and fast distinction between the administration of civil justice and criminal justice. Both are handled in the same courts. It is true that in many cases a single act may give rise to both criminal and civil actions which may both proceed to judgment. This results from the fact that often only the second of the above three identities exists. As a usual thing, while the defendant may be the same person, the plaintiffs are different parties, the plaintiff in a criminal action being the state, and the plaintiff in the civil action being the person wronged. As a usual thing also, the relief sought is different, the object of the criminal action being punishment and the object of the civil action being remedial.

The following language is found in 30 *Am. Jur.* 1005:

> "The general rule that a judgment rendered in a criminal action may not be received in evidence in a subsequent civil action to bar such action, or to establish the truth of the facts upon which it was rendered, is subject to a number of well-defined exceptions. Thus, where the subsequent action, although civil in form, is quasi-criminal in its nature, it is frequently regarded as a second prosecution for the same offense, and as such, barred by a prior conviction or acquittal. This exception to the general rule is recognized, however, only where the object of the quasi-criminal or penal action is punishment and not compensation."

In this case the relief sought in the existing action is identical with a portion of the relief sought in the criminal action, namely, removal from office.

A United States Supreme Court case which discusses the matter is the case of *Helvering v. Mitchell,* 303 U.S. 397, 82 L. ed 921. In that case the defendant was convicted of income tax evasion. The government also proceeded against him in a civil action attempting to collect a fraud penalty on the same set of facts that give rise to the criminal action. The court held that because the relief sought was different, namely, punishment in the one case and compensation in the another, both cases could proceed independently. It went on to point out, however, that if the object of the two actions had been the same that both could not proceed, and that either a conviction or acquittal as to one would be a bar to the other.

In the case now before the court the parties were identical, the issues were identical. All of the relief sought in this case, namely removal from office, was provided by the statute under which the criminal case was brought. It would be impossible to find two cases where the three identities discussed above are more clearly present. The fact that one is a criminal case with civil overtones, while the other is sort of a hybrid-civil-criminal case, does not destroy this identity.

Counsel for the defendant knows of nothing either in the statutes or the decided cases which would indicate that the state in a situation such as this may have two bites at the same apple.

2. The Allegations of the Accusation

Let us now pass from the question of res adjudicata to

the merits of the matter and determine whether or not Count 1 of the accusation did state an offense.

Although there is some minor difference in the language between Count 1 in this case anad Count 1 in Case No. 16525, the allegations are identical. In each of them the charge is made that the defendant accepted a real estate commission, or a portion thereof which in some vague way, not stated or shown, is related to a transaction which the city made in purchasing certain property. We had already been through this matter once with Judge Faux as to whether or not such an allegation states a public offense. Judge Faux ruled that it did not.

The fatal defect in Count 1 of the Accusation, as in Count 1 of the indictment, is that the State does not state the reason that the defendant received a part of the commission. From all that appears, it might reasonably be assumed that the real estate agent used a portion of the commission to purchase items at a store owned by the defendant or that he used a portion of the commission to pay off a loan which he owed to the defendant. As a matter of fact, what happened, and what the District Attorney knew happened, is that the real estate agent made a political contribution to the defendant. The crux of the matter is why did he make it? If the payment was made for the purpose of influencing the defendant's vote on the City Commission, then the defendant is guilty of a public offense, regardless of the guise under which it was made. On the other hand, if the payment was not made for the purpose of influencing the defendant's vote, it is not unlawful, regardless of whether it was given as a gratuity or otherwise.

What the State was attempting to do was to imply, without saying so, that the defendant took a bribe. It was attempting to accuse by innuendo, by casting suspicion. An accusation put in this light makes it impossible for the defendant to assert a defense, for he could have done the act of which he is accused without commiting any offense.

The District Attorney was evidently attempting by the language used in court to bring the allegation under Sec. 10-6-38, U.C.A. 1953, prohibitng officers of municipal corporations from being directly or indirectly interested in any contract, work or business, or in the sale of any article, the expense, price or consideration of which is paid from the treasury. Under this section the District Attorney fails to state facts sufficient to bring the matter within the statute. It is necessary, to be a violation of this statute, that *at the time of the transaction with the city* the officer have an interest. The purpose of this statute is clear. A public officer in voting upon a public matter should have the public interest at heart. He should not be serving two masters. He should not have any reason other than his duty as a public official to vote for or against the purchase of any property. Therefore, it follows that the interest must be a present one, one existing at the time the property is purchased. It follows, therefore, that in order to violate this statute the public officer must either have received or have been promised, or must have an expectation that he will receive a reward if he votes in a certain way. This the District Attorney did not charge.

The requirements of an allegation to state a cause of action under 77-7-1, U.C.A. 1953, are identical with the requirements

under Sec. 10-6-36, U.C.A. 1953, or if anything, the requirements are stronger under 77-7-1, whereunder this charge is laid. 77-7-1 makes an officer removable for "high crimes, misdemeanors, or malfeasance." Sec. 10-6-36 makes removable any officer who shall "wilfully omit the performance of any duty or wilfully and corruptly be guilty of oppression, malconduct or misfeasance in office." Thus, it will be seen that Sec. 10-6-36 is by far the broader section. It encompasses everything encompassed in 77-7-1, and something besides. Therefore, it follows sylogistically that any charge which fails to state an offense under 10-6-36 could not state an offense under 77-7-1.

This very matter has been passed upon by the courts in a number of jurisdictions. In the case of *People v. Deysher,* 40 P. 2d 259, the Supreme Court of California had before it a situation where the Supervisor of county roads was indicted under a charge that he had leased road machinery to a contractor to whom had previously been awarded a contract for improving county rodas. The section under which the indictment was laid was almost identical with Sec. 10-6-38, U.C.A. 1953. This California statute, Sec. 4322 of the Code, provided in pertinent part:

> "No member of the board may be interested, directly or indirectly * * * in any contract made by the board, or other person, on behalf of the county, for the * * * improvement of roads * * * ."

In considering the question as to when the interest of the board member must arise in order to constitute a violation of the statute, the Supreme Court stated:

"Neither the briefs nor our own investigation has disclosed any case deciding what facts sufficiently establish such an interest in a public contract as will subject an officer to punishment under said section 71 or similar statute. But aid can be obtained from civil cases considering the sufficiency of evidence to prove such an interest of an officer in a public contract as to invalidate it. Outside of a general discussion of the public policy, underlying the statutory prohibition, the cases of Stockton P. & S. Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020; County of Shasta v. Moody, 90 Cal. App. 519, 265 P. 1032; Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 293 P. 145; Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095, cited by respondent, are not presently helpful, because in each case the prohibited interest existed at the award of contract. The purchase, after award of contract and without previous agreement so to do, by the contract of material used in the performance of the contract from a member of the board awarding the contract, or from a corporation of which such member is a stockholder or employee, does not create, in such member, an interest in the contract which will invalidate it."

To the same effect see *State v. Abernathy,* a Louisiana case, 194 So. 19. In the case of *Warrell v. Jurden,* a Nevada case, 132 Pac. 1158, the school district entered into a contract for the construction of a building. Thereafter the contractor purchased from a board member certain materials which went into the building. The contract was attacked as being illegal because of this purchase. The court held that the contract did not violate the statute unless the board member had acquired or had been promised an interest in the contract at the time he voted thereon, or had other interest therein that might influence his vote.

In the case of *O'Neil v. Town of Auburn,* a Washington case, reported at 135 Pac. 1000, a contractor was awarded a road contract from the city. Thereafter he purchased cement from a company owned by the Mayor. It was alleged that the contract with the city was illegal under a statute similar to the conflict of interest statutes in the state of Utah. The court held that there was no violation of the contract unless the conflict of interest existed at the time of awarding the contract.

The same matter was passed upon by the New Jersey cour tin the case of *Fredericks v. Burrough of Wanaque,* 112 Atl. 309:

> "But we are referred to no case which intimates that in the absence of a corrupt understanding or agreement of the contractor with the member of the council voting for the contract, for the purpose of asserting the provisions of the Crimes Act, a resolution of its municipality, otherwise legal is rendered illegal by the subsequent action of the contractor in purchasing his material from a recognized source of supply, the proprietor of which happened to be a member of the governing body which awarded the contract. The contention of the defendant quite obviously is resolvable upon the fallacious argument of conduct post hoc and not proper hoc; *for the manifest test of the legality of the contract must be determined as of the time when the resolution was passed* and not by the free act of the plaintiff in purchasing materials. *If it was free of criminal taint at its inception, the subsequent action of the contractor in executing the contract cannot relate back, so as to vitiate it,* unless such ex post facto action can be connected with a prior corrupt agreement or understanding with a member of the governing body

in pursuance of which the resolution was passed." Italics added).

Another similar case is the case of *People v. Southern Surety Company,* a Michigan case, 163 N.W. 769. There the Supreme Court of Michigan stated:

> "The court found as a matter of fact that prior to the making of the contracts between Jansma and the city there was no talk, agreement, contract or understanding between plaintiff and Jansma to the effect that defendant Jansma would purchase any material from the plaintiff for such improvement and with this finding of fact, we agree. Broadly stated and carried to its logical conclusion, the position of the defendant is that an alderman is prohibited by the charter provision under consideration from sustaining any business relationships whatsoever with any person who has a contract with the municipality of which he is an officer. We are of the opinion that it was not the legislative intention to carry the inhibition so far."

The defendant in this case violated no law or committed no act of malfeasance unless he was given a promise of something prior to the time the city purchased the property in question. If it is the position of the State that every public officer who has received a political contribution from an individual who had theretofore done business with the public body with which such officer was connected, then indeed there are few, if any, public officers within the State of Utah who are not subject to removal from office.

POINT IV

Count 1 should therefore have been dismissed prior to the trial on the motion made by the defendant. Upon the

denial of this motion for dismissal, the defendant then attempted to take the depositions of the State's witnesses, or in the alternative to have a preliminary hearing. Had either of these procedures been allowed, the defective character of the evidence so far as it pertained to Count 1 would have come to the attention of the court and the defendant could either have renewed the motion for dismissal, based upon the evidence, or have moved for a summary judgment. We were denied the right of either the civil remedy or the criminal remedy.

The rules of criminal procedure of the State of Utah provide that before a person can be held to trial in the District Court on a felony charge brought on complaint and information, he must be given a preliminary hearing before a magistrate. The twofold purpose of this is obvious. It is a safeguard that the individual will not be called to stand trial before a jury in the district court unless there is sufficient evidence to go to the jury as to the commission of the offense. Secondly, it assures that extraneous matters will not get before the jury.

The same safeguard is given to parties in civil actions. Under the code of civil procedure the parties have the right to take the depositions of witnesses prior to the trial. Depositions serve a three-fold purpose—1, perpetuation of testimony; 2, discovery; and 3, to form a basis for a motion for summary judgment where it appears that the evidence taken as a whole is insufficient to take a case to a jury. Had the defendant been granted either of the rights guaranteed to defendants under the code of criminal procedure or the code

of civil procedure, the evidence under Count 1 would never have been heard by the jury. The trial court, however, held that because this was a quasi-criminal case, the defendant was afforded the protection of neither mode of procedure. Certainly this does not appear to be a logical deduction to draw from the applicable statutes. The cases from this court hold that removal proceedings under Chapter 77, Title 7, are civil in nature. See *Burk v. Knox,* 59 Utah 596, 206 P. 711; *Skeen v. Payne,* 32 Utah 295, 90 P. 440; *Skeen v. Craig,* 31 Ut 29 86 P. 487. Based upon these cases, the court held that we were not entitled to the protection afforded defendants under the rules of criminal procedure. On our attempt to obtain the rights afforded to defendants in civil cases, the trial court denied us these rights, based upon the provisions of Section 77-7-11, Utah Code Annotated, which provides:

> "The trial must be by jury and shall be conducted in all respects in the same manner as the trial of an indictment or information for a felony."

We urge upon the court that the obvious intention of this section is that only the trial of the case, and not the procedure prior to trial, shall be governed by the rules of criminal procedure. Sections 77-7-5 to 77-7-10 inclusive are concerned with matters preceding trial. As to these matters the code of criminal procedure cannot be applicable. The section above quoted obviously refers only to the trial itself, and not to those matters preceding or following the trial. We therefore should have had the rights granted to parties under the code of civil procedure, and, having been denied those rights, have been denied the due process of law guaranteed to defendants in the courts of the State of Utah.

Having failed to secure the dismissal of Count 1, due to the defect which appeared on its face, and having been denied the right to test the sufficiency of the evidence at pretrial proceedings, the defendant, at the close of the state's evidence, did the only thing he could do to protect himself. Following the dismissal of Count 1 he moved for a mistrial on the other two counts (R. 318). That this should have been granted appears too clear to require argument.

As has been pointed out above, although the facts proved under Count 1 do not constitute an offense, they do give rise to innuendos and suspicions which are much more serious in their nature than anything that was proved under Counts 2 and 3. The suspicion of the jury could not help but have been aroused. The things they had heard in support of Count 1 could not have helped but color the attitude of any juror untrained in the law toward the defendant in the case. The instruction of the judge that they were to disregard the evidence let in as to Count 1 did no more than to accentuate the effects of this evidence in the minds of the jury. We agree that there is a large measure of discretion in the trial judge as to whether or not occurrences which happen during the trial are of such a nature as to prejudice the rights of the defendant. However, such discretion is not unlimited, and in a case such as this it appears clearly an abuse of discretion to deny the motion for a mistrial. The Supreme Court of the State of Oregon in the case of *Guedon v. Rooney,* 87 P. 2d. 209, in overriding the discretion of the trial court in denying a motion for mistrial, stated:

> "In view of the entire record we are strongly of the opinion that a mistrial should have been ordered by

the circuit court. In the first place, the court committed error in permitting English to give in evidence his conclusion as to the manner in which Wilson was driving. Furthermore, the inferences conveyed to the jury on the extended direct examination of Rooney by the the plaintiff, when he was recalled to the stand, were extremely prejudical. The statements of the annontator in the A.L.R. notes to Paul v. Drawn, 108 V. 458, 189 A. 144, 109 A.L.R. 1085, are peculiarly appropriate as applied to that examination of Rooney:

" 'Improper questions may be prejudicial in various ways, including the following: They may plainly convey information excluded by the rules of evidence; may hint at the existence of significant though admissible facts, with or without a suggestion as to their nature, may, by the assumptions therein contained, and notwithstanding, the answers being prevented, impress upon the jury, by a mere show of proof, matters which are not admissible in evidence and which perhaps could not be proved, as inferred, even if opportunity were afforded, and may, by reason of the objections made, emphasize the facts suggested more effectively than might be done by answers admitted without objection.'

" 'It seems to be the invariable quality of questions the asking of which may require a reversal that in themselves, and without any answers made, they call to the attention of, or suggest to, the jury some fact or claim prejudical to the opposite party and concerning which counsel has no right to inquire."

. . . . .

"We are not unmindful of the rule that wide discretion is vested in the trial court in deciding whether a mistrial shall be declared. That discretion, however, is not absolute. No general rule, it is true, can be laid down as to what specific set of circumstances will result

in a mistrial. We are of the opinion, from all the facts in the case before us, that the defendants did not have a fair trial."

Here the situation is much more serious than a case where simply a few improper questions were asked and answered. Here a full day's trial was devoted to the abortive effort to prove Count 1. This court is aware from the preceding discussion in this brief as to the inflammatory nature of that evidence. Furthermore, in view of the fact that the court dismissed Count 1 on motion of the defendant, the defendant could not put in his own evidence to show his interpretation of the facts of Count 1. These facts were left before the jury in their most damaging form.

As the District Attorney reluctantly admitted under oath that he had stated, there would probably have been no conviction under the other two counts had the jury not heard the evidence as to Count 1. The motion for a mistrial should clearly have been granted at the close of the State's evidence, and the motion for a new trial should have been granted as to Counts 2 and 3 on the ground that the jury had been improperly influenced by the evidence which they heard as to Count 1.

POINT VI. THE COURT ERRED IN DENYING THE CHALLENGE FOR CAUSE OF THE DEFENDANT TO THE JUROR RAY H. WILSON.

POINT VII. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE JURORS IKEDA AND JENSEN HAD ANSWERED FALSELY TO CERTAIN VOIR

DIRE QUESTIONS, WHICH FALSE ANSWERS HAD PREVENTED THE DEFENDANT FROM TAKING A CHALLENGE FOR CAUSE FROM INTELLIGENTLY EXERCISING HIS PEREMPTORY CHALLENGES.

During the voir dire examination of the Juror Wilson the following occurred:

> "THE COURT: And I don't want to know what your opinion is, if you have one. I say we don't want to know what it is, but do you at this time have an opinion about the truth or the falsity of these accusations?
>
> "Mr. Wilson: I have an opinion but I might be able to change it in case the evidence showed it wrong.
>
> "THE COURT: Do you believe that it would require evidence to remove the opinion that you now have?
>
> "Mr. Wilson: I think so."

The court then went on with a rather lengthy examination of the juror Wilson, in which he explained to him the presumption of innocence and the necessity for proof beyond a reasonable doubt. Wilson agreed with these principles and said that he would attempt to follow them. At one point during the questioning by the judge as to whether or not he would require more proof in this case than in another case, he stated:

> "Well, if I say yes, I would say it is because I think public officials should be above reproach in whatever office they have been elected to, and that there should be no suspicion of anything of that kind."

As a concluding question the court asked, "And if you were a defendant in this case, do you think you would get a fair and impartial trial if you were sitting on the jury and seven

others like you?" to which Mr. Wilson replied, "I would think so." At no time, however, did Wilson change or repudiate his statement that he had formed an opinion about the case which it would require evidence to remove. He did not change his statement that it would require more proof than the average case.

Counsel challenged Wilson for cause, but the challenge was denied by the court. Wilson ultimately did serve on the jury, because in spite of his answers, there were others on the jury panel who, although they had answered the questions technically correctly, caused counsel for the defense more concern than did the juror Wilson and the peremptory challenges were exhausted on these other jurors.

The Juror Ikeda answered the routine question as to whether or not he had formed or expressed an opinion in the case in the negative. His examination was not extensive. After the trial of the case, however, counsel learned from a nephew of the defendant that a short time previous to the trial of the case the nephew had taken his automobile to Ikeda's repair shop for some work thereon. Upon hearing that the nephew's name was "Geurts," Ikeda asked: "Are you related to the crooked Commissioner?" This information was placed in the file by affidavit in support of the motion for new trial (R. 67). Ikeda placed in a counter-affidavit (R. 69). The court denied a motion for new trial on this ground.

One of the things that greatly concerned counsel for the defense in selecting a jury was the matter of prejudice that might exist in the minds of prospective jurors arising out of matters having no connection with the charges against Com-

missioner Geurts. In the few weeks preceding the trial of this case there had been before the Commission a number of very heated hearings, protests and discussions involving the activities of the Public Safety Department of the city government and the removal of the chief of police. Feelings had run high on the matter in the community, and counsel was very desirous that no member of the jury be a person that had been involved in any such proceedings. Accordingly, counsel requested the judge to question the jurors about this matter. The following appears from the record (R. 124):

> "THE COURT: What question, Mr. Rampton, haven't I asked?
>
> Mr. Rampton: The question of recent unpleasantness in the City Commission having no connection with this case, if any of them have engaged in these citizens committee meetings or protests, and so forth?
>
> THE COURT: Is there any juror that didn't hear what Mr. Rampton said? All right, if you all heard it, is there any juror who has been engaged in any of the matters that he has indicated by his question. Does that satisfy you on that question?
>
> Mr. Rampton: Yes.
>
> (There was no affirmative response from any of the jurors in the panel)."

After the jury retired, but before the verdict was returned, a man from a radio station covering the trial informed counsel for the defendant that the juror Jensen had been one of the instigators of one of the most violent protest meetings that occurred before the City Commission. Jensen, the owner of a bar and grill, had made complaint to the Mayor that the

Police Department had "shaken him down" by making him pay certain bills which he did not owe before they would renew his beer license. These charges resulted in a hearing before the City Commission, in which Jensen did participate as a witness and as a moving party. Counsel immediately took the matter up with the defendant. Commissioner Geurts informed counsel that the witness Jensen looked familiar to him. However, during the hearing before the City Commission, Jensen had sat with his back to Geurts and Geurts could not positively identify him, but said now that the matter was brought to his attention that could have been the man (R. 355). Counsel immediately contacted the city attorney, Mr. Barker, who had conducted the investigation before the City Commission, and was informed that indeed the juror Jensen was the person involved in the hearing before the City Commission (R. 66). Counsel for the defendant immediately called this matter to the attention of the trial court (R. 358). The above facts appear by affidavit and also by evidence taken in support of the motion for new trial.

This was a case in which extreme care should have been exercised in the selection of a jury. The case was given wide publicity by all media of public information. The matter had been discussed extensively in the community. Furthermore, in the weeks immediately preceding the trial, feelings in the community had run high, both for and against members of the City Commission. Even under the most favorable circumstances it would have been difficult to select a juror who would not have been prejudiced in this case. In view of these facts, the court should have exercised its discretion in removing from the jury any juror that had any prejudice at all, and

should have granted a new trial if it appeared that anything happened during the voir dire examination which would prevent the defendant from intelligently exercising his peremptory challenges. As this court stated in the case of *Balle v. Smith,* 17 P. 2d 224, at page 229, "A litigant is entitled to a trial before an impartial and disinterested jury, and must be given reasonable opportunity to obtain such a panel." We are cognizant of the provisions of Rule 47(f)(6) of the Rules of Civil Procedure, which provides:

> "No person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded on public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him."

We submit, however, that no Utah case has gone so far as to say a challenge for cause will not be sustained to a juror who has formed an opinion where such opinion is so strong that the juror cannot lay it aside at the beginning of the trial, and where it will actually take evidence to remove such an opinion. Furthermore, it should be borne in mind that, while this is a civil case, the "beyond reasonable doubt" standard of proof applies. How can anyone say that the juror Wilson could give the defendant a fair and impartial trial, when he went into the case with an opinion which would remain with him until the defendant picked up a burden of proof he should not bear and introduced evidence to remove such opinion?

In the case of *State v. Thorne,* 41 Utah 414, this court

sustained a refusal of a trial judge to grant a challenge to a juror who said that he had formed an opinion as to the guilt of the defendant. However, in that case the witness Cannon stated, to use the words of the court, "that he could and would lay aside and disregard his present opinion and give appellant a fair and impartial trial." That is far from what the witness Wilson said in this case. He did not say he would lay aside his opinion. He said that his opinion could be removed only by the introduction of evidence, and strong evidence at that.

The authors of *Am. Jur.* in Vol. 31, page 84, state:

> "Disqualification of one to sit as a juror in a case does not follow from mere impression, a slight, light and transient opinion, a temporary, qualified or passing state of mind concerning the merits of the controversy based on mere rumor, newspaper accounts or other hearsay information, where it appears unequivocably or absolutely that he can and will, notwithstanding such opinion, act fairly and impartially and render a verdict in the case in accordance with the law and the evidence."

Such a situation did not exist here. It was not a mere impression which Wilson had. It was not a transient opinion. It was an opinion which he said would stay with him unless it was removed by evidence. This we submit was the basis for challenge.

The situation here is very much akin to the situation which existed in the Oklahoma case of *Morehead v. State,* 151 P. 1183, where the court held that a juror should be dismissed for cause where he had formed an opinion which it would take strong evidence to remove, even though he

stated he could and would, notwithstanding such opinion, act impartiallyand fairly and render an impartial verdict upon the law and the evidence. See also *People v. McQuade,* 110 N.Y. 284, 18 N.E. 156.

The purpose of voir dire examination of jurors, of course, is to give counsel the necessary information necessarily to exercise his peremptory challenges. If fair and honest answers are not given to these voir dire questions, this right does not exist in the defendant. Section 77-38-3, U.C.A. 1953, lists as grounds for a new trial any misconduct of the jury by which a fair or due consideration of the cause may have been prevented. This court has held in a number of cases that failure of jurors to give fair and true answers on voir dire examinations constitutes such misconduct. In the case of *State v. Mickle,* 25 Utah 179, 70 P. 856, the court held that previously expressed bias of a juror, which he did not acknowledge on voir dire, and which was not known to the defendant or his counsel until after the trial, was misconduct, warranting the grantings of a new trial. This case is directly in point as to the juror Ikeda.

In the case of *State v. Thompson,* 24 Utah 314, 67 P. 789, it was held to be misconduct warranting a new trial where a juror on voir dire failed to disclose that he was a stockholder in the corporation which owned the store which the defendant was accused of having burglarized. Obviously, in the Thompson case, had counsel for the defendant known of this connection, he would have exercised a peremptory challenge to the juror. It might reasonably be supposed that the juror would be prejudiced. Likewise on this case, had the juror Jensen disclosed

his controversy with the City Commission and the Department of Public Safety, counsel for the defendant would have immediately exercised a peremptory challenge to him because of the probability of bias in the case. It matters not whether Jensen's failure to answer resulted from a deliberate attempt to conceal his activities or from a lack of understanding of the question. The effect as to the defendant is exactly the same.

We concede the existence of the rule that the question of granting or denying challenges to a juror and the question of granting or denying a motion for new trial based on the misconduct of jurors is a matter largely within the discretion of the trial court. Such discretion, however, is not unbounded. Whether the presence of any one of these three questionable jurors on the jury panel affected the outcome of the case cannot be known, of course. However, in view of the high public feeling in this case, and in further view of the tendency of the members of the public to regard public officials with suspicion, which was mentioned by the trial judge during his examination of the jurors (R. 98), the cumulative effect of these three jurors might well have been the determining factor in the returning of a guilty verdict as to Count 2. The court therefore should have exercised its discretion in favor of granting the motion for new trial when these facts come to light.

POINT VIII. THE COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTIONS TO QUESTIONS ON CROSS-EXAMINATION ASKED BY THE DISTRICT ATTORNEY OF THE DEFENDANT'S CHARACTER WITNESS SMITH.

The defendant called Mr. Willard R. Smith as a character witness. Mr. Smith testified that Commissioner Geurts' reputation for honesty and integrity in the community were very good. On cross-examination the district attorney asked: "Would you state or would you believe that a man is honest and has high integrity if he uses city employees' work for his own gain?" (R. 284). This question was objected to by the defense. The court overruled the objection and of course Mr. Smith answered in the negative. This question was objectionable on two grounds—first, it assumes the truth of the very matter for which Commissioner Geurts was being tried; secondly, what Mr. Smith might think or might not think about Commissoiner Geurts' honesty and integrity are not an issue in the case. The issue in the case is the general reputation in the community, and this question on cross examination did not go to that question at all. The court on the motion for new trial when this ruling was assigned as error admitted that he had made an error in overruling this objection (R. 373). However, he held that the error was not prejudical. We would agree that in most circumstances probably an error of this type would not be of such an important nature as to affect the outcome of the trial. In a case such as this, however, which is replete with small and large errors, and where the deliberation of the jury was obviously balanced on a very narrow edge, any error of any nature at all might well have been the thing which turned the deliberation.

POINT IX. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION IN ARREST OF JUDGMENT MADE ON THE GROUNDS THAT CHAPTER 7, SECTION

77, UTAH CODE OF CRIMINAL PROCEDURE HAS BEEN SUPERSEDED BY RULE 65(b)(1) UTAH RULES OF CIVIL PROCEDURE.

A review of the Utah Rules of Civil Procedure reveals that a removal proceeding, rather than being handled by the District Attorney, should properly be handled by the Attorney General of the State, under the provisions of Rule 65B. Rule 65B(b)(1) reads as follows, in the parts here relevant:

> "Where any person usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, or an office in a corporation created by the authority of this state; or any public officer, civil or military, does or permits to be done any act which by the provisions of law works a forfeiture of his office . . ."

This rule was adopted and became effective with all of the other rules of civil procedure on January 1, 1950 (See Rule 1(b)). Rule 1(a) states the scope of the rules in the following language:

> "(a) Scope of Rules: These rules shall govern the procedure in the Supreme Court, the district courts, city courts, and justice courts of the state of Utah, in all actions, suits and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action."

The exception stated in Rule 81 as to the applicability of the rules deals with special statutory proceedings, and reads as follows:

"(a) Special Statutory Proceedings. These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules."

There can be no doubt but that the matter before us is a *special statutory proceeding.* The District Attorney improperly proceeded under 77-7-1 and 2, U.C.A. 1953, which Sections were adopted in 1898. The Utah Rules clearly govern the procedure in the courts of Utah "in all suits and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as stated in Rule 81." Rule 81(a) has been quoted above; (b) refers to Probate and Guardianship; (c) to City and Justice Courts and (d) to appeals from adminisrative boards or agencies. Thus Rule 81(a) requires the Rules "shall apply in all special statutory proceedings except insofar as such rules are by their nature clearly inapplicable."

We strongly assert that the proceeding established by Rule 56B(b)(1) is not excluded by Rule 81(a) as being "clearly inapplicable." The converse is true. The power is lodged specifically in the Attorney General under 56B(c) to initiate any action authorized by 65B(b)(1), either on his own initiative or at the behest of the Governor. Rule 65B(b)(1) is an amalgamation of former statutory Quo Warranto provisions found in Sections 104-66-1 and 104-66-2 (Code 1943).

The language of this Rule prescribes that appropriate

relief may be granted where " . . . any public officer, civil or military, does or permits to be done any act which by the provisions of law works a forfeiture of his office . . ." This is exactly what the District Attorney has attempted to have this court declare in this special statutory proceeding. He has endeavored to usurp the functions of the Attorney General and ignore Rule 65B(b)(1).

Apparently the District Attorney was in a rare quandary as to what procedure to follow. He could not adopt the ordinary criminal procedure as the Grand Jury's indictments were pending and untried. No common law crime or civil remedy was available under a *complaint* procedure. So he has elected to try a special statutory proceeding enacted in 1898 and file an Accusation. But this procedure has been terminated and superseded by Rule 65B(b)(1), which is of the nature of Quo Warranto.

Our Utah Supreme Court said that Quo Warranto is the correct procedure in this type case in *Olsen v. Merrill,* 78 Utah 453, 5P2d 226. There procedures were initiated to test the right of certain persons to hold office as members of the Provo City Board of Education. The procedural question of whether a Writ of Prohibition or Quo Warranto is the proper remedy was raised, but the Court held "a proceeding in the nature of Quo Warranto is the proper remedy to try title to a public office where it is sought to oust an incumbent from an office on the ground that he is not entitled to such office" (P. 227).

The same basic logic applies to Rule 65B(b)(1) and such is the sole procedural method to be followed. Rule

65B(c), which requires the Attorney General alone to bring the action, has only one exception, and that is found in Rule 65B(d), which permits a person claiming public office to file if the Attorney General has been first requested to file and has failed to do so. No situation of this type applies here. District Attorney Banks makes no pretense of coming within this permissive position.

Next, let us consider the procedural aspect of the case. Had the matter been filed by the Attorney General under Rule 65B(b)(1) as required, there would be no question but that all of the rules of civil procedure would apply, including the discovery procedures. By deposition the vague and unsubstantial nature of Count 1 would have been revealed prior to trial and the matter then would have been disposed of by Summary Judgment.

CONCLUSION

Counsel submits that the ruling of the lower court should be reversed and that this action should be dismissed, first upon the ground that the statute under which it was brought is unconstitutional; second, on the ground that the procedural statute under which it is brought has been superseded. Or if the court rules adversely to the appellant on the above matters, then the case should be sent back to the lower court for a new trial because of the numerous and substantial errors committed by the trial court, as hereinbefore set forth.

Respectfully submitted,

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