1967

The State of Utah v. C. W. Brady, Jr. : Appellant's Brief

IN THE SUPREME COURT

of the

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

- vs. -

C. W. BRADY, JR.,
Defendant and Appellant.

Case No.
10653

APPELLANT'S BRIEF

Appeal from the Judgment of the 3rd District Court
for Salt Lake County, Hon. John F. Wahlquist, Judge

GUSTIN & RICHARDS
1610 Walker Bank Building
Salt Lake City, Utah
Attorneys for Appellant

PHIL L. HANSEN
Attorney General
Capitol Building
Salt Lake City, Utah
Attorney for Respondent

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STATUTES

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STATEMENT OF THE KIND OF CASE

This is a criminal action initiated by indictment charging defendant with 1st degree perjury.

DISPOSITION IN LOWER COURT

Defendant was convicted by a petit jury. The judgment of conviction was after denial of a motion for a new trial.

RELIEF SOUGHT ON APPEAL

The defendant seeks to reverse the judgment of conviction and the dismissal of the action.

STATEMENT OF FACTS

The indictment (R. 1-3) accuses the defendant of having testified falsely on the 7th day of May, 1965

before the Honorable Maurice D. Jones, Judge of the City Court, Salt Lake City. The indictment is set forth in Schedule A of the appendices. The bracketed portions as shown on Schedule A are our own markings, with the letters in the left-hand margin corresponding with the same lettered subparagraphs of paragraph 2 of the Instruction No. 6 (R. 68-71), which instruction is set forth in full in Schedule B of the appendices.

During the year 1963 and the portion of the year 1964 covered by Judge Jones in his questioning of the defendant Mr. Brady was Chairman of the Salt Lake County Board of Commissioners, in charge of Roads and Bridges, Sanitation and Flood Control. At the time of his deposition on May 7, 1965, Mr. Brady was Commissioner of Public Safety for the State of Utah. The Grand Jury for Salt Lake County was convened in July of 1965.

The bill of particulars (R. 12-14) as furnished by the District Attorney attempts to delineate the subject of inquiry before Judge Jones. The copy of complaint attached to the bill of particulars (R. 15) is referred to in the proceedings as a "John Doe Complaint" and was never filed or made of record. (R. 108-109) The bill of particulars, with complaint attached, is set forth in Schedule C of the appendices.

The deposition of the defendant taken before Judge Jones (Exhibit 2) was never offered to the defendant for signature or correction and he never delivered the

same to any one within the concept of Section 76-45-6, *Utah Code Annotated,* 1953. (R. 118)

The questions and answers contained in the indictment in some respects are taken out of context. Paragraph 3 of the bill of particulars states that all of the subject matter of the indictment "is material to the charge set forth" in the "John Doe Complaint." Demands for a further bill of particulars were rejected and a motion to quash the indictment was denied.

The indictment is silent as to the subject of inquiry and gives no indication as to materiality. Judge Jones inquired directly on the question of bribery, but the indictment does not charge perjury in connection with the negation of the same.

> "Q. In relation to these leases, Mr. Brady did anyone ever approach you and offer you any sort of bribe in relation to them?
>
> A. No, Judge, nobody ever approached me on a bribe." (Exhibit 2, p. 31, l. 25-28, R. 154)

The preamble of the deposition states, in part:

> "THE COURT: What we're doing, Mr. Brady and Mr. Nielsen, is proceeding under Title 77 of the Utah Code. It provides that * * * a John Doe Complaint may be signed and * * * to proceed with the depositions of other persons to see if there is any grounds for having it actually issued, * * *. First of all, there was Hugh Nielsen. The second individual was Neuman Petty. We've also had Boyd Nerdin in, and this morning, Ted Newsom was here.

* * *

> Our principal area will involve the bit paver and the history on both sides of it, plus what would appear to be related facts. * * *" (Exhibit 2, Pages 2-3, R. 127-128)

The trial judge permitted the jury to speculate not only as to what was in the minds of the Grand Jurors, but also as to what was in the mind of Judge Jones, sans testimony. (Instruction No. 6).

The leasing of the bit paver by the Salt Lake County Commission during the month of September, 1963 and other transactions will be pointed up in the argument pertaining to our claim of the insufficiency of the evidence to support the verdict.

ARGUMENT

I. The Evidence is Insufficient to Support the Verdict of the Jury and the Motion for a Directed Verdict of Not Guilty Should Have Been Granted.

It is contended that the quantitative evidence rule precludes proof of falsity by circumstantial evidence alone. The rule is stated in the annotation, 88 A.L.R. 2d 859, as follows:

> "Thus, in a number of cases it has been expressly held or stated that falsity of testimony alleged to be perjurious must be established by *direct and positive testimony of two witnesses or one witness and corroborating circumstances,* and that circumstantial evidence alone is never sufficient." (Emphasis added)

See also *Weiler v. United States,* 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945); *United States v. Remington,* 191 F.2d 246, (2nd Cir., 1951) cert. denied, 343 U.S. 907, 72 S.Ct. 580, 96 L.Ed. 1325, and 41 *Am. Jur., Perjury,* Sec. 67, Page 37.

We analyze the various issues as submitted to the jury by Instruction No. 6, in sequence and under headings as follows:

A. THE TESTING OF THE BIT PAVER

The questions and answers in this regard were as follows:

"Q. After you returned to Salt Lake, and before you were informed that Midvale Motors had purchased this machine, was the County testing this machine?

A. You bet, we were.

Q. And were any reports submitted to you as to the result of the tests?

A. Mr. Nerdin contacted me quite frequently and *I* went out to the scene quite frequently to see the tests." (Exhibit 2, p. 15, l. 17-24)

The indictment omits the italicized letter "I," which was inserted by the trial judge. There is no evidence in the record as to whether the defendant did or did not go to the scene "quite frequently" or otherwise. The insertion of the word "I" is consistent, however, with the unsigned deposition of the defendant. The State did not challenge the testimony that the defendant went to the scene to see the tests nor did the State adduce any

testimony to challenge the statement that "Mr. Nerdin contacted me quite frequently." The bill of particulars concedes that the bit paver was tested:

> "The testing consisted of two days only — on or about August 13, 1963 and on or about August 17, 1963."

This begs the question as to whether the testimony as given by the defendant was false. The trial judge put words in the defendant's mouth that he did not utter by Instruction No. 6, 2A, the preamble of which reads:

> "That C. W. Brady Jr. spoke words calculated by Mr. Brady to lead Judge Jones to understand that Salt Lake County tested the 'bit paver' before leasing it substantially more exclusive than it was in fact so tested * * *."

The Grand Jury by its indictment did not subscribe to the connotation of "extensive testing." It even omitted the subject of inquiry in its indictment. It was the District Attorney who authored the idea and the trial judge elaborated by the words: "substantially more * * * than it was in fact so tested." Regardless of the distortion of the defendant's testimony, there was no evidence that the same was false, there was no showing that the defendant did not go to the scene of the tests, and there was no showing that Nerdin did not contact the defendant. The evidence affirmatively shows that tests were conducted while the machine was owned by Bonneville Equipment Company. (R. 210) The sale of the bit paver to Midvale Motors was August 27, 1963. (R. 179) The letter from Hubert H. Nielsen, President of

Bonneville Equipment Company dated August 24, 1963 (Exhibit 5) states in part as follows:

> "In line with the results of the past 36 days relative to the performance of the Tanco Bit Paver, this machine has concluded its' test pattern at 3200 West by putting down a seal coat of 'Black Beauty Slag' and US-2 Bitumen that is unequalled in the State of Utah."

It is submitted that the evidence is insufficient to support a verdict of guilty in connection with the questions and answers under subsection A of Instruction No. 6 and that the motion for a directed verdict with respect thereto (R. 297-300) should have been granted.

B. THE USE OF THE BIT PAVER UP TO CHRISTMASTIME.

The questions and answers in this regard were as follows:

"Q. Are you aware of the fact that the machine was not used at all during January and February and part of December?

A. As I recall, the machine was used, and I think we used it in the Chesterfield area, and I think we used the machine right up until Christmas.

* * *

Q. Do you remember Mr. Schemahorn back in Indiana discussing the fact that they put their machine away from Labor Day until May?

A. No, I do not. We used this machine up until December, I'm sure, right until Christmastime." (Exhibit 2, p. 21, l. 6-22)

The words "As I recall," "I think we used it in the Chesterfield area," "I think we used the machine right up until Christmastime," when fairly considered in connection with all of the testimony of the defendant, qualify, explain and erode away the assertion "We used this machine up until December, I'm sure, right until Christmastime."

The questions and answers are taken out of context when viewed in the light of the entire deposition. Preceding the question first above, Mr. Brady was asked:

> "Q. If Mr. Nerdin's record that the machine was used during September, October, November and part of December, would you accept this as being pretty accurate?
>
> A. Yes, I would." (Exhibit 2, p. 20, l. 24-27)

It is clear that Mr. Brady was not testifying of his own knowledge as to the use of the bit paver. He made it obvious to Judge Jones that Mr. Nerdin's *record* as to the use of the machine would be the best evidence. Judge Jones stated in his introductory comments in the deposition that he had previously deposed Nerdin.

The net effect of taking the testimony before Judge Jones out of context is to give the impression that the defendant was testifying as to his own knowledge. Mr. Brady made it obvious to Judge Jones that his recollection was subordinate to the record. Judge Jones, by his question, implied that Nerdin had a record showing that the machine was used during "part of December." There was no effort made on the part of the State to

show that the defendant did not honestly believe that the machine had been used up until Christmastime.

The elements of falsity, deliberation and willfulness are all dissipated by the answer to the effect that the witness would subscribe to whatever the record showed, as that question was put to him by Judge Jones. The annotation, 66 A.L.R. 2d 792 states in part:

> "It has in many instances been held, or stated as a general proposition, that perjury cannot be assigned upon a statement which is merely an expression of belief or opinion. Such holdings and statements are subject, however, to the qualification that a charge of perjury or false swearing may be based on a statement under oath as, or embodying, a matter of belief or opinion where such belief or opinion is not in fact held or entertained."

The trial court in ruling upon the motion for a directed verdict in this regard stated that "The testimony is circumstantial only that he knew it." (R. 299) When the defendant was asked if he would accept Nerdin's record "as being pretty accurate" and having answered in the affirmative, then the defendant's state of mind became inconsequential. Under the quantitative rule, however, the State had the burden to prove the alleged falsity of the state of mind or opinion by more than circumstantial evidence.

What Judge Jones meant by his reference to "Mr. Nerdin's record" is not revealed. No record by that name was produced. A bookkeeper, Joe Riccardi, prepared State's Exhibit 21, which was received in evidence

over the objection of the defendant. (R. 237) The exhibit purports to be a summary made by the witness from documents relating to materials used by the bit paver. (R. 235) The exhibit was calculated to show substantially when the bit paver was last used in the calendar year 1963. On voir dire, the witness revealed that he did not have the basic documents in his possession and that they were last seen in the custody of the Grand Jury. (R. 236) The court admitted the exhibit over objection, but stated to the District Attorney "eventually I want you to produce" the documents. (R. 237) The documents were never produced and as a consequence, cross-examination of the witness on the subject was aborted. The same objection, the same rule and the same voir dire questions apply to State's Exhibit 22, the summary of alleged daily reports of chips spread for 1964. (R. 240) The base documents were never produced. Exhibit 20, purporting to be a summary of parts purchased for repairs on the bit paver and of supplies furnished was also received in evidence over objection, with the court ordering basic documents to be produced, which was never complied with. (R. 242)

The rule is well stated in 20 *Am. Jur., Evidence*, Section 449, Page 400:

> "To render a summary of voluminous records prepared by an expert admissible in evidence, the competency of the records themselves as evidence must have been established and the records must further be made available to the opposite party for the purpose of cross-examination."

The witness Van Ausdal, testifying for the State, said that operations with the bit paver in the Chesterfield area stopped "just before Thanksgiving" on account of mechanical difficulty. (R. 211) The State's witness Thayne, who had the overall responsibility for the operation of the bit paver (R. 222), testified that the work in the Chesterfield area with the bit paver terminated around the 15th or the 20th of November, 1963 (R. 220); that the wheel on the machine broke and that it was taken back to the shop approximately ten days later. (R. 221) When asked who, besides himself, would have any knowledge of the fact that the machine had been returned, he answered: "I don't know of anybody. I don't recall telling anyone." (R. 227)

The uncertain testimony of the witnesses Van Ausdal and Thayne as to the cessation of work in the Chesterfield area and the removal of the bit paver to the county shops points up the prejudicial effect of not having the advantage of the documents from which Riccardi made his compilations. There can be no justification for the absence of the documents at the trial of the case in light of the testimony that they had been exhibited to the Grand Jury.

The answers to the questions under this subsection of Instruction No. 6 cannot be tortured into the concept of a willful, deliberate falsehood. The evidence is not sufficient to support the verdict and the motion for a directed verdict in favor of the defendant should have been granted. We submit that reasonable minds could not differ.

C. THE TAKING OF THE BIT PAVER TO THE SHOPS IN JANUARY FROM CHESTERFIELD.

The question and answer in this regard is as follows:

"Q. Did Mr. Nerdin ever inform you that the machine was sitting idle during January?

A. Oh, I knew the machine was — as a matter of fact, at that time we used it, like I say, up until December, and the weather moved in, and we was hoping to get the project completed in Chesterfield, and we left the machine in Chesterfield. And then we had to take it from Chesterfield back out to the shop, and this was sometime in January. We had to get the machine out of there." (Exhibit 2, p. 22, l. 1-9)

Much that we have said with respect to the Subsection B above is applicable to this subsection. Both the question and answer have their idiosyncrasies and are taken out of context. For example, the question as to whether Mr. Nerdin informed Mr. Brady that the machine was sitting idle during January was not answered. Characteristic of many witnesses, Mr. Brady volunteered that the machine had to be taken from Chesterfield back to the Shop because of weather conditions even though they had hoped to get the project completed.

It is conceded by everyone that the machine remained idle at the County Shops from and including the month of January 1964 until June of that year when a new lease was entered into, and all without any expense

to the County, except perhaps small repairs. The trial court, however, in its preamble to the question and answer in this subsection (Instruction No. 6) stated:

> "That C. W. Brady Jr. spoke words calculated by Mr. Brady Jr. to lead Judge Jones to understand that the bit paver was not placed in the Salt Lake County shop yard till substantially later than it was in fact so placed * * *."

The materiality of whether the bit paver was returned to the shops in January because of weather or other conditions is centered around the concept of the cancellable provisions of the lease of the machinery. The lease (Exhibit 4) is dated September 25, 1963 and is for a term of five consecutive months, commencing on the 23rd day of August, 1963 and ending on the *22nd day of February, 1964.* The italicized portion, the date of February 22, 1964 is an obvious error. Five consecutive months from the 23rd day of August, 1963 would make the termination date the 23rd day of January, 1964. The last rental payment of $4,000.00 was due on the 22nd day of December, 1963. The lease would have had to have been cancelled prior to the 22nd day of December in order to save the last monthly payment.

The testimony is uncertain as to the precise date when the machine broke down in the Chesterfield area, but it is clear from the testimony of both Thayne and Van Ausdal that the lease could not have been cancelled in time to save the $4,000.00 payment due November 22, 1963. Any fair consideration of all of the surrounding circumstances, including a possible "break" in the

weather, permitting the renewed operation of the machine would lead to the conclusion that it would be unreasonable to have expected Mr. Brady as the head of the department, to have brought about the cancellation of the lease to save the payment due December 23, 1963.

Assuming the exactitude of prudent supervision and being able to forecast the vagaries of weather during the forepart of December, 1963 making the operation of the machine impossible, and giving some reasonable tolerance to arrive at the conclusion and to set in motion the paperwork incident to cancellation, there is still reasonable doubt that Mr. Brady could have cancelled the lease to save the December payment. It is obvious, however, that Judge Jones did not have the December payment in mind when he queried the defendant. He was misled in the belief that the lease could have been cancelled in January to save the last month's payment. During the deposition, Judge Jones asked Mr. Brady the following:

"Q. Could you have reasonably anticipated using it during January and February?

A. No, no, I don't think so. Not unless the weather would have really been opened and the temperature been up we may have been able to use it.

Q. Was there any reason then for not cancelling the lease as provided in the lease?

A. No, probably an oversight was all." (Exhibit 2, p. 22, l. 10-17)

Mr. Brady was forthright in his response to Judge Jones and there was no evasion of the thrust of the inquiry. If the defendant had answered that Nerdin's records were the best evidence instead of guessing at the situation, as he obviously did, he would still have revealed the possible oversight in not having cancelled the lease. If the physical operations of the bit paver had ceased prior to or on or about Thanksgivingtime, the witness would still have revealed the oversight in not having cancelled the lease.

This renders anticlimactic as to whether the bit paver was taken back to the shop at Christmastime or in January and most certainly no fair minded man could say that there was a willful intent to deceive. There is no evidence sufficient for the jury to the effect that Mr. Brady knew that the machine had been returned to the shop, and particularly in light of the testimony of the State's witness Thayne to the effect that he, as the foreman, told no one of the incident.

Judge Jones in a question following within an interval of four questions clearly indicates his misinterpretation of the lease when he asked the witness:

> "Q. Excuse me, Isn't it a fact that the bit paver remained on the County or at the County shops between the expiration of the first lease which was in February, and the signing of the second lease which was in June of 1964?
>
> A. It did, yes." (Exhibit 2, p. 22-23, l. 29-3)

It is clear that there was no intent to deceive nor was the question or the answer material. Both Judge

Jones and the trial court misconstrued the lease, as the last rental payment was due on December 23, 1963 and there was no further payment due during the month of January, 1964 or February of that year. There was no issue that could properly have been submitted to the jury premised upon the question and answer in this subsection of Instruction No. 6.

D. OTHER PROPERTY LEASED BY THE COUNTY.

The question and answer in this regard is as follows:

> "Q. What other type of equipment have *you* leased in the past for the county? (Emphasis added)
>
> A. I think we leased a garbage packer or two of them through the Purchasing Department. I think we also and are presently leasing from — well, you can check the name. It would be in the records. Leasing some sweepers." (Exhibit 2, p. 29, l. 16-22)

The State contends that the perjury consists of the fact that Mr. Brady did not reveal in answer to the question propounded that Commissioner Jensen on May 15, 1963 had leased an Allis-Chalmers crawler tractor for Salt Lake County Roads and Bridges from Motor Lease, Inc. through Ted Newsom, manager, (Exhibit 18) and thereafter on the 15th day of June, 1963 leased the same tractor for Salt Lake County Roads and Bridges from the same lessor for a period of two years, ending on the 14th day of June, 1965. (Exhibit 19) The first lease for the period of one month was for the sum of $3,000.00,

payable in advance, and the second lease was for the sum of $3,000.00 per month for the first six months and the remaining eighteen months at $1,880.00 per month. Mr. Brady had nothing to do with either lease and so far as the record is concerned, knew nothing about the transactions.

The language "what other type of equipment" excludes the type of equipment previously the subject of inquiry by Judge Jones, such as the bit paver and conceivably all heavy equipment. The question uses the word "you" and excludes Commissioner Jensen and all other individuals leasing or purchasing property for the county.

The question is inarticulate, ambiguous and misleading, particularly in light of the claim that the defendant should have included the Allis-Chalmers tractor leased by Commissioner Jensen within the response that was made. The State stretches the imagination to the breaking point when it contends that the responsive reply should have included the heavy piece of equipment called the Allis-Chalmers tractor, covered by a lease that the defendant neither knew about nor was connected with as a participant.

The trial judge puts this strained construction on the question and the answer by the preface to this portion of the instruction, which reads as follows:

> "That C. W. Brady Jr. spoke words calculated by Mr. Brady to lead Judge Jones to understand that no other lease of such equipment was in ef-

> fect with, or through Ted Newsom or any company represented by him when in fact a lease existed on an *Alas*-Chalmers tractor * * *."

The trial court ignored the fact that the Allis-Chalmers tractor was the subject of a lease participated in by Commissioner Jensen for Salt Lake County, and the fact that there was no lease of that particular equipment that the defendant was a party to. Judge Jones was inquiring concerning the direct and personal activities of the defendant with reference to the subject matter. This is made crystal clear by the questions and answers immediately preceding the question and answer, the subject of the instruction.

> "Q. As the Commissioner in charge of Bridges and Roads for the County, have you in the past had an occasion to negotiate several leases?
>
> A. Oh, yes.
>
> Q. For special equipment such as a bit paver, specialized equipment such as a bit paver?
>
> A. No. I think that's the only piece of specialized equipment that I ever leased." (Exhibit 2, p. 29, l. 8-17)

There is nothing in the deposition taken before Judge Jones or in the indictment or in the bill of particulars that refers to an Allis-Chalmers tractor. There was no formal charge apprising the defendant of the nature of the charge against him so far as the subject of inquiry was concerned, and in particular, the lease of the Allis-Chalmers tractor.

To compound the error, State's Exhibit No. 15 was admitted over the objection of the defendant during the examination of Commissioner Jensen and read in part to the jury. (R. 270-271) The exhibit purports to be a reproduction of a document, *not signed* by, for, or on behalf of Salt Lake County. The document is dated the 17th day of May, 1964 and covers the same Allis-Chalmers tractor as described in Exhibit 18.

The obvious purpose of the State Attorney was to create the impression before the jury that the defendant had in fact leased the Allis-Chalmers equipment on behalf of the County from Motor Lease, Inc. This erroneous impression, with the aid of the trial court, and over objection, was to the prejudice of the defendant. Exhibit 15 was inadmissible on its face. It is an unsigned reproduction of an instrument concerning which no foundation was laid as to the whereabouts of the original document or that either the original or the exhibit itself ever had any vitality as a commitment binding upon Salt Lake County. Defendant's struggle to keep out the obviously inflammatory and prejudicial exhibit and the conversations with respect thereto was futile. (R. 265-270) On cross-examination, Commissioner Jensen admitted that Exhibit 15 was not presented to him by Mr. Brady; that it was presented by Mr. Borg, the purchasing agent (R. 275); that Exhibit 15 was never executed by Salt Lake County; that it never became a lease; that it never had any vitality as a contractual document; that it does not mean anything except a piece of paper so far as a contractual commitment is concerned. (R. 276)

Commissioner Jensen conceded Exhibit 18 to be a lease for the same equipment; that it was executed by him as Commissioner in charge of the Purchasing Department; that it did not go through the Commission and that it was not submitted to him by Mr. Brady. Commissioner Jensen did not recall whether the lease, Exhibit 18, was presented to him by the purchasing agent, Mr. Borg, or by Mr. Newsom. Then, on cross-examination, stated that he (Jensen) did not say anything to Mr. Brady about the lease dated the 15th day of May, 1963. (R. 277)

By way of summary, the closest that the State got in its efforts to prove perjury in connection with the Allis-Chalmers equipment was that Mr. Brady had somewhat of a caustic conversation with Commissioner Jensen over a proposed lease submitted by someone other than Mr. Brady, probably the purchasing agent, and which lease was never consummated. The lease of the Allis-Chalmers equipment was negotiated and consummated by Commissioner Jensen and there is nothing in the record to show that Brady had any knowledge of the transaction. Commissioner Jensen did not advise Mr. Brady, and the minutes of the County Commission do not reveal the transaction. It must be assumed, therefore, that Mr. Brady did not know of the leasing of the equipment, and most certainly, the proof does not square up with Judge Jones' question: "What other type of equipment have *you* leased in the past for the county?" The motion for a directed verdict in this respect should have been granted.

II. Other Prejudicial Evidence Admitted During the Trial Over the Objection of Appellant.

1. DURING THE TESTIMONY OF JUDGE JONES.

Judge Jones identified State's Exhibit No. 1 as a carbon copy of the so-called "John Doe" complaint signed before him by Delmar L. Larson on the 22nd day of April, 1965. The witness did not know where the ribbon copy of the document was and stated that he did not believe it was given a file number. The carbon copy, along with the original copy, was left by the witness in the County Attorney's office and not afterwards seen by him. (R. 108-109) When the Exhibit was offered, there was an objection made, and the following occurred:

"Q. (By Mr. Banks) I will show you a file in this case. Attached to one of the Defendant's pleadings is a photo copy marked Exhibit B. I will ask you if you can identify what that purports to be.
* * *

A. This appears to be a photo of the *amended John Doe complaint,* which this is a copy of.

MR. GUSTIN: I move to strike that term "amended John Doe Complaint" on the ground that it is an improper conclusion by this witness.

THE COURT: The objection is overruled. The jury may make such, I think they will be able to understand what the situation is. I trust the common sense of the jury on this matter." (R. 109-110)

Throughout the trial, the trial judge left matters of law on objections as to relevancy, materiality and competency to "the common sense of the jury". In this instance, however, the above reference by Mr. Banks was to a photocopy marked Exhibit B "attached to Defendant's Objections to Bill of Particulars as Furnished and Request for a Supplemental Bill of Particulars." (R. 21) The Exhibit B, so attached, was exhibited to the witness and he then characterized it as "a photo of the amended John Doe complaint, * * *". The handwritten additions and deletions appearing on Exhibit B are in the handwriting of Judge Jones (R. 110) and were made after the 7th day of May, 1965, the time of the deposition of the defendant Brady and after the 22nd day of April, 1965, the date that Delmar L. Larson signed Exhibit 1.

Judge Jones characterized his scribblings as being the "amended complaint". The document with the handwritten scribblings was never filed and while the witness deleted the names John Doe, James Doe and Richard Doe, and substituted the name of Theodore M. Newsom, the implication that the document was an "amended complaint" as affecting Mr. Brady, or anyone other than Newsom, is clearly erroneous. The trial jury was not shown Exhibit B referred to as being attached to one of the defendant's pleadings, so that it did not have even an inkling as to the true facts of the situation, merely the conclusion of Judge Jones that the "John Doe" complaint had been amended. The motion to strike the term "amended John Doe Complaint" on the ground that it was an improper conclusion by the witness should obvi-

ously have been granted. The prejudicial effect in not granting the motion is obvious. The trial court, however, was not content with merely denying the motion, but added:

> "The jury may make such, and I think they will be able to understand what the situation is. I trust the common sense of the jury on this matter." (R 110)

A rather thorny legal problem was thus delegated to the jury. Furthermore, a community of interest between the trial court and the jury was established and peculiarly solidified when Exhibit No. 1, after having been read to the jury by the District Attorney, was ordered handed to the jury by the court with the comment:

> "Hand it to the jurors so they can pass it among themselves to see the general nature of the instrument. You may continue." (R. 111-112)

Exhibit No. 1 purports to charge "the attempted bribery of an executive officer." It had no probative value so far as the instant action is concerned and it was inflammatory. Its only purpose was to establish the right, if any, on the part of Judge Jones to depose Mr. Brady. This was a legal problem and not one for the jury.

2. DURING THE TESTIMONY OF THE WITNESS NIELSEN.

Nielsen was identified with Bonneville Equipment Company, the concern that sold the bit paver to Motor Lease, the company with which Ted Newsom was identified. The defendant in his deposition taken before Judge

Jones acknowledged having leased the bit paver from Motor Lease. The lease, Exhibit 4, signed by Commissioner Cannon on behalf of Salt Lake County, was the end point of the lease negotiations. Nielsen, however, was asked several questions as to conversations with Boyd Nerdin, the Superintendent of Roads and Bridges, and with Newsom, all out of the presence of defendant Brady. The objection to each of the questions on the grounds of hearsay was overruled and each answer by the witness resulted in inflammatory and collateral matters. By way of example, Nielsen was asked:

> "Q. Did you negotiate with anyone from Salt Lake County with reference *to the purchase* of this machine." (R. 161)

Over objection as to materiality and as being beyond the issues in this case (the District Attorney knew that there were no negotiations for the purchase of this machine) the witness stated that he contacted Boyd Nerdin, Superintendent of Salt Lake County Roads and Bridges. The witness was then asked concerning a conversation with Nerdin, which was objected to as being hearsay and which was overruled on the stated ground:

> "Res gestae, business transaction. He may answer as to this. The hearsay rule does not have application, continue." (R. 161)

The answer was that the witness asked if he, Nerdin, would talk to Mr. Brady "about getting some interest in the machine, to purchase it". (R. 163) A subsequent conversation with Nerdin developed the answer:

"A. Mr. Nerdin said that he had talked with Mr. Brady about it, but he said that he says there is another man that is closer to Mr. Brady than anybody, whom I suggest that you talk to." (R. 164)

On a motion to strike, which was overruled, the court stated:

"I believe the jury can handle this type of testimony, continue."

The witness then testified:

"A. Well, he said, 'I suggest that you talk to him, Ted Newsom appeared in court, he said 'I think he might be able to help you on this type of thing.' He is Mr. Brady's gubernatorial campaign manager and handled his affairs on anything that might reflect upon him." (R. 164-165)

The motion to strike the answer of the witness on the ground that it was inflammatory, prejudicial, hearsay and immaterial was denied and the trial court made the gratuitous but ambiguous statement:

"I believe that it is a matter for the jury as to whether or not this is part of the way the business was done, or whether it was not, and whether it occurred, or whether it didn't occur, is immaterial for the jury to decide." (R. 165)

Counsel for the State did not ask in good faith concerning a transaction with reference to the "purchase" of the bit paver, but was interested only in getting before the jury by innuendo and hearsay that the defendant had suggested that Nielsen do business with a third

party and the alleged political ambitions of Brady to run for governor and identifying Ted Newsom as his alleged campaign manager. This was not only the rankest kind of hearsay and over-the-fence gossip, with nothing at all to do with any business transaction, but prejudicial.

The error was compounded in still another objection which was overruled when the court passed on to the jury the responsibility of determining a legal point and then refused to admonish the jury that hearsay was not offered "for the truthfulness of it", the words used by the District Attorney. (R. 166)

An unjustified statement of the trial court was made in the presence of the jury after overruling a motion to strike certain of the hearsay testimony of the witness Nielsen by the gratutious statement:

> "I believe it is an *insult to the jury* to quibble into this matter." (R. 163)

The rapport between the trial court and the jury had already been established beyond the normal course of things, as pointed out in connection with the "John Doe" complaint. The belittling or downgrading of counsel by the trial judge could not have had other than a detrimental effect. The motion to strike was addressed to the court and involved a legal point. The jury was in no way involved and the so-called connotation of "insult" was a problem for the trial court and not the jury.

3. DURING THE TESTIMONY OF THE WITNESS RUSSELL.

John K. Russell was an accountant for Motor Lease and a previous employee of Petty Ford Company. (R. 205) The witness was asked to give the name of the majority stockholder of Midvale Motors. The question was objected to on the ground that it was immaterial and irrelevant. The trial court in overruling the objection made the gratutious statement:

> "Answer the question and the jury will decide what is relevant in this matter." (R. 206)

4. DURING THE TESTIMONY OF THE WITNESS JENSEN.

The objection made to the testimony of the witness Jensen with respect to Exhibit No. 15 which never ripened into a commitment on the part of Salt Lake County (R. 265) and the assignment of misconduct on the part of the District Attorney (R. 267-269) is somewhat unique. Prior to trial, an order had been entered permitting the defendant a limited inspection of testimony given before the Grand Jury by the witness Jensen and others. (R. 30-32) Thus the defendant was alerted to certain matters occurring before the Grand Jury that had no competency, relevancy, materiality or probative value upon the trial of the issues in the instant case. This included the reference to Exhibit No. 15 and to the purported conversations elicited from the witness Jensen with the defendant. (R. 267-269) Counsel for the State, in adhereing to the modus operandi pursued before the Grand Jury, was peculiarly vulnerable in so doing to the charge of bad faith when the evidence so adduced at the trial

accomplished no more than to inflame the petit jury on extraneous matters to the prejudice of the defendant. The proceedings before the Grand Jury lose much of their glamour when viewed in the cold light of day and in this instance, the District Attorney was warned in advance that the testimony attempted to be elicited by Commissioner Jensen would be challenged on the grounds indicated, as well as counsel's good faith.

Commissioner Jensen did not testify to any relevant fact material to the issues herein involved. He was the one that negotiated the lease of the Allis-Chalmers tractor and not the defendant. Commissioner Jensen did not advise the defendant of the lease nor did he make it of record at any Commission meeting. The only purpose of his testimony was an ulterior one, that of getting before the jury, to the prejudice of the defendant, a purported conversation with reference to a proposed lease (Exhibit 15) that was never consummated.

5. SUMMARY OF RULINGS ON EVIDENCE.

The trial court, and to even a greater extent, the District Attorney, was aware of the inflammatory nature of collateral matters. While certain latitude is undoubtedly permissible to determine the materiality of the answers of witnesses in support of the charge of 1st degree perjury, nevertheless, a definite area of judicial circumspection was involved in order to insulate against erroneous impressions and erroneous conclusions. The hearsay injected into the record and indicated by the trial court as being a "part of the way the business was done", or

"just a verbal fact and business transaction", or the "res gestae" or "shop book rule" was admissible, if at all, for a limited purpose. We submit that none of these rules apply. The conversations carried with them no business implication, but merely inflammatory collateral matters.

Even in those instances where the exception to the hearsay rule is applicable, it is pointed out with uniformity that the admissibility of evidence for a limited purpose involves "certain risks" in that the trier of fact might consider the evidence in relation to issues for which it would be inadmissible. In *State v. Greene,* 33 Utah 497, 94 P. 987 (1908), the Court states:

> "In State v. Thompson, 31 Utah 228, 87 Pac. 709, Mr. Justice Straup, speaking for the court, says: 'Where evidence is received in a case which is admissible only for a certain purpose, and is inadmissible for other purposes to which the jury unaided may improperly apply it, it is essential that the court should correctly instruct them as to the purpose for which they may consider the evidence'."

Wigmore on Evidence, Volume 1, Section 14, Page 303 (3rd Edition) states:

> "The *time* for determining the admissibility of a particular fact is ordinarily the time *when it is offered to the Court.*"

It will be recalled that the trial court refused to forthwith instruct the jury that the truthfulness of the Newsom statement to the witness Nielsen was not an issue in light of the District Attorney's express statement in that regard. (R. 166)

The statements attributable to the defendant by Commissioner Jensen could not possibly come within the holding of this court in *State v. Neal,* 123 Utah 93, 254 P.2d 1053 (1953) where the testimony of the bus driver that the defendant threatened him, saying: "Keep moving. I just shot a man." was held admissible as an admission against interest, citing *Wigmore on Evidence,* 3rd Edition, Section 10 and Sections 1048 and 1049. With Commissioner Jensen's statement, however, the claim is made that the testimony was elicited in bad faith because the District Attorney, in his contact with the Grand Jury knew that the defendant had not leased the Allis-Chalmers tractor.

The other facet of the Neal case in its reference to *Wigmore on Evidence* is under the rule of res gestae, which clearly is not applicable here. As pointed out above, the conversations with the third parties were not in connection with any extemporaneous or even remote overt act chargeable to the defendant within the issues of the case.

Justice Wolfe in *State v. Scott,* 111 Utah 9, 175 P.2d 1016 (1947) comments on the hearsay rule, as follows:

> "But in the common law there were developed certain exceptions to that basic rule, for example, the hearsay rule, which made certain evidence, though relevant and material, incompetent. That was because of the danger of prejudice to the party against whom it was offered who would have no chance to cross-examine the source, or the probative value of the evidence offered was small

> as compared to the great prejudicial affect it might have."

Viewed in light of the hearsay testimony as having little, if any, probative value, it became incumbent upon the trial judge to determine whether the same might be misused by the triers of fact and to apply the rule credited to Justice Cardozo in *Shepard v. United States,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed.196 (1933), that:

> "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

The practicalities of attempting to have a jury of laymen screen from the evidence that which is relevant from that which is not is pointed up by Justice Cardozo in *Shepard v. United States,* supra, by the following:

> "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

In *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949) the hearsay statement of a co-conspirator was held inadmissible because made after the objectives of the conspiracy either had failed or had been achieved. The statement was not admissible having been made in furtherance of an alleged implied, but uncharged, conspiracy aimed at preventing detection and punish-

ment. The importance of this decision in the instant case is the holding to the effect that error is presumed if "the Court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict." And, the language of Mr. Justice Jackson in his concurring opinion is equally important:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction."

The rule was recently restated in *Taylor v. Baltimore & Ohio Railroad Co.*, 344 F.2d 281 (2nd Cir., 1965):

> "The basis for an inference of intimidation is extremely weak as against the danger that if the statement is admitted, the jury will use it substantively regardless of what the judge may say. See McCormick, supra S 39, at 77. 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.'"

III. Instructions and Requested Instructions.

Instruction No. 2 (R. 63-66) purports to instruct as to the "allegations of the indictment." This instruction is set forth in full in the appendices as Schedule D. There is nothing in the instruction except for the quoted questions and answers that is even remotely connected with the indictment. The instruction is centered around matters alleged to have occurred on or about the *23rd day of August in 1963*, which date is taken from the "John Doe" Complaint signed by Delmar Larson on April 22, 1965. The instruction quotes the charging part thereof includ-

ing "the attempted bribing of an executive officer". The instruction attributes to the indictment evidentiary detail including the mentioning of the Allis-Chalmers tractor, concerning which both the indictment and the bill of particulars are silent

The instruction credits the indictment as saying that Mr. Brady's answer omitting reference to the Allis-Chalmers tractor "could logically lead Judge Jones to believe Mr. Newsom had no other lease with the County to be enquired into, and that belief could logically mislead Judge Jones in his taking of testimony and in acting on Delmar Larson's allegations". There are other distortions of both the indictment and the testimony within the four corners of Instruction No. 2.

The exception to Instruction No. 2 was upon the ground that the instruction does not set forth what the indictment charges, and in other respects it constitutes an "editorialization" on the indictment. (R. 304) The trial judge not only improperly commented on the evidence and drew conclusions with respect thereto, but amended and supplemented the indictment. It was for the Grand Jury to articulate the charge. The indictment cannot be changed, amended or rewritten except by the grace of Section 77-21-43, *Utah Code Annotated,* 1953.

In *State v. Myers,* 5 Utah 365, 302 P.2d 276 (1956), the statute just mentioned was held not to be applicable to matters of substance. The court stated:

> "As was stated by this court in the case of State v. Pettit, (97 Utah 443, 93 P.2d 675)

> 'The code of criminal procedure is not designed to eliminate essential averments or to permit the pleading of misleading factual data, whether or not it was done knowingly.'
>
> The court in that case construed 105-21-43, U.C.A. 1943 (now 77-21-43, supra), to apply to variance, defects, or omissions that pertain to matters of form only rather than matters of substance."

The last paragraph of Instruction No. 15 (R. 80) was objected to on the ground of prejudicial comment on the defendant's conduct. (R. 306) Of interest is the fact that the District Attorney took exception to the same portion of the Instruction (R. 301-302) as being an unwarranted comment on the entire conduct of the accused. He has not testified. The last paragraph of Instruction No. 15, after being interlined by the trial court reads:

> "Corroborative evidence may be circumstantial as well as direct and the entire conduct of the accused himself, both as a witness in his own behalf *before a City Judge,* and at times other than at the trial, as shown by the evidence, may be looked to for corroborative circumstances." (Emphasis added)

The portion of the instruction objected to not only had the effect of emasculating the quantitative rule relating to proof of perjury, but it also was an unwarranted and entirely improper invitation to speculate on matters that were not and could not conceivably have been of record. The word "conduct" connotes something different than the words spoken before Judge Jones. The words "as a witness in his own behalf" clearly imply that he was the accused before Judge Jones. Take this conno-

tation and apply it to Exhibit 1, the "John Doe" complaint, and to Instruction No. 2, which re-emphasizes "the attempted bribery of an executive officer", we have a situation the equivalent of saying to the jury that the defendant stood before Judge Jones accused of bribery. To this is added, the "conduct" of the accused "at times other than at the trial". This could conceivably mean the outward expressions of the defendant to newspaper reporters in the corridor of the courtroom. The speculation in this regard is not saved by the expression "as shown by the evidence". There is no evidence in the record as to the "conduct" of the defendant, in or out of court. The defendant did not testify in the instant case, and the suggestion as to his conduct "as a witness in his own behalf", with or without the interlineation "before a City Judge" is but an oblique adverse comment by the trial judge of the fact that he did not take the witness stand. The prejudice is apparent.

Instruction No. 14 (R. 79) is inconsistent with the first paragraph of Instruction No. 15 (R. 80) and the second paragraph of Instruction No. 16 (R. 81) and was excepted to on the ground of such inconsistencies. (R. 305) Other exceptions to instructions were taken, as well as exceptions to requests made and not given and to requests given as modified, but these matters in the light of the error specifically pointed out above are but cumulative. Instruction No. 6, however, merits specific reference on the ground that it is confusing and incomprehensible and the exception to that effect.

Requested Instruction No. 2 (R. 47), which was refused, should, under all of the circumstances of the case, have been given, particularly in light of the literary license indulged by the trial court in its instruction of the same number. The request reads as follows:

> "The Court instructs the jury, as a matter of law, that the indictment in this case is no evidence, in the slightest degree, but is a mere formal charge, requiring proof of all of the material allegations contained therein, by the testimony of witnesses, or by facts and circumstances. And you are further instructed that the law presumes the defendant to be innocent of the crime charged in the indictment, until he has been proven to be guilty beyond all reasonable doubt; and this presumption of innocence is no mere idle theory, to be cast aside by the jury through mere caprice, passion or prejudice, but it is a substantial part of the law of the land, and follows the defendant throughout the entire case, and must not be lost sight of by the jury until it has been overcome by evidence which establishes the defendant's guilt beyond all reasonable doubt and to a moral certainty."

In lieu of the foregoing, the court gave its Instruction No. 3, which reads:

> "You are instructed that the foregoing instruction is not to be regarded as a statement of facts proved in this case. But is to be considered merely as a summarized statement of the accusation against the defendant." (R. 66)

Requested Instruction No. 3 (R. 48) on the quantitative proof required incident to a perjury charge was refused. This request should be compared with the first

two paragraphs of Instruction No. 15 (R. 80) which instruction was diluted beyond comprehension by the reference to defendant's conduct as more particularly stated above. The requested instruction reads:

> "You are instructed that the State must establish to your satisfaction beyond a reasonable doubt the falsity of the defendant's sworn statements by direct and positive evidence. Direct and positive evidence is evidence of one or more witnesses who have actual knowledge of the facts corroborated by other independent circumstantial evidence. Should the State fail to sustain its burden in these particulars to your satisfaction beyond a reasonable doubt, then you cannot convict the defendant and he must be acquitted."

IV. The Deposition Taken Before Judge Jones Should Have Been Suppressed.

Defendant's motion to supress (R. 33-34) was overruled and denied (R. 35) and was based upon grounds (1) the same grounds as urged in connection with the motion to quash the indictment; (2) the "John Doe" complaint did not charge a public offense, was never filed in the City Court, was rendered nugatory and made abortive by Judge Jones, and all proceedings thereunder were extrajudicial; (3) the complaint as sworn to by Delmar L. Larson did not comply with subparagraph 1 of Section 77-11-1, *Utah Code Annotated,* 1953; and (4) the purported deposition was never subscribed to by the defendant, nor was he permitted to correct the same, nor was it delivered to any person by him with the intent that it be uttered or published as true.

As to the subparagraph 1 of Section 77-11-1, it is mandatory that the complaint name the person accused, if known, "or if not known and it is so stated" he may be designated by another name. Delmar L. Larson did not under oath in the so-called "John Doe" complaint state that the true name of a defendant was not known. The lack of such an allegation goes to the question of good faith at the grass roots of the entire proceeding.

The bill of particulars states that Judge Jones "acquired jurisdiction over the subject matter contained in said complaint" (John Doe Complaint) and proceeded to interrogate the defendant herein under the provisions of Section 77-11-3, *Utah Code Annotated,* 1953, which Section reads:

> "When a complaint is made before a magistrate charging a person with the commission of a crime or public offense, such magistrate must examine the complainant, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other persons and may take their depositions."

The bill of particulars states that the interrogation, in question and answer form, was reported by a certified shorthand reporter and notary public and was reduced to writing. Mr. Brady did not sign or correct the so-called deposition, nor was it ever delivered by him to any person with the intent that it be uttered or published as true, as contemplated by Section 76-45-6, *Utah Code Annotated,* 1953, which reads:

> "The making of a deposition or certificate is deemed to be complete, within the provisions of this

chapter, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true."

Section 77-44-2, *Utah Code Annotated,* 1953, makes the rules of evidence in civil actions applicable to criminal actions, except as otherwise provided in the Code of Criminal Procedure. Rule 30(e), *Utah Rules of Civil Procedure,* is to the effect that when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination, shall be read to or by him, and that he may make such corrections or changes upon the deposition, in form or in substance, as he desires.

If perjury is to be based on what occurred before Judge Jones, it should be bottomed upon a deposition subscribed to by the defendant in the manner recognized by rule and not otherwise. The indictment was fatally defective in this regard and in any event, the purported deposition not so signed, subscribed, uttered and delivered should have been suppressed.

V. The indictment is Fatally Defective.

The motion to quash (R 23-24) which was denied by the trial court (R. 27) is referred to here on the ground that the indictment does not charge the defendant with the commission of an offense, in that it does not inform of the nature and cause of the accusation and with respect to which there must be an identification of some issue or inquiry or subject matter in terms of which an initial judgment can be made regarding the possible materiality of the allegedly false testimony recited in the

indictment. These matters were carefully considered by the court in *State v. Popolos*, 103 A.2d 511 (Maine, 1954), where the court, among other things, stated:

> "A respondent, or a court, cannot judge the reasonable possibility of the materiality of the testimony unless the indictment, on its face, identifies some specific issue, or subject matter, in relation to which the question of materiality is raised. * * * The purpose is to allow for the formulation or identification of some issue, or inquiry, or subject matter in terms of which an initial judgment can be made regarding the *possible materiality* of the allegedly false testimony recited in the indictment. It is to enable the Court, by inspection of the indictment alone, to conclude whether the testimony set forth and claimed to be false can have any reasonable possibility of materiality. If the indictment on its face does not sufficiently identify the particular proceeding to which it is claimed the materiality of the alleged testimony relates, defendant is deprived of a most important right * * *."

The court cites *State v. Webber*, 78 Vt. 463, 62 A. 1018, as a leading case "and one squarely in point". The Vermont case had to do with a streamlined statutory form of indictment in perjury cases, and held the indictment to be fatally defective because neither count specified the subject matter of the investigation then being pursued by the Grand Jury.

The court, in *Popolos*, supra, then concludes:

> "It is thus clear that an indictment for perjury even under a streamlined statutory form, *must contain some designation or identification of the*

particular matter being investigated, or heard, by the tribunal involved. Such identification is entirely lacking in the present indictment. The prosecutor has done no more than to show, in the most generic terms possible, that the Grand Jury was acting on a multitude of matters within its jurisdiction. In no manner has he undertaken to inform the respondent of any particularized or identifiable subject matter, within that general jurisdiction, by which the respondent or the court can evaluate, initially, the possibilty of the materiality of respondent's allegedly false testimony, or to give him information to prepare his defense. Neither can we comprehend how a respondent could plead former jeopardy under such a general allegation."

The Colorado case of *Treece v. People,* 40 P.2d 233 (1934) is cited in *State v. Popolos,* supra. Objections were made at the beginning of the trial to the introduction of any testimony, and to the testimony of each witness. A motion for a directed verdict was made. The motion and all objections were overruled by the trial court. The objections were made on the ground that the indictment was insufficient to charge perjury in that it did not allege the subject or matter of the inquiry before the Grand Jury at the time the defendant gave the alleged false testimony. The appellate court, in reversing, held that the objections were to matters of substance and not of form and therefore could be raised at any stage of the proceedings.

In *People v. Greenwell,* 5 Utah 112, 13 P. 89 (1887), the indictment stated the fact claimed to be material to the matter under investigation. In *State v. Anderson,* 35

Utah 496, 101 P. 385 (1909), the complaint before the magistrate set forth with a fair degree of particularity the issue of materiality. The *Popolos* case, supra, carries this requirement into the present day streamlined mode of pleading.

The District Attorney, by his bill of particulars, has stated that all of the matters set forth in the indictment are not claimed to be false, and then he presumes to suggest the area of the alleged falsity, a matter peculiarly within the province of the Grand Jury. Whether the District Attorney can presume to reflect the deliberations of the Grand Jury by the bill of particulars, he cannot, in any event, enlarge upon the indictment or aid or assist the court in the determination of what may or may not be material. It was held in *State v. Spencer,* 101 Utah 274, 117 P.2d 455 (1941) that the offense must be charged in the indictment or information without reference to the bill of particulars and that if the information is indefinite as to the offense charged, the bill of particulars is of no help in deciding questions of the relevency of evidence.

There is no criteria, no yardstick, for the trial judge to follow in the inevitable instruction to the jury or determination as a matter of law the problem of what is or is not material and therefore, the motion to quash should have been granted on that ground alone.

CONCLUSION

Perjury when in fact committed is a most reprehensible crime. More reprehensible, however, is the low-

ering of judicial standards as a matter of expediency. In this case, it was considered expedient by someone to bring about the political demise of an individual. That was accomplished. It remains for this court to apply time honored rules and the unquestioned sense of justice and fair play to a situation in which the accumulation of error is overwhelming. When the proceedings before Judge Jones are considered in their full context, every answer attributed to the defendant by the indictment will not support the charge of which he stands convicted. This court should reverse and dismiss the action.

Respectfully submitted,

Harley W. Gustin
GUSTIN & RICHARDS
Attorneys for Appellant

APPENDICES

SCHEDULE A

(CAPTION OF COURT AND CAUSE OMITTED)

INDICTMENT

The Grand Jurors of the County of Salt Lake, State of Utah, accuse C. W. BRADY, JR. of the crime of PERJURY IN THE FIRST DEGREE, in violation of Title 76, Chapter 45, Section 7, Utah Code Annotated 1953, as follows, to-wit:

That on or about the 7th day of May, 1965 at the County of Salt Lake, State of Utah, the said C. W. BRADY, Jr. committed Perjury in the First Degree by falsely testifying before the Honorable Maurice D. Jones, Judge of the City Court of Salt Lake City, State of Utah, after having been duly sworn upon oath to tell the truth to the following material facts:

Q. "Did Mr. Newsom inform you of the time of departure and when you were going to leave? Did he have anything to do with the arrangements for the trip?

A. I don't think so, no."

Q. "Did you ever discuss this with Mr. Newsom prior to his submitting the lease to the County that was eventually signed?

A. "Never did I ever discuss the machine with anybody."

Q. "After you returned to Salt Lake, and before you were informed that Midvale Motors had purchased this machine, was the County testing this machine?

A. You bet, we were.

A. Q. And were any reports submitted to you as to the result of the tests?

A. Mr. Nerdin contacted me quite frequently, and went out to the scene quite frequently to see the tests."

Q. "Do you remember whether or not it was used during September of 1963?

A. No, I would not know.

Q. Do you know whether it was used during October of 1963?

A. No. You'd have to go back to the records on that.

Q. Do you know whether it was used during November of 1963?

A. No but I'm sure the records we'd have would show whether it was or was not.

Q "Are you aware of the fact that the machine was not used at all during January and February and part of December?

A. As I recall, the machine was used, and I think we used it in the Chesterfield area, and I think we used the machine right up until Christmas.

B. Q. Do you know that it sat in the lot down there not being used through January and February?

A. No, I didn't know this."

Q. "Do you remember Mr. Schemahorn back in Indiana discussing the fact that they put their machine away from Labor Day until May?

A. No, I do not. We used this machine up until December, I'm sure, right until Christmastime."

C. Q. "Did Mr. Nerdin ever inform you that the machine was sitting idle during January.

A. Oh, I knew the machine was — as a matter of fact, at that time we used it, like I say, up until December, and the weather moved in, and we was hoping to get the project completed in Chesterfield, and we left the machine in Chesterfield. And then we had to take it from Chesterfield back out to the shop, and this was sometime in January. We had to get the machine out of there."

D. Q. "What other type of equipment have you leased in the past for the County?

A. I think we leased a garbage packer or two of them through the Purchasing Department. I think we also and are presently leasing from — well, you can check the name. It would be in the records. Leasing some sweepers."

contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

A true bill

Russell C. Bendixen

FOREMAN OF THE GRAND JURY
Salt Lake County, State of Utah

SCHEDULE B

INSTRUCTION NO. 6

No. 6

Before you can convict the defendant, C. W. Brady, Jr. of perjury in the first degree you must find each of

the following elements proven beyond a reasonable doubt.

1. That C. W. Brady, Jr. was sworn to tell the truth before a Salt Lake City Judge on or about 7 May 1965 in Salt Lake County.

   By "sworn" the court means to take an oath and promise to speak honestly and completely concerning the truth as he believed it to be.

2. That while under said above-oath C. W. Brady Jr. intentionally and wilfully testified in words in substance being inconsistent with fact as follows:

   A. That C. W. Brady Jr. spoke words calculated by Mr. Brady to lead Judge Jones to understand that Salt Lake County tested the "bit paver" before leasing it substantially more exclusive than it was in fact so tested and that at least part of such representation was in substance as follows:

   "Question: After you returned to Salt Lake, and before you were informed that Midvale Motors had purchased this machine, was the County testing this machine?

   Answer: You bet, we were.
   Question: And were any reports submitted to you as to the result of the tests?

   Answer: Mr. Nerdin contacted me quite frequently, and I went out to the scene quite frequently to see the tests."
   and/or

B. That C. W. Brady Jr. spoke words calculated by Mr. Brady to lead Judge Jones to understand that the "bit paver" was used much later in the year of 1963 than was the fact, and that at least part of such representation was in substance as follows:

"Question: Are you aware of the fact that the machine was not used at all during January and February and part of December?

Answer: As I recall, the machine was used, and I think we used it in the Chesterfield area, and I think we used the machine right up until Christmas."

****

"Question: Do you remember Mr. Schemahorn back in Indiana discussing the fact that they put their machine away from Labor Day until May?
Answer: No, I do not. We used this machine up until December, I'm sure, right until Christmastime."
And/or

C. That C. W. Brady Jr. spoke words calculated by Mr. Brady Jr. to lead Judge Jones to understand that the bit paver was not placed in the Salt Lake County shop yard till substantially later than it was in fact so placed and that at least in part such representation was in substance as follows:

"Question: Did Mr. Nerdin ever inform you that the machine was sitting idle during January?

"Answer: Oh, I knew the machine was — as a matter of fact, at that time we used it, like I say, up until December, and the weather moved in, and we was hoping to get the project completed in Chesterfield, and we left the machine in Chesterfield. And then we had to take it from Chesterfield back out to the shop, and this was sometime in January. We had to get the machine out of there."

And/or

D. That C. W. Brady Jr. spoke words calculated by Mr. Brady to lead Judge Jones to understand that no other lease of such equipment was in effect with or through Ted Newsom or any company represented by him when in fact a lease existed on an Alas-Chalmers tractor and that at least in part such representation was in substance as follows:

"Question: What other type of equipment have you leased in the past for the county?

Answer: I think we leased a garbage packer or two of them through the Purchasing Department. I think we also and are presently leasing from — well, you can check the name. It would be in the records. Leasing some sweepers."

It must be recognized that the State must prove only one of the above alleged false statements, but may prove more than one.

That at the time C. W. Brady Jr. spoke the words proven as in two above, if any, C. W. Brady Jr. was conscious that he was representing contrary to fact. A mere honest mistake or misunderstanding, no matter how serious, is not perjury but perjury may come about if one consciously and wilfully

A. States as a fact that which is not true, or

B. States he has knowledge or a belief when he knows he does not enjoy that state of mind, and knows it, or

C. States he does not have knowledge or a belief when he knows he, in fact, had such knowledge or belief, or

D. Or a combination of ABC, or AB, or BC, etc.

When the information charges in the same count that the defendant made more than one perjured statement, the proof need show that he made only one of such statements to support a conviction provided that as to that one statement the proof is adequate under the law and shows that every essential element of the crime of perjury, as I have defined those elements, was present in the making of such statement.

3. That the falsehood was material in the proceeding.

An essential element of the crime of perjury in the first degree is that the matter falsely sworn to be true be material to a valid issue in the proceeding, in or for which the statement is made. If it is not thus material the making of the statement however false or reprehensible, is not perjury in the first degree.

But the matter sworn to, need not be directly and immediately material; and if not the requirement of the law as to materiality is met if the false statement is so connected with a fact which is directly in issue as to have a natural tendency to prove or disprove such a fact either by itself bearing circumstantially on the question, or by giving weight to or directing from any other evidence on the issue. In short, the test of materiality is whether or not the statement could have properly influenced the tribunal upon the question at issue before it.

The alleged issue at the time of the alleged oath was given is alleged to be: Judge Jones' judicial determination of how to act on Delmar Larson's allegation that is set out in the exhibit .....

If you find elements one, two, and three proven beyond a reasonable doubt it is your duty to convict the defendant of perjury in the first degree. If you find elements one, two, so proven but not element three then it is your duty to convict of only second degree perjury, that is a lesser included offense and occurs when all elements of perjury in the first degree are present except the third above. If you do not find element one and two proven beyond a reasonable doubt you must acquit C. W. Brady Jr. the defendant.

SCHEDULE C
BILL OF PARTICULARS
(CAPTION OF COURT AND CAUSE OMITTED)

In answer to defendant's Request for Bill of Particulars, plaintiff submits the following:

1. A complaint entitled the *State of Utah vs. John Doe, Jane Doe and Richard Doe,* a copy of which is attached hereto and marked Exhibit "A", was duly issued by the Honorable Maurice D. Jones, a duly elected and qualified Judge of the City Court of Salt Lake City, State of Utah, on the 22nd day of April 1965, after the complainant, Delmar L. Larson personally appeared before said Judge and after being duly sworn upon oath attested to the truthfulness of the allegations therein contained where the defendants were charged with the crime of Accessory to the crime of Attempting to Bribe Executive Officer in violation of Title 76, Chapter 1, Section 45, Utah Code Annotated 1953. The Court thereby acquired Jurisdiction over the subject matter contained in said complaint and proceeded under Title 77, Chapter 11, Section 3, Utah Code Annotated 1953 to bring before the Court the defendant C. W. Brady, Jr. and after placing him under oath proceeded to interrogate him in open court in question and answer form, the same being reported by Ned E. Greenig, Certified Shorthand Reporter and Notary Public in and for the State of Utah, the same being reduced to writing, the District Attorney, Jay E. Banks, a duplicate original copy of same, and said matters being material to the allegations in said complaint, and after examining said defendant, C. W. Brady, Jr., and others with reference thereto, the said Maurice D. Jones, Judge of the City Court of Salt Lake City, State of Utah, as such on the 12th day of May 1965, issued Salt Lake City complaint No. 42895 entitled State of Utah vs. Clarence William Brady, Jr. a/k/a C. W.

Buck Brady, Jr., charging said defendant with Making a Profit Out of or Misusing Public Funds; Salt Lake City case No. 42896 entitled State of Utah vs. Clarence William Brady, Jr., a/k/a C. W. Buck Brady, Jr. charging said defendant with Asking for or Receiving a Bribe as an Executive Officer of Salt Lake County; and Salt Lake City case No. 42897 entitled State of Utah vs. Theodore M. Newsom and charging said defendant with Bribing an Executive Officer, said complaints arising out of the John Doe complaints heretofore referred to. That all of said complaints heretofore referred to were duly issued by the said City Judge Maurice D. Jones, after being duly sworn to by Delmar L. Larson as complaining witness.

2. All of the alleged testimony contained in the Indictment is not claimed to be false.

3. All of the subject matter of the Indictment is material to the charge set forth in the copy of the attached complaint.

4. That portion of the Indictment relating to Newsom's not making arrangements for the trip is false. The portion of the Indictment relating to the defendant's never discussing the bit paver with Newsom prior to his submitting the lease to the County is false. The portion of the transcript as to extensive testing of the bit paver is false. The testing consisted of two days only — on

or about August 13, 1963 and on or about August 17, 1963.] [That portion of the testimony of using the bit

B. paver up to Christmastime is false] and [it was taken

C. back to the Shops in January from Chesterfield is false.]

[That portion of the transcript referring to other equip-

D. ment leased by the County is false.]

JAY E. BANKS, District Attorney
Third Judicial District
Salt Lake County, Utah

EXHIBIT A
ATTACHED TO
BILL OF PARTICULARS

In the City Court

OF SALT LAKE CITY

Before M. D. JONES

Judge of the City Court

Bail $ 1500.00 each

Judge.

THE STATE OF UTAH
vs.
JOHN DOE, JANE DOE and
RICHARD DOE

Defendant.

COMPLAINT

On this 22nd day of April, A.D. 1965, before me, M. D. JONES, Judge of the City Court within and for Salt Lake City, Salt Lake County, State of Utah, personally appeared Delmar L. Larson, who, being sworn by me on his oath, did say that John Doe, Jane Doe and Richard Doe on or about the 23rd day of August, A.D. 1963, at the County of Salt Lake, State of Utah, did commit the crime of ACCESSORY TO THE CRIME OF ATTEMPTING TO BRIBE EXECUTIVE OFFICER, in violation of Title 76, Chapter 1, Section 45, Utah Code Annotated, 1953, as follows, to-wit:

That the said John Doe, Jane Doe and Richard Doe, at the time and place aforesaid, having full knowledge that a felony had been committed, to-wit: the attempted bribery of an executive officer, in violation of 76-1-30 and 76-28-3, Utah Code Annotated, 1953, did conceal same from a magistrate;

contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

/s/ DELMAR L. LARSON

Subscribed and sworn to before me,
the day and year first above written.

M. D. JONES

City Judge

SCHEDULE D

Instruction No. 2

You are instructed that allegations of the indictment are as follows:

That the witness Jones is a city Judge of Salt Lake City. That on or about the 7th day of May 1965 Judge Jones was acting as a judge and had before him for consideration an allegation by a person named Delmar L. Larson, who swore that one had attempted to bribe an Executive Officer in violation of Utah Statute; and that other persons were accessory to such an offense in that they had knowledge of the felony but had concealed it, or secreted it; the allegation was that the conduct had occurred on or about the 23rd day of August in 1963, that Delmar Larson was alleging

> "That the said John Doe, Jane Doe and Richard Doe, at the time and place aforesaid, having full knowledge that a felony had been committed, to-wit: the attempted bribery of an executive officer, in violation of 76-1-30 and 76-28-3 Utah Code Annotated, 1953, did conceal same from a magistrate"

That Judge Jones was attempting to search out information to make a judicial determination of whether or not he as Judge should or should not issue process and what form, if any, it should take, if issued.

That Judge Jones, pursuant to this indeavor, did request the defendant, C. W. Brady, Jr. to take an oath to answer truthfully concerning the matter under inquiry. That Mr. Brady consented and was duly sworn and ques-

tioned, and made answers. The indictment alleges that Mr. Brady in violation of this oath committed perjury in that he intentionally, and wilfully and contrary to law gave untrue answers with an intent to mislead Judge Jones when such might lead or encourage Judge Jones into not acting correctly in the matter. So far as this proceeding before you jurors here today, the prosecution relies on the following particular allegations as perjury:

1. That Mr. Brady was asked the following questions and Mr. Brady gave the following answers with an intention of misleading Judge Jones into understanding the bit paver had undergone materially more extensive testing in Salt Lake County than was the fact, whereas it had been tested only on two days before the county leased the machine:

> "Question: After you returned to Salt Lake, and before you were informed that Midvale Motors had purchased this machine, was the county testing this machine?
>
> Answer: You bet, we were.
>
> Question: And were any reports submitted to you as to the result of the tests?
>
> Answer: Mr. Nerdin contacted me quite frequently, and went out to the scene quite frequently to see the tests."

And it is alleged that Mr. Brady's testimony above taken in context and as intended, was a perjurous attempt to mislead Judge Jones in that he might believe the method used by Salt Lake County in leasing the machines was

contrary to what was the fact; and might reasonably affect Judge Jones' action if the matter of the general allegations made by Delmar Larson.

2 . That Mr. Brady was asked concerning when the "bit paver" was last used in 1963 in the following question and made the following answer with intent to mislead Judge Jones into understanding that the "bit paver" was used much later in the year than was true, thereby possibly leading Judge Jones into understanding the contract lease was more favorable to Salt Lake County than true and the failure to cancel the lease more favorable in that the season of its use more nearly matched the contract period than was true and such statements might reasonably have misguided Judge Jones in his determination as to how to act on Delmar Larson's allegations

> "Question: Are you aware of the fact that the machine was not used at all during January and February and part of December?
>
> Answer: As I recall, the machine was used, and I think we used it in the Chesterfield area, and I think we used the machine right up until Christmas.
>
> *******
>
> Question: Do you remember Mr. Schemahorn back in Indiana discussing the fact that they put their machine away from Labor Day until May?
>
> Answer: No, I do not. We used this machine up until December, I'm sure, right until Christmas-time."

When in fact the bit paver was never used after November 20 and Mr. Brady knew that he, Mr. Brady was not informed affirmatively of its use in December.

3. Also it is here charged that for the same purpose as of 2 above Mr. Brady was questioned concerning the machine's use and place in January of 1964. On questioning he made an answer intentionally calculated to mislead Judge Jones in that he stated he affirmatively knew the bit paver was not returned to the shops till Juanuary 1964 which statement Mr. Brady made knowing it was not the state of his information in that he knew he did not know when it was returned or knew it was returned in an earlier month, in question and answer as follows:

> "Question: Did Mr. Nerdin ever inform you that the machine was sitting idle during January?
>
> Answer: Oh, I knew the machine was — as a matter of fact, at that time we used it, like I say, up until December, and the weather moved in, and we was hoping to get the project completed in Chesterfield, and we left the machine in Chesterfield. And then we had to take it from Chesterfield back out to the shop, and this was sometime in January. We had to get the machine out of there."

4. That Judge Jones asked concerning other leased machinery but Mr. Brady's answer thereto was perjurous and calculated by Mr. Brady to omit reference to an Alas-Chalmers tractor leased through Mr. Newsom, the same person who effected the "bit paver" lease; said answer purporting to refer to all such leases and said

answer could logically lead Judge Jones to believe Mr. Newsom had no other lease with the county to be enquired into, and that belief could logically mislead Judge Jones in his taking of testimony and in acting on Delmar Larson's allegations.

> Question: What other type of equipment have you leased in the past for the county?
>
> Answer: I think we leased a garbage packer or two of them through the purchasing department. I think we also and are presently leasing from — well, you can check the name. It would be in the records. Leasing some sweepers."

To these allegations the defendant has plead not guilty, in effect denying that they are true.

NOTE: *No effort has been made to correct, as to spelling, punctuation, or gramatical errors appearing in any of the above schedules, as reproduced from the originals of the respective documents.*