

1940

State of Utah v. Frank R. Hill: Brief of Appellant

Utah Supreme Court

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No. 6254

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,
Plaintiff and Respondent
vs.
FRANK R. HILL,
Defendant and Appellant.

Appeal From the Fifth Judicial District Court
Millard County
Honorable Will M. Hoyt, Judge

BRIEF OF APPELLANT

WILLARD HANSON,
Attorney for Defendant
and Appellant.

FILED

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In
The Supreme Court
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State of Utah

STATE OF UTAH,

Plaintiff and Respondent

vs.

FRANK R. HILL,

Defendant and Appellant.

BRIEF OF APPELLANT

PROCEEDINGS UP TO THE TIME OF TRIAL

In October, 1939, complaint was filed before a justice of the peace at Delta, Millard County, Utah, charging the defendant with a felony. The complaint alleged that on the 31st of July, 1939, the defendant "did obtain 112,905 pounds of alfalfa hay of the value of \$536.30 from Dudley and Reed Crafts by means of false pretenses." (See Judgment Roll, p. 1).

A preliminary hearing was had and on October 26, 1939, defendant was bound over to the District

Court for trial. Mr. W. R. Walker, a layman, represented the defendant at this hearing. (J. R. 4).

An information in the exact language of the complaint was filed January 22, 1940. (J. R. 6). The defendant filed a motion to quash the information on the following grounds:

- (1) That the information did not state facts sufficient to constitute a public offense;
- (2) That no facts were set forth in the information from which the defendant could determine with what he was charged;
- (3) That the information did not comply with the provisions of Article I, Section XII of the Constitution of Utah;
- (4) That it did not set forth facts sufficient to enable the defendant to properly defend the action;
- (5) That it did not comply with Sec. 105-11-1, R. S. Utah, 1933;
- (6) That more than one offense was attempted to be charged;
- (7) That the language of the information "by means of false pretenses" was uncertain, indefinite and did not apprise the defendant of anything. The defendant demurred to the information upon the same grounds. (J. R. 9).

Without waiving the motion to quash, demand for a bill of particulars was duly made (J. R. 10). The bill of particulars was filed February 23, 1940. It alleged that on or about July 31, 1939, at Delta, Millard County, Utah, the complaining witness,

Dudley Crafts, had a conversation with the defendant and that Crafts asked the defendant, "Have you enough credits coming in to take care of your debts, because if you haven't I will not sell you the hay?" and that Hill replied that he had sufficient credits due to pay all bills and the amount due Crafts for the hay then about to be purchased; that upon that representation Crafts sold the defendant the hay; that the statement of defendant was false and untrue, which the defendant knew and that the defendant was at the time insolvent (J. R. 12).

After the filing of this bill of particulars, a supplemental motion to quash the information was duly made alleging the same grounds that had been set forth in the original motion; that the bill of particulars was insufficient, and that insufficient facts were set forth to enable the defendant to properly defend the action; that the facts stated did not constitute a public offense and that it could not be ascertained upon what terms the hay mentioned was sold, whether for cash or credit, and if on credit what were the terms of payment. There was also a motion to strike the bill of particulars upon the same grounds as made in the motion.

The case had been duly set for trial for February 23, 1940, at 10:00 A. M. Arguments were duly had on the motions to quash, motions to strike and the demurrer, and the district attorney stated that he would furnish a supplemental bill of particulars, which was filed at 2:00 P. M. of February 23d. After the filing of this supplemental bill of particulars, it was agreed that the supplemental motion filed against the former bill of particulars and information should be deemed to apply to the information as it stood with the supplemental bill of particulars filed. These motions were overruled.

PROCEEDINGS HAD AND EVIDENCE GIVEN AT THE TRIAL.

A trial by jury was waived, a plea of not guilty was entered. (Tr. 6-7). Objection was made by the defendant to the introduction of any testimony on the following grounds: (1) that the court had no jurisdiction of the offense attempted to be alleged; (2) that the information did not state a public offense.

Over the objection of the defendant, the bill of particulars was amended by interlineation in the following particulars: "that the above statements were not made in writing, but were made orally," and at the end of the information, the following was added: "and that the said statements of the defendant were made with the intent to cheat or defraud the said Dudley and Reed Crafts," (J. R. 17).

The same objections were made to the supplemental bill of particulars as amended. These objections were overruled, and the following proceedings were then had:

The State offered the following:

DUDLEY CRAFTS testified that in July, 1939 the defendant was engaged in buying alfalfa hay and grinding it; that on or about the 31st of July he had a conversation over the telephone with the defendant regarding the sale of the hay; that the defendant stated he wanted to buy a stack of hay, and that he (Crafts) replied that the hay belonged to his brother Reed. That that same afternoon the witness went to Hill Bros. Milling Company and told defendant that he had come down to find out just what the exact financial condition of the Hill

Bros. Milling Company was, before he could let him have the hay; that the defendant said :

“Dudley, this time we are going to tell you the truth about it. We have got outstanding accounts, good accounts, to pay every dollar we owe. You understand how it is, we send this stuff out over the country to the poultrymen and stock markets; they are slow pay, but they are good pay. We always get our money.”

Crafts replied that that was all he wanted to know; that if the company had ~~money~~ to pay for the hay, if that was true, then they could have it, and upon that representation he and Reed Crafts sold the hay; that there was something over 50 tons, and that the price was \$536.00; the defendant asked if it would be all right to pay for the hay in thirty days, the first of September, and that Crafts said yes, that would be all right (Tr. 11-12); that within the next two or three days the trucks were sent down and got the hay; that through legal proceedings he had received about \$246.00. (Tr. 14).

That the last business conducted by defendant at Delta was on the 19th of October, 1939; that at that time a committee had been appointed to take over the affairs of the company and this committee had paid some of the bills owing by the company, (Tr. 15); that in October, 1939 he had a conversation with the defendant as to the accounts receivable, and at that time defendant said the company owed approximately \$22,000.00 and had no accounts receivable (Tr.17).

CROSS - EXAMINATION:

On cross-examination, the witness testified that he had been selling hay to Hill Bros. Milling Company a corporation, since June, 1937; that the defendant

was vice-president and manager of the company; that on July 31, 1939 Mr. Hill wanted to buy some hay for the company, and that he, the witness, wanted to find out the financial condition of the company; that he asked Hill how the company stood, and that Hill stated that the company had outstanding accounts to pay every dollar that it owed; (Tr. 19) that Hill requested a thirty days' credit, and stated that the company could pay for the hay in thirty days; that it was because he had been led to believe that the company had enough money to pay every dollar it owed, that he sold the hay to the company (Tr. 20); that Mr. I. N. Parker owned half of the hay and that Reed Crafts owned a half; that he (Crafts) was selling it for them, but had no interest in it (Tr. 21).

We also sold second crop hay but that was a different transaction. The hay involved here was sold on thirty days credit.

“A. There was no payment made prior to September on this because it was not due, he had two accounts, this was on the other account, this payment was made on the second crop.

Q. Was the second crop due?

A. It was due when they got it.

Q. It was all on the first the credit was extended?

A. Yes.

Q. This credit was extended to the company on Mr. Hill's statement, as you have stated?

A. That is true.

Q. How?

A. That is true.

Q. There is no question about that?

A. There is no question about it.

Q. How?

A. No.

Q. On the representation that he made as to the financial condition of the company?

A. On the representation that he made as to the financial condition of the company, that is true."

Afterwards the committee took over the affairs of the company, and Hill promised to turn over the stock of the corporation, but never did it. Crafts brought suit against the corporation on the very account of the sale of this hay. The complaint which is verified by him and the other papers relating to it are on account of this hay. (These papers are marked Exhibit 2 and are part of the record).

Defendant's Exhibit 2, which was received in evidence, consists of the summons, writ of attachment and complaint, affidavit for attachment and execution in the case of I. R. Parker v. Hill Bros. Alfalfa Milling Company, a corporation. This was a suit for the amount due on the hay that it is claimed in this criminal proceeding was obtained by false pretenses. The hay belonged to I. R. Parker and Reed Crafts, and we brought a civil suit for Parker's part of it. Mr. Parker never assigned any of his claim to Reed Crafts and Reed Crafts never assigned any part of his to Mr. Parker (Tr. 27).

Defendant's Exhibit 1 is the statement rendered to Reed and Dudley Crafts showing the amount of hay sold, payments made and the balance due.

DARYL PEARSON testified that from July, 1938 to August of 1939 he worked for Hill Bros. Alfalfa Milling Company, that he was the secretary and treasurer of the company and also kept the books; that he made a financial statement to the board of directors as of the month of June, 1939 (Tr. 28); that he got his information from the books of the corporation. This report was marked plaintiff's Exhibit A and was introduced in evidence over the objection of the defendant. That as to the items machinery and equipment, building and land, he could not tell how they came to have the value that was placed upon them (Tr. 32). That he left the service of the company August 20, 1939 (Tr. 35); that the financial condition of the company was better by between six and eight hundred dollars July 31st than it was June 30, 1939; that he was in the office and heard the conversation between Dudley Crafts and the defendant; that Mr. Crafts wanted to know if the company was in good condition, and Mr. Hill said that the company was; that Mr. Crafts said he did not want to sell the hay to the company unless he was sure he would get his money (Tr. 42).

On cross examination, the witness testified that when Dudley Crafts came to the office, he (Crafts) wanted to know whether the business was in a condition where he wouldn't lose his money, that he said he couldn't afford to lose it and that Mr. Hill stated that the company would be able to pay for the hay in thirty days (Tr. 43).

DUDLEY CRAFTS was recalled and testified that in October of 1939 he told the defendant that when the defendant bought the hay from him (Crafts), the defendant lied to him, and that he knew he was

lying when he said they had enough money to pay every bill they owed, and that the defendant said yes, but that if he had not said that, Crafts would not have sold him the hay (Tr. 45).

It was agreed that Mr. Rulon Hinckley, Mr. Frank Roberts and Mr. Peter Gronning would testify substantially as Dudley Crafts had done as to this last conversation of October, 1939.

The foregoing constitutes all the evidence received at the trial.

Thereupon the State and defendant rested.

The defendant moved for a dismissal of the case because of a fatal variance as to the ownership of the hay; also that there was no evidence offered or given as to the solvency or insolvency of the defendant; that there was no evidence offered or given that the defendant was insolvent at the time the hay was purchased, or at any other time; that no evidence had been given whatever as to the financial condition of the defendant; that the transaction appeared to be wholly with the corporation of which the defendant was the manager (Tr. 47); that no evidence has been given which showed or tended to show that the defendant was guilty.

The court refused to pass on this motion, refused to decide the case and held that the evidence showed that the hay belonged to Reed Crafts and I. R. Parker and that Dudley Crafts had authority to sell it; that there was no evidence as to the solvency or insolvency of the defendant individually (Tr. 48).

The court then stated that if the information referred to a representation as to the financial condition of the corporation and that the hay was sold

to the corporation in reliance upon the financial condition of the corporation, that evidence had been offered to sustain such an information, but if the information referred to a representation as to the ability of the defendant individually to pay for it, *then there was no proof of the defendant's guilt*; that under the provisions of

Secs. 105-21-43 and 105-21-44, Laws of Utah, 1935,

it would be proper to direct that the bill of particulars be amended, or that a new bill of particulars be furnished which sets out the matters that the court has referred to as being proved so there will be no question as to the charge that is made against the defendant;

That proof had been offered showing obtaining property under false pretenses, but that the bill of particulars is not definite enough and does not properly cover the false pretenses which appears have been proved; that the original bill of particulars referred to this statement of the defendant which is alleged to have been a false pretense; that the original bill stated that "Hill replied that he had sufficient credits to pay all bills and the amount due Crafts for the hay;" that the supplemental bill of particulars refers to a statement that "we have enough outstanding accounts to pay every dollar that we owe." The information is silent as to the particulars of the offense so that it could refer to a statement made as to the financial condition of the company or the defendant individually.

He then ordered that the bill of particulars should be amended to show the particulars of the offense which appeared to have been proven and that the defendant could ask for a reopening of the case

so as to offer further evidence if he desired. To all such rulings the defendant duly excepted (Tr. 50).

The court then directed that the bill of particulars be amended to show that on July 31, 1939, Dudley Crafts discussed with the defendant the sale of hay which belonged to Reed Crafts and I. R. Parker, and that Dudley Crafts in the conversation said, "I want to know what your financial condition is before we let you have the hay," and that the defendant stated that the company was in good financial condition and had outstanding accounts receivable sufficient to pay all of its liabilities, and that the statement was false and was then known to the defendant to be false, and that Dudley Crafts relied upon the statement being true and in reliance sold the hay in question (Tr. 51). The State was allowed ten days in which to file this supplemental bill of particulars and on March 4, 1940, filed the said supplemental bill (J. R. 18).

PROCEEDINGS AFTER TRIAL

Afterwards, the defendant was directed to appear before the court on April 9, 1940, which he did. At that time, the defendant again moved the court to determine the case as it was at the time the State and the defendant rested, towit, February 24, 1940, and either declare the defendant guilty or not guilty. This the court refused to do (J. R. 24; Tr. 55). The court then asked the defendant if he desired to plead to the charge since the supplemental bill of particulars was filed; the defendant refused to plead, asserting there was no jurisdiction to hear any matter or proceeding on any pretended

charge set forth in the supplemental bill of particulars filed as of March 4, 1940 (Tr. 56). The court then stated that leave would be granted to the defendant to submit further evidence; the defendant stated that the court had already passed upon the evidence and had made a declaration into the record that the defendant was guilty and that in view of that statement, he felt it would be useless to offer any evidence to change the court's mind; that the court had no power or authority to proceed under the supplemental bill of particulars filed as of March 4, 1940; the court then found the defendant guilty under the supplemental bill of particulars filed as of March 4, 1940, and sentenced the defendant to from one to ten years in the State Penitentiary (J. R. 24; Tr. 57-59).

ASSIGNMENTS OF ERROR

There are 24 assignments of error. The first six relate to the rulings of the court upholding the information and the bills of particulars. Assignments 7 to 17, each inclusive, relate to the admission of evidence. Assignment 18 relates to the refusal of the court to dismiss the case because there was no proof offered as to the guilt of the defendant. Assignments 19 and 21 relate to the supplemental bill of particulars filed March 4, 1940. No. 20 relates to the refusal of the court to decide the case upon the issues upon which the case was tried. Assignments 22 to 24, each inclusive, relate to the court's finding the defendant guilty and in sentencing the defendant to the State prison.

We will first discuss assignments 18, 20, 21, 22, 23 and 24.

ARGUMENT

I

The complaint upon which the defendant was bound over to the District Court and the information upon which he was tried were based on

Sec. 103-18-8, R. S. Utah, 1933.

The information did not set forth what the false pretenses were. The bill of particulars filed February 23, 1940 (J. R. 12) set forth that at the time and place in question in answer to the question put by the complaining witness "Have you enough credits coming in to take care of your debts?" that the defendant replied that he had sufficient credits due to pay all bills and the amount due Crafts for the hay then about to be purchased.

The supplemental bill of particulars which was filed February 23, 1940 (J. R. 17) is practically to the same effect, stating that at the time and place in question Crafts said to the defendant, "I want to know just what your financial condition is before we let you have the hay," and that he could not let the defendant have the hay unless their financial condition was such that they were sure to get their money, to which the defendant replied, "This time, Dudley, we are going to tell you the truth about it. The fact is, we have enough outstanding accounts to pay every dollar we owe."

Upon the information, the bill of particulars and the supplemental bill of particulars the trial was had. The evidence in support of those allegations has heretofore been set forth in considerable detail. Suffice it to say that on the day in question Mr. Crafts agreed to sell to Hill Brothers Alfalfa Milling Co. the hay in question; that Mr. Hill

as manager of the corporation, agreed to and did purchase it with the understanding that the company would be allowed thirty days in which to make payment; that Mr. Hill told Mr. Crafts that the company had outstanding accounts sufficient to pay for the hay within thirty days. In other words, the hay was sold to the company upon the agreement and understanding that the company would pay for it within thirty days. Although the information, aided if it could be by the bills of particulars filed February 23, 1940, charged the defendant with representing that he was financially able to pay for the hay, not a scintilla of evidence was offered as to the financial standing, ability or condition of the defendant.

There was no evidence of any kind what the financial standing of the defendant was; whether he was solvent or insolvent, affluent or penniless, wealthy or poverty-stricken, was not disclosed. Even the court, determined as he was to punish the defendant, said at the conclusion of the evidence, that "it further appears to the court that there is no evidence as to the solvency or insolvency of the defendant." (Tr. 48).

The issue to be determined by the court was whether the representation alleged to have been made by the defendant as to his solvency was true or not true; that was the issue which was tried. The State had alleged that the defendant obtained the hay upon the pretense that he, defendant, was solvent, whereas in truth and in fact the defendant was insolvent and that the representation he made as to his solvency was untrue.

There was a complete failure of proof. The State utterly failed to prove the charge against the de-

fendant, failed to prove that he made any representation as to his financial condition, failed to prove what his financial condition was. The court, having found, as he did, that there was no evidence as to the solvency or insolvency of the defendant, should have immediately found him not guilty and discharged the defendant. Instead, the court appeared determined to find him guilty of a charge upon which he had never been bound over to the District Court, upon which no issue had been made or trial had. The court apparently either did not understand what a failure of proof was, or confused failure of proof with an immaterial variance. The court apparently believed that under

Subdivision 2 of Sec. 105-21-43, Laws of Utah, 1935,

he could order a bill of particulars amended to conform to whatever evidence was given. He took the view that even though there was a complete failure of proof as to the crime charged, that there was evidence as to some other crime, and therefore he could order a bill of particulars filed that would cover the case made by the evidence, and that the defendant could not complain. The court's theory seemed to be that if A was charged with the murder of B and a trial was had upon that issue and the evidence showed that instead of committing murder, A had burned down the house of C, that the State could after trial file a bill of particulars setting forth that A had burned C's house down and that the defendant could then be found guilty of arson.

To the court's mind the original complaint, the original information and the original bill of particulars which attempted to explain, elucidate and clarify the information, were of no consequence. All

the court seemed to be concerned with was what did the evidence show, and even though the evidence showed an entirely different offense from that charged, a bill of particulars after the case had been closed would cover the defect and justice had been done. A most novel proceeding, to say the least. If such were the purpose and intent of the so-called "reformed procedure," let us hope and pray that no more reformations are attempted.

The court apparently overlooked

Sec. 104-14-2, R. S. Utah, 1933, which provides:

"Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only but in its general scope and meaning, it is not to be deemed a case of variance, but a failure of proof."

That statute is directly applicable to the case at bar. The allegations made by the State were unproved. They were unproved in their general scope and meaning. There was a complete failure of proof. The court should have discharged the defendant.

The purchase of goods on the promise to pay in the future is not a false pretense. A false pretense is a misrepresentation as to an existing fact or past event, and not a mere promise to do something in the future or a misrepresentation as to something to take place in the future. See

People v. Green, (Cal.), 133 Pac. 334.
 Taylor v. Territory, (Okl.), 99 Pac. 628.
 State v. Leonard, (Ore.), 144 Pac. 113.
 State v. Lynn, (Wash.), 154 Pac. 798.
 Jacobson v. State, (Ariz.), 209 Pac. 310.

Willis v. State, (Ariz.), 271 Pac. 725.
 People v. Moore, (Cal.) 256 Pac. 266.
 People v. White, (Cal.), 259 Pac. 76.
 People v. Orris, (Colo.), 121 Pac. 163.
 Huckaby v. State, (Okl.), 211 Pac. 525.

In State v. Howd, 56 Utah 527,
 the Supreme Court of this State followed the principle announced in the above cases. In that case the Court held that the representation by the buyer of cattle that he would pay therefor on their arrival, though made without intention to pay, was not a fraudulent representation or false pretense in the legal acceptance of the terms.

“Elements of Offense Charged. Since the accused can be legally convicted only of the offense charged in the indictment or information, it is apparent that the evidence adduced must be in conformity with and be sufficient to sustain the material elements of the crime alleged. Proof of a different offense than that laid in the pleading would be fatal to the prosecution and must necessarily result in an acquittal.”

25 Cyc. of Procedure 552, and cases there cited.

This principle is so well established in the law that further citations are unnecessary.

The court was in error in holding that some crime had been committed. An examination of the evidence shows that the defendant was guilty of no crime whatsoever. If we assume that the defendant misrepresented the financial condition of Hill Bros. Alfalfa Milling Company, of which he was manager, and had obtained the hay in question upon that mis-

representation, still he did not commit any offense. The representation made by the defendant was that the company had sufficient outstanding accounts which could be collected and the hay paid for within thirty days. In other words, the defendant purchased the hay with the understanding and agreement that it would be paid for within thirty days. The agreement was oral. No written representation as to the financial condition of the company was made.

Sec. 103-18-9, R. S. Utah 1933,
provides in effect that where one obtains credit by a false representation in writing respecting the financial condition or ability of himself or those for whom he is acting, to pay, he is guilty of a misdemeanor. It necessarily follows that unless the false representation is written, no offense is committed.

II.

ASSIGNMENT OF ERROR NO. 19

This assignment relates to the error of the court in directing the State to file a supplemental bill of particulars after the case had been tried and submitted.

We will briefly summarize the record under this assignment. The complaint before the justice of the peace charged the defendant with obtaining by false pretenses hay belonging to Dudley and Reed Crafts, the false pretense being that the defendant had represented that he was solvent, when in fact he was insolvent. The information was identical with the complaint. The bill of particulars and the supplemental bill of particulars, both

filed February 23, 1940, detailed the false representations alleged to have been made. Instead of proving the case as alleged, the State proved that the hay belonged to Reed Crafts and I. R. Parker, and that it was purchased by defendant for Hill Bros. Alfalfa Milling Company upon 30-days' credit.

At the conclusion of the evidence and after both the State and defendant had rested, the defendant requested the court to dismiss the case and find the defendant not guilty because there was no evidence which tended to show that the defendant was guilty of any crime whatsoever. Instead of deciding the case as tried and either finding the defendant guilty or not guilty of the crime attempted to be charged in the information, the court directed the district attorney to file within ten days a supplemental bill of particulars alleging that the defendant had obtained hay by false pretenses from I. R. Parker and Reed Crafts, the false pretenses being that the defendant had misrepresented the financial condition of Hill Bros. Alfalfa Milling Company.

At the threshold of the inquiry we are met with three questions: Is a bill of particulars in a criminal case superior and paramount to the information? Can a bill of particulars give a court jurisdiction to determine the guilt or innocence of a defendant of a crime upon which no preliminary examination has ever been waived or had and upon which no information has ever been filed? When the evidence discloses that the offense for which the defendant has been bound over to the District Court and upon which an information has been filed, has not been committed, does the court, because he erroneously supposes that some other offense has been committed, have jurisdiction to

order the filing of a bill of particulars to cover the supposed offense, and then declare the defendant guilty of the supposed offense and sentence him not to a supposed, but to a real penitentiary?

What need is there of a complaint before the justice of the peace, a preliminary examination on that complaint, the filing of an information and a trial upon that information, if they are to be superseded by a bill of particulars charging an entirely new and distinct offense? Asking the question, answers it.

The trial court was not clear as to the correctness of the proceeding which he adopted. He allowed the State ten days in which to file the supplemental bill of particulars; he thereafter ordered the defendant brought before him to plead to that supplemental bill of particulars. Pause for one moment. The information and two bills of particulars had been filed, the defendant had been tried and had moved for a dismissal of the case, moved to have the case determined upon the issues upon which it had been tried; instead of deciding the case, the court ordered a supplemental bill of particulars filed and gave the State ten days in which to file it.

This supplemental bill of particulars was filed on March 4, 1940, and afterwards and in the month of April the defendant was directed to appear before the court for further proceedings *under that supplemental bill of particulars*. He did appear on April 9, 1940, and was requested by the court to plead to that supplemental bill of particulars. Notwithstanding that the defendant had entered a plea of not guilty to the offense alleged in the information, and notwithstanding he had been tried under that information, and notwithstanding that both parties had rested, the court desired the defend-

ant to plead anew to the supplemental bill of particulars which he, the court, had ordered filed. When the defendant refused to plead, the court announced that he would entertain an application on the part of the defendant to reopen the case and present further evidence if the defendant desired. What could it avail the defendant to offer evidence in view of the fact that the court had already pronounced him guilty of the offense? Was the defendant expected to prove his innocence? Did the court desire the defendant to introduce evidence to change the court's opinion? In view of the rulings of the court and the decision that he had already made, it would have been a Herculean task to change the mind of the court. The labor of Sisyphus was easy compared to what the court was asking.

The holding by the trial court that a bill of particulars is superior to and supplants the information was clearly error. This Court held in

State v. Solomon, 93 Utah 70; 71 Pac. (2d)
104,

that the bill of particulars was no part of the information. In

State v. Jessop, 100 Pac. (2d) 969,

this Court held that in a criminal prosecution the function of a bill of particulars is not that of compelling the defendants to aid the prosecution in stating a cause of action. The authorities are uniform that the office of a bill of particulars is to inform the defendant what the State expects to prove, and is no part of the information.

Schaumloeffel v. State, 62 Atl. 803, 804;
102 Md. 470.

Clary v. Commonwealth, 173 S. W. 171, 173;
163 Ky. 48.

In *United States v. Gouled*, 253 Fed. 239, it is held that the office of a bill of particulars is to advise the court, and more particularly the defendant, of what facts he will be required to meet, and when a bill of particulars is made and served, it concludes the rights of all parties and the prosecution must be confined to the particulars specified. See also

State v. Harness, 238 N. W. 430.

Instead of applying the principles of law as laid down in the above cases, the court apparently took the view that a bill of particulars supersedes and supplants the information, and gives the court jurisdiction of the person and offense described in that bill of particulars, even though no preliminary hearing had been held on the offense described therein and no information filed thereon.

The supplemental bill of particulars which the court ordered filed as of March 4, 1940, was a nullity. The court had no authority to order it filed, and the filing of it did not vest the court with any power or authority to take any action under it. The supplemental bill of particulars describes an entirely different offense from that which is pretended to be set forth in the original complaint and information. It attempts to describe one offense, the information another. Assume that the defendant should again be charged with the offense set forth in his original complaint and the information filed thereon; as a defense to that action, could he plead that he had been once in jeopardy and had been found guilty, and as evidence of former jeopardy set up the conviction under that supplemental bill of particulars? If the State should desire to retry the defendant on the charge that he had obtained hay from Dudley and Reed Crafts by falsely repre-

senting his financial condition, would a plea of once in jeopardy lie, and would that plea be sustained by the defendant's showing that he had been convicted of obtaining hay from Reed Crafts and I. R. Parker by falsely representing the condition of Hill Bros. Alfalfa Milling Company? The question illustrates very clearly the error of the court in directing the supplemental bill of particulars to be filed. The court seemed to have one thing in mind only, and that was by what method could he find the defendant guilty of some offense. Although the court was perfectly satisfied that the offense alleged in the information had not been proven, he was determined that the defendant should be found guilty of something, even though that *something* was entirely distinct and apart from the offense for which the defendant had been charged and for which he had been tried. The court justified his action under the reformed procedure. How this Court can sustain the lower court under the reformed procedure or any other procedure we are at a loss to understand. The action of the trial court can only be sustained by disregarding fundamental principles of law and wiping out sacred safeguards which have come down through the ages for the protection of individual rights.

The reasoning of the court in directing a supplemental bill of particulars to be filed is most unique. The court, after finding that there was no evidence as to the solvency or insolvency of the defendant individually, said:

“It therefore appears that if the information in this case referred to a representation as to the financial condition of the corporation and that the hay was sold to the corporation in reliance upon the corporation being in good financial condi-

tion or able to pay all of its then outstanding accounts, that the information is sustained by the proofs offered. But if the information refers to a representation as to the ability of the defendant individually to pay for it, then there is no proof." (Tr. 48).

The court then said it would be proper under the provisions of

Sec. 105-21-43 and 105-21-44

to direct that the bill of particulars be amended, or that a new bill of particulars be furnished which sets out the matters that the court had referred to as being proved so that there would be no question as to the charge that is made against the defendant; that proof had been offered showing obtaining property under false pretenses,

"but that the bill of particulars (under which the case was tried) is not definite enough and does not properly cover the false pretenses which it appears have been proved the information is silent as to the particulars of the offense, so that it could refer to a statement made as to the financial condition of the company or the defendant individually." (Tr. 49).

The court thus disregarded both bills of particulars which had theretofore been filed and both of which set forth the false representations as being that of the ability of the individual to pay. They were of no more consequence to the court. If the information was as duplicitous as the court indicated it was, and that under it proof could be made as to the financial ability of the defendant to pay or the financial ability of the corporation to pay, just as the State saw fit, then he should have sustained the motion to quash.

III.

ASSIGNMENTS 1 TO 6

Assignments of error 1 to 6, each inclusive, relate to the rulings of the trial court in overruling the motion to quash the information and in refusing to quash the bills of particulars filed February 23, 1940, and in overruling the defendant's objection to the introduction of evidence because the court did not have jurisdiction of the offense pretended to be charged, and in permitting the State to amend the first bill of particulars after the trial had begun (Tr. 2 to 9; J. R. 20).

The defendant insisted before the trial court that the complaint before the justice of the peace did not state a public offense, also that the information did not state a public offense. The defendant still insists that no offense is stated either in the complaint before the justice of the peace nor in the information filed in the District Court. The information is under the so-called "Reformed Procedure," but the reformed procedure cannot change the fundamental law. Any statute changing the fundamental law is clearly unconstitutional.

A bill of particulars cannot be used to aid the information in stating a public offense.

Article I, Section XIII of the Constitution
of Utah,

provides that offenses which had theretofore been prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate. Information, as used in the Constitution at the time it was adopted, means an accusation in writing in form and substance like an indictment for the same offense, charging a person with a public offense. See

Sec. 4606, R. S. Utah 1898.

Under Article I, Section XII of the Constitution of Utah,

an accused is guaranteed the right to demand the nature and cause of the accusation against him and to have a copy thereof. The information must be in such detail as will furnish the accused with a description of the charge against him sufficient to enable him to make a defense; it must be sufficiently specific to avail him of the right upon conviction or acquittal to protect him against a further prosecution for the same offense.

As heretofore referred to, the

Constitution of Utah, Article I, Section XII, provides that the accused shall have the right to demand the nature and cause of the accusation against him and to have a copy thereof.

The Constitution of the United States, Amendment VI,

provides that the accused has the right "to be informed of the nature and cause of the accusation" against him.

It is seen that the two Constitutional provisions are almost identical. This language has been frequently construed by the Supreme Court and Federal Courts of the United States to mean that the indictment, here the information, must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged, and that every ingredient of which the offense is composed must be accurately and clearly alleged. The cases so holding have been heretofore cited.

It is very clear that a bill of particulars is no part of an indictment or information.

State v. Solomon, 93 Utah 70; 71 Pac.
(2d) 104

State v. Jessop, (Utah), 100 Pac. (2d) 969.

Wright v. People, (Colo.), 91 Pac. (2d) 499.

People v. Westrup, (Ill.), 25 N. E. (2d) 16.

United States v. Lynch, 11 Fed. (2d) 298.

Jarl v. U. S., 19 Fed. (2d) 891.

State v. Gilbert, (N. H.), 194 Atl. 728.

United States v. Tubbs, 94 Fed. 356.

This naturally follows from the well known maxim that what is required to appear of record must be shown by the record and by the right record. Hence, when the Constitution provides, as heretofore referred to, that the accused has the right to demand the nature and cause of the accusation against him, which, under similar provisions of the Constitution of the United States has so frequently been construed to mean, that the indictment or information itself must contain with clearness and certainty every ingredient of which the offense is composed. it needs no argument to show that the legislature may not provide that such ingredients may be stated or furnished by a bill of particulars, or by some other document, or by some other method other than or different from a compliance with the Constitutional provision. It is no doubt contended by the State that in view of

Chap. 21, Sec. 105-21-9, Laws 1935,

that whatever defect there may be in an information or indictment in not sufficiently stating the offense therein, may be cured or avoided by a bill of particulars, which section provides that when an information or indictment charges an offense in accordance with the provisions of

Sec. 105-21-8,

but fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense *or give him such information as he is entitled to under the Constitution of this State*. the court may require or direct the prosecuting attorney to furnish the defendant a bill of particulars. The cases heretofore cited and referred to, and especially the case of

Goldberg v. United States, 277 Fed. 211.
that the facts must be set forth in the indictment or information which the pleader claims constitute the alleged transgressions so distinctly as to advise the accused of the charge which he has to meet and to give him a fair opportunity to prepare his defense, and *to enable the court to determine whether the facts as there stated are sufficient to support a conviction*, and that the facts as so stated may enable the accused to avail himself of a conviction or acquittal in defense of another prosecution for the same offense.

State v. McKenna, 24 Utah 317; 67 Pac. 815.

State v. Topham, 41 Utah 39; 123 Pac. 888.

State v. Gesas, 49 Utah 181; 162 Pac. 366.

State v. Steele, 67 Utah 1; 245 Pac. 332.

State v. Hale, (Utah), 263 Pac. 86

State v. Lund, 75 Utah 559; 286 Pac. 960.

Lynch v. United States, 10 Fed. (2d) 947.

Goldberg v. United States, 277 Fed. 211.

United States v. Hess, 124 U. S. 483; 8 S. Ct. 571; 31 L. Ed. 516

Armour Packing Co. v. United States, 153 Fed. 1; 82 C. C. A. 135; 14 L. R. A. (N. S.) 400.

Floren v. United States, 186 Fed. 961; 108 C. C. A. 577.

Miller v. United States, 133 Fed. 337, 341; 66 C. C. A. 399, 403.

Naftzger v. United States, 200 Fed. 494.
502; 118 C. C. A. 598, 604.

United States v. Britton, 107 U. S. 665;
2 Sup. Ct. 512; 27 L. Ed. 520.

Etheredge v. United States, 186 Fed. 434;
108 C. C. A. 356.

Winters v. United States, 201 Fed. 845, 848;
120 C. C. A. 175, 189.

Horn v. United States, 182 Fed. 721; 105
C. C. A. 163, 167.

Fontana v. United States, 262 Fed. 283.

United States v. Cruikshank, 92 U. S. 542;
23 L. Ed. 588.

Where the statute itself directly and sufficiently prescribes the ingredients of the offense, an information or an indictment in the language of the statute ordinarily is a sufficient compliance with the Constitutional provision. But where the statute defines the offense only in generic terms, then to satisfy the Constitutional provision, the information or indictment must go further in stating the offense than by merely using the language of the statute, and in which case, the information or indictment must descend to the particulars and to a statement of all of the elements and ingredients of the offense.

State v. Jessop, *supra*, and other cases
heretofore cited.

By the provision of the code of criminal procedure as provided by Session Laws, 1935, and by

Sec. 105-21-47,

short forms of informations and indictments are specified. Among other things, it is there provided that an information charging murder is sufficient merely to state that "AB murdered CD," without stating anything else as to time, place or means of

the commission of the offense, or any of the ingredients of murder. So, too, charging that "AB embezzled \$50.00 of CD" was a sufficient charge of embezzlement. That a charge, that "AB obtained an automobile from CD by means of false pretenses," was a sufficient charge to constitute the offense of false pretenses.

It is apparent that such informations or indictments in no sense are a compliance with the constitutional provision, that by the indictment or information itself, the accused is entitled to demand the nature and cause of the accusation against him which, as heretofore shown and as a similar provision construed by the Supreme Court of the United States, means that the information or indictment itself must set forth the offense with clearness, with all necessary certainty as to every ingredient constituting the offense. It is very clear that such an information or indictment as referred to in

Sec. 105-21-47, Laws of 1935,
does not give the accused such information as he is entitled to under the Constitution.

The question then is: May such information when given by a bill of particulars constitute a compliance with the Constitutional provision? If it be considered and as determined by the Supreme Court of this State and in the cases heretofore cited, that the bill of particulars is no part of the indictment or information and can in no sense aid an information or indictment itself defective in not sufficiently stating the essential elements and ingredients of the offense, then it is very clear that the information here, stated in mere generic terms and charging merely as indicated by the short form of information as provided by Session Laws of 1935, is wholly insufficient and not in compliance with the Constitutional provision.

We recognize that in some jurisdictions it has been held that a bill of particulars may aid an information or indictment, though defective in substance as well as in form. But under jurisdictions having Constitutional provisions as in our Constitution, as to the requirements of an information or an indictment, the great weight of authority is that an information or indictment defective in substance cannot be aided by a bill of particulars. But whatever conflict there may be upon that question, we think it set at rest by the decisions of the Supreme Court of this State, that a bill of particulars is no part of an information or indictment and hence, cannot aid an information or indictment which does not comply with the requirements of the Constitution.

However, in addition to all this and as heretofore argued, the bill of particulars authorized and directed by the court to be filed by the prosecuting attorney after the case was tried and submitted for decision, shows a statement of an offense wholly separate and distinct from that charged in the information. Let it be noticed that the court here did not grant leave nor direct the prosecuting attorney to file an amended information in accordance with the bill of particulars ordered and directed. And had the court done so, it is very clear that the information could not be amended in such particular, for to do so, would permit the information to be amended as to a separate, independent and distinct offense, and it is clear that what is charged in the information and what is presented by the bill of particulars in question, constitute two separate and distinct offenses.

In the next place, the accused is required to plead to an information or an indictment. He is not required to plead to a bill of particulars. The court

has no authority to require a plea of the accused otherwise than to an indictment or information, and when the court thus required the accused to plead to the bill of particulars, the court clearly transcended its authority. That is the effect of the holding of this Court in the case of

State v. Solomon, supra.

Lastly, by Laws of 1935 relating to the code of criminal procedure and by

Sec. 105-23-3,

it is provided that a motion to quash is available, among other things, and as stated in subdivision (e) thereof,

“that it appears from a bill of particulars furnished under the provisions of Sec. 105-21-9 that the particulars stated do not constitute the offense charged in the information or indictment,”

etc., and as heretofore urged, the bill of particulars ordered and directed by the court, after trial on the information and a submission of the case, stated particulars constituting an offense other than or different from that charged in the information, and no leave asked and none granted, to permit an amended information, and as heretofore urged, an amended information could not even be granted substituting one offense for another.

IV.

ASSIGNMENTS 12 AND 13

The court erred in admitting plaintiff's Exhibit A and in permitting the witness Pearson to testify as to the financial condition of the corporation.

We will group together Assignments Nos. 12 and 13, covering the above errors. Exhibit A purports

to be a report of the financial condition of Hill Bros. Alfalfa Milling Company as of June 30, 1939. It was compiled by Mr. Pearson, who at the time of trial, was a bank teller at Nephi. From July, 1938, until the first of June, 1939, when Hill Bros Alfalfa Milling Company was organized, Pearson was in the employ of Hill Brothers as bookkeeper (Tr. 28). From June 1, 1939, until about the 20th of August, 1939, he continued as bookkeeper for the corporation and was also secretary-treasurer of the corporation (Tr. 28-29). Who Hill Brothers were is not shown. The only reference we have to any such parties is the statement of the witness Pearson that he was bookkeeper for them. No presumption can be indulged in that the defendant was one of them. As secretary-treasurer of the corporation, Pearson was supposed to keep the books and get out financial statements. The first sheet in the report is the balance sheet, the next is the profit and loss statement, and the last shows how the money was spent. The report was made some time in July and was intended to show something of the affairs of the company as of June 30, 1939, as will be shown by the sheet bearing the signature of Pearson (Tr. 30).

Certain items, towit, machinery and equipment, buildings and land, are shown under fixed assets on the first sheet of the report. Just how the valuation of those items was arrived at was not determined (Tr. 32).

This report, over objection of the defendant, was received in evidence; the witness was then asked, "Now, what was the financial condition of the company on July the 31st, 1939, in comparison to this date of June 30, 1939, when this statement was gotten out?" to which the witness replied that it was

better July 31st than it was June 30th by between six and eight hundred dollars.

The books of the corporation were not produced, although they were in the possession of the sheriff of Millard County.

Exhibit A was erroneously admitted for several reasons. In the first place, the financial condition of Hill Bros. Alfalfa Milling Company was not an issue. There had been no claim at that time that there had been any representation as to the financial standing of the corporation. The only issue was as to the representations made and financial condition of the defendant personally.

Next, the proper foundation was not laid for the admission of Exhibit A. We believe it is elementary that before books of account can be admitted that it must be shown that they were correctly kept and that the items in there are true, and that they are relevant to the issue.

An account book of original entries, fair on its face and shown to have been kept in the usual course of business, is admissible in evidence *in favor of the party by whom it is kept*. Ordinarily a person's books of account cannot be used as evidence upon issues between third persons. The entries in such books as to third persons are *res inter alios acta* and may not be introduced unless a foundation is laid for their admission on special grounds.

10 R. C. L. 1176.

In Notes 53 L. R. A. 513, the annotator says that the general rule is that a person's books of account cannot be used as evidence upon issues between third persons; that entries in such books as to such third persons are *res inter alios acta* and cannot be used against persons not parties to them. Citing cases.

The corporation, Hill Bros. Alfalfa Milling Company, is not a party to this action. The books and records of the corporation themselves could not be put in evidence against the defendant Hill. Nor is it shown that he was a party to or connected with the transactions concerning the entries of the books of the corporation. If the books of the corporation were not themselves admissible in evidence, then it is clear that no copy or statement of the books would be admissible. Though the defendant Hill had been a party to or connected with the transactions concerning the entries of the books and the statement made from the books and put in evidence, still the books or the statement would be inadmissible, for that to be admissible in any case and as stated in a leading case.

Radtke v. Taylor, 105 Ore. 559; 210 Pac
863.

and particularly,

27 A. L. R. 1423,

the books must appear to have been honestly kept, that they must be books of original entry, that the entries must have been made in the regular course of the entrant's business or employment, that the entries must have been fairly contemporaneous with the transactions entered, that the entrant must verify the correctness of the books, or his absence be accounted for and that the entrant must know of his own knowledge the truth of the transaction which he enters or his testimony be supplemented by one having knowledge. None of these requirements were shown, nor indeed was there any foundation laid for the admissibility of the books in evidence, or with respect to a statement made from the books, or what books or the nature or character thereof that were examined by the author making the statement, or as to what knowledge he had of or

concerning the nature or character of the books examined by him.

It was from this report, Exhibit A, that the court concluded that the defendant had made false statements concerning the financial condition of the corporation at the time the hay in question was purchased. Without this report, there was no evidence of any kind whatever as to the financial condition of the corporation. Manifestly, the admission of this evidence was prejudicial to the defendant. What has been said of Exhibit A applies also to the question asked witness Pearson as to the financial condition of the company as of July 31, 1939.

There are other errors assigned relating to the admission of evidence, especially in admitting the testimony of Mr. Crafts, Assignment of Error 16, and Rulon Hinckley, Frank Roberts and Peter Gronning, Assignment of Error 17. These witnesses testified to what the defendant said to them in October, 1939, concerning the financial condition of the company on July 31, 1939, when the hay was purchased. This evidence was offered on the theory that it was an admission by the defendant. As we have heretofore said, the financial condition of the corporation was not in issue and anything said concerning the financial condition of the corporation was irrelevant and immaterial. Further, the corpus delicti had not been proven and never was proven: hence, the admission of this testimony was plainly error.

For the manifest reasons stated in this brief, the case should be reversed with directions that the same should be dismissed and the defendant released.

Respectfully submitted,
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Attorney for Appellant.