

1941

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Utah v. Hill*, No. 6254 (Utah Supreme Court, 1941).
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In the Supreme Court
OF THE
State of Utah

STATE OF UTAH,
Plaintiff and Respondent

vs.

FRANK R. HILL,
Defendant and Appellant

} No. 6254

BRIEF OF RESPONDENTS

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FILED

FEB 25 1941

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} No. 6254

BRIEF OF RESPONDENTS

PROCEEDINGS PRIOR TO AND AFTER TRIAL

On the 19th day of October, a Complaint was filed before a Justice of the Peace at Delta, Millard County, State of Utah, charging the defendant, Frank R. Hill, with committing the crime of obtaining property by false pretense. The charging part of said Complaint reads as follows:

“That the said Frank R. Hill at the time and place last aforesaid did obtain 112,905 pounds of alfalfa hay of a value of \$536.30 from Dudley and Reed Crafts by means of false pretense.”

A preliminary hearing was held before the Justice of the Peace on October 26, 1939, and the defendant was

held to answer the charge in the district court. Thereafter, on the 22nd day of January, 1940, an information was filed in the district court of the Fifth Judicial District in and for Millard County, State of Utah, by the District Attorney. Said information charges the offense in the form prescribed by Chapter 118, Laws of Utah, 1935, as follows:

“That the said Frank R. Hill on or about the 31st day of July, 1939, at Delta, County of Millard, State of Utah, did obtain 112,905 pounds of alfalfa hay of a value of \$536.30 from Dudley and Reed Crafts by means of false pretense.”

The defendent thereupon filed a motion to quash the information and a demand for a Bill of Particulars. The motion to quash was overruled, and the State was ordered to furnish a Bill of Particulars, which Bill of Particulars was furnished on February 23, 1940. Thereupon the defendant filed a supplement motion to quash, which the court denied. The defendant thereupon demanded a further and additional Bill of Particulars, which was ordered by the court, and was filed by the State on February 23, 1940. Following the trial of the action, the Court, by virtue of the authority granted by sub-section 2, Section 105-21-43, Revised Statutes of Utah, 1933, as enacted by Chapter 118, Laws of Utah, 1935, directed the Bill of Particulars to be amended in certain particulars to conform to the evidence presented at the trial of the case. An amended or supplemental Bill of Particulars was filed on

the 4th day of March, 1940, which supplemental Bill of Particulars reads as follows:

"The State of Utah herewith submits the following as a Supplemental Bill of Particulars in the above entitled action:

"That on or about the 31st day of July, 1939, at Delta, Millard County, Utah, Dudley Crafts discussed with the Defendant, Frank R. Hill, the sale of certain hay then belonging to Reed Crafts and I. R. Parker, which Dudley Crafts was then authorized to sell for the said owners; that at that time the defendant was the Vice-President and manager of the Hill Brothers' Alfalfa Milling Company, a corporation. That in the course of the said discussion Dudley Crafts said to the defendant, 'I want to know what your financial condition is before we let you have the hay,' and said further in substance 'that they absolutely would not let the defendants company have the hay unless its financial condition was such that they (Crafts) were sure to get their money.' That in answer to the above the defendant said, '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.' That the defendant said in substance that the Company, the said Hill Brothers' Alfalfa Milling Company, was in good financial condition, and had enough outstanding accounts receivable to pay all its obligations.' That the above statement was false and untrue and said company was then insolvent all of which defendant well knew; that Dudley Crafts relied upon the statements of the defendant as aforesaid and sold to the said Hill Brothers' Alfalfa Milling Company 112,905 pounds of hay belonging to Reed Crafts and I. R. Parker for the sum of \$536.30; that the same has not been paid except the sum of approximately \$246.00; that

the said statements of defendant were false and untrue, which defendant well knew, and that the same were made with intent to cheat and defraud Dudley and Reed Crafts and I. R. Parker.”

ELLIS PICKETT.

EVIDENCE GIVEN AT THE TRIAL

The State offered the following evidence at the trial of the case:

Dudley Crafts testified that on or about the 31st day of July, 1939, the defendant telephoned him and told him that he wanted to buy a particular stack of hay which, Crafts informed him, belonged to his brother, Reed Crafts, whom he would have to see about the sale. Later the same day a conference took place in the office of Hill Brothers' Alfalfa Milling Company at Delta, the defendant, Daryl Pearson and Dudley Crafts being present.

The testimony as to this conversation is as follows:

“Q. Now, will you state what conversation you had with him at that time with reference to the sale of hay to the defendant?

“A. I told him that I had come down there to find out just what the exact financial condition of the Hill Brothers' Milling Company was before we could let them have the hay. I told him that I had to know that before I could let him have the hay, because we couldn't afford to lose it.

“Q. When you said ‘we’ whom did you mean?

“A. My brother and I.

“Q. All right, what did he say?

“A. Well, he says, ‘Dudley, this time we are going to tell you the truth about it,’ he said, ‘we

have got outstanding accounts, good accounts, to pay every dollar we owe.' And he went on, he said, '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.' I told him that is all we wanted to know, that they had property to pay for the hay, if that was true, they could have it.

"Q. Upon those representations state whether or not you and Reed Crafts sold the hay to him.

"A. Yes, we sold it.

"Q. How much hay?

"A. I don't remember the exact amount over, something over fifty tons.

"Q. Do you know the total amount for which you sold the hay?

"A. \$536 and some odd cents.

Crafts stated that the defendant took his own truck and went down and got the hay during the next three days, but that it was not paid for until attachment proceedings were instituted, at which time approximately \$246 were recovered.

The State then called Daryl H. Pearson who testified that he had been a bookkeeper for Hill Brothers' Alfalfa Milling Company between about July, 1938, and August, 1939, and that he had served also as secretary and treasurer of the corporation, and in this capacity he had kept the books and prepared financial statements of the corporation. He produced a financial statement of the corporation prepared by himself on the 30th of June, 1939, which statement was offered and received in evidence.

This statement shows that on June 30, 1939, the accounts receivable of the Hill Brothers' Alfalfa Milling Corporation included advances to employees and officers of the corporation, totaled \$3,664.78, whereas, the accounts payable, including advances from brokers, amounted to \$14,605.14. In addition to this, the statement shows notes payable in the amount of \$1,867.28. Pearson was then asked what was the financial condition of the company on July 31, as compared with June 30, and testified as follows:

"A. Well, I should say it was better July 31st than it was June 30, 1939.

"Q. Could you give the court any idea how much better it was?

"A. Well I would say between six and eight hundred dollars better.

"Q. Now of what assets would these additional assets consist of?

"A. Well, it would, I imagine it would show more of a reduction in the liabilities than it would increase in the assets".

Dudley Crafts was then recalled and examined on behalf of the State and testified that at a meeting with the defendant on the evening of October 18, 1939, in Crafts' office, which meeting was attended by Peter Gronning, Frank Roberts, the defendant and Crafts, a discussion was had regarding the financial condition of Hill's company on July 31. In regard to the conversation Crafts testified:

"A. Why, we talked about a great many things, but particularly with respect to this matter now, I told him that when he bought the hay from me that he lied to me, that he knew he lied when

he said they had enough outstanding accounts to pay every bill they owed. He says: 'Yes, but if I hadn't said that you wouldn't have sold me the hay.' "

A stipulation was then entered into by counsel to the effect that if Rulon Hinckley, Frank Roberts, and Peter Gronning were called to testify they would testify substantially as Dudley Crafts testified with respect to this conversation.

ARGUMENT I

In his first argument in support of his Assignments of Error 18, 20, 21, 22, 23, and 24, the defendant claims that the State has neither alleged in its information or Bill of Particulars, facts sufficient to constitute an offense, nor does the evidence offered at the trial show the commission of a public offense of any type whatever.

In making his argument, the defense ignores entirely the amendments in the Bill of Particulars which were ordered by the Judge following the trial. Whether or not the court was in error in directing these amendments to be made will be considered hereafter in answering defendants Assignment of Error, No. 19.

For the purpose of the present argument, let us consider the amended Bill of Particulars together with the information in determining whether or not a public offense was charged, and if so whether the evidence introduced at the trial was sufficient to prove the commission of such an offense. The information follows the form prescribed by

Sub-section (2) of Section 105-21-43, Revised Statutes of Utah, 1933, as enacted by Chapter 118, Laws of Utah, 1935, which Sub-section provides as follows:

“The following forms may be used in cases in which they are applicable.

* * * * *

“A. B. obtained an automobile from C. D. by means of false pretenses.”

The information in this case alleges “That the said Frank Hill on or about the 31st day of July, 1939, at Delta, Millard County, State of Utah, did obtain 112,905 pounds of alfalfa seed of the value of \$536.30 from Dudley and Reed Crafts by means of false pretenses.” The amended Bill of Particulars sets forth the nature of the false pretenses which were, in effect, that the defendant obtained the hay in question from Dudley Crafts for Hill Brothers’ Alfalfa Milling Corporation, a corporation, of which he was vice-president and general manager, by representing orally to said Dudley Crafts that said Corporation had enough outstanding accounts to pay every dollar they owed.

The Bill of Particulars further alleges that said representation was untrue as the company was at that time insolvent, all of which the defendant well knew, and that the representations which he made were made with the intent to cheat and defraud Dudley Crafts, through whom the hay was purchased, and Reed Crafts and I. R. Parker, who owned the hay.

The evidence presented at the trial in support of the allegations thus made showed that the defendant approached

Dudley Crafts relative to purchasing the hay, and that Dudley Crafts informed the defendant that unless the company was in good shape financially they could not have the hay. The evidence further shows that the defendant represented that they had outstanding accounts sufficient to pay every dollar which they, the corporation, owed. The financial statement which was offered and accepted in evidence showed that far from having enough accounts to pay everything they owed, the corporation was actually insolvent; its accounts totaling \$3,664.78, whereas, the corporation owed \$16,472.42 on June 30th when the last financial statement was rendered. According to the testimony of the Secretary-Treasurer and bookkeeper of the corporation, it had no more assets, and only \$600 to \$800 less in liabilities a month later when the representation complained of was made.

The evidence further showed that the defendant later in the presence of Dudley Crafts and three other witnesses, admitted that he had lied regarding the financial standing of the Company at the time he made the representations upon which he obtained the hay from Dudley Crafts, and further admitted that he made the representations because he knew that if he told the truth Crafts would be unwilling to let him have the hay.

Defendant bases most of his first argument upon the proposition that it is not a fraudulent misrepresentation within the meaning of this statute for the defendant to promise to pay for the hay and then fail to do so, and

he cites numerous cases in support of this proposition. The State agrees that these cases state the law on the subject, and that a mere failure to keep a promise to pay does not constitute obtaining property by false representation even though the person obtaining the property had agreed to pay.

This argument of the defendant and the cases cited in support thereof, however, have no bearing on the case at issue. The State does not base its case upon the fact that the defendant failed to keep his promise to pay for the hay. The failure to pay has no connection with the case except as to the evidentiary bearing it may have upon the question of good faith and intent to defraud.

The defendant in his brief says: "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."

The defendant here did make a misrepresentation as to an existing fact, namely, the financial condition of the Hill Brothers Alfalfa Milling Corporation, and it was on the basis of this false representation that he obtained the property in question. This property would not have been turned over to him on his mere promise to pay, as he well knew, as is evidenced by his admission made on the 18th of October, 1939.

25 CJ 594 says in this regard:

"While the crime is not committed by mere false promise without a false statement of fact, a

false statement of fact may become effective only by being coupled with a false promise. When this is the case, the statement of fact and the promise may be considered as together constituting the false pretenses and a conviction may follow, or, if the statement of fact and promise can be separated and prosecutor relied in part on the former, the promise may be destroyed and accused be convicted on the statement of fact."

See *Donohue vs. State*, (Arkansas) 26 S.W. 226; *People vs. Bowman*, (California) 142 Pac. 495; *Watson vs. People*, 87 New York, 561; *State vs. Hollingsworth*, (Iowa), 109 N.W. 1003, *Commonwealth vs. Drew*, (Mass.), 27 N.E. 593.

The defendant cites the case of *State vs. Howd*, 56 Utah 527, in support of his position. This case, however, has no bearing upon the case at issue. In that case Howd purchased cattle from one Foy, and promised to pay for them in the future.

There was no evidence of any misrepresentation as to a present or past fact. The court there stated, "All that can be gathered from the record of the testimony is to the effect that defendant purchased Foy's cattle at Thompson, Utah; that he there paid to Foy a part of the purchase price, and promised to pay the balance upon the arrival of the cattle at Grand Junction, Colorado, a promise to be performed in the future."

In this case, however, we have a definite misrepresentation as to a *present existing fact*.

The Court in *State vs. Howd* sets out four elements

which must be proved in order to convict a person of obtaining property by false pretenses. These are:

- “1. There must be an intent to cheat or defraud.
- “2. An actual fraud must be committed.
- “3. It must be a fraudulent representation or false pretense for the purpose of perpetrating the fraud, and obtaining the property of another.
- “4. The fraudulent representations or false pretenses must be the cause which induced the owner to part with his property.”

In regard to the first element, we can determine the defendant's intention to cheat or defraud only by his actions in the matter. We know from the evidence which is not contradicted that he did make false statements as to the financial condition of his company, that he did obtain property thereby, and that he failed to pay for such property. As a man is presumed to intend the ordinary consequences of his wrongful act, and as the consequence of this act was to cheat and defraud the owners of the hay, there can be no question, especially in view of the defendant's admissions that there was, on his part, an intent to cheat or defraud.

The Supreme Court of Wisconsin in *State vs. Hintz*, 229 N.W. 55, said:

“While the intent to defraud is an essential element of the crime of obtaining property by false pretenses and must be proved by the State, it need not be proved by direct and positive evidence. It may be inferred from all the circumstances proved. Where all the other elements of the crime were proved, it is generally held that the intent to defraud may be inferred from the circumstances proved.”

See *State vs. Loesch*, 180 S.W. 875; *State vs. Cooper*, 151 N.W. 835; *State vs. Hooker*, 170 Pac. 374.

In regard to the second element, the evidence shows that there was an actual fraud committed in that by a false statement, which the defendant well knew was false, he obtained property of another, for which property he did not pay.

In regard to the third element, the fraudulent representation stands out clear in the evidence and requires no comment. Nor is there any doubt as to the fourth element, for Crafts stated in his testimony that he would not part with the hay unless the financial condition of the company was acceptable, and the defendant also testified that he knew that Crafts would not part with the hay unless he falsified as to the financial standing of the company. The evidence introduced in the trial clearly shows, therefore, that a public offense was committed.

“False representation as to financial ability or pecuniary condition of the accused or of a third person are within the statute in its usual form unless they are mere expressions of opinion.”

25 *Corpus Juris* 596.

See *People vs. Jordan*, (California), 4 Pac. 773; *State vs. Timmins*, 58 Ind. 98. *State vs. Donaldson*, 148 S.W. 79.

Defendant further contends in this section of his argument that even if the evidence does show the commission of a public offense, it is an entirely different offense from that charged in the information, and so the defendant should not have been convicted.

The argument to sustain this position appears rather strained. The crime with which the defendant was charged was the crime of obtaining property by false pretenses, and the crime of which he was convicted was the crime of obtaining property by false pretenses. The defendant's argument that under this theory a person could be charged with murder and found guilty of arson is without ground. The variance between the information and the first Bill of Particulars and the evidence introduced at the trial were merely as to minor matters not going with the essence of the offense. This matter, however, will be considered in greater length in answering defendant's Assignment of Error No. 19 which was to the effect that the court did not have the right to order the Bill of Particulars amended to conform to the evidence.

The defendant in his argument maintains that because the Legislature by Section 103-18-9, Revised Statutes of Utah, 1933, made it a misdemeanor to make a false statement in writing respecting the financial condition or ability to pay of himself or any other person, firm or corporation in whom he is interested, it is by implication provided that no oral statement is actionable even though it might come within the terms of Section 103-18-8, Revised Statutes of Utah, 1933. This contention appears to be highly illogical. Because the Legislature has seen fit to pass a specific statute does not mean that all cases which have a similarity in any respect to the specific case would be removed from the operation of the general statute. The defendant would, no doubt, contend under this theory that if

the Legislature passed a specific act making it a felony for a person to kill another person with a knife that it would not be actionable to kill a person with a gun in spite of the general homicide statute.

It does not appear logical that it was ever the intention of the Legislature to permit such rascality as has been practiced by the defendant in this case to go unpunished.

This point is covered in *Commonwealth vs. Lavine* (Mass.), 181 N.E. 851, at page 856. The court said:

“The defendant’s contention that the statements about the corporation were, at most, only false representation with regard to the credit of the Massachusetts Thread Mills, Incorporated, and so under G. L., c 266, No. 35, since they were not in writing do not support an indictment, is not sound. That statute furnishes no protection to one who makes false statements as to the character, credit and ability of another in order that the speaker may obtain something for himself through reliance placed upon the misrepresentation.”

The Legislature, no doubt, placed the provision in regard to written misrepresentation in the statute because of the fact that falsification of facts in written applications for credit are quite frequently made by persons applying for credit at stores, and it was believed that the felony penalty was too severe in such cases, as such mercantile institutions have ample opportunity to check credit ratings. The worst frauds, however, are usually perpetrated not by written misrepresentations but by word of mouth. O. Henry’s Gentle Grafter and the legendary characters who sell “gold bricks”

at county fairs and the Brooklyn Bridge to New York visitors as well as the more realistic swindlers who sell watered stock and citrus groves which, at high tide, prove to be below water level, practice their "art" by means of oral representations.

Certainly, it could not have been the intention of the Legislature to permit persons to make such representation with immunity and the law should not be so construed.

22 Am. Juris 452 says:

"It would certainly seem, however, that a law which punishes a man for obtaining property by means of willful misrepresentation or deliberate falsehood does not establish a rule of morality which can be deemed too rigid for honest men. Moreover, it has been judicially recognized that to cramp the operation of such laws with artificial restrictions would tend to encourage fraud and swindling and it has also been suggested that since the purpose of the statutes against false pretense is to suppress cheating they should be construed liberally so as to effectuate that purpose."

See *State vs. Stove*, (S. C.) 79, S. E. 108; 49 L. R. A. W. S. 514; *Com. vs. Watson* (Ky.) 142 S. W. 200.

ARGUMENT II

In his second argument which is in support of Assignment of Error No. 19, the defendant attacks the order of the court, directing the filing of a supplemental Bill of Particulars after the trial of the case. He charges that in view of the fact that the Bill of Particulars was amended as

to some matters following the trial of the action, it necessarily follows that the defendant was not properly bound over to the District Court to stand trial for the charge upon which he was ultimately convicted.

In making this charge the defendant ignores entirely certain statements made later in his brief to the effect that the Bill of Particulars is no part of the information and does not change the nature of the offense that is charged. The State agrees with this position and with the two Utah cases, *State vs. Solomon*, 93 Utah 70 and *State vs. Jessup*, 98 Utah 482, which hold to this effect.

The State agrees further with the defendant's statement made later in his brief that the information itself, separate and apart from the Bill of Particulars, must state a cause of action. This being true, how could any amendment to the Bill of Particulars change the nature of the offense? The record shows that the complaint which was filed in the Justice's Court and upon which a preliminary hearing was conducted, charged the defendant with the commission of the crime of obtaining property by false pretenses as follows: "That the said Frank R. Hill, at the time and place last aforesaid, did obtain 112,905 pounds of alfalfa hay of the value of \$536.30 from Dudley and Reed Crafts by means of false pretenses." The information which was filed by the District Attorney charges the offense as follows: "That the said Frank R. Hill, on or about the 30th day of July, 1939, at Delta, County of Millard, State of Utah, did obtain 112,905 pounds of alfalfa hay of a value

of \$536.30 from Dudley and Reed Crafts by means of false pretenses." The question as to whether or not the complaint and the information which was based thereon state a cause of action standing by themselves, separate and apart from the Bill of Particulars, will be considered at greater detail later in the brief when answering defendant's argument No. 3 in support of Assignments of Error No. 1 to No. 6.

The purpose of the Bill of Particulars, as stated before, is not to aid the information in stating a cause of action but to inform the defendant regarding the facts which the state will prove in support of such information in order that the defendant may have an opportunity to prepare to meet the evidence introduced by the State. Section 105-21-9, Revised Statutes of Utah, 1933, as enacted by Chapter 118 of Laws of Utah, 1935, reads in part as follows:

"When an information or indictment charges an offense in accordance with the provisions of Section 105-21-8, but fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense or to give him such information as he is entitled to under the Constitution of this State, the court may, of its own motion, and shall at the request of the defendant, order the prosecuting attorney to furnish a Bill of Particulars containing such information as may be necessary for these purposes."

Subsection 2 of Section 105-21,43, Revised Statutes of Utah, 1933, as enacted by Chapter 118, Laws of Utah, 1935, provides as follows:

"No variance between those allegations of an information, indictment or Bill of Particulars which

state the particulars of the offense whether amended or not, and the evidence offered in support thereof shall be ground for the acquittal of the defendant. The court may at any time cause the information, indictment or Bill of Particulars to be amended in respect to any such variance to conform to the evidence."

The right of the court to permit an amendment to the Bill of Particulars, even in the absence of statutory permission such as is given above is recognized by most courts. See *State vs. Wadford* (N. C.), 129 SE 608.

In face of express statutory provision, such as is given by the above statute, it can hardly be doubted that the court has such power. The court, it is true, could not permit amendment of the information or the Bill of Particulars to conform to the evidence if the evidence showed the commission of a separate and distinct crime from that alleged in the information. The information in this case, however, does not allege what the representations were. It merely alleges that false representations were made and leaves it to the Bill of Particulars to set out the exact statement. The exact nature of the statement which was made would clearly, therefore, it seems, come under the terms of the statute above which permits amendment of the allegations "which state the particulars of offense."

Likewise, the allegation regarding the ownership of the hay is a matter in which amendment should be permitted even in the absence of such a statute as is quoted above. In the case of *State vs. Sturrs* (Mo.), 51 SW 2nd 45, the

court permitted the prosecutor, following the trial of the action, to amend the information by changing the name of the person robbed to conform to the proof. While this court in *State vs. Jensen*, 83 Utah 452, permitted the amendment of an information to show the owner of stolen property where the original information had not even alleged an owner. This court, speaking by Mr. Justice Folland in approving this amendment, said:

“While the amendment was one of substance, it did not change the nature of the crime involved. The District Attorney, by the original information, intended to charge grand larceny and it is grand larceny which is charged by the amended information. The amendment was germane to the offense charged in the complaint filed before the magistrate wherein the element of ownership of the property in *Lester Jensen* was properly alleged * * * such an amendment by leave of the court is authorized by statute.”

The substantial rights of the defendant are not in any way effected by the amendment. If he were in any way taken by surprise, he could have taken advantage of the Court's offer to give him whatever time he needed to prepare and present his defense to the matters set out in the Supplemental Bill of Particulars. He states that his reason for refusing to put in any defense at all was that the court had evidently made up its mind on the basis of the State's testimony that the defendant was guilty. I find no place in the record where the Court indicates that it had made such a finding. If the defendant's rights were substantially im-

paired, whenever the court had reached some opinion on the case at the end of the State's testimony, any defendant might come in and ask for a dismissal on this ground whenever the State made a particularly strong case.

I find nothing in the record which would indicate that the court was not willing to listen to any testimony which the defense might offer with a fair and unbiased mind, and render its verdict according to all of the evidence in the case.

ARGUMENT III

The defendant's third argument in support of Assignments of Error 1 to 6, inclusive, proceeds on the theory that the revised criminal procedure adopted by the 1935 Legislature, providing for short form informations and indictments, is unconstitutional. He freely admits, both in his brief and in argument, at the time of the trial, that the information as drawn meets the requirements of Chapter 118, Laws of Utah, 1935. He alleges, however, that this section is unconstitutional in that it abridges certain rights which are guaranteed to the accused under the terms of the Constitution of the State of Utah.

The reformed procedure, which was adopted by our Legislature in 1935, was not the result of hasty and ill-considered action. The Legislature followed the form recommended by the American Law Institute after lengthy and detailed study on the matter. Substantially the same statute has, over the past several years, been put into operation in

many of the states of the Union and although its constitutionality has been challenged by many cases the State is not aware of a case in which this act has been invalidated.

At the time of the formation of the Government of the United States, the people were seeking a way to escape cruel and inhumane punishments which had often been inflicted without a fair and adequate trial. As a result, numerous technical safeguards were thrown up around the accused among which were the very technical rules which existed in regard to criminal pleading. A minor infraction of any of these rules, although it did not in the least prejudice the substantial rights of the accused, was a basis for an acquittal. As a result, far from promoting justice, these technical rules of criminal pleadings very frequently afforded an avenue of escape for an obviously guilty criminal. It was to escape this situation that reform in criminal procedure was undertaken and the courts of this country have generally recognized that the old, needlessly technical rules are outmoded, if indeed they ever served a worthy purpose.

One of the first cases to uphold the reformed procedure such as we have now adopted in the State of Utah was the case of *People vs. Bogdanoff*, 254 NY 16, decided in 1930. The majority opinion in this case was written by the eminent Judge Lehman and was concurred in by Chief Justice Pound and by Justice Cardozo, later of the United States Supreme Court. The court in this opinion repeated with approval the words of the New York Commissioner in regard to the reform procedure as follows:

“They are not ignorant of the fact that their proposed reform will strike at the root of a system artificial and absurd in itself, and which is only saved from the contempt it merits, by the frequent use of the names of venerable legal authorities, under whose sanction it has grown and ripened into maturity * * * Nor will they allow themselves to believe that absurdities and fictions so glaring and gross in themselves as to provoke the laughter and contempt of the intelligent, will be permitted to continue longer than until a safe substitute for them can be found.”

Defendant maintains that a Bill of Particulars cannot be used to aid the information in meeting the requirements of the Constitution because Article 1, Section 13 of the Constitution of the State of Utah provided that offenses which had heretofore been prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate. From this he jumps to what the State regards as a highly illogical conclusion that this constitutional provision protected the information with all of its technicalities exactly as it existed at the time of the adoption of the Constitution. This same point was raised in *People vs. Bogdanoff*, supra, and was disposed of by the court in the following language:

“We may not hold that the framers of the Constitution intended that all the formalities of the old common law indictments must remain forever inviolate * * * The Legislature cannot suspend with a ‘written accusation’ by the Grand Jury but it can prescribe new forms of indictments and dispense with some of its technical formalities.”

See also in support of this position, Wolfe vs. State, 19 Ohio State 248; Lougee vs. State, 11 Ohio State 68; State vs. Schnelle, 24 W. Va. 767.

The accused is still being prosecuted by an information as the Constitution provided. If the position of the defendant in this case were carried to its logical conclusion, all of our laws would be frozen in a state of immobility as they existed at the time of the adoption of the Constitution. It is evident, we believe, that the new procedure is in no way in conflict with this particular section of the Constitution.

The defendant further asserts that the reformed procedure is contrary to the Constitution of Utah, Article 1, Section 12, which reads:

“In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf * * *.”

Defendant has cited numerous cases which hold that the Bill of Particulars and the indictment or information are separate and distinct documents, a position with which the State has already agreed. From this, he concludes that unless the information standing alone will satisfy the requirements of the above section of the Constitution that the defendant's rights under this section will be impaired. It should be observed, however, that under the reformed procedure, 105-21-9, Laws of Utah, 1935, the matter of granting or refusing a Bill of Particulars is no longer within

the discretion of the court. In all cases where the information or indictment standing alone fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense or to give him such information as he is entitled to under the Constitution of this State, the court must at the request of the defendant order the prosecutor to furnish a Bill of Particulars. It should be noted that the section of the Constitution above quoted does not require that the defendant be able to determine the nature and cause of the accusation against him from the information. It is merely required that he have such information. So far as the Constitutional provision is concerned it could be furnished to him in several different documents so long as he had an absolute right to obtain these documents. This position is upheld by the Supreme Court of Massachusetts in a number of cases. See *Commonwealth vs. Howard*, 205 Mass., 128; *Commonwealth vs. Peakes*, 231 Mass. 449.

The Supreme Court of New York in *People vs. Bogdanoff*, *supra*, says:

“If, now, the indictment and the Bill of Particulars, which a defendant can demand, may be read together and constitute the written accusation which the Grand Jury has made and which the accused must meet, the right of an accused to be informed of the nature of the accusation against him receives more adequate protection under the statute than at common law and an accused has been deprived of no fundamental or substantial rights.”

The defendant has cited numerous cases holding that various informations or indictments were insufficient because of their failure to allege certain particulars. An examination of these cases, however, reveals that none of them was interpreting a statute similar to the one which has been adopted in Utah and numerous other states in recent years. The Utah cases which he cites without exception hold the informations in each instance to be insufficient, not because they fail to meet the demands of the Constitution, but because they fail to conform to the requirements of the statutes which were in effect at the time the cases were decided, statutes which have since been repealed and have been supplanted by the reformed procedure.

In *State vs. Solomon*, 93 Utah 70, the validity of the short form information was challenged and the court, although refusing to sustain the conviction on another ground, approves the short form information in the following language:

“The chief purpose in prescribing a short form information was to get away entirely from the needless formalism and verbosity usual in criminal proceedings and the consequent reversals by courts on so-called technical grounds. The pleader had been too often held to strict nicety in stating the elements of the crime and the particulars thereof. The Legislature further intended to fully safeguard the rights of defendants by providing that the court shall direct the filing of a Bill of Particulars where the information does not give the defendant the particulars of the offense sufficiently to enable him to prepare his defense or give such information as he is entitled to under the Constitution of the State.

Many of the salutary purposes motivating the new legislation would be lost if the Bill of Particulars were treated as a part of the information and subject to the same consideration and legal tests as the information."

By this statement the court clearly approves the position that although the Bill of Particulars is separate and apart from the information and not subject to the same technicalities, it may supplement the information in meeting the demands of the Constitution in cases where the information itself standing alone does not meet these demands.

In *State vs. Jessup*, 98 Utah 482, this court, by inference, approves the amended procedure as to informations in the following language:

"The information in this case failed to include the simple requirements of the forms prescribed in Section 105-21-47, Laws of Utah, 1935, C. 118, in each of which the name of the victim or other party whose participation is essential to constitute the acts an offense is given."

In the case of *State vs. Engler*, 251 Northwestern 88 the constitutionality of the Iowa short form information statute, which is in all respects similar to our own, was challenged. The provision of the Iowa Constitution, which the defense claimed invalidated the reformed procedure, is identical with Article 1, Section 12 of the Constitution of Utah. The court in dealing with the problem of constitutionality on page 92, said:

"Section 13732-C3 provides that 'no indictment which charges the offense in accordance with the provisions of Section 13732-C2 shall be held to

be insufficient on the ground that it fails to inform the defendant of the particulars of the offense and Section 13732-C4 provides for the compulsory furnishing of a Bill of Particulars to the defendants when required by motion on his part. Under the provisions of the short form indictment law all of the rights of the defendant guaranteed under our Constitution are fully protected and in our opinion the law is constitutional and valid."

The defendant maintains further that because numerous cases hold that all elements constituting the offense must be set out in detail in order for the information to state a cause of action that it follows that should any information fail to contain in detail every element that might have to be ultimately proved, that it fails to state an offense and so is contrary to the Constitution. It will be observed, however, from an examination of the Constitution that the term "state an offense" is foreign to any of its provisions. The requirement that the information "state an offense" is purely statutory and so a determination of what the information must say to "state an offense" is also statutory. Section 105-21-47, which the defendant admits the state has followed explicitly in this case, sets out the method of stating an offense. There is no constitutional provision involved here. Any failure of the complaint or the information standing alone to satisfy the Constitution is cured by the Bill of Particulars.

For other cases upholding the constitutional validity of reformed criminal procedure, which provides for informations in similar terms to that provided by the laws of the State of Utah, see *Commonwealth vs. Howard* (Mass.),

191 NE 397; Noles vs. State, 24 Ala. 672; Ketline vs. State, 69 N. J. Law 468; People vs. Robinson (Cal.), 290 Pac. 470; and State vs. Whitmore (Ohio), 195 NE 547.

ARGUMENT IV

Defendant's fourth argument attacked the court's ruling in admitting plaintiff's Exhibit A, and in permitting Pearson to testify as to the financial condition of the corporation. He claims that no evidence was introduced showing any connection between the defendant and the Hill Brothers' Alfalfa Mill Corporation, and that if such a connection were established the exhibit would not have been admissible because it was not a record of original entry and because the financial condition of the company was not in issue.

As to whether or not the financial condition of the company was an issue depends, of course, upon whether or not the court was right in permitting the State to amend its Bill of Particulars as was done in this case. That matter was covered in Argument No. II, and so need not be reviewed here.

If the Supplemental Bill of Particulars was properly admitted it is clear that the financial condition of the corporation was very much in issue, as it was the financial condition of the corporation that the defendant misrepresented in order to obtain the property in question.

As to the connection between the corporation and the defendant, we do not, as the defendant suggests, have to rely on a presumption. Pearson, who testified that he

was secretary and treasurer of the corporation, also testified on page 28 of the transcript in answer to the question of the State's Attorney that the defendant was vice-president of the corporation.

In support of his claim that Exhibit A, which was a financial statement of the corporation, was not competent evidence, the defendant relies upon the old shop-book rule which has long been outmoded. Under this rule, in order for books to be introduced in evidence, it must be shown that they are books of original entry made at the time the transaction occurred. This strict rule has, however, been considerably relaxed by recent decisions of the courts. It would obviously be impossible under the conditions that prevail in most businesses at the present time for any one person to keep all of the accounts of a corporation or for the books of original entry to show the entire condition of an account. This rule has therefore been relaxed to permit introduction in evidence of any books which were regularly and properly kept in the ordinary course of business of the company.

The same question which is raised here was raised in the case of *Watson vs. Gardner* (Minn.), 236 N. W. 213. In disposing of this contention the court said:

"It is urged that further foundation should be laid by calling the persons who have made the entries and proving the correctness of the entries by such witnesses; that the same proof should have been made as in the case of the books of a merchant or shop keeper in proving an account in his books. The shop book rules do not have much application here. Re-

ports and records kept by corporations in the regular course of their business are now very generally received in evidence, and the sufficiency of the foundation laid therefor is largely within the discretion of the trial court."

The court then cites numerous cases in support of its position.

In the case of *Wyshek vs. U. S. Fidelity and Guaranty Company*, 213 N. W. 488, the court established this rule to determine whether or not records are admissible.

"Such records were made and kept in the usual course of the business, and as part of the system of keeping a record of the transaction to which they are related."

In support of this position see also *Gus Tatilo Fruit Company vs. Lewisville, and N. R. Company*, (Ky.), 37 S. W. (2d) 856 and *Edquest vs. Tripp & Dragstedt Company*, (Cal.), 19 Pac. (2d), 637.

The defendant also maintains that even if the records were competent in an action to which the corporation was a party, it would not be competent as between the state and an officer of the corporation. Here again he is relying on the old shop book rule which forbade the introduction of books in matters concerning third parties.

20 Am. Juris Prudence 825, upon this point, states:

"Corporate books, records, and papers are, however, for many purposes evidence not only as between the corporation and its members but also between the corporation or its members and strangers where relevant to the cause of action. * * * Corporate records and minutes when properly authenticated

are admissible to prove corporate acts of a corporation, its stockholders, the proceedings of its stockholders' meetings, the formal proceedings of its board of directors, and its financial condition where its solvency comes in question."

Numerous decisions are there cited in support of this position.

Jones on Evidence, page 3179, also takes this same position.

Here the matter at issue is the solvency of the corporation, and certainly no better evidence could be found of this solvency than the financial statement of the corporation prepared by the secretary and treasurer of the corporation in the ordinary course of his business of preparing the records of the corporation.

The testimony of Pearson as to the corporation's financial standing on the 31st day of July, as compared to its standing a month previous was properly admitted and should not be excluded as the books of the corporation were not necessarily the best evidence as to this matter. Pearson testified that he was Secretary and Treasurer of the company and that it was his duty to keep the books. Whatever the books might show, therefore, would be merely what Pearson had written in them based on the knowledge which he had obtained from his connection with the operation of the affairs of the corporation.

His testimony, therefore, and not the books would be the best evidence.

Even if the books were considered the best evidence their absence and the inability of the State to obtain them

was properly shown and so secondary evidence was properly admissible. The record shows that the books were locked in a safe and although the safe was being held by the Sheriff, the books themselves could not be said to be in the possession of the State as they could not open the safe to gain access to them. It was therefore impossible to present them at the trial and so secondary evidence should be received.

Further, the record shows that this was a safe belonging to the defendant's company and that the defendant had refused to divulge the combination of the safe to permit access to the books.

The books, therefore, were in the constructive possession of the defendant and although he could not be forced to give them up as this would be forcing him to give evidence against himself, secondary evidence of their contents should certainly be received.

The defendant in this case was fairly tried for an offense punishable under the laws of the State of Utah. The trial was conducted fairly and impartially and in accordance with the procedure established by the Statutes of the State of Utah.

The defendant's constitutional rights were protected and he was given every opportunity to make whatever defense he might have to the case which was established by the State. The fact that he failed to make any defense or to attack the evidence given by the State left the Court no alternative as the finder of fact, but to find the defendant guilty, and pronounce upon him the sentence which his

conduct so clearly deserved. The State submits that the decision of the trial court in this case should be upheld.

Respectively submitted,

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