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State of Utah ex rel Grover A. Giles, Attorney General for State of Utah v. T. E. Burke : Brief of Plaintiffs

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH ex rel GROVER
A. GILES, ATTORNEY GEN-
ERAL FOR STATE OF UTAH,

Plaintiff,

vs.

T. E. BURKE,

Defendant.

BRIEF

PLAINTIFFS' BRIEF

GROVER A. GILES,
Attorney General.

H. F. SMART,
A. JOHN BRENNAN,
Assistant Attorneys General.

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In the Supreme Court of the State of Utah

STATE OF UTAH ex rel GROVER A. GILES, ATTORNEY GEN- ERAL FOR STATE OF UTAH, Plaintiff,	}	BRIEF
vs.		
T. E. BURKE, Defendant.		

This is an action in the nature of a Quo Warranto brought by the State of Utah on the relation of Grover A. Giles, Attorney General, for the purpose of having the court declare and decree that the Defendant, T. E. Burke has forfeited the office of Justice of the Peace for the 4th precinct of Magna, State of Utah; and to order the said T. E. Burke to surrender the official seal of said office and all the records and papers appertaining thereto.

Section 104-66-1, Revised Statutes of Utah, 1933, provides:

"A civil action may be brought in the name of the state:

* * * *

(2) Against a public officer, civil or military, who does or suffers an act which by the provisions of law works a forfeiture of his office."

And section 104-66-4 reads:

“The Attorney General may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action is brought under Section 104-66-1, he may require security for costs to be given as in other cases.”

STATEMENT OF FACTS

Title 103, Chapter 25, Section 1 of the Revised Statutes of Utah, 1933, provides:

“Every person who deals or carries on, opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, or any game played with cards, dice or any other device, for money, checks, credit or any other representative of value is guilty of a felony, and it shall be the duty of all sheriffs, constables, police and other peace officers whenever it shall come to the knowledge of such officer that any person has in his possession any cards, tables, checks, balls, wheels, slot machines or gambling devices of any nature or kind whatsoever used or kept for the purpose of playing for money, or for tokens redeemable in money, at any of the games mentioned in this chapter, or that any cards, tables, checks, balls, wheels, slot machines or gambling devices used or kept for the purposes aforesaid may be found in any place, to seize and take such cards, tables, checks, balls, wheels, slot machines or other

gambling devices, and convey the same before a magistrate of the county in which such devices shall be found; and it shall be the duty of such magistrate to inquire of such witnesses as he shall summon or as may appear before him in that behalf touching the nature of such gambling devices, and, if such magistrate shall determine that the same are used or kept for the purpose of being used at any game or games of chance described in this chapter, it shall be his duty to destroy the same.

On November 8, 1938, the said T. E. Burke, Defendant, was elected to the office of Justice of the Peace for the 4th precinct of Magna, Utah. On January 2, 1939 he qualified for said office and entered upon the duties thereof. On May 14, 1940, after legal committment by a county magistrate, said Defendant was charged by information with the crime of gambling under Title 103, Chapter 25, Section 1 R. S. U., 1933. In the Bill of Particulars the defendant was charged with having operated a gambling house known as "Burke's Wonderland."

On April 8, 1941, after legal trial said Defendant was found guilty of the crime charged. On April 12, 1941, said Defendant was sentenced to an indeterminate term in the State Prison, State of Utah. On April 14, 1941, Notice of Appeal, appealing said cause to the Supreme Court of the State of Utah, was filed with the Clerk of the District Court of Salt Lake County, Utah, and a certificate of probable cause was signed by the trial judge, Honorable M. J. Bronson, and said cause is now pending upon appeal in said Supreme Court. Since his sentence by the Court, the Defendant has been released upon his own recognizance and has not been and is not now confined in the State Prison.

STATEMENT OF ARGUMENT

In this Brief, plaintiff will present the following arguments:

1. A public officer convicted of a felony forfeits his office upon being sentenced to imprisonment in the State Prison, ipso facto, and a certificate of probable cause and an appeal from such conviction does not operate as a stay of execution insofar as the forfeiture of office is concerned.

2. A conviction on a charge of operating a gambling house constitutes misconduct in office.

3. The legislative intent and public policy governing forfeiture of public office.

ARGUMENT NO. I

A public officer convicted of a felony forfeits his office upon being sentenced to imprisonment in the State Prison, ipso facto, and a certificate of probable cause and an appeal from such conviction does not operate as a stay of execution insofar as the forfeiture of office is concerned.

Plaintiff contends that the defendant, T. E. Burke, forfeited his office by operation of law when he was convicted of a felony and sentenced to an indeterminate term in the State Prison, pursuant to Section 103-1-35, Revised Statutes of Utah, 1933:

“A sentence of imprisonment in the state prison for any term less than for life suspends all civil rights of the person so sentenced during such imprisonment, and forfeits all private trusts and all public offices, authority or power.”

(1) Definition of "Conviction" and Sentence.

Conviction when used in its technical legal sense means the verdict of guilty, plus the judgment or sentence of the court upon such verdict. When used in this sense, conviction is consummated when the court pronounces the sentence or judgment, and the terms may be used interchangeably.

Emmertson vs. State Tax Commission, 93 Utah 219, 72 pac. (2d) 467; *Smith vs. Commonwealth of Va.* 113 S. E. 707; *Faunce vs. People*, 51 Ill. 311; *Singer vs. U. S.*, 278 Fed. 415; 24 C. J. S., 17, Section 1556; 24 A. L. R. 1290.

In *Emmertson vs. State Tax Commission*, *supra*, the Court, on page 226, said:

"The cases which hold that a conviction involves and requires also a sentence or judgment before it is a conviction are cases where a more severe penalty is provided for a second offense."

In *Martin vs. State*, 234 Pac. 795, 30 Okla. C. R. 49, the court quoting *Gillmore vs. State*, 108 Pac. 416, said:

"In its ordinary sense the term 'conviction' is used to designate that particular stage of a criminal prosecution, when a plea of guilty is entered in open court or a verdict of guilty is returned by a jury. But in a strict legal sense, it denotes the final judgment of the court, and imports the final consummation of the prosecution, from the complaint to the judgment of the court by sentence."

And, in *State vs. Burnett*, 258 Pac. 484, 144 Wash. 598, the Court defined "conviction:"

"The word 'conviction' means a verdict or plea of guilty and an enforceable judgment rendered thereon in a court of competent jurisdiction."

In 24 C. J. S., page 17, "conviction" in its technical legal sense is defined as follows:

"In the restricted or technical legal sense in which it is sometimes used, conviction means the final consummation of the prosecution against the accused, including the judgment or sentence rendered pursuant to a verdict, confession or plea of guilty. Frequently the term is used to denote the judgment or sentence itself, or to check both the ascertaining of the guilt of accused and judgment thereon by the court. A judgment or sentence is indispensable to a conviction in this sense of the term, and the mere ascertainment of guilt by verdict or plea, which satisfies the ordinary legal definition of conviction, does not suffice."

What is the meaning of the word "sentence?" In "Words and Phrases," Vol. 7, page 6411, "sentence" is defined as follows:

"The sentence is the final determination of a criminal court; the pronouncement by the judge of the penalty or punishment as a consequence to the defendant of the fact of his guilt." "Featherstone vs. People, 62 N. W. 684, 687, 194 Ill. 325."

"'Sentence' as the term is used in criminal law, is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. State vs. Barns, 4 So. 560, 561, 24 Fla. 153."

"A sentence is a judgment of the court. Allen vs. Delaware County, 29 Atl. 288, 289, 161 Pa. 550."

See "24 C. J. S. 15, Section 1556."

Under Section 103-1-35, Revised Statutes of Utah, 1933, the defendant upon being sentenced by the court forfeited his office unless the appeal from the conviction stayed the execution of the judgment insofar as forfeiture of office is concerned.

(2) The affect of an appeal upon forfeiture of office.

The Constitution of the State of Utah, Article I, Section 12, safeguards certain rights to people accused of committing crimes. One such safeguard is the right to appeal from a conviction in the trial court. This right is further safeguarded under Section 105-40-9:

"An appeal to the supreme court from a judgment of conviction stays the execution of the judgment upon the filing with the clerk of the court in which the conviction was had of a certificate of the judge of such court, or of a justice of the supreme court that in his opinion there is probable cause for the appeal, but not otherwise."

The Constitutional right to appear is not infringed, however, by a legislative enactment that a public office is forfeited upon the sentence of imprisonment under Section 103-1-35; nor is Section 103-1-35 in conflict with Section 105-40-9.

The appeal mentioned in the Constitution, Article I, Section 12, and in Section 105-40-9, is applicable to criminal proceedings and for the purpose of giving the accused every legal opportunity of proving his innocence; *but, such an appeal does not stay all of the consequences incident to*

conviction. *McKannay vs. Horton*, 91 Pac. 598, 151 Cal. 711; *Hinson vs. Robbins*, 14 Pac. (2d) 940, 159 Okla. 201; *In re: Obergfell*, 145 N. E. 323, (N. Y.) ; *State ex rel Blake vs. Levi*, (W. Va.), 153 S. E. 587; *Emmertson vs. State Tax Commission*, *supra*, *State ex rel Guthrie vs. Chapman* 60 Pac. (2d) 245, 187 Wn. 327; *State vs. Frater* 89 Pac. (2d) 1046, 1048, 198 Wn. 675; 24 A. L. R. 1200; 106 A. L. R. 640, 644.

Thus, upon conviction the presumption of innocence shifts to a presumption of guilt, and the defendant has the burden of proving his innocence. *State vs. Redman*, (Indiana), 109 N. E. 184, 188. Likewise, if the accused cannot raise bail or is not released on his own recognizance he will be confined to jail pending the appeal, and in civil proceedings, if an undertaking with sufficient surety is not given, pending the appeal, the prevailing party in the trial court may have execution on the judgment notwithstanding the appeal; (Section 104-41-8). These are examples of consequences which are not stayed by virtue of an appeal to a higher court.

A forfeiture of office is a consequence flowing from the conviction or sentence of the accused and is not a part of the judgment; and not being a part of the judgment, the stay of execution and the certificate of probable cause has no effect on the forfeiture of office. McKannay vs. Horton, supra; Hinson vs. Robbins, supra; in re. Obergfell, supra; Emmertson vs. State Tax Commission, supra; State vs. Frater, supra; State vs. Murphy, 148 S. W. (2d) 527, (Missouri) ; *State vs. Levi, supra*; 24 A. L. R. 1200; 106 A. L. R. 644.

In the case of *McKannay vs. Horton*, *supra*, the court was confronted with a case on all fours with the one under

consideration here. In that case the mayor of San Francisco had been convicted of a felony and appealed therefrom. Pending his appeal he was incarcerated. He contended that his appeal:

“* * * suspended the operation of the judgment for every purpose until the appeal which is still pending, shall be finally determined.”

The court in that case said:

“We are clearly of the opinion that the statute will not bear that construction. An office becomes vacant when the incumbent is convicted of a felony, and also it becomes vacant when he is convicted of any offense—whether felony or misdemeanor—if it involves a violation of his official duties.”

Further on the court said:

“No man has a property right in an office paramount to the public interest. He has a property right in the salary and emoluments of an office while he is capable of discharging and actually discharges its duties; but when, by his fault or misfortune, he is no longer able to render the service, the public interests demand that he shall give way to some one who can. An official who is declared insane is simply unfortunate; but he ceases to be an official. An innocent man who is unjustly convicted of a felony is doubly unfortunate; but the fact that he may by means of an appeal ultimately succeed in establishing his innocence does not entitle him in the meantime to hold on to a public office which he is no more

capable of serving than if he were insane. The law allows an appeal from a conviction of felony because, so far from being against the public interest, it is promotive of the public interest that a person accused of crime should have every reasonable opportunity of vindicating his innocence. But if, the person so convicted is the incumbent of a public office, these considerations do not weigh in favor of retaining him in that position pending an appeal. The pendency of the appeal does not affect the presumption of guilt, which arises immediately upon the rendition of the verdict; and it would be strange indeed if a state which gives such weight to that presumption as to deprive the defendant of the right to bail, and to require in all but rare and exceptional cases that he be detained in close custody in the common jail, should at the same time provide by law for his continuance in an office the duties of which he cannot discharge. There is no such law. The only effect of an appeal and certificate of probable cause is to stay the execution of the judgment. Removal from office is not part of the judgment of conviction in cases of felony, though a consequence which flows from it, and the statute in express terms defines and thereby limits the effect of the appeal and certificate of probable cause."

And, in *Hinson vs. Robbins*, *supra*, page 941, under a statute which provided that:

"Every office shall become vacant on the happening of either of the following events before the expiration of the term of such office. * * *

"Third, whenever any judgment shall be obtained against him for a breach of his official bond. * * *"

The court held:

"Upon the rendering of the judgment of December 17, 1930, adjudging that C. R. Hinson had breached his official bond, and rendering judgment against him and his bondsmen, the office of county commissioner of district Number 1, held by C. R. Hinson, became vacant by operation of law, ipso facto."

Further, the court quotes, 29 Cyc. page 1401:

"A vacancy in office, for any of the causes enumerated in the statute occurs usually at the time of the happening of the event whose occurrence is by the statute the cause of the vacancy, and no judicial determination that a vacancy has occurred is necessary."

And in re: Obergfell, supra, under a New York law providing:

"Every office shall be vacant upon the happening of either of the following events before the expiration of the term thereof. * * *"

"(5) His conviction of a felony, or a crime involving a violation of his oath of office. * * *"

The court held that a forfeiture of office resulted upon the conviction of the mayor of Long Beach of the crime of grand larceny. The court succinctly stated the law as follows:

"The argument is made that the certificate of reasonable doubt, by staying the execution of the judgment, has stayed also the creation of a vacancy,

or, if a vacancy exists, the right to fill it. We read the statute otherwise. The abridgment of the term upon conviction of the incumbent is not a punishment for his offense. *Matter of Rouss*, 221 N. Y. 81, 116 N. E. 782. It is an automatic limitation upon the duration of his office. *McKannay vs. Horton*, 151 Cal. 711, 91 P. 598, 13 L. R. A. (N.S.) 661, 121 Am. St. Rep. 146. The application of the statute is not defeated by the possibility that the judgment may be reversed. That possibility would be present though a certificate had not been granted and the incumbent were in jail. The statute does not mean that a vacancy shall exist in those cases, and those only, where the incumbent is subjected to physical restraint. Its meaning is that one convicted of a felony shall not retain a post of honor. *McKannay vs. Horton*, *supra*."

It is interesting to note that the opinion in this case was *Per Curiam* by such outstanding legal minds as Hiscock, Cardozo, Pound, McLaughlin, Crane, Andrews and Lehman.

The Supreme Court of the State of Utah has recognized that there are certain consequences flowing from a conviction which cannot be suspended by the court because they are incident to the conviction and not a part thereof. In *Emmertson vs. State Tax Commission*, *supra*, in discussing the effect of a statute requiring the revocation by the State Tax Commission of the driver's license of one convicted of certain traffic violations, the court said, on page 225:

"It is evident therefore that the revoking of the license is mandatory on the commission upon receipt of a record of the conviction, and is not

founded upon any order or judgment of the court. The court may suspend execution of any judgment or sentence it imposes upon one convicted, but the revocation of the license still takes effect. The court cannot suspend that result of conviction because it is no part of the court's judgment; it is a result imposed by law mandatorily."

It is clear that, under the interpretation of forfeiture of office in the adjudicated cases, when an office holder is convicted of a felony or, as under the Utah Statute, is sentenced to the State Prison for a felony, the forfeiture of office is by operation of law and takes effect, ipso facto, with the sentence of the court. That such a forfeiture is no part of the court's judgment, but is an incident to such judgment and is not stayed by a certificate of probable cause and an appeal thereunder is also the adjudicated law.

ARGUMENT NUMBER II

A conviction on a charge of operating a gambling house constitutes misconduct in office.

Section 103-1-17, Revised Statutes of Utah, 1933, provides as follows:

"The conviction of any state, county, city, town, or precinct officer of a felony involving misconduct in office involves as a consequence, in addition to the punishment prescribed by law, a forfeiture of his office, and disqualifies him ever afterwards from holding any public office in this state."

The definition of the term "conviction" as used in connection with forfeiture of office and the effect of an appeal from a conviction involving as an incident to such conviction a forfeiture of office is discussed in Argument Number 1.

In this argument, plaintiff will endeavor to show that the operating of a gambling house by a justice of the peace (the charge upon which defendant Burke was convicted as particularized in the Bill of Particulars, which is a part of plaintiff's Complaint) involves misconduct in office.

Misconduct in office as defined in 46 C. J. 987, Section 151, is:

"The phrase 'wilfull misconduct' is broad enough to include any wilfull malfeasance, misfeasance, or nonfeasance in office. The word 'wilfull' is used in the sense of a conscious and intentional failure or refusal to perform or keep inviolate any duty imposed upon the officer by law; not every technical violation of the statute, or of an official duty will justify a removal. An officer may be removed under such a statute, although the act alleged to constitute the wilful misconduct charged falls short of the commission of the crime. Wilfull neglect of official duties may be either an act of omission or commission, but the act or omission must have been for a bad purpose, or when the officer conscientiously acts or omits to act contrary to a known duty. To constitute a ground for a summary removal of a public officer for 'wilfull misconduct or maladministration in office,' the acts and conduct thereof must have been wilful and such as to amount to maladministration in office."

And, in *Etzler vs. Brown*, 50 So. 516, 517, 58 Fla. 221, 138 Am. St. Rep. 113, it is stated:

"Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and right actions that are tacitly required of all officers."

For other definitions see 27 Words and Phrases, Perm. Ed., 316, 317.

The operation of a gambling house and its inevitable inducement to gamble, or the permitting of gambling by a public officer, is misconduct in office. *In re: Carpenter*, 50 N. Y. S. R. 631, 21 N. Y. Supp., 351; *State vs. Frater*, *supra*; *State vs. Williams*, 144 S. W. (2d) 98 (Mo.); *State vs. Graves*, 144 S. W. (2d) 91 (Mo.).

In the case of *State vs. Frater*, *supra*, the mayor of the City of Bremerton, Washington, was convicted of the crime of conspiracy to establish and operate gambling games and devices, and was sentenced to imprisonment. He appealed his conviction to the Supreme Court of that state. Quo warranto proceedings were instituted in which the facts relative to the trial, conviction and sentence were set forth. The mayor, in defense to the quo warranto proceedings, alleged that the offense of which he was charged was not malfeasance in office, that it did not involve a violation of his official oath, and that his conviction was not final, since he had appealed to the Supreme Court. The court ruled against him on each allegation.

In holding that his conviction of the crime of conspiracy to violate the gambling laws of the State consti-

tuted a malfeasance in office, the court said, page 1047, 1048:

“Relator contends that his conviction of the crime of conspiracy to violate the gambling laws of this state does not constitute malfeasance in office in that the crime of which he was convicted did not affect the performance on his part of the duties of mayor. He cites *State ex rel. Martin vs. Burnquist*, 141 Minn. 308, 170 N. W. 201, 609; *Mechem on Public Officers*, 290, 457, and *Throop on Public Officers*, 363, 367, and other cases of like import; all of which support the following rule announced in the last mentioned authority: ‘Where the constitution or a statute authorizes a removal for official misconduct, or misfeasance, misconduct, or maladministration in office, or similar acts of misbehavior in office, the general rule is, that the officer can be removed only for acts or omissions relating to the performance of his official duties, not for those which affect his general moral character, or his conduct as a man of business, apart from his conduct as an officer. In such a case, as a learned judge has remarked, it is necessary ‘to separate the character of the man from the character of the officer.’

“Admitting the force of the rule contained in the citations, we are of the opinion that relator did violate a duty of his office when he conspired to introduce and protect gambling in the city of Bremerton and to dissuade the prosecuting attorney of Kitsap County from discharging the legally prescribed duties of his office.

“This conspiracy was of such a nature that its radius was not confined to the sphere and domain of relator’s personal and private life, but invaded his official life, and rendered impossible the faithful

discharge of his official duties in accordance with his oath of office.

"Relator as mayor was superintendent of the department of public safety (Rem. Rev. Stat. 9101) and official head of the city government. It was his official and sworn duty to compel obedience to the ordinances of his city and the statutes of his state. When he conspired to introduce gambling in the city, he violated the principal and most important duty of the high office to which he had been elected by his fellow citizens. He was clearly guilty of malfeasance in office as that term is used in our constitution and statutes."

The defendant Burke, while wearing the cloak of authority as magistrate of the Magna Precinct, not only had actual notice of the commission of a felony but participated in the commission of that offense according to the verdict of the court at his trial.

Section 105-11-2, Revised Statutes of Utah, 1933, reads:

"Every person who has reason to believe that a crime or public offense has been committed must make complaint against such person before some magistrate having authority to make inquiry of the same."

Under the foregoing provisions, it would have been Mr. Burke's duty, in his capacity as a citizen, to make complaint against those committing the gambling offense in his presence. How much higher was his duty when cloaked with the authority of a magistrate under the laws of this State to cause a complaint to be made against his associates. Burke had a plain duty as a magistrate of the

Magna Precinct to cause the arrest of those participating in the gambling after full knowledge that a felony was being committed in his presence. To be the proprietor of a gambling house makes him a person unfit to hold public office. It is difficult to imagine a case in which a more corrupt or evil design or purpose is manifest from the acts of the defendant so as to render him unfit to hold public office. His conviction places him squarely within the law as laid down in *State ex rel. Hart vs. Common Counsel of City of Duluth*, 55 N. W. 118, 120:

“* * * The cause [for removal] must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office.”

ARGUMENT NO. III

The Legislative intent and Public Policy regarding forfeiture of office.

Let us now examine the intent of the Legislature of this State regarding the forfeiture of public office. The Legislature has provided that an appeal from a judgment of ouster in a quo warranto proceeding should not stay the execution of the judgment of ouster. Under the chapter dealing with appeals, Section 104-41-17, it is provided:

“Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed by an appeal. Where the judgment appealed from directs the sale of perishable property and proceedings

are stayed, the court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court."

In Section 105-7-14, dealing with removal by judicial proceedings, the Legislature has provided:

"From a judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant shall be suspended from his office. Pending the appeal the office must be filled as in case of a vacancy."

From the sections last above quoted, it is apparent that the Legislature intended that one, under the approbrious epithet of a convict or felon, should not be entitled to act in a public office. This court has recognized that intention. In the course of its opinion in *State ex rel. Kay vs. Drannev*, 57 Utah 14, 19, 176 Pac. 767, the court stated:

"Section 3315 of our code, [now Section 104-41-17] immediately succeeding Section 3314, [now Section 104-41-16], provides that in the case of one adjudged guilty of usurping, intruding into, of unlawfully holding public office, civil or military, the execution of the judgment shall not be stayed by an appeal. That provision was evidently intended by the Legislature to make an exception in favor of a judgment ousting public officers, civil or military, by providing that such judgment should not be stayed; * * * "

The ouster from office by quo warranto is a civil not a criminal proceeding in Utah as well as in most jurisdictions.

Skeen vs. Craig 31 Utah 20, 86 Pac. 487; *Burke vs. Knox* 59 Utah 596, 600, 206 Pac. 711. In *State ex rel. Lloyd vs. Elliott*, 13 Utah 200, 44 Pac. 248, the court after reviewing the historical development of the writ of quo warranto said; at page 205:

“* * * *The information is criminal in form, but, in substance, it has long since been regarded as a civil proceeding* for the correction of the usurpation, nonuser or misuser of a public office or corporate franchise; and as now employed, both in England and America, its object is substantially the same as that of the ancient writ of quo warranto.
* * * ” (Italics ours)

Among the other jurisdictions which hold that an action in the nature of a quo warranto is a civil proceeding are: Missouri (*State ex rel. Brison vs. Lingo*, 26 N. W. 496); California (*People vs. Dashaway Ass'n*, 24 Pac. 277, 84 Cal. 114); Florida (*State vs. Gleason*, 12 Fla. 190); Rhode Island (*State vs. Kearn*, 22 Atl. 1018, 17 R. I. 391); Wisconsin (*State ex rel. Atty. Gen. vs. Norcross*, 112 N. W. 40, 132 Wis. 534); Alabama (*State ex rel. Goodgame vs. Matthews*, 153 Ala. 646, 45 So. 307); Oklahoma (*Maben vs. Rosser*, 103 Pac. 674, 24 Okla. 588); New Mexico (*Territory vs. Sanches*, 94 Pac. 954); See 51 C. J. 312, Sec. 7; 81 A. L. R. 1094.

Since the action of quo warranto is not in substance criminal, it follows, a fortiori, that a forfeiture of office by operation of law is not criminal. The purpose of the action of quo warranto to remove one from office and a quo warranto proceeding to have declared a forfeiture of office by operation of law accomplish the same purpose.

In the former, the action is to oust defendant from office; while the latter, which is the proceedings in this case, is to have the court declare the office vacant by recognizing judicially a *fait accompli* and oust the wrongdoer from enjoying the privileges and benefits of an office which he no longer possesses. *State vs. Murphy*, supra, at page 530. It would seem to follow that the Constitutional right to appeal in criminal cases is not abridged by declaring that an appeal from a conviction does not stay a forfeiture of office, particularly in view of the fact that the forfeiture is incident to the conviction and not a part thereof.

The defendant may argue that to suffer a forfeiture of office upon sentence or conviction will do him irreparable harm in the event such conviction or sentence is reversed on appeal. That this would be unfortunate, plaintiff concedes. However, it is plaintiff's contention that public policy dictates that one, under the odium of a felony, should not be permitted to hold a public office. A public office is a public trust and one has no property rights in a public office. *Fellows, Attorney General, ex rel. Cummings vs. Eastman*, 136 Atl. 810; *Taylor vs. Beckham*, 178 U. S. 548, 477; *McKannay vs. Horton*, supra.

The public policy in regard to this matter was stated in *State ex rel. Blake vs. Levi*, supra, page 588, (W. Va.):

"The robe of innocence with which the law invested Mr. Camp during trial was stripped from him by the verdict of the jury. The judgment of the court has put upon him the garb of guilt. A legal, as well as a laical presumption has arisen that his conviction is just. Jones Commentary on Evidence (1st Ed.) Section 12D; 2 Bishops New Criminal Procedure (2nd Ed.) Section 1103. * * *

"It is essential to our Government that public officials have the confidence of the people. That confidence cannot extend to an official under conviction for malfeasance in office. His rights are subordinate to the public weal. The possibility that a conviction may be ultimately reversed cannot weigh against public dissatisfaction with, and public mistrust of him pending appellate hearing. Public policy demands a rigid construction of this law as well as its rigid enforcement. With pitiless propriety, the Supreme Court of Virginia said: 'That when the people established the Constitution they never intended that a public office should be contaminated by the presence of a convicted * * * felon.' Commonwealth vs. Fugate, supra, page 726 of 2 Leigh, (29 Va.). Under enactments similar to ours, the Supreme Court of California held: 'If a public officer is convicted of a felony and sentenced upon such conviction, the effect of the judgment as terminating his title to the office is not avoided by his prosecuting an appeal and obtaining from the trial judge a certificate of probable cause.' McKannay vs. Horton, 151 Cal. 711, 91 P. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146.

"We accordingly hold that under the Constitution the conviction of Mr. Camp vacated his office. Under Code, c, 45, No. 32, it then became the duty of the presidents of the several boards of education of Kanawha County to appoint his successor. This duty they have failed to perform. Therefore the peremptory writ will issue."

See also *State ex rel. Guthrie vs. Chapman* 60 P (2nd) 245, 187 Wash. 327; 106 A. L. R. 640.

The court should consider also that if one is permitted to act in a public office after he has been convicted and

sentenced for the commission of a felony, and during the pendency of the appeal, he perform official acts—for example if the defendant T. E. Burke, were to continue to hear cases and pass sentences in criminal proceedings and judgments in civil proceedings—what would be the legal status of those performances if the conviction is ultimately affirmed by the Supreme Court? It is submitted that such acts would be without authority of law and null and void since he would be a felon at the time of the performance of the acts and a felon cannot hold public office. We submit that it would be an anomalous situation and a legal quirk or caprice if an appeal after a conviction and sentence for the commission of a felony worked a stay of execution of the forfeiture of public office while an appeal from an ouster in a quo warranto proceeding did not operate as such a stay. Certainly the Legislature did not intend and did not enact such an anomaly.

CONCLUSION

In this brief plaintiff has shown that a conviction in its strict legal sense and sentence or judgment are synonymous terms and may be used interchangeably. We have demonstrated that an appeal from a conviction of a felony and sentence of judgment does not stay the execution of the judgment insofar as the forfeiture of public office is concerned. That, since the forfeiture of office is incidental to, and not a part of the judgment, it does not abridge the constitutional right of appeal. That the operating of a gambling house, by a public officer is misconduct in office. We have submitted that public policy necessitates the forfeiture of office when the officeholder is convicted of a

felony and sentenced to imprisonment, and that the legislature has recognized and affirmed this policy in its enactments.

GROVER A. GILES,
Attorney General.
H. F. SMART,
A. JOHN BRENNAN,
Assistant Attorneys General.