

1941

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

Utah Supreme Court

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Willard Hanson; Stewart M. Hanson; Attorneys for Defendant;

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No. 6379

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In  
The Supreme Court  
of the  
State of Utah

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STATE OF UTAH EX REL GROVER A. GILES, ATTORNEY GENERAL FOR STATE OF UTAH,	}	Plaintiff,
vs.		
T. E. BURKE,		Defendant.

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**DEFENDANT'S BRIEF**

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WILLARD HANSON,  
STEWART M. HANSON,  
Attorneys for Defendant

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**FILED**

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**STATEMENT**

This action is in quo warranto by petition or complaint filed in this Court by the State on relation of the attorney general seeking to vacate the office of Justice of the Peace of the Fourth Precinct of Magna, Utah held by the defendant, T. E. Burke,

convicted of a felony, and to require him to surrender the office.

The facts are undisputed. The defendant was elected to the office November 8, 1938, duly qualified to hold the office January 2, 1939, and ever since discharged the duties of the office, and was and still is in possession of the office. May 14, 1940, an information, under

Title 103, Chapter 25, Section 1, R. S. U.  
1933,

was filed in the district court in and for Salt Lake County, charging the defendant with the crime or offense of gambling — a felony under the statute. On trial, he on April 8, 1941 was found guilty, and on April 12, 1941 was by the district court sentenced to an indeterminate term in the State prison of Utah.

From that judgment the defendant prosecuted a proper appeal to this Court. April 14, 1940 a certificate of probable cause was granted by the district court, and pending the appeal, he was released from custody on his own recognizance, and at no time under the judgment was confined or imprisoned, or otherwise restrained of his liberty. That case on appeal is still pending in this Court.

To the petition filed by the attorney general the defendant interposed a demurrer and motion to strike, as more particularly appears on the record and files in the cause. The attorney general, to support his petition or complaint, prepared and served a brief. Various grounds are urged by him in support thereof. It is not urged or claimed that the commission of the offense of which the defendant was convicted and sentenced, was connected with or related to or grew out of the office held by the defendant, or was committed in the performance of duties with respect thereto.

## ARGUMENT

### POINT I.

The first point made by him is with respect to Section 103-1-35, R. S. 1933.

The section is as follows:

“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.”

Considerable space is devoted by counsel in his brief as to the meaning of the words “conviction” and “sentence.” That the defendant in the criminal case was “convicted” and was “sentenced” to the State prison, may readily be conceded. If not so, the appeal of the defendant would be wholly fruitless. We thus need not devote any consideration to that part of the brief. But let it be conceded that the real point made by counsel under that statute lies deeper. What counsel more particularly urges is that because of the language, “A sentence of imprisonment in the State prison,” etc., a forfeiture of the office held by the defendant by operation of law and as a necessary consequence resulted immediately upon the conviction and sentence of the defendant of the charged felony in the criminal case, and that the appeal taken by him did not avoid the immediate effect of such result.

Counsel cites many cases which he claims support such view. On an examination of the cases so cited, it will be found that the decisions in each and all of them were rendered under constitutional or statutory provisions materially different from the

Utah statute referred to, in that the constitution or statute of such States provided that a public office held by an incumbent *became vacant or was forfeited* merely upon "a conviction of the incumbent of a felony." We submit the Utah statute is not to the effect that a public office of an incumbent is vacated or forfeited on a "mere conviction" of a felony, but that under the Utah statute to forfeit a public office held by an incumbent requires not only a conviction and a sentence of imprisonment in the State prison, but also an imprisonment as well. To say that the Utah statute means no more than the statutes of other states providing that a *mere conviction* of a felony by an incumbent in office vacates and forfeits the office, is to ignore and not to give effect to much language contained in the Utah statute. If the legislature intended that a mere conviction of a felony forfeited all private trusts and all public office held by an incumbent, the legislature would have said so. It did not do that. Thus the numerous cases cited on the subject by counsel for the State are not applicable.

This brings us to a further consideration or interpretation, or more particularly, the application of the Utah statute itself. We do not find, nor does the State cite, any case from this jurisdiction construing or applying the statute. In considering it, let it not be confused with Chapter 7, 105-7-13, relating to removal of officers by judicial proceedings, and where it is expressly provided that "upon a conviction" of removal, the court "must pronounce judgment that the defendant be removed from office," and while there is provided that an appeal may be taken from the judgment of removal, yet it further is there expressly provided that "until such judgment is reversed the defendant shall be suspended from his office," and "pending the appeal, the office must be filled as in case of a

vacancy." There are several cases from this jurisdiction involving the application of the removal statute, notably the cases of

Parker v. Morgan, 48 Utah 408; 160 Pac. 764.

Burke v. Knox, 59 Utah 596.

It is readily seen that by the removal statute, a "mere conviction" directly and expressly "ousted the defendant from office" until the judgment of removal was reversed, and that pending the appeal, the office was to be filled as in case of vacancy. But the removal statute and the statute under consideration, 103-1-35, are in no sense analogous.

Should it be argued that the phrase or language of the statute, "a sentence of imprisonment in the State prison," is broader and more comprehensive than the language in other States providing that a "mere conviction" of a felony vacated the office of an incumbent and forfeited all rights to the office, or that the word "sentence" necessarily implies a conviction, we say such language or phrase nevertheless must be considered in connection with the further language of the section, "during such imprisonment," language not found in statutes of other States under which the decisions in the cited cases were rendered. The language or phrase, "during such imprisonment," must be given due effect in considering and construing the section in question. It may not be ignored, as is done by counsel for the State. We regard it a material factor in considering and construing the section in question.

It is claimed our statute is the same as the California statute. The statute as it appears in the Revised Statutes of Utah, 1933, is the same as contained in

Compiled Laws of Utah, 1917, Sec. 8533.



There the California statute is noted, as "Cal. Pen. C., Sec. 673," but let it be observed that a star is placed after the figures 673, indicating that the California statute is different from the Utah statute, or that the Utah statute is not like the California statute. And so it is not, for the California statute uses the phrase "conviction of a felony," and omits the words "during such imprisonment."

Nevertheless counsel for the State cites and says that the case of

McKannay v. Horton, 151 Cal. 711; 91 Pac. 598,

is on all fours with the case in hand. We dispute that. In the California case, the charter of the consolidated city and county of San Francisco provided that

"an office *becomes vacant* when the incumbent thereof dies, resigns, is adjudged insane, *convicted of a felony*, or of an offense involving a violation of his official duties." (Italics added).

The Court stated that the political code of California was the same. Eugene Schmitz, while mayor of the city of San Francisco, "was found guilty of a felony — the crime of extortion — by the verdict of a jury," and was sentenced by the court to a term of imprisonment for five years in the State prison of California. A copy of the judgment and of the proceedings was transmitted to the board of supervisors of the city, which declared a vacancy in the office and appointed Edward Taylor as mayor. John Boyle was secretary to Schmitz at the time of and prior and subsequent to the conviction of Schmitz, and Harry McKannay was appointed secretary for Taylor. McKannay, as clerk, presented a claim to Samuel Horton, auditor of San Fran-

cisco, for salary due him. At the same time, Boyle presented a claim for salary due him for and during the same period. The auditor, because of uncertainty as to which of the claimants was entitled to the salary, refused to pay either. McKannay thereupon brought mandamus against Horton, the auditor, requiring him to pay the salary to McKannay. The alternative writ granted was made permanent. The decision, of course, involved the question as to whether Schmitz or Taylor constituted the rightful incumbent to the office of mayor. The effect of the decision was that Taylor and not Schmitz, during the period in question, was the rightful incumbent to the office. Schmitz thereupon appealed from the judgment of the Superior Court to the district court of appeals and in doing so was granted a certificate of probable cause by the Superior Court but was not admitted to bail pending the appeal.

We think there are several distinct and different factors in the cases. As is seen under the California statute, the office ipso facto became vacant when an incumbent was convicted of a felony. But that, we submit, is not the legal effect of the Utah statute when all its parts are considered together, as they must be.

In the next place, under the California criminal procedure, an appeal by the defendant, though with a certificate of probable cause, but without being admitted to bail, does not release the defendant from physical restraint and he is required to be kept in custody by the sheriff. The California statute,

Penal Code, (Cal.), Sec. 1244,  
in such particular, is set forth in the opinion of the McKannay case. Schmitz, notwithstanding his appeal, was thus physically restrained by the sher-

iff and was by him confined and held in custody in the county jail, pending the appeal. With respect thereto, the Court in the McKannay case said:

“Whether a felony does or does not involve a violation of official duty, the indictment will charge the facts constituting the felony, and a verdict of guilty will impart a sentence of imprisonment in the State prison, to be executed at once, unless a stay of proceedings pending an appeal is obtained through the medium of a certificate of probable cause; and even in that case, the defendant is committed to close custody in the county jail to await the result of his appeal, unless the court, in the exercise of a discretion rarely exercised and only in exceptional cases, admits him to bail. The result is that a public officer convicted for a felony is placed by the verdict in a position and under a physical restraint which prevents him from performing the duties of his office.”

In that connection, the Court further said that:

“Since a prisoner in close custody cannot administer a public office, he cannot be allowed to stand in the way of the appointment of one who can perform its duties.”

Though it be assumed that the court here was not in duty bound to admit the defendant to bail, still it cannot be gainsaid that the court had the power, in the exercise of its discretion, to do so.

Section 105-44-5, R. S. 1933, of the code of criminal procedure, provides that *after conviction* of an offense not punishable with death, a defendant may be admitted to bail as a

matter of right when the appeal is from a judgment imposing a fine only, and "as a matter of discretion in all other cases." Let it be conceded that when an incumbent of a public office is physically restrained and actually confined in jail, that during such confinement or imprisonment he necessarily is unable to and cannot perform the duties of the office, and hence it is necessary that another be appointed to do so.

But now let the Utah statute relating to an appeal in a criminal case be considered. It is Section 105-40-9. The heading is "Effect of Appeal by Defendant." It provides that:

"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."

This statute when complied with, as here it is, is a fundamental right of every defendant in a criminal case and grants a stay of execution of the judgment pending the appeal, whether the offense is a mere misdemeanor or a felony when the penalty is not death. Why under the statute should a different rule be applied, when the defendant is an incumbent in public office when the commission of the offense in no particular relates to or is connected with or grows out of the charged offense and when committed by a defendant not in public office? The statute itself makes no such distinction. It is vain to point to the removal statute of public officers where on conviction and a judgment of re-

removal a stay of execution of the judgment pending the appeal is expressly denied. We assert there is no statute which directly or expressly denies a stay of execution of the judgment on appeal from a conviction and sentence of gambling. No such statute is pointed to by the State, except 103-1-35, but that statute does not say that no stay on appeal shall be granted an incumbent in public office convicted and sentenced for the commission of a felony.

Such statute and the statute under which the defendant was convicted and sentenced are in no sense in *pari materia*. Each relates to a distinct, separate and different subject, and may not be read together to ascertain the legal effect of either. Counsel may say they do not contend that the statutes are in *pari materia*; but the proposition advanced by them means just that. Of course, all defendants whether in public office or not when finally adjudged guilty of the commission of a felony forfeit all right to public office and private trusts; and when so finally determined the defendant is an incumbent in public office, he, of course, must vacate the same and surrender it up. But the question here is, must he do so pending an appeal timely and properly taken to a proper court and before the judgment appealed from is affirmed?

It certainly seems a harsh rule, without direct or express legislative decree, that an incumbent in public office convicted of a felony in no wise relating to or connected with or growing out of his office and sentenced to imprisonment, may not on a proper appeal have the execution of the judgment stayed to test the validity of the proceedings resulting in his conviction no matter how grievous and prejudicial errors during the trial of his convic-



tion may have been committed or how scant or insufficient the evidence against him may be.

If it be the sense of the legislature to decree that an incumbent in public office convicted of a felony, whether related to his office or not and sentenced to imprisonment in the State prison may not, notwithstanding an appeal taken by him from the judgment; have a stay of execution of the judgment, pending the appeal, then let the legislature, by some direct and appropriate language, say so, and not leave the matter open to suspend or modify a stay of execution under the general appealing statute to meet exigencies of a particular case.

Counsel may say they do not dispute that an appeal taken as here stays "the execution of the judgment" appealed from. They must say it, whether they do so or not. In portions of their brief they in effect say that a forfeiture of the office is no part of the judgment, that the forfeiture is a mere consequence or result of the judgment. We recognize some such loose language is used in some of the cited decisions involving constitutional or statutory provisions different from ours. But when applied to our statute, there is no logic in such statement. If the "execution of a judgment" is stayed, of necessity all results and consequences thereof are also stayed. If the judgment here appealed from is affirmed, all of its consequences and results go with it. If the judgment is reversed, again all its consequences and results go with the reversal. In other words, in either case, the tail and hair go with the hide. The appeal here is from the conviction and sentence as pronounced by the court in the criminal case. The sentence as so pronounced constitutes the judgment appealed from. And if that is affirmed, all is affirmed. if reversed, all is reversed. Such result may not be

avoided, except to say that the appeal here did not "stay the execution of the judgment." That we say, cannot be maintained without pointing to some express statute, as in case of the removal statute, directly and expressly staying execution of the judgment pending the appeal.

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## POINT II.

The State further contends that the offense of gambling or operating a gambling place, under Title 103, Chapter 25, Section 1, constituted "misconduct in office." To support that, counsel particularly cite

Section 103-1-17, R. S. 1933.

The section is headed "*Felonious Misconduct in Office Forfeits Office and Disqualifies.*" (Italics added). The section itself reads:

"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." (Italics added).

As herein frequently stated, we again remind the Court that it is not claimed that the felony of gambling or of operating a gambling place of which the defendant was convicted was in no wise related to or connected with or grew out of the defendant's office, or that the commission of the felony resulted from any duties performed by the defendant relating to his office. It thus is difficult to see how the charged felony in any way "involved miscon-

duct in office." Certainly it is not every felony an incumbent may commit which may be regarded misconduct in office. In the McKannay case heretofore cited, it is recognized that "there are felonies which involve no violation of official duty." It is apparent that must be so. The long quotation from 46 C. J. 987 cited by counsel as to what constitutes misconduct in office, in the windup it is expressly stated that the acts must be such "as to amount to maladministration in office." A number of cases are cited by counsel wherein it is claimed that 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. But the cases cited do not support the proposition so broadly stated. In the cited case of *Etzler v. Brown*, 58 Fla. 221; 50 So. 416, it was found that a city councilman violated his public obligation *by selling his official influence or vote to influence the city council*. Such, the Court said, constituted misconduct in office. There the committed act related to the office held by the incumbent.

The case of *In re Carpenter*, 50 N. Y. S. R. 631; 21 N. Y. S. 351, involved the removal from office of a justice of the peace, mainly on the ground that *he used his office to punish a constable who was alleged to have shot another, which allegation the justice knew was false*; which were acts done in pursuance of and in course of official conduct.

In the two Missouri cases cited, the defendants removed *failed or neglected to perform duties connected with their office*.

But the main case as to this point cited and relied on by the State is the case of

State v. Frater, 198 Wash. 675; 89 Pac.  
(2d) 1046.



It is well particularly to notice this case. The defendant there was mayor of the city of Bremerton. He, with another, was charged with the crime of conspiracy to establish and operate in the city gambling games, games of chance, gambling devices and to sell lottery tickets. The defendant was convicted. There too after conviction quo warranto proceedings were brought to remove the mayor from office. With respect thereto the Supreme Court said:

“The 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 v. Burnquist*, 141 Minn. 308, 170 N. W. 201, 609; *Mechem on Public Officers*, 290, Par. 457, and *Throop on Public Officers*, 363, Par. 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'."

The Court admitted the force of, and approved, the rule contained in the citations, nevertheless held that the defendant Frater was guilty of misconduct in office, for the reason that under the statute (citing it) he as mayor *was the superintendent of the department of public safety and was the official head of the city government; that it was his official and sworn duty to compel obedience to the ordinances of the city and the statutes of the State; that when he conspired to introduce gambling in the city he violated the principal and most important duty of the office to which he had been elected*, and for that reason, his conviction was held malfeasance in office. The conditions or circumstances under which it thus was held that the defendant Frater was guilty of misconduct in office are here not present. The defendant Burke was not, as there, charged with the superintendency "of the department of public safety" or as the "official head of the city government," or as the head of the county government. In the Frater case, it further will be noted that the defendant there was also by information in the criminal case charged with a conspiracy entered into by him and another to persuade, and promises made of a monetary reward, to induce the prosecuting attorney, "in his official capacity not to enforce the gambling laws of the State of Washington with respect to the games and devices to be operated by the defendant Frater and another." No such condition or circumstance is here present, and hence, the Frater case in essentials was different from the Burke case.

The broad contention made here by the State is, that because the defendant Burke in the criminal case was "convicted of a felony and sentenced to

imprisonment in the State prison," he ipso facto forfeited all rights to the office of justice of the peace and ipso facto was removed from his office, but refusing to do so the State found it necessary to bring an independent action, or proceeding in quo warranto to accomplish such removal.

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### POINT III.

(Page 18 of Counsel's Brief).

There they say that "the legislature has provided that an appeal from a judgment of ouster in quo warranto proceedings should not stay the execution of judgment of ouster," and particularly refer to Section 104-41-17. The section there provides that:

"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."

What that section has to do with the case in hand is difficult to perceive. The section, as will be noted, is under Chapter 41 relating to appeals under the *Code of Civil Procedure* from final judgments in law and equity cases. The section has nothing whatever to do with appeals under the code of criminal procedure and as provided by Section 105-40-9. Nor does the code of civil procedure in any respect or in any particular restrict or modify appeals under the code of criminal procedure. Hence, the provisions of the one may not be read

into the other. They both are separate and distinct from each other.

in the next place, the defendant here, on any proceeding brought for that purpose has not yet been

“adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within the State.”

Had here a proper action in the district court in quo warranto proceedings or otherwise been brought to remove the defendant Burke from office and a judgment therein rendered decreeing that the defendant had usurped, intruded into or unlawfully held a public office, towit, the office of justice of the peace, a civil action, as admitted by the State, let it be conceded no stay of judgment on appeal to the Supreme Court could under Section 104-41-17 be had. But that is not this case.

The question here presented before this Court is whether the complaint or petition of the State in relation of the attorney general states sufficient facts to constitute a cause of action in quo warranto *at the time of the filing of the petition to justify a removal* of the defendant from the office of justice of the peace. That is the question to be determined and decided on the defendant's demurrer and motion to strike the complaint or petition filed in this Court, and not the question as to whether a defendant in a civil or quo warranto proceeding, adjudged guilty of usurping or unlawfully holding a public office, has or has not, pending an appeal from the judgment, the right to a stay of the execution of the judgment. Let the case before

the Court be decided and not another, not before the Court.

We thus submit this action for removal is premature and not maintainable until the appeal in the criminal action is disposed of and then only on an affirmance of the judgment in that case.

Respectfully submitted,

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