

1943

Grover Thompson v. John E. Harris, Warden of the
Utah State Penitentiary and Carl Rolland Demmick
v. John E. Harris, Warden of the Utah State
Penitentiary : Brief of Plaintiffs in Behalf of
Plaintiffs' Petitions for Writ of Habeas Corpus

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Dorothea Merrill Dryer; Attorney for Plaintiff; Amicus Curiae, by appointment of the Supreme Court; Ray S. McCarty; Attorney for Plaintiff;

Recommended Citation

Brief of Appellant, *Thompson v. Harris*, No. 6655 (Utah Supreme Court, 1943).
https://digitalcommons.law.byu.edu/uofu_sc1/807

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

GROVER THOMPSON,

Plaintiff,

vs.

JOHN E. HARRIS Warden of the
Utah State Penitentiary,

Defendant.

DOROTHEA MERRILL DRYER,

Attorney for plaintiff,

*Amicus Curiae, by appoint-
ment of the Supreme Court.*

CARL ROLLAND DEMMICK,

Plaintiff,

vs.

JOHN E. HARRIS, Warden of the
Utah State Penitentiary,

Defendant.

RAY S. McCARTY,

Attorney for Plaintiff.

PLAINTIFFS' BRIEF IN BEHALF OF PLAINTIFFS' PETITIONS FOR WRIT OF HABEAS CORPUS

FILED

OCT 21 1943

INDEX

	Pages
STATEMENT OF THE CASE	1-13
Demmick, Carl Rolland, State v.:	5-11
Information	5-6
Verdict	7
Commitment	7-8
Transcript of proceedings had in connection with sentencing of defendant on Nov. 28, 1942	8-11
Thompson, Grover,:	2-5
Information	2
Commitment	3-4
Verdict	5
STATEMENT OF ILLEGALITY OF RESTRAIN OF PLAINTIFF	11-13
Demmick, Carl Rolland	11-13
Harris, John E.	13
Thompson, Grover	12
ARGUMENT:	
Point 1: THE COURT WAS WITHOUT JURISDICTION TO PROCEED IN EITHER OF SAID CASES BECAUSE IT AFFIRMATIVELY APPEARS FROM THE INFORMATION IN EACH CASE THAT THE DEFENDANTS HAD NEVER BEEN TWICE SENTENCED AND COMMITTED TO PRISON FOR TERMS OF NOT LESS THAN THREE YEARS, AS CONTEMPLATED BY SECTION 103-1-18, REVISED STATUTES OF UTAH, 1933	13-17
Point 2: THAT SAID INFORMATION WAS INSUFFICIENT TO CONFER JURISDICTION ON THE COURT FOR THE REASON THAT SECTION 103-1-18, REVISED STATUTES OF UTAH, 1933, HAD BEEN REPEALED BY IMPLICATION BY THE INDETERMINATE SENTENCE ACT OF 1919	18-22
Point 3: THAT THE VERDICTS IN THE ABOVE CASES WERE IMPROPER AND ILLEGAL, IN THAT SAID VERDICTS WERE BASED ON INFORMATIONS THAT DID NOT CONFER JURISDICTION ON THE LOWER COURT	22
Point 4: THAT THE COURT HAD NO JURISDICTION TO TRY THE STATUS OF AN HABITUAL CRIMINAL UNTIL THE DEFENDANTS HAD BEEN CONVICTED ON THE THREE SUBSTANTIVE OFFENSES IN EACH CASE, SAID CONVICTIONS BEING CONDITIONS PRECEDENT TO ANY DETERMINATION OF DEFENDANTS' STATUS AS HABITUAL CRIMINALS	22-23
Point 5: THAT THE COMMITMENT OF CARL ROLLAND DEMMICK, MADE AND ENTERED JANUARY 4, 1943, WAS ILLEGAL AND BEYOND THE JURISDICTION OF THE COURT	24-27
CONCLUSION	27-28

Table of Cases and Authorities

Pages

Laws of Utah, 1933	27
Revised Statutes of Utah, 1933, Sec. 103-1-18	18
Utah Code Annotated, 1943, Sec. 105-36-17	27
57 A. L. R. 86	16
29 C. J. S. 44, Sec. 35	23
29 C. J. S. 54, Sec. 46	22
39 L. R. A. 450-455	16
Atwood v. Cox, 88 U. 424, 55 P. (2d) 377, 381	15
Batley v. Ritchie, 73 U. 320, 273 P. 969	17
Beland v. U. S. 128 F. (2d) 795 (1942)	24
Bruce v. East, Sheriff, 43 U. 327, 331, 134 P. 1175	17
Cardisco v. Davis, 64 P. (2d) 216	20
Commonwealth v. Ebenezer Evans (Mass. 1835) 16 Pick 448, 451..	15
Commonwealth v. Richardson, (Mass. 1900) 175 Mass. 202, 55 N. E. 988	14
Ex parte Bailey, 64 P. (2d) 278, (Okla. Crim. Ct. of Appeals, 1936)	21
Ex parte Kaster (Dist. Ct. of Appeals, Calif. 1921), 198 P. 1029.....	17
Ex parte Robinson (Fla. 1917), 75 So. 604, L. R. A. 1918B 1148	17
Ex parte William Seymour (Mass. 1833), 14 Pick 40	14
Ex parte Thornton, (Okla. 1925), 234 P. 217	15
In re Evans, 42 U. 282, 130 P. 217	17
Lee Lim v. Davis, 75 U. 245, 284 P. 323, 76 A. L. R. 460	19
Mutart v. Pratt 51 U. 246, 170 P. 67	19
State v. Kirkham, 181 Wash. 313, 43 P. (2d) 44	24
State v. Roberts, 91 U. 117, 63 P. (2d) 584	19
State v. Walsh, Supreme Ct. Utah, No. 6643	13, 20
State v. Zolintakis, 70 U. 296, 259 P. 1044 54 A. L. R. 1463	27

In the Supreme Court of the State of Utah

GROVER THOMPSON,

Plaintiff,

vs.

JOHN E. HARRIS Warden of the
Utah State Penitentiary,

Defendant.

Case No. 6655

CARL ROLLAND DEMMICK,

Plaintiff,

vs.

JOHN E. HARRIS, Warden of the
Utah State Penitentiary,

Defendant.

Case No. 6656

PLAINTIFFS' BRIEF IN BEHALF OF PLAINTIFFS' PETITIONS FOR WRIT OF HABEAS CORPUS

STATEMENT OF THE CASE

The plaintiffs, Grover Thompson and Carl Rolland Demmick, have each petitioned the above court for a writ of habeas corpus, claiming they are illegally restrained of their liberty by the defendant, John E. Harris, warden of the Utah State Penitentiary. Attached to the petition

of each plaintiff are the certified copies of the information, verdict, and commitment, which read as follows:

(Title of Court and Cause):

INFORMATION

BRIGHAM E. ROBERTS, District Attorney of the Third Judicial District, in and for Salt Lake County, State of Utah, accuses GROVER THOMPSON of the Crime of ROBBERY AND BEING AN HABITUAL CRIMINAL, as follows, to-wit:

That the said Grover Thompson, on the 30th day of October, A. D. 1941, at the County of Salt Lake, State of Utah, robbed Corniela Johnson, after the following convictions:

That the said Grover Thompson on the 23rd day of May, A. D. 1936, was convicted of the crime of Burglary in the First Degree, in the County of Owyhee, Third Judicial District Court, State of Idaho, and on the 23 rd day of May, A. D. 1936, was sentenced to serve a term of not less than one or more than fifteen years in the Idaho State Prison, and on said date was committed to serve said term;

That the said Grover Thompson on the 14th day of August, A. D. 1937, was convicted of the crime of Robbery in Salt Lake County, Third Judicial District Court, State of Utah, and on the 17th day of August, A. D. 1937, was sentenced to serve a term of not less than five years to life, and on the 27th day of August, A. D. 1937, was committed to the State Prison to serve said term;

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

BRIGHAM E. ROBERTS,

*District Attorney of the Third
Judicial District in and for
Salt Lake County, State of Utah.*

(Title of Court and Cause):

COMMITMENT

January 29, 1942

The above entitled case having been continued for further hearing until this date, the defendant, the Jury heretofore impaneled the respective counsel and all necessary persons hereto being present and ready the further trial of this case is resumed. Defendant's motion to strike State's exhibits D and F having been submitted and taken under advisement and the Court having considered and being now sufficiently advised in the premises denies said motion. Corniela Johnson is recalled and further examined. The state rests. Comes now defendant's attorney and moves the court to dismiss this action. The motion is submitted without argument and denied. The defendant is sworn and testifies in his own behalf. Plaintiff's exhibits A, B, C, D, E, and F and defendant's exhibits one and two previously offered are by the Court received in evidence. Mrs. Charles O'Nash is sworn and testifies in behalf of the defendant. J. Ross Hunsaker is recalled and further examined. The defendant rests. J. Ross Hunsaker is recalled and testifies in rebuttal. State rests. Defendant rests. Both sides rest. Comes now defendant's attorney asks and is given leave to reopen the case for the introduction of further testimony. Lyle Keller is sworn and testifies in behalf of defendant. On motion of Brigham E. Roberts, District Attorney the Liquor Control Commission is ordered to produce certain records. S. M. Grua and E. A. Johnson are sworn and testify in rebuttal. Edward Glen Cude and Corniela Johnson are recalled and further testify. State rests. Defendant rests. Both sides rest. Pursuant to oral stipulation of respective attorney in open Court the jury is instructed orally. The case is argued to the Court by respective attorneys and submitted. The jury thereupon

retires to consider of its verdict and subsequently returns into open Court and says by its foreman as follows, to-wit:

“We, the Jurors, impaneled in the above case find the defendant guilty of robbery and being an habitual criminal.”

Dated: January 29, 1942.

Signed: N. HAMILTON, *Forman*.

The jury is thereupon polled each juror answering in the affirmative the the above was and now is her or his verdict. The jury is discharged from further consideration of this case and excused subject to call. Comes now the defendant, waives time for passing sentence and asks that sentence be passed at this time. The defendant is thereupon asked by the Court if he has any legal cause to show why judgment and sentence should not be pronounced upon him and the defendant having answered that he has not, the Court now pronounces the following judgment and sentence upon the defendant:

“The judgment and sentence of this Court is that you, Grover Thompson, be confined and imprisoned in the State Prison for a term of not less than fifteen years.”

And you, S. GRANT YOUNG, Sheriff of Salt Lake County, Utah, are hereby commanded to take the said GROVER THOMPSON and deliver him without delay to the Warden of the State Prison, or other person in charge thereof, then and there to be confined and imprisoned in accordance with the above sentence and commitment.

CLARENCE E. BAKER, *Judge*.

(Title of Court and Cause):

VERDICT

We, the Jurors impaneled in the above case, find the defendant guilty of robbery and being an habitual criminal as charged in the information.

Dated Jan. 29, 1942.

N. M. HAMILTON, *Foreman.*

(Title of Court and Cause):

INFORMATION

BRIGHAM E. ROBERTS, District Attorney of the Third Judicial District, in and for Salt Lake County, State of Utah, accuses CARL ROLLAND DEMMICK alias ROBERT MASON alias ROBERT BRYSON of the Crime of Burglary in the Second Degree, Grand Larceny, and Being an Habitual Criminal, and charges:

That the said Carl Rolland Demmick alias Robert Mason alias Robert Bryson, on the 21st day of November, A. D. 1941, at the County of Salt Lake, State of Utah, broke and entered the dwelling of Wayne Christofferson, in the nighttime, with intent to commit larceny therein;

That the said Carl Rolland Demmick alias Robert Mason alias Robert Bryson, on the 21st day of November, A. D. 1941, at the County of Salt Lake, State of Utah, stole from Wayne Christofferson, one Philco Model 41608 Serial No. R-29350, and nine (9) Victor Records, all of the value of more than Fifty (\$50.00) Dollars, the same being the property of Wayne Christofferson;

That the said Carl Rolland Demmick alias Robert Mason, on the 2nd day of September, 1930, was convicted of the crime of Depriving an Owner of the

Possession of His Automobile, in the District Court of Salt Lake County, State of Utah, and on the 2nd day of September, 1930, was sentenced to serve an indeterminate term not exceeding five years in the State Prison of the State of Utah, and on the 5th day of September, 1930, was committed to the State Prison to serve said term;

That the said Carl Rolland Demmick alias Robert Bryson, on the 9th day of May, 1934, was convicted of the crime of Burglary in the Second Degree, in the Superior Court of Sacramento County, State of California, and on the 10th day of May, 1934, was sentenced to serve a term of not less than one or more fifteen years in the Folsom Prison of the State of California, and on the 10th day of May, 1934, was committed to the Folsom Prison of the State of California to serve said term;

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

BRIGHAM E. ROBERTS,

*District Attorney of the Third
Judicial District in and for
Salt Lake County, State of Utah.*

(Title of Court and Cause):

VERDICT

We, the Jurors impaneled in the above case, find the defendant Carl Rolland Demmick, guilty of the crime of Burglary in the Second Degree, and Being An Habitual Criminal as charged in the information.

Dated Nov. 23, 1942.

ALBERT BARTLETT, *Foreman.*

(Title of Court and Cause):

VERDICT

We, the Jurors impaneled in the above case, find the defendant Carl Rolland Demmick guilty of the crime of Grand Larceny, and Being An Habitual Criminal as charged in the information.

Dated Nov. 23, 1942.

ALBERT BARTLETT, *Foreman.*

(Title of Court and Cause):

COMMITMENT

November 28, 1942.

This being the time previously fixed for the passing of sentence upon the within named defendant, said defendant being present in person and represented by Ray S. McCarty, counsel, and Brigham E. Roberts, District Attorney, appearing in behalf of the State of Utah. The defendant herein having filed a motion for a new trial. Guy K. Robinson is sworn and examined in behalf of said motion and said motion is presented to the Court by counsel for the defendant and is denied. Thereupon the defendant is asked by the Court if he has any legal cause to show why judgment and sentence should not be pronounced upon him at this time. The defendant responds thereto that he has none, whereupon the Court pronounces the following judgment and sentence;

“It is the judgment and sentence of this Court that you, Carl Rolland Demmick, be confined and imprisoned in the Utah State Prison for an indeterminate term of not less than fifteen (15) years nor more than life upon the charge of burglary in the second degree and being a habitual criminal, and you are also sentenced by this Court to serve an indeterminate term of not less than fifteen (15) years

nor more than life in the Utah State Prison upon the charge of Grand Larceny and being an habitual criminal, said sentences to run concurrently.

The Court orders the defendant granted a stay of execution of sentence to January 4, 1943 upon certain conditions imposed upon the defendant by the Court, and he is placed in the custody of the State Adult Parole and Probation Department.

The within named defendant having previously been granted a stay of execution of sentence to this date, upon recommendation of the State Adult Parole and Probation Department and good cause appearing therefore the Court orders the defendant committed pursuant to the judgment and sentence previously entered herein.

And you, S. GRANT YOUNG, Sheriff of Salt Lake County, Utah, are hereby commanded to take the said Carl Rolland Demmick and deliver him without delay to the Warden of the State Prison, or other person in charge thereof then and there to be confined and imprisoned in accordance with the above sentence and commitment.

Dated: Jan. 4, 1943.

Issued: Jan. 5, 1943.

A. H. ELLETT, *Judge.*

(Title of Court and Cause):

TRANSCRIPT OF PROCEEDINGS HAD IN CONNECTION WITH SENTENCING OF DEFENDANT,
CARL ROLLAND DEMMICK, ON
NOVEMBER 28, 1942.

PROCEEDINGS

THE COURT: Judgment and sentence of the court is that you be confined in the State Prison for the indeterminate period as provided by law of not less than

fifteen years. However, I am going to give you a stay in that matter and place you with the Adult Board of Probation and Parole.

MR. ROBERTS: There are two counts on this matter, Your Honor. I am wondering if the record should show the sentence on each. Of course, they can run concurrently.

THE COURT: Each one, I take it, to be an habitual criminal charge.

MR. ROBERTS: Yes, Your Honor.

THE COURT: The burglary and grand larceny are each tied in with the habitual criminal.

MR. ROBERTS: I guess the one sentence would be sufficient.

THE COURT: Well, I am not just certain on that. I had a little doubt at the time of instruction. I instructed the jury they could find either or both. I conceive that there are two separate offenses by virtue of the two counts, and the sentence on each count will be not less than fifteen years. They may run concurrently, and I am going to give you a stay until January 4, 1943. Now, where were you working, Mr. Demmick, when you were arrested?

MR. DEMMICK: The first time I was arrested—that is, on this—they brought this charge against me—was in Tooele, Utah. I was driving a truck out there.

THE COURT: Where were you working when you came in to trial?

MR. DEMMICK: I was working for Mr. Melis and Victor Newman. The day I came here I was supposed to have taken his truck to Hill Field and put it to work up there.

THE COURT: I will ask Mr. McFadden to make arrangements to see if the same work can be had. If not, I will ask him to make some arrangements for your work,

and you will be left in jail until he calls for you. Are you a drinking man?

MR. DEMMICK: Well, I drink a little, sir, but I am not a drinker.

THE COURT: I believe in each of your offenses there has been the matter of drink connected with it, some drink, some evidence of drink. One of the conditions of your staying out of the penitentiary is that you drink no liquor or beer. That may be hard, but it will be no harder than if you were in jail where you couldn't get it.

MR. DEMMICK: No sir.

THE COURT: So you must not drink. If I hear of your drinking at all, I will sign a commitment, and you will sign the agreement with Mr. McFadden to report and be under his direction.

MR. DEMMICK: Yes sir.

THE COURT: That's all.

MR. DEMMICK: Your Honor, may I say something?

THE COURT: Yes.

MR. DEMMICK: I think I can possibly clear this up in the next two or three months, this whole charge, and if it is possible for me to do it, would you exonerate me?

THE COURT: If you can do anything, I would do everything I could for you. I believe it lays in your power to clear this up. That is the reason I am not putting you in the prison. I think you are implicated, but I think you had some help that are outside and that some of these boys that were doing some testifying are possibly in it just as much or more than you are, and I am satisfied it is in your power to clear this up. I will tell you this. I would think a lot more of you if you would come clean with the matter, because I think the first element of being a good citizen is to tell the truth.

MR. DEMMICK: That is right but, Your Honor, I know it is pretty difficult for you to believe, and a man

with my record that can come up here and on an absolute miscarriage of justice.

THE COURT: You can talk to the District Attorney about the thing. If you can clear it up to the satisfaction of him, I am satisfied he would be interested in aiding and assisting you in getting a pardon on this matter, too.

MR. DEMMICK: Thank you, sir.

That the plaintiff, Grover Thompson, alleged that his restraint and imprisonment were illegal in this:

a. That it affirmatively appears from said information that the defendant had never been twice sentenced and committed to prison for terms of not less than three years, as contemplated by Section 103-1-18, Revised Statutes of Utah, 1933.

b. That said information was insufficient to confer jurisdiction upon the court for the reason that Section 103-1-18, Revised Statutes of Utah, 1933, had been repealed by implication by the indeterminate sentence act of 1919.

c. That the verdict in the above case was improper and illegal, in that said verdict was based on an information that did not confer jurisdiction on the court.

d. That the court had no jurisdiction to try the status of an habitual criminal until the defendant had been convicted on the third substantive offense, to-wit, the robbery charge alleged to have been committed on the 30th day of October, 1941, said conviction being a

condition precedent to the determination of the defendant's status as an habitual criminal.

e. That sentence and commitment are void because they exceed the jurisdiction of the court, and because it cannot be determined from the record whether the defendant was sentenced for the crime of robbery or for the status of an habitual criminal, or both, and for the further reason that the sentence is an indefinite sentence.

That the said Carl Rolland Demmick, in addition to the foregoing reasons alleged, the sentence and commitment in his case were void for the reason that he was sentenced to fifteen years to life, and that the court had no jurisdiction to sentence the defendant on the first count for more than twenty years, and on the second count for more than fifteen years, and that the said sentence and judgment as appears from the transcript of the proceedings prepared by the official court reporter, on November 28, 1942, was illegal and void and beyond the jurisdiction of the court for the reason that the court had no power to sentence said defendant for being an habitual criminal, there being no such crime as habitual criminal, and for the further reason that said sentence is void because it is an indefinite sentence; and that said commitment made and entered January 4, 1943, was illegal and beyond the jurisdiction of the court for the reason that the court had paroled this defendant on November 28, 1942, and then on January 4, 1943, revoked said parole without hearing or without order to show cause.

That the defendant, John E. Harris, warden in each case, made his return admitting that he had custody of the defendants, and in each case attached a certified copy of the judgment and commitment, which judgment and commitment were the same as heretofore set out, and in addition thereto, the warden filed in each case his motion to quash the writ of habeas corpus, which were the same in each case, which claim that the petitioner in each case did not set forth facts sufficient to justify the issuance of said writ and that each petition showed that the detention of the plaintiff by the defendant is legal and lawful.

POINTS FOR DETERMINATION

We will consider the points for determination as the plaintiffs have listed them in their petitions.

POINT I.

THE COURT WAS WITHOUT JURISDICTION TO PROCEED IN EITHER OF SAID CASES BECAUSE IT AFFIRMATIVELY APPEARS FROM THE INFORMATION IN EACH CASE THAT THE DEFENDANTS HAD NEVER BEEN TWICE SENTENCED AND COMMITTED TO PRISON FOR TERMS OF NOT LESS THAN THREE YEARS, AS CONTEMPLATED BY SECTION 103-1-18, REVISED STATUTES OF UTAH, 1933.

In considering this point, we will refer to the brief in the case of *State of Utah v. Walsh*. Following up the idea there suggested, we find that our habitual criminal

statute was taken practically verbatim from an old Massachusetts statute. See *Commonwealth v. Richardson*, (Mass. 1900) 175 Mass. 202, 55 N. E. 988. Prior to the enactment of this act, in the case of *Ex parte William Seymour*, (Mass. 1833), 14 Pick 40:

“In the statutes of 1817 and 1827, which provide that whenever any person who shall be convicted of any crime, the punishment whereof shall be confinement to hard labor ‘for any term of years’ shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that by law prescribed for the offense of which he shall be convicted, the words *term of years* mean a period of time not less than two years.”

The court said on page 43:

“We think the only mode of giving a reasonable and sensible construction to the statute is, to consider those words as introduced for the purpose of describing the higher classes of offenses, distinguishing from among crimes, all of which are by law punishable by confinement to hard labor, for longer or shorter periods, according to their aggravation, those of sufficient magnitude, to be punishable by a long period of confinement to hard labor. Considering this to be the object and purposes for which this clause was introduced into the statute, we think the natural and legal, as well as the literal and grammatical construction of the words, ‘any term of years’, must be a period of time of not less than two years.”

In the case of *Commonwealth v. Ebenezer Evans*, 16 Pick (Mass. 1835) 448, on page 451, in discussing *Ex parte Seymour*, supra, the court said:

“In that case it was held that the language of the statute was not to be understood in a technical sense, but as indicating the degree of aggravation, short of which a convict, after the second or third conviction, should not be subjected to an additional punishment, and that any term short of two years would not be sufficient for that purpose, although an estate for a half a year, or less, would be a term for years in the technical meaning of the words.”

It is obvious that the informations in both cases were so fundamentally defective in substance so that in no manner or form, and by no intendment or inference could it state a status denounced by our habitual criminal law. Therefore, the informations were insufficient to confer jurisdiction, and the parties in custody by reason of commitments based thereon, should be discharged on habeas corpus. *Ex parte Thornton* (Okla. 1925), 234 P. 217.

The cases at bar come within the rule laid down in *Atwood v. Cox*, 88 U. 424, 55 P. (2d) 377, at page 381, where this court says:

“Where the pleading shows on its face that the subject-matter in regard to which jurisdiction is attempted to be invoked is one over which the court has no jurisdiction, then the court has no jurisdiction to go any further than to decide to refuse to take cognizance.”

In the instant case, of course, the jurisdictional facts and essential ingredient missing is the fact that they had not been each previously convicted, sentenced, and committed to prison for terms of not less than three years.

The following is taken from the note in 57 A. L. R. at page 86:

“The rationale of this doctrine is that in criminal cases the jurisdiction of the court extends to such matters as the law has declared criminal, and none other; and when a court undertakes to punish for an offense to which no criminality attaches, however reprehensible such offense may be in the forum of conscience, the court acts beyond its jurisdiction. An indictment, information, or written accusation is the very groundwork of the whole superstructure of a prosecution for the commission of an offense. If such an information contains allegations of overt acts or conduct which does not constitute any crime known to the law, or undertakes to state an offense, but the facts stated do not constitute the offense, and no addition to them, however full and complete, can supply what is essential, the court is without jurisdiction to put the accused on trial. In such case the judgment of conviction cannot be corrected. It is simply void. Imprisonment thereunder is illegal, and the accused is entitled to his release in a habeas corpus proceeding, even though he might secure the same relief on appeal.”

That, we believe correctly states the rule. The above remarks by the annotator are followed by several well-considered cases found in the same annotation. See also 39 L. R. A. 450-455.

Ex parte Kaster, (Dist. Ct. of Appeals,
California, 1921), 198 P. 1029;

Ex parte Robinson (Fla. 1917),
75 So. 604, L. R. A. 1918B 1148;

In re Evans, 42 U. 282, 130 P. 217;

Batley v. Ritchie, 73 U. 320, 273 P. 969;

Bruce v. East, Sheriff,
43 U. 327, 331, 134 P. 1175.

It might be argued that the court had jurisdiction over the substantive offense, even if it did not have jurisdiction over the status; that the allegations charging the substantive offense were mere surplusage. But, in the cases at bar, the substantive offenses were so comingled with the status that it would be impossible to segregate them. They are charged together in the same information, tried at the same time at the trial, the verdicts found them guilty of both, and they were sentenced and committed on both. It is not like charging two crimes in the same information under different counts. There it would be a very easy matter to segregate, because the verdicts would be separate, as also would be the sentence and commitment, but here they are so comingled that they cannot be separated without destroying the entire structure.

The plaintiffs contend that the entire charge and proceedings were void, and that the plaintiffs are entitled to their discharge.

POINT II.

THAT SAID INFORMATION WAS INSUFFICIENT TO CONFER JURISDICTION ON THE COURT FOR THE REASON THAT SECTION 103-1-18, REVISED STATUTES OF UTAH, 1933, HAD BEEN REPEALED BY IMPLICATION BY THE INDETERMINATE SENTENCE ACT OF 1919.

Section 103-1-18 provides specifically that in order that a previous crime might be made part of the predicate for a charge that a defendant was an habitual criminal, such crime must have resulted in conviction and commitment for not less than three years. When Section 103-1-18 was adopted, the legislature could only have contemplated, and in fact did contemplate, that every sentence should be set by a judge, according to the degree of heinousness of the crime proved. In making a decision as to sentence, the judge was limited to facts presented at the trial.

With the passage of the indeterminate sentence act, judge-made sentences were eliminated. The Pardon Board was given the sole power to determine the length of sentence, where previously the trial judge had done so. It was held in several cases on matters distinguishable from those involved here that any sentence was for the maximum period permissible under the law, subject to a condition subsequent, namely, the exercise of executive clemency in the light of a multitude of personal and social factors which never were and never could have been considered by a judge in fixing a definite sentence; as, for example, facts occurring subsequent to

the trial. See the cases of *Mutart v. Pratt*, 51 U. 246, 170 P. 67; *Lee Lim v. Davis*, 75 U. 245, 284 P. 323, 76 A. L. R. 460; and *State v. Roberts*, 91 U. 117, 63 P. (2d) 584.

Can these two acts be reconciled in the light of all the facts and circumstances? Clearly not. Obviously it was not imagined that practically every crime would furnish a basis for the application of the habitual criminal statute. Such would, however, be the practical result if the maximum permissible sentence under the indeterminate sentence law were held to be the sentence for the purpose of proving a defendant had acquired the status of being an habitual criminal. The framers of the indeterminate sentence act did not intend to create a rigid and inflexible system under which any two previous crimes with a maximum permissible sentence in excess of three years should form the predicate for a charge of being an habitual criminal at the instant of the third conviction. The fact that such an intention was lacking is proven by the fact that the legislature itself distinguished between (a) previous crimes requiring sentences of not less than three years each to meet the terms of the statute, and (b) a third crime, any felony, without regard to the liability for sentence, be it long or be it short. Moreover, if the legislature had intended to provide that the maximum should govern, it could readily have so distinguished between (a) *previous crimes* requiring sentences provided, but it did not. Neither did it intend that the minimum sentence should govern, for the purpose of the habitual criminal act, for it did not so provide.

Instead, the legislature provided that, where the circumstances surrounding a crime were such as to lead a judge to fix a sentence of not less than three years, the crime should be used in applying the habitual criminal statute. Since judge-made sentences have been abolished, and the actual duration of sentences is determined by the Board of Pardons, the only close approach to the original intent of the legislature today is by counting those crimes where not less than three years have actually been served.

Aside from the obvious fact that the legislature did not provide for the "time actually served" test, there is a further and dominating reason why that test cannot be used to reconcile the two statutes. That reason is that the indeterminate sentence act outlined a social policy with respect to the duration of sentences which was a complete substitute for the habitual criminal law and the social policy it represented. The whole purpose of the indeterminate sentence law was to provide a different standard of judgment with regard to sentence than that of the opinion of the legislature or of the individual trial judge, and one which would be sufficiently tailored to meet the need of society in each separate instance. See the case of *Cardisco v. Davis*, 64 P. (2d) 216, cited on page 23 of the Walsh brief and quoted at length. All sentences became indeterminate, by the terms of the act. No sentence was definite within the permissible minimum and maximum limits, but all became subject to the exercise of a condition subsequent, the exercise by the Pardon Board, in its sole discretion, of

its judgment with regard to various stated and unstated facts, objectives, and principles of the administration of justice.

If the legislature intended to give this broad discretion respecting the duration of sentence to the Board of Pardons, it impliedly withdrew its own previous determination of the sentence in the type of case covered by the habitual criminal law. Such an implication is supported by the fact that the legislature gave such broad discretion to the Board of Pardons as to *render inoperative every legislative determination of a "minimum" sentence*. The habitual criminal law is a minimum sentence law and is accordingly impliedly repealed.

When one realizes that penal statutes must be strictly construed, one must accept the view that two competing policies are expressed by these acts, the later of which crystallizes a modern, flexible concept which is inconsistent with the earlier, and which, being superior to the earlier, must govern.

In this view, the district court had no jurisdiction to entertain an allegation of habitual criminality, since from the time of the passage of the indeterminate sentence act, the habitual criminal act was repealed by clear implication. Surely, if any act which is void by reason of being unconstitutional can be attacked on habeas corpus, an act which had been so clearly repealed by implication as Section 103-1-18 can be attacked in the same way. See the case of *Ex Parte Bailey*, 64 P. (2d) 278, (Okla., Crim. Ct. of Appeals, 1936), where the court, in an habeas

corpus proceeding, held that a judgment of conviction for the "crime" of being an habitual criminal was void since there was no such offense known to the penal code.

POINT III.

THAT THE VERDICTS IN THE ABOVE CASES WERE IMPROPER AND ILLEGAL, IN THAT SAID VERDICTS WERE BASED ON INFORMATIONS THAT DID NOT CONFER JURISDICTION ON THE LOWER COURTS.

The verdicts and commitments were improper, illegal, and beyond the jurisdiction of the lower courts in that they were based on informations which gave no jurisdiction to the lower courts to determine whether or not the defendants had acquired the status of being habitual criminals. See arguments and citations under Points I, II, and III.

Where a judgment, sentence, or order is fatally defective upon the face of the record, habeas corpus will lie. 29 C. J. S., p. 54, Sec. 46.

POINT IV.

THAT THE COURT HAD NO JURISDICTION TO TRY THE STATUS OF AN HABITUAL CRIMINAL UNTIL THE DEFENDANTS HAD BEEN CONVICTED ON THE THREE SUBSTANTIVE OFFENSES IN EACH CASE, SAID CONVICTIONS BEING CONDITIONS PRECEDENT TO ANY DETERMINATION OF DEFENDANTS' STATUS AS HABITUAL CRIMINALS.

The proposition that the court had no jurisdiction to try the status of being an habitual criminal in either

case until the defendant was convicted of his third substantive offense seems too clear to require discussion. The words of the act, "*upon conviction*", cannot possibly be construed to mean "*before*" or "*during*" or any other thing but "*after*" conviction. The third conviction of any felony, following two previous convictions and commitments for not less than three years, is an absolute condition precedent to the determination of the defendant's status as an habitual criminal, even if the statute be by some means reconciled with the indeterminate sentence act, and is not a condition precedent that could be waived in any manner, being fundamental to the cause. See *29 C. J. S.*, p. 44, Section 35, which reads as follows: "Disregard of mandatory requirements essential to jurisdiction to proceed with the trial will support habeas corpus."

Therefore, even if the court could reconcile the habitual criminal act with the indeterminate sentence act, no court could be said to have had jurisdiction of the status under the conditions which obtained in the trial courts in these cases. It is obvious that the courts not only pretended to have a jurisdiction clearly beyond their reach, but further than that, they permitted a mingling of two matters, on one of which they have had jurisdiction but on one of which they clearly did not to such a degree and extent as to render the entire proceedings below illegal, void, and beyond the jurisdiction of the courts. For one of the leading cases on

this point, see *State v. Kirkpatrick*, 181 Wash. 313, 43 P. (2d) 44, in which the defendant was charged identically as the defendant in the district court, Demmick, was charged. Kirkpatrick was convicted and sentenced to life imprisonment, but the higher court reversed the judgment and granted the man a new trial, stating that it refused to be bound by an archaic common-law practice, "which impinges upon the fair and impartial trial guaranteed by the Constitution to everyone charged with a criminal offense."

For further light upon the proper construction of a statute such as ours, see the case of *Beland v. U. S.*, 128 F. (2d) 795 (1942). This case supports the view that the fact of previous convictions does not become material until after the trial on the substantive offense, and then it becomes material only for the purpose of determining a proper term of imprisonment.

POINT V.

THAT THE COMMITMENT OF CARL ROLLAND DEMMICK, MADE AND ENTERED JANUARY 4, 1943, WAS ILLEGAL AND BEYOND THE JURISDICTION OF THE COURT.

In the case of Carl Rolland Demmick, the court sentenced the defendant on November 28, 1942, as appears by the commitment. The court then ordered the defendant granted a stay of execution of sentence to January 4, 1943, upon certain conditions imposed upon the defendant by the court. These conditions do not

appear on the commitment. Then on January 4, 1943, the commitment states:

“The within named defendant having previously been granted a stay of execution of sentence to this date, upon recommendation of the State Adult Parole and Probation Department and good cause appearing therefore the Court orders the defendant committed pursuant to the judgment and sentence previously entered herein.”

The transcript of the proceedings of November 28, 1942, which are set out in full in this brief, aid us in determining what the conditions were upon which he was granted the parole, suspended sentence, or “stay of execution”, as it is termed by the court. The court questioned the defendant as to his work and as to his drinking; in fact, the court said:

“THE COURT: I believe in each of your offenses there has been the matter of drink connected with it, some drink, some evidence of drink. One of the conditions of your staying out of the penitentiary is that you drink no liquor or beer. That may be hard, but it will be no harder than if you were in jail where you couldn't get it.

“MR. DEMMICK: No sir.

“THE COURT: So you must not drink. If I hear of your drinking at all, I will sign a commitment, and you will sign the agreement with Mr. McFadden to report and be under his direction.”

The court further went on to state that he believed that the defendant could clear the case up, and for that reason he was not putting him in prison. The court even

went so far as to say that if the defendant could clear up the case to the satisfaction of the district attorney, he was satisfied that the district attorney would assist him, the defendant, in obtaining a pardon in the matter also.

Now, what happened on January 4, 1943, cannot be determined as no notes were taken by the reporter on that date, and it can be safely assumed that the reason they were not taken was that nothing more occurred than what appears in the commitment in the files in the case; that is, that upon recommendation of the State Adult Parole and Probation Department, and good cause appearing therefor, the court orders the defendant committed pursuant to the judgment and sentence previously entered herein. Definitely, the defendant was not given an order to show cause why the suspension, or parole, or stay of execution should not terminate. He was merely taken into court, and for no reason apparent to the person reading the record, committed to prison. There was no citation or order to show cause served on the defendant in order for him to show the court that he had complied or was complying with the terms of his suspension. The record is silent as to the reasons why the court took an about-face in this matter. Surely the language of the court at the time he sentenced this defendant is such that the defendant had reason to believe that he was being given an opportunity to stay out of prison for all time, if he complied with certain conditions. In no sense could this be classed as a mere stay of execution, such as is given on certain occasions to

prisoners so they may clear up their affairs, or receive medical attention before going to prison. Regardless of the label,—stay, suspension, or parole—the actions of the court in this case came squarely under Section 105-36-17, Utah Code Annotated, 1943 (Laws of Utah, 1933). The court had no jurisdiction to commit the defendant Demmick until there had been a hearing on the revocation of the suspended sentence.

This case falls within the rule laid down in *State v. Zolintakis*, 70 U. 296, 259 P. 1044, 54 A. L. R. 1463.

CONCLUSION

The plaintiffs submit that the lower courts acted without and beyond their jurisdiction, to try or to hear the habitual criminal status—

First: Because the habitual criminal act was repealed by implication;

Second: Because the previous crimes of which defendants were convicted did not involve sentences of “not less than three years” as required by the statute; and

Third: On account of the procedure followed by the lower courts.

Therefore, all verdicts and commitments based upon such informations are nullities, void, and subject to attack on habeas corpus.

The plaintiffs feel that merely to resentence these plaintiffs on their substantive offenses would not be adequate or sufficient relief, since the co-mingling of that of which the lower courts obviously had jurisdiction, and that of which they did not, was such as to render the whole proceedings void.

Plaintiff Demmick's contention that his commitment on January 4, 1943, was beyond the jurisdiction of the court is of course purely academic unless the court finds that up until this point the lower court acted within its jurisdiction.

The plaintiffs submit that the writs of habeas corpus should be granted and that they should be discharged.

Respectfully submitted,

DOROTHEA MERRILL DRYER,

*Attorney for Plaintiff Grover
Thompson*

*Amicus Curiae, by appointment
of the Supreme Court.*

RAY S. McCARTY,

*Attorney for Plaintiff Carl
Rolland Demmick.*