

1953

# Otho R. Murphy v. Grand County, Utah : Brief of Plaintiff and Respondent

Utah Supreme Court

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Hammond & Hammond; Attorneys for Plaintiff;

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## Recommended Citation

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# IN THE SUPREME COURT OF THE STATE OF UTAH

OTHO R. MURPHY,  
Plaintiff and Respondent

vs.

GRAND COUNTY, UTAH, a body  
corporate and politic, and MAR-  
GIE M. SHAFER, County Clerk of  
Grand County, Utah and Ex-Offi-  
cio County Auditor,

Defendants and Appellants.

FILED  
AUG 1 1953

Clerk, Supreme Court, Utah

Civil No. 7998

APPEAL FROM THE DISTRICT COURT OF GRAND  
COUNTY, STATE OF UTAH

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## Brief of Plaintiff and Respondent

HAMMOND & HAMMOND

By Mark Hammond

Attorneys for Plaintiff

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OTHO R. MURPHY,  
Plaintiff and Respondent

vs.

GRAND COUNTY, UTAH, a body  
corporate and politic, and MARGIE  
M. SHAFER, County Clerk of  
Grand County, Utah and Ex-Offi-  
cio County Auditor,  
Defendants and Appellants.

Civil No. 7998

APPEAL FROM THE DISTRICT COURT OF GRAND  
COUNTY, STATE OF UTAH

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## Brief of Plaintiff and Respondent

### STATEMENT OF FACTS

The facts of this case are as set forth in plaintiff's Amended Complaint and as alleged and admitted by defendants: That Grand County, Utah is a body corporate and politic and that the defendant Margie M. Shafer was, at the commencement of this action, and at the time judgment was entered, the County Clerk of Grand County

and Ex-Officio County Auditor; (Record, pp. 17, 24, 36); that plaintiff was duly elected to the office of County Attorney of Grand County on the 7th day of November, 1950; that he duly qualified and entered upon the performance of his duties in that office on the 1st day of January, 1951, and ever since, he has been, and is now the duly elected, qualified and acting county attorney of said county, (Record, pp. 17, 24, 36); that on April 3, 1950, pursuant to Section 19-13-15, UCA 1943, as amended, and within the time therein specified, the then county commissioners of Grand County, Utah pretended to fix the salary of the county attorney for the term commencing January 1, 1951, and fixed the sum of \$10.00 per year (Record, pp. 7, 10, 24, 37); that the salary of plaintiff's predecessor in the office of county attorney was \$1,000.00 per year (Record, pp. 18, 24, 37); that at the time said purported salary of \$10.00 per year was fixed, Grand County, Utah had an assessed valuation of \$4,976,687.00, and was a county of the Fourth Class as provided by Section 19-13-13, UCA 1943, as amended (Record, p. 8) and the maximum salary for the office of county attorney for said county was \$1,800.00 per year (Record, pp. 8, 34, 37; Section 19-13-14, UCA 1943 as amended); that the plaintiff presented his claim for salary as county attorney to the board of county commissioners of Grand County on the basis of \$1,000.00 per year and his claim was rejected, whereupon this suit was instituted (Record, pp. 25, 32, 38); that Section 19-13-15, UCA 1943 as amended, provides as follows:

“The Board of County Commissioners shall biennially (sic) at a meeting held at least six months prior to the election of county officers, fix and determine the salaries of the county officers,

for whom maximum salaries are fixed, for the term next succeeding; provided that the salaries of such officers shall not be diminished or increased for the term for which they were elected and shall have qualified; and provided further, that should any board fail to fix the salary of any of the county officers as provided in this section, the salary of the predecessor of said officer whose salary has been fixed shall apply; provided however said boards of County Commissioners may on or before July 1, 1949 fix the salaries of county officers in amounts which in their opinion will establish sufficient and proper salaries for services rendered or to be rendered by officers whose salaries are so fixed; and provided further that the maximum salaries for county officers shall not exceed in amount the maximum salaries as set forth in Section 19-13-14 hereof."

Reference by appellants in their Statement of Facts contained in their brief to the "write-in" vote which elected plaintiff, estoppel by reason of a "news item" appearing in the Times-Independent of Moab, Utah and the limitation of the budget of Grand County as a defense, involves the correctness of the ruling of the trial court and such matters are not material facts pertaining to the issues of this case.

## ARGUMENT

### I

The Board of County Commissioners of Grand County, Utah failed to exercise a fair and reasonable discretion in fixing the sum of \$10.00 per year as the salary for the County Attorney.

The court found that the sum of \$10.00 per year was

so small as to amount to no compensation at all for the duties imposed by law upon the office of county attorney and was calculated to discourage anyone from seeking said office, or to limit aspirants to those willing to render the service gratuitously, in violation of the provisions of Section 10, Article VIII of the Constitution of the State of Utah as amended, that "A county attorney shall be elected by the qualified voters of each county . . . ." (Record, pp. 34, 37).

The trial court stated in its Memorandum Decision:

"One need but scan the index of our Code under the title 'County Attorney' to obtain a realization of the importance of the office. Chapter 15, Title 19 enumerates his general duties. It is important to note that he must pass upon the legality of County Commissioners claims for expenses (19-11-14), and that it is made his duty to sue the Board to set aside excessive levies made by them (80-9-19). I mention these particular provisions, and could mention many more, to point out that a County Attorney has many functions to perform which could not well be controlled by the Commissioners, notwithstanding the provisions of Section 19-5-9. The importance of the office and the duties to be performed could not well be excluded from consideration in determining the salary to be fixed for the office. . . . They (county commissioners) must, however, have anticipated that their action would discourage anyone from seeking the office or in any event to limit aspirants to the office to those who were willing to render the service gratuitously, and whatever their motives, the fixing of a fair salary as compensation for the duties to be performed was not among them." (Record, p. 34).

The case of *State ex rel. Yeargin v. Maschke et al.* (Wash. 1916) 155 Pac. 1064, is in point. The state consti-



tution authorized the appointment by the judge of the Superior Court of the county of a court commissioner who should perform "like duties as a judge of the superior court at chambers, and perform such other duties connected with the administration of justice as may be prescribed by law." The law provided that the court commissioner "be allowed a salary in addition to fees provided for, in such sum as the board of county commissioners may designate." Prior to April 12, 1913 the salary had been \$15.00 per month. On that date the commissioners reduced the salary to \$1.00 per month (\$12 per year): The relator brought suit. The court found that the commissioners were prompted by wrong motives. In the course of the opinion the court states:

"It remains to inquire whether the board in fixing the salary of the court commissioner at \$1 per month exercised an honest discretion, or acted arbitrarily or from improper motives, and thus failed to exercise that discretion which the law demands. \* \* \* \* \* They seem to have been actuated by one motive, and that was to so reduce the salary as to force the resignation of the relator from that office. This was a gross abuse of discretion."

It is submitted that the essence of that holding is that in fixing the salary at \$1.00 per month, the commissioners failed to exercise a legal discretion. The fact that they were prompted by wrong motives does not detract from the force of that holding.

## II

The court has the power to review the action of the

county commissioners to determine whether they have exercised a legal discretion.

The substance and burden of appellants' argument and brief are that the Board has absolute discretion in the matter of salary for county officers within the maximum set by law and that the court has no power to review the action of the board. The leading case cited by appellants, and from which they quote extensively, should be sufficient answer to their contention:

“ . . . . . If the theory of the appellants be correct, that the action of the board is final and cannot be reviewed by the courts, the taxpayer in one of the smaller counties may see the salaries fixed at the maximum, without regard to the amount of labor to be performed or other circumstances, contrary to the public interests, and be powerless to remedy the wrong. . . .” **Reynolds v. Board of Commissioners**, 6 Idaho 787, 59 Pac. 730.

While in the case just cited the court was concerned about the maximum salary being against the public interest under some circumstances, by the same token, a salary fixed at so low a figure as to prevent the candidacy for the office of county attorney, would place the choice for that office completely in the hands of the commissioners in which case they could pay whatever compensation they desired to a “favorite”, to the detriment of the public interests.

Appellants also cited the case of **Cawsey v. Brichey**, 82 Wash. 653, 144 Pac. 938. (Appellants' Brief, p. 6). In that case the court says, at page 942:

“ . . . . The declared purpose of the act is the protection, propagation, and restoration of game, etc.

The powers conferred upon the game commission must be construed with reference to that purpose. The power to set aside lands as a game preserve necessarily implies not an arbitrary selection, but a selection of lands peculiarly suitable for that purpose. The act, reasonably construed, gives no power to select any other lands. True it gives the commission a discretion, but the whole purpose of the act furnishes a guide and marks a limit to that discretion which excludes the right to act arbitrarily. . . .”

Referring again to the case of **State ex rel. Yeargin v. Maschke et al.**, *supra*, the court says:

“The general rule, of course, is, that the discretionary power of the board of county commissioners is not subject to review by the court. But this is not a universal rule. If the action of the board of county commissioners is arbitrary or capricious, or if its action is prompted by wrong motives, there is not only an abuse of discretion, but in contemplation of law there has been no exercise of the discretionary power. If an honest discretion, as demanded by the law, has not been exercised, the result is to substitute arbitrary action for such discretion. If a tribunal such as the board of county commissioners acts arbitrarily, or refuses to exercise its discretion, the law will by mandamus require it to exercise its discretionary power.”

From the foregoing it is made abundantly clear that the courts may review the action of the county commissioners. If further proof is necessary, our own court has announced its views on the question in the case of **Startup v. Harmon et al., Com’rs of Utah County**, 59 Utah 329; 203 pac. 637 @ 639:

“... It is true the commissioners have the discretion to determine the amount necessary to be provided, but it is not an arbitrary discretion; it is a discretion that may be abused, and whenever abuse is properly charged the question may be reviewed even in a mandamus proceeding. 18 R.C.L. p. 126; 26 Cyc. 161, 162.”

The appellants put a great deal of emphasis on the fact that there was no evidence offered by plaintiff to prove the motive which prompted the Board's action. When the case came on for trial, both sides rested and the cause was submitted on the record.

“The court is justified in finding facts as they are alleged and admitted or not denied in the pleadings.” 64 C. J. 1259, Trial, Sec. 1106

The essential facts of this case are all admitted. As set forth in the Statement of Facts, the plaintiff was duly elected; he qualified and entered upon the performance of his duties as county attorney and ever since, he has been and is now the duly elected, qualified and acting county attorney of defendant county. The board of county commissioners in due time, purported to fix the salary for the office of county attorney and fixed the same at \$10.00 per year. The salary of plaintiff's predecessor was \$1,000.00 per year.

It may be that the “finding” that the sum of \$10.00 per year was so low “as to amount to no compensation at all” is a legal conclusion drawn by the trial judge from the facts as set forth in the pleadings and record. The fact that it is included in the findings cannot prejudice the defendants.

“Under the practice in most jurisdictions, the findings of fact and conclusions of law made by the trial judge in a case tried without a jury are to be separately stated, although a failure to do so may not be a ground for reversal where no prejudice results. . . . Propositions which are in reality conclusions of law cannot be given effect as findings even though included with the findings of fact. . . . .

In determining the character of a finding, the court will look to the substance thereof rather than its classification. Conclusions drawn by the court in the exercise of its legal judgment from facts found by it are conclusions of law, although denominated findings of fact.” 53 Am. Jur. 793-794; Trial, Section 1138.

If \$10.00 per year is no salary, then the Board failed to fix any salary for the term beginning January 1, 1951. Not having fixed any salary, the salary of plaintiff's predecessor prevails under the statute.

Appellants argue that the trial court substituted its discretion for that of the commissioners. This is not so. The trial court found that the commissioners had fixed no salary. The law, Section 19-13-15, UCA, 1943 as amended, then applies. This court must decide whether the trial court erred in concluding that \$10.00 per year was no salary for the county attorney under the circumstances.

Appellants also argue, in this connection, that “If the Board abused its discretion then it should be compelled to exercise its discretion within reason and not be required to accept the judgment of the court as to what is a reasonable salary for the office of county attorney of Grand County.” (Appellants' Brief p. 14). If this theory be correct, then the whole purpose of Section 19-13-15, UCA 1943 as amended would be defeated. The salary would be

determined by considering the particular person who held office. In other words, the salary would be fixed after it was known to the Board who had been elected to the office, and the amount determined in the light of that knowledge. To prevent this sort of thing, the Legislature provided that if no salary was fixed within the time specified, the salary of the predecessor should prevail. Our Legislature has set no minimum salary as have the legislatures of most other states. Therefore, a reasonable amount in the honest discretion of the Board is all that is required. If this is not provided, then the salary of the predecessor in office is the maximum and the minimum.

Appellants in their Brief (p. 14-15) cite and quote extensively from the case of *Merwin v. Board of Com'rs*, (Colo. 1901) 67 Pac. 285, apparently for the propositions that the court may not substitute its judgment for that of the Board, but if the board has failed to act, then the court can compel it to act; and that "Where one enters into a public office for which no compensation has been provided by law, he is presumed to give his services: . . . ." The case is not in point. In the first place, under the Utah law the Board cannot be compelled to act. It either fixes a reasonable salary for the office, or the salary of the predecessor prevails. In the second place, the Colorado law provided that deputy district attorneys should not be allowed any fees for attendance before justices of the peace in misdemeanors; and the county commissioners "might, in their discretion, disallow any charges against the county for fees or costs of district attorneys, or other persons, for the trial or examination of any criminal case, before any justice of the peace, police magistrate, police judge, or any court not being a court of record." It was for such serv-



ices that the plaintiff in that case was suing for the value of his services. There is no similarity between that case and the instant case.

As to the proposition that plaintiff is presumed to give his services in an office for which no salary is provided, it is submitted that this is untenable under the Utah law. Else why the provision that the salary of the predecessor shall prevail where no salary is fixed?

### III

Plaintiff is not estopped from claiming salary in the amount provided for his predecessor in office.

A. An elective office is not a contract and the elements of estoppel do not apply.

“The salary of a public officer is an emolument of the office and rules governing contractual relations and obligations in ordinary cases are not applicable in fixing such salary.” **Cahill v. Beltrami County, (Minn.) 29 N.W. (2d) 444;**

“A public officer cannot estop himself from claiming his statutory salary by agreeing to accept or by accepting a lesser sum than is provided by statute.” **Fannin County v. Dobbs, (Texas) 202 S.W. (2d) 950.**

B. Notice of salaries fixed unnecessary.

In the matter of fixing salaries of county officers, there is nothing in the statute that provides for official notice of the amounts so fixed, so that assuming that plaintiff knew of the amount provided by the Board was \$10.00 per year, knowledge did not prevent him from claiming his salary as provided by law.

Even if official notice was required, it is submitted that the news item contained in the Times-Independent, issue of April 6, 1950, pertaining to the salary of the county attorney was not sufficient. The only reference to that matter in the news item was two and one-fourth lines of small type at the end of the report entitled "LET CONTRACT FOR OILING AIRPORT \* \* \*: the salary of county attorney was reduced from \$1000.00 to \$10.00 per year". (Record p. 15)

#### IV

The county commissioners may not, by reducing salary or otherwise, abolish an elective office created by the Constitution.

In *Argyle vs. Wright*, 63 Utah 184; 224 Pac. 649, the plaintiff sought a writ of mandate against the county auditor of Utah County, compelling him to draw his warrant in favor of plaintiff for a years salary as county surveyor, to which office plaintiff has been duly elected and had qualified. Defendants contended that plaintiff had abandoned his office and the trial court so concluded. This conclusion was reversed on appeal and this court in the course of its opinion at page 651 of the Pacific citation states:

"No authority is found in the statutes of this state authorizing boards of county commissioners to remove a county officer from office or to declare a vacancy by any act on the part of such commissioners."

In the case of *Sheriff of Salt Lake County v. Board of*



Com'rs 71 Utah 593; 268 Pac. 783, the county commissioners suspended six deputy sheriffs on the theory that they, the commissioners, had the absolute power and right to do so. In denying the commissioners' power to suspend the deputies, and making permanent the writ of prohibition prayed for, this court stated:

"The Sheriff's office is an elective office of the county, as is also the office of a county commissioner, and is a co-ordinate office or branch of our county government. His powers and duties are prescribed by statute and are similar to those generally prescribed by other western states. In performing them, he, generally speaking, acts independently of the board of county commissioners except as otherwise restricted and specified by statute."

It is submitted that the quotation can be paraphrased to apply to the office of county attorney with the same effect as it applied to the office of the sheriff.

"The phrase 'by and with the consent and approval of the board of county commissioners,' contained in section 7873, supra, is not involved in the facts now presented. That phrase vests no discretion in the board of county commissioners in so far as the duty to make provision for the payment of the salary of the position is concerned. That phrase does vest a discretion in the board, whereby it determines whether a nomination of an individual for appointment to the position shall be confirmed or rejected. The position created cannot be abolished by failure to provide a salary." **Board of County Com'rs of McIntosh County et al. v. Kirby, Court Clerk, et al. Okl. 1935) 49 p. (2d) 746.**

"Section 4448, O.S. 1931, provides that in every county in the state there shall be appointed by the State Commissioner of Health a county

superintendent of public health. This section further prescribes his qualifications and duties. Section 7770, O.S. 1931, directs that the board of county commissioners shall pay him certain designated compensation. . . . We held in *Board of County Commissioners of McIntosh County et al. v. Kirby*, 174 Okl. 20, 49 P. (2d) 746, that no discretion is lodged in the board of county commissioners in so far as the duty to make provisions for the payment of the salary or a deputy court clerk is concerned. We also held that the position, created by the Legislature, cannot be abolished by failure to provide a salary by appropriation, and also affirmed a writ of mandamus to make the appropriation, granted in that action by the lower court." *Board of Com'rs of Carter County et al. v. Dorrough*, (Okl. 1936) 59 P. (2d) 273.

## V

The appellants are not prevented by budget limitations from paying plaintiff the salary due him.

The case of *Startup v. Harmon*, 59 Utah 329; 203 Pac. 637, cited above, is sufficient answer to appellants' argument. This court stated, at page 639 of the Pacific citation:

"It is further contended as matter of defense that there are no funds at present out of which provision can be expressly made for the purpose demanded in this proceeding. Ordinarily such a defense is a complete answer to an application for a writ of mandate; that which is impossible cannot justly be required. But assuming there are no funds at the present time available for the purpose in question, it does not necessarily follow that such condition must continue indefinitely. Utah county is a quasi public corporation, a legal subdivision of the state, with ample power to assess and collect taxes for all legitimate purposes

authorized by the laws of the state. It is quite true that taxes must be assessed, levied, and collected at the time and in the manner provided by law. Defendants contend that it is now too late to assess and collect additional taxes for the year 1921. They also insist that it is too early to compel the assessment and collection of taxes for the year 1922. It is also suggested that no person has the right to anticipate that defendants will refuse to make the provision that may be required in 1922, and that until defendants do refuse there is no ground for action against them. Upon this point they cite High on Extraordinary Legal Remedies (3d Ed.) p. 17, page 160, par. 144, and page 19, par. 14; also State v. Rising 15 Nev. 164.

“The contention, to say the least, is ingenious, if not disingenuous. If it is too late to assess and collect taxes for 1921, because the time has past within which it can lawfully be done, and too early for 1922, because the time when it can be done has not yet arrived, it is easy to see, in a meritorious case, that grave injustice might be done; in fact it might happen, if the rule contended for were rigidly enforced, that relief in a case of this kind could never be obtained. The contention of defendants is squarely met by a somewhat lengthy quotation furnished by plaintiff from a Colorado case reported in 110 Pac. 197 . . .”

## VI

The court did not err in striking Third and Fourth Defenses of answer.

The appellants complain at the action of the court in striking the Third and Fourth Defenses of their answer (Appellants' Brief p. 3).

Plaintiff filed his Motion to Strike on or about the 8th day of May, 1952 (Record, p. 28), and the same came on regularly for hearing June 17, 1952 (Record, p. ....).

Minute Entry, June 17, 1952). The court sustained the motion “. . .with the understanding that on pretrial counsel for defendant may be heard on the motion if he so desires.”

Counsel for defendants made no move to argue the matter or to vacate the court's order striking the Third and Fourth Defenses.

Rule 7 (b) (2) URCP reads in part as follows:

“ . . . Except as otherwise specifically provided by these rules, any order made without notice to the adverse party may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice. . . . ”

Therefore, even if the court erred in sustaining the plaintiff's Motion to Strike the defendants' Third and Fourth Defenses, defendants' may not be heard to complain for their failure to move for a vacation or modification of the court's order.

## SUMMARY AND CONCLUSION

By way of Summary and Conclusion, this court is confronted with the facts: (a) that the office of County Attorney in the State of Utah is, and was a constitutional and elective office in each County; (b) that Grand County, Utah was a county of the Fourth Class with the maximum salary for the office of county attorney fixed by the Legislature at \$1800.00 per year; (c) that the salary of the plaintiff's predecessor in office was \$1000.00 per year; (d) that the Board of County Commissioners of Grand County,

Utah, on April 3, 1950, fixed the sum of \$10.00 per year as "compensation" for the performance of the duties of county attorney of Grand County for the term commencing January 1, 1951; (e) that plaintiff was duly elected on November 7, 1950 to the office of county attorney of Grand County, and on the 1st day of January, 1951, duly qualified and entered upon the performance of his duties as such attorney, and ever since, he has been, and is now the duly elected, qualified and acting County Attorney of Grand County, Utah; (f) that plaintiff duly presented his claim for salary as such county attorney on the basis of \$1000.00 per year and his claim was rejected and disallowed by the Board of County Commissioners.

Even if it be conceded that the Board had no ulterior motive in fixing the sum of \$10.00 per year as "compensation" for the performance of the duties of county attorney, yet they must have intended the consequences of their action deliberately taken.

" . . . . The result either way, as a practical matter, simply brings the bridge into the district for taxation purposes. Such inevitably is the sole result of including the river within the district, and legislative bodies, as well as individuals, must be presumed to have intended the necessary and inevitable result of their action." **Portland General Electric Co. V. City of Estacada, (Ore. 1952) 241 P. 2d 1129 @ 1145.**

They could not seriously have expected any person to have undertaken the duties and responsibilities of such an office for such a small compensation. The idea is palpably absurd. They must have anticipated that no person would choose to run for office for such a nominal "salary".

Therefore they must have intended to prevent the candidacy of any person for the office of County Attorney.

The answer to the argument that a nominal "salary" did not prevent the election of a county attorney is found in the basis for this suit:—that \$10.00 per year is not a salary; that the Board of County Commissioners failed to fix any salary for the office of county attorney for the term commencing January 1, 1951 and that the salary of plaintiff's predecessor, to wit, \$1000.00 per year, is the salary to which he is entitled.

Respectively submitted

HAMMOND & HAMMOND

By Mark Hammond

Attorneys for Plaintiff

August, 1953