

1955

## State of Utah v. Wilbur J. Stites : Brief of Respondent

Utah Supreme Court

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E. R. Callister; K. Roger Bean; Attorneys for Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,

*Respondent,*

— vs. —

WILBUR J. STITES,

*Appellant.*

Case No.  
8419

**FILED**

MAR 9

1956

Clerk, Supreme Court, Utah

## Brief of Respondent

E. R. CALLISTER  
*Attorney General*

K. ROGER BEAN  
*Assistant Attorney General*  
*Attorneys for Respondent*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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## Brief of Respondent

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### STATEMENT OF FACTS

Respondent adopts as its Statement of Facts the first five paragraphs of Appellant's Brief.

### STATEMENT OF POINTS

#### POINT I

THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION TO QUASH THE INFORMATION.

## POINT II

THE COURT PROPERLY DENIED THE APPELLANT'S MOTIONS FOR DISMISSAL AND IN ARREST OF JUDGMENT.

## POINT III

TESTIMONY THAT APPELLANT WAS ARMED WAS NOT IMPROPER.

## POINT IV

TESTIMONY OF APPELLANT'S ADMISSIONS WAS PROPERLY ADMITTED.

## POINT V

THE COPY OF CORPORATION MINUTES WAS ADMISSIBLE.

## POINT VI

THE COURT'S INSTRUCTIONS TO THE JURY CORRECTLY STATED THE LAW.

## ARGUMENT

### POINT I

THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION TO QUASH THE INFORMATION.

Section 77-21-8 of our Code of Criminal Procedure provides two principal methods of charging an offense. The part applicable to this appeal reads as follows:

“(1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:

\* \* \*

“(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.”

The statute (76-13-5, U.C.A. 1953) under which the appellant was charged reads in pertinent part:

“\* \* \* and every director, officer, agent or member of any corporation or association who embezzles, abstracts or wilfully misapplies any of the money, funds or credits of the corporation or association; \* \* \* is guilty of a felony, and shall be imprisoned in the state prison for not less than one year nor more than ten years, and be fined in any sum less than \$10,000.”

The information in this case states:

“That on or about the 3rd day of December, 1954, at the County of Cache, State of Utah, the said defendant did then and there as a director and an officer of a corporation, to-wit a director and president of Valley Motor Company, a Utah corporation, wilfully, unlawfully and feloniously misapply money of the said corporation in the amount of \$2,000.00 which he had received from Robert S. Budge on the sale of an automobile to said Robert S. Budge which was the property of the said corporation.”

The information in a criminal proceeding must be sufficiently definite to (1) notify the defendant of the charge against him so as to enable him to prepare his defense, (2) identify the offense so that the defendant can successfully interpose a double jeopardy plea in the event of a second prosecution thereon, and (3) apprise

the court of the issues before it so that it can properly rule on questions of evidence and determine the sufficiency thereof. *Leasure v. State*, ..... Okla. ...., 275 P. 2d 344. Additionally, the information must contain all of the elements of the offense charged. The test of sufficiency is not whether the information could have been made more certain, but rather whether it meets the foregoing requisites. *Sandy v. State*, 94 Okla. Cr. 80, 231 P. 2d 374.

The complaint made of the information in this case was similarly advanced against the information in the case of *State v. Pritchett*, 87 Utah 104, 34 P. 2d 704, rev. on reh. 87 Utah 109, 48 P. 2d 451. In its first opinion this Honorable Court held in favor of the defendant, setting forth its reasons in the following language:

“It is familiar doctrine in this jurisdiction that an information to withstand an attack by a general demurrer or motion in arrest of judgment must apprise the accused of the crime charged with such reasonable certainty that he can make his defense and after verdict and judgment thereon protect himself against further prosecution for the same offense. It is also well settled by numerous decisions of this court that where a statute uses general or generic terms in defining a crime, it is not sufficient that the information merely charged the crime in the same general or generic terms as those used in the statutory definition. The particular acts which the accused is charged with having committed must be alleged in the information. \* \* \*

“It will be observed that the statute under which this prosecution is had uses general or generic terms in defining the crime of misapply-



ing credits of a corporation. That crime may be committed in several different ways and by the use of various means. The accused is charged with using and passing a bank check or draft in the sum of \$1,642.36. The only language contained in the information which is descriptive of the check or draft is the amount thereof. It is alleged that the instrument was 'drawn on or against' a credit at the National Copper Bank from which it may be inferred that the National Copper Bank was the drawee of the check or draft. The information is silent as to the date of the check or draft, as to its maker or payee. \* \* \*

Upon rehearing, however, and after more extensive consideration of the point, this Court reversed its prior holding, explaining its decision in part in the following language:

“\* \* \* A re-examination of the information convinces us that the defendant was specifically charged with unlawfully misapplying credits of a corporation, and that we therefore misconceived the nature of the charge. The gist of the offense is that of misapplying credits, and if that result is accomplished, the offense is complete irrespective of the means employed. \* \* \*”  
(48 P. 2d at 452)

The only difference between the information in the *Pritchett Case* and that under consideration here is that the former dealt with misapplying credit of a corporation, whereas the charge here is misapplying money of a corporation—an immaterial distinction. This is the only case the respondent has been able to find in which the Court has passed on a charge laid under the “misapplication” statute.

The reasons for sustaining the information in the *Pritchett Case* are even more applicable to the case at bar. This appellant was notified that he was charged with wilfully misapplying, as an officer and director of a corporation, money of the corporation; that the particular money in question was a \$2,000 sum received from Robert S. Budge; that the money was property of the corporation as a result of the sale of an automobile to Budge; and that the automobile was property of the corporation. Additionally, the time and place of the offense were specified. Neither the provisions of our State and Federal Constitutions nor the decided cases require more definiteness than this.

In broad view, there is only one way in which this offense can be committed—by using for some other purpose corporate money which under the law must be used for a corporate purpose. *State v. Erwin*, 101 Utah 365, 120 P. 2d 285. Yet, like any other offense, it may be accomplished in detail by a variety of methods.

The offense of robbery offers an example. It is settled law in Utah that the short form information is sufficient to charge robbery. *State v. Hill*, 100 Utah 456, 116 P. 2d 392; *State v. Landrum*, 3 Ut. 2d 372, 284 P. 2d 693; and *State v. Robbins*, 102 Utah 119, 127 P. 2d 1042. The information may state merely that AB robbed CD. Yet, robbery can be committed by any one of four methods and in each category, by as many different acts as the pleader's imagination might offer. It can be committed by a taking from the person of the victim by force or by threat of force; or it may be taken from his

immediate presence by either of these. The force itself may be applied by club, clenched fist, knife or flat iron; the threat of force may accompany the brandishing of a gun, a blackjack or a broken beer bottle. So also, in this case, the appellant could have used the money to buy a refrigerator, or take a vacation, or pay off a personal debt, or for any of numberless other purposes which he may have thought expedient at the time.

The appellant contends, however, that this information is bad because it contains no allegation of what, specifically, he did with the money nor any statement of what authority required him to apply it otherwise. His brief suggests other questions which he maintains should have been answered by the information. But, the State is not, and properly should not, be required to plead such matters as a part of the information. If the appellant has any right to restrict the prosecution in its proof, it is by means of a bill of particulars, and no clearer case than this for its appropriateness can be imagined. See *State v. Robbins*, supra.

The appellant places great stress on the holding in *State v. Topham*, 41 Utah 39, 123 P. 888, but this Court's subsequent views of the *Topham Case* suggests a distinction. As explained in *State v. Zaharapoulos*, 60 Utah 244, 208 P. 493:

“\* \* \* The case at bar is not at all analogous, and is readily distinguishable from the decided cases relied upon by defendant. In those cases it was charged that the offenses had been committed in divers ways. As an illustration, take the *Topham Case*, wherein it was charged that the offense was

committed 'by promises and threats and by divers devices and schemes,' without stating any specific act or thing done on the part of the accused, or the kind or nature of the promises, threats, devices, and schemes, or any facts or circumstances whatever whereby the accused might know the kind or character of the acts constituting the offense with which she was charged. In the present case the defendant is charged with nothing more than one act, that of 'knowingly permitting prostitutes to solicit patronage in their [his] place of business,' during a certain period, 'on the 25th day of February, A.D. 1921, and thence continuing until and including the 4th day of March A.D. 1921.' The exact period of time, place, and names of the prostitutes who were permitted to solicit patronage for prostitution were specifically stated in the charge. What more was needed to advise the defendant of the nature of the charge against him? The manner in which the women prostitutes solicited patronage of men for the immoral purposes of prostitution was wholly immaterial. The gist of the offense was defendant's permitting them to solicit in his place of business, the Alco Hotel. These facts constituting the essential elements of the crime with which defendant was charged were specifically pleaded, together with the time, place, and names of the persons permitted to solicit. Every requirement of our statutes in a case of this kind was complied with."

In *People v. Hill*, 3 Utah 334, 3 P. 75, this Honorable Court sustained an indictment which was attacked by the defendant as insufficient. The language of that opinion is appropriate to this issue. It reads:

"\* \* \* It is sufficient if the charge be stated with so much certainty that the defendant may know what he is called upon to answer, and the court

how to render judgment. In other words, substantial justice should be more sought after than artificial nicety. The defendant, whether he be guilty or innocent, if he understands the English language, cannot fail to have understood when the indictment was read to him that by it he is charged with the embezzlement of \$9,000, the property of Lucy J. Hill."

## POINT II

### THE COURT PROPERLY DENIED THE APPELLANT'S MOTIONS FOR DISMISSAL AND IN ARREST OF JUDGMENT.

The heart of the appellant's second point is the argument that he could not have misappropriated the Budge payment because he was his own boss and accountable to no one. The idea is that this was a "one-man corporation" and appellant was the man; consequently, the only duty he owed with respect to these funds was a duty to himself.

The record shows that the Valley Motor Company was organized under the incorporation provisions of the laws of Utah and received its charter on January 8, 1954. The appellant was one of the original promoters (R. 37). He was present at the first meeting of the stockholders and the first meeting of the board of directors. He was president of the corporation and one of its directors (R. 42). For more than a year, the corporation, through the appellant and its other officers and agents, carried on the business of an automobile agency, entering into numerous contractual arrangements both with the public and with other corporations.

Throughout that time, its share-holders, including the appellant, enjoyed all the benefits and advantages of doing business by the corporate form of organization. He now seeks by his argument to deny the corporation's existence and to place himself in the role of an individual proprietor, or at most, a partner, unfettered by the statutes governing the management of corporate affairs. The cases hold that he is estopped from doing so. He cannot run with the hare and bark with the hounds.

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The record contradicts the appellant's claim that there was no evidence at the trial of fraudulent intent on his part. Following is part of the direct examination of Clair Lundberg, a prosecution witness:

“THE COURT: \* \* \* Go ahead, Mr. Lundberg. What did you say and what did Mr. Stites say?”

“A. I said, ‘What did you do with the \$2,000 from Bob Budge?’ And he said, ‘I took that to cover another fictitious deal.’”

“Q. Another fictitious deal?”

“A. Yes.”

(R. 104)

And, on cross examination:

“Q. Do you know what he meant by a fictitious deal?”

“A. I assumed there were other deals where money had been taken from the company.”

\* \* \*

“Q. So you don’t know what he meant when he said he took the money to cover another fictitious deal?

“A. I assumed there had been other fictitious deals. He said, ‘I took that money to cover another fictitious deal.’

“Q. For whom?

“A. You ask him. I don’t know.”

(R. 104, 107)

Wayne Craw testified similarly:

“Q. Did you hear Mr. Lundberg ask Mr. Stites the question of what he had done with the \$2,000 of the Budge transaction?

“A. Yes, sir.

\* \* \*

“Q. What was his answer, to your recollection?

“A. The same as was given by Mr. Lundberg. That was a true statement.

“Q. What was that statement?

“A. ‘I used that check to cover another fictitious deal.’ ”

(R. 110-111)

Jay C. Howell also testified to the defendant’s admissions:

“Q. Now in regard to this conversation that was up in this office at this date, did you have a conversation with Mr. Stites in regard to funds missing from the corporation?

“A. That’s right.

“Q. Would you state in words or effect, as

near as you can, what you said to Mr. Stites and what Mr. Stites said to you in respect to that matter?

\* \* \*

“A. I asked Webb, ‘Webb, you say we’ve been short of money.’ I says, ‘The reason that we’ve been short of money recently is because of poor business practices, or because you’ve taken it for your own use?’ He didn’t reply. He put his head down in his hands like that (indicating) and remained for two or three minutes; and finally he came on up and he said, ‘We’ve made some poor deals,’ and he says, ‘I’ve used the money.’ (R. 131-132)

Clair Lundberg was recalled by the defendant and testified in part as follows:

“Dr. Budge called me on the phone and at the time that he called—He didn’t call me personally. He called the office and I think I was about the only one around to answer the phone. He said, ‘I have a statement for \$2,000, of which I have paid. What does it mean?’ And I said, ‘I don’t know what it means,’ and he said, ‘I paid that account to Mr. Stites.’ This was after the conversation we have had with Webb, and I asked him at that time what happened with Dr. Budge’s account. And Dr. Bob said, ‘I paid it to Webb.’ And I said, ‘I understand that you paid it to Webb,’ because Webb said that he had taken the check and applied it on the fictitious deal that I mentioned yesterday, and that’s the reason I understood it had been paid.” (R. 145)

### POINT III

TESTIMONY THAT APPELLANT WAS ARMED  
WAS NOT IMPROPER.



During the examination of prosecution witnesses with respect to the appellant's admissions, quoted under Point II, defense counsel interposed numerous objections. In the ensuing discussions between the court and counsel on the merits of those objections, the court stated that if there were any evidence that the statements were coerced or that the defendant was in any manner intimidated, the testimony would be excluded (R. 100, 103). In order to rebut any inference of duress or intimidation, the district attorney asked his witness whether, at the time the admissions were made, anyone in the room was armed (R. 124). The witness answered that the defendant was armed and the matter was dropped insofar as the jury was concerned. There is no evidence that the question was not asked in good faith or that the district attorney knew what answer he would receive. For all that appears, the defendant carried a gun everyday and had a permit to do so. As a precaution against error, however, the court directed that the answer be stricken and admonished the jury to disregard it. The statement was not inflammatory and there is no showing that the defendant was prejudiced. There was no basis for granting a mistrial or a new trial. *State v. Bechtold*, 48 S. Dak. 219, 203 N.W. 511; *Harkins v. State*, 14 Okla. Cr. 440, 172 P. 469.

#### POINT IV

#### TESTIMONY OF APPELLANT'S ADMISSIONS WAS PROPERLY ADMITTED.

The appellant's statements testified to by Craw, Lundberg and Howell were admissions, not confessions.

*State v. Johnson*, 95 Utah 572, 83 P. 2d 1010; *People v. Skinner*, 123 Cal. App. 2d 741, 267 P. 2d 875. As such, they were relevant and competent to prove one or more elements of the offense. *State v. White*, 107 Utah 84, 152 P. 2d 80. There is no basis for the argument that these witnesses were accomplices.

## POINT V

### THE COPY OF CORPORATION MINUTES WAS ADMISSIBLE.

The attorney for the Valley Motor Company testified that he prepared an agenda of business drawn up in the form of minutes and that each item of business on the agenda, with some changes, was passed upon by the board of directors at a meeting attended by all the directors (R. 120). He testified that the original copies used at the directors' meeting could not be found but that the copy introduced in Exhibit 1 was a true copy of the action taken by the board.

Fletcher in his *Cyclopedia Corporations*, Volume 9, Sections 4613, 4623, states that where there is a showing that originals of corporation documents are lost, destroyed, or otherwise not producible, secondary evidence is admissible to prove their contents; and if it be argued that the original copies themselves had not been signed by the corporation officers, then the rule announced by this Court in *Copper King Mining Company v. Hanson*, 52 Utah 605, 176 P. 623, would seem to apply. To use the language of that opinion:

“\* \* \* It is true no record was made of that meeting, but the action or proceedings were shown

by oral testimony at the hearing, which may be done in a proper case. 'Any act of the directors may be proven by oral testimony, when it is shown that no record was made of such action, or when it is shown that if such record was made it has been lost.' "

This view finds support in *Fletcher*, supra, Section 2190, where it is stated that signing of corporate minutes is not essential to their validity and force as evidence.

To the same effect is Jones Commentaries on Evidence, Second Edition, Section 778. In discussing the best evidence rule with respect to corporate acts and records, he states:

"Questions as to the effect of the omission of a corporation to record its corporate acts frequently arise in determining the admissibility of parol evidence to prove such acts. The records of a corporation are prima facie evidence of its organization and subsequent proceedings. When such records exist, they are the best evidence, and the rules of evidence require their production. But all the acts of a corporation need not be established by positive record evidence. Where the records of a corporation are omitted entirely, or where they are so carelessly or imperfectly kept as not to show the adoption of resolutions or other acts of the corporation, parol evidence may be admitted to show that such resolutions were adopted, or that such acts were done, by the governing body, unless the law or the charter expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. \* \* \*"

But assuming the minutes to have been improperly admitted, the appellant was not prejudiced thereby.

The unauthenticated minutes contained nothing pertinent to this case which was not testified to by prosecution witnesses (R. 35-46, 49-51), or admitted by appellant through his counsel (R. 52-57). He complains, however, that the jury may have inferred from the minutes that he himself was not in sole control of the corporation. As a matter of law, he was not in sole control (Point II, supra) and the jury was so instructed (Instruction No. 4).

## POINT VI

### THE COURT'S INSTRUCTIONS TO THE JURY CORRECTLY STATED THE LAW.

The statute in question in this case makes wilful misapplication of corporate funds a felony. Its effect is to insure the use of corporate funds for corporate purposes. It is beyond argument that payment of corporate creditors is one of the fundamental purposes of laws governing the disposition of corporate funds.

## CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

E. R. CALLISTER,

*Attorney General*

K. ROGER BEAN

*Assistant Attorney General*

*Attorneys for Respondent*