

1960

State of Utah v. Theodore I. Geurts : Brief of Respondent

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.

Walter L. Budge; Vernon B. Romney; Jay E. Banks; Quentin L. R. Alston; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *State v. Geurts*, No. 9281 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3713

This Brief of Respondent 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

FILED
20 1960

Utah Supreme Court, Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

THEODORE I. GEURTS,
Defendant and Appellant.

Case No.

9281

BRIEF OF RESPONDENT

WALTER L. BUDGE,
Attorney General,
VERNON B. ROMNEY,
Assistant Attorney General,
JAY E. BANKS,
District Attorney,
Third Judicial District,
QUENTIN L. R. ALSTON,
Assistant District Attorney,
Third Judicial District,
Attorneys for Respondent.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	3
ARGUMENT	5
POINT I. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS FOR PURPORTED UN- CONSTITUTIONALITY OF THE CHARGING STATUTE	5
POINT II. THE COURT DID NOT ERR IN ITS INSTRUCTIONS AS TO THE MEANING OF THE TERM "MAL- FEASANCE" IN OFFICE	14
POINT III. THE COURT DID NOT ERR IN RULING AGAINST APPELLANT'S MOTION TO DISMISS COUNT 1	22
POINT IV. THE COURT DID NOT ERR IN DENYING APPELLANT THE RIGHT TO TAKE DEPOSITIONS PRIOR TO TRIAL OR TO HAVE A PRELIMINARY HEARING	29
POINT V. THE COURT DID NOT ERR IN DENYING APPELLANT'S MO- TION FOR A MISTRIAL AS TO COUNTS 2 AND 3 AND HIS MOTION FOR A NEW TRIAL	33
POINT VI. THE COURT DID NOT ERR IN DENYING THE CHALLENGES FOR CAUSE OF JUROR WILSON	33

TABLE OF CONTENTS—Continued

	Page
POINT VII. THE COURT DID NOT ERR IN DENYING APPELLANT'S MO- TION FOR A NEW TRIAL BECAUSE OF ANSWERS GIVEN BY JURORS IKEDA AND JENSEN ON VOIRE DIRE EXAMINATION	43
POINT VIII. THE COURT DID NOT ERR IN OVERRULING APPELLANT'S OB- JECTIONS TO CERTAIN QUES- TIONS ASKED BY THE DISTRICT ATTORNEY	46
POINT IX. THE COURT DID NOT ERR IN DENYING APPELLANT'S MO- TION IN ARREST OF JUDGMENT ...	47
CONCLUSION	49

AUTHORITIES CITED

38 A. L. R. 2d 627	45
30 Am. Jur. 1005	26
31 Am. Jur. 125, 143	45
43 Am. Jur. 39	20
50 Am. Jur. 489, 490	13

CASES CITED

Alerno v. Western Pacific, 5 U. 2d 146, 298 P. 2d 527	46
Atwood v. Cox, 88 Utah 437, 55 P. 2d 377	21
Beck v. Young (Neb.), 48 N. W. 2d 677	21

TABLE OF CONTENTS—Continued

	Page
Burke v. Knox, 59 Utah 596, 206 Pac. 711	31
Connolly v. General Const. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322	8
Daugherty v. Ellis (W. Va.), 97 S. E. 2d 33	21
Ex Parte Daniels (Cal.), 192 P. 442, 21 A. L. R. 1172	11
Frank v. U. S. (C. C. A. 9), 42 F. 2d 623	42
Geurts v. District Court, et al., ----- Utah -----, 352 P. 2d 778, dec. 6-1-60	47
Hopt v. Utah, 7 S. Ct. 614, 120 U. S. 430	39
Hunt v. State (Ind.), 146 N. E. 329	13
International Harvester Co. v. Kentucky, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284--	8
Law v. Smith, 34 Utah 395, 98 Pac. 300 --19, 27, 31	
Lawhorn v. Robertson (Okla.), 266 P. 2d 1008	21
Leick v. People (Cal.), 323 P. 2d 674	39
Lockheed Aircraft Corporation v. Superior Court (Cal.), 171 P. 2d 21, 166 A. L. R. 701----	13
Lorenson v. Superior Court (Cal.), 216 P. 2d 859	12
Nash v. United States, 229 U. S. 373, 33 S. Ct. 700, 57 L. Ed. 1232	8
Pacific Coast Dairy v. Police Court (Cal.), 8 P. 2d 140, 80 A. L. R. 1172 -----10, 11, 12, 13	
People v. Beifuss (Cal.), 67 P. 2d 411	12
People v. Curtis (Cal.), 300 Pac. 801	11
People v. Darby (Cal.), 250 P. 2d 743	13

TABLE OF CONTENTS—Continued

	Page
People v. Ring (Cal.), 70 P. 2d 281	11
People v. Schnieder (Colo.), 292 Pac. 982	21
People v. Smith (Cal.), 92 P. 2d 1039	11
Sims v. Moeur, (Ariz.), 19 P. 2d 679	21
Skeen v. Craig, 31 Utah 20, 86 Pac. 487	6, 24
State, ex rel. Atty. General v. Lazarus (La.), 1 So. 361	21
State v. Barboglio, 63 Utah 432, 222 Pac. 904 ..	48
State v. Burns, 79 Utah 575, 11 P. 2d 605	46
State v. Cano, 64 Utah 86, 228 Pac. 563	42
State v. Ellensten (N. J.), 2 A. 2d 454	21
State v. Green, 78 Utah 580, 6 P. 2d 177	27
State, ex rel. Hardie v. Coleman, (Fla.), 155 So. 129	20
State v. Langley (Ore.), 323 P. 2d 301	21
State v. Neal, 1 U. 2d 122, 262 P. 2d 756	29, 46
State v. Packard, 122 Utah 369, 250 P. 2d 561..	10
State v. Thorne, 41 Utah 414, 126 Pac. 286	41
State v. Ward (Tenn.), 43 S. W. 2d 217	21
State v. Winne (N. J.), 91 A. 2d 65	21
Thiede v. People of the Territory of Utah, 159 U. S. 510	39
Utah Builders' Supply Co. v. Gardner, 86 Utah 250, 39 P. 2d 327, 103 A. L. R. 928	9
Van Wagoner v. Union Pacific R. R., 112 Utah 189, 186 P. 2d 293 (1947)	40
Wyson v. Walden (W. Va.), 52 S. E. 2d 392	21

TABLE OF CONTENTS—Continued

Page

STATUTES CITED

Utah Code Annotated 1953:

10-6-36	22
10-6-38	26
76-1-6	9
77-1-4	30
77-7	7, 23, 47

Utah Constitution:

Article I, Section 7	6
Article VI, Section 19, 21	7, 8, 23

Utah Rules of Civil Procedure:

Rule 47f(6)	33, 45
Rule 65B(b)(1)	48
Rule 81	48

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

THEODORE I. GEURTS,
Defendant and Appellant.

Case No.

9281

BRIEF OF RESPONDENT

STATEMENT OF FACTS

While appellant's statement of facts is fairly accurate, as far as it goes, still it portrays them in a manner most sympathetic to appellant's cause. In addition, it fails to set forth many necessary facts, particularly those pertaining to Count 2 of the Accusation upon

which appellant was found guilty of "malfeasance in office." They should be considered in the determination of this appeal.

Appellant endeavors to infer that the only thing really involved was the taking by Commissioner Geurts of three yards of top soil. He then intimates that this top soil was merely sprinkled on the roots of some trees and shrubs being hauled to his home, thereby doing a favor for the city since this enabled the city employees to get rid of them at a location more convenient than the City Dump. He fails to mention, however, that none of the trees and shrubs were given to Commissioner Geurts by the original owners of the graves from which they were removed. All the top soil, trees and shrubs, with possibly the exception of one tree—reverted to the City and could have been used in the beautification of the Cemetery or of city owned parks.

Moreover, when the trees and shrubs removed from the graves were not used in connection with the landscaping and beautification of city property, they generally were taken out by attaching a chain to them and pulling them out with a truck. They then were hauled to a trash pile in the cemetery until it was convenient to haul a full truck-load to the City Dump. In this case, however, each tree and shrub taken to the home of Commissioner Geurts and that of his son-in-law was balled, transported and placed in holes prepared for it, all of which took

the time of at least two city employees working on city time and using city equipment.

Appellant tries to show that the top soil in question merely was sprinkled on the roots of the trees and shrubs to protect them as they were being hauled in the truck to the Commissioner's home. This suggestion is made in spite of the fact that all of the trees and shrubs in question had already been balled. Furthermore, regardless of the amount of top soil involved—and the evidence indicates there was a considerable quantity—it took the time and labor of city employees working on city time and using city equipment to dig it out of the mountains, load it, and haul it to the City Cemetery; then, to reload it; and finally, to haul it to the home of Commissioner Geurts (Tr. 99-127).

The facts are also that Commissioner Geurts on at least one occasion personally directed a city employee to plant one of the trees (Tr. 125). It is uncontroverted, furthermore, that on another occasion he directed one of the city employees to dig up and transplant some bridal wreaths for him (Tr. 119). In short, in his recitation of facts appellant failed to set forth much of the conduct indulged in by Commissioner Geurts which no public official charged with a public trust should have done.

STATEMENT OF POINTS

Appellant relies on nine points which respon-

dent will answer in the same order in which they are presented by appellant.

POINT I.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS FOR PURPORTED UNCONSTITUTIONALITY OF THE CHARGING STATUTE.

POINT II.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS AS TO THE MEANING OF THE TERM "MALFEASANCE" IN OFFICE.

POINT III.

THE COURT DID NOT ERR IN RULING AGAINST APPELLANT'S MOTION TO DISMISS COUNT I.

POINT IV.

THE COURT DID NOT ERR IN DENYING APPELLANT THE RIGHT TO TAKE DEPOSITIONS PRIOR TO TRIAL OR TO HAVE A PRELIMINARY HEARING.

POINT V.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MIS-

TRIAL AS TO COUNTS 2 AND 3 AND HIS MOTION FOR A NEW TRIAL.

POINT VI.

THE COURT DID NOT ERR IN DENYING THE CHALLENGES FOR CAUSE OF JUROR WILSON.

POINT VII.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE OF ANSWERS GIVEN BY JURORS IKEDA AND JENSEN ON VOIR DIRE EXAMINATION.

POINT VIII.

THE COURT DID NOT ERR IN OVER-RULING APPELLANT'S OBJECTIONS TO CERTAIN QUESTIONS ASKED BY THE DISTRICT ATTORNEY.

POINT IX.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION IN ARREST OF JUDGMENT.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS

FOR PURPORTED UNCONSTITUTION- ALITY OF THE CHARGING STATUTE.

One of the points stressed heavily by appellant is that the statute under which he was removed from office for "malfeasance" is so "vague, indefinite and uncertain" as to deny him "due process of law" as guaranteed by Section 7 of Article 1 of the Constitution of Utah.

In a labored effort to support his contention that the charging statute is unconstitutional, appellant cites several cases dealing with statutes and ordinances struck down because they did not recite with sufficient particularity the precise conduct which would subject the offender to criminal punishment. Those cases are not in point here. They deal with criminal statutes and ordinances subjecting the offender to criminal punishment. The statutory provision here involved simply is a procedural statute for removal of public officers for "malfeasance in office". It does not involve criminal punishment.

As pointed out by this Court in *Skeen v. Craig*, 31 Utah 20, 86 Pac. 487,

"We think it reasonably appears from the provisions of the Constitution and Revised Statutes referred to, that their object is not to punish delinquent and unfaithful public officers as for crimes, but to protect the public against the rapacity and unscrupulousness of

such officials, who, by their official misconduct, have forfeited their right to continue in the positions of public trust to which they have been elected or appointed.”

Appellant suggests that if the Legislature wanted to make provision for the removal of public officers for “malfeasance in office” it should have laid down standards of conduct by which a person reading the statute could determine what was intended. Appellant fails to mention and possibly even failed to consider that it was not the Legislature which provided that public officers should be removed for “malfeasance”, but the framers of the Constitution.

Article VI, Section 19 of the Constitution of Utah provides in part as follows:

“The Governor and other State and Judicial officers, except Justices of the Peace, shall be liable to impeachment for high crimes, misdemeanors or *malfeasance* in office * * *.
(Emphasis supplied.)

Section 21 of that same Article then provides as follows:

“All officers not liable to impeachment *shall be removed* for any of the offenses specified in this article, in such manner as may be provided by law.” (Emphasis supplied.)

“Malfeasance in office,” then, is one of the offenses for which the Constitution declares public officers “shall be removed.” Title 77, Chapter 7, Utah

Code Annotated 1953, merely establishes the method and procedure for their removal. It is only this procedural statute that appellant attacks as unconstitutional. He does not attack or even mention the constitutional provision which requires that public officers shall be removed for "malfeasance in office".

The term "malfeasance in office" is a recognized common law offense and a term of long usage. Courts consistently uphold statutory provisions as being sufficiently certain if they employ terms of long usage or with a recognized common law meaning. *Connolly v. General Const. Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 S. Ct. 853, 58 L. Ed. 1284; *Nash v. United States*, 229 U. S. 373, 33 S. Ct. 700, 57 L. Ed. 1232.

The Constitutional Convention and the members of the Legislature which enacted the statute recognized that the term "malfeasance in office" was one of long usage and one designating a common law offense. This is shown by the fact that the Constitution states in Section 21 of Article VI, without further definition or clarification that all officers not liable to impeachment "shall be removed" for any of the offenses specified in this article, (including Section 19) and by what the Legislature did in carrying out its constitutional mandate to provide a method and procedure for removal for malfeasance.

The Legislature further provided in Section 76-1-6, Utah Code Annotated 1953, that,

“The omission to specify or affirm in this Code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension.”

It is a fundamental rule of constitutional construction that terms employed therein must be given the meaning which they possessed at the time of the framing and adoption of the instrument. Courts must give effect to constitutional provisions according to their language and obvious intent. *Utah Builders' Supply Co. v. Gardner*, 86 Utah 250, 39 P. 2d 327, 103 A. L. R. 928. Nothing could be plainer than that the framers of the Utah Constitution intended that public officers should be removed from office for “malfeasance in office” in such manner as provided by law.

The common law recognized “malfeasance in office” as a public offense, and the meaning which that term possessed at the time of the adoption of that instrument is the meaning which must still be placed upon it. The Legislature very wisely refrained from

detailing all the various and sundry acts which might constitute “malfeasance in office”, first, because of the almost impossible task of doing so, and second, because they were proscribed in interpreting that term differently than the common law meaning it had acquired at the framing and adoption of the Constitution. It must be presumed that the framers of the Constitution drafted it with utmost care and with a full and complete understanding of the terms employed therein.

Mere difficulty in ascertaining the meaning of words will not invalidate a statute. *Pacific Coast Dairy v. Police Court*, (Cal.), 8 P. 2d 140, 80 A. L. R. 1172. To make a statute sufficiently certain to comply with the constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. As pointed out by Justice Crockett in *State v. Packard*, 122 Ut. 369, 250 P. 2d 561, “The limitations of language are such that neither absolute exactitude of expression nor complete precision of meaning are to be expected and such standard cannot be required.”

True, this does not relieve the Legislature from the necessity of setting fair and understandable standards of conduct, but this, we contend, was properly done in enacting the statute in question.

Since the test of constitutional legislation in this area is similar in most jurisdictions, respondent hopes

to provide some assistance to the court by citing several leading cases in other states.

While the matter before the court was civil with criminal procedure, the statements below are applicable here in that a lesser standard is required in civil actions than in criminal ones, and if the statute in question satisfies the constitutional requirements as to criminal proceedings, it certainly satisfies them as to those civil in nature.

To comply with the constitutional requirements of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them.

“To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of acts or conduct prohibited.”
People v. Smith, (Cal.), 92 P. 2d 1039.

For example, the courts have upheld statutes employing such terms as “to make diligent effort to find the owner”, *Pacific Coast Dairy v. Police Court*, (Cal.), 8 P. 2d 140, 80 A. L. R. 1217; “unreasonable speed”, *Ex Parte Daniels*, (Cal.), 192 P. 442, 21 A. L. R. 1172, “unjustifiable physical pain or mental suffering”, *People v. Curtis*, (Cal.), 300 P. 801; “practice law”, *People v. Ring*, (Cal.), 70 P. 2d 281;

and “to the annoyance of any other person”, *People v. Beifuss*, (Cal.), 67 P. 2d 411.

It is contended that the section is uncertain, vague and indefinite; that in defining an offense the legislature must use language that will not deceive the common mind.

The answer to such contention is that it is necessary only that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited. *Lorenson v. Superior Court*, (Cal.), 216 P. 2d 859.

“In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required by them, the courts must endeavor, if possible, to view the statute from the standpoint of the reasonable man who might be subject to its terms.” *Pacific Coast Dairy v. Police Court of the City and County of San Francisco*, (Cal.), 8 P. 2d 140, 80 A. L. R. 1217.

Inasmuch as the language employed in the statute under attack is clear and the words are such as a person of average intelligence can understand, it must be held that there is no want of certainty or definiteness about it.

But mere difficulty in ascertaining the meaning of words employed or the fact that the language is ambiguous will not invalidate a statute. *Pacific Coast Dairy v. Police Court*, supra.

It must be upheld unless its nullity clearly, positively and unmistakably appears. *Lockheed Aircraft Corporation v. Superior Court*, (Cal.), 171 P. 2d 21, 166 A. L. R. 701. Neither is a statute void for vagueness and uncertainty if its meaning may be inferred or because the legislative intent might have been declared in plainer terms. 50 Am. Jur. 489, 490; *Hunt v. State*, (Ind.), 146 N. E. 329; *People v. Darby*, (Cal.), 250 P. 2d 743.

The acts and conduct of appellant were set forth with meticulous detail and particularity. It would be difficult to find a reasonable person who would not immediately recognize the presence of "malfeasance" on the part of a public official who wilfully and corruptly received for his personal gain and benefit trees, shrubs and top soil hauled to his home by city employees working on city time and using city equipment and who directed that at least one of the trees be planted by a city employee and that another city employee dig up and transplant some other shrubbery in his yard. Such a series of acts so clearly comes within the scope of "malfeasance" on the part of a public official as to require little further comment.

The statute providing for the removal of public officers for "malfeasance in office" is not so vague, indefinite and uncertain as to be unconstitutional.

POINT II.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS AS TO THE MEANING OF THE TERM "MALFEASANCE" IN OFFICE.

Closely related to his first point is his second, that the instruction given to the jury as to the meaning of "malfeasance" was so vague, uncertain and indefinite as to force the jury to rely upon a purely subjective standard. Appellant argues that "perhaps one member of a jury might think a Commissioner should attend every Commission meeting, and that a commissioner was guilty of malfeasance if he were absent for a day". Appellant concludes his argument on this point by stating that "malfeasance requires a guilty knowledge and an intent to do wrong in all cases and not mere inadvertence, negligence or even failure to know the law".

It is difficult to conceive of language which would more perfectly meet the requirements suggested by appellant for properly defining "malfeasance" than the language which actually was employed in this case. Count 2 of the Accusation as modified by the Bill of Particulars was precise and exact as to the acts

constituting the "malfeasance" of appellant. The Court thereafter defined the term "malfeasance" in language, as appellant himself concedes, taken from other cases decided by this Court, which language, incidentally, embraced the common law definition of that term. The Court then went on to instruct the jury in No. 3 as follows (R. 44):

"Before you are warranted in finding the defendant guilty as to Count 2, the State must prove to your satisfaction and beyond a reasonable doubt the following elements which constitute the accusations set forth therein:

1. That said defendant from on or about February 1, 1959, did wilfully and corruptly receive for his personal gain, benefit and advantage certain property belonging to Salt Lake City Corporation; or,
2. That said defendant during said time aforesaid did wilfully and corruptly receive for his personal gain, benefit and advantage the labor of Salt Lake City employees while they were regularly employed by Salt Lake City Corporation in and during the regular course and scope of their employment, for which labor they were paid out of Salt Lake City funds; or,
3. The wrongful use of Salt Lake City equipment;
4. That during the period of time stated aforesaid defendant was the duly elected, qualified and acting Commissioner of the City of Salt Lake, State of Utah;

5. That said act, or acts, by the said defendant at the time and place charged herein was done consciously as a wrongful act in his official capacity with the knowledge upon his part at the time of doing the same that it was wrongful and that he had no right to do the same, or in lieu of said wrongful act, the defendant did an unlawful act.

“It is not sufficient that the State prove one or more of these elements but it is necessary, in order to justify a finding against the defendant on said Count that each and every one of the elements enumerated in Count 2, and, one or more of the alternative elements aforesaid be proven to your satisfaction and beyond a reasonable doubt. Upon failure of proof of the elements as aforesaid beyond a reasonable doubt the defendant is entitled to an acquittal.”

This instruction certainly did not, as appellant asserts in his brief at page 24, leave it up to the members of the jury to determine whether under their own standards of right and wrong appellant was guilty of “malfeasance in office”.

The court then cautioned the jury even further in Instruction No. 6 (R. 49) :

“You are instructed that in order to authorize a removal from office, the act of which the officer is accused must be positively unlawful, or must involve some evil or wrongdoing on his part which must be known to him to be so when the act is committed. To commit the

act of malfeasance in office it is not necessary that he be convicted of a crime, or that he have a criminal intent at the time of committing the act, unless the act committed and relied upon for malfeasance is a crime, in which case he must have a criminal intent, nor is it necessary that the defendant have an intent to defraud at the time of committing the act in question."

"As you will observe from these instructions there are several ways of committing malfeasance in office. One way is to commit an act that is wrongful in which there must exist a showing beyond a reasonable doubt that the defendant at the time of committing the wrongful act knew that the act so committed was wrongful and that he had no right to commit the same."

"Secondly, if the act committed is evil the same showing of conscious wrongdoing must likewise exist in the mind of the perpetrator at the time of the commission of the act. This, and the commission of the act in question, must be shown beyond a reasonable doubt in all situations."

"Thirdly, if the act relied upon by the State to constitute the malfeasance in office consists of the commission of a crime, then the perpetrator must commit acts constituting all the elements that go to make up the crime involved; namely, the commission of the unlawful act, the intent to commit the act, and a knowledge upon the part of the perpetrator that the commission of the act is a crime. This latter element the law imputes to every person because the law conclusively presumes that all persons know the

law and ignorance thereof is no defense or excuse.”

“It is therefore necessary, to warrant a conviction of malfeasance in office, that the State prove beyond a reasonable doubt all of the elements enumerated in each instance above. In the event there is a failure upon the part of State to prove each and all of the said elements constituting the malfeasance relied upon, then the defendant is entitled to a verdict of not guilty.”

The Court further instructed the jury that mere mistakes in judgment and their personal opinions as to the proper conduct of the office had no place in their deliberations. In Instruction No. 7 the Court said in part (R. 51):

“To justify the removal of a public officer for malfeasance in office as a result of high crimes, misdemeanors, or malfeasance committed by him it is necessary for the State to show beyond a reasonable doubt that the act which the defendant has been accused of is positively unlawful or involves some evil or wrongdoing on his part which must be known to him to be such when he committed the act or acts.”

“In other words, mere mistake in judgment or unorthodox handling of public affairs would not justify removal from office. Your personal opinions as jurors as to whether or not the defendant has conducted the office as it should be conducted or whether or not he should be re-elected to this post have no place in your deliberations. Unless you believe beyond a reasonable doubt that the accused has

been guilty of offenses done with an evil motive or conscious wrongdoing, or an act that is unlawful, you should acquit him on all of these counts.”

It must be presumed that the jury followed the foregoing instructions of the District Court. Contrary to the assertions of appellant, the jury could not possibly have found that he was guilty of “malfeasance in office” for “being absent for a day”, deciding a discretionary matter in “one way whereas he should have decided it in another way”, for mere “inadvertence” or for “negligence” as the appellant argues.

The instructions as given represent a most conscientious and realistic application of the facts in this case to what would constitute the common law offense of “malfeasance in office”. A careful reading of those instructions evidences the care and skill exercised by the District Judge in putting them into understandable language.

Appellant concedes that the instruction given obviously was picked from language used in *Law v. Smith*, 34 Utah 395, 98 Pac. 300. In describing the various offenses for which a public officer could be removed from office Judge Frick had this to say:

“Both under the Constitution and under the statute it is provided that officers of the class to which respondent belongs may be removed upon three grounds, namely, for high crimes, for misdemeanors, and for malfeasance

in office. It therefore was not intended that, before an officer is subject to removal from office, he must be found guilty of some high crime or misdemeanor; but, if he is found guilty of some act or acts which constitute malfeasance in office, it is sufficient to remove him. In order to authorize a removal from office, however, the act of which the officer is accused must be positively unlawful, or must involve some evil or wrongdoing on his part which must be known to him to be so when the act is committed."

In 43 Am. Jur. at page 39, the term "malfeasance" is defined as follows:

"* * * Malfeasance, as ground for removal of a public officer, has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of any act by an officer in his official capacity that is wholly illegal and wrongful. * * *"

Without any apparent constitutional qualms the Supreme Court of Florida said in *State ex rel. Hardie v. Coleman*, 155 So. 129,

"Malfeasance has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful, which he has no right to perform or which he has contracted not to do. Words and Phrases, First, Second, Third and Fourth Series, malfeasance; Webster's New International Dictionary."

In *Sims v. Moeur*, 19 P. 2d 679, the Arizona Supreme Court adopted as its legal definition of malfeasance the following expression:

“Evil doing; ill conduct; the commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which the person ought not to do at all.”

See also *People v. Schnieder*, (Colo.), 292 P. 982; *State v. Langley*, (Ore.), 323 P. 2d 301; *Daugherty v. Ellis*, (W. Va.), 97 S. E. 2d 33; *State, ex rel. Atty. General v. Lazarus*, (La.), 1 So. 361; *Lawhorn v. Robertson*, (Okla.), 266 P. 2d 1008; *Beck v. Young*, (Neb.), 48 N. W. 2d 677; *Wyson v. Walden*, (W. Va.), 52 S. E. 2d 392; *State v. Ellenstein*, (N. J.), 2 A. 2d 454; *State v. Winne*, (N. J.), 91 A. 2d 65; *State v. Ward*, (Tenn.), 43 S. W. 2d 217; and the cases decided by this Court and cited by appellant and respondent.

An additional allegation of error in appellant's Point II is that the court below failed to establish a proper standard of right and wrong. Appellant says malfeasance requires actual guilty knowledge and intent to do wrong in all cases.

This does not appear to be the current law in this jurisdiction. *Atwood v. Cox*, 88 Ut. 437, 55 P. 2d 377, a case decided later than the Law case, indicates that such knowledge might be imputed in using

the following words at page 393: “* * *, that he must have done so knowing that he was doing wrong or at least under such circumstances that any reasonable person who had done the same thing would have known that he was doing something wrong.”

The jury was properly instructed and no error was committed harmful or detrimental to the substantial rights of appellant. There was no prejudice.

POINT III.

THE COURT DID NOT ERR IN RULING AGAINST APPELLANT’S MOTION TO DISMISS COUNT I.

It is urged that the District Court erred in not dismissing Count 1 of the accusation for the reasons, first, that it was “res adjudicata” and second, that “the same reasons for dismissal that were present in the criminal cases were present in the civil case”.

The argument asserting “res adjudicata” as a reason for dismissing Count 1 of the Accusation is without merit. Count 1 of the Indictment was part of Criminal Case No. 16525 charging appellant with commission of a misdemeanor as set forth in Title 10, Chapter 6, Section 36, Utah Code Annotated, 1953. Count 1 of the Accusation, on the other hand, was part of civil Case No. 124396, charging appellant with “malfeasance in office”, brought solely for the

purpose of removing him from office under our removal statute, Title 77, Chapter 7, Utah Code Annotated, 1953.

The Utah Constitution, providing for removal of public officers by “impeachment”, states in part in Section 19 of Article VI,

“* * * judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust or profit in the State. *The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial and punishment according to law.*” (Emphasis supplied.)

While the constitutional provision quoted above appears in Section 19 dealing with removal of officers by “impeachment” and not in Section 21 dealing with the removal of officers “in such manner as may be provided by Law,” still, it certainly would be a ridiculous anomaly if an officer removed by “impeachment” should be liable to prosecution, trial and punishment according to law, while an officer removed “in such manner as may be provided by Law” should not be so liable.

The framers of the Constitution and the members of the Legislature were in accord, moreover, that public officers removed for “malfeasance in office” should be liable to prosecution, trial and punishment regardless of their manner of removal. Upon conviction under Title 77, Chapter 7, Utah Code Anno-

tated, 1953, the Legislature provided in Section 15, that "the Court must enter a judgment that the party accused be deprived of his office", and then in Section 16, that,

"Nothing in this chapter shall be construed to prevent the officers mentioned from being proceeded against by information or indictment for a public offense in the same manner as is provided by law for so proceeding against other persons accused of a public offense."

Appellant himself concedes that for "res adjudicata" to apply, three conditions must exist: The actions must be between the same parties, the issues must be the same, and, the relief sought must be the same. Those conditions did *not* exist.

The Indictment was a criminal action. Upon conviction thereunder appellant could have been subjected to a fine up to \$1,000.00. The Accusation was only a removal proceeding. Conviction thereunder could not have subjected appellant to a fine but only to removal from office.

The removal statute is primarily for the purpose of protecting citizens of a particular body politic. It was not written with the purpose of punishing a public official and/or subjecting him to a possible fine as is the case in a criminal statute.

The Utah case, *Skeen v. Craig*, 86 P. 487, sheds some light on the res adjudicata question. It holds

that proceedings under a statute virtually identical to the one involved here are of a civil nature even though containing some criminal procedural steps and that the relief sought is entirely different than in a criminal case. A discussion of these matters appears at page 488:

“We think it reasonably appears from the provisions of the Constitution and Revised Statutes referred to, that their object is not to punish delinquent and unfaithful public officers as for crimes, but to protect the public against the rapacity and unscrupulousness of such officials, who, by their official misconduct, have forfeited their right to continue in the positions of public trust to which they have been elected or appointed. And it would seem that, if the object of such proceedings brought under section 4580 were to punish for the commission of crime, some judgment, other than that of removal from office only, would have been provided for and provision made in the same act for the prosecution of offending officers whose misconduct might escape detection until after the expiration of their terms of office. * * *

Since one of the proceedings was criminal and the other civil, even without the aforesaid positive constitutional and legislative declarations that a public official convicted or acquitted under a removal proceeding shall nevertheless be liable to criminal prosecution and punishment, the argument of appellant as to “res adjudicata” is still without merit.

The matter here involved would still appear to fall squarely within the general rule that a judgment rendered in a criminal action may not be received in evidence in a subsequent civil action to bar such action or to establish the truth of the facts upon which it was rendered, 30 Am. Jur. 1005.

There is no merit either to the second part of appellant's argument on this point that the count should have been dismissed for the same reasons the similar count in the Indictment was dismissed. In substance the Accusation charged appellant with wilfully and corruptly having a personal interest in a contract with the city. Appellant insinuates that this was a veiled charge of bribery when in fact the only charge is that he had a personal interest in a contract with the city which is prohibited by the provisions of Section 10-6-38 Utah Code Annotated, 1953, reading as follows:

“No officer of any municipal corporation shall be directly or indirectly interested in any contract * * * the * * * consideration of which is paid from the treasury * * *.”

Without detailing the evidence adduced, it is respectfully submitted that there was ample and substantial evidence from which the jury could have found appellant guilty. Few if any officials actually guilty would ever admit their interest and guilt. This must be ascertained from all the facts and circum-

stances and the reasonable inferences to be derived therefrom. This is a factual determination and should have been decided by the jury under proper instructions. As said by this Court in *Law v. Smith*, 34 Ut. 394, 98 P. 300,

“It was for the jury to say, after considering all of the evidence produced in support of the accusation * * *.”

In that regard, our system of jurisprudence has, from earliest times, contemplated that a jury of a man's peers should find the facts of his case, not the judge. It is the sole and exclusive province of the jury to determine the facts whether the evidence offered be weak or strong, in conflict or uncontroverted. This applies to both civil and criminal cases and so covers the matter at hand. *State v. Green*, 78 Ut. 580, 6 P. 2d 177.

Certainly appellant was not prejudiced since the Count was dismissed and any possible error thereafter was cured by the remarks of the Judge at the time and by his subsequent instruction. He told the Court:

“Gentlemen of the jury, at the end of the State's case, the defendant made a motion to dismiss this first count that is charged against the defendant, and I have considered it during the noon hour and have come to the conclusion that I would not be warranted in submitting it to you for your deliberations and determination, for the reason that there is not evidence that supports the necessary elements of that

charge. And I am, therefore, dismissing it and withdrawing it from your consideration.”

“So you will devote your attention to the second and third counts as they are charged in the accusation and counsel for the defendant may now proceed to put on their evidence * * *.” (Tr. 190-191.)

The Judge then in Instruction No. 4 stated:

“* * * You are instructed, gentlemen of the jury, that you have heard much evidence respecting the first count of this accusation and you have also been informed that the same has been dismissed by me upon motion of the defendant’s counsel. You are, therefore, instructed that you should disregard all of the evidence that pertains to that count in your deliberations upon the guilt or innocence of the defendant respecting counts No. 2 and 3 as now contained in the accusation. * * *” (R. 47.)

Moreover, the fact that the court forthrightly dismissed Count 1 may have had just the opposite effect upon the jury than that contended by appellant. The jury, upon hearing the court dismiss the count, may very well have become impressed not only with the weakness of that particular count, but with the State’s case generally and have become somewhat more inclined to rule in appellant’s favor upon the counts submitted to it. This theory is enhanced somewhat by the actual fact that the jury did bring in a verdict in favor of appellant as to Count 3 despite the clear evidence introduced by the State.

Respondent feels strongly that Count 1 should have been submitted to the jury under proper instructions for their determination as to the guilt or innocence of appellant. If any error did occur, however, it certainly was not prejudicial under the cautionary remarks and instructions given. As pointed out by this Court in *State v. Neal*, 1 Ut. 2d 122, 262 P. 2d 756,

“We are also conscious of the fact that a trial in the Courts of this state is a proceeding in the interest of justice to determine the guilt or innocence of the accused, and not just a game. We will not reverse criminal cases for mere error or irregularity. It is only where there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted.”

These remarks are equally applicable in civil cases such as this, as they are in criminal matters.

POINT IV.

THE COURT DID NOT ERR IN DENYING APPELLANT THE RIGHT TO TAKE DEPOSITIONS PRIOR TO TRIAL OR TO HAVE A PRELIMINARY HEARING.

Appellant's argument that the trial Court committed error in denying him a preliminary hearing or the right to take depositions prior to trial is without merit.

Only by statute is a person entitled to a preliminary hearing. The Utah law gives a person charged with crime by complaint and information that right, but specifically denies it to a public official in a removal proceeding. Section 77-1-4 Utah Code Annotated 1953, provides in part that,

“Every public offense must be prosecuted by information after examination and commitment by a magistrate unless the examination is waived by the accused with the consent of the state, or by indictment, with or without such examination and commitment, *except*:

(1) *Where proceedings are had for the removal of a civil officer of the state, of a political subdivision thereof, of a municipality or of a school district.*” (Emphasis supplied.)

The removal statute itself does not grant an officer accused of “malfeasance in office” the right to a preliminary hearing, nor does it assure the use of depositions. It is a special type of proceeding. Its purpose is to protect the public by providing for the expeditious removal of officials found guilty of “malfeasance in office”. It is not designed to try persons charged with the commission of crime as in a criminal proceeding, nor is it designed to adjudicate private rights of individuals as in the usual civil proceeding.

Commissioner Geurts, on being accused of “malfeasance in office” in the case at bar, was entitled to

be informed in the Accusation itself in clear and concise language of the very acts relied upon as constituting that offense, which acts in and of themselves must, as a matter of law, constitute the offense. *Law v. Smith*, 34 Ut. 394, 98 Pac. 300.

The Accusation against him met all legal requirements. In addition he was furnished a Bill of Particulars which set forth with even more particularity the details and evidence of his acts of malfeasance.

It is clear from a careful reading of the removal statute and the decisions of this Court thereunder that the "accusation" takes the place of the "preliminary hearing". The accusation must in and of itself set forth in clear and concise language those acts which constitute the common law offense of "malfeasance in office". If it does not, the proceeding for removal can be enjoined by writ of prohibition. See *Burke v. Knox*, 59 Ut. 596, 206 P. 711. In this case appellant sought such writs on two occasions from this Court and both of them were denied.

The right to take depositions is a right granted only in civil proceedings governed by the Utah Rules of Civil Procedure. The removal statute does not grant the right to take depositions. Nor are they otherwise provided for by rule, since the removal statute must be enforced only in accordance with the Rules of Criminal Procedure. Appellant was not harmed in any way by being denied the right to take them. This is

very clearly pointed out by appellant's own words at pages 27 through 29 of his brief. The court should take particular notice of the following quotation from page 28:

“Counsel for the defense was certain in his own mind that the district attorney had no such evidence, as we believed that we had talked to all of the witnesses that knew anything about this particular matter. Accordingly, we filed a demand with the district attorney for a list of all of the witnesses whom he would use to prove Count 1 (R. 8). * * *”

In other words, counsel for appellant had already obtained all the information necessary to the prosecution of his case since he had interviewed all of the witnesses. There remained the further opportunity, moreover, to talk with all witnesses whose names might thereafter be turned over by the district attorney in response to his demand.

Appellant claims, too, that he knew in advance what evidence would be introduced as to Count 1 and that, in fact, it came into the trial just as he knew it would (A. B. 28). Counsel does not profess to be a mind reader and this knowledge could only have been obtained by careful scrutiny of the State's witnesses.

Therefore, no depositions were necessary nor could they have given any further light to appellant beyond what he professed to have.

POINT V.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MISTRIAL AS TO COUNTS 2 AND 3 AND HIS MOTION FOR A NEW TRIAL.

In appellant's contention that the District Court committed error in not granting a mistrial as to Counts 2 and 3 and in not granting his motion for a new trial, he presents nothing not already presented in his arguments at his Points III and IV. The denial of his motion for a mistrial and of his motion for a new trial was not an abuse of discretion by the trial Judge. The rule that this Court will not reverse a ruling of a District Court unless there is a gross abuse of discretion has been announced so often as to need no citation of authority. Clearly there was no abuse of discretion. The substantial rights of appellant were not prejudiced.

POINT VI.

THE COURT DID NOT ERR IN DENYING THE CHALLENGES FOR CAUSE OF JUROR WILSON.

Rule 47f(6) of the Utah Rules of Civil Procedure covers the question presented and dealt with under this point.

“(6) That a state of mind exists on the part of the juror with reference to the cause,

or to either party, which would prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the Court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him."

The following portion of the transcript containing the questions of the trial Judge and the answers given by Wilson will clearly show that the Judge acted well within his discretion in denying the challenge for cause to juror Wilson (Tr. 20-23):

"THE COURT: Mr. Wilson, what is your occupation?

"MR. WILSON: I am retired.

"THE COURT: And before you retired, what did you do?

"MR. WILSON: I worked in the wholesale lumber business for the Utah Lumber Company.

"THE COURT: And I presume you have heard through the press and radio and some discussions, publications of City affairs and probably about the filing of this accusation, have you?

"MR. WILSON: Yes, sir, I have.

“THE COURT: And from what you have read and heard and general gossip and talk, have you formed or expressed any opinion about the merits of this case?

“MR. WILSON: Not to anybody except my own family. I might say that I was quite greatly concerned about the accusations that were made at the time.

“THE COURT: And I don’t want to know what your opinion is, if you have one. I say we don’t want to know what it is, but do you at this time have an opinion about the truth or falsity of these accusations?

“MR. WILSON: I have an opinion but I might be able to change it in case the evidence showed it wrong.

“THE COURT: Do you believe that it would require evidence to remove the opinion that you have now?

“MR. WILSON: I think so.

“THE COURT: Do you agree with the rule of law that a man is presumed innocent until he is proven guilty beyond a reasonable doubt?

“MR. WILSON: Yes, sir, I do.

“THE COURT: And you likewise agree with the rule of law that if the State should prove the truth or accuracy of these accusations that they are entitled to have a finding made in their favor?

“MR. WILSON: That is right. I believe it.

“THE COURT: And if you were accepted as a juror, would you conduct your duties as a juror along those lines?

“MR. WILSON: I would do so.

“THE COURT: I take it from the questions you have answered that you now are of the opinion that a man is presumed innocent until he is proved guilty?

“MR. WILSON: That’s true, yes, sir.

“THE COURT: Do you think you would require more proof of guilt in this instance than you would in any other case where the same rule of law applied?

“MR. WILSON: Well, I think it is quite an important case, and I think it should have sufficient proof, yes.

“THE COURT: Well, Mr. Wilson, I have made this statement to many jurors, that every case is important. It all depends upon who is involved. That is, it is important to the people that are involved. This case is important to the State of Utah, and it is important to Commissioner Geurts, but the case tomorrow will be important to the State or some defendant there and we should treat every case as important. But the thing I want to know from the statement you have made is whether or not you think this case is of such a nature that you would require more proof in this instance than you would in a case tomorrow involving some other defendant, maybe involving the same charge?

“MR. WILSON: Well, if I say yes, I would say it is because I think public officials should be above reproach in whatever office they have been elected to, and that there should be no suspicion or anything of that kind.

“THE COURT: Well, nobody can quarrel with your statement, but that is not an offense or it is not a ground for removal if a man is not above suspicion. It must be stronger than that. It must be that he is guilty of wrongdoing beyond a reasonable doubt. Now you would not find this defendant, the issue for or against him on the matter of suspicion, would you?

“MR. WILSON: No, sir.

“THE COURT: In other words, suspicion really has nothing to do with the trial of this case.

“MR. WILSON: That’s right.

“THE COURT: It is the question of whether he is or is not guilty of these accusations.

“MR. WILSON: I understand that.

“THE COURT: And even though a man may be indiscreet or may have done something that you don’t approve of, you would not hold that against him from the standpoint of finding this issue against him, would you?

“MR. WILSON: I would not.

“THE COURT: Do you have any mental reservation about whether or not you should

sit as a juror in this case, as concerns your impartiality?

“MR. WILSON: No, sir.

“THE COURT: And if you were a defendant in this case do you think you would get a fair and impartial trial if you were sitting on the jury and seven others like you?

“MR. WILSON: I would think so.”

31 Am. Jur. 183, pg. 217 states the general rule as follows:

“According to the majority rule which is sometimes incorporated in a statutory enactment, a juror who states on his examination that he has formed and expressed an opinion about the case which it would take evidence to remove but who states that he can fairly and impartially try the case according to the law and the evidence, and render a true verdict, is competent to act as a juror, where the court or triors are satisfied of the truth of his statements. It is quite natural for prospective jurors to say, under such conditions, that it would require some evidence to change their former impressions, but it does not follow that such condition of mind renders them incompetent.”

In *Thiede v. People of the Territory of Utah*, 159 U. S. 510, a murder case, four jurors testified that they had read newspaper accounts of the killing and had formed impressions from them, but each stated he could lay aside such impressions and try the case fairly. At that time, the territory had a statute

similar to our Rule 47f(6). The court held that the jurors clearly came within the terms of the statute and no error occurred.

To the same effect is the case of *Hopt v. Utah*, 7 S. Ct. 614, 120 U. S. 430. It also held that the judgment of the court as to the competency of the juror, upon his declarations under the statute then in effect, was conclusive.

In *Leick v. People*, (Cal.), 323 P. 2d 674, a murder trial, a juror admitted having an opinion at the time of the voir dire examination, but said he could disregard the opinion, listen to the evidence and apply it to the instructions of the court and that he would be fair and impartial, under the circumstances. The court held that to believe or not to believe such a juror became the problem of the judge. The court said that if the trial judge is persuaded that the juror will fairly and impartially try the issue, his denial of a challenge for cause should not be disturbed except in the case of clear abuse of discretion.

In addition to the above reasons for upholding the exercise of discretion by the trial Court it is submitted that appellant has failed to show that any prejudice resulted to him from the denial of said challenge. Subsequent to the examination of the juror Wilson, appellant had an opportunity to use one of his peremptory challenges on said juror, but used it, instead,

on another. Appellant's only attempt at showing prejudice is the bare self-serving statement of counsel that in his opinion there were other more objectional jurors on the panel than Wilson.

Respondent has found no cases dealing with this question in which the counsel for the complaining party did not later exercise the peremptory challenge in striking from the panel the so-called objectional juror.

In *Van Wagoner v. Union Pacific R. R.*, 112 Ut. 189, 186 P. 2d 293, (1947), the juror in question was the mother of one of defendant's witnesses, an adjuster who investigated the case. Under questioning from the Court she stated that she would be fair but naturally she was inclined to believe her son. A challenge for cause was denied, and the juror was later excused on peremptory challenge. The Court held that no showing was made at the time of choosing the jury that the plaintiff desired to use any more peremptory challenges and stated on page 195,

“Should this Court now permit them to say they would have used a peremptory challenge on one of the remaining jurors had the trial Court excused Mrs. Hurd for cause? They make the contention in this Court that they would have done so, but to permit the question now to be raised, would allow a party to willingly accept a jury before verdict and then claim error in the Court because of an adverse verdict. If an erroneous ruling on a challenge

for cause has the effect of depriving a party of a peremptory challenge, this Court will not review the ruling unless the deprivation was of a challenge that the record affirmatively shows would have been used. To make this showing to the trial Judge before the jury is sworn is a burden we place on the complaining party.”

The Court goes to cite from the case of *State v. Thorne*, 41 Ut. 414, 126 P. 286, which case in turn cites from Thompson & Merriam on Juries as follows:

“Will the law presume prejudice from the simple facts that the peremptory challenges were exhausted: Some Courts answer this question in the affirmative; but, in the opinion of others, something more must be shown, namely, that after the peremptory challenges were exhausted some objectionable person took his place upon the jury, who would otherwise have been excluded by a peremptory challenge. The latter seems to be the better view. Conceding the challenge for cause to have been improperly overruled, it is evident that only under such circumstances as just stated can the loss of peremptory challenge, necessary to cure the erroneous decision of the Court, be said to have worked an injury to the challenging party.”

The Court goes on to refer to the case of *State v. Cano*, 64 Ut. 86, 228 P. 563. The record in that case showed that all objectionable jurors challenged for cause were later removed by peremptory challenges. The Court held that it was clear that no prejudice resulted from any of the Court’s rulings in regard to

denying the challenges for cause. The Court further cited the following language from the case of *Frank v. U. S.*, (C. C. A. 9) 42 F. 2d 623.

“If the defendant is dissatisfied with the jury or any member of the panel selected to try the case, he should manifest that fact to the trial Court, and in the absence of some objection or request to exercise an additional peremptory challenge, he ought not to be heard to complain upon appeal of an error which was corrected by his exercise of a peremptory challenge to the juror challenged for cause. If later he found that because he had thus cured the error of the trial judge, he would be forced to accept an objectionable juror whom he could not challenge for cause he should have called the attention of the trial Court to that fact. The injury to him was not sustained by the ruling of the Court on the challenge for cause. If he was thereby injured it would be for the reason that after exhausting his peremptory challenges he was thereby required to accept an unsatisfactory juror.”

It is submitted that in light of the above cases the appellant has failed to show any prejudice resulting from the denial, appellant had an opportunity to exercise a peremptory challenge if he thought the juror objectionable. This he failed to do and he thereby accepted the juror. Appellant's bare assertion that in the opinion of his counsel there were other jurors more objectionable than Wilson will not suffice to show prejudice.

In view of testimony of juror Wilson that he would try the case impartially, it is clear that the judge acted well within the bounds of his discretion in refusing to disqualify him for cause.

POINT VII.

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE OF ANSWERS GIVEN BY JURORS IKEDA AND JENSEN ON VOIR DIRE EXAMINATION.

The Ikeda matter can be fully answered simply by referring to his absolute denial of the allegations made by appellant Geurts' nephew (R. 69).

It appears that the judge either chose to believe Mr. Ikeda as against young Geurts or that such an innocent statement, if actually made, really was not prejudicial to appellant's cause.

On voire dire examination, furthermore, juror Ikeda passed every test of his qualifications to try the case impartially.

Appellant puts considerable stress on his allegation that juror Jensen attended and participated in a certain hearing before the city commission dealing with an alleged shake-down involving the police department.

The meeting is not shown by any fact or allegation to have had any bearing whatsoever on appellant's troubles. As a matter of fact, Mr. Geurts was not the commissioner in charge of the police department and had very little to do with it, the department being under the direction of Mayor Lee.

Appellant talks about feelings running high as to commission members, but is unable to show, apparently, any indication of feeling on the part of Jensen against Mr. Geurts, personally.

It may well have been that he was favorably disposed toward Mr. Geurts, since the latter apparently supported Mayor Lee in many of the proceedings leading to the ouster of the chief of police.

Moreover, the question posed by Mr. Rampton (A. B.-46) is very vague and uncertain at best and the logical import of it might well have been only as to protest meetings involving the ouster of the chief of police.

Appellant's contention is too tenuous to be a basis for a new trial. This is especially so, in that appellant has been unable to show how any prejudice occurred in Mr. Jensen's participation on the jury.

The citations from the legal texts cited below apply to this problem:

31 Am. Jur. 125, 143:

“False or misleading information elicited on voir dire examination results in an illegal verdict where it is of such character as to indicate probable bias on the part of the juror, but not where it is so insignificant as to indicate only a remote or speculative influence.”

38 A. L. R. 2d 627:

“It is generally recognized that a false answer on voir dire which has the effect of depriving counsel of the opportunity to make a proper determination whether to exercise the right to challenge a juror will not in itself require the granting of a new trial. Most courts agree that to justify a new trial it must appear that the party seeking it has been prejudiced by the false answers.”

Both as to Points VI and VII generally, regardless of the type of proceeding this is deemed to be, Rule 47f(6), *Supra*, applies.

It is presumed that jurors having heard a case and delivered a verdict conducted themselves properly and the presumption is not overcome except by some definite proof of misconduct. Such proof must be adduced by the defendant and must be of a convincing nature. *Alerano v. Western Pacific*, 5 Ut. 2d 146, 298 P. 2d 527; *State v. Burns*, 79 Ut. 575, 11 P. 2d 605.

POINT VIII.

THE COURT DID NOT ERR IN OVER-
RULING APPELLANT'S OBJECTIONS TO
CERTAIN QUESTIONS ASKED BY THE
DISTRICT ATTORNEY.

It is not readily apparent how the district attorney's innocuous and almost rhetorical question could have done appellant any harm.

Every honest person would have given the same response to Mr. Banks' question that Mr. Smith did and his answer was of no significance.

Mr. Smith had succeeded in giving his estimate of the opinion held by the community as to appellant's character. His opinion was not shaken or challenged in any way by the offending question.

As a strict matter of evidence, perhaps it was ill advised for the district attorney to ask the question just as he did. However, this court is not interested in technicalities, but only in seeing that substantial justice is done. *State v. Neal*, *supra*.

Since no harm occurred, the point constitutes no cause for reversal.

POINT IX.

THE COURT DID NOT ERR IN DENYING
APPELLANT'S MOTION IN ARREST OF
JUDGMENT.

The action brought by Mr. Banks as district attorney for the jurisdiction which includes Salt Lake City was entirely appropriate in every respect.

The action is entitled ‘Removal by Judicial Proceeding’. It appears as Chapter 7 of Title 77, U. C. A. 1953 and has been on our statute books since 1898. It has been employed from time to time to remove public officers from their positions for the commission of high crimes, misdemeanors or malfeasance in office.

Paragraph 2 states that the action is to be initiated by an accusation in writing which “may be presented to the district court by the grand jury or *by the district attorney*, or by the county attorney of the county in which the officer accused was elected or appointed”.

That this is a proper action is indicated in the opinion of this court in *Geurts v. District Court, et al.*, _____ Ut. _____, 352 P. 2d 778, decided June 1, 1960.

Appellant’s claim that the indicated statute has been superseded by Rule 65B(b) (1) is unfounded in law.

The rule dealing with quo-warranto merely gave expression to the common law right long in existence. That procedure has never been made exclusive and the statute is still fully in force. See *State v. Barboglio*, 63 Ut. 432, 222 P. 904.

Moreover, quo-warranto traditionally has been the remedy for removing a person from an office which he attempts to exercise without right thereto. Its purpose has not been the removal of one, who upon legally attaining to such office, thereafter performs acts that authorize his being removed by judicial proceedings.

In addition, Rule 81 indicates that the rules (i. e., 65B(b)(1)) shall apply to all special statutory proceedings, "*except insofar as such rules are, by their nature, clearly inapplicable.*" (Emphasis ours.)

Since this special statutory proceeding, still in force, declares that the action *may* be brought by the district attorney, it is clear that Rule 81 makes Rule 65 inapplicable wherein it supposedly attempts to lodge exclusive responsibility for prosecuting removal proceedings in the Attorney General.

Appellant has not been harmed through the action brought by the district attorney and there is no prejudicial error present. Appellant's point, therefore, is without merit.

CONCLUSION

For the reasons stated and in light of the statutes, cases and texts set forth, the appeal of appellant Geurts is without foundation and should be dismissed.

Respectfully submitted,

WALTER L. BUDGE,
Attorney General,

VERNON B. ROMNEY,
Assistant Attorney General,

JAY E. BANKS,
District Attorney,
Third Judicial District,

QUENTIN L. R. ALSTON,
Assistant District Attorney,
Third Judicial District,

Attorneys for Respondent.