1967

George L. Bell, et al.. v. Bud Favero and Maurice Richards : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE L. BELL, et al,
Plaintiffs-Respondents,

vs.

BUD FAVERO and MAURICE RICHARDS,
Defendants-Appellants.

Case No. 10709

BRIEF OF APPELLANTS

Appeal from Judgment of the Second Judicial District Court
Honorable Lewis Jones, Judge

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STATEMENT OF NATURE OF CASE

The appellants, Bud Favero and Maurice Richards, two of three elected Commissioners of Weber County, appeal from a judgment of the District Court of Weber County, the Honorable Lewis Jones, Judge of the First District, sitting at request without jury, awarding respondent judgment against each defendant in the sum of Seven Hundred Seventy Seven Dollars, fifty cents, ($777.50), One Thousand Five Hundred

Fifty Five ($1,555.00) Dollars in total, plus some costs, for allegedly making an ultra vires appropriation of public funds in violation of 17-5-13, Utah Code Annotated, 1953.

DISPOSITION IN LOWER COURT

On March 1, 1966, George L. Bell, a taxpayer and resident of Weber County, filed a complaint in the District Court of Weber County, State of Utah, against Bud Favero and Maurice Richards, Weber County Commissioners. Plaintiff alleged that the defendants had improperly and illegally appropriated certain public funds for football admission tickets for private individuals. A further allegation was contained in the complaint that the actions of the defendants were done fraudulently. The plaintiff sought recovery of $600.00 allegedly appropriated by the defendants and a $500.00 forfeiture under the provisions of 17-5-13, Utah Code Annotated, 1953. A motion to strike was filed and denied and an answer duly entered by the defendants. Discovery was perfected by both parties and the matter tried to the Honorable Lewis Jones, District Judge of the First Judicial District, sitting upon request. Subsequent to the receipt of the evidence, Judge Jones entered judgment in favor of plaintiff and against the defendants, finding however, that in the alleged appropriation was not fraudulently made.

RELIEF SOUGHT ON APPEAL

The appellants submit the decision of the trial court should be reversed.

STATEMENT OF FACTS

The facts are relatively undisputed. Mr. Gary Crompton, the athletic business manager of Weber State College, testified that he approached the Weber County Commissioners for the purpose of getting them to purchase an ad in the football programs of Weber State College (Tr. 6). He indicated that the Commissioners stated that they didn't want to put an ad in the programs even though it had been the general practice in the past, but that they indicated they wanted to help the college (Tr. 7). They felt that putting an ad in a football program was political (Tr. 7). There were several meetings held between Mr. Crompton and one or more of the Commissioners and as an end result the county purchased 50 season, reserved tickets at Weber State College football games for the sum of $600.00 (Tr. 8). Mr. Crompton testified that he was under the impression that the Commissioners wanted to help the school more than they had done in the past (Tr. 11). Crompton told the Commissioners that there were approximately three ways that they could help. The first way was by placing an ad in the football programs; the second, by making a direct scholarship to the college; or third, by purchasing football tickets and distributing them to county employees in an effort

to get them to attend the football games as a gro and encourage interest in the Weber State Colle athletic program (Tr. 11, Tr. 13-14). Crompton to the Commissioners that he preferred the purchase the tickets because he felt it would do more to devel the Weber State College athletic program (Tr. 14

Mr. Crompton testified that prior to the 19 football season the college had only sold approximate 150 reserved season tickets in 1964 out of 1,170 ava able. He stated that the money acquired through ticke purchases went to the same fund as that used for athlet scholarships for the Weber State College Athletic De partment (Tr. 15). He said that the 1965 season, th season for which the Weber County Commissioners ha purchased the tickets, a 200% increase in attendan resulted (Tr. 16).

Mr. Crompton also testified that payment for th tickets was made approximately three weeks after h had delivered the tickets and that payment was by \$600.00 check. He indicated that the cashier at Webe State College had received the check and a voucher on which noted the payment was for a scholarship and he advised the cashier that it should be treated as ticket purchase (Tr. 10). Mr. Thomas H. Jackson the cashier of Weber State College, testified that h credited the \$600.00 payment towards ticket sales.

Commissioner Elmer Carver, a Weber County Commissioner, who was not sued as a party defendan testified that he recalled a meeting in which Mr. Crom

ton was present and in which there was discussion about purchasing football tickets. He indicated, however, he did not approve the purchase, and subsequently, when it was called to his attention, he scanned the minutes of the formal meetings and was unable to find any formal approval. He stated that although there was no budget request made for the tickets as part of the annual budget it was not uncommon to make expenditures for items not budgeted. He testified that the claim for the purchase of the tickets was handled in the usual and routine way (Tr. 30), and ackowledged that a lot of claims against the County Treasurer were paid other than at regular meetings and that expenditures could be authorized on the signature of one commissioner unless there was some question about the expenditure and then two approvals were requested (Tr. 29). He stated the reason that he did not approve the claim was because he was not familiar with it, but he didn't question it (Tr. 32).

Donna Adam, an employee of the Weber County Clerk, who took the regular minutes of the Commissioners' meetings, testified that according to the minutes Mr. Crompton appeared before the Commission on the 21st of August, 1965, at which time there was discussion relating to the Commissioners putting an ad in the Weber State College football program and there was also discussion relative to obtaining football tickets for county employees at a group rate. She testified that she could remember that there was discussion about helping the college and that the claim for the football

tickets was approved on October 14, 1965, and in the usual routine manner (Tr. 39-42).

Mr. Dee Wilcox, the Weber County Auditor called and testified that generally the purchasing order procedure is that the purchasing procedure for items the county needs is that a purchase order is made up and sent to his office to determine whether or not there is sufficient funds in the budget to cover the expenditure. He would normally indicate that there was sufficient money and the purchase order would go back to the purchasing department where the purchase order was required to be approved by one of the Commissioners if it was in excess of $100.00. He indicated that the appropriation for the football tickets was approved by Commissioners Favero and Richards (Tr. 46). He indicated that the claim stated that it was "Scholarship for Weber Athletic Department" (Tr. 46). He indicated that the warrant was dated October 13, and the purchase order September 20. He further testified that subsequent to the time that he found out that football tickets he received had been purchased with the $600.00 funds, he paid back the value of the tickets he received as did another individual in his department (Tr. 53-54). The amount paid back totaled $45.00.

Mr. Warren Drury, an employee in the Weber County Shops, who serves on the Board of the Weber County Employees' Association, indicated that he received tickets from Mr. Al Covieo (Tr. 57). He stated he was told to go to the football games and join an

associate with the other employees (Tr. 58). He stated that he hadn't been before at least for several years and as a result of receiving the tickets he purchased other tickets and then intended to buy more next year. He further testified that at one point plaintiff himself wanted to obtain some of the tickets (Tr. 58-59).

Mr. B. M. Richards, a deputy sheriff who also serves as a non-paid member of the Weber County Health Board, testified that he received several tickets and he gave some to a District Judge and to employees of the County Hospital (Tr. 60-61). He received the tickets from Mr. Covieo and he stated that Covieo indicated that he was trying to give the tickets to people who hadn't attended before and to scatter them among the employees of the county (Tr. 61). He stated that as a result of the tickets given him, he was "sold" on Weber State College football and intended to buy a season ticket (Tr. 62).

Dr. Rex M. Alvord, a physician, testified that he received four tickets and that he used some and gave some away. He indicated the tickets had been given to him by the President of the County Industrial Bureau.

The answers to interrogatories proposed by the plaintiff were published and received by the court. Interrogatory 17 showed that most of the persons receiving tickets were employed in some positions in the county (R. 5).

In addition Dr. Alvord testified that the attendance at football games had increased by many thou-

sand and that he was especially impressed with th economic value the ticket purchase had for the com munity (Tr. 65-67). Also, Mr. Lowell H. Alvor testified that he was employed at Hill Air Force Bas was a member and chairman of the Weber Count Health Board. He received tickets to the Weber Stat College football games, distributed by Mr. Covieo (Tr 70). He testified that he was present when all th Commissioners discussed the tickets and that he under stood that it was their intention that unsalaried em ployees be given some of the benefit by the distributio of the tickets (Tr. 71).

Maurice Richards, an appellant and Weber County Commissioner, testified that Mr. Covieo, a general em ployee and inspector for Weber County, had bee designated to handle the relationships with Mr. Cromp ton (Tr. 73). He stated that Crompton wanted to com to the Commission and upon presenting his ideas t the Commission, it appeared that he wanted the Com missioners to take an ad in the program. He was advise by the Commissioners that they did not desire to tak an ad because they considered it political (Tr. 74). He stated that Mr. Crompton then mentioned obtainin tickets and selling them to County employees, but tha this idea was rejected as involving too much difficult (Tr. 75). Crompton stated that the College needed help and he was asking the Commission to help thei program. Commissioner Richards testified at severa meetings the question of providing a scholarship fo between $500 and $700 to the college was discussed

He stated that he discussed, on the street, with Mr. Crompton the possibility of a $600.00 scholarship being given directly to the school. Mr. Crompton told Richards that he was interested in building up the athletic fund and that a direct scholarship would not have that effect (Tr. 76). He listed the ways the Commissioners could help the College and suggested the idea of purchasing tickets as a means of developing the athletic program (Tr. 76). Subsequent to the meeting on the street, two of the Commissioners told Crompton that they would go forward with the ticket purchase of $600.00. This was on or about the 17th or 18th of September. Richards said he or Mr. Favero told Mr. Covieo to make out a requisition for $600.00 and that as a result a purchase order was prepared, signed and submitted as a proper claim (Tr. 77). When the tickets first arrived, they were scattered throughout the stadium and they were sent back in order to get seats together (Tr. 78). Commissioner Richards said it was his intent to aid the athletic department and that Mr. Crompton had been pushing the end result of getting money into the athletic fund and selling tickets in order to get people out to support Weber State College football (Tr. 78-79). He also stated it was Mr. Covieo's job to get out the crowds and to distribute the tickets to non-paid board members, hospital confinees, county employees and to generally use his own discretion. He stated that it was not their intention to give tickets to those who normally would have gone, and that although this had occurred on one instance when a

ticket had been given at the front gate to an individual who had intended to go to the game, it was subsequently corrected (Tr. 79-81). Richards testified that it was Commission policy that any expenditure over $100.00 required one Commissioner's approval unless there was some question about it and then it required two or three Commissioners' signatures (Tr. 82). He stated that most expenditures are not approved at regular meetings. Richards stated that at the time Covieo was directed to make up the voucher, there were no specific instructions given to him as to what to put on the requisition and that there was no intention to make the requisition secret. The idea was to generate spirit and enthusiasm within a block of people, primarily county employees and affiliates, and to help Weber State College (Tr. 88). The primary purpose was to help the college (Tr. 88). Richards testified that Commissioner Favero signed Richards' name to the requisition by stamping it on the requisition and that this was authorized by him (Tr. 91).

Donna Adam, the employee of the County Clerk, testified as to a minute entry which would allow any Commissioner to approve an expenditure in an amount over $100.00, but two out of three was required if the expenditure was questioned in any manner (Tr. 93).

Al Covieo testified that he was an inspector and apparently a general administrator for the County Commission (Tr. 94). He stated that Mr. Crompton appeared on several occasions before the Commission

to solicit help for the Weber State College athletic program. He stated that he was directed to make out a $600.00 purchase order to Weber College, that he requested a secretary, Lorna Boam, to make out the requisition. He said he knew it was for football tickets and that he couldn't remember telling her what to put on the requisition, but that he and Crompton were talking and that she apparently absorbed the conversation between the two and placed the statement relating to athletic scholarship on the requisition (Tr. 95). He stated that no one told her to put the purpose of the requisition as being for scholarships (Tr. 96). He indicated that the purpose of the purchase of the tickets as he understood it was "to prime the pump" for Weber State College and to distribute the tickets throughout the building. He said that it was suggested that he distribute them first to unpaid board members, county employees, individuals in hospitals and similar persons (Tr. 97). He said he kept a record of who received the tickets and who attended of every game, but did not have the records at time of trial since the season was over (Tr. 97). He said he would distribute some of the tickets to the elected department heads, and that some would pick up the tickets in his office and that generally he was "running around" to distribute the tickets (Tr. 98). He indicated that he had never gone to Weber State College football games before the ticket purchase but that he went at the time and generally had a good time. He did not use any of the tickets himself. He further indicated that approximately 35% to 40% of

the tickets had not actually been used by the person to whom they were distributed to or that the tickets were not distributed into the hands of persons who did use them (Tr. 102).

Lorna Boam, secretary of the Weber County Commission, testified that she wrote up the ticket purchase requisition and that neither of the County Commissioners instructed her how to fill it out. She stated that either Mr. Covieo or Mr. Compton gave her information as to what to put on the requisition (Tr. 104-106).

Commissioner Bud Favero testified that he recalled when Mr. Covieo and Mr. Compton came into the commission meeting and requested help for the College (Tr. 107). He said that Crompton originally sought an ad from the Commissioners and that this was turned down. He said this was computed on the basis of $70.00 for the ad for 9 to 10 games which would be approximately $700.00 (Tr. 108). He indicated that first there was consideration given to a direct scholarship of $600.00 and that finally Crompton talked them into taking tickets (Tr. 109). He stated that subsequent to the determination being made, Mr. Covieo was told to make out a requisition and that he did not tell them what to put on the requisition (Tr. 110-111). He stated there was no intent to hide anything in making up the requisition (Tr. 114). He considered the payment to be for a scholarship and the tickets a donation to the Weber County Commission (Tr. 115). He felt the tickets had been given back to Weber County in

order to develop good will (Tr. 115). He said that instructions were given to Covieo to distribute the tickets generally to unpaid board members and various other county officials (Tr. 114). He stated that some county employees were poor and that this provided a means to assist them to attend a game which they otherwise wouldn't have the opportunity (Tr. 116). He stated that their sole intention was to help Weber State College and that the Commission had contributed on other occasions to 4-H clubs and other activities of public import. It further appeared in the record that the Commission had made a donation to a Weber County project known as "All Faces West" Tr. 34). Mr. Favero said that his purpose in taking the tickets was:

> That instead of them taking that thousand dollars and doing what I sometimes think they do with it, to go out and give it to the people and let them fill them stands and let them come and see what a beautiful thing it is, that they actually can't afford to. It would be better for the community. It would grow. Maybe they would save from year to year to be able to go to this the next year. All this is stimulating business just like we try to do day in and day out with the Industrial Bureau. Stimulate the mind that we got something here greater than just what we think we have got, let people talk about. That's building industry, that's building our county. (Tr. 118-119).

Subsequent to the presentation of the evidence the trial court indicated that he felt there had been a mistake in judgment and the action of the Weber County

Commissioners, the appellants herein, was ultra vires. He stated that the court concluded as a matter of law that counties do not have statutory power to construct "Universities" and "build football fields or Universities" and that that being so, that no power to appropriate funds to the Weber State College (Tr. 121). The court felt there was a mistaken judgment but that it was an honest mistake (Tr. 122), and the motive of the Commissioners was not questioned ,Tr. 122. The court stated:

> The court will state that a reading of the Commissioners' testimony convinces the court that they, the County Commissioners, believed they had a right to make the purchases enumerated and charge them to the county, and that they did these things through no dishonest motives. They were simply mistaken as to the law.

The court further stated (Tr. 123):

> All right, the plaintiff prevails as to the first three paragraphs of the complaint. The plaintiff fails as to the paragraph four and five of the complaint, and that portion is dismissed with prejudice.

And (Tr. 122):

> But the court finds that there was no fraud, no wilfull criminality, no corrupt or venal acts on the part of these County Commissioners, and expressly exonerates them from any evil motive by reason of the concession made by plaintiff in its closing arguments.

> And the court—I don't know how we're going to do this. I want findings made at length on this subject, that this is merely a mistake in judgment on the part of the presiding officers of this county.

The appellants submit the trial court erred in the construction of the legislative powers of County Commissions.

POINT I

THE TRIAL COURT ERRED IN RULING THAT THE APPROPRIATION MADE BY APPELLANTS WAS ILLEGAL.

The appellants submit there is no justification for the trial court's ruling when a fair examination of the evidence and the legal powers of the appellants is made and the growing social and political realization of the extent of participation of government in community affairs is properly appraised.

The evidence is quite undisputed and simply shows that the appellants, while acting as Commissioners of Weber County, appropriated the sum of $600.00 to Weber State College and in exchange, therefore, received football tickets which were distributed to non-paid county employees and officials, some hospitalized persons, and others in the community. The purpose of the appropriation was to aid Weber State College, an educational institution in the county. The appropriation was aimed at developing community interest

in the athletic program at the college and "priming the pump" in developing the economic, social, and recreational resources of the community. The trial court found the action ultra vires apparently on the theory that because there was no express authority authorizing county appropriations for "the building of universities and colleges" it had no authority "to make donations to football fields and athletic funds" (R. 121). The court also determined that there was "no fraud, no wilful criminality" (R. 122).

The respondent maintained its action below under the provisions of 17-5-12, Utah Code Annotated, 1953, which provides:

> "Whenever any board of county commissioners shall without authority of law order any money paid for any purpose and such money shall have been actually paid, or whenever any other county officer has drawn any warrant in his own favor or in favor of any person without being authorized thereto by the board of county commissioners or by law and the same shall have been paid, the county attorney of such county shall institute suit in the name of the county against such person or such officer and his official bondsman to recover the money so paid, and when the money has not been paid on such order or warrants, the county attorney of such county upon receiving notice thereof shall commence suit in the name of the county to restrain the payment of the same; no order of the board of county commissioners shall be necessary in order to maintain either of such actions."

The trial court also imposed the statutory penalty under 17-5-13, Utah Code Annotated, 1953.[1] Thus, the essential issue is whether the expenditure made by the appellants was in fact ultra vires.

17-5-9, Utah Code Annotated. 1953, provides:

> "The board of county commissioners shall have power to make and enforce such rules and regulations for the government of the board, the preservation of order and the transaction of business as may be proper."

The Weber County Commission had required the approval of one commissioner on an appropriation of over $100.00, but if there was any question on the item the approval of two commissioners was required. In the instant case the appellants approved the appropriation, and, therefore, it must be viewed as being made under proper procedure and authority unless it was ultra vires.

Counties are certainly units of government in the State of Utah and arms of State authority. Weber County existed prior to statehood and counties, like other sub-divisions of government, necessarily must perform many functions for their citizens. *Emery County v. Burresen,* 14 Utah 328, 47 Pac. 91; *State v. Standford,* 24 Utah 148, 66 Pac. 1061. 17-4-1, Utah Code Annotated, 1953, provides:

> "The several counties of the state as they now exist and such other counties as may be here-

(1) The propriety of this action is canvassed in POINT II of this brief.

after organized are bodies corporate and politic and as such have the powers specified in this title and such other powers as are necessarily implied."

Thus, county powers, which may be exercised by the Commissioners, necessarily exceed those set out in statute and include necessary and implied powers, 17-4-2, Utah Code Annotated, 1953. The Commissioners of a county exercise legislative as well as executive authority and have, therefore, some of the substantial discretion that the legislative power envisions. 20 C.J.S., *Counties,* Sec. 74, p. 834. Of course, they also exercise quasi-judicial authority, *Salt Lake County v. Clinton,* 39 Utah 462, 117 Pac. 1075 (1911). There is a presumption that the expenditure of funds is for a proper county purpose, and courts may not substitute their discretion as to the wisdom of an expenditure for that of the local official. *Slater v. Salt Lake City,* 115 Utah 476, 206 P.2d 153 (1949). It is submitted when these factors are weighed against the statutes, evidence and precedents applicable in this case, the appellants are not liable under 17-5-12, Utah Code Annotated, 1953.

The general powers of a county are set out in 17-4-3, Utah Code Annotated, 1953, and include:

"(3) To make such contracts and to purchase and hold such personal property as may be necessary to the exercise of its powers.

(4) To manage and dispose of its property as the interests of its inhabitants may require.

The interests of the inhabitants and the general performance of county purposes appear to be the other limitations on the contracting and spending power of counties. 17-4-4, Utah Code Annotated, 1953, deals with a county's right to appropriate money and contains only one relevant limitation:

> "No county shall in any manner give or lend its credit to or in aid of any person or corporation, or appropriate money in aid of any private enterprise."

From the above sections it may be concluded that county expenditures must be for public purposes rather than private, and the expenditure of funds or disposal of property must be in the interest of its inhabitants.

In 20 C.J.S., *Counties,* Sec. 236, it is observed:

> "A county board has no power to make appropriations for any purposes other than those authorized by law. It must not violate constitutional and statutory limitations and prohibitions; and, in the absence of express statutory authority to do so, it cannot appropriate county funds for other than county purposes. It is unnecessary, however, that the entire public be benefited from the object in aid of which such funds are set apart, and, in determining whether an appropriation is for a public purpose, the public policy of the state as expressed in its legislative enactments is entitled to weighty consideration."

Thus, the expenditure in the instant case must at least have been for a county purpose to be valid. As

noted above, the needs of the inhabitants and the necessary and implied functions of a county may determine whether it is a county purpose, subject to the limitation that the expenditure should not be for a private purpose. Certainly, at this juncture it is apparent that the trial court too narrowly circumscribed the powers of counties. Weber State College is a public institution, Title 53, Chapter 43, Utah Code Annotated 1953. It is located in Weber County and satisfies multiple needs of the local citizenry, economic, social, educational, recreational, et al. Therefore, it seems axiomatic that an expenditure for Weber State College is an expenditure for a county purpose.

17-5-80, Utah Code Annotated, 1953, provides:

> "The boards of county commissioners of the respective counties within the state are authorized and empowered to provide for the development of the county's mineral, water, man-power, industrial and other resources."

Thus, the Legislature has expressly recognized the obligation of the County Commissioners to endeavor to develop county resources. Broad language was used by the Legislature thus evidencing an intent to allow great discretion to be used by County Commissioners in determining by what means the resources of the county will be developed. It would be an absurd argument to urge that Weber State College is not a resource of Weber County or an industry of that county. Consequently, the Commissioners of Weber County were clearly empowered to expend county funds in promot-

ing the college and the activities of the college. See Laws of Utah, 1956, Ch. 32, Sec. 1, and especially the Title of the Act. 17-5-85, Utah Code Annotated, 1953, expressly allows the "board of county commissioners" to "expend county funds as are deemed advisable" to carry out the development of resources in the county. More directly, 11-2-2, Utah Code Annotated, 1953, allows counties to organize and conduct athletic contests and maintain "other forms of recreational activity that may employ the leisure time of the people in a constructive and wholesome manner.[2]

Several cases have found donations by local government organizations to schools within their boundaries to be proper expenditures.

In *Southwestern Presb. University v. City of Clarksville,* 149 Tenn. 256, 259 S.W. 550 (1924), the court was concerned with whether municipal funds could be used to support a non-profit, private, sectarian school within the municipal limits. The court found the contribution of funds proper because "the city was providing for a higher school education for its young men than otherwise could be afforded." In the instant case Mr. Favero felt the expenditure a donation, and certainly the county's contribution would be providing for participation in athletics of interest to the county which otherwise might not have been afforded.

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[2] See also 17-31-1, Utah Code Annotated, 1953, allowing the use of the taxing power for the establishment of a recreational or tourist bureau.

A similar issue was before the court in *Butler v. Compton Junior College Dist.*, 77 Cal. App.2d 71, 176 P.2d 417 (1947). In holding the expenditure of public funds against a taxpayer's claim of illegality the court observed:

> "The education of the young is a public purpose of the greatest importance, fraught with no less consequence than the purposes for which the expenditure of public funds was approved in O'Dea v. Cook. . . ."

See also *City College of New York v. Hylan*, 203 App. D.W. 372, 199 N.Y.S. 804.

The approval of the use of county funds for a state medical college was acknowledged in *Smith v. Robertson*, 41 S.E.2d 631 (S.C. 1947).

In McQuillin, *Municipal Corporations*, Vol. 15, Sec. 39.25, p. 69, it is observed:

> "Likewise, *aid to a college*, or to a public school, aid to charitable institutions, donations to a housing authority, and appropriations for incorporated homes for friendless women or for industrial expositions, or to secure the location near the city of a state reform school to which it may send its youthful offenders, have been held proper."

In *Bailey v. Van Dyke*, 66 Utah 184, 240 Pac 454 (1925), the expendture of funds was approved where Weber County gave $250.00 to the Utah State Agricultural College under contract for extension

services. The contention was made that the expenditure was not for a public purpose and that the statute authorizing such services was, therefore, unconstitutional. This court found the expenditure to be for a public purpose noting that it was "designed for the public welfare" and provided "popular education for the benefit of those not reached by schools and colleges."

In the instant case the expenditure of funds would aid the athletic program of Weber State College including the athletic scholarship fund. This would enable persons to obtain education they otherwise may not have been able to obtain. Further, by "priming the pump" of community interest in the college and its activities the growth of the college is assured. The economy of the county is enhanced and industry attracted. Further, the aesthetic interests and recreational pursuits of the citizens are stimulated and satisfied. The action of the appellants was solely for a public purpose, a county purpose and, therefore, not ultra vires. The wisdom of the expenditure is obvious and as such this court may not, nor could the trial court, brand the expenditure as improper.

In *Wood v. Budge,* 13 Utah 2d 359, 374 P.2d 516 (1962), a challenge was made to a legislative appropriation to pay various claims made against the State. One of the bases for challenge was the allegation that the appropriation was for benefit of private persons and, therefore, a gift of public monies and, hence, ultra vires the legislative authority. This court observed:

"In order to justify a conclusion that the power to approve and pay such claims has been taken away from the Legislature and placed exclusively within the control of the Board of Examiners, it would have to clearly so appear, which is not the case here.

"The Attorney General has also suggested that the appropriation to pay these claims may be outside the bounds of constitutional propriety as gifts of public funds to private individuals. It is an elementary principle of justice that there should be 'equal rights to all and special privileges to none.' And that thus there should be no discrimination against nor favoritism toward some persons other others. It is quite unthinkable that the Legislature could properly make gifts of public funds merely to confer favors on certain individuals, or to appease self-seeking persons, who make pretended but groundless claims against the State. *In order to justify approval and payment there must be at least some semblance of a valid claim; or some relationship to the public interest or welfare, on the basis of which some responsibility on behalf of the State could properly rest.*"

The court also noted:

"We are obliged to apply the principle that legislative actions are endowed with a presumption of validity; and that they will not be stricken down unless it clearly appears that the Legislature acted beyond its authority."

The court determined the issues adverse to the claim of illegality.

If it is remembered that the appellants in the instant case acted in a legislative capacity, it seems proper to conclude there was "some semblance of a valid claim" for which the appropriation was made and the "presumption of validity" (a factor the trial court did not mention) warrants upholding the expenditure. Certainly it is so since the appropriation was made to another public body. The appropriation alone, not the distribution of the tickets or the other allegations (political in nature) as to wrongdoing, are before this court. It must be borne in mind that the act questioned was simply the purchase of the tickets, and not the manner in which the tickets were invoiced and paid for, nor the manner in which they were distributed free of charge to people to develop an interest in supporting the athletic program of Weber State College. The question of legality then, as emphasized above, becomes one of the use of county funds as a donation in support of a local college athletic program. The appropriation was consequently legal.

Prior to the filing of the instant lawsuit, the Attorney General was asked to issue an opinion as to the legality of the purchase of football tickets which now is the subject of this appeal. That opinion, issued May 20, 1966, as Opinion No. 66-073, ruled that the expenditure was legal, and since that opinion was an independent determination by the State's Legal Officer, rather than an argument by an advocate, a raither extensive abstract from that opinion seems justified:

"All the authorities are in agreement that t appropriation of public funds for the prima purpose of private gain is clearly an unlawf expenditure. It is specifically provided in t Utah Code that, whenever the county commi sion shall without authority of law order an money paid, for any purpose, the county attor ney of such county shall institute suit in the nam of the county against such officer and his bond man to recover the money. See Section 17-5-1 Utah Code Annotated, 1953. Section 76-28-6 Utah Code Annotated, 1953, also provides:

> 'The making of profit out of public money or using the same for any purpose not author ized by law, by any public officer, is a felony and such officer, in addition to the punishmen provided by law, shall be disqualified to hol public office.'

The key to the issue presented in the purcha and distribution of the football tickets is whethe or not the expenditure would be considered 'public purpose.'

The difficulty presented, of course, is: Wha constitutes a 'public purpose'? Would the ex penditure necessarily be illegal if individual benefit from the expenditure? This problem be comes more difficult and his caused the court a considerable amount of trouble. Many court and authorities have held that an appropriation of public funds is not per se illegal simply be cause private individuals benefited from the ex penditure. 42 Am. Jur. 756.

> 'Where the appropriation of public funds or the creation of a public debt is primarily for public purposes, it is not necessarily ren

dered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit, but if the result is chiefly that of private benefit, an incidental or even ostensible public purpose will not save its constitutionality. 156 A.L.R. 924.'

Bearing in mind the concept of 'public purpose,' it is necessary to relate the facts concerning the purchase of the football tickets to the meaning of the phrase 'public purpose.'

The Weber County Commission in previous years made contributions to the Weber College Athletic Department. Certainly, a contribution to a public institution that provides education to the people of Weber County and stimulates economic activity would not be disputed; there is obviously sufficient 'public purpose' to justify such an expenditure. It is noted that the general statutory provisions and opinions discussed in Part II would also allow an appropriation of public funds to a public educational institution such as Weber State College; more specifically, Section 17-5-77, Utah Code Annotated, 1953, authorizes the county commission to provide for the safety, and preserve the health, promote the prosperity, improve the morals, peace and good order of the county; Section 17-5-80, Utah Code Annotated, 1953, as amended (1965), empowers the county commissioners to provide for the development of the counties, manpower, industrial and other resources.

In 1965, the county commission advanced one step further than it had done in the past; instead of making an outright gift to the college, 50

football tickets were received for the $600.00 expenditure. If the county commission had merely filed the tickets away, it would, in effect, be making an outright gift to the college as it had done in the past. It was the opinion of the county commission, however, that a purchase and distribution of football tickets would stimulate more public interest in the college and prove to be more valuable than a mere gift or donation.

The distribution of the football tickets to city and county employees and other individuals certainly benefited private persons. The question presented, however, is whether or not the expenditure was primarily for a public purpose with an incidental private benefit, or whether it was primarily for a private purpose with an incidental public benefit.

The apparent intent of the county commission was to make a contribution to the college that would have more value than a mere donation of money. The purchase and distribution of the tickets not only provided money for the athletic program, but also stimulated interest in the school; the result would give a dual effect to the action taken by the county commission.

A number of cases have held that the determination of what constitutes a public purpose rests in the judgment or discretion of the legislative body, and the judiciary will not substitute its judgment or discretion for that of the legislative body, unless that discretion is shown to have been unquestionably abused. *Glendale v. White,* 67 Ariz. 231, 194 P.2d 435 (1948); *Pipes v. Hilderbrand,* 110 Cal. App. 2d 645, 243 P.2d 123 (1962); *Slater v. Salt Lake City,* 115 Utah 476, 206 P.2d 153 (1949).

The action taken by the county commission should be distinguished from a situation where an appropriation is made with the intent to purchase football tickets for friends and associates or to gain political favors; in this event, private gain would be the primary motivative factor.

To insure that the purchase and distribution of the football tickets remains a 'public purpose,' precautions should be taken when the tickets are distributed. Care must be exercised to insure that the distributions are not limited to particular groups, organizations, or political parties.

If the foregoing precautions are practiced, it must be concluded that the Weber County Commission may authorize an expenditure of public funds for the purchase of Weber State College football tickets."

On June 24, 1965, the Utah Attorney General issued Opinion No. 65-044, in which it was concluded that both cities and counties could donate public funds for cultural and entertainment purposes. The relatively broad powers of cities and counties in this respect were analyzed and summarized in that opinion:

"The basic question presented necessarily requires an examination of several subordinate points. These considerations are summarized in 42 Am. Jur., p. 774, as follows:

'It is to be observed that the question of the power of a county or municipality to lend its aid to a private enterprise conducted for recreational entertainment purposes depends upon a number of different considerations, in-

cluding: (1) Whether such enterprise can be deemed a 'public purpose' within the general rule restricting the expenditure of public funds to public purposes; (2) whether the legislature has authorized the county or municipality to lend its aid to the enterprise in question; and (3) whether the State Constitution contains a provision, as is the case in many states, forbidding local authorities to lend their aid to private enterprises.

For purposes of simplicity and organization, the foregoing questions will be discussed in reverse order. The initial question, therefore, is the nature and extent of the prohibition contained in Article VI, Section 31, Constitution of Utah, which provides:

> 'The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking.'

The basic purpose of the above provision is to prevent any political subdivision with the State from using public funds to aid private persons or organizations engaged in businesses for profit. It is clear that a variety of serious abuses would result if those in charge of the public purse strings could utilize public funds to favor or aid private persons in their pecuniary pursuits. This is to be distinguished from legitimate uses of public funds or bonafide public purposes, even though there might be some incidental benefit to private commercial organizations, and is further to be distinguished from

donations of funds to nonprofit organizations which perform functions which legitimately could be performed by political subdivisions.

With respect to the use of public funds for investment in privately-owned corporations for profit, the Utah Supreme Court has held that the constitutional provision above quoted is not a blanket prohibition against such investments, but is designed only to prevent use of public funds when the primary purpose is to aid or benefit the private commercial venture; but when the Primary motive is to invest the public funds in the public interest and for the benefit of the public by providing a desirable return on the investment, the constitutional provision is not offended. *Utah State Land Board v. Utah State Finance Commission,* 12 P.2d 265, 365 P.2d 213.

With respect to donating funds to nonprofit corporations performing educational, entertainment and cultural functions, the general rule is well established that constitutional provisions similar to the provision above quoted do not prohibit such donatoins and grants:

> 'Such donations are generally construed as directed against benefits at public expense attempted in behalf of individuals, corporations, or associations, as such, acting independently and conducting some enterprise of their own as are usually conducted for profit and are commercial in nature.' 38 Am. Jur., p. 94.

It is therefore concluded that there is no constitutional prohibition in Utah against counties and municipalities donating public monies to

organizations such as the Utah State Institu of Fine Arts and the Utah Civic Ballet Societ

We turn now to a consideration of the questio as to whether the Legislature has authorize municipalities and counties either to make suc donations or to conduct activities comparabl to those conducted by the institute and societ

It is reasonably clear that municipalities ca provide educational, entertainmet and cultura functions for the benefit of the inhabitants o the municipality. Section 10-8-2, Utah Cod Annotated, 1953, as amended, provides, in part as follows:

> ' * * * It shall be deemed a corporate pur pose to appropriate money for any purpo which in the judgment of the board of com missioners or city council will provide for th safety, preserve the health, promote the pro perity and improve the morals, peace, order comfort and convenience of the inhabitant of the city.'

It is also reasonably clear that counties ca provide the services under consideration. Th broad powers of counties granted by Section 17-5-77, Utah Code Annotated, 1953, as amend ed, would seem to provide ample authority fo such services and functions. Section 17-5-60 Utah Codes Annotated, 1953, authorizes coun ties to levy a special tax for the purpose of rai ing revenue for exhibitions of products an industries of the county, for fairs and livestoc shows, and for comparable purposes, and spe cifically provides that the counties can accom plish this directly or 'though the instrumentality of a corporation not for pecuniary profit, * * *

It might also be observed, with reference to the broad powers of counties, that Section 17-4-1, Utah Code Annotated, 1953, grants to counties, in addition to powers expressly granted, all other powers as are necessarily implied to accomplish the functions of county government; and Section 17-5-50 provides that counties 'may do and perform all other acts and things required by law not in this title enumerated which may be necessary to the full discharge of the duties of the board.'

More specifically, Section 11-2-1, Utah Code Annotated, 1953, authorizes counties to establish 'indoor recreation centers * * * or other recreational facilities * * *' and Section 11-2-2 authorizes counties to organize and conduct 'plays, games, * * * dramatics, * * * festivals, * * * community music * * * and other forms of recreational activity, that may employ the leisure time of the people in a constructive and wholesome manner.' Sections 17-12-3, 4, Utah Code Annotated, 1953, as amended, authorize the issuance of bonds by counties for the construction of 'convention complex' facilities.

Having concluded that there is no constitutional prohibition against donation of public funds to the entities under consideration, and having further concluded that the Legislature has granted sufficiently broad authority to cities and counties to permit such entities to perform services of the same nature as those under review, we turn now to the question as to whether counties and cities can donate money to non-profit entities as perform such services.

It is clear that public funds must be used for public purposes. This does not mean that

public funds must be appropriated only public entities. It merely means that the tities to which public funds are donated or propriated must use that money for legitim public purposes. The same rule applies ev though the money donated or appropriated been derived from taxation and ordinarily wou not be available to private entities. 42 Am. Ju pp. 756-60.

It might be observed that the Utah Legis ture has for a number of years appropriat funds to private nonprofit corporations prov ing services which might legitimately have be performed by the State, but which, in fact, a being performed by private nonprofit agencie For example, funds have been appropriated the State Welfare Department for distributi to children's aid societies, which are nonprof corporations deemed by the Legislature to performing legitimate public services. Chap 175, Laws of Utah 1965, Section 13, Item 6

Since the Utah State Institute of Fine Ar and the Utah Civic Ballet perform entertai ment and cultural services and functions, would be within the good faith determination the governing boards of cities or counties declare such services as public services, and make a reasonable donation of public fun to support such public purpose for the bene and the welfare of the inhabitants of the spective political subdivisions.

The Opinion above quoted recognized that reaso able precautions and safeguards should be taken assure that a general public purpose would be serv within the boundaries of the political subdivision m

ing the donation and to assure that the funds were actually used for the purpose for which they were donated:

Reasonable protections should be provided for in making any such donation. The governing board of the county or municipality should insure that the funds donated by it will be utilized to aid in providing the service or function within the particular political subdivision. In other words, Salt Lake City could not donate funds to the Utah Civic Ballet for the purpose of financing a ballet performance in Iron County. This is to say that any city should insure that the funds donated will be used exclusively to promote performances within the city and any county should insure that the funds donated by it will be used to promote performances within the county, thus insuring that the inhabitants within the political subdivision from which the monies are donated will be the beneficiaries of the service or function provided.

It would also be advisable for a city or county to provide that, in the event of dissolution or liquidation of a nonprofit corporation which receives donated funds, any nonused funds donated by the city or county would revert to the city or county, respectively. It could also be provided that the city or county would receive an accounting as to the method and manner in which the donated funds were spent, and the city or county should specifically provide for the right to audit and verify any such accounting made as to the expenditure of donated funds. It is further possible, in order to insure complete protection tothe officers of the municipal-

ity or county authorizing the donation, to requ
that the donated funds be spent only upon th
written approval of the city or county governin
board for the particular function proposed. I
other words, if a particular city were to mak
a donation of $10,000.00 to the Utah Civ
Ballet, and the ballet society proposed to spen
$2,000.00 of that sum to finance a performanc
within the particular city, the city commission
could still require its approval in writing for th
expenditure of that part of the donation for thi
particular performance.

It is therefore concluded that if the foregoing
determinations and protections are made an
satisfied, cities and counties can make donation
of public funds to either the Utah State Insti
tute of Fine Arts or the Utah Civic Ballet So
ciety."

In the instant appeal there can be no question tha
Weber State College serves a county-wide public pur
pose in its athletic program and activities. Located in
Ogden, Utah, the college serves the entire county in
a number of ways, and while the primary and immediate
benefit is that all persons within the county may for
entertainment purposes attend the athletic function
and games, secondary county-wide benefits would neces
sarily include the local pride in the quality and suc
cesses of the athletic teams (whether or not everyone
actually attends the games as spectators), local busi
ness generated through a larger and more active college
program, and the county share of sales tax generated
from concession sales, etc., at the athletic contests.

From the authorities cited above, it must be concluded that Weber County can legally donate county funds in support of any cultural, recreational or entertainment function sponsored by Weber State College, so long as the function supported is reasonably available to the general public within the county.

It is not denied that abuses and illegal conduct could arise from the purchase of football tickets if fraud or bad faith existed. If County Commissioners used public funds simply to purchase season tickets for their own personal use; or if county commissioners used public funds to purchase a block of tickets which they then sold and personally kept the money; or if county commissioners used public funds to purchase tickets for distribution only to relatives, or to members of a particular political party, or to a specially selected group; then, in all of such instances, the corrupt intent might well result in civil and criminal liability.

However, the only conduct of the appellants that was questioned by the lower court was the donation for the purchase of the tickets—no concern whatsoever was expressed by the fact that the tickets were distributed free of charge to those performing unpaid volunteer county services, and to others, but without any favoritism based on race, creed, color, politics, or other consideration. The pertinent observation is that none of the Commissioners personally used any of the tickets. Suffice to say that the court underscored the fact that the Commissioners had "no dishonest motives" (Tr. 122).

It must be concluded that the determination of trial court that appellants' action was illegal must reversed.

POINT II

THE TRIAL COURT ERRED IN IMPO ING THE STATUTORY PENALTY UNDE 17-5-13, UTAH COURT ANNOTATED, 1953

The appellants submit that if the appropriati to Weber State College was illegal, a contention app lants reject, that the trial court committed error imposing the statutory penalty under 17-5-13, Ut Code Annotated, 1953. That section states:

> "Any county commissioner who refuses neglects to perform any duty imposed upon h without just cause therefor or willfully violat any law provided for his government as su officer, or who, as commissioner, willfully, frau ulently or corruptly attempts to perform an unauthorized by law shall, in addition to t penalty provided in the penal code, forfeit the county $500 for every such act, to be re covered on his official bond, and shall be furth liable on his official bond to any person injure thereby for all damages sustained"

As can be seen the penalty provision relates more than a simple mistake as to powers but requir the person "willfully, fraudulently or corruptly" a tempting to perform an unauthorized act or the willf violation of law. This section, therefore, seems contemplate the necessity of scienter and evil doin

such as would give rise to a common law action for deceit. Such being the case the elements for liability require a stronger finding to sustain the penalty that the lower court made in this case. Prosser, *Torts,* 2nd Ed., p. 522.

The trial court expressly found "there was no fraud nor criminal intent" (R. 23 etc.). The appellants, according to the trial court, were "simply mistaken as to the law" (Tr. 122). There was no "evil motive" (Tr. 122). The judgment made by appellants was an "honest mistake" if it was an erroneous judgment (Tr. 122). The court dismissed the allegations of fraud and intentional misdoing alleged in plaintiff's complaint (Tr. 123). Consequently, the court did not by its findings determine that there was the willful and corrupt act necessary to invoke the penalty clause of 17-5-13, Utah Code Annotated, 1953.

It is a general rule that county officials are not liable for honest mistakes as to their powers, 20 C.J.S., *Counties,* Sec. 97, p. 884, and in the absence of bad faith liability for illegal acts has often been withheld. *State ex. rel. Murphy v. Board of Commissioners of Oklahoma County,* 95 P.2d 101 (Okl. 1939). This is implicit if not express in the decisions of this court in *Salt Lake County v. Clinton,* supra.; *Bailey v. Van Dyke,* supra.; and *Carbon County v. Hamilton,* 48 Utah 503, 160 Pac. 765 (1916). 17-5-12, Utah Code Annotated, 1953, imposes liability for a wrongful payment or appropriation of money. However, 17-5-13,

Utah Code Annotated, 1953, is a separate penalty pr
vision and appears to require a more intentional a
willful showing of wrongdoing. This statute should
contrasted with the case where the statute grants
additional recovery merely from the violation itse
Avery v. Pima County, 7 Ariz. 26, 60 Pac. 702 (1900
Such is not the case under the instant statute. It r
quires a separate showing of wilfullness, or fraud,
corruption not established in this case. Consequentl
allowing the penalty was improper.

The provisions of 17-5-13, Utah Code Annotate
1953, are penalty provisions allowing for a civil f
feiture on violation being established. Consequentl
the provisions should be narrowly construed, 23 A
Jur., *Forfeitures and Penalties*, Sec. 37; *Christian*
v. Virginia Drilling Co., 170 Kan. 355, 226 P.2d
(1950). In the absence of clear expression of legis
tive intent to apply the forefeiture provisions of
5-13 to instances of simple mistake as to powers
judgment this court should construe the statute
keeping with the strong and express requirements
the statute and require a willful or evil intent, at le
a purposeful one to make an illegal expenditure. Si
this was not show the court should, at least, reverse
imposition of the penalty.

Further, it should be noted that the Attorn
General of the State of Utah was of the opinion t
the expenditure was lawful. Although this deter
nation came after the fact it is not without signific

in determining whether the penalty was properly imposed in this instance. In *State v. Spring City,* 123 Utah 471, 260 P.2d 527 (1953), this court held city officials could properly rely upon the advice of the Attorney General as to the legality of a bond issue, and that such reliance would preclude liability. Certainly, where the State's Chief Executive Legal Officer is of the opinion the action of appellants was proper, thus confirming the fact that this case at best is one on which legal minds may differ, it would be improper to allow the penalty to remain in the absence of clear-cut willful corruption. This court should reverse.

CONCLUSION

It is submitted that the trial court committed error in concluding the appropriation made by appellants was ultra-vires. The role of government is undergoing change, and has changed substantially in the past years. The public expects more in the way of services from government, and if public officials are to render meaningful service their power to exercise their authority and fulfill their obligations must not be curtailed by overly rigid restrictions.

The expenditure in the instant case was clearly for a public purpose. It most definitely was aimed at helping an important institution in Weber County and contributing to the industrial, educational and recreational resources of the county. This was a legi-

timate end and, therefore, quite within the appella power. The determination of the trial court that expenditure was illegal does not withstand pro analysis in light of modern day reality. The role government in the development of local resources a industry is ever increasing, Abbey, *Municipal Ind trial Development Bonds,* 19 Vanderbilt Law Revi 25 (1965), and the need for such participation is su stantial, Chamber of Commerce of the United State What New Industrial Jobs Mean to a Communi (1963). Only by a flexible approach can true growt continue and the expense of government be adequate financed, Bridges, *State and Local Inducements f* Industry, 18 National Tax Journal 1,175 (1965). T judiciary must not, as this court has observed, intrud into the policies of the executive and the legislati branches on any level unless the basis of the interve tion is obvious, cf., *Utah State Land Board v. Ut State Finance Com'n.,* 12 Utah 2d 265, 365 P.2d 2 (1961). When the instant facts are so analyzed it apparent the lower court committed error. This cou should reverse.

Respectfully submitted,

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