creditors whose debts arose prior to the appointment of the committee. The aforesaid application of such money was therefore a wrongful conversion of it by appellants, Martin and Reid, for their own use and benefit, in breach of the aforesaid trust, which rendered them personally liable, and, since they acted in concert in the matter, rendered them jointly and severally liable therefor, which was, in substance, the holding of the decree under review.

[4] It is urged in behalf of the appellants, Martin and Reid, that the corporation was not insolvent at the time the aforesaid application of the money in question was made to the aforesaid payments on account of the two debts of the corporation in preference to other debts of the corporation, and the well-settled rule is invoked that it is not fraudulent per se, under the state law on the subject, even for an insolvent debtor to prefer certain creditors in the distribution of his assets, if the preference is made in good faith, with no actual fraudulent intent; and it is urged that, in the case of a corporation, the directors, acting in good faith and without any fraudulent intent, may make preferences between creditors of the corporation, even in their own favor, where the directors are themselves creditors of the corporation —citing Planters' Bank v. Whittle, 78 Va. 737, and other authority to the same effect. But these well-settled principles have no application to the case before us, for the reason that we have not before us the case of any preference made or attempted by the debtor corporation in the distribution of its assets between its creditors, through the action of its board of directors, or otherwise. We have before us the attempt of members of a committee of the board of directors of the debtor corporation to act for the corporation in making such a preference, without any authority whatsoever so to do—a wholly different situation. And such being the situation it is immaterial for us to determine whether, in the case before us, the corporation was or was not insolvent at the time the wrongful conversion of assets aforesaid was made or whether or not the conversion was made with fraudulent intent on the part of the appellants. In any case, the conversion being without authority and in breach of trust, as aforesaid, it was wrongful, and having been made by appellants acting in concert, they are jointly and severally liable. Hence the decree under review, so holding, will be affirmed; but nothing said in this opinion is to be construed as intended to affect any right which the appellants, Reid and Martin, may have, by way of subrogation, to assert against the corporation so much of the debts of the banks as was paid by them.

Affirmed.

(136 Va. 573)

WARREN, Com'r of the Revenue, v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 14, 1923.)

1. Officers ⟸74—Court could set aside verdict finding officer not guilty in proceeding for removal.

In a proceeding for removal of an officer from office, under Code 1919, §§ 2705, 2706, a verdict acquitting the accused upon all of the charges against him could be set aside by the court, if, upon the law applicable to the uncontroverted evidence, the accused committed any of the offenses specified.

2. Municipal corporations ⟸156—Officer not removed for honest delay in assessing license thereafter.

A commissioner of revenue of a city must exercise a reasonable judgment in delaying assessments of license taxes upon persons and firms, in order to ascertain the facts relevant to the proper assessments, and cannot be removed from office, under Code 1919, § 2705, because he was honestly mistaken as to the law applicable, and erred in failing to make assessments.

3. Municipal corporations ⟸156—Commissioner of revenue removed from office for issuance of license without treasurer's receipt.

A commissioner of revenue of a city had no authority to act for the treasurer in receiving license taxes and signing treasurer's name to certificate, and is subject to removal, notwithstanding he acted solely with the purpose of accommodating applicants for licenses at times when the treasurer was not conveniently accessible, and for the better dispatch of business, under Code 1919, §§ 2705, 2706, 2360, 2374, 2375.

4. Officers ⟸66—Evil intent not element of malfeasance.

Where the thing done by an officer is purely ministerial, and the officer is intrusted with no discretion in the premises, if he exceeds his authority and does an act officially for which there is not authority of law, he is guilty of malfeasance in office, although there is an entire absence of any corrupt or evil intention.

5. Officers ⟸74—Court erred in entering final judgment removing officer after setting aside verdict.

In a proceeding to remove an officer under Code 1919, §§ 2705, 2706, the court, upon setting aside a verdict in favor of the defendant because contrary to law and the evidence, erred in entering final judgment removing the defendant from office; section 6251 not applying to such a proceeding.

Error to Corporation Court of Hopewell.

Proceeding by the Commonwealth for the removal of I. M. Warren from the office of Commissioner of the Revenue of the City of Hopewell. The accused was removed from office, and brings error. Reversed, and remanded for new trial.

This is a proceeding, under section 2705 of the Code, having for its object the removal of the plaintiff in error, I. M. Warren (who will be hereinafter referred to as the accused), from the office of commissioner of the revenue of the city of Hopewell, to which he was elected, being the current term of the office, beginning on January 1, 1922, and which office, after duly qualifying, he held at the time such proceeding was instituted.

The proceeding was instituted by order of court issuing a rule against the accused to show cause why he should not be removed from said office "for malfeasance, misfeasance, gross neglect of official duties, and knowingly and willfully neglecting to perform the duties enjoined upon him by the laws of the state and ordinances of the city of Hopewell," in the particulars mentioned in the three charges set out in the rule, as amended, namely:

"* * * In this to-wit:

"(1) That the said I. M. Warren, commissioner of the revenue of the city of Hopewell, during his present term of office, did issue a license to Mary Charlem, or some one else for her, on the 14th day of February, 1922, signed the treasurer's name to said license and receipt, collecting the sum of $5 therefor, without any authority from the said Hugh T. Birchett, treasurer.

"(2) That the said I. M. Warren, as commissioner of the revenues of the city of Hopewell, during his present term of office, did, on the 17th day of April, 1922, issue a license to Jim Kins for a pool room of 4 tables, which license amounted to $10.42, for a place known and numbered as No. 131 Poythress avenue, in the city of Hopewell, which license expired on the 30th day of April, 1922, receiving the amount of money therefor, signing the treasurer's name to the receipt thereon, without any authority from the said Hugh T. Birchett, treasurer.

"(3) That the said I. M. Warren, commissioner of the revenues of the city of Hopewell, during his present term of office, has knowingly and willfully neglected to perform the duties imposed upon him, as such officer by law, by failing to assess persons, firms, and corporations with the necessary license as required by law."

There was a trial by jury which resulted in the following verdict: "We, the jury, find the defendant not guilty on any of the charges."

Upon motion of the commonwealth the trial court set aside the verdict on the grounds that it was contrary to the law and the evidence and without evidence to support it; and the court, as stated in its order, "being further of opinion that there is sufficient evidence before the court to enable it to decide the case upon its merits," adjudged the accused to be "guilty of malfeasance, misfeasance, gross neglect of official duties, and knowingly and willfully neglecting to perform the duties enjoined upon him as commissioner of the revenue of the city of Hopewell, as charged in the amended rule," and ordered that the accused "be forthwith removed from and vacate said office of commissioner of the revenue;" and the accused brings error.

Of the evidence it is sufficient to say that it showed, without conflict therein, that the accused during his aforesaid current term of office issued the licenses in the two instances mentioned in the amended rule without any receipt of the city treasurer having been first obtained, as required by law, for the respective amounts of the license taxes required by the city ordinances to be paid to the treasurer by the applicants for such licenses; that the accused, well knowing that it was contrary to law, collected such license taxes from the applicants and signed the treasurer's name to the receipts therefor, with the intention, however, of handing the money to the treasurer so that he could enter its receipt by him upon his books and account therefor as received by him, and upon the assumption that the treasurer, who was newly in office, would assent to such method of transacting the business, as the previous treasurer had been accustomed to do in his dealings with the accused during previous years, as far back as 1917 (during which years also the accused was commissioner of the revenue for said city, and the accused and his deputies had been accustomed to transact such business in that manner during such previous years); but that the accused, at and before the time of the said transactions mentioned in the amended rule, well knew such assent of the treasurer would not render such conduct on the part of the accused any the less contrary to law.

The evidence further showed that the aforesaid method of transacting such business was not used by the accused with any intention of retaining the money collected by him, but merely from the desire to accommodate applicants for licenses and to dispatch the business at times when the treasurer was not at hand; but the evidence showed that the accused negligently failed to pay over to the treasurer some of the money collected by him, which should have been paid, as the law required, directly to the treasurer, and also negligently failed to report the same as chargeable to the treasurer, as the law required; the loss thereby occasioned to the state and city aggregating, during the years 1917, 1918, 1919, 1920, 1921, and 1922 probably a considerable amount, but only a small percentage of the aggregate of the license taxes assessed by the accused during such years, which was a very large amount.

The evidence further showed several instances during the year 1922, covered by the third charge in the amended rule, of the failure of the accused to assess certain persons and firms with city license taxes which should have been assessed; but the evidence as to those instances was such that the jury were warranted in concluding that the ac-

cused was either honestly mistaken as to the law applicable in some cases, and in the other cases merely reasonably delayed the assessment of the license tax until he could satisfy himself of the facts, and for those reasons only, and not from any corrupt motive, failed to make such assessments.

The following provisions of the Code of 1919 are pertinent:

"Sec. 2705. *Removal of officer from office; proceedings therefor.*—The circuit courts of counties, and the corporation courts of cities, shall have power to remove from office all state, county, city, town and district officers elected or appointed, except such officers as are by the Constitution removable only and exclusively by methods other than those provided by this and the following section, for malfeasance, misfeasance, incompetency, gross neglect of official duty, or who shall knowingly or willfully neglect to perform any duty enjoined upon such officer by any law of this state. * * *

"All proceedings under this section shall be by order of the court on its own motion, or on motion in open court, or upon complaint in writing, * * * the court shall * * * cause a rule to be issued, requiring the officer complained of to show cause, if he can, why he should not be removed from office, the rule alleging in general terms the cause or causes for such removal. * * * Upon return of said rule duly executed, unless good cause shall be shown for a continuance, * * * the case shall be tried on the day named in said rule * * * and if upon such trial it shall appear that the officer has violated any of the provisions of this section, or has failed in the performance of his duty as required herein, he shall be removed from office. * * *"

"Sec. 2706. * * * Any such officer proceeded against for violating the provisions of the preceding section shall have the right to demand a trial by jury, except in cases where the officer is an appointee, in which case it shall be triable by the court without a jury. The commonwealth and the defendant shall both have the right to apply to the Supreme Court of Appeals for a writ of error and supersedeas upon the record made in the trial court, and the Court of Appeals shall hear and determine such cases."

"Sec. 2360. *How license applied for and granted; what constitutes a license.*—Every person, corporation, company, firm, partnership, or association, desiring to obtain a license to prosecute any business, employment, or profession, shall make application therefor in writing to a commissioner of the revenue of the county or city wherein such business, employment, or profession is proposed to be conducted, in which shall be stated the residence of the applicant, the nature of the business, employment, or profession, the place where it is proposed to be prosecuted, and the amount of tax prescribed by law, accompanied with the certificate of the treasurer of such county or city that the amount of the tax in gold or silver coin, United States treasury notes, or national bank notes has been deposited with him by the applicant. Upon the receipt of such application, the commissioner, if satisfied of its correctness, shall make and sign the following indorsement thereon: 'I find the within application in due form, and accompanied with the certificate of the treasurer of the county (or city) that the sum of ——— dollars, in gold or silver coin, United States treasury notes, or national bank notes has been deposited with him.' The application so indorsed shall be filed by the commissioner in his office, and a duplicate thereof delivered to the applicant. Such duplicate shall constitute a license to prosecute the business, employment, or profession therein named, unless it be a business for which a license can be granted only on the certificate of a court, in which case the applicant upon obtaining such certificate shall be entitled to the license."

"Sec. 2374. *When commissioners to return lists of licenses to auditor and clerks; what list to contain; auditor to furnish forms.*—Every six months, to wit, the first day of July and the thirty-first of December of each year, the commissioner shall return, on oath, to the auditor of public accounts, and to the clerk of the court of the county or city a fair classified list of all licenses granted by him within the last preceding six months, embracing all such licenses as were not contained in any preceding report; and if no licenses were issued he shall report the fact, on oath, at the time aforesaid. In each class of licenses the names of the persons licensed shall also be arranged alphabetically, and such list shall specify the date of each license and the period for which said license is granted, for what it was granted, the name of the person, firm or company to whom granted, the amount of tax on the license, to whom paid, and if paid to the deputy of any county or city treasurer, shall state also the name of his principal, and shall also show the date on which his calculations of the tax were made. It shall be the duty of the auditor of public accounts to furnish to each commissioner printed forms and oaths for authenticating such lists or reports as above indicated and the commissioner shall make report according to such forms. Any commissioner failing to make such report at the time specified shall forfeit not less than one hundred nor more than five hundred dollars, and unless a reasonable excuse is given, shall forfeit all compensation to be received from the treasury."

"Sec. 2375. *Lists of licenses to be evidence to charge collecting officer.*—Any list of licenses signed and sworn to by the commissioner issuing the same, or, if he be dead, by his personal representative, wherein the amount of tax is stated and to whom paid, shall be evidence to charge the collecting officer with the amount of such tax."

There is no law authorizing commissioners of the revenue to collect any license taxes.

R. H. Mann, of Petersburg, and D. A. Harrison, Jr., and A. L. Jones, both of Hopewell, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions presented for decision by the assignments of error will be disposed of in their order as stated below.

[1] 1. Did the trial court err in setting aside the verdict on the ground that it was contrary to the law and the evidence?

The question must be answered in the negative.

Since the verdict acquitted the accused upon all of the charges against him, if, upon the law applicable to the uncontroverted evidence, the accused, during his current term of office, committed any one of the offenses specified in the statute (section 2705 of the Code) under which the proceeding was had, the verdict was contrary to the law and the evidence and was therefore properly set aside.

[2] Now it is true that in the matter of assessing persons, firms, and corporations with the license taxes required by law (i. e., by the ordinances of the city of Hopewell and by statute), the accused, although a ministerial officer, was required to exercise a reasonable judgment of his own as to the law applicable and a reasonable discretion in delaying assessments a reasonable time in order to ascertain the facts relevant to the proper assessments to be made. And it is well settled that, such being the case, if the accused did not act corruptly or with evil intent, but honestly and with reasonable diligence in such matters, even if he was mistaken as to the law applicable, and erred in failing to make such assessments, he could not be regarded as guilty of any of the offenses specified in the rule against him, in so far as the third charge contained in the rule is concerned. 1 Bish. New Cr. Law (8th Ed.), § 460 (1).

As said in the section of the learned work just cited:

"One serving in a * * * capacity in which he is required to exercise a judgment of his own is not punishable for a mere error therein, or for a mistake of law. His act to be cognizable criminally, *or even civilly*, must be willful and corrupt." (Italics supplied.)

Under the evidence the jury were warranted in finding that the accused did not act corruptly or with evil intent, but honestly and with reasonable diligence in the matters embraced in the third charge against him. Hence, we must conclude that the verdict of the jury was not contrary to the law or the evidence with respect to that charge, and the verdict should not have been set aside as to such charge.

[3] But with respect to the first and second charges contained in the rule, the situation is materially different. The official duty of the accused with respect to the matters embraced in those charges was purely ministerial; and, under the express and imperative provisions of the statute law on the subject, the accused, as to such matters, was intrusted with no discretion whatever. Under the plain mandate of the statute (2360 of the Code) commissioners of the revenue have no authority to issue licenses except upon the application "accompanied with the certificate of the treasurer * * * that the amount of the tax * * * has been deposited with him by the applicant;" and they have no authority, under any circumstances, to act for the treasurer in receiving such taxes. They are given by the statute no discretion in this particular. For them to act for the treasurer in receiving such taxes, from any motive whatsoever, is in direct violation of the statute on the subject, and if allowed would annul and suspend the operation of the statute.

The evidence shows, without conflict therein, that the accused was guilty of the first and second charges contained in the rule upon which the case was tried—that is to say, that during his current term of office the accused acted for the treasurer in receiving license taxes, signed the treasurer's name to the certificates that the same had been paid to the treasurer, and issued licenses upon the applications containing such certificates so signed. This was not only a plain violation of the law, but, as the evidence shows, without conflict, the accused well knew at the time that he did this that he was acting in violation of the law. It is true that the jury were warranted by the evidence in finding that his motive for so acting was not a corrupt or evil one, that he so acted solely with the purpose of accommodating applicants for licenses at times when the treasurer was not conveniently accessible, and for the better dispatch of business, and hence we must so find. But this is immaterial, since the statute conferred on the accused no discretion in the premises. Whatever inconvenience results to applicants for licenses and whatever impediment there may be to the dispatch of business, arising from the statutory requirements on the subject, are the result of the imperative legislative requirements contained in the statute, and they can be removed by the Legislature alone, by amendment or repeal of the statute in the particulars in question, and not by the commissioners of the revenue by conduct in violation of the statute.

And it is obvious that it is of vital importance to the state and cities that the particular requirement of the statute in question should not be departed from by the commissioners of the revenue. The two offices of the commissioner of the revenue and of the treasurer, and the functions of assessing and collecting license taxes to be performed by the respective officers, are required by the statute to be kept separate. The reports of the commissioners of the revenue furnish the sole independent evidence by which the treasurer is charged and held accountable for the license taxes collected. Hence, obviously,

the statute allows no consolidation of these two offices and no joint performance of the functions of collecting the taxes and issuing the licenses by a single officer in any case, and hence the imperative provisions of the statute on the subject. The public convenience and the dispatch of the business are undertaken to be provided for by section 2374 of the Code, by stipulating the times the commissioners of the revenue shall attend court (at which the treasurer is expected to be present and readily accessible). If such provisions do not adequately serve their purpose, the remedy is by application to the Legislature for amendment of the statute, and not by having commissioners of the revenue take the law into their own hands.

[4] Where the thing done by the officer is purely ministerial, and the officer is intrusted with no discretion in the premises, if he exceeds his authority and does an act officially for which there is not authority of law, he is guilty of malfeasance in office, although there is an entire absence of any corrupt or evil intention. 1 Bish. New Cr. Law (8th Ed.) § 459; 2 Bish. New Cr. Law (8th Ed.) c. 4414, and especially section 978; Cutchin v. Roanoke, 113 Va. 452, 74 S. E. 403; Law v. Smith, 34 Utah, 394, 98 Pac. 300; Bell v. Josselyn, 69 Mass. (3 Gray) 309, 63 Am. Dec. 741; Harris v. Hanson, 11 Me. 241; Coite v. Lynes, 33 Conn. 109; Bradford v. Territory of Oklahoma, 2 Okl. 228, 37 Pac. 1061; Mechem on Public Officers, §§ 457, 458.

In 1 Bish. New Cr. Law, § 459, supra, this is said:

"Any act * * * in breach of duty of public concern by one who has accepted public office is, within limitations about to be stated, a crime. Particularly is this so where the thing is of a ministerial or other like nature, and the officer is intrusted with no discretion"—citing numerous English and American cases.

The limitations referred to are stated in the next section of this work (460), above cited and quoted from, and, so far as material to the case in judgment, refer to the distinction, above adverted to, between the doctrine applicable where the officer is required to exercise a judgment of his own and that applicable where the officer is not intrusted with any discretion.

In Cutchin v. Roanoke, supra, 113 Va. 452, 74 S. E. 403, which was a proceeding for the removal of the mayor of the city of Roanoke, the following statements of the law are contained in the instructions given by the trial court, which were approved by this court, namely:

"The court instructs the jury that malfeasance in office is the doing of an act for which there is no authority or warrant of law; * * *

"The court further instructs the jury that if they believe from the evidence that the defendant has done or omitted to do what is charged in specifications 1 and 2 of the rule" (which was, in substance, that he had exceeded his authority and had done, without authority of law, an act officially, as to which he was intrusted by law with no discretion), "he cannot excuse or justify himself for his conduct, even though he might have acted from honest convictions that he was doing what was best to minimize the evil. * * * He has no right, power, or authority to annul any ordinance of the city, or suspend its operation as to any person or locality. * * *"

In Law v. Smith, supra, 34 Utah, 394, 98 Pac. 300, this is said:

"* * * It does not follow that the proof must show a specific intent to defraud in order to sustain a conviction for malfeasance in office. In State v. Lazarus, 39 La. Ann. 161, 1 South. 361, the ordinary definitions given to the term malfeasance by lexicographers are set forth as follows: '* * * The doing of what one ought not to do; the unjust performance of some act which the party had no right, or which he had contracted not to do. * * * The contention of the defense that the malfeasance * * * charged must as a condition precedent to removal [from office] be proved to be criminal or corrupt is manifestly erroneous. It is absolutely untenable either in reason or on authority.'"

In Bell v. Josselyn, supra, 69 Mass. (3 Gray) 309, this is said:

"* * * Malfeasance is the doing of an act which a person ought not to do at all. 2 Inst. 107; 2 Dana Ab. 482; 1 Chit. Pl. (6th Amer. Ed.) 151; 1 Chit. Gen. Prac. 9."

In Coite v. Lynes, supra, 33 Conn. 109, this is said:

"* * * Malfeasance is the doing of an act wholly wrongful and unlawful."

Bradford v. Territory of Oklahoma, supra, 2 Okla. 228, 37 Pac. 1061, was a proceeding for the removal of a county clerk from office. One of the duties of the clerk was to issue liquor licenses to applicants, but the statute provided that he should do so upon the payment of the license tax having been first made to the treasurer. The statute specified "willful maladministration in office," as a ground for removal from office. The court held that the act of the clerk in issuing the license prior to the payment of the tax to the treasurer constituted "willful maladministration in office." In the course of the opinion this is said:

"The law makes it the duty of the county clerk, after certain conditions have been performed by the applicant, to issue liquor license on payment of a specified sum of money into the county treasury. The applicant is not entitled to a license until this payment is actually made to the county treasurer. The law fixes the terms upon which an applicant may procure a license to sell liquor, and there is no authority vested in any officer to change or modify the statute. The license may be for a less time than a year, but no less sum than the annual license fee can be accepted for either a long or short time.

"The county clerk, in this case, is charged with having issued liquor licenses to applicants without requiring the payment of any sum to the county treasurer, and it is alleged that he accepted a sum himself from the applicant less than the required fee, and this sum he failed to pay over to the treasurer.

"This was a clear violation of his duties as a public officer and one that could not have been committed, except knowingly and willfully. Willful misconduct and violation of the statutory duties of office is maladministration in office, and is such a disregard of official duties as will, under the statutes, forfeit the right to the office and its emoluments, and, under the law as it existed at the time this proceeding was commenced, * * * it is immaterial whether Bradford collected the money for the county and embezzled the funds; accepted the money paid him as bribes from the parties who procured the licenses, accepted it as a loan, or took it in good faith with the purpose to pay it into the county treasury. * * *"

As appears from the foregoing quotation, the court, in referring to the violation of the statute being done "willfully" and to this constituting "willful misconduct," used the words "willfully" and "willful misconduct." with the meaning, respectively, of "knowingly" and "misconduct known to be such at the time" by the officer. Such misconduct of an officer intrusted by the statute with no discretion in the premises constitutes malfeasance, which is the same thing as the knowingly doing acts of maladministration. This meaning, being given by the court to the Oklahoma statute, puts this case in line with the current of authority on the subject.

It is true that the weight of authority is to the effect that a corrupt or evil intent is essential to constitute "willful misconduct" (State v. Meek, 148 Iowa, 671, 127 N. W. 1023, 31 L. R. A. [N. S.] 569, 570, 571, Ann. Cas. 1912C, 1075; 22 R. C. L. § 281, p. 571), "willful" violation of the provisions of a statute (Spurr v. United States, 174 U. S. 728, 19 Sup. Ct. 812, 43 L. Ed. 1153), or "willful neglect of duty" (State ex rel. Brickell v. Hasty [Ala.] 63 South. 559, 50 L. R. A. [N. S.] 553, 560, 561). But the Virginia statute (section 2705) contains no specification of affirmative "willful" misconduct as ground for removal from office. And while it does include willful "neglect to perform any duty imposed * * * by any law of the state" among the offenses for which there may be removal from office, it also specified, in the alternative, "malfeasance" or "knowingly" to neglect to perform any duty imposed by any law of the state, as among such offenses. To constitute neither of the two last-named offenses is a corrupt or evil intent essential, where, as aforesaid, the officer is not intrusted by law with any discretion. And those being the provisions of the Virginia statute, we are concerned, in dealing with the question under consideration, only with what constitutes "malfeasance" in office, where the officer is clothed with no discretion, but is required by the statute to conform his conduct to the plain provisions thereof, which define his authority, and specifically set out what, and only what, he is authorized to do.

The facts being as above stated, as shown by the evidence before the jury, without conflict in the evidence, and such being the law, the trial court was plainly right in setting aside the verdict as contrary to the law and the evidence, in so far as the first and second charges are concerned.

[5] 2. Did the trial court err in entering final judgment after setting aside the verdict, instead of awarding a new trial?

The question must be answered in the affirmative.

The correctness of this conclusion depends, of course, upon whether section 6251 of the Code embraces such a proceeding as that before us. We are of opinion that it does not.

The material provisions of the section just mentioned are as follows:

"When the verdict of a jury in *a civil action* is set aside by a trial court upon the ground that it is contrary to the evidence or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper." (Italics supplied.)

What is a civil action has been the subject of much division of opinion under varying circumstances. But, as said by Mr. Bishop (1 Bish. New Cr. Law [8th Ed.] §§ 32, 33):

"Sec. 32. * * * We have proceedings neither strictly civil nor strictly criminal, but quasi the one or the other. Indeed,

"Sec. 33. * * * The criminal and civil departments of the law somewhat blend; consequently the line dividing them is neither at all points distinct, nor drawn by the hand of an exact science. And when there is no doubt to which department a particular controversy belongs, it may still be so like something else of the other department as to be governed partly by its rules, while yet it follows the rules of its own department in other respects."

As laid down in 22 R. C. L. § 284, p. 573, a statutory proceeding for removal from office (such as that before us), belongs to the civil department of the law and is regarded as "a civil and not a criminal proceeding." Nevertheless, as stated in the same section of this valuable work, such a proceeding is regarded "as quasi criminal in its character."

The power of the courts to remove from office, in proceedings under statutes conferring that authority, is defined by 29 Cyc. p. 1406 (b) as "a disciplinary power." In the same section of that work (pp. 1406, 1407) this is said:

"Such methods of removal are often treated as partaking of the nature of a criminal action. At the same time, the strictness which has to

be observed in criminal proceedings is not usually required. * * *"

It is held by many decisions, cited and relied on before us for the commonwealth, that, since the primary object of the statutes providing for removal from office is the removal of the officer from his official position, and not the punishment of the officer individually, unless the removal statute, or other statutory law affecting the subject contains provisions requiring a different holding, a prosecution under the statute will not be regarded as a criminal case, and the proceedings in the trial court under such statute will be held to be governed by the rules which are applicable in civil actions. For example, the right to trial by jury, if not expressly provided for in the statute, the constitution of the jury, the rule as to the burden of proof, the direction or refusal of direction of verdicts, the granting or refusing to grant new trials, etc., etc., will be governed by the rules applicable in the particular jurisdiction to civil actions, rather than those applicable to criminal cases. Territory v. Sanches, 14 N. M. 493, 94 Pac. 954, 20 Ann. Cas. 109; State v. Medler, 17 N. M. 644, 131 Pac. 976, Ann. Cas. 1915B, 1141; State v. Foster, 32 Kan. 41, 765, 3 Pac. 534; Fields v. State, Mart. & Y. (Tenn.) 168; Skeen v. Craig, 31 Utah, 20, 86 Pac. 487; Skeen v. Paine, 32 Utah, 295, 90 Pac. 440; State v. Brown, 24 Okl. 433, 103 Pac. 762; State v. Leach, 60 Me. 58, 11 Am. Rep. 172. See, also, Jernigan v. Com., 104 Va. 850, 52 S. E. 361, for a discussion of the difference between civil and criminal proceedings. But these cases involve statutory provisions and rules of procedure not the same as those contained in the Virginia statute under consideration.

So that, notwithstanding the decisions cited, the question remains whether the proceeding before us is "a civil action" within the meaning of the Virginia statute (section 6251), upon which depends the authority or lack of authority of the trial court to enter final judgment upon setting aside the verdict.

This is a new statutory provision which appeared in our law for the first time in the present Code. Previously the trial courts had no authority in any case, civil or criminal, to enter final judgment upon setting aside a verdict, but were confined to the granting of a new trial in such cases. The revisors' note to this section is as follows:

"This section is new, and is intended to apply to all civil actions and, of course, to motions under section 6046, as these have been held to be actions. The object is to end the action at once and put the losing party to his writ of error, thus avoiding the temptation to perjury and in many cases the unnecessary expense of a second trial.

"The further effect of the section is that it will probably be used as a substitute for a demurrer to the evidence. Instead of demurring to the evidence, the trial will proceed to verdict, and the losing party will move to set aside the verdict because contrary to the evidence or without evidence to support it; and if the court sustains the motion, it will enter judgment accordingly, and the party in whose favor the verdict was rendered will then apply for a writ of error. The verdict is not robbed of any of the weight heretofore given to the verdict of a jury, but the judgment of the appellate court, instead of remanding the case for a new trial, will be a final judgment, just as it was under the former law on a demurrer to the evidence. The advantage of getting rid of the additional trial seems to be manifest.

"This section should be read in connection with section 6363."

From the language of the revisors' note, and the use of the technical terms "civil action" in the statute, we think that the statute means to embrace only private personal actions, and not such a quasi criminal statutory proceeding as that before us, which is not a private or personal action—is not purely private or civil—but one which is primarily public in its nature, which, although not a criminal case, is one highly penal in its nature, and one in which the commonwealth is the party plaintiff.

"Civil action" is thus defined in 7 Cyc. pp. 151, 152:

"In civil law, a personal action, which is instituted to compel payment, or the doing of some other thing which is purely civil. At common law, an action which has for its object the recovery of private or civil rights or compensation for their infraction. * * *"

Upon consideration of the question of whether a contested election proceeding is an "action" within the meaning of certain sections of the Code then in force, authorizing trial courts to enter judgment for costs "upon any motion," "upon any interlocutory order or proceeding," and in "any action," this court, in West v. Ferguson, 16 Grat. (57 Va.) 270 at page 272, said this:

"Unless the proceedings * * * in the case of a contested election can be considered as a 'motion,' or an 'action,' or an 'interlocutory order or proceeding,' it is clear that they are not embraced by either of these sections.

"They certainly do not fall within the terms 'interlocutory order or proceeding;' and it seems equally clear that they are neither a 'motion' nor an 'action.' *These words have a well understood technical meaning*, and cannot, by any stretch of construction, be made to embrace such proceedings as are directed to be had in cases of contested elections. *These proceedings* are novel and *peculiar in their character*, and *seem designed rather for the purpose of ascertaining, on behalf of the public*, who has been duly elected, *than of enabling rival candidates to litigate, on their own behalf*, the question of right to an office. * * *" (Italics supplied.)

"Proceedings like these cannot be regarded as a 'motion,' or an 'action' within the purview of

the statutes regulating costs between parties. * * *

"The county court in rendering such judgment exceeded its jurisdiction. * * *"

We think the principle announced in the observations just quoted is applicable to the case in judgment upon the question under consideration.

The case will therefore be reversed and remanded for a new trial, upon the first and second charges embraced in the amended rule, and upon those charges only, to be had not in conflict with the views expressed in this opinion.

Reversed, and remanded for a new trial.

(136 Va. 718)

GRAY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
June 21, 1923.)

Intoxicating liquors ⊂=236(5)—Evidence held insufficient to sustain conviction for possession of still.

Evidence of the finding of utensils which might be employed in manufacturing intoxicating liquor, and testimony as to the finding of mash, *held* insufficient to sustain conviction for the possession of a copper still, two fermenters, and one still cap.

Error to Circuit Court, Giles County.

One Gray was convicted of possessing a still, and he brings error. Reversed and remanded.

W. B. Snidow, of Pearisburg, for plaintiff in error.

Jno. R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

BURKS, J. The accused was found guilty of violating section 21½ of the prohibition law, and sentenced to confinement in jail for 90 days and to pay a fine of $100.

The indictment charged that the accused unlawfully had in his possession a copper still, two fermenters, and one still cap for use in the manufacture of ardent spirits; the said still not being registered with the commissioner of prohibition, and the accused not being a licensed druggist.

The evidence shows that a federal officer, with a search warrant, searched the premises of the accused and found a 25-gallon copper boiler sitting upstairs near the head of the steps, and two ordinary wooden barrels sitting on the outside of the house, and an old piece of a zinc washtub of about 25 gallons capacity in the privy. The boiler was an ordinary boiler without top, and such as is in general use for household purposes, and the zinc washtub an ordinary tub such as is used for household purposes, and this had a round hole cut in the bottom of it about a foot in diameter, and the top of it around the edge had holes punched or cut in it as if it had been riveted to something in time; that this tub could be inserted in the boiler and when so inserted fitted it. Upon a complete search of all the premises, no whisky or intoxicating liquors were found, nor any material from which to make any. The officer found no worm nor any other of the necessary paraphernalia of a still, and he testified that it would be impossible to make whisky or other intoxicating liquors with what he found there. It is also further stated that the larger of the two barrels smelled sour, and the witness reached down in the barrel and picked up a handful of meal, which he called mash, and that the smaller barrel contained traces of mash.

The accused and his wife both testified and denied that he had ever made any whisky, or had ever sold any, or that the boiler had ever been used for making whisky, or for any other purpose than domestic purposes, and that he did not know how to make whisky, and had no idea it could be made with the utensils aforesaid. They explained that the larger barrel had been used as a kraut barrel, and that they had had kraut in it all winter, and had only lately taken the remainder of it from the barrel and canned it. They also testified that if there was any meal in the barrels it was placed there without their knowledge or consent. The smaller barrel, it was said, was a fish barrel, and was kept sitting under a spout in the yard. Both barrels were sitting out in the yard in plain view from the public highway.

It will be observed that the charge in the indictment is limited to the unlawful possession of a copper still, two fermenters, and one still cap. Nothing is said about mash or other material for making intoxicating liquor. The brief of the Attorney General sets forth the evidence with great fairness, and concludes with this statement:

"We think that, unless the fact that the testimony of the commonwealth's witnesses that they found mash in the barrels, was sufficient to sustain the verdict, the assignment (that the verdict is without evidence to support it) is well taken."

We are of opinion that the evidence is not sufficient to support the charge made in the indictment, and that therefore the verdict of the jury should be set aside, the judgment of the trial court reversed, and the case remanded to the trial court for further proceedings, if the commonwealth shall be so advised.

Reversed.
