

1968

Valley Shopping Center No. 3, a Corporation,
American Home Assurance Company, a
Corporation and Safeco Insurance Company, a
Corporation v. Sumner J. Hatch and Robert M.
Mcrae : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

VALLEY SHOPPING CENTER NO. 3,
a corporation, AMERICAN HOME
ASSURANCE COMPANY, a corpora-
tion and SAFECO INSURANCE
COMPANY, a corporation,
Respondents-Plaintiffs

-vs-

SUMNER J. HATCH and
ROBERT M. McRAE,
Appellants-Defendants

Case No.

11188

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District
Court, Salt Lake County, the Honorable Joseph
G. Jeppson, Judge

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FILED

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COMPANY, a corporation,

Respondents-Plaintiffs

-vs-

SUMNER J. HATCH and
ROBERT M. McRAE,

Appellants-Defendants

Case No.

11188

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

The appellants, practicing attorneys engaging in the private practice of law in Salt Lake City, Utah, appeal from a judgment entered on jury verdict in favor of the plaintiffs in the amount of \$2,165.40 for monies allegedly received by the appellants as attorneys fees for repre-

senting certain clients, the respondents contending that the monies were taken during a robbery of a grocery store in Salt Lake City, Utah.

DISPOSITION OF THE CASE BELOW

The plaintiffs originally filed the instant action as Valley Shopping Centers (R. 1) against the appellants, and Wayne Johnson, James Floyd Workman and George Stockton. Subsequently, in various motions, proper parties were determined to be American Home Assurance Company, Safeco Insurance Company for the amount of funds paid over to Valley Shopping Center No. 3 and an employee under theft insurance policies and Valley Shopping Center No. 3 for its loss not covered by the insurance. Trial was held in the District Court, Salt Lake County, State of Utah, and upon jury verdict on special interrogatories judgment was entered against the appellants. The original defendants, Johnson, Workman and Stockton, were dismissed from the lawsuit prior to trial. (R. 29). A motion for Judgment notwithstanding the verdict and for a new trial was duly filed. The order denying the motion was entered on the 30th day of January, 1968, the notice of appeal was duly filed on the 23rd day of February, 1968.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the trial court and dismissal of the action or in the alternative request that a new trial be granted.

STATEMENT OF FACTS

The instant action was commenced on July 28, 1965, in the District Court of the Third Judicial District. Plaintiff at that time was designated as Valley Shopping Center (R. page 1). Joined in the complaint were Wayne Johnson, James Floyd Workman, George Stockton, Sumner J. Hatch and Robert M. McRae. The first cause of action alleged that Johnson, Workman, and Stockton took monies of the Valley Shopping Center of approximately \$2,500.00. The second cause of action alleged that the defendants, Hatch and McRae, attorneys engaged in the practice of law in Salt Lake County "without a valuable consideration" obtained possession of the funds (R. 2). Subsequently, Stan Hale dba Boy's Market was substituted as a plaintiff in that action (R. 6). Various motions were filed as well as an answer. An answer was also filed by George Stockton (R. 14). Subsequently discovery was undertaken, and on the 26th day of August, 1966, Valley Shopping Center no. 3 was joined as an additional party plaintiff, the plaintiffs' second cause of action against Hatch and McRae was severed for trial purposes, and the first cause of action dismissed without prejudice (R. 29). Subsequent to pretrial an order was entered requiring that American Home Assurance Company be designated a plaintiff along with Safeco Insurance Company and that Stan Hale dba Boy's Market be dismissed as a party plaintiff (R. 35, 36).

At the trial counsel for the plaintiffs, respondents

herein, in his opening statement to the jury stated that Mr. Workman and Mr. Stockton gave a written confession to the robbery of the Valley Shopping Center No. 3 (R. page 94). The trial court refused to allow testimony as to any statements made by Stockton and Johnson to be received in evidence against appellants, Hatch and McRae, on the grounds that they were hearsay in the absence of any evidence that appellants had knowledge of the confessions (R. 137). However, based on the opening statement of the counsel for respondents, one of the jurors clearly was of the opinion that Workman and Stockton had confessed to the robbery. (R. 153, 154).

Miss Margaret Leaver testified that on December 19, 1964, she was an employee of Valley Shopping Center No. 3 located at 702 East 1st South, Salt Lake City, Utah. She testified that at approximately 9:00 P.M. on that date, two men entered the store wearing Halloween masks and robbed the store taking the money out three cash registers. She could not identify the individuals who robbed the store except that at a lineup held subsequent to the robbery she did indicate that one of the individuals in the lineup had a simildad build and voice (R. pages 104, 112, 113.). She did not see a third individual. (R. page 108). Money also was taken from the safe in the store and included were certain Kennedy half dollars and silver dollars (R. 106). Miss Leaver could not testify with any precision as to the amount of money taken. \$50.00 was also taken from Miss Leaver's purse during the robbery.

Mr. Stan Hale testified that he had been one of the owners of Valley Shopping Center No. 3 and that they were paid the sum of \$2,231.37 by American Home Assurance Company and that their theft policy was a \$200.00 deductible policy. He stated that Valley Shopping Center No. 3 was no longer in existence and had gone through dissolution. (R. 116). He stated that he did not know if suit had been authorized and that it would not make any difference to him (R. 117). He was not aware if Valley Shopping Center was making any claim against the appellants (R. 118). Subsequently, however, on recall after the trial had progressed a substantial distance, he testified (R. 299) that Valley Shopping Center No. 3 had a "position" that they were entitled to the \$200.00 deductible on their insurance policy. On cross examination, he admitted that there was no Valley Shopping Center No. 3 and that he was not an officer of that corporation. (R. 299, 300). Mr. Lloyd Gonzales, employee of the shopping center, testified that he computed the loss at approximately \$2,500.00 (R. 179) but that his computation was based on his recollection of cash register slips and that he had no independent knowledge of what the receipts totaled (R. 180).

Dave Nicholson testified that at the time of the robbery he was a detective with the Salt Lake City Police Department (R. 119). He was dispatched to the store upon hearing of the robbery but uniformed officers arrived in the first instance (R. 121). During the course of the investigation, someone indicated that the name

"Wayne" had been used during the robbery. (R. 122). He stated that as a result of this information he went to 123 M Street in the company of Sgt. Don Lyman of the Salt Lake City Police Department. There, they observed two vehicles, one of which appeared similar to one observed at the scene of the crime. (R. 134). They then knocked on the door of the premises and the wife of George Stockton admitted them to the living room where George Stockton and Wayne Johnson were present. (R. 127). They immediately arrested Johnson and Stockton and commenced a search of the premises. Nicholson testified that he found a box with "Valley No. 7" on it. One hundred twenty four dollars was found in the bottom of a clothes hamper in the bedroom. Ten Dollars in miscellaneous change was also found in a doll. (R. 130). On a shelf in a closet, in a ladies wallet, three hundred twenty dollars in twenty dollar bills was found. Mrs. Stockton protested that this was her money, that she had been saving for an operation. (R. 147). Seven hundred ninety dollars in cash and coins was found in a suitcase on a back porch including some silver dollars and Kennedy half dollars. (R. 134). Three hundred twenty dollars was taken from the person of Wayne Johnson. Mr. Johnson contended that this was money that he had received from gambling in Las Vegas and so testified. (R. 184, 188, 189). Officer Nicholson's police report showed that \$1,914.40 was placed in the police evidence room. This included \$550.00 obtained from Mr. Stockton's daughter, Mrs. Kelsey, on the evening of the 20th day of December, 1964. It should be remembered that Valley Shopping Center No. 3 was the store robbed.

No money was found on Mr. Workman.

The respondents called Wayne Johnson as their witness against the appellants. Mr. Johnson was called over objection because counsel for respondents previously advised that he would refuse to answer question on the grounds that the answers might tend to incriminate him. Even so, the court permitted the witness to take the stand in prison clothes where it was brought out that he was in prison serving a sentence for several crimes. (R. 184). He did state that he advised Mr. Hatch and the police that he had obtained the money taken by the police while gambling in Nevada. (R. 184, 188). He indicated that he did not discuss the source of funds with Mr. McRae, and that Mr. Hatch represented him in the defense on the Valley Shopping Center No. 3 charge and other offenses. (R. 184, 195). Mr. Johnson refused to answer several of the questions on the grounds that the answers would tend to incriminate him. (R. 184, 186). Subsequent to his testimony, part of which occurred when in order to save time appellants called him as their own witness, Judge Jeppson, in the presence of the jury and in summary fashion, found Mr. Johnson in contempt and sentenced him. The same circumstances generally occurred as to Mr. Stockton although he was not found in contempt by Judge Jeppson. (R. 199). Mr. Stockton indicated that he traded at the Valley Shopping store on several occasions and that he engaged Mr. McRae to defend him on the robbery charge. He invoked the Fifth Amendment several times on his

behalf (R. 211-215). He indicated that he never told Mr. McRae anything except that the money taken from his house was his (R. 214), contended that the money taken from his daughter was his and that he had done some painting and other things to obtain the money (R. 213). An Exhibit (defendant's Exhibit 2) was received by the court which was a letter from Mr. Wayne Johnson to Mr. Hatch stating that the police had approximately \$1,000.00 cash which belonged to him and that he wished to retain Mr. Hatch as his attorney.

James Workman indicated that he had no association with either Mr. Hatch or Mr. McRae. He also invoked his Fifth Amendment right against self-incrimination (R. 208). It was stipulated that the appellants received the sum of \$2163.63 cash in assignments from Stockton and Johnson which money was obtained by court order and released from police custody (R. 237).

Appellant, Robert McRae, testified that he had not known either Stockton or Johnson before December 19, 1964, that he received a call from Mr. Stockton either the 21st or 22nd of December, 1964, and saw Stockton in the jail for approximately ten minutes where the question of fee was discussed but no inquiry was made of the facts (R. 229, 230, 232). He knew that Stockton was being held on a probation violation warrant (R. 232). McRae did not examine any written police department statements nor did he discuss the matter with any potential witnesses. (R. 240, 241). He was of the opinion that the money was

that of the suspect and didn't know whether the funds were impounded for evidence or for safekeeping (R. 241-243). Messrs. Hatch and McRae duly filed motions in the City Court of Salt Lake City to have the funds released to them pursuant to assignment from Stockton and Johnson. They did not talk to the investigating officers prior to the motions. At the time of the hearing on the motions to release the funds, Mr. Warren Weggeland represented the State of Utah. (R. 278). No witness testified at the hearings (R. 282). Judge Beck ordered the money released to the appellants. (R. 250). Mr. McRae had a conversation with Mr. Stockton, his wife and daughter, in his office at which time Mrs. Stockton advised Mr. McRae that the funds taken from her purse had been accumulated for an operation, and Mr. Stockton's daughter advised him that she had some of her father's money in her purse and that Mr. McRae was "welcome to it." (R. 255). He stated that there was no indication that the money was anyone's other than Stockton's nor had he any knowledge as to where the money was found that the police took into evidence until the time of the lawsuit.

Mr. Sumner J. Hatch testified that he received a letter from Mr. Wayne Johnson at which time he contacted Johnson at the jail. Johnson advised him that the police had approximately \$1,000.00 of his money which he had obtained gambling in Nevada. (R. 288). Hatch did not check with the police department to determine what evidence they had, and he had no reason to suspect the money was loot from any robbery. (R. 289). Mr. Hatch

appeared on one of the four hearings before Judge Beck, and Mr. McRae appeared on the other three. (R. 290). Hatch never had any discussion with the police concerning the case. (R. 292). Mr. Hatch also indicated he had no knowledge as to where the money had been found by the police. (R. 294).

No one from Valley Shopping Center or the insurance company respondents made any claim as to the money until long after it had been transferred to the appellants. (R. 296).

Officer Nicholson indicated that the police report he had showed that \$1,910.46 was received by the police department and \$2,128.40 recovered. (R. 320).

The trial court over objection allowed Mr. C. W. Reese, an independent insurance adjustor, to testify that his firm investigated the loss and made a report. He indicated that he did not personally investigate the loss nor did he have any personal knowledge concerning it. No foundation whatsoever was laid for his opinion as to the amount of the loss. (R. 301). He indicated that his firm recommended payment of \$2,231.57 and computed the loss at \$2,431.57. It was stipulated that Safeco Insurance Company paid Miss Leaver fifty dollars in compensation for the funds taken from her purse. Based upon the above evidence, the jury on special interrogatories returned a verdict against the appellants (R. 78, 79) finding that \$2,065.40 paid over to the appellants

was stolen from Valley Shopping Center No. 3 and that it was paid over to the appellants with notice or knowledge that it had been stolen. Exceptions were duly taken to all claimed errors at the time of trial.

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE APPLICABLE STANDARD OF LAW AND IN THE FORM OF THE SPECIAL INTERROGATORIES SUBMITTED TO THE JURY.

A. The trial court in Instruction 9-A and 9-B advised the jury that the lawsuit involved a claim on behalf of the respondents, that appellants received the monies in question "with notice *or* knowledge that the funds were stolen." The last sentence of Instruction 9-A indicated that the defendants contended they obtained the money in good faith and for a valuable consideration. (R. 65). Trial court determined that the issue of consideration was not before the jury since the funds had been paid over in consideration for appellants acting as defense counsel for Johnson and Stockton. Instruction 9-B took an *objective* approach to the question of notice and completely dissipated the appellants' claim of good faith by not advising the jury that it was the state of mind of the appellants that was important and further by stressing completely the question of notice and indicating that if there was information by which a reasonably prudent man would have notice this alone would over-

come the good faith of the appellants even though they did not subjectively have notice sufficient to overcome their good faith. The appellants contend that the effect of the Instructions, which were duly expected to (R. 324) was to apply a standard requiring the appellants to make inquiry and not to test the state of the information that the appellants actually had at any time before they received the funds. Further, the instructions when coupled with the form of the interrogatories submitted to the jury for their verdict stressed again that knowledge to the defendants was not required if they had the "notice" set forth in instruction 9-B even though they acted in good faith. (R. 54, 55).

Although money is a negotiable commodity, the law respecting the transfer from person to person is different than that relating to negotiable instruments because of the special nature of money and the requirement in our commercial society that money by a free token of exchange and that a person not be put on his peril in accepting the coin of the realm. Title 31 U.S.C. §§ 392, 352, 353, evidences the clear legislative intent of Congress to have federal reserve notes, silver certificates, and other recognized monies be freely accepted as good and legal tender for the satisfaction of obligations and the acquisition of goods. Generally, money is bearer *property* and must be subject to free exchange. In Mann, *The Legal Aspect of Money*, page 8, it is stated:

“As regards money as a chattel the general rule,

‘nemo potest dare quod non habet’, was apparently never applied to coins, which always passed by delivery and which could not be specifically recovered from a person who honestly and for valuable consideration had obtained possession. The reason for this is not that the loser cannot know his money again, or in other words, that money has no earmark; ‘for if his guineas or shillings had some private marks on them by which he could prove they had been his, he could not get them back from a bona fide holders. The true reason of this rule is that by the use of money the interchange of all other properties is most readily accomplished.”

Thus, before an individual is held accountable to another for receiving stolen funds it must appear that the money is clearly identifiable as the funds of another and that the recipient by the nature of his conduct has not received the funds in good faith. The same work on page 9 notes:

“Thus both coin and bank notes came to be united under the heading of ‘negotiable chattels’, i.e. if they ‘were received in good faith and for valuable consideration, the transferee got property though the transferor had none.”

In *Sinclair v. Brougham*, [1914] A.C. 398, 418, the House of Lords observed that there was no obligation on the part of the recipient of funds to inquire as to title and therefore the test was not that of our prudent “reasonable man” but that of subjective good faith. The court observed:

“*** in most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subject of specific title as chattels. If a sovereign or bank note be offered in payment, it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such kind form part of what the law recognizes as currency and treats as passing from hand to hand in point, not merely of possession, but of property.”

The term “mala fide” has been used to apply to instances where the recipient of funds has been allowed to trace the monies, Mann *Supra* page 10, and in *Clarke v. Shce*, 1 COWP. 197 (1774) the common law appeared to confirm prior decisions that there was a presumption of good faith. The law in the United States is not without confusion, but can generally be characterized as stated in 36 Am. Jur., *Money* § 6, where it is noted:

“While there has apparently been considerable confusion in the past as to the rule applicable to the rights of a person receiving stolen money, and while this confusion still exists to a certain extent, it arises more from the use of different terms in stating the doctrine than in its practical application. It may be safely said that the general proposition supported by the great weight of authority is that only bad faith on the part of a third person receiving stolen money, or the failure on his part to pay a valuable consideration therefor, will defeat his title thereto as against the true owner. This general doctrine has been variously stated.

Thus, it has been said that a taker in good faith of stolen money has good title thereto, and that even gross negligence on his part will not, in and of itself, defeat his title. It is, however, proper evidence against him to prove bad faith on his part; that a person receiving stolen money, who gives a valuable consideration therefor, without notice or knowledge of its tainted character, has a good title thereto as against the true owner; and that the title of a third person to stolen money is good as against the true owner, where he receives it innocently, without knowledge of its tainted character."

In *State Bank v. The United States*, 114 U.S. 401 (1885) the United States Supreme Court held that funds coming into the possession of the United States were not subject to reclaim by the bank because agents of the United States had discovered that certain funds had been fraudulently obtained by a third person from the United States and made sufficient coercive inquiry of that person for the return of the funds that the individual committed fraud in obtaining the monies which were later given over to the same agents of the United States. This is so even though it was clear that the amount of money involved, thousands of dollars, would tend to cast doubt on the ability of the person to obtain the money to repay the United States except were he to obtain it through illegal means. The court stated:

"Carter knew that that promise could not be kept, without subjecting both himself and Hartwell to criminal prosecution, and it was no violation of his

legal rights for the agents of the government, after receiving from him the draft for \$125,000, without any knowledge of the circumstances under which he had obtained it, to dispose of it and place the proceeds in the sub-treasury."

The appellant in that case in its brief had argued that the agents of the United States clearly were on notice or at least suspicious as to the tainted source of the funds. Even so, the Supreme Court apparently rejected the argument. 114 U.S. 408.

A case of special concern in the instant situation is that of *Kelly Kar Company v. Maryland Casualty Company*, 142 Cal. App. 2d 263, 298, P.2d 590 (1956), where an automobile had been purchased from a dealer through monies obtained in a bank robbery. The bank's insurer, claiming its subrogation rights, contended that it was entitled to the funds. The court rejected the argument and found in favor of the dealer stating that the standard was one of good faith and fair consideration and stated: "Only bad faith on the part of such purchaser of a chattel purchased with stolen money can deprive him of ownership of the chattel." In a dicta pronouncement in *Sinclair Houston Federal Credit Union v. Hendricks*; 268 S.W. 2d 290, Texas Civil Appeals (1954), the court noted:

"The general rule is that the owner of stolen property can recover it or its value from anyone who has received it and exercised dominion over it. But money, under certain circumstances, is an exception to the general rule. This because of the

necessity that money pass freely in commercial transactions. One who receives money which has been illegally obtained by a third party in due course of business, in good faith, and for valuable considerations, can keep it without liability to him from whom it was stolen. See *Texas State Bank of Walnut Springs v. First National Bank of Meridian, Tex Civ App, 168 SW 504; Mashek v. Leonard, Tex Civ App, 186 SW 2d 745.*"

See also *Annotations 25 L.R.A. (N.S.) 632 and L.R.A. 1917 A 707*. Thus it would appear reasonably clear that the following should be the stated law to the jury:

1. That if an individual receives money for good and valuable consideration he is presumed to take it in good faith.

2. That if the money has been stolen this does not preclude the recipient from keeping the money as against the person from whom it was stolen or his agents or assigns if,

3. He received the funds for a valuable consideration and in good faith and that only if it appears that the person received the funds in bad faith with knowledge that they were stolen must he respond to the person from whom the funds were taken.

In the instant case the instructions of the court imposed a unusually light burden on the plaintiff. No where was the jury advised that if the appellant took the money

in good faith and for a valuable consideration a judgment should be rendered in their behalf. Rather a standard of a reasonable prudent man and a nebulous standard of notice, objective in nature, and unrelated to the state of mind of the appellants was the makeup of the court's instructions. Under these circumstances, the instruction was prejudicial error since it in effect directed the jury both expressly and impliedly that appellants had a duty to make inquiry if a reasonable prudent man would have done so even though the appellants otherwise acted in good faith and did not believe that the funds they were receiving were obtained through an illegal means. Consequently, the instruction was prejudicial error and requires reversal.

B. Since the special interrogatories directed to the jury merely required a standard of notice and related back to the erroneous instruction given by the court no strength can come from the fact that the jury decided the case on special interrogatories. *Schweitzer v. Stone*, 13 Utah 2d 199; 371 P.2d 201 (1962). It is submitted therefore that reversal is required based on the erroneous instructions given by the court.

POINT II

THE EVIDENCE AS AGAINST THE APPLICABLE STANDARD OF LAW WAS INSUFFICIENT AS A MATTER OF LAW TO ALLOW RESPONDENTS TO RECOVER

It is submitted that based upon the standard of law

required as set forth in Point I of this brief that the evidence presented below was insufficient as a matter of law and that reversal and dismissal of the plaintiff's complaint is required.

The evidence clearly establishes a robbery of the Valley Shopping Center No. 3. However, it fails completely to demonstrate a mala fide state of mind or action or bad faith on the part of the appellants. The undisputed testimony as to the action of appellants is that they acted in good faith in receiving the money from Johnson and Stockton.

Mr. Hatch received a letter from Johnson stating that the police had \$1,000 of *his* money. Both Johnson and Hatch testified that Johnson had advised Hatch that the money he had (which in part had been taken from his person (R. 41) had been obtained by gambling in Nevada. (R. 184, 188, 288). This was the same statement Johnson had made to Officer Lyman (R. 169). Hatch was unaware of where the police had found the money, and he had no conversations with the police as to the source of the funds. (R. 289-294). He testified he did not suspect the funds to be loot, and no claim was made by Valley No. 3 or its insurers against the funds prior to the time Hatch received the money. (R. 289, 296). He had no conversations with Stockton concerning the matter. (R. 254, 255). Johnson was bailed out soon after giving Hatch an assignment of the monies he had told Hatch were his and Hatch had only a 15 minute conversation with him prior

to receiving the funds at which time only the question of fee was discussed. (R. 290).

Mr. McRae represented Stockton. Stockton was at the Salt Lake County Jail when McRae first saw him. (R. 229, 230). McRae visited with Stockton for only about 10 minutes to ascertain if Stockton could pay his fee. (R. 230, 231). Stockton was being held on a probation violation detainer. Subsequently, McRae met with Stockton, his wife, and daughter. (R. 254). Stockton's daughter, Mrs. Kelsey, advised McRae that she had given the police money that was hers and/or her fathers. (R. 234, 235). Mrs. Stockton advised McRae that some of the money the police had was money she had been saving for an operation and that McRae was "welcome to it." (R. 255). Mrs. Stockton had also protested to the police that the money they had was hers and for her operation. (R. 147) McRae had no knowledge as to where the money had been found (R. 256), and did not believe the money had been stolen (R. 242). He did not know whether the police were holding the money as evidence or safekeeping. (R. 243). He did not see the police report on the incident or discuss the case with the investigating officers. (R. 242, 246, 318, 150, 170).

Thus, the information both appellants had was that the funds were those of their clients. Both men thereafter filed motions with the City Court of Salt Lake City seeking release of the funds based on their assignments. (R. 290). No witnesses were called, although the State was

represented. (R. 282). Judge Beck on four separate motions (three at which McRae appeared and one at which Hatch appeared) ordered the funds released. (R. 290).

Clearly the evidence shows the utmost good faith on the part of the appellants. They did exactly what they should have done in seeking release of the money by court order. The evidence, completely unrefuted, shows that all the information appellants had at any time they received the money for their services was that the funds belonged to their clients or their clients relatives. Therefore, as a matter of law the evidence will not support respondents case under the proper legal rules noted in Point I of this brief.

Further, as to the deductible claim of \$200 of Valley No. 3, it appears clear, that the case should have been dismissed by the trial court at the time of counsel's motion (R. 118, 119). The corporation never authorized the bringing of the suit (R. 117), had gone through dissolution (R. 116) and was no longer in existence. (R. 116). The former officer. of the defunct corporation testified: (R. 118)

"Q. Did you indicate at any time, Sir, you had any authority to request Mr. Jensen to bring suit on behalf of the corporation against these gentlemen for any money?

A. No, we never went to them.

Q. Let me ask you this. Did you care one way or another whether suit was brought by the Valley Shopping Centers against these gentlemen?

A. Well, I believe our insurance company is entitled to their money, if it is. The insurance company—

Q. Mr Hale—

MR. JENSEN: May he answer the question please?

MR. BOYCE: Go ahead.

A. I believe there is a moral obligation on our insurance company if they have—

Q. I appreciate that. I do not think you understand my question.

My question is, is Valley Shopping Center making any claim you are aware of?

A. Not now, they don't."

Therefore the evidence as a matter of law requires reversal and dismissal of the case.

POINT III

THE TRIAL COURT ERRED IN FINDING WAYNE JOHNSON IN CONTEMPT OF COURT IN THE PRESENCE OF THE JURY WHICH ACTION WAS PREJUDICIAL ERROR REQUIRING REVERSAL.

At the time of trial respondents called Wayne Johnson, Mr. Hatch's client, as a witness. The charges against Johnson for the robbery had been dismissed and he had never been in jeopardy. He was asked whether prior to December 19, 1964, he knew Stockton. Johnson then invoked his privilege against self-incrimination. (R. 183). The trial judge overruled the claim and directed him to answer. Johnson refused. He was orally charged with contempt by the trial judge. Subsequently he was asked whether he was in Stockton's home when arrested on the 19th of December, 1964. He again refused to answer on the basis of his privilege against self-incrimination and the trial court refused to allow the privilege. (R. 186). Subsequently, before the jury, and after appellant's counsel had made Johnson his witness to save time (R. 187), the court repeated the questions to Johnson and directed him to answer; he refused. (R. 194). The court then, while the jury was present found Johnson in contempt of court and sentenced him to 30 days imprisonment. (R. 194).

Appellants contend that holding the contempt proceedings in the presence of the jury was prejudicial error. Johnson had just finished testifying that he had told Hatch the contested money had been won gambling and that the money the police impounded was Johnson's. His testimony was crucial to the claim of good faith by appellants. By holding the contempt proceedings in front of the jury and sentencing Johnson the court necessarily impinged his creditability, and jurors not being accus-

ed to such responses could not help but be prejudiced. Appellant's moved for a mistrial. (R. 195) but the court merely instructed the jury that as to questions not answered they were not to infer answers. No instruction was given that Johnson's creditability was not to be weighed any differently because of the contempt action. Further, no instruction could cure the court's action and obvious personal hostility towards the witness.

The action of the court in ruling on the claims of self-incrimination was clearly erroneous since the answers could have "tended" to incriminate or provided a "link in the chain" of incriminating evidence. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Hoffman v. United States*, 341 U.S. 479 (1951); *In re Petty*, 18 Utah 2d 320, 422 P.2d 659 (1967); Wigmore, *Evidence*, Vol. VIII (McN. Rev. 1961) § 2260. The appellants do not contend they have standing to complain on this issue, but merely point it out as a basis for the contention that contempt proceedings should under such circumstances be held in an atmosphere where there is an opportunity for free inquiry and not in the summary hurried fashion adopted in this case. The court processess were not in immediate danger, there was no disruption of decorum that required such action in the presence of the jury. In similar instances Courts have ruled summary action to be improper. *Harris v. United States*, 382 U.S. 162 (1965). Although, 78-32-3 U.C.A., 1953, allows the court when the contempt is committed in its presence to proceed in a summary fashion, it is submitted that this should be

limited to instances where the need to maintain order or decorum is manifest or where there is no likelihood of prejudice to innocent parties. This would construe 78-32-3, U.C.A., 1953 in harmony with 78-32-1 (1), U.C.A., 1953. As is noted in Goldfarb, *The Contempt Power*, p. 250 quoting from *United States v. Sacher*, 343 U.S. 1 p. 36 (Frankfurter dissenting):

“Summary punishment of contempt is concededly an exception to the requirements of due process. *Necessity* dictates the departure.” (Emphasis added).

There was no necessity that dictated the summary action in the presence of the jury. The effect could only have been to identify the attorney with his client, and create questions in the minds of the jurors as to the witnesses veracity thus prejudicing appellant.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING RESPONDENTS' COUNSEL TO CALL TO THE STAND WAYNE JOHNSON AND GEORGE STOCKTON AFTER HAVING BEEN ADVISED THAT THEY WOULD INVOKE THEIR PRIVILEGE AGAINST SELF-INCRIMINATION. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS' MOTION FOR MISTRIAL AND A NEW TRIAL WHEN COUNSEL FOR RESPONDENTS IN HIS OPENING STATEMENT TO THE JURY ALLUDED TO INADMISSIBLE EVIDENCE WHICH CLEARLY HAD AN IMPACT ON THE JURY.

A. The appellants contend that the trial court erred to their prejudice in not granting a mistrial and a new

trial where the respondents called to the stand Johnson, Stockton and Workman and asked obviously incriminating questions thus causing them to invoke their privilege against self-incrimination. Counsel was on notice beforehand that the witnesses would claim the privilege. (R. 181).

The privilege against self-incrimination is a delicate one. The effect in a civil case of the privilege being invoked has recently sharply divided this Court. *Gerard v. Young*, 20 Utah 2d 30, 432 P.2d 343 (1967). Many laymen and lawyers alike believe the invocation of the privilege to be evidence of guilt. Griswold, *The Fifth Amendment Today*, (1955); *Gerard v. Young*, supra.

Therefore, the invocation of the privilege before a jury is necessarily damaging. Courts have held it reversible error where a prosecutor calls a witness to the stand he knows will invoke the privilege against self-incrimination, even where the court gives a limiting instruction. *United States v. Maloney*, 262 F.2d 535 (2nd Cir. 1959); *People v. Pollock*, NY 2d (NYCA 1967) 4 CL Bull. 68-69; *State v. Nelson*, 432 P.2d 857 (Wash.)

The damage is even more severe in a civil case because of the reduced burden of proof. It is especially damaging in this case because Johnson and Stockton were clients of the appellants and the inference of guilt from the invocation is easily transferred to appellants and found to be their state of mind. The questions asked of Johnson and Stockton, on matters upon which they invoked

ed their privilege, were clearly matters where the privilege was validly exercised. No benefit to the respondents case could be expected except the improper inference from the invocation of the privilege. Nor, can respondents claim other relevant information was sought since such other information was brought as a part of appellants' case, outside the scope of direct examination, to save time. (R. 187).

It is submitted therefore that the deliberate calling of witnesses by respondents counsel which he knew would invoke the privilege against self-incrimination and the examination of the witnesses on matters obviously protected by the privilege was prejudicial and requires reversal.

B. Counsel for respondents in his opening address to the jury advised the jury that Stockton and Workman had given confessions to the police as to the commission of the robbery. This evidence was clearly inadmissible since it was hearsay as to the appellants, and not related to their knowledge absent proof that they knew of the statements, which they did not.

The opening statement evoked from a juror a statement later in the trial that he thought there had been evidence of the confessions put before the jury when there had been none. (R. 153, 154). Obviously the opening statement was prejudicial. In fact the juror thought that Johnson had confessed when in fact he steadfastly maintained he was not involved.

In 53 Am. Jur., *Trial* § 456 it is observed:

"It is generally held that statements by counsel that certain evidence will be introduced are not improper if made in good faith and with reasonable ground to believe that the evidence is admissible, even though the intended proof referred to is afterward excluded. However, in the absence of good faith, or where prejudice is clearly produced, whether as the result of accident, inadvertence, or misconception, the rule is to the contrary. Inferences in his opening statement by counsel for the plaintiff in a negligence action that the defendant carries liability insurance are, of course, highly improper, and in a number of instances have been held to constitute ground for a reversal or new trial."

Whether the action was intended, merely inadvertent, or energetic advocacy the effect was to put before the jury inadmissible evidence which they could not remove from their minds as the juror's comment indicated. The statement would obviously prejudice appellants in their claim by allowing the jury to believe appellants must have had the confessions or known of the guilt. Further, it tended to refute Stockton's and Johnson's claim that they were not involved. The action merely added to the inherent difficulties of a trial of the nature of the instant case.

Points A and B require reversal and a new trial.

POINT V

THE TRIAL COURT MADE NUMEROUS ERRORS IN RUL-

ING ON EVIDENCE WHICH SUBSTANTIALLY PREJUDIC-
ED THE RIGHTS OF APPELLANTS

The trial court made several erroneous rulings on the evidence during the course of trial, however, not all of these were serious or prejudicial. Appellants however, contend that some rulings of the court very definitely were prejudicial.

A. One of the basic contentions at trial was the amount of claimed loss to Valley No. 3 from the robbery. The police records showed \$1,910.46 placed in evidence (R. 320). The police testimony was that \$2,128.40 was recovered. The appellants received by court order the sum of \$2,163.63 (R. 237) a sum more than police records show they ever had. Johnson contended \$1,000 was his personal money. Mrs. Stockton contended that some of the money seized she had been saving for an operation. Her husband testified that he had finished a painting job and that some of the money was from that job. Consequently, there was a real dispute as to just how much money had been taken from the store by the robbers.

The trial court over objection allowed Mr. Clarence W. Reese, a partner in an independent insurance adjusting service, to testify that from the investigation of his company the loss was 2,431.57. Mr. Reese did not personally investigate the loss, nor was he able to lay any foundation as to how the loss was computed. (R. 301-303). Exhibit 1 was received as the "proof of loss form". There was no authentication of this document whatsoever (R.

302, 303). Clearly therefore the testimony of Mr. Reese was hearsay as was Exhibit 1. He had no personal knowledge of the loss or the exhibit and there was no effort to introduce the evidence as an exception under the business records exception. The evidence was blatant hearsay. Paulson & Polasky, *Business Entries*, 4 Utah L. Rev. 327 (1955); McCormick, *Evidence*, p. 596 etc. This evidence was obviously prejudicial since it was the only evidence purporting to be an exact calculation of the loss.

B. Towards the end of the trial appellants called Jay E. Banks, the District Attorney of the Third Judicial District, (R. 313). On direct examination his testimony was limited to the discovery methods available to a defense attorney through Utah procedures. Primarily, he discussed the use of the preliminary hearing (R. 314). On cross-examination, the trial court allowed the respondents' counsel to put hypothetical questions to Mr. Banks as to whether under the evidence *he would have suspected* the money found was loot. (R. 316, 317). Objection was duly made to the hypothetical question (R. 316) including the fact that it was outside the scope of direct examination. (R. 317)

This evidence was clearly not admissible. First it in no way related to the direct examination and was completely outside the scope of direct examination or anything related to it. This court in other cases where the scope of examination has been so seriously violated has not hesitated to find prejudicial error. *State v. Vance*.

38 Utah 1, 110 Pac. 434 (1910); *State v. Gardner*, 61 Utah 359, 213 Pac. 794 (1923). In other cases the court was held that it was proper to prevent the extension of the cross-examination to the latitude allowed here. *Anderson v. Salt Lake and Ogden R. Co.*, 35 Utah 509, 101 Pac. 579 (1909); *Degnan, Non-Rules Evidence Laws, Cross-Examination*, 6 Utah L. Rev. 323, 330-338 (1959).

In addition it seems clear the matter was not a proper subject for hypothetical expert opinion. The question was one that the jury was as capable of answering as the witness. It is well settled that if the subject matter is one not calling for expert opinion the expert may not give his opinion. Thus, McCormick, *Evidence*, p. 28 notes:

"To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so *distinctively related to some science*, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth."

Since a layman is equally as able to say whether he would have a suspicion as to the source of funds as Mr. Banks, the question was not a proper one for an expert opinion. *Macshara v. Garfield*, 20 Utah 2d 152, 434 P.2d 756 (1964); *Day v. Lorenzo Smith & Son, Inc.*, 17 Utah 2d 221, 408 P. 2d 186 (1965).

Further, Mr. Banks' opinion of whether the money would be lost as set forth in the hypothetical is not relevant. The question is whether defendants knew not whether some third party would have a suspicion.

Since the answer of Mr. Banks could clearly be damaging to appellants and coming from a prominent attorney and the District Attorney the trial courts error was obviously prejudicial.

CONCLUSION

Appellants submit the trial court committed serious errors that require reversal. The jury was instructed on a totally erroneous standard of law which would warrant a new trial except for the fact that the evidence as a matter of law will not support a judgment.

Further, reversal is required because of the serious departure from proper procedure and erroneous and prejudicial rulings on evidence.

This case clearly indicates the extreme difficulty a jury has in comprehending the function, obligations, and operations of a criminal defense attorney. That inherent problem was seriously intensified by the erroneous actions of the trial court. This court should reverse.

Respectfully submitted,

Ronald N. Boyce