

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 Respondents

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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VALLEY SHOPPING CENTER NO. 3,  
a corporation, AMERICAN HOME AS-  
SURANCE COMPANY, a corporation and  
SAFECO INSURANCE COMPANY, a  
corporation,

*Respondents-Plaintiffs*

vs.

SUMNER J. HATCH and ROBERT M.  
McRAE,

*Appellants-Defendants*

Case No.  
11188

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## BRIEF OF RESPONDENTS

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

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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VALLEY SHOPPING CENTER NO. 3,  
a corporation, AMERICAN HOME AS-  
SURANCE COMPANY, a corporation and  
SAFECO INSURANCE COMPANY, a  
corporation,

*Respondents-Plaintiffs*

vs.

SUMNER J. HATCH and ROBERT M.  
McRAE,

*Appellants-Defendants*

Case No.  
11188

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE NATURE OF THE CASE

The plaintiffs-respondents represent the interests of those who were robbed of about \$2500.00 cash. Plaintiffs contend that the defendants-appellants, as attorneys for the robbers, obtained the stolen cash from their clients with notice that it was loot.

### DISPOSITION IN LOWER COURT

The case was tried to a jury who unanimously found that defendants obtained \$2,115.40 with notice that it was loot.

## RELIEF SOUGHT ON APPEAL

Plaintiffs seek affirmance of the verdict and judgment below.

## STATEMENT OF FACTS

Defendants' statement of facts requires some elaboration.

The grocery store, on 1st South and 7th East, was robbed by two (3) armed and masked men at about 8:50 p.m. on December 19, 1964 (R. 98). The police, store personnel and insurer of the store investigated the loss and determined the loss at approximately \$2,431.37 (R. 120, 175, 301, Ex. P-1).

Within a few hours of the robbery, police apprehended and arrested Wayne Johnson and George Stockton at the latter's residence, a few blocks from the store. There the officers found the following:

A cardboard box marked "Valley No. 7" in the basement (R. 129, 164, 165)

\$124.00 in currency and rolled coins in the bottom of a clothes hamper filled with dirty clothes (R. 130, 131, 162)

\$10.00 cash in rolled dimes and \$2.00 in rolled nickles under a plastic doll (R. 131)

\$320.00 in \$20 bills in a closet on a shelf (R. 132)

About \$790.00, consisting of 100-\$1 bills, 25-\$5's, 19-\$10's and 7-\$20's, and rolls of nickles, dimes and quarters, 1921 and 1891 silver dollars, and 16 Kennedy half dollars, all in a suitcase on the back porch (R. 133, 134, 163, 164)

A new \$1 bill under edge of buffet (R. 133)

A torn wrapper used for \$100 bills (R. 163)

1 pair of black and 1 pair of red leather gloves (R. 133)

2 automatic pistols, one of which was loaded (R. 129, 133)

At the police station \$320.00 or \$332.00 was taken from the person of Wayne Johnson (R. 140, 141, 145).

Workman was arrested upon information obtained from Stockton (R. 138, 167).

Robbery charges were filed against Johnson, Stockton and Workman (R. 187, 203, 204, 210, 276).

The next evening Stockton took the officers to the apartment of his daughter at 720 - 2nd Avenue, also just a few blocks from the store and from Stockton's residence, where another \$550.00 in \$20 bills was obtained (R. 165, 212, 213, 305, 306, 307)

All of the aforescribed money, totaling approximately \$2117.00, was itemized and placed as evidence in the evidence room of the Salt Lake City Police Department in connection with the robbery case (R. 135, 144, 167, 168).



Johnson, Stockton and Workman were interrogated and subjected to a line-up (R. 166, 167, 172, 173). A comprehensive written report of the incident was filed by Detective Nicholson (R. 142, 144).

Workman plead guilty to the robbery (R. 155). However, the robbery charges against Stockton and Johnson were ultimately dismissed because Stockton had his probation revoked and Johnson plead guilty to still another robbery charge (R. 152).

At the time of the robbery Johnson was being sought by the police all over the country (R. 169, 184, 261). Johnson had no gainful employment immediately before the robbery (R. 184). Stockton had not worked since 1960 (R. 201). Johnson, Stockton and Workman had made their initial associations at the State Prison (R. 199, 207).

Stockton retained Attorney McRae, who ascertained that Stockton was held on probation violation charges and potential charges of forgery, robbery and burglary (R. 231, 232, 243, 269, 270, 271, 272), McRae was aware the money was impounded in evidence and recognized the possibility that it belonged to someone besides Stockton (R. 243). McRae did not diligently look into the ownership of the money (R. 240, 255). McRae knew that the Kennedy half dollars and the old silver dollars were picked up at Stockton's home (R. 241, 242).

Wayne Johnson retained defendant Hatch, who asked Johnson "questions" when they first consulted (R. 195).

Hatch and McRae, who were engaged in a joint venture in the criminal defense work (R. 225), obtained assignments from Johnson and Stockton of all their interest in the monies in the evidence room (R. 211, 212, 234).

Defendants knew the investigating detectives by their first names (R. 151, 226) and thus probed them for information (R. 241, 143, 152, 173, 174, 315). Defendants knew the police were pushing the robbery charges (R. 241, 260), and knew they could get police records (R. 150, 170). Without notice to the robbery victims (R. 282) defendants obtained court orders from City Judge Horace Beck releasing about \$2,160.22 of the currency and rolled coins from the evidence room to defendants between December 29, 1964 and January 19, 1965 (R. 237, 238, 239). Before the latter date Johnson was charged with another robbery (R. 292). The defendant attorneys apparently relied on technicalities of identifying the money to obtain the court orders (R. 240, 244, 274, 280, 290). The County Attorney's office essentially offered the same proof had on the instant trial and vigorously resisted the orders (R. 250, 264, 278, 285). However, defendants did not seek the silver dollars or the Kennedy half dollars (R. 239, 241, 242, 294).

At the instant trial Johnson, Workman and Stockton testified. Johnson and Workman were prison inmates at that time (R. 182, 207). All three of them gave pertinent testimony and on occasion took the Fifth Amendment (R. 208, 211, 213). Mrs. Stockton could not recall anything and "knew" nothing (R. 197, 198).

Stockton testified that he had never had \$1,000 cash in his home (R. 211). Yet in an assignment to Attorneys Mc-

Rae and Hatch, Stockton assigned all of his interest in the money found at his residence and his daughter's (about \$1800.00) (R. 212).

Although Johnson gave an assignment of his interest in the monies picked up at Stockton's home, Johnson refused to state whether he claimed some interest in those monies, on the ground that it might tend to incriminate him (R. 188-192, 287, 288, Ex. D-2).

## ARGUMENT

### POINT I

#### THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE APPLICABLE STANDARD OF LAW

The court instructed that the defendants had "no obligation to make an independent inquiry as to the ownership of the funds they may receive from their clients, unless they had sufficient notice prior to the receipt of same, to put a reasonable and prudent man on inquiry to avoid taking funds belonging to someone else. Information that would put a reasonable, prudent man on such an inquiry as to the ownership of the funds would constitute the notice referred to in proposition No. 2 of the verdict (R. 65, Instr. 9B).

The jury found that the defendants received the money with "notice or knowledge that it had been stolen" (R. 55, Prop. No. 2).

Defendants' own requested instruction No. 4 (R. 60), (essentially adopted by the court in its instructions Nos. 9A, B, and C) provided that the defendants had no obligation to make an independent inquiry as to the source of the funds "if they had no clear or convincing evidence to the contrary."

36 *Am. Jur.*, Money §6, cited by defendants, describes good faith as "without *notice* or knowledge of its tainted character" and goes on to say:

"The authorities are agreed that it is not sufficient that the receiver of stolen money act in good faith and without notice of its tainted character; he must also have parted with a valuable consideration therefor; and hence, if he is a mere depository for the thief, the money may be recovered from him; or if he parts with it after notice that it was stolen money, he will be liable to the true owner therefor . . .

"It is said that at the present time there is substantially no difference in the rule applicable to the rights of a person receiving stolen money and receiving stolen negotiable instruments *which are complete on their face* . . ."

Although there is some confusion even under negotiable instruments law, it is submitted that the following authorities are in accord with the instructions of the court in the instant case:

"If circumstances exist as to the purchase of stolen paper which are calculated to raise suspicion in the mind of *an ordinary man of prudence* and discretion, such a purchaser will be prevented from acquiring

title better than that of his vendor." 8 *Am. Jur.*, Bills and Notes, §619, pp. 332-333

In 11 *Am. Jur. 2d*, Bills and Notes §§425 et seq., even the discussion of the subjective test ultimately falls back on a discussion of objective standards: "Knowledge of facts which render the taking dishonest" or "facts known to the taker . . . such as to *reasonably* form the basis for an inference that in acquiring the instrument with knowledge of such facts, he acted in dishonest regard of the rights of (others)."

In 10 *C.J.S.*, Bills and Notes §323, it states:

"If a party has knowledge of facts or circumstances involved in the negotiation of a note, the legal effect of which would avoid the transfer to him, he cannot claim as a holder in due course, *no matter how honestly he may have believed that the law would sustain the transfer.*"

In *First National Bank v. Trebin*, (Ohio) 52 N.E. 834, we find:

"Good faith is not measured by a man's own standard of right, but by a standard for the observance of all men in their dealings with one another."

In *Ward v. City Trust*, (NY) 84 N.E. 585, it states:

"One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose."

When the defendants had knowledge that the money was impounded as evidence in the robbery case, such is

equivalent to a person taking a negotiable instrument which is altered and irregular on its face. In such a case there is a duty to inquire and discover the facts which a prudent purchaser would discover. See 11 *Am. Jur. 2d* Bills and Notes, §448.

In *Sinclair v. Houston*, (Texas) 268 SW2d 290, cited in defendant's brief, the court reaffirmed that it is against public policy to protect a gambler who has won stolen money. In the instant case it is clearly against the public interest to permit the loot to be used to the advantage of the robbers in their own defense of that very robbery.

Also in *Sinclair v. Houston*, the court apparently approved an objective standard by stating that it is "unnecessary to determine whether the evidence would have supported a finding that the appellee, *in the exercise of reasonable care*, would have concluded from the heavy losses sustained by an assistant treasurer . . . that he was not losing his own money."

At trial the defendants should have had, but did not have, the burden of proving their good faith and lack of notice or knowledge, once it was established that the money belonged to the plaintiffs or had infirmities.

In *Warren v. Smith* 35 Ut. 455, 100 P.1069, the court stated:

"It is also well settled that when the loss by the original owner or the theft from him is proven, the burden of proof shifts, and the holder must show

that he acquired it bona fide for value and before maturity, or from someone who had a perfect title."

See also *Idaho State Bank v. Hooper Sugar*, 74 Ut. 24, 276 P.659; *Lembo v. Federici*, (Wash.) 385 P2d 312; and 12 *Am. Jur. 2d*, Bills and Notes, §1204.

In *National Bank v. Price*, 65 Ut. 57, 234 P. 231, the court quoted at pages 240 and 241:

"It is ordinarily to be expected in these cases that the purchaser will testify to his good faith and want of notice and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently *sustained the burden* resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury . . . A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or departure from the ordinary methods of business, and all other facts and circumstances which, though of slight moment in themselves, yet when taken together give character and color to the purchase under inquiry, . . . (O)bserving this principle, it has frequently been held that a denial of notice by the purchaser, though he be uncontradicted by any other witness, is not sufficient to justify a directed verdict in his favor."

In *USF&G v. Eades*, (W.Va.) 144 S.E.2d, p. 709, the court stated:

"A purchaser (of negotiable instrument) takes with notice only where he has actual knowledge or



knowledge of facts which make it bad faith on his part not to inquire or discover evidence of inequities, and certain facts or circumstances may or may not constitute notice, actual or *imputed* because of the failure to inquire."

In any event, whether the duty to inquire be discussed in terms of subjectivity or objectivity, the evidence is without dispute in this case that the defendants, in spite of any real inquiry, did, in fact have notice and knowledge that the money was loot. The defendants did not, and could never, under the circumstances, meet the burden of showing their innocence and good faith.

Even the *Kelly Kar* case, cited by plaintiff in his brief, (298 P2d 590,) states:

"So long as he buys in good faith and exercises all the *precautions* as to title that *the reasonable man* would exercise, and so long as he is not put on notice . . . the transaction was valid. . . . (I)f he was put on *such notice as a reasonably prudent man would have interpreted to be* tantamount to a declaration by the thief that the chattel had been purchased with stolen money, he cannot retain the movable against the innocent victim of the robbery."

10 *C.J.S.*, Bills and Notes, §324, pp. 820 and 821, states:

"It would seem that what might be bad faith on the part of one person engaged in one occupation because of his failure to make inquiry, might not be bad faith on the part of a person engaged in another occupation."

Attorneys are required to act as reasonable, prudent men, particularly where their own interests are competing



with their client's interests and the interests of third parties, such as the victims of a robbery, law enforcement agencies and the public.

## POINT II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN JUDGMENT AGAINST THE DEFENDANTS AS A MATTER OF LAW AND AS A MATTER OF FACT

In a nearly identical case of *McKinley v. Smith*, (Calif.) 17 P2d 1032, involving an attorney plaintiff, the court said:

“The record further shows that at the time that the plaintiff presented his assignment signed by Russell Hill, purporting to transfer the ownership of the money in question from Russell Hill to the plaintiff, the plaintiff specifically excepted in his demand upon the chief of police the turning over and delivery to him of the \$10 bill of which bank had the serial number, and taken from the possession of Russell Hill. Why the plaintiff did not want all of the money is sufficiently apparent from what we have said, and needs no further comment.

“The record further shows that at the time of the assignment upon which the plaintiff bases his right of action, and prior thereto, he knew that Russell Hill was confined in the county jail of the county of Stanislaus, in the city of Modesto, charged with robbing the Modesto Branch of the American Trust Company. *This fixes the fact that the plaintiff is not in the position of an innocent holder*, and took no better title than that possessed by Russell Hill, the man identified, beyond any reasonably controversy, as the one who held up the bank.

"In addition to what we have said, the record shows that Russell Hill was arrested in St. Joseph, Mo., about two weeks after the robbery of the bank in Modesto. The marked \$10 bill had not been paid out to any other person, and it could not have come into the possession of Russell Hill unless he were the one who had robbed the bank, or had obtained the bill from someone who had robbed the bank. The record being practically incontrovertible that Russell Hill was the one who robbed the bank, the jury could not reasonably have come to any other conclusion than that Russell Hill was the person who robbed the bank, obtained possession of the marked bill, and took it with him with the other moneys found in his possession, to St. Joseph, Mo. Under these circumstances *no jury could reasonably come to any other conclusion* than that Russell Hill was the one who robbed the bank of the bank of the \$1548, and still had in his possession, as a part thereof, the currency which was found upon him at the time of his arrest.

"(T)he jury had a right to take into consideration as to where Russell Hill had obtained the money when he was asked by the chief of police if he had anything to say, and he replied, 'I ain't saying anything.' No one who had obtained the money honestly would have made such an answer. After the bank had been robbed the insurance carrier of the bank, took an assignment of the bank's claim, was allowed to intervene herein, and was found by the jury to be the owner of the money involved in this action.

"In view of the foregoing, we do not deem it necessary to enter into any technical discussion of the instruction given by the trial court to the jury, nor of the requested instructions that were refused, further than to say that a reading of the instructions shows that the jury was fairly and fully instructed,

and that no error is disclosed sufficient to warrant any reversal, if error there be.

“We do not deem it necessary to cite any authorities in this case, as what we have said, as disclosed by the record, is sufficient to satisfy *any reasonable man* that the money involved herein was a part of the currency stolen by Russell Hill, from the bank in Modesto, and that anyone taking an assignment from him, with knowledge, would acquire no title.”

*Stiller v. Rogers*, (Calif.) 159 P.456, is in the same context. There a woman stole \$900. At the time of her arrest the police found \$501 on her person which was deposited with the sheriff. Most of the money was in \$50 bills. Thereafter, her attorney received a written order upon the sheriff to pay \$200 of the deposited moneys as attorneys' fees. After some resistance by the sheriff, the money was turned over to the attorney. In affirming the trial court, the appellate court found that the defendant either “*knew or should have known* that at least part of the money so received by him were stolen funds. . . .” and stated:

“In accepting employment . . . he must have known that she was charged with the theft . . . from the plaintiff. . . . (H)e knew from both her and the sheriff that a considerable sum had been found on her person at her arrest and had been impounded. . .

“Such facts would seem to deprive the defendant of the benefit of receiving the assignment of the currency . . . as being one who paid value therefor in good faith, without notice of the theft of such money.”

“A purchaser . . . cannot shut his eyes to the surrounding circumstances, and where the circumstances are so cogent and obvious that to remain

passive would constitute bad faith or as such is to justify the conclusion that failure to make such inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument of transaction, such purchaser is charged with knowledge. Intentional ignorance, such as a wilful evasion of knowledge of the facts, constitutes bad faith disqualifying the purchaser from becoming a holder in due course. *Where circumstances which put him on inquiry are within his knowledge, he is chargeable with knowledge of all facts which an inquiry would have revealed."*

In *Hindmarch v. Hoffman*, (Pa.) 18 A. 14, the thief gave \$1400 loot to the defendant to hold, the defendant not then being aware that it was loot. Later, the defendant was advised by plaintiff's attorney that the plaintiff claimed the money. Thereafter, the defendant paid the money on order of the thief to a third party. The court held as a matter of law that "under these circumstances, it was clearly his duty to hold it for plaintiff. . . . Justice demands that he should now be compelled to pay the amount to the rightful owner."

In *Bergheim v. McRae*, (Minn.) 252 NW 833, plaintiff, as the owner of a note, assigned the note to the bank cashier personally. The cashier (McRae) embezzled the money from the bank and then endorsed the note to the defendant Simon. Affirming the judgment for the plaintiff, the court stated:

"The trial court found that Simon acquired the note. . . . with knowledge of such circumstances that he acted in bad faith . . . It found that Simon knew that McRae was in financial difficulties and that he had embezzled money from the bank and was endeavoring to borrow to make up the shortage. He

knew that McRae was menaced with criminal prosecutions and . . . with all other. . . circumstances. . . were sufficient to constitute red lights ahead and to cast upon . . . defendant. . . Simon the duty to make inquiries. . . The neglect to make inquiry. . . was more than mere negligence. It was lack of commercial faith. The inquiry most naturally should have been directed to the mortgagee (plaintiff). It is contended that inasmuch as the appellant discussed the matter with McRae, his banker and with the attorney for the bank, he did everything that an honest man should. The record is necessarily silent as to what was submitted to the lawyer, and McRae was the very man whose title should have been scrutinized. . . Men of business experience know that hard-pressed debtors turn sharp corners and are not scrupulous to distinguish between their own and the property of others. . . Knowledge, not surmise suspicion or fear is necessary. Not knowledge of the exact truth, but knowledge of some truth that would prevent action by those commercially honest men for whom law is made."

In *Lytle v. Lansing*, 147 U.S. 59, the court commented:

"It is incredible that a man should purchase this large amount of bonds (\$50,000) for half their base value without looking at them or even noticing whether they were signed or sealed, without making any inquiries with regard to the responsibility of the town, or the circumstances under which the bonds were issued, the non-payment of the overdue coupons, or the title of the person (to him an entire stranger) through whom he purchased them. . . (T)he very fact that bonds were offered for sale at this large discount, at a place 2,000 miles from where they were issued, was of itself a circumstance calculated to arouse suspicion of their validity in the mind of *any person of ordinary intelligence*."

"It is singular as a matter of fact and fatal to a recovery as *a matter of law* that the plaintiff did not

act upon the information thus received and at once repudiate the transaction and refuse to consummate the sale by a deed.

"While the notice received by the plaintiff may not have gone to the extent of informing him of the particular facts showing the invalidity of the bonds, he was informed that the town was contesting its liability, and that Breckenridge himself was in litigation with it over the payment of the coupons. Receiving this information as he did, not only from his vendor, but from his own attorneys from whom he could have learned all the facts by inquiry, it is mere quibbling to say that he had no notice that the bonds were invalid. While purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities, it has never been doubted. . . . that those who buy such securities from litigating parties with actual notice of a suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Under the circumstances it was bad faith or wilful ignorance . . . to forebear making further inquiries. . . . No rule of law protects a purchaser who wilfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion impair it."

11 *Am. Jur. 2d*, Bills and Notes §422, at page 478, states:

"The fact that the holder knew that his transferor was an embezzler or thief and was charged or expected to be charged with crime is sufficient to put him on inquiry and establish his bad faith where he makes no inquiry as to title to an instrument which he takes."

It is difficult to imagine that the defendants did not in-

quire directly of their clients concerning the robbery. However, at trial both the defendants and their clients claimed privilege as far as their discussions of the robbery (R. 290). The only inference to be drawn is that the attorneys were told something by their clients which, if disclosed, would tend to involve their clients in the robbery and loot.

The only explanation Johnson gave was that the money the police took from him (\$320.00) was won gambling (R. 184-189). Yet, Johnson assigned \$1,000 to the defendants (R. 288, Exh. 2).

Likewise, Stockton failed to give any plausible explanation of his interest in any sum such as \$1,000 or more.

Even if it be assumed that the robbers told the defendants that part of the moneys impounded were from a source other than the robbery, can a reasonable man let alone an attorney be permitted to take money under those circumstances without inquiring of the robbery victims?

The proceedings before Judge Beck in no way could have determined title to the monies, since none of the alleged principals involved in title (the robbery victims and Stockton and Johnson) appeared as parties or witnesses. Apparently only technicalities were discussed by the attorneys who were involved in the criminal proceedings against Stockton and Johnson.

Why did defendants leave the silver dollars and Kennedy half dollars in the evidence room, unless they realized that such was loot?

There is no dispute in the evidence but that before taking the money the defendants knew:

1. That a robbery had taken place involving a few thousand dollars.

2. Their clients were charged with that robbery.

3. Money, in the form of bills and rolled coins, specific silver dollars and half dollars, was held as evidence and loot in connection with the robbery.

4. Although their clients were strangers, they had criminal records and no apparent legitimate source of such sums.

5. The police and county attorney's office resisted defendants taking the money.

6. The victims of the robbery had no opportunity to protect their interests.

7. Workman plead guilty to the charge of robbery.  
(Note: *State v. Workman*, 20 Ut. 2d 178, 435 P2d 919).

The defendants were in the position of having the knowledge or being able readily to obtain the knowledge apparent in the instant trial.

As a matter of law defendants had notice and knowledge of the tainted character of the money and of the infirmities of their clients' title.



## POINT III

THE TRIAL COURT DID NOT ERR IN FINDING JOHNSON IN CONTEMPT IN THE PRESENCE OF THE JURY, AND SUCH ACTION WAS NOT PREJUDICIAL ERROR

Section 78-32-3, Utah Code Annotated 1953, provides for summary punishment of contempt committed in the immediate presence of the court.

This is in accord with 53 *Am. Jur., Trials*, §81:

“During a trial and in the presence of a jury the trial court may cause the arrest and punishment of a contumacious witness. . . .”

The court’s contempt finding added nothing to the effect already created by Johnson in identifying himself as a convict and refusing to answer relevant questions.

## POINT IV

THE TRIAL COURT DID NOT ERR IN PERMITTING RESPONDENT’S COUNSEL TO CALL JOHNSON AND STOCKTON AFTER HAVING BEEN ADVISED THAT THEY WOULD INVOKE A PRIVILEGE AGAINST SELF-INCRIMINATION

In the instant case Stockton and Johnson did testify, despite occasional resort to the Fifth Amendment (R. 195, 203, 206). The court gave cautionary instructions to the jury. (R. 195, 203, 206).

In *Girard v. Young*, 20 Ut.2d 30, 432 P2d 343, the entire court agreed that:

“In a civil case where a party invokes the Fifth Amendment privilege, it is a circumstance which upon a trial the court or jury may consider in connection with all other evidence and may draw an inference adverse to that party’s interest if they so desire.”

The cases cited in plaintiff’s brief are otherwise criminal in nature and not apropos.

#### POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO DECLARE A MISTRIAL ON RESPONDENT’S OPENING STATEMENT ALLUDING TO CONFESSIONS, WHICH IN ANY EVENT WAS NOT PREJUDICIAL

It is plaintiff’s position that the confessions of Johnson and Stockton were admissible for the purpose of showing what information would have been available to the defendants if they had made reasonable inquiry, but not for the purpose of establishing the truth of such confessions. Accordingly, plaintiffs made an offer of proof consistent with the opening statement (R. 265).

Under such circumstances the discretion of the trial court in refusing to grant a mistrial was entirely appropriate. See *Miller v. Braun*, (Kans.) 411 P2d 621, and 88 C.J.S., Trials, §161.

## POINT VI

## THE TRIAL COURT DID NOT ERR IN ITS RULINGS ON EVIDENCE

A. The testimony of Mr. Reese with respect to the loss paid by the insurance company was entirely compatible with establishing the extent of the interest of the insurance company in the lawsuit. The exhibit was nothing more than confirmation of the payment actually made by the insurance company.

B. The testimony of District Attorney Banks was most objective. He did not really answer the allegedly objectionable question put to him, but merely stated that which was obvious to everybody.

“And if you could tie the money itself, by identity, or identify the individuals, either way, and the amounts were the same, if all of those existed, then that all would be a circumstance that would point toward being involved in the robbery.” (R. 318)

Under direct examination Mr. Banks discussed what he understood to be the normal practice of criminal defense counsel in obtaining information. The cross-examination by plaintiffs was germane to the state of mind of an attorney under the circumstances. It was within the proper discretion of the trial court. See *Stagmeyer v. Leatham*, 20 Ut. 2d 421, 439 P2d 279.

## CONCLUSION

The defendants, as a matter of law, had notice that the money they obtained had infirmities in their clients'

claimed title to even a part of the monies. In any event, the case was fairly submitted to the jury which could not reasonably have come to any other conclusion than that the defendants took the money with notice of its infirmities. Although there were many complicated details involved, the substance of the case was clear and without dispute. Rulings on various minor details were of little moment and not prejudicial to defendants.

*Respectfully submitted,*  
CHRISTENSEN & JENSEN  
JAY E. JENSEN