

1940

State of Utah v. E. B. Erwin, Harry Finch and R. O. Pearce : Brief of Appellant E. B. Erwin

Utah Supreme Court

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STATE OF UTAH,
Plaintiff and Respondent,
 vs.
 E. B. ERWIN, HARRY FINCH and
 R. O. PEARCE,
Defendants and Appellants.

BRIEF OF APPELLANT E. B. ERWIN

BALL AND MUSSER,
EDWARD F. RICHARDS,
Attorneys for Appellant
E. B. Erwin

FILED

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I N D E X

	Page
Statement of Case	1
Indictment	1
Statement of Facts	3
Statement of Errors relied on	6
Argument	
Insufficiency of Indictment	8
Bill of Particulars	10
Indictment Defined	12
Indictment not cured by Bill of Particulars	21
Bill of Particulars not part of Indictment	22
No Overt Act Alleged	26
No Overt Act Proved	30
Insufficiency of Evidence to Support Verdict	30
No Direct Evidence of Agreement	32
Witnesses	
Alder, Sadie	34
Carlton, Bobbie	34
Collins, Ann	34
Early, John S.	39
Ellett, A. H.	35
Friend, Augusta	34
Gosling, Henry V.	35
Harris, Fisher	50
Hays, D. L.	35
Hedman, E. A.	35
Hoagland, B. O.	36
Holt, Golden	46
Hunsaker, Ben	58
Hunsaker, Clifford	58
Kempner, Dar	44

I N D E X (Cont.)

	Page
Kesler, A. Pratt	35
Lewis, Davit T.	35
McDonald, Ethel	36
Newman, Margaret	34
Prichard, A. M. J.	42
Record, H. K.	43
Record, O. B.	36
Runzler, Mrs. W. T.	41
Scott, William	35
Smith, Austin	37
Weiler, Jacob	36
Evidence Erroneously Admitted	63
Erroneous Instructions given by Court	64
Improper Conduct of District Attorney	68

AUTHORITIES CITED

State Statutes:

103-11-1, R. S. 1933	1-26
103-11-3, R. S. 1933	26-64
105-1-8 (2) R. S., 1933	8
105-5-8, R. S., 1933	7
105-10-2, R. S., 1933	12
105-20-1, R. S., 1933	22
105-32-11, R. S., 1933	27
Chap. 118, Sec. 1, Laws of Utah, 1935	12

Cases:

10 A. L. R. 982	25.
11 American Jurisprudence 574	34
Fontana v. United States, 262 Fed. 283	17
Goldberg v. United States, 277 Fed. 211	19

I N D E X (Cont.)

	Page
Jarl v. United States, 19 Fed. (2d) 891	24
Lynch v. United States, 10 Fed. (2d) 947	18
Marino v. United States, 91 Fed. (2d) 691	28
People v. Arnold (Ill.) 93 N. E. 786	69
People v. Hines (N. Y.) 6 N. Y. Sup. (2d) 2; 168	
Misc. 453	28
People v. Westrup (Ill.) 25 N. E. (2d) 16	23
Smith v. State (Fla.) 112 So. 70	25
State v. Distefano, 70 U. 586, 262 Pac. 113.	72
State v. Gilbert (N.H.) 194 Atl. 728	24
State v. Jessup, Utah, 100 Pac. (2) 969	22
State v. Johnson, 95 U. 572, 83 Pac. (2d) 1010	33
State v. Lund, 75 U. 559, 286 P. 960	20
State v. Nathoo (Iowa) 133 N.W. 129	71
State v. Soloman, 93 U. 70, 71 Pac. (2d) 104	22
State v. Topham, 41 U. 39, 123 P. 888	19
State v. Wadford (N.C.) 139 S. E. 608	25
Thomas v. State of Maryland, 197 Atl. 296	25
Underhill's Criminal Evidence, Third Edition,	
Page 33	33
United States v. Cruikshank, 92 U. S. 542, 23 L.	
Ed. 588	14
United States v. Hess, 124 U. S. 483, 31 L. Ed.	
516	15
United States v. Grossman, 55 Fed. (2d) 408	28
United States v. Lynch, 11 Fed. (2d) 298	23
Wright v. People (Colo.) 91 Pac. (2d) 499	22

IN THE
SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

E. B. ERWIN, HARRY FINCH and
R. O. PEARCE,
Defendants and Appellants.

CASE
NO. 6200

BRIEF OF APPELLANT E. B. ERWIN

STATEMENT OF CASE

The grand jury of Salt Lake County returned an indictment accusing E. B. Erwin, Harry Finch, Frank A. Thacker (who was acquitted), R. O. Pearce and Ben Harmon (now deceased) of the crime of criminal conspiracy in violation of 103-11-1 R. S. 1933. Unless otherwise indicated italics are supplied.

The grand jury found:

The grand jurors . . . accuse E. B. Erwin . . . of the crime of criminal conspiracy . . . committed as follows:

. . . the said E. B. Erwin (and others) . . . on the 6th day of January, 1936, and on divers other days and times between that day and the first day of January, 1938, did . . . agree, combine, conspire, confederate, and en-

gage to . . . commit *acts* injurious to public morals *and* for the perversion *and* obstruction of justice *and* the due administration of the laws of . . . Utah, to-wit:

. . . the said E. B. Erwin (and others) . . . did . . . agree, combine, conspire, confederate, and engage to . . . permit, allow, assist, and enable houses of ill fame . . . and lotteries, dice games, slot machines, book making, and other gambling devices and games of chance (card and poker games are not mentioned in indictment) to be kept, maintained, and operated at various places in Salt Lake City . . . the said defendants then and there well knowing that said . . . (places) were being kept, maintained, and operated in . . . Salt Lake City in violation of (law) . . . and in furtherance of said conspiracy did commit the following overt acts:

1. . . . between March 15, 1936, and January 1, 1938, the . . . defendants permitted, allowed, assisted and enabled houses of ill fame . . . to be kept, maintained and operated at various places in Salt Lake City . . .

2. . . . between (same dates) the . . . defendants permitted, allowed, assisted and enabled lotteries, dice games, slot machines, and book making and other games of chance and gambling devices to be kept . . . at various places in Salt Lake City. . . .

3. That on or about the 1st day of each . . . month between . . . June, 1937, and January, 1938 . . . the defendants collected money from the operators of various houses of ill fame in various places in Salt Lake City . . .

4. That at various times between April 1, 1936, and January 1, 1938, the defendants col-

lected and caused to be collected money from the operators of various lotteries, dice games, slot machines, book-making, and other games of chance and gambling devices at various places in Salt Lake City . . . contrary to . . . statutes . . . of Utah . .

Carl W. Buehner, Foreman.

Endorsed "A True Bill", Carl W. Buehner,
Foreman.

****STATEMENT OF FACTS**

The conspiracy is alleged to have commenced at the time Mr. Erwin was sworn in as mayor (2½ months before Mr. Finch became chief of police) and ended the 1st day of January, 1938.

None of the defendants was an operator of any of the houses of vice mentioned.

The only money paid by the underworld was paid to (1) Abe Stubeck (774 and 787) and (2) Golden Holt (970).

None of the money collected was ever paid to Mr. Erwin. Money collected in 1936 was paid to Abe Rosenblum. Money collected in 1937 was paid to Ben Harmon (now deceased).

The overt acts consist of:

1. and 2. Permitted houses of vice to remain open.
3. and 4. Collecting money from houses of vice.

****Unless otherwise indicated the figures in parentheses refer to pages of the record. The record is so voluminous that we concluded it would be more satisfactory to the court to refer only to record pages rather than to record and abstract and supplemental abstract pages.**

The alleged conspirators were not related to each other nor were they club, political, fraternal, social, religious or professional friends. None of them were in business together.

Mr. Erwin was elected mayor of Salt Lake City in the election of 1935 and was sworn in office in January, 1936. He was assigned to the department of public safety.

Mr. Finch had been in business in Salt Lake City for upwards of forty-five years, had been a city commissioner for ten years (1510). In the above election he supported Mr. Erwin's opponent. He met Mr. Erwin after the primary in 1935 in Mr. A. S. Brown's office (1512). Mr. Finch was known favorably by great groups of persons in the city and by the City Commission. In February, 1936, he was nominated for chief of police by Mr. Erwin and was appointed by the city commission. The appointment took effect March 15, 1936.

Mr. Pearce is an attorney and was the attorney for Mr. Harmon. On one occasion he used Mr. Erwin as a witness in a city court case which was filed in 1934. Mr. Erwin was not a party to that suit.

Mr. Thacker had been a police officer for many years. *He was acquitted of being a conspirator in this action.*

Mr. Harmon is deceased. There is no evidence that he and Mr. Erwin were acquainted with each other. Mr. Harmon and Mr. Finch were acquainted and in the

past had been competitors in the restaurant business.

There is no evidence that Mr. Erwin (or any other defendant for that matter) conspired or agreed with any other person to do the things alleged in the indictment or to do the things alleged by Mr. Romney in the bill of particulars. (More will be said about the bill of particulars later).

There is no evidence that Mr. Erwin ever knew the witness Stubeck. Witness Holt was a police officer who had been connected with prostitution in this city for many years and was the recipient of money and an overcoat from prostitutes (940). He had been present on one occasion during a conference when Mr. Erwin was present.

There was no evidence of an agreement. The state does not contend there was any direct evidence of an agreement. The court so instructed the jury in instruction No. 7 (Ab. 264). To sustain the charge of agreement we must search for indirect or circumstantial evidence which supports the charge. *There is no such evidence.*

So far as Mr. Erwin is concerned the circumstantial evidence on agreement is as follows:

1. The witness Kempner testified that as he went with the witness Stubeck (and this is all denied by Stubeck) while Stubeck collected money from various persons in pool halls and at certain card games Stubeck told Kempner that he, Stubeck, collected the money and took it over to Ben Harmon who split it "with Erwin and his crowd" (787).

2. The witness O. B. Record testified that Mr. Pearce had told him that the mayor wanted a collection made.

3. The witnesses Smith, Early, Prichard and Runzler testified that Mr. Erwin had been informed by them or others that a pay-off was being conducted. No one testified as to the existence of any agreement.

4. The witness Hunsaker testified that Mr. Erwin paid him in currency on a note Mr. Erwin owed Mr. Hunsaker; took receipts for this currency; sometimes paid by check or money order, and made payments to Mrs. Hunsaker, her son, Clifford Hunsaker, and at least once to a Miss Stone.

Houses of prostitution have been operated in Salt Lake City since long before January 6, 1936, and subsequent to January 1, 1938, and prostitutes for many years have been, were and are being periodically examined (once every two weeks) to ascertain if they are diseased, and, if they are not, they go back to their wellknown houses and practice prostitution.

Lotteries, dice games, slot machines, bookmaking and other games of chance had operated in the city since prior to 1913 with few, if any, molestations.

If this case is not decided on the questions of law, as we think it should, we apprehend the court will read the five volumes of record. The facts will further appear as we proceed.

STATEMENT OF ERRORS RELIED UPON

1. Failure of the court to quash the indictment. (Assignments 1 & 5).

2. Insufficient accusation contained in the indictment. (Assignments 2, 4 & 6).

3. Failure of the court to require the state to elect which subdivision of 103-11-1 R. S. 1933 it would proceed under (Assignment 6).

4. Failure of the court to grant appellant's motion for non suit and dismissal. (Assignment 7).

5. Failure of the court to grant appellant's motion for a directed verdict. (Assignment 8).

6. That the verdict is against and not supported by the evidence. (Assignments 10 & 18).

7. Failure of the court to grant appellant a fair trial. (Assignments 9, 11, 12, 13 & 19).

8. The court received incompetent, irrelevant and immaterial evidence. (Assignments 14 & 15).

9. The court gave improper instructions to jury. (Assignments 17 & 24).

10. The court failed to properly instruct the jury (Assignment 20).

11. Failure of the court to grant the motion in arrest of judgment. (Assignment 21).

12. Failure of the court to grant appellant's motion for a new trial (Assignment 22).

STATEMENT OF PARTICULAR QUESTIONS INVOLVED

I. The copy of the indictment returned by the grand jury and furnished defendant pursuant to the requirements of Section 12, Article I. of the Constitution of Utah, and 105-5-8 (2) R. S. 1933 did not, and does not contain the nature and

cause of the accusation against him. The indictment cannot be cured by a bill of particulars.

II. Insufficiency of the evidence to support the verdict of the jury.

III. Erroneous admissions of evidence.

IV. The instructions of the court were such as to permit the jury to speculate on its verdict.

V. Appellant's requested instructions should have been granted in the particulars hereinafter set out.

VI. Appellant was placed twice in jeopardy for the same offense.

VII. Improper conduct of district attorney.

ARGUMENT

INSUFFICIENCY OF INDICTMENT

I.

Under Section 12, Article I. of the Constitution of Utah, and 105-1-8 (2) R. S. 1933, the accused is guaranteed the right to demand the nature and cause of the accusation against him, and to have supplied to him *a copy of the indictment containing such accusation.*

At the first opportunity available to him after the

grand jury returned its indictment, appellant moved to quash the indictment on numerous grounds, (rec. 8, ab. 4) one of which grounds was that it did not allege facts which showed the nature and cause of the accusation against him as is guaranteed and required by the aforementioned constitutional and statutory provisions. (This statute was not repealed by the Code of Criminal Procedure adopted in 1935, nor by Chapter 143, Laws of Utah 1937, or by any other amendment or statute).

The motion to quash the indictment was denied. Defendant thereupon was required to plead to the indictment. The indictment as returned by the grand jury was obviously insufficient and inadequate. Acting under the coercion of the circumstances and without in any manner waiving his motion to quash, Mr. Erwin demanded a bill of particulars.

The insufficiency of the indictment as returned by the grand jury was conceded by the court and by the state. It was wholly inadequate and insufficient to require defendants to plead. For that reason the court granted defendants' request for a bill of particulars and required the state to furnish a bill

particularizing upon the alleged means employed by the defendants to permit, allow, assist and enable houses of ill fame, lotteries, dice games, slot machines and various gambling devices and games of chance to be operated and maintained at various places in Salt Lake City; and I shall further require the State to particularize in respect to the location of the houses of ill fame referred to in the indictment and in the overt act set forth in the indictment, and the names of the

operators of those various houses of ill fame referred to. I shall further require the State to particularize in respect to the location of and the operators of the lottery establishments and the dice game establishments and the bookmaking establishments, and in respect to the operators of the slot machines, and also to particularize, if they intend to rely upon other games of chance or gambling devices, as to what those gambling devices are and who operate them and where they are maintained in Salt Lake City.

I shall further require the State to particularize in respect to the location of the various houses of ill fame, and the operators thereof from whom allegedly money was collected, and who collected it, if anyone, and the same in respect to the location of and the operators of the various lotteries, dice games, slot machines and bookmaking establishments referred to in the indictment. (Rec. 37, ab. 6)

Thereupon a bill of particulars was furnished by Marion G. Romney, Deputy District Attorney (Rec. 39, Ab. 7).

BILL OF PARTICULARS

The bill of particulars contains the names and addresses of fourteen operators of houses of ill fame; the names and addresses of five operators of lotteries; the names and addresses of three operators of dice games; the names and addresses of six bookmaking establishments; and the names and addresses of ten places where poker games were kept, maintained and operated. (Poker games are not mentioned in the indictment). The deputy district attorney, and not the

grand jurors, interpreted the language of the indictment "and other gambling devices and games of chance" to mean poker games.

The bill of particulars then alleges (ab. 10) that the defendants

permitted, allowed, assisted, and enabled houses of ill fame, resorted to for purposes of prostitution and lewdness, lotteries, dice games, slot machines, bookmaking and other games of chance and other gambling devices to be kept, maintained and operated at the places herein mentioned in Salt Lake City, Salt Lake County, State of Utah, *by then and there failing and refusing to make arrests for the keeping, maintaining, and operating of said places, although the said defendants herein well knew that said places were being kept, maintained and operated* * * * and said defendants further permitted, allowed, assisted and enabled said places to be kept, maintained and operated *by failing and refusing to enforce the statutes of the State of Utah and the ordinances of Salt Lake City* prohibiting the keeping, maintaining and operating of said places and said games.

The deputy district attorney then alleges in the bill of particulars that the defendants

with the aid and assistance of Golden Holt and Ben Harmon, collected money from the operators of the houses of ill fame * * * .

and that the defendants:

with the aid and assistance of Ben Harmon, and other persons to the State of Utah unknown, collected money from the operators of the lotteries, dice games, bookmaking, and other games of

chance and gambling devices herein referred to and set out. (It was under the above words "and other games of chance and gambling devices" that the court let in all of the evidence concerning poker games. Poker games are not mentioned in the indictment.)

Thereupon, motions were made by each defendant to quash the indictment as supplemented by the bill of particulars upon all of the grounds of the previous motions to quash and upon the further grounds: (1) that the bill of particulars did not conform to the court's order, (2) that the indictment returned by the grand jury cannot be supplemented or augmented by a bill of particulars furnished by the deputy district attorney, and on other grounds contained in said motions. (Rec. 42, ab. 11)

Motions were made to strike the bill of particulars and after they were denied the defendants Erwin and Pearce pleaded "not guilty" and "former jeopardy and acquittal". (Rec. 59, ab. 13).

INDICTMENT DEFINED

"An indictment is an accusation in writing presented by a Grand Jury to the District Court, charging a person with a public offense."
105-10-2 R. S. 1933.

If the indictment as returned by the grand jury had contained the nature and the cause of the accusation against the defendant as required by the Constitution and the statute, the defendant would not have been entitled to a bill of particulars, except, perhaps, to make it more certain.

The trial court and the state proceeded on the theory that Ch. 118, Sec. 1, Laws of Utah 1935 (105-21-9) applied to an indictment returned by a grand jury. We confess that the language of the statute includes indictments, but obviously the statute could not amend the constitution and it was not intended to. Just as obviously the grand jurors must return the indictment and no one else.

The above mentioned section of the 1935 laws provides that when the indictment

fails to inform the defendant of the particulars of the offense, sufficiently to enable him to prepare his defense, or to give him such information as he is *entitled to under the Constitution of this State*, the court may, of its own motion, and shall at the request of the defendant, order the prosecuting attorney to furnish a bill of particulars *containing such information as may be necessary for these purposes; * * * .*

It cannot be said that the grand jurors found that the defendants, "permitted, allowed, assisted, and enabled" the houses of ill fame and lotteries, bookmaking establishments and poker games referred to in the bill of particulars to be kept, maintained and operated *by failing and refusing to make arrests for the keeping, maintaining and operating of said places because*, for the simple reason, no one knows, except the grand jurors, what places and what reasons the grand jurors had in mind when they returned the indictment filed in this case.

The grand jurors never found that Golden Holt and Ben Harmon collected money from operators of

houses of ill fame nor that Ben Harmon assisted the defendants to collect money from the operators of the gambling places. It was the deputy district attorney who found those alleged facts. This defendant is entitled to an indictment returned by a grand jury which gives the nature and cause of the accusation *without resorting to any paper or document or bill of particulars furnished by someone else.*

Who can say that when the grand jurors used the words "and other gambling devices and games of chance" they meant "poker games" which had been played at the places and under the operators named in the bill of particulars. *The mention of the particular gambling devices excludes card games.*

The deputy district attorney after setting out the lotteries, dice games, bookmaking establishments and poker games he had in his mind uses the words "and other games of chance and gambling devices" so that notwithstanding he has named the poker games, someone else may come along and under that sort of language include other games of chance and gambling devices. See last two paragraphs of bill of particulars.

The language of our constitutional and statutory provisions concerning the requirements of an indictment has received judicial determination in many cases. A defendant is entitled to demand that the indictment charge the essential facts so specifically that the judgment rendered will be a complete defense to a second prosecution for the same offense.

In the case of U. S. v. Cruikshank, 92 U. S. 542, 23

L. Ed. 588, in discussing an indictment for criminal conspiracy, the court stated as follows:

According to the view we take of these counts the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire "To injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all and singular" the rights granted them by the Constitution, etc. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amend. VI. In *U. S. v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *U. S. v. Cook*, 17 Wall. 174, 21 L. ed. 539, that "Every ingredient of which the offense is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms

as in the definition; but it must state the species; it must descend to particulars." 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

Likewise, Justice Field in the case of U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516, stated as follows:

The doctrine invoked by the solicitor-general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. One or two cases will serve as an illustration of the doctrine. In *United States v. Cruikshank*, 92 U. S. 542, the counts of the indictment in general language charged the defendants with an intent to hinder and prevent citizens of the United States of African descent named therein, in the free exercise and enjoyment of all the rights, privileges, and immunities, and protection granted and secured to them respectively as citizens of the

United States and of the State of Louisiana, because they were persons of African descent, but did not specify any particular right, the enjoyment of which the conspirators intended to hinder or prevent; and it was held that the averments of the counts were too vague and general, and lacked the certainty and precision required by the established rules of criminal pleading, and were therefore insufficient in law. In speaking of the necessity of greater particularity of statement, the court said, p. 558: "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars. 1 Arch. Cr. Pr. & Pl. 291. *The object of the indictment is: First, to furnish the accused with such a description of th charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.* For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

Justice Sanborn, in the case of *Fontana v. United States*, 262 Fed. 283, says:

The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law; and notice of the charge or claim

against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. *When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading.* Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Naftzger v. United States, 200 Fed. 494, 502, 118 C. C. A. 598, 604.

It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. United States v. Britton, 107 U. S. 665, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; United States v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Armour Pkg. Co. v. United States, 153 Fed. 1, 16, 17; 82 C. C. A. 135, 150, 151 14 L. R. A. (N. S.) 400; Etheredge v. United States, 186 Fed. 434, 108 C. C. A. 356; Winters v. United States, 201 Fed. 845, 848, 120 C. C. A. 175, 178; Horn v.

United States, 182 Fed. 721, 722, 105 C. C. A. 163, 167.

In *Lynch v. United States*, 10 Fed. (2d) 947, the court held as follows:

The defendant in a criminal case, in view of his presumed innocence, is not only entitled to know from the statements of the indictment what facts the prosecution considers sufficient to make him guilty of the offense charged, with reasonable particularity, so that he may procure witnesses and make proper defense thereto, *but he is also entitled to demand that the indictment charge the essential facts so specifically that the judgment rendered will be a complete defense to a second prosecution for the same offense.* *United States v. Hess*, 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516; *Armour Packing Co. v. United States*, 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; *Floren v. United States*, 186 F. 961, 108 C. C. A. 577.

See also *Goldberg v. United States*, 277 Fed. 211.

The Supreme Court of Utah, in the case of *State v. Topham*, 123 Pac. 888, 41 Utah 39, held as follows:

The doctrine is fundamental, and, as stated by the Supreme Court of the United States in *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, that "the constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty *that he can make his defense and protect himself after judgment against an-*

other prosecution for the same offense;" and by Mr. Justice Sanborn in *Floren v. United States*, 186 Fed. 961, 108 C. C. A. 577, that "On a motion in arrest of judgment, as well as on a demurrer, *it is essential to the validity of an indictment that it contain averments of the facts which constitute the offense it charges so certain and specific that upon conviction or acquittal thereon it, and the judgment upon it, will constitute a complete defense to a second prosecution of the defendant for the same offense.*" Many cases in support of this doctrine are there cited.

It is also elementary and, as stated by the Michigan court in *People v. Marion*, 28 Mich. 257, approved and quoted by this court in *State v. McKenna*, 24 Utah, 317, 67 Pac. 815, that, "as every man is presumed to be innocent until proved to be guilty, *he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information.*" These doctrines are not here disputed. Our statute is in harmony with them.

In *State v. Lund*, 75 Utah 559, 286 Pac. 960, discussing the sufficiency of an information covering a statute very similar to the statute upon which the charge in this case is founded this court held:

It will be observed that various acts are declared to be felonies by the provisions of Section 8097, and that different penalties are provided for a violation of the various provisions of that section. There is no allegation of any fact in the information here under review which makes direct and certain any one of the crimes defined in that section. It necessarily follows that the information is fatally defective. This conclusion

finds support in the following cases decided by this court: *State v. McKenna*, 24 Utah, 317, 67 P. 815; *State v. Topham*, 41 Utah, 39, 123 P. 888; *State v. Gesas*, 49 Utah 181, 162 P. 366; *State v. Steele*, 67 Utah, 1, 245 P. 332; *State v. Hale* (Utah) 263 P. 86.

From the cases cited above it is apparent that under our constitution the object of an indictment is two-fold: *It must, first, furnish the accused with such a description of the charge against him as will enable him to make his defense, and, second, it must be specific enough to avail him of the right upon conviction or acquittal to protect him against a further prosecution for the same offense.* Even though it is true that certain crimes may be charged in the words of the statute such does not apply to statutes where the crime is defined in general and generic terms.

It is clear from the reading of the statute pleaded that if a person were charged in the terms of the statute he would not know what sort of a conspiracy he was charged with, nor if tried for a conspiracy would never be able to plead the same as a bar to a similar charge made after either a conviction or acquittal.

THE INDICTMENT WAS NOT AND COULD NOT BE CURED BY THE BILL OF PARTICULARS

The nature and cause of the accusation must be contained within the four corners of the indictment. The deputy district attorney had no authority to assume to state or to specify the particulars of the offense the grand jury intended to charge. No statement he might make is binding as of record on a plea of for-

mer jeopardy. He has no power or control or right to change the substance of the indictment.

An indictment can be found only on the concurrence of at least five grand jurors. 105-20-1, R. S. 1933.

When so found it must be endorsed as a true bill.

The endorsement must be signed by the foreman of the grand jury.

The grand jury must be constitutionally formed and must act as provided for in the constitution (Art. 1, Sec. 13).

BILL OF PARTICULARS NOT A PART OF THE INDICTMENT

In *State vs. Solomon*, 93 Utah 70, 71 Pac. (2d) 104, this court held that a bill of particulars is not a part of the information or indictment. In *State vs. Jessup*—Utah——, 100 Pac. (2d) 969, the court held:

***The function of a bill of particulars is not that of compelling the defense to aid the prosecution in stating a cause of action. The burden of stating such a cause rests upon the shoulders of the prosecution, and until it is stated to the extent required by our simple form of criminal pleading, the question of whether or not a bill of particulars is prerequisite to further action on behalf of the accused, has not arisen.

Wright v. People (Colo.), 91 Pac. (2d) 499:

The offense set out in the bill of particulars appears to be obtaining money and warrants by means of false pretenses. It is fundamental that a defendant can be tried only on the charge contained in the indictment, and not for any other

offense. "*A bill of particulars is not a part of an indictment or information, nor an amendment thereto. The sole office of the bill of particulars is to give the adverse party information which the pleadings, by reason of their generality, do not give. * * * It cannot change the offense charged nor in any way aid an indictment fundamentally bad, although it may remove an objection upon the ground of uncertainty.*" 31 C. J. 752, 753; *United States v. Tubbs*, D. C., 94 F. 356; *May v. United States*, 8 Cir., 199 F. 53-61.

People v. Westrup (Ill.), 25 N. E. (2d) 16:

However, the indictment, and not the bill of particulars, is the charge upon which the defendant was tried. The only object of the bill of particulars is to give the defendant notice of the charge against him and to inform him of the particular transactions brought in question so that he may be prepared to make his defense. McDonald v. People, 126 Ill., 150, 18 N. E. 817, 9 Am. St. Rep. 547. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars. The prosecution, however, is not required to set out all the evidence it will produce. The object of a bill of particulars is not to make a substantial charge against the defendant, but to limit the evidence which may be introduced under the indictment to particular transactions. The indictment, which is the charge, can neither be helped nor hurt by the bill of particulars. People v. Depew, 237 Ill. 574, 86 N. E. 1090.

United States v. Lynch, 11 Fed. (2d) 298:

***Hence all of the averments necessary to

charge an offense must be included and presented by that body, (grand jury) and the district attorney would be without power to supply any such essentials by amendment or through the medium of a bill of particulars, 31 C. J. p. 650, and authorities in footnotes.

Jarl v. United States, 19 Fed. (2d) 891, at page 894:

A charge may be good and yet it may be made to appear that in fairness the defendant should be furnished with additional information to prevent surprise, restrict the proof and thus enable him to make reasonable preparation for his defense. *It cannot be used to cure an indictment fatally defective. Furthermore, we do not know on what reason, or by what authority a District Attorney can assume to specify the particular offense the grand jury intends to charge, nor do we believe any statement he might make in that respect would be binding as of record on a plea of former jeopardy. He has no power of control or right to change the action of that body. There are cases in which that practice is appropriate, but the indictment must be good on its face; and that procedure cannot be resorted to, with or without the request of defendant, to amend an indictment which is bad because of a lack of precision, certainty and accuracy in charging the offense.* This, we think, is the plain meaning of the authorities that have been cited, whether the offense was known at common law or only statutory and whether it be a felony or only a misdemeanor. The reason and necessity for the rule apply as much to the one as to the other. The roots of the principle are in the common law and we find them imbedded in the Constitution.

State vs. Gilbert (N. H.) 194 Atl. 728. The defend-

ant was charged with reckless driving and the charge was merely stated in general terms of the statute. The court held:

Nor can the defect be cured by permitting the state to file a bill of particulars *for the solicitor may not speak for the Grand Jury any more than he may amend an indictment.* See State vs. Kelly, 66 N. H. 577, 580, 29 A. 843 and cases cited.

See also the following cases:

Thomas vs. State of Maryland, 197 Atl. 296.
 Smith vs. State (Florida) 112 So. 70.
 State vs. Wadford, (N. C.) 139 S. E. 608.
 State vs. Gilbert (N. H.) 194 Atl. 728.
 10 A. L. R. 982.

The court ordered the district attorney to furnish to the defendants the means employed by the defendants to enable the houses of vice to be operated. That could not be ascertained from the indictment. In response to that, the deputy district attorney alleged that the defendants enabled houses of vice to be operated by refusing to make arrests and by refusing to enforce the laws of the State of Utah and the ordinances of Salt Lake City (Ab. 10).

Does that constitute the nature and cause of the accusation? The grand jury did not so state. Maybe the grand jury found that the defendants furnished the facilities which enabled the houses of vice to operate; or furnished the operators of these houses of vice money, fixtures, buildings and customers. And, there is no allegation or proof that houses of vice would

not continue to be operated even if arrests had been made. The proof is that prostitution is carried on at the named houses of prostitution and if prostitutes are driven from those houses, they scatter over the city. That is so, also, of card games and poker games and other games of chance where a lot of paraphernalia is not needed. That is so of bookmaking.

The bill of particulars said that collections were made with the aid and assistance of Golden Holt and Ben Harmon and other persons unknown to the deputy district attorney (Ab. 11). The grand jury did not so find. And this defendant is to be tried on an accusation of the grand jury.

NO OVERT ACT ALLEGED

The statute alleged to have been violated:
103-11-1, R. S. 1933.

If two or more persons conspire: (1)
(2) . . . (3) . . . (4) . . . (5) to commit any act injurious to public morals, or for the perversion or obstruction of justice or the due administration of the laws;—they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding \$1,000.

No agreement amounts to a conspiracy unless some *act* is performed by one of the parties to the agreement, which act effects the object of the agreement.

103-11-3, R. S. 1933.

No agreement . . . amounts to a conspiracy, unless some act, besides such agreement, is done

to effect the object thereof by one or more of the parties to such agreement.

Upon a trial for conspiracy such as is sought to be alleged in this case the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment and proved.

105-32-11, R. S. 1933.

Upon a trial for conspiracy in a case where an overt act is necessary to constitute the offense, the defendant shall not be convicted, unless one or more overt acts are expressly alleged in the . . . indictment, nor unless one of the acts alleged has been proved; . . .

An overt act is an act done by one or more of the conspirators to effect the object of the agreement. It must be separate and apart from the agreement and in addition to the agreement.

The overt acts sought to be alleged are:

- 1 and 2: That the the defendants permitted houses of vice to be operated.
- 3 and 4: That the defendants collected money from operators of houses of vice.

The first and second overt acts are not overt acts at all. If anything, they are a part of the agreement.

The agreement is:

The defendants did agree to permit (houses of vice) to operate.

The first two overt acts are:

The defendants permitted houses of vice to operate.

The first two overt acts clearly set forth the same acts that are alleged to have constituted the agreement. The last two overt acts in no way show that money was collected for the purpose of carrying out and with the intent to carry out the agreement.

The case of *People v. Hines*, 6 N. Y. Sup. (2d), 2, 168 Misc. 453, discussing the question of overt acts states:

A number of allegations are recited in the indictment under the heading "Overt Acts." The only ones affecting defendant Hines are two contained in paragraph 15. One is to the effect that in March, 1932, he met with others and conferred upon and discussed plans to influence, intimidate and bribe judicial officers. The other is that at the same time he received \$1,000 in cash from Dutch Schultz, one of the conspirators. *The first "overt act" is really a part of the conspiracy looking toward action in the future and is not properly an overt act.* The receipt by Hines of a payment of \$1,000 cash, although alleged as an overt act, is not such, but something done as a part of the agreement to cement the conspiracy.

United States v. Grossman, 55 Fed. (2d) 408:

The overt act must be entirely independent of the conspiracy. It must not be one of the series of acts constituting the agreement, but it must be a subsequent independent act following a complete agreement or conspiracy, and done to carry into effect the object of the original agreement.

Marino v. United States, 91 Fed. (2d) 691:

The crime is completed when an overt act effect the object of the conspiracy is done by at least one of the conspirators. An overt act is something apart from the conspiracy, and is "an act to effect the object of the conspiracy." *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 535, 35 S. Ct. 291, 293, 59 L. Ed. 705. It need be neither a criminal act, nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement, and must be done in furtherance of the object of it.

The third and fourth alleged overt acts—that the defendants collected money from operators of houses of vice, are not *acts* "done to effect the object (of the agreement) by *one or more of the parties to such agreement*." To collect money from houses of vice does not enable such houses of vice to operate. If it did, the more money collected from operators of house of vice the better enabled such operators would be to operate.

It can't be said that to collect money by way of taxes, tribute, fines or other impositions enables houses of ill fame to operate.

The state is put in this position. For thirty years these houses of vice have been operating. They could not operate unless collections were made from their operators. Therefore, for thirty years collections have been made. The state changed its theory when it filed its bill of particulars and, abandoning its alleged overt acts, took the position that the houses of vice were enabled to operate because defendants failed and refused to make arrests. But there is no allegation or proof that the

failure to make arrests is the thing that enables houses of vice to operate. If that were so, it would be simple to rid the city of houses of vice and it is known from the record in this case and the court has judicial knowledge that houses of vice are not so easily suppressed.

NO OVERT ACT PROVED

The state was required to prove an act done by one or more of the alleged conspirators to effect the object of an agreement proved to have been entered into by this defendant. The only money collected was collected by Abe Stubeck (774 and 787) and Golden Holt (970). This money was delivered to Abe Rosenblum (967); someone in the Mint Cafe (787); Ben Harmon (937); and on one occasion Mr. Holt gave approximately \$500.00 to Mr. Pearce in the presence of Mr. Harmon at a time when Mr. Pearce was Mr. Harmon's attorney (Rec. 738)).

There is no proof that any of the money collected ever got into the hands of Mr. Erwin and there is no competent evidence from which it can be deduced that any such money got into his hands. This will be discussed in greater detail under the heading of the insufficiency of the evidence.

II.

INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT

So far as Mr. Erwin is concerned the corpus delicti

in this case is an agreement between him and one or more named or referred to co-conspirators plus at least one of the alleged overt acts (if said acts are in truth overt acts) *done to effect the object of the agreement by one or more of the parties to such agreement.*

The evidence is not sufficient unless it proves an agreement to commit the offense between Mr. Erwin and one or more of the following: (1) Mr. Finch, (2) Mr. Thacker, (3) Mr. Pearce, (4) Mr. Harmon, (5) Mr. Stubeck, (6) Mr. Holt; and unless the evidence in addition to the proof of such agreement, proves an act (which has been alleged) done to effect the object of the agreement *by one or more of the parties to such agreement.* It isn't sufficient that an overt act be proved. It isn't sufficient that the agreement and an overt act be proved. It isn't sufficient that the agreement and one of the overt acts alleged in the indictment (if they are overt acts) be proved.

The state must prove an agreement of Mr. Erwin with one or more of the parties named to commit the offense denounced by the statute and in addition thereto must show an overt act (which has been alleged) done to effect the objects of the agreement *by one or more of the parties to such agreement.*

The agreement alleged in the indictment is an agreement between Mr. Erwin, Mr. Finch, Mr. Thacker, Mr. Pearce and Mr. Harmon "together with divers other persons to this grand jury unknown". The agreement was entered into "on the 6th day of January, 1936, and on divers other days and times between that day

and the 1st day of January, 1938". The agreement was "to commit acts injurious to public morals *and* for the perversion *and* obstruction of justice *and* the due administration of the laws of the State of Utah."

The agreement was "to permit, allow, assist and enable houses of ill fame . . . and lotteries, dice games, slot machines, book-making and other gambling devices and games of chance (card or poker games are not mentioned in the indictment) to be kept, maintained and operated at various places in Salt Lake City," The defendants "then and there well knowing that said houses of ill fame, lotteries, dice games, slot machines, bookmaking and other gambling devices and games of chance, were being kept, maintained and operated. . . ."

NO DIRECT EVIDENCE OF AGREEMENT

There is no direct evidence of any agreement. If there is any evidence of such an agreement it is circumstantial. By an analysis of the testimony of each witness whose testimony in any wise affected Mr. Erwin, we will demonstrate that there was no direct, circumstantial or other evidence that he (or for that matter, any other defendant) entered into any agreement to commit any offense much less an agreement to commit the offense alleged.

The corpus delicti cannot be proved by a confession, admission or declaration alone. You must put your hand over any alleged confession or admission or declaration and then see if there is any independent evi-

dence proving the corpus delicti. State vs. Johnson, 95 Utah 572, 83 Pac. (2d) 1010.

The corpus delicti is the body of the crime. Proof of the corpus delicti is essential to a conviction. It must be proved beyond a reasonable doubt, and must exclude every hypotheses other than that a crime was committed in order to convict.

The author of Underhill's Criminal Evidence, Third Edition, Page 33, in discussing confessions and admissions to prove the corpus delicti says:

A voluntary confession or admission of the accused is not sufficient to prove the corpus delicti unless there is other evidence in proof thereof either direct or circumstantial; or, as it is frequently decided, a confession or admission by the accused to prove the corpus delicti must be "corroborated". The "corroboration" of a confession or admission which is required in order to prove the corpus delicti refer not merely to facts proving the confession but to facts concerning the corpus delicti, or evidence independent of the confession. The corroboration of a confession does not necessarily prove the corpus delicti. The other evidence required to establish the corpus delicti in addition to that furnished by the confession need not be wholly independent on the confession, and it need not connect the defendant with the crime. The corpus delicti may be established by the confession of the accused together with corroborating circumstances. Where the evidence is sufficient to show that the crime has been committed, or where there is any evidence dehors the confession in proof of the corpus delicti, the confession or admission is admis-

sible. A confession together with proof of the corpus delicti may sustain a conviction, but an extra-judicial confession alone will not sustain a conviction. An extra-judicial confession is supported by proof of the corpus delicti where the evidence of both together produces a conviction of guilt.

11 American Jurisprudence 574:

Declarations of an alleged conspirator are not admissible against a co-conspirator in the absence of evidence from which may be inferred the latter's assent jointly with the other conspirators to the existence and execution of the conspiracy within the statutory period of limitation, unless the statements are made in the presence of those against whom they are offered.

* * *

WITNESSES

The state called 26 witnesses. Of these witnesses one was Augusta Friend, whose evidence was stricken (901).

Four of the 26 witnesses were prostitutes, Alder, Carlton, Newman and Collins. One of these four, Collins (902), claimed her privilege and did not testify as to what her business was (910). Three testified that they had paid money to Mr. Holt. One of the three testified she gave him an overcoat. They all testified that they had been engaged in prostitution in this city for many years prior to January 6, 1936, and since the 1st day of January, 1938, and up to the time of the trial (932), (914), (942). There cannot be any dispute but

that houses of ill fame operated in this city long before and long after the above dates (Holt's testimony 1030).

Prostitutes, generally, were arrested monthly or semi-monthly, booked at the police station, examined for venereal diseases. If found to be "clean" were discharged to go back to their well-known houses of ill fame, and if found to be diseased kept until they were cured (1033).

Three of the witnesses were reformed gamblers,—Goslin (544), Hayes (821), Scott (677 et seq.). The proof is that gambling such as mentioned in the indictment was carried on in Salt Lake long prior to and after the dates mentioned in the indictment. There is nothing in the evidence of any of these witnesses which in the remotest degree connects the defendant Mr. Erwin (or for that matter any other defendant, with any agreement or with the commission of any overt act, nor is it claimed that any of these witnesses was a co-conspirator.

The witness Ellett's testimony (1264) and the witness Headman's testimony (1497) do not affect this defendant. If it affects any defendant, it was Mr. Thacker, who was acquitted. The witness Lewis's testimony (967) does not affect this defendant. If it affected anybody, it affected Mr. Thacker who was acquitted. The witness Kesler testified merely as to the quantity of proof it took to prove the offense of bookmaking (2018).

The above disposes of twelve witnesses. There are fourteen remaining. Of these one, Weiler, was called to prove the likelihood of Mr. Erwin agreeing with Mr. Pearce to commit a crime by showing that on one occasion while the witness was acting as a deputy county clerk in 1936, Mr. Pearce acted as attorney in a case filed in the City Court in 1934, and called Mr. Erwin as a witness in a case in which he was not a party (1243).

The witness, Miss McDonald, City Recorder, testified that Mr. Erwin was sworn in as Mayor of Salt Lake City the first Monday in January, 1936 (378); that he resigned February 7, 1939 (378); that Mr. Finch was discharged as Chief of Police January 21, 1938 (379). While she was on the stand city ordinances were introduced, one showing that the City Board of Health had control of prostitution (444).

O. B. Record testified (1499) that he had been Inspector of Police for three years, and concerning certain arrests in certain gambling houses; that he was next in line to the Chief of Police; that in the absence of the Chief of Police, Mr. Thacker did not report to Mr. Record. His testimony seems not to be directed toward Mr. Erwin. If it involved anyone, it involved Mr. Thacker who was acquitted.

The testimony of the witness Hoagland (2025) was not directed to the defendant Erwin.

The above four witnesses did not testify as to any agreement, nor as to the commission of any overt

act in furtherance of any agreement. The testimony of the remaining ten witnesses is claimed by the state to affect the defendant Mr. Erwin.

We now proceed to a close analysis of the testimony of these witnesses. The testimony of one is not in any sense related to the testimony of the other, so we will not take them in the order in which they were sworn, nor the order in which they testified.

The testimony of the witnesses Smith (492), Early (460), Mrs. Runzler (1252) and Prichard (1107) goes to the proposition that Mr. Erwin's attention was called to the existence of a former or present underworld pay-off in Salt Lake City.

MR. AUSTIN SMITH

Mr. Smith had been appointed Mr. Erwin's secretary on January 6, 1936 (492). Shortly after Mr. Finch's appointment and at his invitation, Mr. Smith visited Mr. Finch at his home (493). Mr. Smith received a memorandum in the first part of June, 1936 (497) and in the absence of Mr. Erwin left it on his desk (513). This memorandum contained a list of supposed payoffs in town. The last place the witness ever saw the memorandum was on Mr. Erwin's desk (499). Mr. Smith handed the memorandum to Mr. Erwin and Mr. Erwin said it would be immediately investigated; that he did not know anything about it (500). (All of this testimony was objected to and motions were made to strike it on all conceivable grounds).

At the witness Holt's request, the witness Smith met Mr. Holt in Captain Taggart's office in the Federal Building (501). This occurred some time in June, 1936. Two days after that, Mr. Smith had a conversation with Mr. Erwin in his office. Mr. Smith told Mr. Erwin that he, Smith, had had a conversation with an unnamed party who knew conditions first hand (503). Mr. Smith told Mr. Erwin that there was a payoff going on; that there were vice conditions that were being talked about all up and down the street. Mr. Erwin informed Mr. Smith that it would be thoroughly investigated. Two days afterwards, Mr. Smith met Mr. Erwin and Mr. Finch and Mr. Holt in the Public Safety Building (504). On the day of this conversation and before the meeting in the Public Safety Building Mr. Smith met Mr. Erwin at Mr. Erwin's office. Mr. Erwin appeared to be very upset, and told Mr. Smith that he, Smith, should not be talking to the people he had talked to pertaining to the department and Mr. Erwin's particular affairs (506). During the conversation in Mr. Finch's office in the Public Safety Building, Mr. Holt stated that there were vice conditions and that Mr. Holt had called Mr. Smith to Mr. Taggart's office to inform him so that he, Smith, could tell Mr. Erwin (507). When asked to state what Mr. Holt meant by "vice conditions" Mr. Smith testified that there was a payoff going on from houses of prostitution and gambling houses. Mr. Smith was reprimanded for going over in the enemy's camp and washing out dirty linen (508).

On cross examination Mr. Smith testified that he had not given the memorandum to Mr. Erwin but in the absence of Mr. Erwin he had left it on Mr. Erwin's desk and that he, Mr. Smith, had never seen the memorandum after that time (513). The memorandum was not signed by Mr. Smith (514).

Now, the most that can be said of this testimony is that Mr. Holt, a police officer, had told Mr. Smith that there was a payoff; that somebody had given Mr. Smith a memorandum containing approximately the same information, which memorandum was unsigned and in the absence of Mr. Erwin was placed on his desk and was never thereafter seen, and that Mr. Holt repeated to Mr. Erwin in the presence of Mr. Finch that there was such a payoff. The testimony is that several times Mr. Erwin said the matter would be thoroughly investigated. This does not constitute any evidence of the agreement, nor of the commission of any overt act done to affect the object of any agreement by any one or more of the parties to the agreement as is required by 103-11-3 R. S.1933.

MR. JOHN S. EARLY

About January 8, 1936, Mr. Early was appointed by the City Commission as Office Manager, Public Safety Department of Salt Lake City (499). Mr. Erwin talked to Mr. Early about this position after he, Mr. Erwin, had been assigned to the Department of Public Safety. Mr. Erwin stated to the witness that he had heard that there was a payoff (466). Mr. Erwin

asked Mr. Early to get all of the information he could with reference to it (467). Later on, Mr. Early told Mr. Erwin that he had discussed the matter with numerous officers and had been unable to get any information whatever from them (468). He told Mr. Erwin that from another source he had learned that there was a payoff of \$2,000 per month from prostitution and gambling houses (469). He was not asked for any reply from Mr. Erwin but 21 pages further in the record the witness testified that he told Mr. Erwin there were rumors that there was a vice payoff and that Mr. Erwin said that the entire matter was in the jurisdiction of the Chief of Police. That was as near as the witness could recollect the statement (485). Later on, he told Mr. Erwin again that he had heard rumors of a vice payoff (486). The witness was then asked if in these conversations with Mr. Erwin the witness had mentioned that Mr. Finch and Mr. Erwin were involved (487). The witness said, "No" (488). Thereupon, the prosecuting attorney was permitted to cross examine the witness over objection and finally, to the same question, Mr. Early answered, "Yes, I did tell him that, that I had advised them that I heard that they were involved, that there were such rumors around." When asked what Mr. Erwin said, Mr. Early testified, "I can't recall his exact words, but he disclaimed all knowledge of it, of course, both him and Mr. Finch." (490). Thereupon the witness was excused.

There is nothing in Mr. Early's testimony which proves or tends to prove any agreement or the commission of any overt act or which constitutes an ad-

mission or a confession or is in any sense competent or relevant unless prior or subsequent to the receipt of such testimony the *corpus delicti* is proved.

MRS. W. T. RUNSLER

Mrs. Runsler testified that early in 1937, she and Mrs. Earl Van Cott and Mrs. Lee Wright called on Mr. Erwin at his office in the City and County Building. Mrs. Runsler was State Director, Salt Lake City District, Utah Federation of Women's Clubs (1253). In this conversation Mrs. Van Cott stated *that according to information she had received* Mr. Erwin was receiving a payoff of \$750.00 a month, the chief \$350.00 and other operators \$250.00. Mrs. Runsler testified that when this statement was made Mr. Erwin flushed considerably and stated, "Oh, I am accused of that too, am I?" (1257) Then Mr. Erwin took a cigarette and asked if he might smoke and changed the subject (1258). This does not constitute evidence of agreement or of the doing of one of the overt acts and does not constitute an admission that Mr. Erwin was receiving the \$750.00 per month payoff. It was not received by the court as an admission. Mrs. Runsler simply stated that Mrs. Van Cott stated *that according to information she had received such and such* were the facts. This was not an accusation made by Mrs. Van Cott that what she had heard was true. She might have smilingly said, "I have heard that you are participating in a payoff." The very form of her question might have led him to believe that she, Mrs. Van Cott, did not believe the rumor. The point is, no one had accused him

of any offense and this alleged "payoff" was not in any sense identified. No man, especially a public officer, is called upon to constantly deny every rumor of which he is informed. And if he doesn't deny it, his failure cannot be construed to be an admission. Nor can his failure be construed to be evidence of an agreement or the commission of an overt act.

MR. A. M. PRICHARD

The witness Prichard testified that he was the city sexton; that prior to that he had been a detective; that he frequently met Mr. Erwin in his office where he brought plants from the cemetery. In the fall of 1936, he had a conversation with Mr. Erwin (1108) in which he told Mr. Erwin that there was a payoff in town and the women's organization of Salt Lake City had a list of all the payoffs, the names of the parties paying off, the amount they were paying off, and they were going to have a meeting about it (1108-A). Mr. Erwin and Mr. Prichard talked about this information and Mr. Erwin asked Mr. Prichard if Mr. Prichard could get Mr. Erwin a copy of the list and Mr. Prichard said he would try (1109).

About three days afterwards, he returned and gave Mr. Erwin a list of the names of the people that were supposed to be paying the payoff, their addresses, and the amount they were paying. Mr. Erwin stated that it was unbelievable and from that day to the time of the trial the matter was never mentioned by Mr. Erwin to Mr. Prichard (1110). The witness was ex-

cused.

This does not constitute evidence of an agreement or of the commission of an overt act in furtherance of an agreement. It certainly isn't an admission. Mr. Erwin was not accused of taking part of the money. He did not say he would not investigate it. He said it was unbelievable and put the paper in his desk. He was not called upon to make any denial. He was not called upon to do anything other than what he did do. Having done exactly what he did do, how can it be said that that constitutes evidence of an agreement or of the commission of an overt act in furtherance of any agreement.

H. K. RECORD

Mr. Record had been a police officer of Salt Lake City for fifteen years and in the early part of 1936 was chief of the anti-vice squad (948). He testified that he visited Mr. Pearce in his office in the Continental Bank Building and in the presence of Mr. Harmon Mr. Pearce told him that he, Mr. Pearce, was responsible for Mr. Record's appointment to the head of the vice squad "and that the mayor had instructed him to make collections from gambling houses and other forms of vice." Thereupon, Mr. Record asked how much they wanted or expected to get and Mr. Pearce is alleged to have said, "\$1700 a month." After talking about the sources of this money Mr. Record said that he would have nothing to do with it and Mr. Pearce said, "All right, we will get somebody else to handle it." (954) At this stage of the trial, no evidence of the corpus de-

licti had been introduced, nor was any thereafter introduced. It is claimed by the state that because Mr. Pearce used in this alleged conversation the term "mayor" that Mr. Erwin is somehow bound by the testimony as showing that Mr. Erwin was a party to an agreement to make the collections referred to. Taken in connection with other testimony in the record or taken alone and given the full force of anything that possibly can be claimed for it, it amounts to nothing so far as Mr. Erwin is concerned. From it, the jury could not possibly properly deduce that there was any agreement or that any overt act had been committed, or that any overt act would be committed in furtherance of any agreement. It should have been stricken as was strenuously argued by counsel.

MR. DAR KEMPNER

Mr. Kempner testified that some time during the months of April, May or June, 1937, he saw a Mr. Stubeck. That early in the spring of 1937 (774) he accompanied Mr. Stubeck to certain pool halls and card rooms. That at about 3:00 o'clock in the afternoon of that day (776) the witness and Mr. Stubeck went to 248 South Main Street and Mr. Stubeck went up to a man who was racking pool balls on the pool tables and asked that man if he had the money ready (779). (All of this testimony was strenuously objected to by counsel and in the midst of the objections the state announced that Mr. Stubeck was one of the conspirators (780). The witness then testified that the man racking pool balls said, "I haven't quite got all of it." (782)

Whereupon, Mr. Stubeck told him he had better get it in a hurry or he would know the result (783). That man left the place and said he would be back right away. When he returned he had some currency in his hand. Thereupon, Mr. Stubeck said, "All right", and put the money in his pocket. The witness and Mr. Stubeck then went to 222 South Main Street. The witness went to get a drink of coca cola, and Mr. Stubeck went into the card room. After he had been in the card room the two of them left. Thereupon, the prosecuting attorney asked the witness:

"Q. Then, after you got upstairs, did he say anything to you?" (784)

This was objected to and during the course of objections and argument, the court said, "Of course, this is of importance. If it should develop that it isn't pertinent, I presume that it would be a mistrial. I am not saying that it would, but I presume it would." Whereupon, the witness testified that Mr. Stubeck told him that all card games were paying off and that some of them were trying to chisel by giving him less money than they should. (786). The witness asked Mr. Stubeck who was paying off and Stubeck answered that all card clubs were paying off. The witness asked him who gets the money and the witness testified that Stubeck said, "Well, I take it over to Ben Harmon's place." Then the witness said,.... "Well, does Ben Harmon get that money?" And the witness stated that Stubeck said, "Well, he splits it with Erwin and his crowd." (787)

On what theory is this evidence competent or relevant? Up to this point there has been no connection by way of pleading or otherwise between Mr. Erwin and Mr. Stubeck, or between Mr. Erwin and Mr. Harmon, except that Mr. Harmon is one of the defendants.

We will hereafter discuss the question of whether or not Mr. Stubeck and Mr. Holt were co-conspirators. But for the time being suffice it to say that Mr. Erwin can't be bound by this testimony unless it can be shown that Mr. Stubeck gave the money to Mr. Harmon and Mr. Harmon gave the money to Mr. Erwin pursuant to an agreement and under circumstances which charged Mr. Erwin with knowledge of the source of this money. The testimony of Kempner is not evidence that Stubeck made any collections of money pursuant to an agreement or that he paid it to Mr. Harmon pursuant to that agreement, or that Mr. Harmon paid it to Mr. Erwin pursuant to that agreement.

Twenty-two witnesses have now testified and there isn't a scintilla of evidence that any agreement was ever entered into or that any overt act was ever committed to effectuate such an agreement.

MR. GOLDEN HOLT

The prosecuting attorney early announced that he did not claim Mr. Holt wasn't a conspirator. He claimed that he was (932). Thereafter, he claimed that he was a co-actor (973).

Mr. Holt testified (962) that he had been a police

officer for many years prior to 1936; that he had been connected with the anti-vice squad of the police department and that in March of 1936 he was appointed chief of the anti-vice squad by the chief of police. He testified concerning the conversation to which the witness Smith had previously testified to the effect that he had heard of a payoff (966). He testified that later the chief told him to close everything up (968) and that he went around and did close them up (969) and that they remained closed for about a month.

He testified he had another conversation with Mr. Finch in the latter part of July, 1936, at which conversation Mr. Finch told Mr. Holt to see Mr. Rosenblum (660). That he saw Mr. Rosenblum and Rosenblum told him to go and collect from the women (970). Mr. Rosenblum told him the places that were operating and the amounts to collect from each place; that he did make collections from them and turned the money over to Mr. Rosenblum (971). He testified as to the amounts he collected from houses of prostitution (972). At this point the district attorney claimed that the witness Holt was a conspirator (973). He testified that he had another conversation with the chief and the chief told him to let the places remain open but not let them run too openly (974) and that he just let them run (975). He testified that in January of 1937, the chief told him to close everything up and that he was going to give the witness another man on the squad to see that there was absolutely no more payoff. He testified that he was removed from that position the first of March (976) and that H. K. Record took his place; that later he was put back on the vice squad

(977); that later Mr. Thacker told him to take charge of prostitution and that Mr. Thacker would take charge of gambling. He testified that he had had a conference with Mr. Ben Harmon in May of 1937 at the Mint (982) and that Ben Harmon told him he wanted to collect from the places of prostitution (984) and that Ben Harmon told him the amount that he would collect from each place (985). The last collection was made the 1st day of January, 1938. Asked where he took the money that he collected in June, he testified he took it to Mr. Harmon and Mr. Harmon told him to take it to Mr. Pearce's office (938). That was the 3rd or 4th of June, 1937. The witness went to Mr. Pearce's office and entered the lobby. Mr. Pearce told him to come in which he did and laid the money on the desk. Mr. Pearce picked the money up and put it in the drawer of the desk (1001). Mr. Harmon was sitting in a chair left of the desk. There was about \$500.00 (1002). The witness testified that at a later conversation with Mr. Harmon, Mr. Harmon told him that Mr. Pearce had accused the witness of holding out on him and wanted the witness to go to Mr. Pearce's office and see him (1004). The witness went to Mr. Pearce's office and was shown a slip of paper with a list of places on it (696). After they had talked a while Mr. Pearce told the witness that he thought the witness was doing a fine job (1005).

On cross-examination the witness testified that the chief told him to bring the prostitutes in for examination as that was done in the past (1030). That the prostitutes were brought in about every two weeks. That where they could, they would try to keep track of where the

girls were. That as the prostitutes came to town, the witness would find out who they were and see that they were brought into the Board of Health. The police department had their names and addresses. They were booked on the book entitled "Register of Arrests, Salt Lake City Corporation" (1032). The prostitutes were handled the same way during all the time the witness was on the anti-vice squad (1035). The witness testified that he had been taking collections to Abe Rosenblum until the 1st day of January, 1937 (1039). The witness never reported any of these transactions to any officer, city attorney, or to anyone else until after the alleged conspiracy had ended. The witness testified that Mr. Finch said to him, "I don't see what has been done that could cause this talk about taking money from the underworld and about the department being tied up with the underworld." And the witness stated in reply, "I don't know how anyone could have anything on you. You don't need to worry. I do not know of anything that involved you in this." (1046)

During the period in question the witness testified that he was living at the Moxum Hotel for a period of about sixteen or seventeen months (1069); that he had been divorced from his wife and was living apart from her. That he was driving an automobile and that he bought a lot of stock in the Dead Cedar Mining Company and the Lead Strike Mining Company. He invested in these stocks \$300.00 on two different occasions in 1937 (1070), and the money was paid in currency (1071). The witness made substantial investments in stock (1072), that the witness's salary as patrolman was between \$155

to \$165 a month (1077). That up to September of 1938, the witness had never had a conversation with Mr. Erwin, had never associated with Mr. Erwin, was never present at any conversation or at any place when anyone else had a conversation with Mr. Erwin concerning any payoff or anything of that kind; that he never reported any vice conditions to Mr. Erwin (1080). None of this testimony in the slightest degree tends to prove directly or indirectly that Mr. Erwin (or for that matter any other defendant) was a party to any agreement or conspiracy as alleged, or otherwise or at all, or that he in any fashion participated with anyone *to commit any overt act to effect the purposes of any agreement*. There isn't an admission, a declaration, a confession or any circumstances that can be tortured into proof of anything connecting Mr. Erwin with the offense charged.

MR. FISHER HARRIS

Mr. Harris testified that since March 15, 1932, he had been and that he still was City Attorney for Salt Lake City (1288); that during the fall and winter of 1937 he made an investigation of vice conditions in the city and that as a result thereof prepared a letter which he delivered to Mr. Erwin on January 15, 1937 (1290). January 15th fell on Saturday.

So far as Mr. Erwin is concerned the highlights of Mr. Harris's testimony are:

1. The letter of January 14, 1938 (Exhibit R).
2. The conversations Mr. Harris had with Mr. Erwin at the City and County Building.
3. The conference at the Alta Club.
4. Mr. Erwin's resignation.

The court will not be satisfied with any discussion of his testimony unless and until it reads the record. Its introduction was strenuously objected to on all conceivable grounds by all parties at all times. In our discussion of Mr. Harris's testimony at this time we give full weight to what he said and expect to demonstrate that it does not constitute proof (a) of the alleged agreement, (b) of any overt act, (c) of any admissable conversation, admission or declaration.

THE LETTER

The letter was not offered or received in evidence as an admission (1293). It was not offered to prove its contents (1296).

It was not offered to show that the things stated in the letter actually existed (1297).

The district attorney examined Mr. Harris concerning the contents of the letter (1291). The letter had not been offered in evidence (1293).

The letter was offered as Exhibit "R" (1295) for the purpose of showing the reaction of the former mayor as to this letter (1296).

It was admitted for the purpose indicated (whatever that is), not as evidence of the things therein stated (1301).

For the convenience of the Court we are producing this exhibit. It will be noted that the letter has been fastened together and unfastened at least three times;

that the first page was written on one typewriter and the second page written on another typewriter, that the first page is dated January 14, 1938 and the second page is dated January 12, 1938, with a 4 written over the 2.

There is attached to the exhibit a slip of paper which indicates that it was filed for record on the motion of Mr. Erwin.

EXHIBIT R

“Law Department

SALT LAKE CITY CORPORATION

Salt Lake City, Utah

January 14, 1938.

Hon. E. B. Erwin, Mayor, and
Board of Commissioners,
Salt Lake City, Utah.

Gentlemen :

During the past several months rumors of corrupt alliance between officers and employees of the Department of Public Safety and operators of various illegal establishments in Salt Lake City have reached me with such frequency and from so many sources of apparent reliability that I found it to be my official duty to make an independent investigation of their validity, and, having made it, to inform you of the result.

I have found the following in actual existence and operation :

LOTTERIES:

456 West 2nd South

458 West 2nd South

472 West 2nd South

435 West 2nd South

439 West Second South

DICE GAMES:

Western Social Club—35½ West 2nd South
 Zapeon Club—56 West 2nd South

POKER GAMES:

Past Time Club—55 East 2nd South
 Bank Smoke Shop—58 East 2nd South
 Mission Cigar Store—129 South Main
 Peter Pan Card Club—222 South Main
 Horse Shoe Card Room—49 East 2nd South
 Mint Card Club—27 East 2nd South
 Wilson Card Room—32 East 2nd South

BOOKMAKERS:

Basement Atlas Bldg.
 Basement New Grand Hotel
 124 East 2nd South
 First Floor, Woodruff Apts.
 Newhouse Building

Hon. E. B. Erwin—Page 2

Jan. 14, 1938

HOUSES OF PROSTITUTION:

63½ West 2nd South
 253 South West Temple
 143½ West 3rd South
 133 West 3rd South
 143½ East 2nd South
 128½ West 1st South
 243½ West 2nd South
 31 West 1st South
 36 East 4th South
 127½ West 1st South
 123 West 3rd South
 255 South 1st West
 Piedmont Hotel—249½ South State St.
 Rex Hotel—253 South State St.

I have found that all of these exist, and have existed to the knowledge and with the connivance of the officers of the Police Department charged

with the duty of their suppression.

I have found also that, with rare exceptions, no illegal activity in Salt Lake City is exempt from the payment of tribute; that those I have mentioned, with a few exceptions, pay each month a previously agreed upon amount for the privilege of operating during that month.

The persons who actually collect this tribute, and its amount, in each case are as well known to me as those who pay it, and it is known to me also to whom it is ultimately distributed.

You will notice that I say in each instance that "I have found," etc. By this I mean that I am not repeating rumors or street gossip. I have related undeniable facts and facts of such public notoriety that to ascertain them required little more than the desire to do so.

Very truly yours,

(s) FISHER HARRIS,
City Attorney."

Apparently the letter was offered and received in connection with a statement attributed to Mr. Erwin—"Why, I have never heard anything like this before," when it is claimed that he had heard all those things before (1504). After this letter was admitted it was referred to, read from, discussed, handled, and then stricken as an exhibit but was left to remain in the record (1379 and 1380).

CONVERSATIONS

The witness had two or three conversations with Mr. Erwin at his office in the City and County Building. The contents of the letter were discussed and the penciled

memoranda on the letter were made by Mr. Erwin. None of these conversations involved the necessity of Mr. Erwin making any denials or admissions. He was not charged with taking any money from the alleged collections and if the witness knew that Mr. Erwin was receiving such money he did not discuss the fact with Mr. Erwin.

CONFERENCE AT ALTA CLUB

This conference occurred on January 20, 1938. Mr. Fish, connected with the Salt Lake Telegram, had invited Mr. Bourn and Mr. Heal, connected with the Salt Lake Tribune, Mr. Harris, Mr. Finch and Mr. Erwin to take luncheon at the Alta Club on that date (1360). Mr. Harris purposely did not attend the luncheon until after the other parties had finished eating (1360). The witness was requested to state the conversation had in the presence of these men (1360). The evidence was admitted as against Messrs. Erwin and Finch only (1361).

The witness stated that Mr. Fish said that they had heard rumors of an investigation being made in regard to underworld activities and in regard to official corruption and he demanded to know what it was all about.

The witness answered that he had made a complete report of the matter to Mr. Erwin, in writing. In response to an investigation to do so, the witness enumerated them (1361). The witness enumerated the amount of each kind of activity paid. Whereupon, Mr. Fish said: "Do you know who gets this money and to whom is it finally distributed?" (1362), and the witness said that he did and then Mr. Fish said: "Who?" The witness said:

“E. B. Erwin gets \$750 per month. Harry Finch gets \$500.00 per month. The amount collected.” The witness said that Mr. Erwin was about five and one-half feet distant from him at the time the statement was made and that neither Mr. Erwin nor Mr. Finch said anything (1362).

On cross examination, Mr. Harris testified that the gentlemen present had been invited to the luncheon; that the luncheon was served on a rectangular shaped table, something the shape of the counsel table in the court room (1407), the long way was east and west. Mr. Erwin sat on the west end of the table and Mr. Fish on the east end of the table and when Mr. Harris came in he sat at Mr. Fish's right. Mr. Finch was directly across from Mr. Harris. Mr. Bourn was at his right and Mr. Heal was seated at Mr. Erwin's right on the west end of the table (1407).

The witness testified that he drew a piece of paper from his pocket and wrote some figure on it and was doing what he called “doodling.” Mr. Fish may have asked who got the money before the witness wrote the figures on the paper (1407).

Thereupon, the following occurred:

Q. (by Mr. Musser) Now, as a result of that, Mr. Harris, your testimony in the other case—as you recall, didn't you write this on this piece of paper and just show it to Mr. Fish at your left?

A. I rather believe I did. I believe I did show Mr. Fish that piece of paper if that is what you are asking.

Q. Yes, that is exactly what. And that paper had on it the figures 750 in one place and 250 in another place?

A. 250 you say.

Q. Was it 250 or 500?

A. 500.

Q. Now, shortly after that the meeting broke up, did it not?

A. Well, soon after it broke up, yes. (1408)

Mr. Erwin's failure to make any reply to Mr. Harris's statement does not constitute an admission that an agreement was entered into or that an overt act was committed. The occasion was at a luncheon party at which Mr. Erwin and the other gentlemen were the guests of Mr. Fish and nothing is stated as to what occurred prior to the time Mr. Harris entered into the conversation.

There is no showing that Mr. Erwin heard the statement. The statement was probably not made.

If he did hear it he was under no obligation to reply to it under the circumstances of the occasion.

And his failure to reply to it does not constitute any admission, declaration or confession.

MR. ERWIN'S RESIGNATION

Mr. Harris testified that on January 26, 1938, Mr. Erwin's attorney, Mr. Stewart, handed him, Mr. Harris, a resignation signed by Mr. Erwin. That was marked Exhibit "S" and was offered and received in evidence (1367). That at a later date Mr. Erwin sent the City Commission another resignation, which was marked Ex-

hibit "T" and was offered and received in evidence (1372).

The witness testified that he demanded the second resignation from Mr. Erwin (1378). These were not offered or received on any theory that they tended to prove the agreement or that they tended to prove any of the overt acts and they were wholly immaterial until the corpus delicti had been proved.

The motion to strike should have been granted.

MR. BEN HUNSAKER, AND
MR. CLIFFORD HUNSAKER

The testimony of these two witnesses will be considered together. The court will not be satisfied with this testimony without reading the record.

Ben Hunsaker was interested in a corporation selling automobiles, known as the Gateway Chevrolet, Inc. Mr. Erwin joined in this undertaking in 1932 and put into the business about \$1,000 (1145).

The Gateway Chevrolet, Inc. became indebted to Ben Hunsaker for \$18,500 incurred before Mr. Erwin became connected with the Company. This was represented by a note (1145). The note was finally paid down to \$10,000 (1146). Thereafter and on or about March 23, 1936, Mr. Erwin individually signed a note in favor of Mr. Hunsaker for the \$10,000 and agreed to pay it at the rate of \$200 per month out of Mr. Erwin's salary (1119).

Ben Hunsaker and Clifford Hunsaker came down to Salt Lake to get the note signed and met Mr. Erwin in

his office in the City and County Building and after discussing the note and without further adieu Ben Hunsaker said that he wanted Mr. Erwin to pay the note out of his salary and not out of graft—that Mr. Erwin had been crooked, but that he wanted him to go straight from then on (1118).

Thereafter the witness testified to numerous conversations had between him and Mr. Erwin. His son, Clifford, testified that he was present at the time Mr. Erwin signed the note and knew that the note was to be paid out of Mr. Erwin's salary.

Thereafter Mr. Erwin made many payments on the note in question, one was made by check; one was by Western Union money order; seven were made to Ben Hunsaker in currency for which receipts were given; six were made to Mrs. Hunsaker, for which receipts were given; three were made to Clifford Hunsaker, for which receipts were given and one was made to Dorothy Stone, for which a receipt was given.

Ben Hunsaker testified that on the occasions when money was paid to him and on one or two other occasions Mr. Erwin stated that (a) he had his chief of police and money was coming in, (b) that he wanted the department of finance because he said he would make plenty of money, (c) that they couldn't catch him because he didn't do the collecting, (d) that they couldn't catch the chief of police because he didn't do any collecting, (e) that they had the women lined up, (f) that he paid the money in currency so that the banks wouldn't know his business, (g) that he was glad Ben Hunsaker was not making an

income tax report of it because he didn't want to, etc.

None of this testimony was admissable unless the agreement and an overt act had been proved or was to be proved.

No inference can be drawn from it that Mr. Erwin agreed with anybody to do the things alleged in the indictment or referred to in the bill of particulars. They do not amount to conversations, declarations or admissions. The fact that he made payments in currency is not proof that he did not come into possession of the money legally or that if he came into possession of the money illegally he got it from houses of vice in Salt Lake City.

It is significant to note that Ben Hunsaker accepted these payments without complaint and without notifying anybody of his receipt of them or of his suspicions with respect to them.

The court will read with interest the threatening letters and telegrams sent by Ben Hunsaker to Mr. Erwin, exhibits 16, 17, 18, 19, 20 and 21. It will also read with interest the letter sent by Mr. Lowe to Mr. Stewart, (defendants' exhibit 22) in which Mr. Lowe states that the letter is being dictated in the presence of Mr. Hunsaker. Mr. Hunsaker admits it (1177). They state "The mayor is a good man and we want to assist him in maintaining his high standing in Salt Lake."

Now, this letter was written January 12, 1938, almost two years after the conference held in the mayor's office in March of 1936, and after all of the "slimy stuff"

Ben Hunsaker had testified to as having occurred in the meantime.

In this same letter they also said that they had talked the difficulty over "and while the amount should be paid and probably would be paid if suit were filed, we both nevertheless want to help the mayor and are very loathe to see him embarrassed."

This concludes the State's case.

The court instructed the jury that there was no sufficient direct or positive evidence that the defendants, or any of them, with each other, or otherwise, actually met or came together or expressly agreed to commit or pursue any common design or purpose or to commit or do any of the things or matters alleged in the indictment. (Instruction No. 7, Abs. 264.)

Now, what circumstantial evidence was there to prove the charges?

No witness testified as to any conversation between or amongst or with respect to any of the defendants concerning any agreement.

No one paid any money to Mr. Erwin. No one paid any money to anyone else with instructions to deliver it to Mr. Erwin. No person who collected money from houses of vice told the operators that the money was for Mr. Erwin. No person who paid money was told that if he paid it he could continue to operate his establishment.

There is no evidence of the reason why operators of pool halls and card games paid money to the witness Stubeck, except the bald statement of the witness Kemp-

ner (denied by Stubeck) that Stubeck told Kempner that there was a pay-off. There is no proof that any payments to Stubeck constituted a pay-off. If these operators did pay the witness Stubeck money and if Stubeck said that this money was paid for protection, that does not prove any agreement or conspiracy, nor does it prove any one of the overt acts.

The witness Holt never testified that he made any collection at the instance of Mr. Erwin or that he paid any money to anyone to be turned over to Mr. Erwin (he certainly kept the overcoat that the prostitute Sadie Alder gave him).

Disregarding Stubeck's denial and giving weight to the fantastic testimony of Kempner, collections from houses of vice were made only by Stubeck and Holt. The money Stubeck collected was put on the cashier's desk at the Mint Cafe.

The money Holt collected, which was not kept by him, was turned over to: (1) Abe Rosenblum, who was not even designated by the State or the Court as being a co-actor or a co-conspirator; (2) Ben Harmon, who is now dead and with whom Mr. Erwin was not even acquainted; (3) Mr. Pearce, the attorney for Mr. Harmon, and in the presence of Mr. Harmon.

The only way the State can possibly connect any of this money with Mr. Erwin is by way of confessions, admissions or declarations.

When Mr. Erwin replied to Mrs. Van Cott: "Oh! they're accusing me of that, too, are they?", he did not

thereby make an admission that can be construed as any proof of the corpus delicti in this case.

When he said to Mr. Harris with respect to the letter (Exhibit R): "I have never heard of such things. It is unbelievable," he did not thereby make any such admission.

When he did not reply to the statement by Mr. Harris at the Alta Club (if he heard the statement), he did not thereby confess or admit or declare that he was a party to an agreement to permit houses of vice to operate in Salt Lake City or that he had actually received such money.

When Mr. Erwin told Ben Hunsaker the things Ben Hunsaker testified to, he did not thereby confess, admit or declare that he was a party to a conspiracy to permit houses of vice to be operated in Salt Lake City or that he was receiving any monies collected from such places by the witnesses Holt and Stubeck.

So far as applicable and in support of his contentions, Mr. Erwin adopts the argument contained in the brief filed in this cause on behalf of Messrs. Pearce and Finch. (See that brief, page 60 et seq.)

On the lack of proof of the conspiracy, Mr. Erwin adopts the brief and argument, so far as applicable to his case, presented on behalf of Messrs. Pearce and Finch. (See that brief, page 74 et seq.)

EVIDENCE ERRONEOUSLY ADMITTED

1. Kempner's testimony that Stubeck told him that he collected money from pool halls and card rooms and

took it over to Ben Harmon and Ben Harmon split it with Erwin and his crowd.

2. Fisher Harris's testimony relating to the letter of January 12-14, 1938 (State Exhibit R).

3. Evidence of witnesses to the effect that they told Mr. Erwin that a pay-off was being conducted.

4. The testimony of H. K. Record concerning his alleged conversation with Mr. Pearce.

5. The testimony of Golden Holt concerning collections made by him to and for Abe Rosenblum and Ben Harmon.

6. The testimony of the prostitutes that they paid money to Holt.

With respect to these matters we adopt the argument made on behalf of Messrs. Pearce and Finch.

ERRONEOUS INSTRUCTIONS GIVEN BY THE COURT

The court in instruction 16 intended to cover the elements that must be proved before any of the defendants could be convicted in this case. However, the court erroneously omitted from this instruction and from other instructions the element that the overt act must be done by one of the conspirators.

Section 103-11-3 states:

* * * * unless some act besides such agreement is done to effect the object thereof by *one or more of the parties to such agreement*.

Instruction 16 merely states: (255-257, ab. 271)

* * * (5) that at least one of the following overt acts was committed: * * *.

(6) that any such overt act or acts was or were in furtherance of said conspiracy, agreement or combination charged in the indictment.

Nor has the deficiency in this instruction been cured by any other instruction given by the court.

The court erroneously gave instruction 18 for in that instruction the court instructed: (258; ab. 274)

* * * It is enough if the common purpose and design was formed in the manner and way as charged in the indictment and that any one of the alleged overt acts was done in furtherance of such design and purpose by either of the defendants * * * then the act of either one of the defendants or the acts of said Golden Holt, Ben Harmon or Abe Stubeck in furtherance of the common purpose and design proved, as aforesaid, will be regarded as the act of all.

This instruction does not give the necessary statutory requirement for one of the overt acts very well could have been accomplished by one of the defendants or by Golden Holt, Ben Harmon or Abe Stubeck and been in furtherance of the common purpose and design and still not have been an overt act of one of the parties to such agreement for if the act *was not done knowingly* by one of the parties, then such party would not, under the court's instruction 19, have been a party to the conspiracy unless he had prior thereto entered into the agreement. It is apparent that such act could have been accom-

plished by one of the defendants without having been an act of a conspirator for the defendant Thacker was acquitted, and though he was a defendant, he was not a conspirator.

Instruction 9-A is defective in that said instruction gave the jury a right to convict anyone who actually participated in the conspiracy or in the carrying out of said agreement regardless of whether said defendants knowingly participated in the conspiracy or carrying out of said agreement. This instruction is also in conflict with instruction 19 as that instruction expressly states that one must knowingly participate before he may be a conspirator (249).

Instruction 16 is also erroneous in that it permits the jury to speculate as to what act might be one of the overt acts necessary to be proved in order to support a conviction for said instruction sets out as one of the overt acts that might be proved the following:

(5) * * *

(d) that between January 6, 1936, and January 1, 1938, the defendants permitted, allowed, enabled and assisted a house or houses of ill fame to operation in violation of the state statutes and of the Ordinances of Salt Lake City.

A like paragraph is also made in connection with lotteries, bookmaking places, dice games, etc.

By setting forth such alleged overt acts the jury would be entitled to consider almost any act or acts of anyone as an act which had assisted, allowed and enabled houses of ill fame and gambling places to operate.

For instance, the jury might even go so far as to say that if the evidence showed that there happened to be a gambling place operating even though there had not been brought to the attention of defendants or other parties responsible for enforcing the laws of the state sufficient evidence or information to warrant an arrest or the filing of some charge or action, that they would be justified in bringing in their verdict of guilty merely on the conclusion that the defendants or their employes should have done something they did not do. To allow a conviction on such a set of facts means that one could be tried on a conspiracy and convicted on facts or circumstances which were not considered by the grand jury nor even in the contemplation of the district attorney during the trial of the case. Nor will the fact that the overt act of collecting money which was also alleged and given in the instruction aid the error for you would have to speculate as to which overt act the jury based its conviction.

The court erred in refusing to give defendant Erwin's requested instructions Nos. 19 and 22, which instructions are as follows:

INSTRUCTION No. 19

You are instructed that the witness Ben Hun-

saker related certain conversations which he claimed he had with the defendant E. B. Erwin. You are instructed that you must not consider any such statement alleged to have been made by the defendant E. B. Erwin to the witness Ben Hunsaker as in any sense being an admission of the said E. B. Erwin that he was guilty of entering into a criminal conspiracy as alleged in the indictment or that he committed any of the overt acts alleged in the indictment. (170 Ab. 297.)

INSTRUCTION No. 22

You are instructed that the witness Fisher Harris related certain conversations which he claimed he had with the defendant E. B. Erwin. You are instructed that you must not consider any such statement alleged to have been made by the defendant E. B. Erwin to the witness Fisher Harris as in any sense being an admission by the said E. B. Erwin that he was guilty of entering into a criminal conspiracy as alleged in the indictment or that he committed any of the overt acts alleged in the indictment. (177 Ab. 299.)

We feel that both of these instructions should have been given and that our position is amply justified and supported by the numerous authorities cited in the brief submitted by the defendants Finch and Pearce covering what has been designated therein as testimony under classification No. 2 and set forth between pages 59 and 74 in said brief, and which authorities we hereby adopt in this brief as if set out in full and ask that they be considered in connection with these two instructions.

IMPROPER CONDUCT OF DISTRICT ATTORNEY BY OPENING STATEMENT

Numerous objections and exceptions were taken to the opening statement made by Mr. Rawlings, which statement is included in Volume V consisting of 73 pages.

To appreciate the error committed by such opening statement it is necessary to read and analyze the entire statement and also to fully appreciate the fact that Mr. Rawlings had, prior to his opening statement, full knowledge of just what facts he could and could not prove.

This is true because he knew what had been introduced before the grand jury and also what had taken place at the previous trial of Mr. Erwin and had also undoubtedly gone over the testimony of the witnesses he was going to call numerous times prior to his opening statement in this case.

The purpose of an opening statement is to advise the jury concerning the questions of fact involved so as to prepare their minds for the evidence to be heard and it is not and should not be permitted to become an argument. Nor should it contain a statement of facts or circumstances which he knows cannot be proved or that he will not be allowed to prove.

People vs. Arnold (Ill.), 93 N. E. 786, where the court in discussing an opening statement said:

The office of an opening statement is to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard (1 Thompson on Trials 267; Pietsch vs. Pietsch, 245 Ill. 454, 92 N. E. 325), and it is not and should not be, permitted to become an argument.

If Mr. Rawlings was not attempting to argue and convince or influence the jury by his opening statement, then the following statements should not have been made:

Right here let me call this matter to your attention: It is our contention not only that these houses and other establishments of vice, covering book-making, card rooms, marble games, — not only that they were tolerated, that they were known about by these defendants, who had knowledge of them, but that in addition to the fact that

they were permitted to operate, that there was a pay-off; and a portion of the money from the pay-off given by the operators of these places went into the hands of the defendants, in order that these establishments might run, and as a protection against their being closed up and the operators and those in attendance being run out of town.

We shall introduce evidence to show that as soon as Mr. Erwin made the request of Mr. Earley—I reiterate that this request came early in January of '36, when Mr. Earley was acting as the office manager in the Public Safety Department—that Mr. Earley made some inquiry to determine how much was being paid for protection. That he determined, and reported to the mayor that there were sums aggregating approximately two thousand dollars per month being collected from the operators of these vice institutions, including prostitutes, operators of the houses, operators of book-making establishments, operators of card games and dice games. (Page 3 add. tr.)

I have all the confidence in the world that this jury can determine when that evidence comes in whether or not I am telling the truth. (Page 49 add. tr.)

In about September or October, when another payment was made—and during the time payments were brought up to Ogden, mind you, by Mr. Erwin personally, and paid in cash, for which receipts were requested. In practically every instance, I think, with the exception of one, and maybe two, they were paid to Mr. Hunsaker or to his wife, or in one or two instances his son, who will be produced as a witness; but in each of these instances, with the exceptions I mentioned, they

were paid in cash, larger denominations as the year went on. (Page 50 add. tr.)

Now, as I indicated to you, these payments were all made in cash, and with the exception of those I have mentioned, the latter ones were made in payments in cash in bills of \$50.00 and \$100.00. (Page 52 add. tr.)

And in November—recall now, this is the time that this crusade was on by the women's clubs—* * * *. (Page 53, add. tr.)

I call your attention to the fact that at this first meeting no question was asked by Mr. Erwin—no question asked as to who was making collections, or who was involved. (Page 64 add. tr.)

Nor, as heretofore mentioned, should counsel deliberately and knowingly make a statement of a fact which he knows he cannot prove.

State vs. Nathoo (Iowa), 133 N. W. 129:

An attorney ought not to be permitted to get a matter before the jury in an opening statement which he must know he will not be allowed to prove under the specious pretext that it cannot then be said what evidence will be received.

And certainly Mr. Rawlings cannot say when he made the following statement:

He knows what the evidence is. We will show, in this case, that this money was turned over to Mr. Erwin, but came through Mr. Holt's hands. (Page 36 add. tr.)

that he thought the evidence would prove that money had

been paid to Mr. Erwin by Holt or anyone else. This is the very thing they endeavored to prove in the previous trial and failed and he knew he would be unable to prove it.

State vs. Distefano, 70 Utah 586, 262 Pac. 113:

In the opening statement to the jury counsel may properly fully state all of the material facts which the evidence will establish, but not facts which the party is not able to prove and none that cannot be supported by legal evidence. Bishop's Criminal Procedure (2d Ed.) Vol. 2, Page 791 and 969.

From Mr. Rawlings' opening statement, only a small portion of which we have set forth, it is apparent that counsel did not merely intend to outline what the evidence would probably be, but intended to paint a vivid picture of corruption and illegality that regardless of the evidence that might follow, would remain in the minds of the jury.

From the detailed statement of the evidence, his arguments with the court and his fight to put before the jury his theory of the case clearly shows that counsel intended by his opening statement to win at any cost and we earnestly contend that such error cannot be cured by any instruction the court did make.

We do not waive any assignments of error. We adopt the points and authorities contained in the brief filed for Messrs. Pearce and Finch so far as they are applicable to Mr. Erwin.

We respectfully submit that the indictment should have been quashed. That it could not be cured by a bill

of particulars. That the bill of particulars should have been stricken. That the evidence introduced does not support the verdict of the jury. That the court committed grievous error in its receipt and exclusion of evidence. That the instructions of the court were misleading and allowed the jury to speculate as to the outcome of their deliberations and misinstructed the jury in the particulars mentioned and contended for. That the error committed by the district attorney in trying the case in the manner in which he did try it deprived the defendant of a fair trial.

Respectfully submitted,

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E. B. Erwin.