

1942

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

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff and Respondent,*

vs.

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

*Defendants and Appellants.*

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## Petition and Brief on Rehearing of Appellant, E. B. Erwin

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# INDEX

	Page
Appellant E. B. Erwin's Petition for Rehearing.....	1
Appellant E. B. Erwin's Supplemental Petition for Rehearing.....	3
In Support of Appellant E. B. Erwin's Petition for Rehearing.....	4
Points Argued:	
I. The Court Erroneously Reached the Conclusion:	
(a) That the corpus delecti had been proved.....	5
(b) That the corpus delecti was proved by consid- ering as evidence one inference based upon another inference .....	8
II. The Court Erroneously Held:	
(a) That a conversation of a certain witness was admissible in evidence to show a claimed ad- mission of appellant when it had not been shown and was not shown that the conversation testified to was heard by appellant.....	14
(b) That appellant admitted guilt because he failed to make a proper answer to a statement made by the witness Runzler that she had heard others say that there was money being paid to protect crime and that appellant and others received such money.....	17
III. The Court erroneously held admissible under the res gestae rule certain hearsay evidence which was based upon other hearsay evidence, thus considering as competent and proper evidence testimony of what "A" said "C" said that "D" said.....	19
IV. The Court decided that the numerous errors found in the record were not inconsequential and errone- ously decided that said errors did not prejudice appel- lant .....	24
V. The Court erroneously decided that errors admittedly prejudicial to appellant and repeatedly indulged in were cured by the admonition of the Court, when as a matter of fact the error committed was only magnified and emphasized by such admonition.....	26
Supplemental Petition for Rehearing.....	30
Conclusion .....	31

# INDEX OF CASES

	Page
Bloomer v. State, 75 Ark. 297.....	16
Booth v. Nelson, 61 Utah 239, 211 Pac. 985.....	22
Busse v. Murray Meat and Livestock Company, 45 Utah 596, 147 Pac. 626.....	12
Delaney v. United States, 283 U. S. 586, 68 L. Ed. 462, 44 Sup. Ct. 206.....	22
Karren v. Blair, 63 Utah 344, 225 Pac. 1049, 95 A. L. R. 162.....	12
New York Life Ins. Co. v. McNeely, 79 Pac. (2d) 948.....	12
Parlton v. United States, 75 Fed. (2d) 772.....	24
State v. Haynes, (Oregon) 253 Pac. 7.....	22
State v. Jensen, 75 Utah 299, 279 Pac. 506.....	24
State v. Judd, 74 Utah 398, 279 Pac. 953.....	12
State v. Lund, 75 Utah 559, 286 Pac. 960.....	30
State v. Martinez, 56 Utah 351, 191 Pac. 214.....	27
State v. Potello, 40 Utah 56, 119 Pac. 1023.....	11
Utah Foundry and Machine Company v. Utah Gas & Coke, 42 Utah 533, 133 Pac. 1173.....	12
Vickers v. United States, 1 Okla. Cr. 452, 98 Pac. 467.....	28

# In the Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff and Respondent,*

vs.

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

*Defendants and Appellants.*

Case No. 6200

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## Petition and Brief on Rehearing of Appellant, E. B. Erwin

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### APPELLANT E. B. ERWIN'S PETITION FOR REHEARING.

(Original served and filed.)

Comes now E. B. Erwin, defendant and appellant herein, and pursuant to law and the rules of this Court respectfully requests and petitions this Honorable Court to grant a rehearing of and to re-examine the above entitled cause. In support of his petition and for his grounds therefor, appellant respectfully alleges that this Honorable Court erred in its opinion handed down in this cause in the particulars hereinafter set out. Accompany-

ing this petition is a brief of authorities relied upon in support hereof.

### I.

The Court erroneously reached the conclusion:

- (a) That the corpus delecti had been proved.
- (b) That the corpus delecti could be proved by considering as evidence one inference based upon another inference.

### II.

The Court erroneously held:

(a) That a conversation of a certain witness was admissible in evidence to show a claimed admission of appellant when it had not been shown and was not shown that the conversation testified to was heard by appellant.

(b) That appellant admitted guilt because he failed to make a proper answer to a statement made by the witness Runzler that she had heard others say that there was money being paid to protect crime and that appellant and others received such money.

### III.

The Court erroneously held admissible under the res gestae rule certain hearsay evidence which was based upon other hearsay evidence, thus considering as competent and proper evidence testimony of what "A" said "C" said that "D" said.

## IV.

The Court decided that the numerous errors found in the record were not inconsequential and erroneously decided that said errors did not prejudice appellant.

## V.

The Court erroneously decided that errors admittedly prejudicial to appellant and repeatedly indulged in were cured by the admonition of the Court, when as a matter of fact the error committed was only magnified and emphasized by such admonition.

WHEREFORE, appellant prays this Honorable Court to rehear and reconsider the above cause and grant to appellant such relief as on the record he is so abundantly entitled to. And appellant forever prays.

BURTON W. MUSSER,

EDWARD F. RICHARDS,

*Attorneys for E. B. Erwin,  
Appellant and Defendant.*

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APPELLANT E. B. ERWIN'S SUPPLEMENTAL  
PETITION FOR REHEARING

(Original served and filed.)

Comes now appellant E. B. Erwin, and consent of the Court having been first obtained, files this his sup-

plemental petition for rehearing, praying that the above cause be re-examined, and without waiving any of the grounds contained in his petition for rehearing, alleges:

A.

That the Court erred in determining and finding that the indictment herein was sufficient to inform appellant of the nature and the cause of the accusation against him.

B.

That the Court erred in determining that the indictment was sufficient under the constitution and laws of the State of Utah.

WHEREFORE, appellant respectfully prays that this Honorable Court consider the above in determining whether it will re-examine and rehear this cause.

BURTON W. MUSSER,  
EDWARD F. RICHARDS,

*Attorneys for Appellant,  
E. B. Erwin.*

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The record in this case is in many respects very unsatisfactory. It is long, complicated, contains many ambiguities, and no doubt taxed the patience of the writer of the opinion. In many respects the record is unusual. The form of the indictment, the nature of the alleged proof, the character of the witnesses, the disposition of the defendants, and the obvious determinations of the trial judge—all contributed to making a difficult task



more difficult and lead to misunderstandings concerning the facts and the applicable law.

This appeal is in no sense a personal matter between counsel for appellants and the Court. As officers of the Court we urge with all of the persuasiveness at our command that the Court re-examine this cause and grant us an opportunity to re-argue it to the Court so that by the process of meeting face to face and asking and answering questions, we can come more nearly doing justice than has been done. In the following pages we give the Court our best thought and attention to numerous parts of the opinion we think demand attention. However, we hasten to admit that we haven't exhaustively treated the scores of errors found in the opinion. There are upwards of thirty.

## ARGUMENT.

### I.

THE COURT ERRONEOUSLY REACHED THE CONCLUSION:

- (a) THAT THE CORPUS DELECTI HAD BEEN PROVED,
- (b) THAT THE CORPUS DELECTI WAS PROVED BY CONSIDERING AS EVIDENCE ONE INFERENCE BASED UPON ANOTHER INFERENCE.
- (a) THE CORPUS DELECTI WAS NEVER PROVED.

On page five of the opinion the Court says:

In order to support a verdict the state must prove the corpus delecti; that is, that a crime was com-

mitted. In this case it must be shown that there was such an agreement as was alleged in the indictment between some of the defendants and that one of the overt acts alleged has been committed, *and this without the aid of the admissions of the defendants themselves.* (Italics indicate emphasis supplied by the writer unless it otherwise appears.)

The opinion then reviews the evidence of certain witnesses to show that appellant entered into the conspiracy charged and committed the overt acts alleged, and refers to the testimony of the witnesses Holt (page 5), Record (page 6), and Kempner (page 6). After reviewing this testimony the opinion says:

This evidence is sufficient to prove the corpus delicti. While there is no direct testimony of any express agreement on the part of defendants to allow these illegal activities to operate, the only inference that can be drawn from the fact these operators paid the money to Holt and Stubeck under the circumstances detailed, that there was an understanding that they would be allowed to operate their illegal businesses.

The evidence the opinion refers to is not sufficient to prove the corpus delicti. Appellant is presumed to be innocent of this charge until he is proved to be guilty beyond a reasonable doubt. That presumption is never overcome in this record. If the testimony above referred to proves anything, it only proves that appellant was Mayor; that upon his recommendation Mr. Finch was unanimously appointed Chief of Police by the entire City Commission; that houses of vice operated and that they

had operated long before, and long after the alleged agreement; that Holt demanded that certain underworld women pay him money; that the witness Smith said he had *heard* somebody else say that there was a pay-off in Salt Lake City and that the Mayor and the Chief of Police were participating in it; that Record said that Pearce said that the Mayor had instructed him (Record) to make collections from gambling houses; and that Kempner said that he went with Abe Stubeck from one licensed card room to another licensed card room where collections were made, and that Stubeck told Kempner that he took the money over to Ben Harmon, who divided it up with Erwin and his crowd. The decision then contains the following paragraph which is not attributed to any particular witness:

About the middle of January, 1938, Harmon telephoned Holt and asked him to pick him up, which he did, and while driving around Harmon said, 'For *God's* sake (*italics Court's*), don't make any more collections; Harris and Lee got hold of Pierce and accused him of being in the pay-off. Don't take anything from anyone any more, as things might blow over.'

After reviewing the above evidence the opinion contains this wholly unjustified statement:

This evidence is sufficient to prove the corpus delicti.

What is the body of the crime? It is the agreement. There is no evidence in the record the Court reviewed,

or elsewhere for that matter, that appellant ever entered into the agreement charged. The only part of the evidence referred to that connects appellant with any phase of any offense is the testimony that Record said that Pearce said that the Mayor said something about making a collection; and the testimony that Holt said that Smith said that Smith had heard that the Mayor and the Chief had been in on a pay-off. Now that isn't independent evidence to prove the fact that appellant entered into the agreement. The only possible probative force it can have is to torture it into being an admission on the part of appellant that appellant had entered into the agreement. It even isn't an admission. But the opinion seems to construe it as being such. This evidence should not be considered by the Court until the corpus delicti had been proved. *It cannot be considered by the Court as being proof of the corpus delicti. It is, after all, only an admission.* This testimony should be entirely disregarded until the corpus delicti had been proved.

(b) THE CORPUS DELECTI CANNOT BE PROVED BY CONSIDERING AS EVIDENCE ONE INFERENCE WHICH IS BASED UPON ANOTHER INFERENCE.

The Court seemed to have abandoned the idea that the testimony referred to constituted admissions. The opinion states:

While there is no direct testimony of any express agreement on the part of the defendants to allow

these illegal activities to operate, the only *inference* that can be drawn from the fact that these operators paid the money to Holt and Stubeck under the circumstances is that there was an understanding that they would be allowed to operate their illegal business.

The record is plain that these houses of vice operated long before and long after the alleged conspiracy. From the testimony that money was paid to Holt the Court draws the *inference*, (1) that the operators of the houses of vice were allowed to operate. Now, upon that inference the opinion draws the *further inference*, (2) that houses of vice were allowed to operate by reason of the agreement alleged. As yet there is no proof of the agreement, so the opinion infers one thing and from that inference infers another thing, and after indulging in the second inference concludes that an agreement had been proved.

There is no proof in the record that when the money was paid to Holt he told the operators of the houses of vice that by reason of making the payments they could operate. There is no proof to show that the houses of vice operated pursuant to any alleged agreement. But after going through all this, the opinion draws another inference. It says:

The operators of gambling houses and houses of prostitution do not pay police officers money for nothing.

Upon that inference the opinion draws the further inference that the operators would be protected in their

operations, and upon that inference the opinion draws the further inference that the inferred protection came about by reason of the conspiracy alleged.

The opinion further states:

The evidence shows that about five hundred dollars was collected each month for a period of six months at one time and eight months the last time.

From this the opinion draws the inference that such payments do not show a shakedown by an individual officer. And upon that inference draws the further inference that there must have been an understanding of those higher up. And having drawn those two wholly unwarranted inferences, the opinion concludes that the corpus delicti had been amply proved. The opinion states immediately following the foregoing recitations:

Thus, the corpus delicti is amply proved.

As a matter of fact, proof of the corpus delicti does not follow. It cannot be said to follow without giving full weight to inferences based upon other inferences, and without asserting that the corpus delicti can be proved solely by the alleged admissions of the parties concerned.

The inferences drawn by the court we respectfully contend are not justified by the facts upon which they are based. The law is well settled that one conclusion or inference cannot be based upon another conclusion or



inference: *State v. Potello*, 40 Utah 56, 119 Pac. 1023. In this case the defendant was charged with having stolen a horse. There was evidence to show that the defendant had possession of the horse, but there was no evidence to show whether the horse had wandered from the range or been driven therefrom. In speaking upon the question of presumptions and inferences the court stated:

*It is a familiar rule that one presumption or inference cannot rest upon another mere inference or presumption. It can only rest on proven facts. In accordance with that rule, the inference or presumption referred to in the statute is also based, not on mere inference, but on declared or proven facts. Let it be assumed that the evidence sufficiently shows that the defendant's explanation of his possession was not satisfactory. Do the proved facts on the part of the state also prove the larceny? We think not. \* \* \* All it showed was that the horse got out, strayed away, and four or five months thereafter was found in the possession of the accused, who said he bought him from an Indian, and who refused to give him up. Of course, the state seeks to draw the inference that the horse strayed to the range some six or eight miles from the defendant's place, and that some one there took and drove him away; and, since the horse was found in the defendant's possession, the further inference is sought that the defendant took and drove, or aided another to take and drive, the horse from the range. But this is merely resting an inference or a presumption upon an inference or a presumption.*

In the instant case the state proved that the operators of houses of vice paid money to Holt. No further facts were proved in either case, and in both cases the court had endeavored to base the remaining elements of the crime by drawing inferences from the one fact proved. From that fact the opinion starts into motion a series of inferences which result in an unwarranted ipse dixit of the writer of the opinion. The opinion cannot arrive at the conclusion it did arrive at without wholly relying on inferences.

The question of inferences is again fully discussed by this court in the case of *State v. Judd*, 74 Utah 398, 279 Pac. 953. See also *Utah Foundry and Machine Company v. Utah Gas and Coke*, 42 Utah 533, 133 Pac. 1173; *Busse v. Murray Meat and Livestock Company*, 45 Utah 596, 147 Pac. 626; *Karren v. Bair*, 63 Utah 344, 225 Pac. 1049, 95 A. L. R. 162.

In *New York Life Insurance Company v. McNeely*, (Ariz.) 79 Pac. (2d) 948, the Supreme Court of Arizona discusses this principle as applicable to a civil case. It also considers the statement of Dean Wigmore on this rule. The Arizona case has a third of a column filled with authorities from many, if not all, jurisdictions in the United States, holding that "one inference cannot rest upon another inference." At page 904 of the above report the Court says:

The courts, however, have always insisted that the life, liberty and property of a citizen should not



be taken away on possibilities, conjectures, or even, generally speaking, on bare probability.

Again :

This rule is not based on an application of the exact rules of logic, but upon the pragmatic principle that a certain quantum of proof is arbitrarily required when the courts are asked to take away life, liberty, or property.

So the evidence here complained of is not admissible and is not competent. To hold otherwise you must overrule *State v. Potello*; *State v. Judd*; *Utah Foundry and Machine Company v. Utah Gas and Coke*; *Busse v. Murray Meat and Livestock Company*; and *Karren v. Blair*, supra. In his third edition on evidence, paragraph 41, Wigmore refers to the *McNeely* case, supra, and approves the rule laid down by that court.

The old rule in 1 Wigmore on Evidence, paragraph 41, is based on a perfectly silly argument. For instance the author says :

For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that he discharged it; and from this we infer that it was his bullet which struck and killed the deceased.

Again :

Or, the defendant is shown to have been sharpening the knife; from this we have the design that he intended to use it; and from this we argue that the fatal stab was the result of this design.

The above statements are merely the unfounded and unsupported statements of the author. If they are true then everyone owning a gun and everyone found sharpening a knife is liable to be convicted where a shot is fired or a person is stabbed.

## II.

THE COURT ERRONEOUSLY HELD: (a) THAT A CONVERSATION OF A CERTAIN WITNESS WAS ADMISSIBLE IN EVIDENCE TO SHOW A CLAIMED ADMISSION OF APPELLANT WHEN IT HAD NOT BEEN SHOWN AND WAS NOT SHOWN THAT THE CONVERSATION TESTIFIED TO WAS HEARD BY APPELLANT. (b) THAT APPELLANT ADMITTED GUILT BECAUSE HE FAILED TO MAKE A PROPER ANSWER TO A STATEMENT MADE BY THE WITNESS RUNZLER THAT SHE HAD HEARD OTHERS SAY THAT THERE WAS MONEY BEING PAID TO PROTECT CRIME AND THAT APPELLANT AND OTHERS RECEIVED SUCH MONEY.

(a) The silence of appellant at the conversation testified to by the witness Harris was not an admission and should not have been received by the court on the theory that it constituted an admission on the part of the appellant.

Mr. Harris testified that on a certain date a group of men were invited to a luncheon at the Alta Club. That amongst those persons were certain newspaper men, Mr. Finch and Mr. Erwin. That after the luncheon had been

concluded, Mr. Harris entered the room and participated in certain conversations. The record shows that the table around which they sat was about as large as one of council tables in the courtroom and that Mr. Erwin sat at one end of the table and Mr. Finch, the host, at the other end thereof and that Mr. Harris sat by Mr. Fish.

It was at this conversation that Mr. Harris made certain statements, which for the lack of a proper answer the opinion holds constituted an admission on the part of appellant.

On cross examination the witness was asked if as a matter of fact he didn't write the figures that were involved on a piece of paper and then show it to Mr. Fish, and the witness frankly stated that he might have done that.

There is no evidence in the record that appellant heard the alleged accusation. Mr. Finch denied that he heard it.

With respect to this alleged admission, the opinion states:

The circumstances described would make it almost impossible for them not to hear what was said. It is true that on cross examination Harris said that he probably wrote the figures 750 and 500 on a piece of paper and showed them to Mr. Fish sitting next to him, but this does not contradict his original testimony, *nor in any way indicate that the defendant might not have heard the accusation.*

The purpose of the testimony was to show that because appellant didn't vociferously deny what Mr. Harris said he thereby impliedly admitted the truth of what Mr. Harris said. But this sort of evidence is not admissible on the theory that it constitutes an admission until it clearly appears that appellant did hear it. It is a significant thing that the happening occurred at a social engagement; that appellant was further away from the speaker than any other person in the room; that the witness said that he might have shown the figures to Mr. Fish. If you give appellant the benefit of his presumption of innocence, why not conclude that he did not hear it. Why *assume* that he heard it.

After all, it is claimed that a certain accusation was made in the presence of appellant; that he did not deny it; that he thereby admitted the truthfulness of it; and that thereby he admitted that he had entered into a conspiracy as alleged in the indictment. Whereas, not knowing that appellant did hear the conversation and knowing that Mr. Finch testified that he did not hear the conversation (although Mr. Finch sat much closer to the speaker than did appellant) why conclude that appellant heard the conversation and then set in motion a chain of inferences with which to destroy appellant.

In *Bloomer v. State*, 75 Arkansas 297, the lower court was held to have committed error by admitting in evidence a statement of a witness made in the presence of the defendant who at the time was staggering around the room intoxicated. This was error because the Su-

preme Court held it was not shown that the defendant heard the remarks.

Because of appellant's asserted silence with respect to the statement it is not shown that he heard, the opinion attributes the truth of such a statement to appellant. Why not assume that appellant did not hear it because if he did hear it he would have said something about it.

There is no testimony that appellant looked abashed, hung his head, or "flushed" or that he stammered, or anything else. The testimony is that after the luncheon party broke up all walked out of the room together as if nothing had occurred.

(b) Appellant did not admit his guilt because he failed to make a proper answer to the statement made by the witness Runzler.

On page 15 of the opinion, it is stated:

The conversation testified to by Mrs. Runzler, with Mr. Erwin, comes squarely within this rule. *When the accusation was made he flushed considerably, and said: 'Oh, I am accused of that too, am I?'; and immediately changed the subject.* It is a well-recognized fact that when a person holding the position which Mr. Erwin held at that time, as Mayor of a large city, is accused by one of his constituents, as testified by Mrs. Runzler, and he is not guilty of that accusation, he will usually be very positive in his denials of guilt. Instead of that, here he passed the matter off very lightly and made no denial of the accusation. This evidence was therefore clearly admissible.

*Mrs. Runzler made no accusation. Mrs. VanCott, the other person in the room, made no accusation.* The truth is that Mrs. Runzler testified that at the time of the conference Mrs. VanCott said that she (Mrs. VanCott) had heard it rumored that there was a pay-off and that the mayor and the chief of police and others were taking part of the money.

Was it the appellant's duty to deny that Mrs. VanCott had heard the rumor? I had heard it and I have heard it with respect to every mayor we have ever had and the rumors are all false. The mayor couldn't say to her: "That is a lie,—you didn't hear it." And if he didn't say that it doesn't constitute an admission that houses of vice were being operated because they were paying money to the police officer for protection because of a conspiracy entered into by appellant.

The above statement in the opinion is not fair. It isn't fair to appellant, nor to the writer of the opinion, nor to counsel, nor to court. It just isn't crickett.

Appellant was not accused of any crime. What if Mrs. VanCott said what she is alleged to have said,—said it as if she herself did not believe it. What if she said it smilingly, lightly, or trippingly? Must her hearer fail to "flush", refuse to smoke, and not change the subject? I am sure that if the same statement were made by the same person to each member of this court separately that each member would react differently.

Why abandon the presumption of innocence to conclude that because appellant did not make the answer that the writer of the opinion thought he should make, he thereby admitted that he was receiving a pay-off of \$750, which proved that houses of vice operated pursuant to an agreement to permit them to operate?

The opinion takes judicial notice of how a person might react and should react under certain circumstances. The writer of the opinion is not justified in reaching the conclusion that from what occurred at the time of the conference of Runzler and VanCott with appellant, there emerged an admission that appellant had entered into an agreement to permit houses of vice to operate in Salt Lake City. We cited numerous cases in our original briefs utterly destroying this sort of evidence.

### III.

THE COURT ERRONEOUSLY HELD ADMISSIBLE UNDER THE RES GESTAE RULE CERTAIN HEARSAY EVIDENCE WHICH WAS BASED UPON OTHER HEARSAY EVIDENCE, THUS CONSIDERING AS COMPETENT AND PROPER EVIDENCE TESTIMONY OF WHAT "A" SAID "C" SAID THAT "D" SAID.

The opinion gives full weight to evidence that is clearly hearsay. The testimony of witnesses Record, Holt, and Kempner are fair examples as to the length to which the opinion has gone in respect to this matter. We will not iterate all of the many statements in the opinion



which are based on hearsay evidence, but will call attention to a few of them.

The witness Record:

Mr. Record testified that Pearce told him that he, Pearce, was responsible for Record's being placed at the head of the vice squad; "that the Mayor had instructed him (Pearce) to make collections from gambling houses and other forms of vice; \* \* \*" (Opinion, page 6). Record further testified that he was in Mr. Pearce's office and Mr. Pearce said, "that the Mayor had requested him, Pearce, to make collections" (Opinion, page 9).

The opinion states that "the testimony of Record clearly indicates that there was an understanding between Pearce and his associates to allow the violation of law for money." Who "his associates" refers to is not disclosed. "To allow the violation of law for money" is not explained.

The opinion states:

Harmon said to him that Pearce had accused him, Holt, of holding out.

Again,

The testimony by Holt that Harmon said that Harris had accused Pearce of being in the pay-off \* \* \*. (Opinion, page 18).

We are not complaining as to what Pearce said to Record or what Harmon said to Holt, but we do object to



having Record testify as to what Pearce told him the Mayor said, and we object to Holt testifying as to what Harmon told him Pearce said, and we object to Holt testifying as to what Harmon said Harris accused Pearce of. To the writer of the opinion all of the foregoing evidence was admissible to show that Harmon was connected with the conspiracy, "and therefore this testimony was admissible."

The court then discusses what Kempner said Stubeck told him, (page 19). Kempner testified that Stubeck said to him:

All the card games have to pay, but some of them try to welsh on it. I take the money to Harmon, who divides it with Erwin and his crowd.

The opinion states that under the ordinary rules those statements of Kempner *were not admissible*. They were, however, admitted. They are very prejudicial. The opinion thereupon cites certain cases which the writer claims support the doctrine that such evidence is admissible because the statements are a part of the *res gestae* (page 19). However the opinion is not satisfied with those authorities. On the same page of the opinion the writer gives his reasons why such *statements were not admissible* but hastens to explain that they were admissible in the discretion of the trial court, and then states:

In this case the Court did not violate its discretion in receiving this evidence.

*The cases referred to in the opinion do not hold that such evidence is admissible.*

In *State v. Haynes*, (Oregon) 253 Pac. 7, the question before the Court was the admissibility in evidence of a bucket of mash and a barrel still, and not a hearsay statement. In *Delaney v. United States*, 283 U. S. 586, 68 L. Ed. 462, 44 Sup. Ct. 206, the Court said that a conspirator could testify as to what a co-conspirator stated with respect to the conspiracy, but that case did not hold that a person who is not a conspirator, Kempner, could testify that Stubeck told him, Kempner, that he, Stubeck, collected money from the card games and took it over to Harmon, and Harmon divided it with Erwin and his crowd. You will not find any case anywhere decided by any court that that sort of testimony is admissible. If this opinion is finally adopted this will be the only opinion in existence that upholds such a strange doctrine. The writer of the opinion constantly confuses the language of witnesses and the language of the decisions. The cases do not hold that "A" may testify that "B" told "A" that "C" told "B" something. That is exactly what this opinion holds.

In *Booth v. Nelson*, 61 Utah 239, 211 Pac. 985, this Court held that in order to come within the *res gestae* rule the statement had to be spontaneous, instinctive, and connected with the main or principal event or transaction and result from the immediate and present influences of the main event and be contemporaneous with it. If the Court wants to overrule the Nelson case it

should do so with greater regard to the seriousness of such a step than is evinced in the opinion under consideration.

An oral admission of a party can be shown *only* by the testimony of a person who heard it; a witness who did not hear the admission cannot testify as to what a person who did hear it told him about it. (22 Corpus Juris 206.)

Justice Wolfe agrees with us that it was error to admit the above referred to Kempner testimony, but unfortunately concludes that although it was error it was not prejudicial error.

If you take out of the record what the witness Record said Pearce said the mayor said; and if you take out of the record what Record said that Pearce said that the mayor requested Pearce to do; and then if you eliminate from the record what Holt said Harmon said Pearce said and what Holt said Harmon said that Finch said, and then eliminate from the record what Kempner said Stubeck said Harmon said, then the only proof you have of the corpus delicti so far as this appellant is concerned are the so-called admissions.

The conduct of appellant at the instance testified to by Mrs. Runzler is not an admission. What the opinion states Fisher Harris said is not shown to have been heard by appellant and nothing in the record that Hunsaker testified to constitutes an admission that establishes the guilt of appellant. If they are admissions they can not be used to prove the corpus delicti.

If the court cared to, it could write a much stronger, a much more logical, and a much more persuasive opinion reversing the case as to appellant than it has written affirming the case. If the court is looking for matters that prejudice appellant and matters that support the presumption of innocence they are easily found because the record is full of them.

#### IV.

THE COURT DECIDED THAT THE NUMEROUS ERRORS FOUND IN THE RECORD WERE NOT INCONSEQUENTIAL AND ERRONEOUSLY DECIDED THAT SAID ERRORS DID NOT PREJUDICE APPELLANT.

The errors referred to were prejudicial.

In *State v. Jensen*, 75 Utah 299, 279 Pac. 506, this Court held that it would be presumed that error of the kind under discussion was prejudicial. It stated:

We also are of the opinion that the admission of such objectionable testimony was prejudicial. The natural tendency of it was to do harm. From such kind of error prejudice will be presumed, until by the record it is affirmatively shown the error was not or could not have been of harmful effect. *Jensen v. Utah R. Co.*, (Utah) 270 Pac. 349. From the record it cannot be told that the objectionable testimony did not influence the jury in the rendition of the verdict. \* \* \*

See also the case of *Parlton v. United States*, 75 Fed. (2d) 772, which held as follows:

Nor can it be properly contended, as was suggested in the original brief of the government, that the error was harmless. The generally applied rule is that when error appears in the record it is presumed to be injurious unless it appears *beyond any doubt* that it did not and could not prejudice the rights of the parties. \* \* \* (Italics ours).

The record is saturated with error. Error was repeatedly committed. It was purposely committed. Error was committed without any regard to the rights of the defendants. Errors were shamefully committed and continuously committed. In referring to the opening statement of the District Attorney the opinion states:

It covers 73 pages of the transcript and in it the District Attorney attempted to recite verbatim practically all of the many conversations which he intended to prove. *A number of these conversations were obviously hearsay, and were not admitted in evidence. In several of these instances the court instructed the jury to disregard the District Attorney's statement of them.* In other conversations the recital in the opening statement was more favorable to the state than when later testified to by the witnesses. There were many objections interposed, and the court repeatedly admonished the jury that the statements of the District Attorney should not be considered by them as evidence, and a number of times asked the District Attorney to make his statements more general and to omit hearsay evidence. For a short time after these admonitions *the District Attorney followed them, but soon dropped back into his old habit.*

So regardless of the instructions of the Court, the State's Attorney was determined to bias and prejudice the jury and to win the verdict at all costs.

It cannot be said that such conduct did not influence the jury prejudicially. Again the opinion states:

The District Attorney went way beyond what was proper.

The error is cumulated. It is much more grave in this case than it was in the Vasquez case recently decided by this Court.

## V.

THE COURT ERRONEOUSLY DECIDED THAT ERRORS ADMITTEDLY PREJUDICIAL TO APPELLANT AND REPEATEDLY INDULGED IN WERE CURED BY THE ADMONITION OF THE COURT, WHEN AS A MATTER OF FACT THE ERROR COMMITTED WAS ONLY MAGNIFIED AND EMPHASIZED BY SUCH ADMONITION.

The numerous errors committed in the introduction of evidence coupled with the persistent improper statements made by State's Counsel to the jury constitute reversible error. This error is not cured even though the trial court does sustain objections to it, and even though the trial court undertakes to strike such evidence and such improper statements from the record. An occasional inadvertent error of the prosecutor may be cured by the trial court by admonishing the jury not to consider it, and an occasional improper question may



also be thus cured. But where the objectionable questions are repeatedly asked and repeatedly ruled on, and where the objectionable statements are repeatedly made and repeatedly ruled on, the error thus committed is not and cannot be cured by the usual admonition of the Court.

This Court in *State v. Martinez*, 56 Utah 351, 191 Pac. 214, severely criticized the prosecuting attorney and reversed the case for an error much less grave than the admitted errors committed in this case. With withering language it denounces the persistent misconduct of State's Counsel. It calls attention to the fact that the District Attorney stands before the jury representing the majesty of the law; that he has the implicit confidence of the jury, which usually is well deserved; and that under such circumstances when the prosecutor makes statements of the kind under discussion it is bound to prejudice the defendant. The language of this Court in that case on this subject is as follows:

*The district attorney stood before the jury representing the majesty of the law, and no doubt had the implicit confidence of the jury, which was well deserved. The case at best was exceedingly close, and the evidence complicated and difficult to digest. In these circumstances the defendant was at a decided disadvantage. When the district attorney said that the defendant had admitted the shooting, and reiterated the statement in the presence of the jury, they must have thought that by some implication of law an admission by defendant had actually been made. In view of the circumstances, we think the statement was prejudicial error. (Italics ours).*

It was the duty of State's Counsel to act impartially and in the interest only of justice. He should not become a heated partisan. It isn't his duty to seek to procure a conviction at all hazards. When he does that he ceases to properly represent the public interest. The State demands no conviction. It should seek no conviction through the aid of passion, sympathy, or resentment.

*Vickers v. United States*, 1 Okla. Cr. 452, 98 Pac. 467:

A public prosecutor is presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner, and appeals to prejudice, seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and seeks no conviction through the aid of passion, sympathy, or resentment. The only way to secure fair trials is to set aside the verdict so procured.

In a civil suit where damages for personal injuries are sought, almost the mere mention of the fact that defendant is insured by an insurance company constitutes reversible error, and all that is at stake is a few dollars. But here, life and liberty are at stake,—reputations, money, everything is at stake. If it is prejudicial error in a civil action to prejudice a jury against defendant by improper conduct of counsel for the plaintiff, certainly in a criminal action like conduct on the part of the State's counsel is prejudicial error. In 56 A. L. R., page 1492, there is an annotation on this



subject as it affects civil suits. The annotation is brought down to a very much later date. The annotator's language in this annotation is so apt that we take the liberty of quoting part of it:

Many courts have taken the position that the prejudicial effect of an attempt to inject improperly into the trial of a negligence case, by evidence, statements, or arguments, matters from which the jury might infer that the defendant was insured against liability, cannot be cured by its exclusion and by instruction to the jury to disregard it. Their position is that evidence that the defendant in an action for negligence is insured in a casualty company, or that the defense is being conducted by such company, is not only incompetent, but so dangerous and prejudicial *as to require a reversal even when the court strikes it from the record and directs the jury to disregard it.* \* \* \* The theory is that the very fact that objections are interposed to such questions may be, and probably is, more prejudicial to the defendant than otherwise, for by objection the matter is particularly called to the attention of the jury; and, on the other hand, a party should not be deprived of his privilege to urge a valid objection because a greater prejudice might follow; he should not be subjected to a possible penalty for insisting upon a proper regard for his right, but rather the penalty, if penalty there be, should be visited upon the real party in fault, even in the absence of an affirmative answer.

State's counsel should not be permitted to resort to the practice of violating the law of evidence, trusting that the error will be cured by the usual impotent instruction to the jury to disregard it. In this case the statements of State's counsel were unwarranted and illegiti-

mate and to disregard them would not only make a trial a useless sham, but it would convert it into a judicial farce. The error of improperly getting to the jury by statement, arguments, or testimony is prejudicial. It is presumed to be prejudicial. One can hardly say that State's attorney was not persistent and did not intend to win at all costs. This court points out that several times the trial court instructed the jury to disregard the District Attorney's statement and asked the District Attorney to make his statements more general and to omit hearsay. The opinion states:

The District Attorney followed them, but soon dropped back into his old habit of placing before the jury improper statements.

### SUPPLEMENTAL PETITION FOR REHEARING.

With the consent of the Court, appellant has filed a supplemental petition for a rehearing, alleging that the Court erred in finding the indictment sufficient. This is the first intimation we have had that without being supported by a Bill of Particulars the indictment was sufficient. The opinion states on the bottom of page 2 that the question of whether or not an indictment can be cured by a Bill of Particulars is not before the Court because "this indictment is sufficient without the Bill of Particulars." An information containing the meagre allegations that this indictment contained was held to be insufficient in *State v. Lund*, 75 Utah 559, 286 Pac. 960. And this indictment is not sufficient if tested by the other

cases cited in appellant's brief commencing at the bottom of page 14.

The indictment has been skelatinized in appellant's original brief. The particulars in which the indictment is insufficient are set out in the brief and are so obvious that a further discussion of them would not be profitable. I do not think the writer of the opinion can fairly say that those particulars are not sufficiently pointed out. (Opinion, page 2) It was because the indictment was insufficient that the Court required the state to particularize. (Appellant's brief, page 13.—Laws of Utah, 1935, Section 105-21-9). See *State of Utah vs. Sid K. Spencer*, opinion on Petition for rehearing No. 6223.

### CONCLUSION.

There are upwards of thirty distinct instances in the opinion where either misstatements of the evidence or of the applicable law occur, or where the evidence is so obviously misinterpreted and given effect as interpreted, as to be entirely misleading. We have not sought to set out each of these instances, but in the brief of appellants Finch and Pearce and in this brief they will sufficiently appear to demonstrate the necessity, or if not the absolute necessity the very great desirability, of granting a rehearing in this cause. We believe that we can clearly demonstrate to the Court on re-argument where we can meet the judges face to face that many grave injustices will be done if this opinion is allowed to stand in its present form. We also are firmly of the

belief that we can convince the Court that by the decisions of this Court and the law of this State appellants are entitled to a reversal. Because of the seriousness of the charges and the way it inevitably affects appellants, we very earnestly request that we be given an opportunity to again argue this matter to this Court.

Respectfully submitted,

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