

1949

# State of Utah v. Robert S. Harries : Brief of Appellant

Utah Supreme Court

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Arthur Woolley; Attorney for Defendant and Appellant;

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IN THE  
**SUPREME COURT**  
OF THE  
**State of Utah**

STATE OF UTAH

VS.

ROBERT S. HARRIES,  
Defendant and Appellant.

No. 7273

**APPELLANT'S BRIEF**

**FILED**

15 1949

**ARTHUR WOOLLEY**  
Attorney for Defendant and Appellant

CLERK, SUPREME COURT, UTAH

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IN THE  
SUPREME COURT  
OF THE  
State of Utah

STATE OF UTAH

vs.

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Defendant and Apellant.

No. 7273

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STATEMENT OF FACTS

A Grand Jury of Salt Lake County, Utah, on June 26, 1948, returned an indictment against the defendant, Robert S. Harries, charging bribery as follows, to-wit:

“That the said Robert S. Harries, on or about the 1st day of December, 1946, at the County of Salt Lake, State of Utah, he being then and there an executive officer and a person appointed to an executive office, to-wit: The Chief of the Enforcement Division of the Utah Liquor Control Commission, received a bribe, to-wit: Money, from Cyrus Lack upon an agreement or understanding that his action upon a matter which might be brought before him in his official capacity would be influenced thereby, to-wit: Upon an agreement and understanding that he, the said Robert S. Harries, would permit and allow

Robert Ossana to maintain a building and rooms where alcoholic beverages were to be sold, kept, bartered and stored in violation of the Liquor Control Act, and where persons would resort for the drinking of alcoholic beverages; \*\*\*\*\*”

The defendant entered his plea of ‘not guilty.’ (Tr. 6)

The case came on for trial before the Hon. Ray Van Cott, Jr., one of the judges of the District Court of Salt Lake County, with a jury, on September 13, 1948.

At the time set and before trial commenced, the defendant, by his attorney, made and presented to the court his motion, reading as follows:

“1. For an order of this court to the clerk of this court for leave to defendant, by his attorney herein, to inspect and make copy of the stenographic transcript of the testimony of the witnesses appearing before the Grand Jury and whose names appear on the indictment herein.

2. That the trial of this cause be continued and postponed until after such inspection and examination by defendant’s attorney, and until time sufficient for defendant’s said attorney to properly prepare for the defendant’s defense herein.

3. That the trial of this cause be continued and postponed until after the general election next ensuing.”

The motion was supported by affidavit. (Tr. 13).

The motion was denied. (Tr. 66).

The jury having been selected and sworn, the District Attorney made a lengthy opening statement. (Tr. 66-98).

The case grew out of the doings of one Cyrus V.

Lack, and the mixture of liquor under the state monopoly system of disposal and the ideology of prohibition in matters of enforcement, and the machinations of politics.

The person of Cyrus V. Lack and the strange regime he manipulated at the Brigham Street Pharmacy, would call for the talents of a Dickens for portrayal. Appointed to a package agency of the Utah Liquor Control Commission on Brigham Street, in alignment with temples, tabernacles, cathedrals, governors' mansions and places of the great, this gnome, whose philogomy, as reflected in the tabloid reproductions of the persons of the trial, carried a striking reminder of the face of a porcupine encountered in the woods, and his tireless and constant nosing-in and doing-for suggested the appellation of a busy beaver. That such a one could, even under the vapors of liquor and in the smokerooms of politics, have entangled himself in the affairs of so many decent people, and gained credence to his pretensions, as sworn to by him at this trial, is beyond imagination.

The business of selling liquor at his agency soon grew from the bottle at a time tempo to truck load lots, and from purveying to the elite neighborhood to a statewide distribution. The trial did not tip the lid of all this very wide.

The Grand Jury which returned this indictment against Harries came into being from the explosions which were caused by the announcement one morning that the Brigham Street Pharmacy had been burglarized of three hundred cases of liquor. Lack was charged with embezzlement by complaint. The Grand Jury indicted him on the same charge and the prosecution was taken over. He was not indicted and has not been charged with any of the other crimes which he revealed in his testimony in this trial. He had not come to trial

on the indictment of embezzlement and he was not indicted in the conspiracy charge which was returned against Harries and Leonard.

The theory of the state's case on this trial was made through twenty witnesses. It was clearly revealed by the opening statement of the District Attorney that the scheme of the state was to present a mass of transactions between Lack and various clubs whose members seemingly enjoyed the conviviality of the select in the cocktail lounge or at the bar.

The first direct examination of the witness Lack covers seventy pages of transcript. (Tr. 121-191.) He was introduced to the defendant by a Mr. McGean. Everyone at the trial, except counsel for the defendant seemed to know what that signified, as he was not further identified. And shortly after this meeting in the early part of 1946, Mr. Harries budded a candidacy for sheriff of Salt Lake County, and Mr. Lack and Mr. McGean and some others of the capitol crowd seemed to take an interest in the matter, and some get-togethers were had, and some political money raised, and a primary campaign was conducted. The candidate did not receive the nomination, but there were some money transactions growing out of these political doings between Lack and Harries, and after the primary was over they went up to West Yellowstone and played the games and lost, and Harries borrowed some money from Lack to keep up his end.

During this time liquor was rationed, but seemingly not to Lack and his customers. He had a scheme. It is inconceivable that it was his own. He could not have carried it out without the knowledge and acquiescence of the Liquor Control Commission and its distributing department, and without them knowing about it. He apparently let it be known that if these clubs would come to him, he would sell them liquor in wholesale



lots at the retail price prescribed by the Liquor CoCn-trol Commission and would take a premium to himself. He engaged in a good deal of double talk in discussing it with these people who came to him, but the testimony does reflect that with some of them he pretended to sell protection from prosecution, except an occasional mild knockover, and he pretended to sell Harries in this scheme.

He testified that this was an arranged matter between him and the defendant.

At the close of the State's case in chief the trial was continued over the weekend. On reconvening the attorney for the defendant made his opening statement to the jury, and said:

“Since we adjourned on last Friday afternoon we have had an opportunity to relax, each one to return to his place of residence and to get a breath of fresh air. I did also. I went up into my canyon retreat in the canyon and to my little farm. I walked across it and then walked over into the corner where there is a large pile of barnyard refuse, and I looked at it, and I thought what a task to shovel it all away and scatter it on the ground.

“The defendant in this case, and I as his counsel, have one task and that is to shovel away the pile of barnyard refuse that has been heaped upon him, and his testimony and that of his witnesses will be directed to that purpose and that purpose only, and to reveal at the bottom of that pile a human soul at the core of which is integrity, honesty and truthfulness, and who is not guilty of taking a bribe, and I shall in throwing that refuse off try not to let it fall upon anyone except that one who piled it upon us, Cy Lack.” (Tr. 616-617.)

It is repeated here as a concise summary and characterization of the State's case and that which was



made by the testimony of the defendant and his witnesses.

In the course of his opening statement, (Tr. 75), the District Attorney mentioned a Mr. Stan Kershaw, who was a trustee of the Elks' Club at Ogden, and who, according to the District Attorney, learned of Mr. Lack's activities and so came down to Salt Lake City to make arrangements with him for the purpose of obtaining liquor. At that point counsel for the defendant asked the District Attorney if he intended to call Mr. Kershaw, and the District Attorney stated, "No, he is dead," and that the evidence he had stated would come through a conversation Kershaw had had with Lack, and counsel for the defendant remarked that this would be incompetent on its face, to which the District Attorney replied, "Not at all. The theory of this case, Your Honor, is that Mr. Lack and Mr. Harries were conspirators and the acts and declarations of each in furtherance of the conspiracy is admissible." (Tr. 75.)

The District Attorney then further informed the court that a great deal of the evidence would be these conversations of Lack with diverse other persons, and with respect of transactions not stated or charged in the indictment, and counsel for the defendant asked the court to limit the District Attorney in his opening statement and objected to the statement of intention to prove manifestly incompetent matters, which the court overruled, (Tr. 77-78), and the District Attorney proceeded to outline in great detail the course his proof would take and which would follow the promise suggested that he would try the case as though it were a conspiracy case, and the court, throughout the trial, permitted this course of testimony.

Among the witnesses called by the State were Lee A. Williams, of Price, Utah, who operated a so-called Country Club thereat, and his testimony wholly related

to transactions had between him and Cyrus V. Lack and the purchase by Williams of liquor from Lack from the Brigham Street Pharmacy. The witness did not testify to any transaction or conversation whatsoever with the defendant Harries.

Parker L. Campbell of Salt Lake City, was secretary of the Elks' Lodge there. He was called and gave testimony concerning conversations between him and Lack out of the presence of Harries, and transactions concerning the purchase of liquor by the Elks' Club from Lack. He had known Mr. Harries by sight, but did not meet him personally until sometime in July of 1947, about eight months after the time charged in the indictment; and since that Mr. Campbell made a deal with Mr. Lack, after rationing went off, to continue to pay Mr. Lack \$100.00 per month for protection money for the Elks' Club. This price was continued, according to Campbell, for about four months, and Campbell took the money in an envelope to the pharmacy run by Lack and gave it to him, or left it with his clerk or attendant thereat. On the occasion of his meeting Mr. Harries in July, 1947, Mr. Harries jumped down his neck for the way he was operating the Elks' Club, and the Elks' Club was knocked over in October or November of 1947, and Harries jumped down his neck again for the way that they were running the place. He then met Harries again at the Brigham Street pharmacy on a Sunday morning. Mr. Lack and Henry McGean and several others were there, and Mr. Lawrence Johnson of the Liquor Commission came in. Mr. Lack there said Mr. Harries had double-crossed him and called Mr. Harries a number of names, and that the lid had been blown off. (Tr. 533-534.) And on cross examination Mr. Campbell testified (Tr. 538), that he went to Harries and told him he had found out he had double-crossed the Elks' Lodge, and Mr. Harries then and there told him he had had anything to do with it, and he was very

indignant about the charge laid against him by Mr. Campbell; and that Mr. Harries told him “when he found out Campbell had been paying protection money to Lack that he had had the Elks’ Club knocked over and Campbell was squealing about it, and Campbell was angry about it”; and Harries reminded him that the Liquor Commission had authorized the locker system at the Club and that the Club, through Campbell, had been fudging and thought they were buying protection, and Campbell gave this testimony: Q: “And then you thought you could get a little extra protection when this man Lack fooled you completely by this talk and fell for it?” A: “That is right.” (Tr. 539.)

Arnold L. Huber of Salt Lake City, a witness for the State, who is manager of the Fort Douglas Golf Club, was permitted to tell about buying whiskey from Lack and conversations had with Lack about it, and this was in May, 1946; and asked about the prices he said he couldn’t tell you. He wasn’t interested particularly; it was just the item of getting the liquor; and he produced a number of checks, Exhibits “O,” “K” “J” and “I,” which he said were purchases of liquor from Lack. (Tr. 543-547.) In his direct examination the name of Harries was not mentioned.

Carl W. Sandstrom of Ogden, secretary of the Ogden Elks’ Club (Tr. 549) became acquainted with Cyrus Lack, he testified, at the Brigham Street Pharmacy through an introduction by S. E. Kershaw, who, it appears, had died before the date of trial, but who, at the time of the introduction in July of 1946, was Exalted Ruler of the Ogden Lodge of Elks, and he thought everything was all right and on a legal basis; and it had been arranged between Kershaw and Lack that he should buy liquor for the Elks’ Club through Lack and pay a bonus of \$15.00 per case, and he related various purchases and produced checks and vouchers for the

payment for whiskey purchased from Lack; and it rather shocked us all that the pre-Christmas 1946 purchase was for a hundred cases at a cost of \$5997.68, Exhibit "B," and this lasted until beyond March, 1947, when the lodge was knocked over for fudging on the locker system and paid \$100.00 fine, and the sins of Ogden were magnified before the jury, but the name of Harries was not mentioned by the witness Sandstrom.

Kenneth E. Bullock of Provo, who was a trustee of the Elks' Club there, testified (Tr. 574) that he met Lack and purchased some whiskey from him for the Elks' Club in Provo, and some of them ran into near shocking size, three-thousand odd dollars at a time for the brothers of Provo. This is an interesting bit of direct examination of this State's witness, speaking of the first check for whiskey (Tr. 576), and before he gave him (Lack) the check, he told him that this was not "my money" and wanted to know that if I gave it to him if everything would be all right. Q: "Can you elaborate on any conversation about everything being all right? What did you sayin that regard?" A: "He says, 'If you don't feel good about it, do you know Mr. Harries?' I said, 'Yes.' He said, 'Would you like to talk to him?' and I said, 'Well, I don't suppose that is necessary if you are sure everything is going to be all right and our club is not going to get in any mix-up on this, I think it will be okeh'." Q: "Did he offer to call Mr. Harries?" A: "Yes." Q: "Did he call Mr. Harries?" A: "No." O: "Did you request him not to?" A: "No, I just said, 'I guess everything will be all right.'" (Tr. 577.) And on cross-examination the witness testified that there had usually been liquor at the club, but that when they couldn't get it there hadn't been any, and they made this arrangement with Lack because rationing was on and the boys said to get some if it could be bought. (Tr. 580.) And that is how it came about. All the business was done with Mr. Lack and his agents, and all he had



to do was deliver the money when they made out the order. (Tr. 581.)

Robert S. Harries, the defendant, was fifty-four years of age at the time of the trial. He was born at Salt Lake City, Utah, and had lived there all of his life. He was a married man with a family and grandchildren. In his early youth, he worked on a farm on the east bench and for the railroad in a machine shop. His father was the former Sheriff of Salt Lake County, and he worked for a time as a deputy, and for about four years was a guard at Utah State Prison where he became Captain of the Guards. In 1941 he was appointed to the position of Chief Enforcement Officer of the Utah State Liquor Control Commission, which he occupied continuously until the return of the indictment herein on June 27, 1948.

The first witness called by the state at the trial, was Henry C. Lunt, a lawyer, and former Assistant United States District Attorney, and one of the three commissioners of the Utah Liquor Control Commission, the Republican, or off party member of that by-partisan unit, and he produced the oath of office of the defendant in which he swore to discharge the duties of the office with fidelity, and Mr. Lunt, after describing in a legalistic sort of way those duties, on cross examination, stated that in his belief Robert S. Harries performed the duties of that office with fidelity. (Tr. 108-109). It was also disclosed to the jury by the testimony of Mr. Lunt that the Attorney General of the State had rendered an opinion upon the Liquor Control Act to the Utah Liquor Control Commission to the effect that it was not unlawful for a permitted person who had lawfully purchased liquor from the Utah Liquor Control Commission, to take it, I assume by lawful means, if there be any, to a private club, "an old line club," as it was called, like the Elks, the Legion, the Moose, the Eagles, and maybe the Labor Temple, the Alta, the Country Club, etc., etc.,

and there, if he could not consume the whole bottle at a single session of solitary imbibing, he might put it in a locker and hie him thither at a later date to finish it.

(This writer is incorrectly quoted in the transcript of this case as having in effect agreed with Mr. Lunt, and the Commission, and the Attorney General, in that interpretation of the law.) (Tr. 111.) This argument is pertinent to an understanding of this case.

Everything that any witness testified to concerning the conduct of this defendant, except only the witness Lack, was and is within the cloak of the tolerance prescribed by the Utah Liquor Control Commission, and was under the immediate supervision and direction of Mr. Lunt, in charge of enforcement. Mr. Lunt was asked this question: Q: "And that was, (the opinion of the Attorney General) in substance, that it was not unlawful for a person to buy liquor from the State Store, and then put it in a locker, individually controlled by him, by a key, in a private club, and then take it out of that locker and put it upon a bar in that place and have the attendant, the bartender, pour in the mixer, and furnish the water and service the drinking, even though a great number of persons of similar privilege met there for the purpose of consuming liquor at that place?" To which he answered: A: "It wouldn't go that far." And the question was: "What detail of that is excessive?" And the answer: "That a member of a club could take it into the club and could consume his own liquor in the club, and could treat his friends in the club, the same as you do in your own home." And to this I, as attorney for the defendant said: "Sir, I *cannot* lawfully treat my friends in my home under the liquor law of the State of Utah, as I have read it, and I have read it many times, and I *cannot* lawfully give another a drink out of my bottle," but I am quoted in the transcript as saying: "I can lawfully treat—I can lawfully give."

And that commission laid down the policy and di-

rected its application with respect to clubs of not bothering them for operating liquor bars under the locker system, and the degree of tolerance related to the provision of the law that it makes it unlawful for a person or company, or anyone else, to maintain a place where persons resort for the purpose of drinking liquor, or consuming liquor. (Tr. 115.) And he was asked this question and gave this answer: Q. "So, upon that provision you shut your eyes and established a policy of tolerance?" A. "I don't know as we shut our eyes, but we figured as a practical proposition that it was a good thing, because then the club itself would have no excuse to handle liquor itself." (Tr. 115)

He further amplified the policy on questioning by the District Attorney to the effect that the clubs definitely understood that they could not sell or resell liquor. (Tr. 116.) This policy, he said, was at first limited to the old line clubs which had already been established, and then he said: "Then we had a number of private chartered clubs mushrooming, getting charters from the Secretary of State, and we met with the Secretary of State and had an understanding that hereafter any of these non-profit clubs applying for a charter, they would notify our office and we would make an investigation."

It was further disclosed by Mr. Lunt that this locker system restricted to members made it practically impossible to get a case of violation in the event a club fudged on the tolerance, because the enforcement officers would have to plan on getting a member to snitch on his own fraternity, or plant a phony membership to get a violation, and that at times special agents were employed who were members of various clubs, to go in and detect violations which would result in raids and a number of them were closed, but whenever the enforcement department had any evidence of sale by the club, whether by undercover agents or personally observed by inspectors, they were prosecuted and whenever there was any liquor



there that could not be accounted for as being owned by club members, it was seized and prosecutions were made. (Tr. 118.) And the testimony in the case developed that raids and prosecutions resulted under the direction of Mr. Harries upon every one of the institutions that had been mentioned, except the Alta Club, and it was the policy of the legal department of the commission in preparing cases, that the enforcement division should get a series of sales, if possible, and when a series of sales could be established, a nuisance or abatement proceedings under the equity provisions of the statute would be instituted, and that the kind of case and the final decision with respect to it rested with the legal department, rested in the lawyers' hands. And when the case was presented to the court, recommendations were made and the judge fixes a fine and penalty. (Tr. 119.) We have all been part of this procedure.

Running along with this situation was the shortage of liquor during the war, and for a short time after the cessation of hostilities, so-called rationing invited a black-marketing in liquor as in other commodities that were short.

The defendant called sixteen witnesses. Eight of them gave testimony of his good character. The trial consumed eight days court time. The typewritten record of the proceedings covers 818 pages.

At the close of the presentation of evidence by the State, the defendant moved the court for an instruction to the jury to return a verdict of 'not guilty' which was denied. (Tr. 31 and 616.) And then at the close of the case defendant again requested an instruction to the jury for a directed verdict of 'not guilty,' which was not given. (Tr. 31.)

The defendant moved for new trial (Tr. 49-51) on ten statutory grounds.

Ground No. 2 was that the jury received communications out of court referring to the cause. This ground was supported by the affidavit of Arthur Woolley, attorney for the defendant, and had to do with a statement made by His Excellency, the Governor of the State of Utah, the Honorable Herbert B. Maw, during the course of the trial and issued and caused to be published in the Deseret News, a newspaper published in the county and read by jurors. The statement was evidentiary in character and upon and specifically pertaining to the testimony that had been given by witnesses at the trial, including the defendant, and was highly prejudicial to him. The statement, as published in the Deseret News, is attached as an exhibit. (Tr. 53-54.)

The motion for new trial was denied. (Tr. 52.)

The defendant was sentenced to imprisonment in the State prison. (Tr. 48.) Certificate of probable cause for an appeal issued and defendant admitted to bail. Notice of appeal was immediately given, October 2, 1948. (Tr. 58.)

## STATEMENT OF ERRORS

The defendant relies for a reversal of the judgment against him upon the following errors occurring at the trial:

1. The refusal of the court of leave to defendant by his attorney to inspect and make copy of the stenographic transcript of the testimony of witnesses appearing before the Grand Jury, and whose names appear upon the indictment herein. The statute gives to the accused the right of inspection and it was an abuse of discretion and error for the court to deny to the defendant this right. The transcript of the testimony was, on September 9, 1948, for the first time, lodged with the Clerk of the court, and the stenographic and transcribed testimony of the witnesses named upon the indictment

(which had been returned June 26, 1948) was then first available, and defendant, by his attorney, made demand on September 11, 1948, upon the Clerk of the court for leave to inspect and read the said stenographic and transcribed testimony of the witnesses named upon the indictment, which demand the Clerk denied, and the defendant, by motion to the court, moved for an order of leave to inspect. (Tr. 13-16.)

2. The refusal of the court to grant a continuance and postponement of the trial until after inspection and examination by defendant's attorney of the stenographic and transcribed testimony of the witnesses named upon the indictment, and until time sufficient for defendant's attorney to properly prepare for defendant's defense of the cause. (Tr. 15-16.)

3. The refusal of the court to grant a continuance and postponement of the case until after the general election next ensuing. (Tr. 15-16.)

4. The rulings of the court during the course of the delivery by the District Attorney of his opening statement to the jury of his intention to prove incompetent and hearsay conversations. (Tr. 65-98.)

5. The court erred in overruling defendant's objection to the question, "Will you tell us what was said in the conversation?" (Tr. 129.) This question called for a conversation out of the presence of the defendant and had between the witness Lack and the witness Ossana and one Harold Leonard; and the court erred in receiving the testimony of the witness Lack in respect to said question and subsequent questions upon the same conversation and transaction, and all thereof is incompetent, irrevelent and immaterial. It was pure hearsay as to the defendant and did not pertain to the charge in the indictment. (Tr. 129-132.)

The court suggested that the defendant, by his coun-

sel, need not state the objections to this line of testimony, and that the objection would be deemed to be stated and overruled and the conversations would be received as though objected to, and exceptions taken, and the defendant relies upon this record, (Tr. 132), with respect to this and all similar testimony.

6. The court erred in permitting the witness Lack to testify concerning and relating to a conversation and conversations had between him and Ossana out of the presence of the defendant. (Tr. 131-133.)

7. The court erred in permitting the witness Lack to relate conversations and transactions had between Lack and one Kershaw, who was dead. (Tr. 141.)

8. The court erred in admitting in evidence conversations between the witness Lack and one Sandstrom out of the presence of the defendant. (Tr. 142-145.)

9. The court erred in admitting in evidence conversations between the witness Lack and Parker Campbell, and transactions between Lack and Campbell out of the presence of the defendant and not in any manner related to the charge in issue. (Tr. 150-167.)

10. The court erred in admitting in evidence conversations between the witness Lack and one Lee Williams, and transactions had between them out of the presence of the defendant and not in any manner related to the charge laid in the indictment. (Tr. 154 et seq.)

11. The court erred in admitting in evidence conversations between the witness Lack and one Tony Nikas concerning other and different transactions and matters than those charged in the indictment and pertaining to a political campaign. (Tr. 163 et seq.)

12. The court erred in receiving in evidence a conversation had between the witness Lack and Duke Hatsis out of the presence of the defendant, and giving the



following testimony: Q: "Did you have a talk with Duke before he left?" A: "Yes, I told him Mr. Harries would pay him for the delivery." (Tr. 169.)

13. The court erred in admitting in evidence conversations had between the witness Lack and Ossana out of the presence of the defendant and not related to the matter charged in the indictment. (Tr. 170 et seq.)

14. The court erred in receiving in evidence conversations between the witness Lack and Bob Bullock out of the presence of the defendant and not related to the matter charged in the indictment, and in receiving evidence of transactions between the witness Lack and the witness Bullock of the Provo Elks Lodge (Tr. 176 et seq.)

15. The court erred in receiving in evidence conversations between the witness Lack and the witness Huber, of the Fort Douglas Club, out of the presence of the defendant and pertaining to matters not related to the matters charged in the indictment. (Tr. 182 et seq.)

16. The court erred in sustaining the objection of the State to the following question put to the witness Lack on cross-examination: Q: "Mr. Lack, will you now please tell the jury the story of the burglary in your pharmacy?," and in refusing to permit the defendant, by his counsel, to cross examine the witness Lack upon the claimed burglary at the pharmacy and matters touching his motive and credibility. (Tr. 192-193.)

17. The court erred in receiving in evidence conversations between the witness Ossana and Lack out of the presence of the defendant. (Tr. 277-278-279-290-283-286-290-295-296-298.)

18. The court erred in overruling the objection of the defendant to the following question on direct examination of the witness Ossana and in permitting the wit-

ness to give testimony as follows: Q: "Why did you purchase liquor from Cy Lack if you could get it for the regular retail price at the liquor store?" A: "Well, he told me what he could do for me and let me know what was going on, and I would get some protection. That is the reason I bought from Cy Lack." (Tr. 321.)

19. The court erred in overruling the defendant's objection to the question put to the witness Meyers and in receiving the following testimony in response thereto: Q: "How did you know?" A: "Well, Mr. Ossana, being my partner, told me." (Tr. 356.)

20. The court erred in overruling defendant's objection to the questions and in permitting the witness Meyers to give testimony as follows: Q: "Had you ever been advised, Mr. Meyers, that Mr. London was coming down there to your premises?" A: "Yes sire, I was advised." Q: "Who advised you he was coming down?" A: "Mr. Ossana." Q: "Did he tell you when he was coming?" A: "He didn't exactly tell me he was coming, but he told me to watch for him." (Tr. 363.) And the following question and answer: Q: "How did you know that fact, that he was supposed to be dressed that way?" A: "Mr. Ossana told me so." (Tr. 364.)

21. The court erred in admitting in evidence conversations between the witness Lack and one Tony Nikas out of the presence of the defendant and not related to the matter charged in the indictment. (Tr. 402-403-404-405-406.)

22. The court erred in receiving in evidence a conversation had between the witness Lack and the witness Tony Natsis out of the presence of the defendant. (Tr. 458.)

23. The court erred in receiving testimony by the witness Duke Harsis concerning a transaction with the witness Lack, and conversations with the witness Lack

out of the presence of the defendant and in nowise related to the matter charged in the indictment. (Tr. 472-473.)

24. The court erred in receiving in evidence a conversation had between the witness Lack and the witness Jensen out of the presence of the defendant and not related to the matter charged in the indictment, and permitting the witness Jensen to testify concerning a transaction with the witness Lack and the delivery of whiskey to the Elks' Club in Ogden. (Tr. 490-491.)

25. The court erred in receiving in evidence and in permitting the witness Lund to testify concerning an alleged transaction with Mr. Harries in the month of May or June, 1946, and not pertaining to the matter charged in the indictment, and the testimony being offered and received over the objection of the defendant that the same is incompetent, irrelevant and immaterial and not related to anything stated in the indictment. (Tr. 500-502.)

26. The court erred in receiving in evidence a conversation had between the witness Lack and the witness Lee A. Williams out of the presence of the defendant. (Tr. 509-514.)

27. The court erred in receiving in evidence conversations had between the witness Lack and Parker L. Campbell out of the presence of the defendant and not relating to the matter charged in the indictment. (Tr. 523-528.)

28. The court erred in receiving in evidence conversations had between the witness Lack and Arnold L. Huber out of the presence of the defendant and concerning other and different transactions and matters than those charged in the indictment, and not related to the charge laid in the indictment. (Tr. 543-546.)

29. The court erred in receiving in evidence conver-



sations and transactions had between the witness Lack and Carl W. Sandstrom concerning other and different transactions and matters than those charged in the indictment and out of the presence of the defendant. (Tr. 549-563.)

30. The court erred in admitting in evidence conversations between the witness Lack and one Kenneth E. Bullock and transactions had between them and out of the presence of the defendant, and not in any manner related to the charge laid in the indictment. (Tr. 574-578.)

31. The court erred in overruling the objection of the defendant to Exhibit "L," and in receiving the same in evidence, the same being incompetent, irrelevant and immaterial. (Tr. 584-585.)

32. The court erred in sustaining the objection of the State to the question put to the witness Lunt on cross examination. Q: "And what occurred?"; (Tr. 598) and in sustaining the objection to the question and refusing to permit the witness to answer the question on cross examination: Q: "What did you say?" (Tr. 598); and the question: Q: "What further did you do digging in?" (Tr. 598.)

33. The court erred in sustaining the objection of the State to a question put to the witness Lunt on cross examination. Q: "What did you do, you and Mr. Harries, digging in?" (Tr. 599.)

34. The court erred in sustaining objections of the State to the questions on cross examination of witness Lunt, and in refusing to permit the witness Lunt to answer the following questions: Q: "Did you have a meeting with the Governor upon the matter?" (Tr. 599); and the question: Q: "Did you succeed, Mr. Lunt, in securing the withdrawal of the Lack Agency?" (Tr. 600); and the question: Q: "Well, what next did you

and Mr. Harries do to dig into this thing?" A: "Later on along about the first of December, Commissioners Peterson, Johnson and myself and Mr. Harries met with the Governor in his office at the State Capitol. The purpose of the mission——"; Q: "What occurred?" (Tr. 600.)

35. The court erred in sustaining the objection of the State to a question put to the witness Harries on direct examination, referring to the testimony of Steve Nikas and his wife in the trial concerning the Diamanti knockover at Price, Utah, and in refusing to permit the witness to give testimony in response to the following question: Q: "What was the nature of their testimony?" (Tr. 714); and in refusing to permit the witness to testify in accordance with the offer of testimony by the witness out of the presence of the jury, as follows: Q: "Mr. Harries, will you state the subject of the testimony given by Steve Nikas and his wife in the trial or preliminary hearing in the Diamanti case?"

Mr. Roberts: "To which may we have our objection that it is immaterial and hearsay?"

The Court: "Yes; and the objection will be sustained, but he may make his offer."

Q: "It is a fact, is it not, Mr. Harries, that those witnesses, after being sworn to tell the truth, the whole truth and nothing but the truth, testified in that case, in behalf of the Liquor Commission and the State in the prosecution of that matter to the effect that they had been in the Diamanti place of business, and had seen drinks served there, and had purchased drinks there and knew the nature of its operation?"

A: "That is correct."

Q: "And that it was a place where liquor was sold and consumed?"

A: "That is correct." (Tr. 730-731.)

36. The court erred in denying defendant's request at the close of the taking of testimony in the case for a directed verdict of "not guilty" and in refusing to instruct the jury to return a verdict of "not guilty of the charge." (Tr. 874.)

37. The court erred in refusing to give defendant's requested instruction numbered 1 in the list of requests, and particularly the last paragraph thereof. (Tr. 877.)

38. The court erred in refusing to instruct the jury in accordance with the defendant's requested Instruction No. 2. (Tr. 877.)

39. The court erred in refusing to instruct the jury in accordance with the defendant's requested Instruction No. 6. (Tr. 877.)

40. The court erred in giving the instructions to the jury as given by the court and to the whole thereof for the reason and on the ground that the same do not contain a complete statement of the law and matters upon which the jury must, of necessity, have been instructed in the case and upon the evidence as received by the court and permitted to go to the jury and introduced by the State over the objections of the defendant, and the limitation and extent to which said evidence might be considered by the jury, particularly with respect to the numerous and diverse matters of hearsay and conversations between Cyrus V. Lack, the witness, and several persons called as witnesses and otherwise, and out of the presence of the defendant. (Tr. 877.)

41. The court erred in the giving of the last paragraph of the Court's instruction No. 6. (Tr. 878.)

42. The court erred in denying defendant's motion for a new trial. (Tr. 51-52.)

## POINTS

I. *The right of the accused to inspect and make copy of the stenographic transcript of the testimony of the witnesses appearing before the Grand Jury, and whose names appear upon the indictment.*

The legislature of 1947 amended the Code of Criminal Procedure relating to Grand Juries. By this amendment (105-19-9), the Grand Jury was required to appoint a competent stenographic reporter to attend sessions of the Grand Jury and report in shorthand the testimony given before it, and it is made the duty of this stenographer to transcribe all of the testimony of the witnesses whose names are inserted or endorsed upon the indictment as witnesses, as well as that of the accused; two copies of the testimony so transcribed must be made, one to be delivered to the clerk of the court and one to the District Attorney. The clerk may not divulge the contents of any transcript except upon written order of the court duly made after hearing, the person in whose custody said copy is placed.

A subsequent section (105-19-10) provides that any person at any time present at any session of the Grand Jury may be required by any court to disclose the testimony of a witness examined before the Grand Jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony in case of a trial for perjury.

To furnish a copy of all of the testimony of the witnesses against an accused to the District Attorney, and to deny to the accused the same information would put the accused to great disadvantage upon his trial. The power lodged in the court to direct the clerk to disclose the testimony is not limited. True, it is not specific. It could not be assumed that this disclosure should be made to the merely curious, nor could the purpose be assumed to have been to make it available to the press. Believing

that the fair intendment of this act is that as a matter of right the accused is entitled to know not only the names of the witnesses against him, but their testimony, the same whether the prosecution is by indictment as it is when the prosecution is by complaint and information, and that it was to afford this protection and opportunity for defense of accused persons, on first learning that the copy of the testimony against this defendant taken before the Grand Jury had been lodged with the clerk of the court, we made demand upon the clerk, who refused us access, and then we moved the court for an order to the clerk to permit the inspection. This was denied.

True it is, that during the course of the trial, when the witness Lack was turned over for cross-examination, we again made demand for the right to inspect and use on impeachment the copy of his testimony before the Grand Jury, upon the assertion, made on information and belief, that he had given testimony before the Grand Jury contrary to and in conflict with that which he had given upon direct examination at the trial, and the court awarded us this right in part, that is to say, portions of his testimony were permitted to be inspected and read on impeachment. This did not cure the wrong done in the deprivation of the right of inspection, if it exists, before trial, and especially with respect to the other witnesses. There were numerous witnesses endorsed upon the indictment. The defendant was required to go to trial without knowing what any of them had said or would say.

II. *The right to a continuance until after inspection of the stenographer's notes.*

We made demand for continuance of the trial until after the inspection above mentioned had been made and for sufficient time for defendant's attorney to properly prepare for defendant's defense of the cause after

such inspection, and this was denied by the court, and of course, if the right of inspection existed the refusal to grant continuance to permit an effective inspection was a wrongful refusal.

III. *The defendant was deprived of a fair trial by reason of the political times.* The trial was set and called and held during a political campaign and on the eve of a general election in which the office of governor and the other state offices including the attorney general, and including the office of the trial judge and the district attorney were at stake, and in which all of the mud and muck of liquor enforcement for nearly a decade was being stirred and smeared about. The defendant moved for a continuance until after the election. It will be said that this is a matter of discretion of the trial court. If we will be recall the course of political argument and harangue and manipulation, and the thrice daily screaming headlines in the tabloids during the period of this trial, I think we now, in retrospect, would all say it was un fair to try this defendant then and in that atmosphere.

IV. *The defendant was deprived of a fair trial by reason of the rulings of the court upon matters of evidence.*

(a) The statement of the District Attorney of intention to prove and the recption in evidence of testimony of other incidents and transactions of alleged bribery by taking or receiving part of the overcharge made by Lack upon the sale of liquor to others than Ossana.

(b) Conversations out of the presence of the defendant between Lack and divers other persons, Ossana and his partner, Myers, and also numerous persons not in any manner connected with the matter charged in the indictment. The details of these conversations and the record upon this are stated in the Statement of Errors, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30 and 31.



(c) The testimony of the witness Lund received over the objection of the defendant concerning an alleged transaction between the defendant and the witness Lund in May or June of 1946, was incompetent, irrelevant and immaterial. (Assignment 25.)

How far may the hearsay rule be relaxed?

In this case, and in the instances of hearsay mentioned in the assignments of error, there are a number of steps. In fact, there is scarcely any kind of hearsay that was not admitted against the defendant.

The District Attorney invoked the rule of relaxation in conspiracy cases, and the court seemed to have in mind that kind of case in the rulings.

The Erwin case

State vs. Erwin, 101 Ut. 365, 120 Pac. (2d) 285 was in the experience of court and counsel. Here we have to do with a charge of specific act of bribery. We have no instance in which the accused, Harries, has made any statement. The conversations and declarations which are assigned as error were made by Lack to others, or by others to Lack, and in some instances, Osanna was allowed to relate his conversations with others, and Myers was allowed to tell what Osanna told him. Conversations between third persons have been received in evidence in prosecutions for bribery where it appears that the money was obtained from them for the purpose of bribery in order that the jury may see the connection between the source from which the money came and the accused, and some conversations between Lack and Osanna might properly have been received subject to the limitation and protective rule against credence to accomplices. In this case conversations between Lack and Kershaw, a dead man, were received. Conversations between Lack and Sandstrom with respect to the Ogden Elks transactions, and the transactions with the Provo Lodge of Elks, and with



the Country Club at Price, and with the Elks Club in Salt Lake City, and the Fort Douglas Golf Club. In other words, conversations of the other instances claimed were received, not conversations between the defendant and any of these persons, but conversations between Lack and these persons, and there is no pretense that the conversations or the acts resulting from them were brought home to the accused. In only one instance was Mr. Harries ever confronted with anything growing out of these extraneous instances and transactions. Mr. Campbell of the Salt Lake Elks Club did come to Mr. Harries, he testified, after the Elks Club was knocked over, and accused Harries of doublecrossing, and Mr. Harries, in effect, gave him the lie, so that this would not seem to connect up or warrant a consideration by the jury of the conversations between Lack and Campbell by which Campbell was received.

(d) The evidence produced by the State as Exhibit "L", and received in evidence over the objection of the defendant was incompetent, irrelevant and immaterial and error.

(e) On cross examination of the witness Lunt, defendant was not permitted to inquire into and further disclose the full acts and conduct of the witness, Lunt, and the defendant, Harries, concerning an investigation made by them of the charges of corruption contained in the anonymous letter testified to by the State. This was clearly a deprivation of the right of the defendant of full disclosure, and an undue limitation upon the cross examination of the witness. (Assignments of error 33, 34, 35.)

(f) The court refused the witness, Harries, to give testimony concerning testimony given by the witnesses used by the Liquor Control Commission and the State of Utah upon the trial of Diamanti, such testimony going to the guilt of Diamanti, and offered upon this trial by

the defendant to establish his integrity in the prosecution of Diamanti, an issue of importance in the theory of the State's case, and it was manifest error for the court to refuse to admit this testimony as offered. (Assignment 36.)

V. *The motion and request for an instruction for a directed verdict of not guilty.*

At the close of the State's case, the defendant moved for a directed verdict, which was denied; and at the close of the taking of the testimony in the case the defendant again requested the court to instruct the jury to return a verdict of not guilty. In each case exception was taken.

The refusal of the court to so instruct was error for reason that upon the whole case and all of the testimony of the State and all of the testimony in the case, there was and is not sufficient competent evidence by way of corroboration of the testimony of the witness Lack and the witness Ossana to warrant a submission of the case to the jury as matter of law.

This indictment charges that on or about December 1st, 1946, Robert S. Harries received a bribe from Cyrus Lack. The District Attorney, in his opening statement, identified the transaction as occurring in November of 1946. That Mr. Ossana had made a purchase of about thirty or thirty-five cases and made a premium payment and Mr. Lack divided that money with Mr. Harries, "and this is the incident upon which the complaint or the specific crime is charged in the Information." Mr. Lack says he remembers counting out the money on the counter which was some of the Ossana money and he remembers that Mr. Young walked up. (Tr. 22.) The witness, John W. Young, mentioned by the District Attorney and the witness Lack, testified (Tr. 503) he was employed at the Brigham Street Pharmacy and he recalled the occasion of his introduction to Mr. Harries,

and then gave the following testimony: Q. "Do you recall a transaction that you saw between Mr. Harries and Mr. Lack?" A. "Only on one occasion." Q. "Could you place the time of this occasion, please?" A. "Not exactly, but it was the latter part of November." Q. "Of what year, please?" A. "1947." Q. "Was it last year or the year before; was it this last November or the year before?" A. "1946. Why I know it was 1946, I will tell you why. I went back on October 14, 1947, and I never seen Mr. Harries after that." Q. "You never saw him after that?" A. "No, sir." Q. "How do you place this time as being the latter part of November of 1946?" A. "Well, it was around Thanksgiving time and I was quite busy getting my liquor lined up for the rush on Thanksgiving." Q. "Will you tell us what you saw, please?" A. "Well, it was in the afternoon. I couldn't tell you the exact time, but I just happened to not have a customer and I went back to get a drink, and while I was taking the drink I seen Mr. Lack standing at the prescription pharmacy counting out some money and Mr. Harries says, 'Cy, we can make some money on this deal.' And I set my cup down and walked back to the counter to take care of some customers who had come in while I was getting the drink."

Mr. Roberts—Cross-examine.

The Court: "Mr. Young, who is it said, 'Cy, we can make some money on this deal?'" A. "Mr. Harries." Q. (by Mr. Roberts) "Your answer was——." A. "Mr. Harries." Q. "Mr. Harries?" A. "That is right." Q. "Do you see him here in the court room?" A. "Yes, I do." Q. "And is that the gentleman at the end of the counsel table?" A. "Yes." Mr. Roberts: "And may the record indicate he points to Robert S. Harries, the defendant?" The Court: "The man at the end of the counsel table?" A. "Yes, Sir; sitting right over there." The Court: "The record may so show." (Tr. 504-506.)

This is the sum total and the whole of the testimony offered and received in this case of the giving and receiving of a bribe on the date and occasion charged in the indictment, except the testimony given by the witness, Lack. This Pharmacy was a public store. This witness saw, he says, Lack give Harries money. Whether change or on what account or in what kind of deal, if there was a deal, it is not reflected or disclosed. Does this corroborate an accomplice sufficient to put this accused on trial? If not, it was the duty of the court in this case as matter of law to direct a verdict of not guilty.

The sufficiency of the corroborative evidence in this case is a question of impression. It would require, I think, a careful reading of the entire record, a winnowing out of all of the extraneous matters, the other instances of claimed sales and the premium price and all of that.

Other instances of claimed wrong which were admitted under the theory that they would reflect an intent or the intention of the accused in the charged case, may not be used as corroboration. The corroboration must go to the specific charge. The bribery, itself, as laid in the indictment, occurred in Salt Lake City and was testified to vaguely by the witness, Lack, and the witness, Young, and his testimony is, I submit, the whole of the corroboration on this record. If Young saw Lack hand money to Harries and heard Harries say in substance that they could make a lot of money out of this, it is still a mere guess as to what the transaction was. The exchange of money at the till in a store between the proprietor and another is not inconsistent with innocence, and the suggestion that two persons in a store having a transaction involving the passing of money may make some money out of it, is not inconsistent with innocence. These words quoted by Lack and Young are the only words uttered by Harries in this case touching this transaction, except

his denial under oath at the trial. I submit that the whole mass and mess of testimony of transactions in Carbon County, involving Ossana and Myers and Diamanti and all those things, do not tend to prove corruption by Harries. The only evidence of a tip off of London's expected visit is that produced by Lack and Ossana, and it is not corroborative. If there was a phony proceeding against Ossana in furtherance of the agreement under which the bribe was passed, as the State claimed, and the accomplishment of the purpose of the bribe is a part of the charge, then the claim of Lack would have to be corroborated. The raid, the seizure, the papers in libel, and the court proceedings for order of sale, and sale, and buying back, and all of that were regular procedure. If that was a phony, we have all been phony. Is there a judge who has not signed papers like those? Is there a lawyer at the bar who touches these things, who has not gone to court with papers like those?

The overall fact of this thing is that under the liberal tolerant policy of the Utah Liquor Control Commission with respect to clubs, these proceedings do not suggest corruption. There was, I believe, a universal opinion among those in the know that Robert S. Harries was incorruptible. He has never been accused by anyone except Cyrus V. Lack.

State v. Somers, 97 Ut. 132, 90 P. (2d) 273.

State v. Lay, 38 Ut. 143, 110 P. 986, 987.

State v. Butterfield, 70 Ut. 529, 261 P. 804.

State v. Park, 44 Ut. 360, 140 P. 768.

State v. Kimball, 45 Ut. 443, 146 P. 313.

State v. Powell, 45 Ut. 193, 143 P. 588.

State v. Bridwell, 48 Ut. 97, 158 P. 710.

State v. Baum, 47 Ut. 7, 151 P. 518.

State v. Frisby, 49 Ut. 227, 162 P. 616.

State v. Elmer, 49 Ut. 6, 161 P. 167.

State v. Cox, 74 Ut. 149, 277 P. 972.

State v. Gardner, 83 Ut. 145, 27 P. (2d) 51.



VI. *The Instructions.* (a) The defendant requested the court to instruct the jury as follows:

And you are further instructed in this case that the statements or admissions of the defendant, the accused, are not sufficient with the testimony of an accomplice alone to warrant a conviction. (Tr. 33.)

Under the evidence in this case and the law, the defendant was entitled to this instruction and it was error for the court to refuse it.

(b) The defendant requested the court to instruct the jury as follows:

You are instructed that the defendant is being tried, and is to be tried by you in this case, solely upon the charge contained in the indictment, and no other. Any intimation of any other misconduct is, in the consideration of the evidence here, to be eliminated entirely from your minds. As to any other collateral matters, you do not know what contradiction or defense or explanation the defendant may have. He does not have the opportunity here to defend against such matters, and could not be allowed to defend against such things in this trial if he wanted to. Your deliberation should, therefore, be confined solely to the charge here made and the evidence as to this charge. (Tr. 34.)

The defendant was entitled to an instruction in this case limiting the consideration of the jury to the charge. There was a mass of testimony in the case concerning other alleged transactions between Lack and the defendant reflecting misconduct, and a great deal of testimony was offered by the State to show that the defendant, Harries, while at a night club engaged in drinking and in a brawl, and that while at Price, in Carbon County, was under the influence of liquor. He was entitled to have the jury instructed that these matters were not

the questions for their consideration and that they should not consider them.

(c) The court failed to instruct the jury upon all of the law of the case and matters upon which the jury must of necessity have been instructed in this case, and upon the evidence received by the court in evidence and introduced by the State over the objection of the defendant, and the limitation and extent to which said evidence might be considered by the jury, particularly with respect to the numerous and divers matters of hearsay and conversations between Cyrus V. Lack, the witness, and the several persons, and out of the presence of the defendant, and relating to other and different transactions than that charged in the indictment. (Tr. 877.)

(d) If it was proper for the court to submit to the jury the evidence of other offenses as limited by the court's instruction No. 6, the defendant would be entitled to an instruction that the witnesses who testified concerning such other offenses by themselves and in which they were culpably implicated were accomplices as matter of law, and that before the proof of such other offenses could be considered corroboration of each thereof would be required. This is the basis of the assignment of error No. 45.

## VII. *The motion for new trial.*

The motion for new trial was made upon the statutory grounds and should have been granted upon the errors hereinbefore pointed out.

In addition thereto, the motion contained a ground of a special pertinency, viz:

“1. That the jury received evidence other than that resulting from a view of the premises.

2. That the jury received communications out of court referring to the cause.” (Tr. 49.)



These grounds were supported by affidavit of counsel for the defendant that the jury received a statement and communication made by His Excellency, the Governor of the State of Utah, the Honorable Herbert B. Maw, during the course of the trial, and on or about the 16th day of September, 1948, which the Governor had made and issued and caused to be published in the Deseret News, a daily newspaper having a wide circulation in Salt Lake County where the case was tried, and throughout the State of Utah and of which members of the jury were then subscribers, and which statement was evidentiary in character and upon and specifically relating to the testimony that had been given by witnesses at the trial of the cause and which was calculated to affect the deliberations of the jury in this cause, and did; that the statement and publication came to the notice of and was read by members of the jury trying the case and was widely commented upon among the people in the court room and in the hearing of the jury and among the large concourse of people who attended upon the trial; that the publication of the statement by the Governor had a strong influence and affected the verdict in this cause adversely to the defendant and prevented him from having a fair trial. A copy of the Deseret News containing said statement so issued by the Governor and printed in the paper and circulated, is attached to the affidavit. (Tr. 54.)

It is respectfully submitted, that the judgment of conviction in this case ought to be set aside, and that the cause be remanded for a new trial.

ARTHUR WOOLLEY,  
Attorney for defendant and appellant.