

1955

# State of Utah v. Ernest Hines and Johnnie Leach : Brief of Respondent

Utah Supreme Court

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E. R. Callister; Vernon B. Romney; Attorneys for Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH  
**FILED**

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STATE OF UTAH,

Clerk, Supreme Court, Utah

*Plaintiff and Respondent,*

— vs. —

ERNEST HINES and  
JOHNNIE LEACH,*Defendants and Appellants.*Case No.  
8346

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**Respondent's Brief**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,  
*Plaintiff and Respondent,*

— vs. —

ERNEST HINES and  
JOHNNIE LEACH,  
*Defendants and Appellants.*

Case No.  
8346

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## Respondent's Brief

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### STATEMENT OF THE CASE

The respondent agrees with the Statement of the Case set forth in appellants' brief.

### STATEMENT OF FACTS

Except for certain added emphasis on the part of

the appellants, respondent agrees substantially with their Statement of Facts.

## STATEMENT OF POINTS

### POINT I

THE COURT ACTED PROPERLY IN REFUSING TO APPOINT A SECOND ATTORNEY FOR APPELLANT LEACH AFTER HE HAD ARBITRARILY DISCHARGED A COMPETENT COURT-APPOINTED ATTORNEY.

### POINT II

THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY, CITED IN POINT II OF APPELLANTS' BRIEF, AND APPELLANTS FAILED TO MAKE EXCEPTION TO THEM.

### POINT III

APPELLANT HINES WAIVED ANY OBJECTION TO THE READING OF TESTIMONY TO THE JURY AFTER THE JURY'S RETIREMENT; AND THE COURT DID NOT ALLOW UNDUE EMPHASIS TO BE PLACED ON A PORTION OF THE EVIDENCE.

### POINT IV

IT WAS DISCRETIONARY WITH THE JUDGE WHETHER OR NOT TO REQUIRE THE PRESENCE OF COUNSEL DURING THE READING OF TESTIMONY TO THE JURY AFTER ITS RETIREMENT; AND IT WAS NOT ERROR TO ALLOW SUCH READING IN COUNSEL'S ABSENCE.

### POINT V

IT WAS NOT ERROR ON THE PART OF THE COURT TO ALLOW MISS PARKER, THE COURT STENOGRAPHER, TO READ THE COURT REPORT.

RAPHER, TO TAKE TWO WOMEN JURORS TO THE LADIES' RESTROOM.

## POINT VI

IT IS PRESUMED THAT THE JURY WAS AT ALL TIMES PROPERLY ADMONISHED; THE APPELLANTS DID NOT RAISE ANY OBJECTION AT THE TRIAL AND SHOULD NOT BE ALLOWED TO DO SO NOW; AND IF THE JURY WAS NOT ADMONISHED IMMEDIATELY PRIOR TO A SHORT INFORMAL RECESS, APPELLANTS WERE NOT PREJUDICED IN THEIR SUBSTANTIAL RIGHTS.

## POINT VII

IF ERRORS WERE MADE BY THE COURT BELOW, THEY WERE, IN EVERY CASE, NONPREJUDICIAL ERRORS WITHOUT NEGATIVE AFFECT UPON THE SUBSTANTIVE RIGHTS OF THE ACCUSED APPELLANTS.

## ARGUMENT

### POINT I

THE COURT ACTED PROPERLY IN REFUSING TO APPOINT A SECOND ATTORNEY FOR APPELLANT LEACH AFTER HE HAD ARBITRARILY DISCHARGED A COMPETENT COURT-APPOINTED ATTORNEY.

Respondent agrees that it appears to be a matter of first impression in the State of Utah whether the trial court is under a duty to appoint counsel for an accused in a criminal case where the accused has discharged court-appointed counsel. There is, however, precedent from other jurisdictions, both federal and

state, that would indicate that the court is not obligated to appoint further counsel.

It is enough that the court appointed a competent criminal attorney and it was not necessary that the court appoint a second attorney after Appellant Leach informed Mr. Reid, his court-appointed counsel, he no longer desired to be represented by him.

It is sufficient in such a situation that the court-appointed counsel be a reputable member of the bar. Beyond that, it is not the prerogative of an indigent defendant in a criminal case to choose his attorney who must then lay aside all else and work for him free of charge.

The defendant cannot have tailor-made counsel and he cannot run a relay race using a court-appointed attorney for a season, then replacing him with a new fresh one of his own choosing, but under court appointment. One good, capable attorney, such as Mr. Reid, was enough for Mr. Leach.

*State v. Griffith*, 81 A. 2d 383, held:

“A person accused of crime is only entitled to counsel to aid him in his defense, not to save him from his voluntary act.”

Leach's foolishness here in discharging reputable and able counsel was a voluntary act, from the effects of which it was not necessary that the court attempt to save him through appointment of a second attorney.

*U. S. v. Gutterman*, 147 Fed. 2d 540, states:

“An accused unable to employ an attorney

must accept such counsel as the court assigns unless he can find a better reason for asking a change than the fact that the accused does not approve of counsel's judgment or unless the accused chooses to undertake his own defense."

*People v. Adamson*, (Calif.), 210 P. 2d 13, in a holding based on comparable, if not precisely similar, facts stated:

"A defendant's right to counsel did not include the right to postpone trial indefinitely and reject the services of the public defender while defendant, at his leisure, attempted to find counsel who would serve without charge and of whom the defendant and another person approved."

A Michigan case, *People v. Kotak*, 11 N. W. 2d 7, informs us that under a statute providing for the appointment of an attorney for an accused unable to provide his own counsel, the appointment of an attorney chosen by the accused is not required.

It was held in *U. S. ex rel Mitchell v. Thompson*, 56 Fed. Supp. 683, that the court's choice of counsel for defendant should not be subject to impeachment on a ground of a claimed displeasure with the appointment or a lack of confidence in the attorney, unless there is good cause why the appointment should not have been made; and that the choice of counsel for indigent persons accused of crime rests with the court and not with the defendant.

Appellants refer to *Ex Parte Masching*, 261 P. 2d 251. That case, however, involved a defendant to whom no counsel had been assigned in the first instance. Here,

Appellant Leach had assigned to him by the court the excellent services of a widely experienced and capable attorney.

No denial is attempted that defendant had an inherent constitutional right to counsel. That is rudimentary law. Counsel was, in fact, obtained and proffered him by the court. Appellant Leach does not allege that counsel assigned was unwilling or unable to go ahead. Leach summarily dismissed Mr. Reid and thereby, and with adequate chance to repent of his error, waived his right to court appointment of counsel. (Tr. 15)

In the Masching Case, the defendant was an alleged traffic violator who claimed to have been bedridden with illness for three weeks and to have been unable to get counsel. The court thereupon refused to appoint an attorney. That case and this one are inimical on their facts and the holding in the Masching Case should not concern this Court.

The Robinson Case and the Glasser Case (Appellants' Brief, p. 18) indicate, as appellants stated, that one attorney cannot be forced on co-defendants. There was no *forcing* here at all. In the first place, the co-defendants agreeably accepted Mr. Reid as their attorney, and he represented both at the preliminary hearing. Afterward, Appellant Leach determined to dismiss Mr. Reid.

The Glasser Case forbids the appointment of one counsel to represent "conflicting interests." There is

no showing here of any conflict whatsoever. Counsel presents to us three "points of conflict" which he claims to be reason enough to prevent acceptance of dual representation. These reasons were not sufficiently impressive to prevent the acceptance, willingly, by both Hines and Leach, of Mr. Reid in the first place. If Appellant Leach wanted to hire representation of his own choosing at that or any later date, he had every right and enough opportunity to do it.

## POINT II

**THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY, CITED IN POINT II OF APPELLANTS' BRIEF, AND APPELLANTS FAILED TO MAKE EXCEPTION TO THEM.**

As to the quoted instruction of the trial judge, relative to Appellant Leach, that "if he is satisfied with the evidence which has been given, there is no occasion for adding thereto," (Appellants' Brief, p. 20) it is impossible for respondent to understand how appellant could have been damaged thereby.

Counsel go to great lengths to prophesy as to an assumed reaction in the minds of the jury on hearing the judge's instruction in that regard. Is it not more likely that the jury would think instead, "if he is satisfied that there is no need for his own testimony, then he must have a pretty good case?"

Clearly, neither appellant nor respondent are in a position to psychoanalyze the jury on this point. There is no negative inference here that if the defendant is

not satisfied with the evidence, he then should take the stand. This is indicated by the preceding sentence stating clearly and unequivocally that "no presumption adverse to a defendant is to arise from the mere fact that he does not place himself on the stand." That is the law and all there is to it. The point relied on by appellant is of no consequence since all that is involved is a simple statement of self-evident law and fact.

In the prosecution of an accused who offered no evidence, according to *Commonwealth v. Pinkenson*, (Pa.), 11 A. 2d 176, a statement in the court's general charge, that if counsel for the accused felt that the Commonwealth had not proved its case they would naturally choose to refrain from offering testimony, was not improper as a reference to the failure of the accused to testify, in view of the court's further statement that no unfavorable inference could be drawn by the failure of the accused to testify.

The Texas case of *Compton v. State*, 184 S. W. 2d 630, states that a statute prohibiting the consideration of defendant's failure to testify as a circumstance against him does not prohibit the court from alluding to defendant's failure to testify.

Where an instruction with respect to the nonprejudicial affect of defendant's failure to testify was adequate, refusal to give requested instruction on the same subject was not error. *Wright v. U. S.*, 175 Fed. 2d 384.

Respondent does not feel that Appellant Leach was in any way prejudiced by the instruction Judge Ellett

gave. If he used the word "privilege" where he should have used "right," he did so innocently and it was a distinction that escaped the jury's minds.

A deliberate and deep discussion of semantics undoubtedly would bring out a difference between the two words, it is true; but a lay person sitting on the jury is not going to be persuaded on a mere hearing that "privilege" in this connotation means anything more, less or different than "right."

In *Brown v. State*, (Ark.), 155 S. W. 2d 722, an instruction, that it was defendant's *privilege* either to testify in his own behalf or to decline to do so and that failure to testify was neither evidence of guilt nor a presumption thereof and that defendant's failure to testify was not to be considered by the jury in determining defendant's guilt, was proper.

Many cases concur with the holding in *State v. Paul*, (Iowa), 48 N. W. 2d 309, which is, as quoted from the syllabus:

"All instructions are to be construed together in determining the matter of prejudice created by any part of the instructions."

See also *State v. Spohr*, (Kan.), 230 P. 2d 1013; *State v. Livesay*, (Idaho), 233 P. 2d 432; *People v. Mercer*, (Calif.), 230 P. 2d 4.

Even if the instruction was not proper, reversal should not be had, according to a Utah case, *Cowley v. State*, (Utah), 82 P. 2d 914, which held:

"The court is firmly committed to the rule

that an instruction improper and erroneous will not be held reversible error where it is manifest on consideration of all the instructions given, the testimony in the case, and the verdict of the jury that such an instruction did not work to the prejudice of the defendant or deprive him of any substantial right.”

Instructions in a criminal case, even if erroneous, are not ground for reversal where they are nonprejudicial. *State v. Condit*, (Utah), 125 P. 2d 801.

An instruction, upon the trial of an information for larceny, though confused and misleading, will not afford ground for reversal if nonprejudicial. *State v. Hall*, (Utah), 145 P. 2d 494.

In the instant case both Leach and Mr. Reid, counsel for Mr. Hines, stated on page 191 of the transcript that they had no exceptions to offer to the instructions given by Judge Ellett. If they invited the error, appellants cannot now take advantage of it. They knowingly and openly waived any exceptions they might have had.

Where neither a defendant nor counsel object in the lower court to instructions to the jury, as in this case, where, as a matter of fact, both agreed, the appellate court in *State v. Johnson*, (N. Mex.), 287 P. 2d 247, stated:

“Error in the court’s instructions to the jury were waived when the defendant failed to call to the trial court’s attention that it might be committing error, thus offering the court an opportunity to correct its mistake.”

See also *U. S. v. Scoblick*, 124 Fed. Supp. 881, and *Rucker*

*v. U. S.*, 206 Fed. 2d 464.

Where instructions are palpably erroneous to such an extent that they would, if allowed by the jury, prevent a fair and proper determination of the issues, the Supreme Court may notice the error without exception having been taken; but the mere failure to give an instruction which might have been given but which was not requested or called to the attention of the court will not be noticed on appeal in the absence of an exception taken to the failure to give the instruction. *State v. Peterson*, (Utah), 240 P. 2d 504.

### POINT III

APPELLANT HINES WAIVED ANY OBJECTION TO THE READING OF TESTIMONY TO THE JURY AFTER THE JURY'S RETIREMENT; AND THE COURT DID NOT ALLOW UNDUE EMPHASIS TO BE PLACED ON A PORTION OF THE EVIDENCE.

No undue emphasis was placed on testimony read to the jury, and this is beside the point since Appellant Hines and his counsel waived any objection. Respondent relies heavily on *Hersey v. Tully*, (Colo.), 44 P. 854 and *Jenkins v. Stephens*, (Utah), 231 P. 112. In *Hersey v. Tully*, supra, certain testimony was read to the jury after the case had been submitted *over the objection of defendant*. In the Jenkins Case, *defendant's counsel was not notified of the reading*.

No such objections are heard here. As a matter of fact and by positive statements, both the appellant and counsel (Tr. 196) agreed to a reading of the testimony

to the jury. Appellant waived his rights thereby and cannot now object to a reading of the testimony.

A case in the Supreme Court of Kansas, *State v. Haines*, 278 P. 767, held that it is not error for the court on the request of the jury, after it has retired to deliberate, to read to the jury an admission made by counsel for the defendant concerning what the evidence of a witness for the state would be, but who was not present when he was called, where the evidence was not objected to at the time it was admitted but which would have been inadmissible if proper objection had been made.

Upon receipt of an oral waiver from Hines and Mr. Reid, the court came on solid ground in ordering the disputed testimony read. The record says, at page 197, that the testimony of Mr. Hales and Mr. Crow was read to the jury. There is no indication that it was read in anything less, or other, than its full context. There is nothing to show that a portion only was read. There is no showing in the record or by the brief of appellants that it was given undue weight.

There is no indication that the women jurors were persuaded to hold for conviction because of having heard this testimony. Their decision and the reasons therefore are not a matter for inquiry, but their decision could likely have been based on persuasive argument and conversation on the part of the other jurors.

*State v. Peterson*, (Utah), 174 P. 2d 843, cited by appellants, is not in point in any way and has no bearing on the facts or law of the instant case.

## POINT IV

IT WAS DISCRETIONARY WITH THE JUDGE WHETHER OR NOT TO REQUIRE THE PRESENCE OF COUNSEL DURING THE READING OF TESTIMONY TO THE JURY AFTER ITS RETIREMENT; AND IT WAS NOT ERROR TO ALLOW SUCH READING IN COUNSEL'S ABSENCE.

The respondent does not question at all the power of the court to order defendant's counsel to be present during the jury's deliberations. The court is not obligated, however, to do so. It is a discretionary matter with the judge.

Clearly, it is not necessary that counsel be in court when the defendant's rights are not threatened in any way and, as here, where telephone contact is maintained by the client and counsel, and judge and counsel.

Since it is not required that counsel be present in court, it follows that the reading of testimony in his physical absence, especially, as here, where objection was specifically waived by counsel and appellant, is not error. Therefore, appellants points 4 and 5 are answered together. In this case the appellants suffered no damage to their rights whatsoever by counsel's physical absence from the courtroom. Both Appellant Hines and his counsel, Mr. Reid, were advised of the desire of the jurors to have the testimony read to them and both Hines and Mr. Reid waived any objection they might have raised.

If there is error, it is not prejudicial error, as the record gives nothing to indicate that Mr. Reid would

have objected even had he been present. Mr. Reid had full knowledge that the testimony would be read before he gave his approval and Appellant Hines did likewise. All details were available to them; everything was clear. They had as much opportunity to object as though both, and not Hines only, had been physically present in court.

The testimony was read simply and clearly, as Mr. Reid contemplated it would be. Hines had Mr. Reid's representation at all necessary times. It should be emphasized that Hines contacted and conversed with Mr. Reid by phone before himself stating that he had no objection to the reading of the testimony.

Article I, Section 12, of the Constitution of Utah, relied on by appellants, does not specify that accused's counsel must attend him at all stages of the trial. He is guaranteed representation, and, in this case, he received it to the fullest necessary extent. The actual physical presence of the attorney at every moment, especially after the case had been tried, was not necessary, nor do either of the statutes set forth by appellants define the nature of the representation required to be given or the amount of time the court-appointed counsel must spend in the physical presence of his defendants.

The Crank Case, cited in appellants' brief (p. 26) adds nothing to a consideration of this question since it too fails to set forth just what constitutes representation as contemplated by the above statutes and constitutional provision.

Appellants rely on *State v. Beeny*, (Utah), 203 P. 2d 397, for their view that where clarification is requested

by the jury and counsel has not been waived, the court should delay proceedings until a diligent effort can be made to secure counsel's presence.

A careful reading of the Beeny Case indicates the court held, however, that after the jury came back into court, instructions could then have been given to the jury by the court after mere notice to the defendant or his counsel; but that assuming that the trial court was of the opinion that despite the statutory provisions (that notice to appellant was sufficient), the defendants were entitled under the Constitution to have counsel present when a jury returned to court and that counsel had not waived the latter's presence, then, in the premises, the court should have delayed the proceedings for such length of time as would have sufficed to render diligent effort to secure counsel's presence.

In the instant case, the judge did not in his discretion feel, however, that appellants' rights were being denied by absence of counsel since notice had been given to counsel; and that being the case, it was not incumbent upon the judge to rule that diligent effort be made to secure counsel's presence.

Here, counsel below and Appellant Hines have invited the alleged error by agreeing to the reading of the evidence to the jury. Appellants cannot now come in and take advantage of any alleged error which they themselves brought about. It has frequently been held not to be error to proceed with the trial in counsel's absence if the accused is not thereby prejudiced. 23 C. J. S. 80.

The Ohio case of *Village of Addyston v. Liddle*, 6 N. E. 2d 877, stated:

“\* \* \* The right of the party accused to the presence of counsel is in the nature of a personal privilege and may be waived, and courts need not compel attendance or enforce vigilance of counsel. The convenience of counsel cannot be allowed to obstruct the reasonable dispatch of business.”

*People v. Holland*, (Calif.), 51 P. 2d 881, holds that where defendant's counsel voluntarily absented himself from the trial, proceeding with the trial in absence of such counsel is not error.

Two analogous cases are referred to—*Morton v. State*, (Ga.), 10 S. E. 2d 836 and *State v. Nichols*, (Kan.), 232 P. 1058. The Morton Case stands for the proposition that where counsel for the accused was absent when the jury returned and where he did not appear when the court had directed an officer to endeavor to locate him, and the court had the accused brought inside the bar and in regular form polled the jury and then disclosed and published the verdict, the return of the verdict in the absence of counsel was not prejudicial error. The Nichols Case held also that it was not error to receive the verdict in the absence of defendant's counsel.

22 C. J. S. 484 indicates that many cases hold it to be discretionary with the court whether or not to continue a case because of the absence of counsel, and it is not error to proceed.

## POINT V

### IT WAS NOT ERROR ON THE PART OF THE COURT

TO ALLOW MISS PARKER, THE COURT STENOGRAPHER, TO TAKE TWO WOMEN JURORS TO THE LADIES' RESTROOM.

The act of the court reporter, Miss Parker, in taking two women jurors to the ladies' restroom, was not prejudicial error. No claim is made that Miss Parker said anything whatsoever to the jurors about the case, and appellants specifically state, on page 30 of their brief, that:

“No accusation of misconduct is levelled at Miss Parker for escorting these jurors to the washroom.”

The statutes quoted, and several cases, hold that it is within the discretion of the court whether or not to let the jury separate during trial. *State v. Cano*, (Utah), 228 P. 563; *State v. Seyboldt*, (Utah), 236 P. 225; *People v. Callaghan*, (Utah), 6 P. 49. The language of the statute, 77-31-27, Utah Code Annotated 1953, furthermore, makes it discretionary with the court whether the jurors are to be accompanied by any officer at all. The language controlling reads that the jurors may be “permitted to separate *or* be kept in the charge of a proper officer.”

The Seyboldt Case, above, clearly holds that the jurors can be allowed to separate on their own and that whether an officer is to accompany and keep charge over them is discretionary with the court. The statute indicates that in the discretion of the court, if “a proper officer” is assigned to have charge of the jurors, the officer must be sworn.

Where the common law prevails rather than a

specific statute, *State v. Lane*, (Wash.), 222 P. 2d 394,

“In a prosecution for rape and burglary, the fact that bailiff was not sworn to perform the duties of his office prior to assuming charge of the jury was not error.”

Appellants object that Miss Parker was, first, not a proper officer and, second, that she should have been sworn. (Appellants' Brief, pp. 30 and 31) It is submitted, in light of the statute above, that *if* Miss Parker was not a “proper officer,” she did not need to be sworn. Since the jurors could have been separated and could have gone alone, it follows that Miss Parker could have acted, as she may have done, as a guide only without having to assume the character of a “proper officer”; and if she was not a “proper officer,” it was not necessary for her to be sworn. Although it is not set forth in the record, it can be presumed, according to the holding *Elkins v. State*, (Okla.), 233 P. 491, that she was sworn.

Appellants supply, on page 31 of their brief, some possibilities that Miss Parker might have pursued on the brief trip to the restroom (an excursion, of course, that did not lend itself to any serious discussion of a criminal case). They do not, however, as pointed out above, allege any misconduct whatsoever on the part of Miss Parker in any way.

Of all the available personnel who might have escorted the women jurors to the restroom, Miss Parker perhaps was best qualified. She had heard judges, perhaps hundreds of times, tell jurors not to converse with

the one in charge of them during adjournments. As a sworn court reporter, she was aware of her serious duties as an officer of the court. She was accustomed to the procedure and protocol entertained by courts of this state. She was aware of penalties for intimidating juries. No better choice could be had.

In light of the fact that no misconduct is laid by appellants to Miss Parker, it should be further pointed out that it is presumed that a jury will act in a proper and orderly fashion with careful effort to preserve the rights of the defendant. This is the holding in *Steadman v. State*, (Tenn.), 282 S. W. 2d 777, wherein it is stated:

“There is a presumption of right acting attending a jury so long as it is not guilty of misconduct.”

No improper relationship is alleged, except by innuendo, between Miss Parker and the two women jurors. Nevertheless, it is interesting to note the holding in *Parker v. State*, (Okla.), 193 P. 2d 607, which indicates that a verdict will not be set aside because of improper comments between jurors and officers, which comments are not of a character calculated to prejudice accused or to influence the verdict.

No objection was shown in the record to the jurors going with Miss Parker and counsel was present when the court so ordered and counsel said nothing to the contrary.

The Supreme Court of Arkansas has said on this point in *Atterbury v. State*, 20 S. W. 411:

“We hold that it is too late after verdict to object for the first time that a jury retired from court in charge of an officer to whom the oath had not been administered where it appeared that the defendant was present when it retired and neither asked that the special oath be administered to him nor objected to his taking charge of the jury and it does not appear that either the officer or the jury was guilty of any misconduct.”

The Court should also consider *Odell v. Hudspeth*, (Kan.), 189 Fed. 2d 300, which held:

“The fact that a sheriff in a murder prosecution acted as bailiff and custodian of the jury during the trial would not void the judgment even though the sheriff also was a witness for the prosecution.”

## POINT VI

IT IS PRESUMED THAT THE JURY WAS AT ALL TIMES PROPERLY ADMONISHED; THE APPELLANTS DID NOT RAISE ANY OBJECTION AT THE TRIAL AND SHOULD NOT BE ALLOWED TO DO SO NOW; AND IF THE JURY WAS NOT ADMONISHED IMMEDIATELY PRIOR TO A SHORT INFORMAL RECESS, APPELLANTS WERE NOT PREJUDICED IN THEIR SUBSTANTIAL RIGHTS.

Where there is nothing in the record to show that the jury was properly admonished, it will be presumed that the court performed its duty in that regard. *Elkins v. State*, supra., *Redman v. Territory*, (Okla.), 37 P. 826, holds that in the absence of direct proof to the contrary, we must presume that the court below admonished the jury, as provided by law, and did all that was necessary

to be done. The presumption is that the court duly admonished the jury as to their duty. The rule that all reasonable presumptions and intendments will be made in favor of the ruling of the trial court is one of the best settled and most recently applied rules in appellate procedure. See also *Donahue v. State*, (Tex.), 236 S. W. 86 and *Caw v. People*, 3 Neb. 357.

In *Quayle v. State*, (Ariz.), 165 P. 331, the court said:

“The court must presume, the record being silent, that the trial court performed its duty, and will not inquire for the first time on appeal whether that duty has been violated.”

*People v. Berger*, 275 P. 2d 799, reaffirms definite law that an appellate court will not indulge in presumptions to defeat a judgment.

“The appellants were present at the trial and might have objected, and should have objected, to any failure of the trial court to follow the prescribed procedure. We presume, if appellants deemed their rights jeopardized by the alleged omission, that they would, therefore, have objected; and if they saw and did not object, or failed to see any irregularity in the matter, they waived it and cannot be heard to complain for the first time on appeal.”

*Yarborough v. State*, (Okla.), 162 P. 2d 678 and *State v. Morris*, (Ore.), 114 P. 476, both hold that where the defendant does not object to the failure of the court to give the proper admonition, it would be presumed on appeal that the error did not work any substantial prejudice to his rights.

## POINT VII

IF ERRORS WERE MADE BY THE COURT BELOW, THEY WERE, IN EVERY CASE, NONPREJUDICIAL ERRORS WITHOUT NEGATIVE AFFECT UPON THE SUBSTANTIVE RIGHTS OF THE ACCUSED APPELLANTS.

The recent Utah case, *State v. Neal*, 262 P. 2d 756, approves and sustains this line of reasoning in stating that the court will not reverse criminal causes for mere error or irregularity. It is only where there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted. Other Utah cases holding with, and precedent for, the Neal Case are *State v. Romeo*, 128 P. 530; *State v. Estes*, 176 P. 271; and *State v. Woods*, 220 P. 215.

Here, the judge and the jury were very careful to preserve the rights of defendants, Leach and Hines, to the best of their ability. This is especially manifest by the great effort the judge went to in affording Mr. Leach a reputable attorney and allowing him, on rejection of Mr. Reid, to obtain one of his own.

A conviction will not be set aside for mere technical errors of the accused. *State v. Thompson*, (Ariz.), 206 P. 2d 1037.

In the absence of proof to the contrary, proceedings of a court properly exercising criminal jurisdiction are presumed to be regular, and mere failure of the records to show it does not overcome this presumption; and after a verdict, all permissible inferences must be made in the favor of the prosecution. This is made clear by

77-42-1, Utah Code Annotated 1953, which states.

“After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.”

Ordinarily the Supreme Court refuses to review matters not excepted to in the trial court. Since being a court of review, it should first allow the trial court the opportunity to rule on matters brought before it for consideration. *State v. Peterson*, (Utah), *supra*.

### CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

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