

1956

## State of Utah v. William France Gillen : Brief of Respondent

Utah Supreme Court

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E. R. Callister; Maurice D. Jones; Attorneys for Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

THE STATE OF UTAH,  
*Plaintiff and Respondent,*  
— vs. —  
WILLIAM FRANCE GILLEN,  
*Defendant and Appellant.*

*Filed*  
*Feb. 9, 1954*

Case No.  
8392

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Brief of Respondent

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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THE STATE OF UTAH, <i>Plaintiff and Respondent,</i> — vs. — WILLIAM FRANCE GILLEN, <i>Defendant and Appellant.</i>	}     }	Case No. 8392
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Brief of Respondent

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STATEMENT OF FACTS

Respondent adopts in substance appellant’s preliminary statement as being substantially correct, but adds the following in order that the Court may conveniently determine the validity of the claim made by appellant through the prosecution of this appeal.

According to the record, the district attorney objected a total of three times during the cross-examination

of the witness Samuelson by appellant's counsel. (R. 62, 71.) Of these three objections, not one was sustained. Appellant's right to face a witness who testifies against him at the trial, and cross-examine him, was never denied nor restricted.

To the contrary, the trial court encouraged defense counsel to proceed in his cross-examination and show how or why the witness Samuelson was biased and prejudiced against the appellant. (R. 71.) The record makes clear that during the cross-examination of Samuelson, he had a difficult time understanding the questions and associating them to a particular part of his experience related to the charges which had been filed against the appellant. It was not unusual for appellant's counsel to have to ask the questions two, three and four times. Even after seeing how slow the witness was in comprehending his questions, defense counsel made no effort to call to his attention the fact that, as counsel, he believed, if he really did, that the witness Samuelson had been offered preferential treatment in return for his testimony.

Prior to the offer of the transcript as evidence (R. 104), which transcript appellant claims would have impeached the witness, there was no attempt made to discover or disclose by or through cross-examination whether any leniency or immunity had been received, promised, offered, expected or hoped for by the witness. The only reference made by appellant's counsel to any such condition was one vague question about the witness being “\* \* \* expected to cooperate with the State in

this matter, \* \* \*” during the following cross-examination:

“Q. At the time of sentencing under that matter did you have a conversation with the court?

“A. No. The date I went up for sentence?

“Q. That’s right.

“A. Yes. I had no conversation at all with the court that day.

“Q. Pardon me?

“A. Didn’t have no talking with the court at all that day.

“Q. Did the court talk to you and admonish you?

“A. Told me to put it over for a week.

“Q. I mean at the time of your sentencing, did you have a conversation with the court?

“A. No. I didn’t.

“Q. You did not. Maybe I can clear up what I mean. At the time that you were put on probation, did you have a conversation with the court?

“A. The day I was put on probation he talked to me, yes.

“Q. And could you tell me what the court told you on that day?

“MR. ANDERSON: I think that’s immaterial.

“MR. HATCH: *I think it is proper to show bias and prejudice, Your Honor.*

“THE COURT: *On the part of the court or*

*on the part of the witness? If on the part of the witness, I will let you go ahead.*

*“MR. HATCH: On the part of the witness, Your Honor.*

*“THE COURT: Go ahead then. Let’s see.*

*“Q. What did the court say to you on that day?*

*“A. On that day they told me they was going to put me on probation, that I had to report back here to the judge on the 26th of this month.*

*“Q. And, as a matter of fact, weren’t you told on that day by the court that you were expected to cooperate with the state in this matter?*

*“A. I did not. They did not say nothing to me.*

*“MR. HATCH: Thank you. That’s all.”  
(R. 71, 72.) (Emphasis added.)*

Defense counsel voluntarily stopped the examination at this point. The witness was never recalled. There was no attempt made to lay a foundation for the introduction of the independent evidence appellant now claims would have impeached the State’s witness by showing his bias or prejudice toward the appellant.

Appellant was found guilty of uttering a forged check, and not of forgery (R. 144). His own testimony discloses he had knowledge that the check delivered to Mr. McDermid, manager of the O. P. Skaggs Store, was forged.

(By Mr. Anderson, District Attorney)

*“Q. Well, you said that you saw these checks*



being made out I understood in the restaurant—

“A. That’s right.

“Q. —in Ogden. Is that right?

“A. That’s right.

“Q. And you knew that the girl making them out wasn’t a man by the name of G. F. Stevensen, didn’t you?

“A. I did.

“Q. Because you had met Stevensen, hadn’t you?

“A. That’s right.

“Q. And you knew at that time these checks had come from his store, didn’t you?

“A. I didn’t know where they came from.

“Q. Well, you read on them, didn’t you?

“A. I didn’t know where they come from because Samuelson popped them up up there the first time.

“Q. Well, you read the title at the top, didn’t you?

“A. Huh?

“Q. You read the name at the top—

\* \* \*

“Q. You read the name at the top of the exhibits where it says “Good Housekeeping Center”?

“A. Yes.

“Q. You did?

“A. Yes.

“Q. Then you knew where the check had come from?

“A. Yes.

“Q. And you knew she was not a man by the name of G. F. Stevensen?

“A. That’s right.

“Q. And so when you were in Skaggs store and you were asked to endorse this check, you did so without telling Mr. McDermid that fact, didn’t you? Didn’t you?

“A. Yes. Go ahead.

“Q. And you knew you weren’t George Nelson, didn’t you?

“A. Yes sir.

“Q. Now, you said that Mr. Samuelson was worse off than you, wasn’t he?

“A. That’s right.

“Q. So you carried his groceries out to the car?

“A. No, I didn’t carry them.

“Q. You didn’t?

“A. No.

“Q. What did you take out to the car?

“A. I didn’t take nothing only myself.

“Q. Only yourself?

“A. Yes.”

(R. 127, 128.)

“Q. When did you first see the three checks that you have mentioned?

“A. The first time I seen three checks was at Ogden, Utah, in the cafeteria.

“Q. Is that the time when this girl — was she a waitress, was she?

“A. Yes, sir.

“Q. Is that the time when she made out the three checks?”

“A. That’s right.

“Q. Did she make out all three of them?

“A. Yes sir.

“Q. At that time?

“A. Yes sir.

“Q. In your presence?

“A. I was sitting off to the side eating a little bite to eat, and Mr. Samuelson had the checks fixed and folded them up and put them in his pocket.

“Q. Then it is your testimony that this girl—you don’t know her name?

“A. No, I don’t.

“Q. That she made out those three checks?

“A. Yes.

“Q. And Exhibits 1 and 2 are two of those checks?

“A. Well, that is what I figured they are, yes, because they are both made out looks to me like the same handwriting.

“Q. So it is your testimony that Exhibits 1 and 2 look like to you the same handwriting?

“A. They certainly do.

“Q. And they were both made by this girl?

“A. I am pretty sure. There were three checks made out there.” (R. 129, 130.)

## STATEMENT OF POINTS

### POINT I

THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO PRODUCE CERTAIN INDEPENDENT EVIDENCE WAS NOT ERROR, FOR IT WAS WITHIN THE COURT'S DISCRETION TO SO REFUSE WHEN THERE HAD NOT BEEN A PROPER FOUNDATION LAID PRIOR TO ITS OFFER.

### POINT II

EVEN IF THE COURT ERRED IN REFUSING THE INTRODUCTION OF CERTAIN INDEPENDENT EVIDENCE, IT WAS NOT PREJUDICIAL TO APPELLANT'S SUBSTANTIAL RIGHTS FOR APPELLANT'S TESTIMONY DISCLOSED THAT HE KNEW THE CHECK WAS FORGED, THEREBY FURNISHING THE JURY SUFFICIENT EVIDENCE UPON WHICH TO FIND APPELLANT GUILTY OF UTTERING A FORGED INSTRUMENT.

## ARGUMENT

### POINT I

THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO PRODUCE CERTAIN INDEPENDENT EVIDENCE WAS NOT ERROR, FOR IT WAS WITHIN THE COURT'S DISCRETION TO SO REFUSE WHEN THERE HAD NOT BEEN A PROPER FOUNDATION LAID PRIOR TO ITS OFFER.

There is no question that the cases cited in appellant's brief speak the law as it has been established. However, respondent feels that the cases cited therein

are not in point and can be distinguished from the issue presented by this appeal.

It is admitted that the testimony of an accomplice must be received with caution and be subject to grave suspicion. However, this kind of testimony is often the only evidence the State can produce in criminal matters. As a result, it is generally considered to be competent, and if, after all the facts and circumstances in evidence are considered, such testimony is sufficient to prove guilt beyond a reasonable doubt, the jury is authorized to find a verdict of guilty. If this rule were any different, many criminals would go unpunished. *State v. Harding*, 161 Wash. 379, 297 P. 167; *People v. Kendall*, 357 Ill. 448, 192 N.E. 378. The general rule is broad enough to include the testimony of an accomplice even though uncorroborated. *People v. Kendall*, supra; *People v. Payne*, 359 Ill. 246, 194 N.E. 539.

But the rule has been changed in Utah by statute. Our law requires that the testimony of an accomplice be corroborated by evidence “\* \* \* which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense \* \* \*.” (77-31-18, Utah Code Annotated, 1953.) In order to determine if the corroborative evidence is sufficient in and of itself to tend to implicate and connect the accused with the commission of the offense charged, the testimony of the accomplice should be disregarded; then, if the other testimony and evidence properly admitted tends to prove the connection of the accused with the crime, it is sufficient. It need not be

sufficient to sustain a conviction by itself, but it must tend to implicate the accused with the crime charged and not be consistent with his innocence. *State v. Clark*, 3 U. 2d 382, 284 P. 2d 700.

At appellant's trial, the accomplice, Samuelson, testified to certain facts which were corroborated by other evidence. There can be little doubt that his testimony was corroborated by that of the other witnesses on the following facts:

1. Samuelson took the checks—no dispute in the testimony of Samuelson and appellant. (R. 57.)

2. The checks were apparently made out by the appellant. (R. 57, 60, 67, 90.)

3. Appellant did not have authority to make out the checks. (R. 36, 58.)

4. Appellant aided in passing the forged check and thereby declaring and asserting, directly or indirectly, by his re-endorsement that the instrument was good. (R. 48, 66, 114, 127, 128.)

5. Appellant received the change (money) given for the forged check cashed at the O. P. Skaggs Store. (R. 55, 64.)

Appellant's brief stresses the right of a defendant, in a criminal action, to confront an individual who is a witness for the State and to cross-examine him during the proceedings. And, it is contended that this is especially true when the witness was an accomplice of the defendant in the commission of the offense he is

charged with. This rule of law has been settled in Utah. There is no question but that the defendant in a criminal proceeding has an absolute right and not only a mere privilege to cross-examine such a witness. *State v. Zolantakis*, 70 Utah 296, 259 P. 1044; *State v. Barretta*, 47 Utah 479, 155 P. 343.

Respondent further accepts the principals of law that require the jury to see and have a chance to study the demeanor of the witness during *cross-examination* in order to evaluate the truth or falsity of his testimony; that a witness may be *cross-examined* as to whether or not he received any consideration for his testimony; that it is error to refuse such *cross-examination* even though the witness has only a hope of leniency; that the witness may be *cross-examined* as to what reward has been already received and the facts surrounding the award of leniency or immunity.

Though this is the law, it is difficult to see what application it has to the issue presented by this appeal. It has no bearing upon the introduction of the independent evidence which it is claimed would have impeached a particular witness, for the right of cross-examination was never refused the appellant during his trial.

The question of whether any leniency or immunity has been afforded an accomplice in return for his testimony at the trial of his associates is always subject to a probing, sifting cross-examination. However, under the rules of our courts and because of the very nature of the proceedings in the courts, being adversary against adversary, it is the duty of the defense counsel to pro-



ceed and extend the examination into the areas he believes will best benefit his client. It is not incumbent upon a court to make sure the attorneys that appear before it perform one hundred per cent in the application of every rule of law within its knowledge and understanding.

The point of respondent's argument is simply this—during the trial, appellant's counsel didn't take advantage of his right to cross-examine the witness as to what leniency or immunity he may have received, been promised, expected or hoped for.

After the trial court had given its express permission to appellant's counsel to proceed in his attempt to disclose the bias and prejudice claimed to be tainting the witness's testimony, counsel stopped after one vague question about the court expecting the witness “\* \* \* to cooperate with the State in this matter?” No attempt was made to associate the remark supposedly made at the time the court sentenced the witness with the present proceeding in that the witness was to receive preferential treatment. Again it is pointed out that defense counsel voluntarily stopped his examination at this point and appellant was never restricted in his right to cross-examine the witness Samuelson.

As stated in Point I of appellant's brief, the real issue to be considered by this appeal is whether it was error to refuse the introduction of certain evidence for impeachment of the witness Samuelson. A party is not permitted to impeach the credibility of a witness against him by the introduction of independent evidence which



it is claimed shows an inconsistent statement, hostility, prejudice, or interest in the outcome of the case without first laying a foundation for the introduction of said evidence. The foundation is laid by calling the attention of the witness to the statement or act which it is claimed will show his bias, prejudice, hostility or interest, thus giving him an opportunity to admit, deny or explain it. *State v. White*, 58 N.M. 324, 270 P. 2d 727; *Fagan v. Lentz*, 156 Cal. 181, 105 P. 951, 20 Ann. Cas. 221; see also 16 A.L.R. 984.

It is not sufficient merely to ask the witness during cross-examination whether certain statements were made by him or made in his presence. It is necessary in order to lay a sufficient foundation on which to show that a witness is hostile or biased to directly question him as to the precise statements or happenings to be used against him and the place where they were alleged to have been made. *Wright v. State*, 153 Ark. 16, 201 S.W. 1107; *State v. Ellsworth*, 30 Ore. 145, 47 P. 199; *State v. McSloy*, 127 Mont. 265, 261 P. 2d 663; *Willis v. State*, 257 Ala. 500, 66 So. 2d 753; *McCauley v. State*, 64 Ga. App. 509, 71 S.E. 2d 664; *People v. Adair*, 120 C.A. 2d 765, 228 P. 2d 336; *Galvan v. State*, 129 Tex. Cr. R. 349, 86 S.W. 2d 228.

There was no attempt made during the cross-examination of Samuelson to disclose whether any leniency or immunity had been offered, accepted, or hoped for, on the part of the witness, nor was it shown that the court's comments at the time Samuelson was sentenced had any effect upon him whatever. Samuelson was not asked

if he felt that his testimony, given at appellant's trial, was to be the basis upon which he expected to receive probation.

A careful reading of the cases cited by appellant in his brief (excluding the last four) discloses that in each instance the right of cross-examination that was refused, resulted either after a question pointed specifically at immunity or leniency received, promised, expected or hoped for, or after an offer of proof directed at disclosing the same.

The case of *State v. Barretta*, supra, a Utah case, is an excellent example. Barretta, an accomplice, was asked on cross-examination:

“Don't you understand that your case is to be dismissed if you will testify against the defendants \* \* \* in this case?”

In the Barretta case, as in most of the cases cited by appellant, the problem of the introduction of independent evidence to impeach a particular witness was not involved. On appeal, in each case, the issue involved the refusal of the trial court of permission to cross-examine one of the state's witnesses about his bias, prejudice, hostility or interest in the outcome of the case. Also, the trial court in some of the cases denied the right to cross-examine a witness concerning immunity or leniency and the fact that, though the witness was an accomplice, the charge filed against him had not been prosecuted or had been dismissed in return for his testimony and help in obtaining a conviction of his associates.

Consideration should also be given to the fact that the disclosure of bias, prejudice or hostility in a witness does not exclude his testimony but rather goes only to the credibility of the witness. The witness Samuelson was labled an accomplice at the very outset of the trial and by his own testimony given a little later. Therefore, the jury had an opportunity to judge his credibility. *People v. Simard*, 314 Mich. 624, 23 N.W. 2d 106. His credibility was also placed before the jury to be tested and studied when on cross-examination it was disclosed that he had a criminal record and had been convicted of a felony in Idaho (R. 60).

Where counsel seeks to discredit a witness by showing bias, hostility, prejudice or interest, he should first inquire as to the state of the witness' feelings toward the person involved. *Carlyle v. State*, 85 Ga. App. 223, 68 S.E. 2d 605. In proving hostility and bias in a witness, facts which directly tend to establish it should be resorted to, such as threats, quarrels and like circumstances. It is also sufficient to show the hostility by reasonable inference from the circumstances inquired about. *State v. Belansky*, 3 Minn. 246, Gil. 169.

After all, impeachment is not a central matter and the trial judge, though he may not deny a reasonable opportunity at any stage to prove the bias of a witness, has discretion to control the extent to which the proof may go.

The writers of texts and encyclopedias list many cases to prove that the evidence to explain bias or hostility, or to explain it away, is or is not admissible.

But what these cases really stand for, when they are sufficiently well reasoned to reveal their rationale, is that the admission or rejection of such evidence lies in the discretion of the trial judge. *Lau Fook Kan v. United States*, 9th Cir., 34 Fed. 86, 91; *People v. Zugouras*, 163 N.Y. 250, 57 N.E. 465; *Priori v. United States*, 6th Cir., 6 F. 2d 575; *Commonwealth v. Ezell*, 212 Pa. 293, 61 A. 930; *State v. Long*, 95 Vt. 485, 115 A. 734; *State v. Frazer*, 23 S.D. 804, 121 N.W. 790; *Bracey v. United States*, 142 F. 2d 85.

The trial judge has the responsibility of seeing the sideshow does not take over the circus. In fact, the situation of the present case provides a good example for the necessity for permitting the trial judge to exercise considerable discretion in admitting or rejecting evidence. He observed the conduct of counsel, the reactions of the witnesses under examination, both direct and cross, and the resulting affect upon the jury. In other words, he was aware as no appellate court can be, of the courtroom psychology and, hence, is in a position to determine whether particular testimony should or should not be received. Appellate courts have been especially unwilling to override the exercise of discretion of trial judges in such circumstances. *Williamson v. United States*, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278; *Holmes v. Goldsmith*, 147 U.S. 150, 13 S.Ct. 288, 37 L.Ed. 278.

By exercising its discretion to exclude the proffered evidence, the court indicated that, in its considered judgment, the appellant would be best served. The judge felt

that such evidence “. . . would have no bearing here and would greatly tend to prejudice this jury. If the jury thought the court at one time had an opinion, I think it would be highly prejudicial.” (R. 104.)

Consideration should also be given to the procedural effect the introduction of the independent evidence would have had upon the court. To rehabilitate the witness Samuelson, it would have been necessary to call the judge there presiding as a witness. Though the statutes of this State allow such (78-24-3, U.C.A. 1953), the general view is that expressed in the California case of *People v. Connors*, 77 Cal. App. 438, 246 P. 1072, 157 A.L.R. 322. That court, in discussing the statute that allowed a trial judge to be called as a witness at a hearing over which he was presiding, indicated such was within his discretion, that such discretion should never be resorted to, and that a trial judge should not become a witness except in cases where the circumstances imperatively require it. It should be noted that the California and Utah statutes use the same language.

As a general proposition, it may be said that the weight of authority sustains the view that a presiding judge may not temporarily leave the bench and become a witness in a case being heard by him. The recent decisions agree that such conduct is improper, although there may be a question of whether or not it constitutes prejudicial error. *Testimony of Judge or Juror*, 1945 Wis. Law Review, p. 248.

In some cases, the courts have held that where the judge, called to the witness stand, is trying the case and

his continuance is necessary to a proper trial thereof, it is error for him to testify. *People v. Dohring*, 59 N.Y. 374, 11 Am. Rep. 349; *State v. Sandquist*, 46 Minn. 322, 178 N.W. 883.

This rule has been amplified and it has been considered a fatal error for the presiding judge to testify in a criminal case. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *People v. McDermott*, 40 N.Y.S. 2d 456; *State v. Bagwell*, 201 S.C. 387, 23 S.E. 2d 244; *Downey v. United States*, 91 F. 2d 223.

In the present case the question of the witness's credibility and veracity had been placed before the jury. It was shown that the witness was an accomplice in the crime; therefore, the jury had a chance to judge his credibility. *People v. Simard*, supra. Also, the jury had a second chance to consider the veracity of Samuelson when it was shown that he had a criminal record. If the independent evidence offered by the appellant had been received, it would have diverted the attention of the jury to a collateral issue, for which there was no foundation upon which to judge the character of evidence introduced.

“Where the effect, even if not the intent, of the evidence offered is to divert the attention of the jury by a collateral and subordinate issue, the matter must always be left largely in the discretion of the judge, and in this case it certainly was not abused, as it is clear that there was no solid foundation for the charge of hostile bias on the part of the witness, whose testimony in the main points” \* \* \* [was corroborated by that of the other witnesses.]

*Commonwealth v. Ezell*, supra.

Cross-examination and the introduction of independent evidence with respect to appropriate subject of inquiry rests in the discretion of the trial court; and it is only in cases of clear abuse of such discretion, resulting in manifest prejudice to the complaining party, that the reviewing court will interfere. *Igo v. State*, ..... Okla. ...., 267 P. 2d 1082.

## POINT II

EVEN IF THE COURT ERRED IN REFUSING THE INTRODUCTION OF CERTAIN INDEPENDENT EVIDENCE, IT WAS NOT PREJUDICIAL TO APPELLANT'S SUBSTANTIAL RIGHTS FOR APPELLANT'S TESTIMONY DISCLOSED THAT HE KNEW THE CHECK WAS FORGED, THEREBY FURNISHING THE JURY SUFFICIENT EVIDENCE UPON WHICH TO FIND APPELLANT GUILTY OF UTTERING A FORGED INSTRUMENT.

Section 76-26-1, Utah Code Annotated 1953, defines uttering in the following language:

“Every person who \* \* \* utters, publishes or passes, or attempts to pass, as true or genuine any \* \* \* fake, altered, forged or counterfeited matters, \* \* \* knowing the same to be false \* \* \* with the intent to prejudice, damage or defraud any person \* \* \* is guilty of forgery.”

It seems reasonable to say that the inference, that a person who utters as genuine a forged instrument had knowledge of its forged condition, is particularly warranted where, in addition to his possession and uttering



of the forged instrument, there are accompanying circumstances which are indicative of such knowledge on his part, such as, for example, his being named as payee or falsely representing himself as the payee or the endorsee, or making other false representations when uttering it. (164 A.L.R. 621.) When a person aids in passing a forged instrument, he thereby declares and asserts, directly and indirectly, that the instrument is good. When the forged instrument is uttered, the intent to defraud is presumed, *Spears v. People*, 220 Ill. 72, 77 N.E. 112, and where a person is actually defrauded, the intent to defraud ordinarily becomes conclusive. And, it has been held that one's intent is prima facie criminal where, in cashing a check, he falsely permitted himself to be identified as being the payee, and forged the endorsement of the payee on said check. *State v. Vineyard*, 16 Mont. 138, 40 P. 173.

In that case, the court said:

“If a man goes to a stranger with a check made out to another, permits himself to be identified as the real payee, and secures the amount of the check as an accommodation, after making a fictitious or forged endorsement thereon, we unhesitatingly say that his intent is prima facie criminal and to hold otherwise, under the facts of this case, is contrary to all logical processes of reasoning \* \* \*.”

Can there be any doubt about whether appellant knew the check was forged? Of course not. His claim of innocent involvement is not worth considering. This man was no innocent bystander. On cross-examination the fact that appellant had served time in both the Ore-



gon and Idaho state penitentiaries for forgery was brought out for the jury to consider (R. 119, 120.) After four different convictions, he certainly must have realized and have been fully aware of the criminal nature of the act of passing the check by a fictitious or forged endorsement or reendorsement.

“Evidence of similar forgeries is admissible to show a uniform course of acting from which guilty knowledge and criminal intent can be inferred. In other words, the evidence of other forgeries is admissible not to prove the commission of the crime for which the party is being tried, but to prove guilty knowledge and intent \* \* \*.”

*State v. Green*, 89 Utah 437, 57 P. 2d 750.

Though the above stated rule is sometimes qualified by the time lapse between each act of forging or passing a forged instrument, it would appear to have application in this case.

By his own testimony, the appellant convicted himself. He admits that he knew the checks were not issued by the proprietor of the Good Housekeeping Center, nor was the authority to make the checks given to anyone else, to his knowledge. (R. 126, 127, 128, 129, 130.) His story involves a waitress whom, he claims, made out the checks. (R. 110, 111.) However, he readily admits she couldn't have had the authorization of Mr. G. F. Stevensen, owner of “Good Housekeeping Center” to so do, nor was she G. F. Stevensen.

Appellant represented to the manager of the store where the check was cashed, that he was George Nelson,

the payee named on the check, and at the request of the manager re-endorsed the check (R. 48). After the check had been cashed, appellant received the change therefrom. This is sufficient to show the intent to defraud and the actual defrauding of an individual.

Throughout the record, the fact is brought out that the appellant and his associate had been drinking heavily. This is of no consequence for: "No act committed while in a state of voluntary intoxication is less criminal by reason of his having been in such conditon." (76-1-22, U.C.A. 1953.)

One last comment should be made concerning the full effect of the testimony given by Samuelson. There was not one material statement made that was not substantiated by the other witnesses. The only force his testimony could lend to the prosecution was to prove the actual forging of the checks, and even this was testified to by the expert who testified on behalf of the State.

Appellant was not convicted of forgery, but of uttering a forged instrument; and, as shown above, the evidence produced by the State and the testimony of the appellant gave the jury all the evidence, and, in considering it, the jury could not have found other than it did.

### CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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