

1958

State of Utah v. Kurt M. Lyman : Brief of Defendant and Appellant

Utah Supreme Court

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8885
Criminal Case No. ~~2926~~

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

STATE OF UTAH,
Plaintiff and Respondent,

v.

KURT M. LYMAN,
Defendant and Appellant.

APPEALED FROM FOURTH DISTRICT COURT
HON. MAURICE HARDING JUDGE

BRIEF OF DEFENDANT AND APELLANT

ELIAS HANSEN
Attorney for Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

v.

KURT M. LYMAN,
Defendant and Appellant.

Criminal Case
No. 2926

STATEMENT OF THE CASE

This action was brought by filing a Complaint in the City Court of Provo City, Utah County, Utah. It is charged in such Complaint:

That Kurt M. Lyman on or about the 15th day of April, 1957, at Utah County, State of Utah, did commit the crime of a felony, to wit: Embezzlement, committed as follow, to wit: "That he, said Kurt M. Lyman, at the time and place aforesaid did embezzle \$12,000.00, the property of the Lyman Finance Corporation of Provo, Utah County, Utah, which said money had been entrusted with said Kurt M. Lyman, an officer for said Lyman Finance Corporation, and did appropriate the same to his own use." (R. 4). A preliminary hearing

was had on the charge contained in the Complaint, and defendant was bound over to the District Court of Utah County to answer the charge contained in the Complaint.

On August 23, 1957, an Information was filed in the District Court of Utah County, wherein it is charged:

“Comes now Jackson B. Howard, District Attorney of the Fourth Judicial District of the State of Utah, and accuses Kurt M. Lyman, he having been bound over to answer to this charge by a Committing Magistrate, and charges that the said Kurt M. Lyman on or about the 15th day of April, 1957, did commit the crime of a felony, to wit: Embezzlement.”

To the Information so filed, defendant, before entering a plea thereto, made and on September 6th filed in the District Court the following instrument:

“Comes now Kurt M. Lyman, above named defendant, and moves the Court to quash the Information filed herein against the defendant upon the following grounds and for the following reasons:

1. That the Information fails to state a public offense.
2. That so far as appears from the Information filed against the defendant the charge therein attempted to be alleged is not the offense charged in the Complaint filed in the City Court of Provo City, and, therefore, the attempted charge contained in the Information may or may not be the charge upon which the defendant has had a preliminary hearing.
3. That the Information is so uncertain as to the value of the alleged embezzlement that it can-

not be determined whether the same was of a value to constitute a felony or a misdemeanor.

4. That the Information does not inform the defendant that which is charged to have been embezzled belonged to some one other than defendant.

“If the foregoing Motion to Quash the Information is not granted, defendant Kurt M. Lyman moves the Court to furnish defendant with a Bill of Particulars giving him the following information:

1. Who was the owner of the property claimed to have been embezzled?
2. What was the kind of property that it is claimed was embezzled?
3. What was the value of the property claimed to have been embezzled?
4. For whose use is it claimed the property was embezzled?
5. In whose possession was the property claimed to have been embezzled?
6. With what intention is it claimed that the defendant did the act with which he is charged?”

The Court below denied the Motion to Quash, but required the State to furnish a Bill of Particulars. Notwithstanding such requirement the District Attorney failed to file a Bill of Particulars but the District Attorney did serve upon Counsel for defendant the following document:

“Comes now Jackson B. Howard, District Attorney, and answers the Bill of Particulars submitted by defendant as follows:

1. The owner of the property claimed to have been embezzled is the Lyman Finance Corporation.
2. The kind of property embezzled was money or back exchange.
3. The value of the property embezzled was \$12,000.00.
4. Kurt M. Lyman or Lyman Motor Company.
5. The Lyman Finance Corporation.
6. With criminal intention, particularly the intent to fraudulently appropriate to his own use or to the use of some other person or corporation moneys or credits which has come into his possession by virtue of his trust as an officer in the Lyman Finance Corporation.” (R. 6)

The foregoing instrument so served upon Counsel for defendant was not filed, but on the contrary, on September 10, 1957, the District Attorney, without having served a copy thereof on Counsel for defendant, was by the Court permitted to file the following Amended Information:

“Comes now Jackson B. Howard, District Attorney of the Fourth Judicial District of the State of Utah, and accuses Kurt M. Lyman, he having been bound over to answer this charge by a Committing Magistrate, and charges that the said Kurt M. Lyman on or about the 15th day of April, 1957, in Utah County did commit the crime of a felony, to wit: Embezzlement, in that

he did embezzle property in excess of \$50.00 from the Lyman Finance Corporation.” (R. 8).

The defendant did not enter a plea to the Amended Information. He went to trial thereon on the 16th day of December, 1957.

Upon motion of Counsel for defendant a mistrial was ordered because of improper statements made by the District Attorney to the jury and the introduction of improper evidence prejudicial to the defendant. (R. 11).

The case was again set down for trial, and a trial had on the 16th of December, 1957, which resulted in the jury being unable to agree upon a verdict, there being seven for acquittal and one for conviction (R. 33).

The case was again tried on the 10th day of February, 1958, which trial resulted in a verdict of guilty (R. 58).

A Motion in Arrest of Judgment was made by the defendant and the same denied (R. 59).

A Motion for a New Trial was also made and denied (R. 61).

On February 20, 1958, defendant was sentenced, and the sentence suspended, subject to the same being *amended* (R. 62). Notice of Appeal was served and filed on April 15, 1958.

It is from the judgment of sentence that this appeal is prosecuted.

Defendant seeks a reversal of the judgment appealed from on account of claimed error committed during the course of the trial in the following particulars:

ASSIGNMENT OR POINT I.

THE TRIAL COURT ERRED IN REFUSING TO QUASH THE INFORMATION. (R. 59-72)

ASSIGNMENT OR POINT II.

THE TRIAL COURT ERRED IN PERMITTING THE STATE OF UTAH TO FILE ITS AMENDED INFORMATION. (R. 72)

ASSIGNMENT OR POINT III.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE EXHIBITS B AND C. (Tr. 18)

ASSIGNMENT OR POINT IV.

THE TRIAL COURT ERRED IN PERMITTING THE WITNESS PAUL BLACK, TO ANSWER THE QUESTION: WAS THERE ANY AUTHORIZATION MADE TO MR. LYMAN, OR TO ANY OTHER PERSON, BY THE BOARD OF DIRECTORS, AUTHORIZING THE PAYMENT FOR SOMETHING OTHER THAN FLOORING OR CONTRACTS. (Tr. 24)

ASSIGNMENT OR POINT V.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE EVIDENCE OF MR. BLACK THAT FERDINAND ERICKSON WAS A DIRECTOR OF THE LYMAN MOTOR COMPANY. (Tr. 28)

ASSIGNMENT OR POINT VI.

THE TRIAL COURT ERRED IN PERMITTING MR. BLACK OVER THE OBJECTIONS OF COUNSEL FOR DEFENDANT TO TESTIFY THAT WHEN HE AND MR. HARMON TOOK OVER THE MANAGEMENT OF THE LYMAN MOTOR COMPANY THERE WAS IN EXCESS OF \$5,000.00 OVERDRAFT AT THE BANK. (TR. 34) AND TO FURTHER TESTIFY AS TO THE FINANCIAL CONDITION OF THE LYMAN MOTOR COMPANY. (Tr. 36-7)

ASSIGNMENT OR POINT VII.

THE TRIAL COURT ERRED IN PERMITTING MR. BLACK TO TESTIFY OVER OBJECTION OF COUNSEL FOR DEFENDANT THAT DEFENDANT WAS OWING TO THE LYMAN MOTOR COMPANY IN THE NEIGHBORHOOD OF \$800.00. (Tr. 68)

ASSIGNMENT OR POINT VIII.

THE TRIAL COURT ERRED IN PERMITTING EXHIBIT J TO BE RECEIVED IN EVIDENCE OVER THE OBJECTION OF COUNSEL FOR DEFENDANT. (Tr. 72)

ASSIGNMENT OR POINT IX.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE STATEMENT OF MR. CARLISLE WHILE TESTIFYING FOR THE PLAINTIFF THAT THE SITUATION WAS BEYOND THE STAGE OF BEING CONTRACTS, AND WERE OF A CRIMINAL NATURE. (Tr. 88-89)

ASSIGNMENT OR POINT X.

THE TRIAL COURT ERRED IN PERMITTING THE DISTRICT ATTORNEY, OVER OBJECTION OF COUNSEL FOR DEFENDANT, UNDER THE GUISE OF CROSS-EXAMINATION TO INTERROGATE THE DEFENDANT AS TO CERTAIN CHECKS MADE OUT BY VARIOUS PERSONS TO VARIOUS OTHER PERSONS. (Tr. 196-204)

ASSIGNMENT OR POINT XI.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN REQUEST BY DEFENDANT IN HIS REQUEST NO. 1.

ASSIGNMENT OR POINT XII.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN REQUEST NO. 2.

ASSIGNMENT OR POINT XIII.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 4.

ASSIGNMENT OR POINT XIV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 5, AND IN GIVING IN LIEU THEREOF INSTRUCTION NO. 5, AND PARTICULARLY THAT PORTION OF INSTRUCTION NO. 5 WHEREIN THE JURY WAS INSTRUCTED TO THE EFFECT THAT A PERSON IS GUILTY OF EMBEZZLING PROPERTY WHETHER THE PERSON DERIVES ANY BENEFIT HIMSELF FROM THE TRANSACTION, OR WHETHER OR NOT HE INTENDS TO RETURN THE MONEY OR OTHER PROPERTY TAKEN AT SOME LATER TIME, OR TO MAKE RESTITUTION TO ITS RIGHTFUL OWNER.

ASSIGNMENT OR POINT XV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY APPELLANT'S REQUEST NO. 8.

ASSIGNMENT OR POINT XVI.

THE TRIAL COURT ERRED IN GIVING ITS NINTH INSTRUCTION TO THE JURY, AND IN PARTICULARLY THAT PORTION OF SUCH INSTRUCTION WHICH IGNORES THE FACT THAT THE ARTICLES OF INCORPORATION OF LYMAN FINANCE CORPORATION EXPRESSLY AUTHORIZED THE LOANING OF ITS MONEY.

ASSIGNMENT OR POINT XVII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN ARREST OF JUDGMENT.

ASSIGNMENT OR POINT XVIII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT A NEW TRIAL.

ARGUMENT

ASSIGNMENTS OR POINTS I, II, and XI

ASSIGNMENT OR POINT I.

THE TRIAL COURT ERRED IN REFUSING TO QUASH THE INFORMATION. (R. 59-72)

ASSIGNMENT OR POINT II.

THE TRIAL COURT ERRED IN PERMITTING THE STATE OF UTAH TO FILE ITS AMENDED INFORMATION. (R. 72)

ASSIGNMENT OR POINT XI.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN REQUEST BY DEFENDANT IN HIS REQUEST NO. 1.

THE ERRORS WHICH APPELLANT CLAIMS WERE COMMITTED BY REASON OF POINTS OR ASSIGNMENTS I, II AND XI, IN THE MAIN, INVOLVED THE SAME QUESTION OF LAW, AND THEREFORE, WE SHALL DISCUSS SUCH ASSIGNMENTS OR POINTS TOGETHER.

Utah Code Annotated, 1953, 77-23-3, provides that a Motion to Quash an Information shall be available on one or more of the following grounds:

- 1(b) That the court has ordered a bill of particulars under the provisions of Section 77-21-9 and the prosecuting attorney fails to furnish a sufficient bill.
- 2(a) That an information was filed without the defendant first having had or waived a preliminary examination.

Utah Code Annotated, 1953, 77-21-6, provides for the form of an information in this language:

“X.Y. the district attorney for the..... district accuses A.B. of (here charge the offense in one of the ways mentioned in section 77-21-8-e.g. murder, assault with intent to kill, poisoning an animal contrary to section 76-5-12 of the Penal Code) and charges that (here the particulars of offense may be added with a view to avoiding the necessity for a bill of particulars).”

Utah Code Annotated, 1953, 77-21-8, provides that an information is valid and sufficient if it charges the offense for which defendant is being prosecuted in one or more of the following ways:

- “(a) By using the name given to the offense by the common law or by a statute.
- (b) By stating so much of the defining of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.
- (2) The information may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference.”

The provisions of *Utah Code Annotated, 1953, 76-5-11*, referred to in the form of an information is of little or no aid in determining the sufficiency of the information in this case.

Embezzlement is thus defined in *Utah Code Annotated, 1953, 76-17-1*:

“Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.”

Utah Code Annotated, 1953, 76-17-2, provides that:

“Every officer, director, trustee, clerk, servant or agent of any association, society or corporation, public or private, who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, or secretes the same with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.”

Utah Code Annotated, 1953, 76-17-3, provides:

“That a carrier or other person having personal property for transportation is guilty of embezzlement if such property is fraudulently appropriated to a use other than for its safe keeping.”

Utah Code Annotated, 1953, 76-17-4, makes it the crime of embezzlement for a bank, trustee, merchant, broker, attorney, agent, assignee in trust, executor, administrator, collector, or other person having control of personal property guilty of embezzlement if he fraudulently appropriates the same to a use other than the lawful execution of his trust.

Utah Code Annotated, 1953, 76-17-5, contains similar provisions as to a bailee, servant, attorney-in-fact, etc.

Utah Code Annotated, 1953, 76-17-6, contains a similar provision as to a bank officer or employee.

Utah Code Annotated, 1953, 76-17-7, provides that:

“Every clerk, agent or servant of any person who fraudulently appropriates to his own use or secretes with a fraudulent intent to appropriate to his own use any property of another which has come into his control or care by virtue of his employment as such clerk, agent or servant, is guilty of embezzlement.”

It will be seen that in the complaint filed in the City Court upon which the defendant had his preliminary hearing, and upon which he was bound over to the District Court, he was charged with having appropriated \$12,000.00 to his own use. It will also be seen that in the original information filed in the District Court the defendant was merely charged with having committed the crime of embezzlement. In compliance with the demand for a Bill of Particulars defendant was informed that he had appropriated either money or bank exchange, either to his own use, or to the use of the Lyman Motor Company. That defendant had the intention of fraudulently appropriating the money to his own use or to the use of some other person or corporation, money or credit which had come into his possession by virtue of his trust as an officer of Lyman Finance Corporation. Contrary to the requirements of *U.C.A. 1953, 77-21-9*, the Bill of Particulars was not filed of record. That thereafter the State was permitted to file an Amended Information in which defendant was charged with having committed the crime of embezzling property in excess of \$50.00 from the Lyman Finance Corporation (R. 8).

It was upon the Amended Information that defendant went to trial. It will be seen that by *U.C.A., 1953, 77-21-9* a new Bill of Particulars shall supersede any previous bill. Apparently it was sought by the Amended Information to supercede the Bill of Particulars and by that means deprive the defendant of all definite information of the charge he was required to answer.

This Court is committed to the following propositions of law:

1. That one charged with a crime may be bound over to the District Court to answer only to the charge contained in the Complaint filed before the Committing Magistrate, and upon which he has been given a preliminary hearing, unless such preliminary hearing, with consent of the State, is waived, or of an offense necessarily included within the charged offense.

Among the cases so holding are *State v. Pay*, 45 Utah 411, 146 Pac. 300; *State v. Freeman*, 93 Utah 125, 71 Pac. (2d) 196; *State v. Jensen*, 103 Utah 478, 136 Pac. (2d) 949.

It is said in the case of *State v. Woolman*, 84 Utah 23, 33 Pac. (2d) 640, that:

“For lesser offense to be necessarily included in greater offense within statute permitting connection of offense charged, the lesser offense must of necessity be embraced within legal definition of greater offense and be part thereof.”

2. While the short form of an information such as that provided for in *U.C.A. 1953, 77-21-8*, has been held not to offend against the provisions of Article One, Section 12 of the Constitution of Utah wherein it is provided that in criminal prosecu-

tion the accused has a right to demand the nature and cause of the accusation against him, none-the-less one charged with a crime is entitled to the benefits of such constitutional provision.

State v. Hill, 3 Utah 334, 3 Pac. 75. *State v. Jensen*, 98 Utah 482, 100 Pac. (2d) 969; *State v. Hale*, 71 Utah 134, 263 Pac. 86; *State v. Spencer*, 101 Utah 281, 121 Pac. 912.

While a Bill of Particulars is not a part of an information, however, the granting thereof is not discretionary, but is a matter of right if the statutory conditions are present. *State v. Solomon*, 93 Utah 70, 71 Pac. (2d) 104.

So, also, is it the settled law in this jurisdiction that the sufficiency or insufficiency of an information must be tested by its allegations and not by the evidence introduced at the trial. *State v. Fisher*, 79 Utah 115, 8 Pac. (2d) 589; *Ballaine, et al. v. District Court of First Judicial District for Box Elder County, et. al.*, 107 Utah 247, 153 Pac. (2d) 265; *State v. Solomon, supra*.

It will be seen that the complaint filed before the committing magistrate did inform the defendant of the nature and cause of the accusation against him, namely: of having misappropriated to his own use the sum of \$12,000.00 belonging to Lyman Finance Company. For some unknown reason the original information merely charged that Kurt M. Lyman committed the crime of embezzlement on or about April 15, 1957. That information is entirely silent as to whose property was misappropriated, the nature or the amount thereof, for

whose use and benefit the same was appropriated, or the provision of the Utah Statutes that were offended against. It may here be noted that the crime of embezzlement did not exist at common law, *18 Am. Jur.* 571.

It would seem clear that since the information utterly failed to give defendant the necessary information to enable him to defend against the same, that, therefore, he was entitled to a Bill of Particulars.

We assumed that when the Bill of Particulars was ordered and a copy thereof was served upon Counsel, the original was filed in the cause as by law provided. It was not until this appeal was prosecuted that Counsel for defendant learned that the proposed Bill of Particulars had not been so filed. Apparently Counsel for the State sought to escape being bound by the Bill of Particulars by filing the Amended Information. It would seem obvious that the defendant may not thus be denied his constitutional right to be informed of the nature and cause of the accusation he is called upon to defend against.

Moreover, the Amended Information upon which defendant was tried is about as vague and uncertain as it could have been drawn within the charge contained in the Complaint upon which he was charged in the Complaint filed in the City Court and upon which he had a preliminary hearing, and upon which he was bound over to the District Court. Such information was calculated to keep defendant in the dark as to the particulars of the nature and cause of the accusation against him. He was merely informed that he was charged with having embezzled

property in excess of \$50.00 from the Lyman Finance Corporation. Under such allegation the evidence offered by the State as to issuance of three separate checks by defendant was received in evidence, one of such checks was for \$12,000.00, one for \$246.97, and one for \$1753.03. Such checks were marked P-C, D and H. (Trs. 78-21)

It seems clear that if the issuance of either of the three above mentioned checks constitute an offense, the issuance of each constituted a separate offense. We have a statute, *U.C.A. 1953, 77-21-31*, which provides that the information must charge but one offense. If in this case an information may be drawn in such vague and uncertain language as to bring within such language a number of claimed offenses, and if, as was done in this case, the three checks were properly received in evidence, then and under such circumstances the provisions of *U.C.A. 1953, 77-21-31*, are circuvented. That is to say, if by the use of vague and uncertain language broad enough to cover two for more claimed offenses, the accused is required to guess as to the particular acts he is called upon to answer, and if at the trial evidence is offered as to more than one offense, then and under such circumstances accused is called upon to answer more than one offense as effectively as if he had been charged with more than one offense. Indeed, if an information may be drawn by the use of vague and uncertain language so as to permit evidence of more than one offense, then and in such a case that kind of an information is fraught with a greater invasion of the rights of the accused than if

he had been openly charged with more than one offense. See *State v. Beck*, 85 Utah 531, 39 Pac. (2d) 1091.

The trial court as a part of its instruction to the jury stated that the particular property charged to have been embezzled is money of the Lyman Finance Company in the sum of \$12,000.00 made payable to the Carlisle Corporation and signed Lyman Finance Corporation by Kurt M. Lyman, President. However, such language did not inform the jury that the information was limited in its charge to the item of \$12,000.00, nor is the information limited to such a charge, nor was the evidence limited to such a charge, nor was the verdict of the jury limited to the item of \$12,000.00. The verdict of the jury is that defendant is guilty as charged.

A principle of law of uniform application is that the purpose to be accomplished by an information and a verdict of a jury rendered after the trial is threefold, namely: (1) To inform the defendant of the nature and cause of the accusation filed against him; (2) To inform the court of the nature and cause of the accusation against the defendant about to be tried; (3) To enable defendant, or other person to determine just what has been determined by the verdict.

It may be inquired: Was the defendant found guilty of the crime of issuing the check for \$12,000.00, or the check for \$246.97, or the check for \$1753.03? No answer to such inquiry can be found in the evidence or in the verdict of the jury. But little aid in giving an answer to such inquiry can be found by reading the instructions of the Court to the jury. All that may be

said of such instructions is that the issuing of the \$12,000.00 check is included in the charge.

As heretofore stated, defendant was charged in the Complaint filed in the City Court of Provo with having appropriated the \$12,000.00 to his own account. There is not a scintilla of evidence showing or tending to show that Kurt M. Lyman received anything belonging to the Lyman Finance Company for his personal use. The evidence is all to the contrary. (Trs. 29, 67-222)

It will be noted from the provisions of our statute dealing with Embezzlement that such crime may be committed in a number of different ways, one of which is by appropriating money to one's own use. Indeed, when one is charged with the crime of embezzlement the usual understanding is that the accused has taken money or property belonging to another and appropriated the same to his own use. That is what defendant is charged with having done. There is a vast distinction between the act of a president of one corporation using money belonging to such corporation to aid another corporation of which he is president, and the act of an officer of a corporation appropriating the money of such a corporation for his personal use. In the former case that may well be lacking moral turpitude. In the latter case moral turpitude is of the very essence of the act.

It is, to say the least, very doubtful if one reading the Complaint filed before the City Court could reasonably anticipate that he would be called upon to defend an act of using the money of one corporation to pay

the obligations of another. If the Complaint filed in the City Court may be so construed, then and in such case, the Complaint is calculated to deceive rather than to inform defendant of the nature of the acts he is called upon to defend against. Nor may it be said that the act of using the money of one corporation to pay the debts of another corporation is included in the charge of appropriating money to one's own use. The State Legislature did not deem the one means of committing an act of embezzlement included with the other acts which constitute that offense. As will be seen from the various sections of the Act defining embezzlement above quoted, that the Legislature specifically designates the acts which constitute embezzlement. When the informations were filed in the District Court we know of no reason why the defendant should not have been informed of the specific act, or the sections which it is claimed the defendant offended against, unless it were to keep the defendant in the dark as to particular acts with which he was charged. Nor is there any good reason why the State should not have filed a Bill of Particulars as by law required, instead of substituting therefor the Amended Information with its vague and uncertain language which may be said to include a number of acts which fall within the meaning of the language of such Amended Information.

It is said in *18 Am. Jur., Sec. 43, page 598*, that:

“If there are several sections of the statute concerning embezzlement which describe different phases of the crime by designating different per-

sons, different property, etc., an indictment must be drawn under the proper section. Even where the difference involves only the relation in which the person stood who committed the offense, the one does not include the other, and a defendant indicted under one statute cannot be convicted of the offense disclosed by the other.”

While our Code of Criminal Procedure provides for the amendment of an information, there is no provision therein which permits the destruction of a Bill of Particulars by resort to the filing of an Amended Information, yet that is what is done in this case. So far as the record shows a Bill of Particulars was not filed, but in lieu thereof there was filed an Amended Information. If that may be done, then the right of defendant to a Bill of Particulars is rendered meaningless. As heretofore pointed out, the evidence shows without conflict that the appellant did not appropriate any of the funds of the Lyman Finance Corporation to his own use, but devoted a substantial portion of his time in attending to the business of such Company without being paid anything for his services. That being so, he was entitled to have the jury bring in a verdict of Not Guilty as requested in his Request No. 1, and by the same token he was entitled to have granted his Motion in Arrest of Judgment.

ASSIGNMENT OR POINT III.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE EXHIBITS B AND C. (Tr. 18)

The court may experience some difficulty in determining the particular Exhibits to which Assignment or

Point III relates. That is due to the fact that there were three trials had in the court below with the result that some of the Exhibits bear more than on exhibit number. Exhibit B, however, contains but one identification as an exhibit. It is a check for \$6000.00 drawn by Paul C. Black for and on behalf of the Lyman Finance Corporation. So far as is made to appear appellant had nothing whatever to do with the execution of that check. It was apparently offered in evidence for the purpose of showing that appellant was responsible for the action of Paul C. Black, the Secretary and Treasurer of the Lyman Finance Corporation. (Tr. 11) If anyone was guilty of misapplying the money represented by the \$6000.00 check, it was Paul C. Black and not appellant. Exhibit C is the stub of the check Exhibit B. What has been said about Exhibit B applies to Exhibit C. Neither of those exhibits had anything to do with the charge here lodged against appellant, especially the charge contained in the Complaint filed in the City Court of Provo.

ASSIGNMENT OR POINT IV.

THE TRIAL COURT ERRED IN PERMITTING THE WITNESS PAUL BLACK, TO ANSWER THE QUESTION: WAS THERE ANY AUTHORIZATION MADE TO MR. LYMAN, OR TO ANY OTHER PERSON, BY THE BOARD OF DIRECTORS, AUTHORIZING THE PAYMENT FOR SOMETHING OTHER THAN FLOORING OR CONTRACTS. (Tr. 24)

It is, of course, elementary law that the best evidence of what the Board of Directors do is contained in its Minutes. At no time was Mr. Black asked about the Minutes of the Board of Directors. By the answer the

witness was permitted to express his own conclusion. Moreover, it is to say the least, doubtful if the action of the Board of Directors was material in that if the appellant was guilty of the crime of embezzlement by what was done, the Board of Directors was without authority to authorize what is claimed was done by defendant. We shall have more to say about this phase of the case later in this Brief.

ASSIGNMENT OR POINT V.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE EVIDENCE OF MR. BLACK THAT FERDINAND ERICKSON WAS A DIRECTOR OF THE LYMAN MOTOR COMPANY. (Tr. 28)

It is the law of Utah that before one can be a director of a company he must, among other things, take an oath of office. *Utah Code Annotated, 1953, 16-2-8, Schwab v. Trisco Min. and Mill. Co.*, 21 Utah 258, 60 Pac. 940. Later Mr. Erickson was called and testified to the effect that he did not take an oath of office. (Tr. 145) The only reason that we can conceive for offering the evidence that Mr. Erickson was a director of the Lyman Motor Company was to justify the actions of Mr. Erickson and Black in convincing appellant that Mr. Erickson and Mr. Black, together with Rulon Snow, should take over the business of Lyman Motor Company. (Tr. 149) They did take over the business, (Tr. 30-33), attempted to amend the Articles of Incorporation, (Tr. 60-61), succeeded in getting appellant to surrender the power to vote his stock, (Tr. 61), and after operating the business for about a month they caused a suit to be brought by the Lyman

Finance Corporation and attached all of the assets of Lyman Motor Company. (Tr. 37) The testimony that Mr. Erickson was a director of the Lyman Motor Company could not have any relevancy to the question of whether or not appellant was guilty of the crime of embezzlement, and was calculated to confuse the jury and cast upon appellant a suspicion of wrongdoing not connected with such crime.

ASSIGNMENT OR POINT VI.

THE TRIAL COURT ERRED IN PERMITTING MR. BLACK OVER THE OBJECTIONS OF COUNSEL FOR DEFENDANT TO TESTIFY THAT WHEN HE AND MR. HARMON TOOK OVER THE MANAGEMENT OF THE LYMAN MOTOR COMPANY THERE WAS IN EXCESS OF \$5,000.00 OVERDRAFT AT THE BANK. (TR. 34) AND TO FURTHER TESTIFY AS TO THE FINANCIAL CONDITION OF THE LYMAN MOTOR COMPANY. (Tr. 36-7)

The evidence of the overdraft of the funds of Lyman Motor Company is foreign to any issue in this case. Nor is there any evidence that appellant was responsible for the overdraft, or the financial condition of that Company. The admission of this and considerable similar incompetent evidence was clearly calculated to mislead the jury as to the matter of whether or not the defendant was guilty of embezzlement.

As we understand the law, the guilt or innocence of an accused of the crime of embezzlement does not depend upon the amount of assets or liabilities owned by a corporation whose funds are being disposed of.

ASSIGNMENT OR POINT VII.

THE TRIAL COURT ERRED IN PERMITTING MR. BLACK TO TESTIFY OVER OBJECTION OF COUNSEL FOR DEFENDANT THAT DEFENDANT WAS OWING TO THE LYMAN MOTOR COMPANY IN THE NEIGHBORHOOD OF \$800.00. (Tr. 68)

It would indeed be enlightening to know upon what theory such evidence is material in this case. Can it be said that because appellant was indebted to Lyman Motor Company in the neighborhood of \$800.00, that, therefore, he was guilty of embezzlement of some money from the Lyman Finance Corporation? Was the Bill of Particulars abandoned by failing to file the same and the vague and uncertain Amended Information filed so that the jury might find that defendant was guilty of embezzlement because he owed the Lyman Motor Company in the neighborhood of \$800.00, which money in turn belonged to Lyman Finance Corporation? It is safe to say that no authority can be found that will support the admissibility of such evidence, on any such a theory, or any other theory. The evidence was calculated to prejudice appellant in the minds of the jury.

ASSIGNMENT OR POINT VIII.

THE TRIAL COURT ERRED IN PERMITTING EXHIBIT J TO BE RECEIVED IN EVIDENCE OVER THE OBJECTION OF COUNSEL FOR DEFENDANT. (Tr. 72)

Exhibit J is an application directed to the Utah State Securities Commission for permission to sell stock to the public in Lyman Finance Corporation. It will be seen that the application provides, among other things,

that Paul C. Black, a Certified Public Accountant licensed in the States of Utah, Nevada and Texas, was the Secretary-Treasurer and General Manager of Lyman Finance Corporation, and was to receive \$600.00 per month salary, and that \$300.00 per month was to be paid to the Lyman Motor, Inc., for office space and facilities, together with telephone and clerical services. The application provides that the proceeds from the sale of these securities will be used in financing of automobile conditional sales contracts with contracts for insurance premiums thereon. Source of such Conditional Sales Contracts is through Lyman Motor, Inc., a Utah Corporation, of which Kurt M. Lyman owns the controlling capital stock. There is no evidence which shows or tends to show that on February 28, 1957, it was not the bona fide intention of appellant to carry out the objects mentioned in the application, and if there can be found in this record evidence to the contrary, the admission of the Exhibit for that reason is inadmissible in evidence. The application is in no sense a part of the crime of embezzlement. If appellant is guilty of the crime of embezzlement, it is because of what he did without regard as to whether there was or was not an application made for the sale of stock in Lyman Finance Corporation. The admission of the Exhibit in evidence was prejudicial to defendant, in that, it carries an inference that some of the money derived from the sale of stock in Lyman Finance Corporation was not used for the purposes specifically mentioned in the application. Later in this Brief we shall direct the attention of the Court to the provisions

of the Articles of Incorporation of Lyman Finance Corporation which should be considered in connection with the above mentioned application.

ASSIGNMENT OR POINT IX.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE THE STATEMENT OF MR. CARLISLE WHILE TESTIFYING FOR THE PLAINTIFF THAT THE SITUATION WAS BEYOND THE STAGE OF BEING CONTRACTS, AND WERE OF A CRIMINAL NATURE. (Tr. 88-89)

Generally the expression of an opinion is limited to expert witnesses and even then such witnesses are not permitted to give testimony as to matters not requiring special knowledge or questions of law. By refusing to strike the testimony as requested by appellant the jury may well have believed that the Court approved the statement of the witness that the acts concerning which testimony was being given were of criminal nature.

ASSIGNMENT OR POINT X.

THE TRIAL COURT ERRED IN PERMITTING THE DISTRICT ATTORNEY, OVER OBJECTION OF COUNSEL FOR DEFENDANT, UNDER THE GUISE OF CROSS-EXAMINATION TO INTERROGATE THE DEFENDANT AS TO CERTAIN CHECKS MADE OUT BY VARIOUS PERSONS TO VARIOUS OTHER PERSONS. (Tr. 196-204)

During the course of the introduction of evidence on behalf of the prosecution, the District Attorney called the attention of the Court and jury to checks which he claimed were drawn on four different banks throughout the State of Utah on accounts in the names of H. Wilhelm, Mary Lyman, George Albert and Bradshaw. (Tr. 31-32) A hearing was had before the Court in the absence of the

jury as to the admissibility of the checks claimed to have been made out to Merlin Bradshaw, H. Wilhelm, George Albert and Mary Lyman, which the District Attorney claimed constituted an unlawful operation of check kiting. The trial court held that the checks were not proper evidence. (Trs. 97-98) Notwithstanding the ruling of the Court in such particular, and notwithstanding appellant was not examined concerning such checks on his direct examination, the District Attorney on cross-examination was, over objection of Counsel for appellant, permitted to cross-examine appellant at considerable length concerning such checks. (Tr. 212-213) No claim was made that the checks were signed by appellant. Indeed, the District Attorney admitted that all of the checks, except one, were signed by the bookkeeper. While the checks were again rejected by the Court, it is clear that the exhibiting of these checks before the jury was improper and calculated to prejudice the jury against the defendant. Such action is expressly condemned by this Court in the case of *State v. Lanos*, 63 Utah 151, 223 Pac. 1065.

ASSIGNMENT OR POINT XII.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED IN REQUEST NO. 2. (R. 55)

In his Request No. 2 defendant requested the Court to instruct the jury thus:

“You are instructed, Members of the Jury, that the *defendant is charged with having appropriated the sum of \$12,000.00, the property of Lyman Finance Corporation to his own use. Before you can find the defendant guilty in this*

case you must find beyond a reasonable doubt that he did appropriate the \$12,000.00 to his own use, and in this connection you are instructed that even if you should find that he appropriated the \$12,000.00 to the use of Lyman Motor Company, you cannot find him guilty of the crime charged, and your verdict must be not guilty.”

Much of what has heretofore been said applies to this Assignment or Point. There is this additional observation. The Amended Information being so vague and uncertain as to the particular acts with which appellant is charged, in fairness to appellant the general language of such information should in any event be limited to the charge contained in the Complaint filed in the City Court, otherwise appellant may not be said to have been informed of “the nature and cause of the accusation against him” as provided in *Article 1, Section 12 of the Constitution of Utah*.

ASSIGNMENT OR POINT XIII.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 4.

In his request No. 4 appellant made this request:

“You are instructed that the defendant is not charged with any offense growing out of any contract or other dealings whereby Carlisle Finance Company advanced money to Lyman Motor Company, and, therefore, the defendant is not called upon in this proceeding to justify his actions in such a transaction, and even if you should believe that defendant was guilty of improperly selling purported contracts of Lyman

Motor Company to the Carlisle Finance Company, such fact, if it be a fact, will not support a conviction of the charge here made against the defendant, in other words, the only matter you are called upon to determine in this cause is whether or not the defendant is guilty of the particular crime of embezzling the sum of \$12,000.00 of the Lyman Finance Corporation.” (R. 56)

It will be seen that the trial court marked the Request just quoted as having been given. (R. 56) However, the same was not given as will be seen from the instructions of the Court to the jury. (R. 36 to 54) In this connection it may be noted that the record fails to show that an exception was taken to the failure of the Court to give Request No. 4. Counsel for appellant does not now recall whether or not he relied upon the notation of the Court that the request was given. Be that as it may, it seems from the provisions of *Utah Code Annotated, 1953, 77-37-4*, that when written requests to a charge have been presented the question presented in such requests need not be expected to, and any error in the decision of the Court thereon may be taken advantage of on appeal.

This Court has apparently construed such section in the following cases. *People v. Berlin*, 10 Utah 39, 36 Pac. 199; *State v. Cooper*, 114 U. 531, 201 Pac. (2d) 764, citing *State v. Anderson*, 75 Utah 496, 286 Pac. 645. In the *Berlin case supra* it was held that no exception need be taken in order that advantage may be taken on appeal. In the *Cooper case supra* the contrary view seems to have been taken. Neither in the Cooper or Anderson cases is the statutory provision mentioned. In light of

the clear language of the statute above referred to it would seem apparent that this Court overlooked the same.

A reading of the evidence in this case will show that the entire case was based upon the claim that appellant paid the \$12,000.00 check, together with the check for \$1753.00 and for \$246.97, to the Carlisle Corporation for invalid contracts that had theretofore been sold by the Lyman Motor Company to Carlisle Corporation. (See testimony of witness Albert Zenger, (Tr. 81 to 96), and cross examination of appellant. Much of the same was objected to by Counsel for appellant. (Tr. 187 to 217) Considerable of the cross examination exceeded the bounds of propriety, such as these questions asked appellant on cross-examination :

“Q. Do you want to take the Fifth Amendment? Do you think that will incriminate you if you tell me why it isn't fraudulent?”

Q. They are all bogus contracts, either no car or no person?” (Tr. 193 to 222)

Notwithstanding the vagueness and uncertainty of the language of the Amended Information, it probably will not be contended that the giving of the checks to the Carlisle Corporation are offenses charged by the Amended Information. It may be even open to doubt as to whether or not the evidence of the transaction had wherein the Lyman Motor Company received money from the Carlisle Corporation was competent evidence, in that, such transactions were in no sense a part of the charge filed against appellant. It is apparent under the theory

of the State the guilt of appellant was not dependent upon whether or not the transactions had whereby the Lyman Motor Company acquired money from the Carlisle Corporation, but upon whether or not appellant had a right to issue the Carlisle Corporation the check or checks in payment of the money owing by the Motor Company to Carlisle Corporation. Be that as it may, in light of the copious testimony about the transactions had between the Motor Company and Carlisle Corporation, the jury might well have believed that such transactions were of controlling importance and appellant was entitled to the requested instruction. It may be noted that at the trial which resulted in the jury being unable to agree upon a verdict, the Court gave the Requested Instruction No. 4. (R. 24)

ASSIGNMENT OR POINT XIV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 5, AND IN GIVING IN LIEU THEREOF INSTRUCTION NO. 5, AND PARTICULARLY THAT PORTION OF INSTRUCTION NO. 5 WHEREIN THE JURY WAS INSTRUCTED TO THE EFFECT THAT A PERSON IS GUILTY OF EMBEZZLING PROPERTY WHETHER THE PERSON DERIVES ANY BENEFIT HIMSELF FROM THE TRANSACTION, OR WHETHER OR NOT HE INTENDS TO RETURN THE MONEY OR OTHER PROPERTY TAKEN AT SOME LATER TIME, OR TO MAKE RESTITUTION TO ITS RIGHTFUL OWNER.

In order to understand appellant's objection to Court's Instruction No. 5, it is necessary to have in mind these facts:

Mr. Black was a Certified Public Accountant with authority to practice his profession in Utah, Nevada and Texas. He was the Secretary-Treasurer, General Manager and a director of the Lyman Finance Corporation. See Exhibit J. He drew the Articles of Incorporation of the Lyman Finance Corporation by having the same copied from the Articles of the Lyman Motor Company. (Tr. 38-39) Among the powers of the Lyman Finance Corporation as contained in its Articles of Incorporation were these:

“To acquire, sell, and otherwise dispose of, deal in stocks, bonds, mortgages, securities, notes and commercial paper of corporations and individuals, to act as agents for insurance companies of Utah and receive applications for fire, casualty, plate glass, boiler, elevator, accident, health, burglary, marine life insurance, all other kinds of insurance and collection of premiums, and to do such other business as may be delegated by agents for such companies, and to conduct a general insurance brokerage business, to lend money and negotiate loans.

“To acquire by purchase or otherwise, own, hold, lease, rent, mortgage and otherwise to trade with and deal in real estate, lands and interest in lands and all other property of every kind and nature.

“To borrow money and to execute notes and obligations and security contracts therefore, and to lend any of the moneys or funds of the corporation and to take evidence of indebtedness therefore.” (Tr. 39 to 42)

Paul Black received a salary of \$600.00 per month,

which was paid from funds of Lyman Motor Company, together with other expenses of the Lyman Finance Corporation (Tr. 75). While Mr. Black subscribed for stock in the Lyman Finance Company and agreed to pay \$3,000.00, no part of which he paid, notwithstanding, he verified the Articles of Incorporation of such Corporation, stating that not less than ten per cent of the stock of the Corporation had been paid (Tr. 45-46). When it was first planned to form the Lyman Finance Company the same was to be a mere branch of the Lyman Motor Company. Mr. Erickson, a lawyer who assisted in the sale of stock in Lyman Finance Corporation, so testified (Tr. 143). The two companies occupied the same offices and the rent was paid by the Motor Company (Tr. 47). See also Exhibit J. Thus from the time of the organization of Lyman Finance Corporation the two companies had substantially the same powers as evidenced by their Articles of Incorporation. For the most part their officers were the same, and their funds were used to pay the debts of the corporations without regard to source of such funds. It is apparent that the financial interests of the two companies were so comingled that the two companies were treated as one corporation. So far as appears, no one objected to this manner of doing business until it was thought that the Motor Company was in financial trouble, when some of the stockholders of the Finance Corporation, particularly Mr. Black and Mr. Erickson, conceived the idea of attaching all of the assets of the Motor Company for the use and benefit of the Finance Corporation. In this connection it should be observed

that appellant did not keep the books of either of the two companies (Tr. 47-48). But that work was done by Mr. Horst Schwermer, who for a short time was succeeded by Rosa Maycock, (Tr. 103), who in turn was succeeded by Paul Black (Tr. 49). The authorities as we read them teach that under such a state of facts one may not be said to be guilty of embezzlement. Such being the law, the trial court's Instruction No. 5 is erroneous. In light of the fact that the obligations of the Finance Corporation had been paid by funds of the Motor Company, it may not be said that appellant was guilty of embezzlement when he used some of the money of the Finance Corporation to pay debts of the Motor Company, especially if appellant intended that the Finance Corporation would in due time be reimbursed for any excess of its money used for that purpose.

ASSIGNMENT OR POINT XV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY APPELLANT'S REQUEST NO. 8. (Tr. 239)

By his request No. 8 appellant requested the Court to instruct the jury

“that the Articles of Incorporation of the Lyman Finance Corporation authorized the defendant, Kurt M. Lyman, to loan the money of the Lyman Finance Corporation to the Lyman Motor Company, and to borrow, on behalf of the Lyman Finance Corporation, money from the Carlisle Finance Company.”

The attention of the Court is again directed to the provisions of the Articles of Incorporation of the Finance

Corporation which provides that such Corporation shall have power:

“To borrow money and to execute notes and obligations and security contracts therefor, and to lend any of the money or funds of the Corporation and to take evidence of indebtedness therefor.” (Tr. 42)

The evidence is all to the effect that appellant exercised the general supervisory powers over both the Motor and Finance Corporations. Indeed, the prosecution seems to have proceeded on the theory that the appellant was responsible for all that was done by the two corporations. During the course of the trial the prosecution apparently took the view that it was of controlling importance because there was written on the stubs of the checks that were paid to the Carlisle Corporation for Flooring. Such notation was made on the stub of the check executed by Paul C. Black. The evidence further shows without conflict that the money paid to Carlisle Corporation was carried on the books of the Motor and Finance Companies under the heading of Flooring, and that at the time the checks were given Horst Schwermer was the bookkeeper of the Motor Company (Tr. 172). The fact that the word flooring was written on the stub of the checks given to Carlisle Corporation did not have the effect of relieving the Motor Company from the obligation to pay the Finance Corporation for the money that was paid to Carlisle Company. At most, the transferring of Contracts to Carlisle Corporation was merely as security for the payment of amounts advanced by Carlisle Corporation in the transactions. The evidence so shows (Tr. 58).

Generally speaking an officer of a corporation who loans its money is not guilty of embezzlement. *10 American and English Encyclopedia of Law* 995.

ASSIGNMENT OR POINT XVI.

THE TRIAL COURT ERRED IN GIVING ITS NINTH INSTRUCTION TO THE JURY, AND IN PARTICULARLY THAT PORTION OF SUCH INSTRUCTION WHICH IGNORES THE FACT THAT THE ARTICLES OF INCORPORATION OF LYMAN FINANCE CORPORATION EXPRESSLY AUTHORIZED THE LOANING OF ITS MONEY.

Much of what has been said under the foregoing Assignment or Point XV applies to Point XVI. It will be seen that such Instruction in effect permits a jury to find a person guilty of embezzlement if he is negligent in conducting the affairs of a corporation. It is also stated that a president of a corporation has only the powers of a director, or such additional powers as may be directly conferred upon him by the Board of Directors, or by the Articles of Incorporation. As we have heretofore directed to the attention of the Court, the Articles of Incorporation of Lyman Finance Corporation expressly authorized the loaning of its money. The law as to the authority of the president of a corporation is thus stated in *13 Am. Jur.* page 878. *Sec. 898*:

“Within the scope of his duties as head of the corporation and in the performance of all acts of an ordinary nature which may fairly be deemed incidental to the administration of the office he holds, the president may act without the direct or special authority of directors.”

So also is it said in *Section 897, page 876, that*

“Irrespective of the inherent powers of the president there can be no doubt that the board of directors may invest the president with authority to act as chief executive officer of the company. This may be done either by an express resolution or by acquiescence in course of dealing.”

Numerous cases are cited in footnotes which support the text.

The evidence in this case clearly shows that the Board of Directors acquiesced in appellant conducting the business of the two corporations without any expressed restrictions being placed thereon. Indeed, if appellant was without authority to pay the Carlisle Corporation money belonging to Lyman Finance Corporation, the Board of Directors were without such authority.

In its Instruction No. Nine the jury were further told that

“A person who negotiates a transaction between two corporations, as an officer and agent of each of them, is required by law to act in fairness to each and to disclose to each facts which he knows or should know would reasonably affect the judgment of each in such transactions.”

By the portion of Instruction No. Nine just quoted, the jury were apparently called upon to determine whether or not appellant acted fairly when he used the money of the Finance Corporation to pay the obligation of the Motor Company. Doubtless, the stockholders of the Motor Company would approve the acts of appellant, if by doing as was done in this case, the Motor Company could be saved from being forced out of business.

Instruction numbered Nine, when viewed either as a whole or by its separate paragraph is calculated to permit the jury to find defendant guilty of embezzlement unless his actions in advancing the money to Carlisle Corporation measures up to each and all of the requirements mentioned in that instruction. We have been unable to find any authority in support of such view and would be surprised if Counsel for the State will be more successful in finding any such authority.

ASSIGNMENT OR POINT XVII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION IN ARREST OF JUDGMENT.

In addition to what has heretofore been said under our discussion of Assignments or Points I, II and XI, the authorities are to the effect that one is not guilty of the offense of embezzlement when the property or money embezzled or a part thereof belongs to the person or corporation to whom or to which it belongs. In this case the evidence without conflict shows that the money or a substantial part of the money of the Finance Corporation that was paid to Carlisle Corporation to pay the obligation of the Motor Company actually belonged to the Motor Company. As heretofore pointed out, the money of the Motor Company was used to pay the salary of Mr. Black while employed by and rendering service for the Finance Corporation, and also to pay the rent of the Finance Corporation. While the amount of money of the Finance Corporation that was used to pay the obligation of the Motor Company apparently exceeded the amount owing by the Finance Corporation to the Motor

Company, such fact under the authorities does not support a conviction for embezzlement especially where as here the funds of the two companies were comingled, and appellant, so far as appears, was not familiar with just how the accounts of the two Lyman companies stood with respect to each other. *Bishop on Criminal Law, Ninth Ed., Vol. 2, page 288, Sec. 343, 10 Amer. & Eng. Ency. of Law, 995*, and cases cited in footnotes. See also *18 Am. Jur. 580* and cases of *State vs. White*, 46 Idaho 124, 266 Pac. 415; *State vs. Clayton*, 80 Utah 557; 15 Pac. 2d 1057.

ASSIGNMENT OR POINT XVIII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT A NEW TRIAL.

As to this Assignment, appellant adopts the claimed errors heretofore discussed as the basis for a new trial in the event the Motion in Arrest of Judgment should not have been granted.

Appellant prays that the judgment be reversed, and that this Court directs the court below to dismiss the action and discharge appellant.

Respectfully submitted,

ELIAS HANSEN,

Attorney for Appellant