

1958

State of Utah v. Kurt M. Lyman : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

— FILED
AUG 1 1958

STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

KURT M. LYMAN,
Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8885

BRIEF OF RESPONDENT

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In the
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STATE OF UTAH,
Plaintiff and Respondent,

—vs.—

KURT M. LYMAN,
Defendant and Appellant.

Case No. 8885

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The statement of facts contained in the defendant's brief is fairly representative of the facts surrounding this case with the following exceptions:

1. The defendant did enter a plea to the amended information in this action, and his plea to the charge contained therein was "not guilty." (R. 65).
2. Contrary to defendant's allegation that the lower court denied his Motion to Quash filed on September 6,

1957, the lower court actually granted the defendant's Motion to Quash. However, the court then granted permission for the District Attorney to amend the information, to which amended information the defendant entered a plea of "not guilty." These proceedings were held before the Court on September 6, 1957, and the defendant appeared and was represented by his attorney, Elias Hansen, at that time. (R. 65). A copy of the amended complaint was then filed with the lower court on September 10, 1957. (R. 8).

3. On February 20, 1958, the defendant was sentenced but the execution of the sentence was suspended and the defendant was placed on probation for 18 months, *subject to his compliance with the terms of the probation agreement.* (R. 62). This sentence was not suspended, subject to the same being amended, as alleged in defendant's statement of facts contained in his brief on appeal.

The plaintiff adopts the statement of facts as set forth in defendant's brief subject to the above noted exceptions.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID GRANT THE DEFENDANT'S MOTION TO QUASH THE INFORMATION AND DEFENDANT IS IN ERROR BY CLAIMING THAT THE LOWER COURT REFUSED TO GRANT HIS MOTION TO QUASH; THEREFORE, DEFENDANT'S ASSIGNMENT OR POINT I INVOLVES NO JUSTICIABLE ISSUE. (R. 65).

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THE TRIAL COURT DID NOT ERR 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?" AS AMENDED BY ADDING THERETO "TO YOUR KNOWLEDGE?"

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THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE THE EVIDENCE OF MR. BLACK THAT FERDINAND ERICKSON WAS A DIRECTOR OF THE LYMAN MOTOR COMPANY.

POINT VI.

THE TRIAL COURT DID NOT ERR 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. INSOFAR AS THIS WITNESS FURTHER TESTIFIED AS TO THE FINANCIAL CONDITION OF THE LYMAN MOTOR COMPANY AT PAGES 36-37 OF THE TRANSCRIPT, EACH AND EVERY ONE OF DEFENDANT'S OBJECTIONS WAS SUSTAINED THUS AFFORDING NO BASIS UPON WHICH DEFENDANT MAY APPEAL.

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THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 1.

POINT XII.

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POINT XIII.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 4.

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THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 5, NOR DID THE TRIAL COURT ERR IN GIVING ITS OWN INSTRUCTION NO. 5.

POINT XV.

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POINT XVII.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN ARREST OF JUDGMENT.

POINT XVIII.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT A NEW TRIAL.

ARGUMENT

POINT I.

THE TRIAL COURT DID GRANT THE DEFENDANT'S MOTION TO QUASH THE INFORMATION AND DEFENDANT IS IN ERROR BY CLAIMING THAT THE LOWER COURT REFUSED TO GRANT HIS MOTION TO QUASH; THEREFORE, DEFENDANT'S ASSIGNMENT OR POINT I INVOLVES NO JUSTICIABLE ISSUE. (R. 65).

The Court's attention is directed to the minute entry dated September 6, 1957 (R. 65) which reads as follows:

“ARRAIGNMENT. This was the time to which arraignment was heretofore continued on August 30, 1957. The defendant appeared and was represented by Elias Hansen, counsel. District Attorney Jackson B. Howard represented the State. The Information was read and a copy thereof was handed to the defendant. *The defense made a motion to quash the Information and the*

court granted the motion. The District Attorney was granted permission to amend the Information. The District Attorney is to furnish a bill of particulars within ten days. To the charge contained in the amended Information the defendant entered a plea of 'not guilty,' and trial was ordered set for November 4, 1957, at 10:00 a.m. The defendant was released on bond heretofore furnished in this matter." (Emphasis added.)

It is thus clear that the only Motion to Quash the Information that was filed in this case was granted rather than denied as alleged by defendant. The defendant, having received the benefit of the Court's ruling upon this point in the lower court, has obviously mistaken his position upon this appeal. As a consequence there is no issue involved herein upon which this Court may exercise its judicial power.

POINT II.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE OF UTAH TO FILE ITS AMENDED INFORMATION, AND FURTHERMORE, THE DEFENDANT FAILED TO MAKE HIS OBJECTION TIMELY IN THIS MATTER AND IS THEREFORE PRECLUDED FROM PURSUING HIS APPEAL UPON THIS POINT.

In answer to defendant's Assignment or Point II, we cite *Section 77-17-3, U.C.A. 1953*, as authority for the State's action in this regard. The pertinent portion of that statute reads as follows:

"77-17-3. Amendments.—*** An information may be amended, without leave of court, in any

matter of form or substance at any time before the defendant pleads thereto. ***"

The minute entry set forth under Point I is indicative of the procedural fact that the defendant entered his plea of "not guilty" to the Amended Information, thus revealing that the amendment of the information in this case preceded the plea of defendant and was fully in accord with the above statute.

The defendant claims that the Amended Complaint was vague, uncertain and calculated "to keep defendant in the dark as to the particulars of the nature and cause of the accusation against him." The Amended Complaint reads as follows:

"Comes now Jackson B. Howard, District Attorney 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).

As part of defendant's argument, he states, at page 13 of his brief on appeal, that this Court is committed to the following proposition 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.” (Emphasis added.)

Therefore it certainly must have been defendant’s understanding that he was being charged in the information with the same act or offense charged in the complaint, even though the exact language employed in the complaint was not incorporated in the information. Can it possibly be claimed that a charge of embezzling an amount in excess of \$50.00 would not include the ultimate proof of a single act of embezzlement of \$12,000? And is this not especially so when the act upon which the conviction is obtained is the same as that charged in the original complaint, and necessarily so? There could be no conviction under these circumstances for any other specific act of embezzlement than that named in the complaint. It necessarily follows that defendant was thus advised, during the entire course of these proceedings, of the specific act upon which he was required to defend himself, and a contrary contention can be sustained only without the aid of logic. That defendant was so advised, in addition to the above, we cite the answers made to defendant’s requested Bill of Particulars which were served upon defendant and the sufficiency of which was never challenged by defendant until he undertook this appeal. By his own conduct defendant acknowledged that his informational objectives were satisfied by this document. This makes his position untenable upon this appeal insofar as he claims uncertainty as to the particulars of the accusation against him. This Bill of Particulars, in addition to the original complaint and amended information, must have

been the basis upon which defendant prepared his defense inasmuch as he admits that it was not until he processed his appeal that he discovered the Bill of Particulars had not been filed with the Court as required by Section 77-21-9, U.C.A. 1953, which provides, in part, as follows:

“77-21-9. Bill of Particulars.—*** (5) When any bill of particulars is furnished it shall be filed of record and a copy of such bill be given to the defendant.”

The defendant had not, prior to this appeal, objected to the sufficiency or form of the Bill of Particulars furnished him in this case. His only objection now is that a copy was not filed with the Court. He does not allege that this in any way prejudiced him in his defense. This Court has held that the purpose of a bill of particulars is to inform defendant of the particulars of the offense sufficiently to enable him to prepare his defense. *State v. Jameson*, 103 U. 129, 134 P.2d 173. This it did in the instant case irregardless of the fact that it was not filed with the Court.

Furthermore, the Court instructed the jury as to the particular act charged against the defendant in its Instruction No. 2 which reads, in part, as follows:

“*** The particular property charged to have been embezzled is money of the Lyman Finance Corporation, represented by a check dated April 15, 1957, in the sum of \$12,000.00, made payable to Carlisle Corporation, and signed Lyman Finance Corporation, by Kurt M. Lyman, President. ***” (R. 37).

It is absolutely clear from the above that the defendant was fully informed at every step in this prosecution of the particular offense, and specific act constituting that offense, with which he was charged, and his ultimate conviction was based solely upon the particular act of defendant in embezzling the sum of \$12,000 from the Lyman Finance Corporation on April 15, 1957, with which he was charged from the inception of this action.

The defendant further relies upon the allegations of the original complaint as insufficient to inform him of the specific act with which he was charged. The complaint charged:

“*** 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 follows: That he, the said Kurt M. Lyman, at the time and place afore-said, did embezzle \$12,000.00, the property of the Lyman Finance Corporation of Provo, Utah County, Utah, which said money had been entrusted with the said Kurt M. Lyman as officer for said Lyman Finance Corporation, *and did appropriate the same to his own use.*” (Emphasis added.)

It is argued by defendant that he could not 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 under the emphasized portion of the complaint quoted above. However, to appropriate “to one’s own use” does not necessarily mean to one’s personal advantage. Every attempt by one person to dispose of the goods of another, without right, as if they were his own is a conversion to his own use. 18 Am. Jur., Em-

bezzlement, § 21. *State v. Ross*, 55 Ore. 450, 104 P. 596, 106 P. 1022, 42 L.R.A. (N.S.) 601, (writ of error dismissed in 227 U.S. 150, 57 L. Ed. 458, 33 S. Ct. 220, Ann. Cas. 1914C, 224). Thus in a case similar to the one at bar, *State v. Foust*, 114 N.C. 842, 19 S.E. 275, the accused received a check as the property of one company, and applied it to the credit, not of that company, but of another. The court in that case held that an indictment which charged that defendant "did convert to his own use, and embezzle" was sufficient and the court's instruction was proper that defendant was guilty if he received the check and misapplied it fraudulently, whether he converted it to his own personal benefit or not. In the case of *State v. Milbrath*, 138 Wis. 354, 120 N.W. 252, 131 Am. St. Rep. 1012, the defendant, as a member of a firm engaged in loaning money, received \$300 from a client to loan on real estate security. The loan was made, the securities being taken in the name of a person from whom defendant held a general power of attorney and assigned by defendant to the client, the assignments not being recorded. A corporation was formed to take over the firm's business, which was controlled by the members of the firm. The loan was repaid to the corporation in defendant's presence when the corporation was insolvent, and was mixed with the corporation's funds and used by the corporation, which continued to pay interest upon the loan until it became bankrupt. The defendant and another corporation officer were charged in an information with the embezzlement of said sum, and the unlawful and fraudulent conversion thereof to their own use. In response to the question whether the money was con-

verted to their own use, as charged in the information, the court answered at page 255, 120 N.W. Reporter:

“*** One may convert money of another to his own use by paying it out upon his private or personal debt. *Guenther v. State* (Wis.) 118 N.W. 640. If this is true, *he can convert the money to his own use by putting it into the treasury and mingling it with the funds of an insolvent corporation which is under his control and management, and of which he is a stockholder and officer in charge. The benefit he receives in the first case by discharge of his personal debt is equal to the whole amount of the money so paid. The benefit which he receives in the second case is not equal to the whole amount of the money so paid. But the extent to which defendant was benefitted does not constitute the test. It is paid to his own use in either case. It is paid into that which is a mere instrumentality created by him under sanction of law, but as much under his control and as subservient to his will as the furniture of his office or the books of account in which he records his transactions. Under such circumstances, there is no room for the legal fiction of separate corporate personality or for distinction between the defendant's acts as officer of the corporation and his acts as an independent natural person.*” (Emphasis added.)

The *Milbrath* case is, in all legal respects, identical to the case at bar. The defendant in each case has converted money to the direct benefit of an insolvent corporation of which he was an officer and over which he exercised direct control. In each instance the defendant was charged with converting the alleged embezzled property to his own use. It therefore follows, as in the *Milbrath*

case, that the complaint in this case was not defective for charging a conversion to the defendant's own use in that such a charge does, in fact, include a conversion which constitutes an indirect benefit to the defendant by providing a direct benefit to an insolvent corporation over which the defendant has control and management.

In addition to the above argument concerning the allegations of the complaint, we again direct the court's attention to the bill of particulars which was furnished the defendant in this case wherein the District Attorney informed the defendant that the state, insofar as proof of defendant's intention was concerned, would prove "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 have come into his possession by virtue of his trust as an officer in the Lyman Finance Corporation." (Pages 3 and 4, Appellant's Brief). We reiterate that defendant at no time prior to his appeal objected to the sufficiency of this Bill of Particulars and the District Attorney's failure to file a copy thereof with the court was not prejudicial to the defendant's rights.

POINT III.

THE TRIAL COURT DID NOT ERR IN ADMITTING IN EVIDENCE EXHIBITS "B" AND "C."

The most recent holding of this court upon this subject is to be found in the case of *State v. Lack*, 118 U. 128, 221 P. 2d 852, wherein the court held that in a prosecution for embezzlement of bottles of whiskey during defend-

ant's conduct of a package agency for the State Liquor Control Commission, evidence that defendant sold case lots of liquor to various clubs and split premium payments therefor with others was not inadmissible as showing other offenses not pleaded, *but was competent to show defendant's scheme or plan and intent to embezzle whiskey*. So here this evidence was admissible to show the chain of circumstances and the scheme or plan employed by the defendant in effecting the act of embezzlement with which he was charged. Although this check was signed by Paul C. Black, the Secretary and Treasurer of the Lyman Finance Company, it represented the first check drawn by that company, of which the defendant was then President and Director, for the alleged purpose of purchasing the "flooring" held by another finance company. Furthermore, the check was made payable to the Lyman Motor, Inc., which defendant managed as President. (Tr. 9-18). This was the first step in a well conceived plan or scheme in the mind of the defendant to fraudulently appropriate another's money to extricate himself from threatened exposure for other fraudulent acts and was, therefore, admissible in evidence to shed light on that plan or scheme.

In addition to the above it is clear that the defendant cannot complain that the admission of certain documentary evidence introduced by plaintiff was prejudicial, where the defendant himself had testified to all the facts contained in the assailed exhibit. *People v. Dunn*, 40 Cal. App. 2d 6, 104 P. 2d 119, certiorari denied 61 S. Ct. 139, 311 U.S. 701, 85 L. Ed. 454. The evidence which

defendant would have this court disallow consists of a check in the amount of \$6,000 issued by Lyman Finance Corporation, over the signature of Paul C. Black, payable to Lyman Motor, Incorporated, as well as the check stub evidencing the payment made by this particular check. Yet the defendant himself described the check in detail and testified as to every material fact it contained. (Tr. 171-172). Under these circumstances the defendant cannot complain of the admission of this evidence for even if there were error in admitting this evidence it is cured by the defendant's admissions covering the same transactions. *Kreinbring v. United States* (C.A. Minn.) 216 F. 2d 671.

POINT IV.

THE TRIAL COURT DID NOT ERR 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?" AS AMENDED BY ADDING THERETO "TO YOUR KNOWLEDGE?"

The defendant does not deny that Mr. Black was a director of the Lyman Finance Company and the testimony affirms that fact. (Tr. 11, 24). As such he is chargeable with knowledge of what transpires at meetings of the Board of Directors. *Gay v. Young Men's Consol. Co-op. Mercantile Inst. et al.*, 37 U. 280, 107 P. 237. Therefore, his parol evidence is admissible to prove a fact

where the fact to be proved is of such a character that it would not be shown by the corporate records. 32 C.J.S., Evidence, § 810 (a) (2). And the fact that the records of a corporation contain no entry relevant to the matter does not preclude parol evidence that certain action was not taken by the corporation. *United Order of Golden Cross v. Hooser*, 160 Ala. 334, 49 So. 354. Thus Mr. Black, who was testifying from his own knowledge as a director of the corporation, was properly allowed to testify that the Board of Directors had not authorized "the payment for something other than flooring or contracts." And, contrary to defendant's contention, it was most material to determine the extent of the authority granted to the defendant by the Board of Directors, for the non-existence of such authority becomes the essential element in the determination of the existence of the crime as charged.

POINT V.

THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE THE EVIDENCE OF MR. BLACK THAT FERDINAND ERICKSON WAS A DIRECTOR OF THE LYMAN MOTOR COMPANY.

It is well settled law that a director of a corporation who has failed to file his oath as required by statute is not a de jure officer, but as to third persons his acts as a de facto director are valid and binding, if otherwise legal, and the corporation, its officers and stockholders may, by acquiescence, become estopped from disputing such authority. *Schwab v. Frisco Min. & Mill Co.*, 21

U. 258, 60 P. 940. Therefore, Mr. Black's testimony that Ferdinand Erickson was a director of Lyman Finance Corporation was properly admitted in evidence over defendant's motion to strike even though Mr. Erickson had not taken his oath of office. His failure to qualify as a de jure director could not effect his status as a de facto director. In fact, the de facto officer exists because of the failure of that officer to achieve de jure status.

Furthermore, the evidence complained of in this assignment of error was not prejudicial to the defendant in any respect. Whether or not Mr. Erickson was a director of the corporation, either de jure or de facto, would have no possible effect upon the jury in its determination of the guilt or innocence of the accused, nor could it have confused the jury and cast upon the defendant a suspicion of wrongdoing not connected with the crime charged because there is not a scintilla of malfeasance to be imputed from the fact that this man was a director of the corporation.

POINT VI.

THE TRIAL COURT DID NOT ERR 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. INSOFAR AS THIS WITNESS FURTHER TESTIFIED AS TO THE FINANCIAL CONDITION OF THE LYMAN MOTOR COMPANY AT PAGES 36-37 OF THE TRANSCRIPT, EACH AND EVERY ONE OF

DEFENDANT'S OBJECTIONS WAS SUSTAINED THUS AFFORDING NO BASIS UPON WHICH DEFENDANT MAY APPEAL.

This court has held, in accordance with the majority rule, that evidence of accused's financial circumstances and expenditures at, or immediately before, the time of an alleged conversion in an embezzlement proceeding is relevant. Thus in the case of *State v. Judd*, 74 U. 398, 279 P. 953, wherein a deputy county treasurer was charged with embezzling county funds, the court said, at page 957 of 279 Pacific Reporter :

“*** The practices of keeping the records and the handling of the money of the department was a proper subject for inquiry, and the question concerning the financial stress of accused and his betting on horse races were relevant as bearing upon a motive for the commission of the acts by defendant which the prosecution was attempting to prove.”

And it has been held that evidence of the desperate financial condition of a brokerage company was competent to prove motive or connection of its president with the embezzlement of proceeds from the sale of stock. *State v. Cooke*, 130 Ore. 552, 278 P. 936.

It follows from the above authorities that the financial condition of the Lyman Motor Company, of which defendant was President, was competent evidence to prove the motive of the defendant in embezzling funds from another company which he also headed as President.

POINT VII.

THE TRIAL COURT DID NOT ERR 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.

Upon cross examination of Mr. Black by counsel for defendant it was inferred that the defendant had not personally received any money from the Lyman Finance Corporation because all moneys were paid to the Lyman Motor Company. (Tr. 48-49). Therefore it was proper, upon redirect examination, for the witness to testify that his examination of the financial records revealed a debit balance of \$800 owing the Lyman Motor Company by the defendant for money advanced, thus showing that defendant had access to the funds of the corporation for his own personal use. It is proper to question a witness on redirect examination to explain statements made on cross-examination. 32 C.J.S., Evidence, § 548 (a).

POINT VIII.

THE TRIAL COURT DID NOT ERR IN PERMITTING EXHIBIT "J" TO BE RECEIVED IN EVIDENCE OVER THE OBJECTION OF COUNSEL FOR DEFENDANT.

Exhibit J, an application to the Utah State Securities Commission for permission to sell stock to the public in Lyman Finance Corporation, provides that the proceeds from the sale of stock would be used for certain described purposes. It was properly admitted in evidence as part

of the general scheme or plan of defendant in making available the funds which were subsequently appropriated to his own uses. *State v. Lack*, supra. Evidence that the proceeds from the sale of stock were not used for the purposes specifically mentioned in the application may be admitted to show the intent of the defendant in the commission of the offense with which the defendant stands charged. *State v. Cooke*, supra. The rule as stated in 29 C.J.S., Embezzlement, § 41, is as follows:

“Since from its nature intent is incapable of direct proof, great latitude is necessarily allowed in proving this element of the offense. Broadly speaking, any evidence is admissible which has a tendency, even the slightest, to establish fraudulent intent on the one hand, or, on the other hand, to show the bona fides of the accused. ***”

POINT IX

THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE THE STATEMENT OF MR. ZENGER WHILE TESTIFYING FOR THE PLAINTIFF THAT THE SITUATION WAS BEYOND THE STAGE OF BEING CONTRACTS, AND WAS OF A CRIMINAL NATURE.

The following is that portion of the trial transcript to be found from line 21, page 88, to line 7, page 89:

Q. Was the security that was given to you sufficient to pay off these fictitious contracts?

A. No sir.

Q. When you talked to Mr. Lyman did you tell him what you were going to do if they weren't paid?

A. I recall saying in his presence and in the presence of Mr. Carlisle, who I called to come down because of the seriousness of the situation, that this was beyond the stage of bum contracts, but it certainly was of a criminal nature and it required further action.

MR. HANSEN: If the court please, we object to that as (and?) move that it be stricken, what Mr. Carlisle said.

THE WITNESS: I said that in the presence of Mr. Lyman and Mr. Carlisle.

MR. HOWARD: That is what he said.

THE COURT: That is what I understood. The motion to strike is denied.

(Parenthetic phrase added.)

It is immediately apparent from the transcript that the defendant's motion to strike was aimed at what he thought to be hearsay evidence of what Mr. Carlisle said. That not being the case the motion was not well taken and was, therefore, properly denied. A party wishing the benefit of an objection must show how he is hurt. A rule of evidence not invoked is waived. Wigmore on Evidence, Third Edition, § 18. The defendant cannot prevail upon appeal where he failed to state the rule of evidence upon which he relied in making his objection to offered evidence in the trial proceeding.

POINT X.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE DISTRICT ATTORNEY, OVER OBJECTION OF COUNSEL FOR DEFENDANT, TO CROSS EXAMINE THE DEFENDANT AS TO CERTAIN CHECKS MADE OUT BY THE DEFENDANT TO VARIOUS OTHER PERSONS.

The defendant had testified that a certain list of contracts which had been assigned to the Carlisle Finance Company by the Lyman Motor Company contained some "valid" and some "incorrect" contracts. (Tr. 176-184). Thus it was entirely proper for the court to allow the District Attorney to impeach the testimony of the defendant by showing the fraudulent nature of these contracts, and to question him concerning his knowledge of the disposition of the money represented by the checks in question. As to the state's proffered Exhibits "P" and "Q" the defendant admitted signing them. (Tr. 200). The fictitious names or non-existent individuals named in these contracts and checks, and acknowledged as such by defendant (Tr. 198-199), are examples of defendant's participation in other fraudulent schemes and was, therefore, a proper subject of cross examination for the purpose of proving the intent, motive or scheme of defendant in committing the crime with which he was charged. *State v. Lack*, supra. The defendant cites the case of *State v. Lanos*, 63 U. 151, 223 P. 1065, as authority to sustain his position on this point. That case stands for the proposition that cross examination, even though objectionable, would not constitute reversible error in the absence of

objection or exception. It has no application to the matter herein considered.

POINT XI.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 1.

The plaintiff incorporates its arguments under Points I and II in answer to Point XI contained in defendant's brief.

POINT XII.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 2.

The plaintiff incorporates its argument under Point II, insofar as it relates to the appropriation of the property to defendant's "own use," in answer to Point XII contained in defendant's brief.

POINT XIII.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT IN HIS REQUEST NO. 4.

In the case of *State v. Anderson*, 75 U. 496, 286 P. 645, this court, upon which defendant's learned counsel was then a member, held that objections to instructions could not be considered on appeal without exceptions. This case was cited by the Court in a later case, *State v.*

Cooper, 114 U. 531, 201 P.2d 764, wherein it was held that an appeal would not be heard upon the alleged error of the lower court in refusing to give a requested instruction where no exception had been taken to the court's refusal to give such instruction. No exception was taken to the court's failure to give the requested instruction in the instant case, nor was the court's attention ever directed to the omission complained of herein until after the trial jury was discharged. Under these circumstances we do not feel that the lower court's failure to give the requested instruction constituted reversible error.

Furthermore, the instructions of the court were explicit in this regard. In its Instruction No. 2, the court informed the jury that:

"The particular property charged to have been embezzled is money of the Lyman Finance Corporation, represented by a check dated April 15, 1957, in the sum of \$12,000.00, made payable to Carlisle Corporation, and signed Lyman Finance Corporation, by Kurt M. Lyman, President." (R. 37).

The same instruction charged the state with the burden of proving every material allegation to the jury's satisfaction beyond reasonable doubt, and Instruction No. 3 sets forth the material allegations upon which proof beyond a reasonable doubt would be required to sustain a conviction for embezzlement. Such material allegations included the proof of the execution of the \$12,000.00 check by the defendant without authority for a purpose not in the due and lawful execution of his trust as an officer of the Lyman Finance Corporation. (R. 38). In-

struction No. 17 charged the jury that unless it found beyond a reasonable doubt that the \$12,000.00 check was not paid for valid contracts for the sale of automobiles, it must find the defendant not guilty. (R. 49). Thus the jury was adequately instructed as to the acts which it was required to find, beyond a reasonable doubt, to have existed as a matter of fact in order to sustain a verdict of guilty. These instructions leave no room for the jury to infer guilt for the crime charged from other acts, the proof of which was essential to show the scheme, plan, intent and motive of the defendant in committing the alleged crime.

POINT XIV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 5, NOR DID THE TRIAL COURT ERR IN GIVING ITS OWN INSTRUCTION NO. 5.

We incorporate herein our argument set forth under Point II, insofar as it relates to the appropriation to the defendant's "own use" of the funds in question, in answer to Point XIV contained in defendant's brief.

POINT XV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 8.

Defendant's requested instruction No. 8 is as follows:

"You are instructed 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 defendant contends that this instruction should have been given inasmuch as the Articles of Incorporation of the Lyman Finance Corporation granted the following powers *to the corporation*:

“To borrow money and to execute notes and obligations 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.*” (Emphasis added.)

Surely the defendant recognizes that the powers of a corporation are to be exercised by its board of directors. Section 16-2-21, U.C.A. 1953, so provides. It is therefore elemental that, in the absence of any delegation of authority by the Board of Directors at Lyman Finance Corporation, the defendant, even as the corporation’s President, could not personally exercise the powers conferred upon the corporation by its charter. Yet defendant’s requested instruction No. 8 would have charged the jury that defendant had such power. The requested instruction was, therefore, properly denied.

We herewith add that no “evidence of indebtedness” was ever introduced in this proceeding to add credence to defendant’s claim that the money was loaned other than the check itself. It is apparent that the powers conferred upon the corporation by its Articles of Incorporation contemplated some “evidence of indebtedness” to be

taken in addition to the proceeds of a negotiated loan, even if such a loan were authorized by the corporation's board of directors. In fact, the defendant himself stated that he would not classify the money taken from the Lyman Finance Company as a loan. (Tr. 213).

POINT XVI.

THE TRIAL COURT DID NOT ERR IN GIVING ITS NINTH INSTRUCTION TO THE JURY.

Our Supreme Court, in construing Section 16-2-21, U.C.A. 1953, *supra*, has held that a president of a corporation, as such, has ordinarily only such powers as are possessed by a director, or such powers as may be directly conferred upon him by the board of directors. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 37 U. 349, 108 P. 1128; *Copper King Min. Co. v. Hanson*, 52 U. 605, 176 P. 623. And this is true notwithstanding a resolution of the stockholders vesting such officer with power. *Anderson v. Grantsville North Willow Irr. Co.*, 51 U. 137, 169 P. 168. It is thus clear that the defendant, as President of Lyman Finance Corporation, had no power to loan the corporation's money, and the lower court's Instruction No. 9 correctly set forth the powers of corporate directors and officers. We further incorporate our argument contained under Point XV in answer to the question here presented.

POINT XVII.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN ARREST OF JUDGMENT.

The amount of money supposedly advanced by the Lyman Motor Company to the Lyman Finance Corporation consisted primarily of Mr. Black's salary of \$600 per month for a period of approximately three months. Even as to the payment of this sum, the defendant testified that he had no authority from the Board of Directors of the motor company authorizing him so to do. (Tr. 171, 213-14). Other expenses claimed to have been advanced by the motor company to the finance company consisted of office space, etc. According to the defendant's own testimony, the total amount would be four or five thousand dollars. (Tr. 213). Yet the motor company was paid \$6,000 out of the first proceeds from the sale of stock of the finance corporation. (Tr. 17-18). Furthermore, the motor company received the benefit of checks in the amounts of \$1,753.03 and \$246.97 from the finance company to the Carlisle Corporation in addition to the \$12,000 check upon which this case is based. (Tr. 19-21). Thus it is clear that no debtor-creditor relationship existed between the motor company and the finance company at the time of the alleged embezzlement, and certainly no such relationship existed between the finance company and the defendant, such as to remove this case from the embezzlement statutes. Furthermore, a charge of embezzlement is sustained by proof that the accused has received a sum of money as agent for another and converted the same to his own use even though a portion is applied to the satisfaction of a debt owed to him by the principal. *State v. Peterson*, 61 U. 91, 211 P. 694. The debtor-creditor exception has absolutely no applica-

tion to this defendant's action. There is not one whit of evidence which would indicate that the finance company was indebted to the defendant for a single cent. Therefore, defendant's Point XVII is without merit.

POINT XVIII.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT A NEW TRIAL.

By virtue of the foregoing arguments in answer to defendant's claimed errors, plaintiff submits that the lower court did not err in denying defendant a new trial.

CONCLUSION

The defendant's appeal in this case should be denied and the verdict and judgment of the District Court in this matter should be affirmed.

Respectfully submitted,

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