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EMBEZZLEMENT — FRAUDULENT CONVERSION BY DIRECTOR.—[Illinois] Ernest J. Stevens, vice president of the Illinois Life Insurance Company, was indicted with his father and brother, also directors of the life insurance company, for embezzlement under Section 75 of the Illinois Criminal Code (Ill. Rev. Stat. (Smith-Hurd, 1933) c. 38, §208) which provides: "If any officer . . . of any incorporated company . . . embezzles or fraudulently converts to his own use . . . without the consent of his company . . . any property of such company . . . he shall be deemed guilty of larceny." The defendant was convicted by the Criminal Court of Cook County. *Held:* on appeal, reversed. The People had failed to prove beyond a reasonable doubt the felonious intent of the defendant to convert the money and bonds to his own use: *People* v. *Stevens* (Ill. 1934) 193 N. E. 154.

The defendant and other members of the Stevens family owned 37,600 shares, of the 40,000 shares outstanding of the life insurance company. The life insurance company owned one-half the general mortgage 7 per cent sinking fund bonds of the Stevens Hotel Company, the defendant owned $250,000 of these bonds, and the Stevens family owned four-fifths of the common stock of the hotel company. The transactions which gave rise to the offense charged were several loans made by the life insurance company, acting through its finance committee of which defendant was a member, to the hotel company, and the sale by the insurance company to the hotel company of bonds, in return for which the hotel company gave its corporate notes. The theory of the state was that at the time of these loans the hotel company was insolvent, that the defendant, his father and brother knew of this insolvency, and since they owned a large portion of the stock of the hotel company, the making of such loans was to convert the money to the use of the defendant.

An examination of the statute under which the indictment was drawn raises the question as to whether the defendant can be said to have converted the property to his own use within the meaning of the statute. Although a literal construction would demand that the conversion be for the direct benefit of the defendant, it has been held under such a statute to be immaterial whether the conversion was for his personal advantage or not, *State* v. *Ross* (1909) 55 Ore. 450, 104 Pac. 596, and that a person could convert money to his own use by mingling it with the funds of an

insolvent corporation of which he is a stockholder and officer, *Milbrath* v. *State* (1909) 138 Wis. 354, 120 N. W. 252. Although doubtful, this construction seems to have been assumed in the principal case.

The second element of the offense as defined in the statute is that the conversion by the officer must be without the consent of the principal: *People* v. *Parker* (1934) 355 Ill. 258, 189 N. E. 352. Under the charter of the insurance company it had the power to make loans to the hotel company, the loans were authorized by the finance committee, and later approved and ratified by the board of directors of the life insurance company, so the loans could not be said to be without the consent of the insurance company. *Cf. People* v. *Burnham* (1907) 104 N. Y. Supp. 725, 119 App. Div. 302; 106 N. Y. Supp. 57, 120 App. Div. 338.

Although this defect in the indictment would seem to be sufficient to reverse the case the court rested its reversal for the most part upon the failure of proof of felonious intent which was said to be necessary to sustain a conviction of embezzlement: *People* v. *Ervin* (1930) 342 Ill. 421, 174 N. E. 529; *Ridge* v. *State* (1923) 192 Ind. 139, 137 N. E. 758. To establish this intent the prosecution attempted to prove that the hotel company was insolvent at the time the loans were made: *Agar* v. *State* (1911) 176 Ind. 234, 94 N. E. 819. This was the foundation of the state's case; without proof of insolvency it must fail. Two witnesses were presented to prove the value of the assets of the hotel company. The first witness testified that his opinion as to the value was based upon calculations as to the cash market value of the hotel property, its economic life, and average occupancy. The second witness arrived at his evaluation by making an estimate of the financial possibilities of the hotel during the remainder of its economic life, based upon past performances during that time and general conditions in Chicago. The Supreme Court held this testimony incompetent and thereby defeated the prosecution. This is in conformity with prior Illinois decisions where in prosecutions for receiving bank deposits while insolvent the court has held opinion evidence as to insolvency was inadmissible: *People* v. *Gould* (1931) 345 Ill. 228, 178 N. E. 133; *People* v. *Clark* (1928) 329 Ill. 104, 160 N. E. 233. However, other jurisdictions have held opinion evidence is admissible to prove insolvency provided the witness is properly qualified and the facts are shown upon which his opinion is founded: *Bennett* v. *American Bank & Trust Co.* (1926) 162 Ga. 718, 134 S. E. 781; *State* v. *Gregory* (1924) 198 Iowa 316, 198 N. W. 58; *Freeman* v. *State* (1915) 108 Miss. 818, 67 So. 460. The term "insolvent" is subject to two common definitions. Under statutes prohibiting the transfer of corporate property while insolvent, the term has been held to mean the inability of the debtor to pay current liabilities as they mature: *Hoagland* v. *U. S. Trust Co.* (1932) 110 N. J. Eq. 489, 160 Atl. 662; *Behrens* v. *Clark* (1928) 227 N. Y. Supp. 717, 131 Misc. Rep. 712. But in criminal prosecutions for receiving bank deposits while insolvent, the term is held to mean that the cash value of assets realizable in a reasonable time is not equal to liabilities, exclusive of capital stock: *People* v. *Clark* (1928) 329 Ill. 104, 160 N. E. 233. To prove criminal intent necessary to support the charge of embezzlement in the principal case, the court said it would have been necessary

to prove insolvency in the latter sense. To use the former definition of insolvency might impose criminal liability on a person who in the utmost good faith has attempted to preserve a business in which he has confidence.

From this analysis it is evident that the present embezzlement statute is insufficient to cope with this situation. If the state desires to place criminal liability upon the officer of a corporation who approves a loan to another corporation of which he is also a director at a time when the borrower is insolvent, further legislation is necessary.

WILL T. WRIGHT.

FEDERAL HABEAS CORPUS AS MEANS OF REVIEWING STATE CRIMINAL TRIALS.—[Federal] This was a proceeding before the Supreme Court of the United States on the application of Thomas J. Mooney for leave to file a petition for an *original* writ of *habeas corpus* against the warden of San Quentin Penitentiary. The petitioner had been held by the State of California upon a conviction of murder. He charged that the state held him in confinement without due process of law in that his conviction had been procured by perjured testimony, used by the prosecutor with *knowledge* that it was perjured. The Attorney General of the state responded by way of demurrer insisting that no federal question was raised. *Held:* leave to file petition denied, without prejudice. The use of testimony by a prosecutor with knowledge that it was perjured is a denial of due process of law for which the court would allow a writ of *habeas corpus,* but such relief cannot be granted until the defendant has exhausted his remedies in the state court: *Mooney* v. *Holohan* (1935) 55 S. Ct. 340.

A procedural question arises in this case. The petitioner had been denied relief in both the lower district court, (D. C. Cal. 1934) 7 F. Supp. 385, and the Circuit Court of Appeals, In re *Mooney* (C. C. A. 9th, 1934) 72 F. (2d) 503, and instead of taking his appeal or applying for a writ of *certiorari* to the Supreme Court: 43 Stat. 936, 28 U. S. C. A. §347 (1925), he abandoned those proceedings and sought an *original* writ from the Supreme Court. In effect, he took a direct route from the highest court of the state to the Supreme Court, complaining of the order of the state court affirming his conviction. This particular procedure seems novel in federal practice for although the Supreme Court has in the past taken jurisdiction upon petitions for original writs, the cases have been those in which the lower federal district court had made the order which was alleged to have deprived the party of his constitutional rights: In re *Sawyer* (1888) 124 U. S. 200, 8 S. Ct. 482; Ex parte *Terry* (1888) 128 U. S. 289, 9 S. Ct. 77; Ex parte *Bollman* (1807) 12 U. S. 75; Ex parte *Siebold* (1879) 100 U. S. 371; Ex parte *Grossman* (1925) 267 U. S. 87, 45 S. Ct. 332; and many other cases a collection of which may be found in 28 U. S. C. A. §251. There is no fault to be found with this procedure, however, for although the application here is for an original writ, it cannot be said that the court is exercising original *jurisdiction* (which we know to be limited to the exclusion of this particular situation by the Constitution of the United States, Article II, §2). It was early decided in our courts that jurisdiction over an original writ of

habeas corpus is *appellate* jurisdiction for if granted it operates only to "revise" a proceeding already instituted: Ex parte *Watkins* (1830) 35 U. S. 193. This construction though strained enough in the ordinary *habeas corpus* case is especially so here since it will require a consideration of matters necessarily extrinsic to the entire case; *i. e.,* perjured testimony. But an inquiry into perjured testimony might seem to be within the criterion of "revises" as stated in Ex parte *Watkins, supra.*

In considering the merits of the principal case, the court practically promised to give the petitioner relief if he fails in the state courts. Therefore the question arises as to how far the decision operates to allow review of state criminal trials by the Supreme Court through the writ of *habeas corpus.* The federal courts have taken jurisdiction in these cases through the Revised Statutes, §753, 28 U. S. C. A. §753 (1927) where it is stated that "the writ of *habeas corpus* shall in no case extend to a prisoner in jail unless . . . where he . . . (3) is in custody in violation of the Constitution or of a law or treaty of the United States . . ." This applies to both state and federal custody and a majority of all federal *habeas corpus* cases probably are brought under it: *Dobie,* "Federal Procedure" (1928) pp. 304, 305. But it is well established that the writ can only be used to look into the matter of jurisdiction; and even then it is issued only in cases of great hardship and where substantial justice so requires: In re *Savage* (1890) 134 U. S. 176, 10 S. Ct. 389; *Dobie, supra,* p. 306. Holmes, J., has expressed the whole matter in the following pithy sentence. "This proceeding is not a fox hunt": *Kelly* v. *Griffen* (1916) 241 U. S. 6, 36 S. Ct. 487. Wherever the writ has been granted, however, under this section of the statute, the theory has been that the defendant was denied due process of law and that the court below therefore had no jurisdiction of the case: *Frank* v. *Magnum* (1915) 237 U. S. 6, 36 S. Ct. 487; *Moore* v. *Dempsey* (1923) 261 U. S. 104, 43 S. Ct. 265; *Powell* v. *Alabama* (1932) 287 U. S. 45, 53 S. Ct. 55; see statutes *supra.*

Frank v. *Magnum, supra,* and *Moore* v. *Dempsey, supra,* were cases similar to the principal case in that they marked an extension of due process as employed in this connection. Those decisions held that a trial dominated by mob violence was proscribed by the due process clause. *Powell* v. *Alabama, supra,* coming a few years later, added another right to those above, *i. e.,* the right to be represented by competent counsel. After those decisions many apprehensive commentators predicted dire results, effects which may as well be expected to result from the decision in the principal case. They feared (1) unprecedented invasion of state criminal procedure and serious inroads on state sovereignty, (2) delay added to administration of justice and (3) an added burden on an already overworked Supreme Court. But these fears have not materialized. To the first it is sufficient to say that attempts to procure the relief had in the above cases have been defeated in many subsequent cases: *Bard* v. *Chilton* (C. C. A. 6th, 1927) 20 F. (2d) 906, *cert.* den. (1925) 270 U. S. 565; *Dunn* v. *Lyons* (C. C. A. 5th, 1927) 23 F. (2d) 14, *cert.* den. (1922) 276 U. S. 622; *Ashe* v. *United States* (1926) 270 U. S. 424, 46 S. Ct. 334 (with lan-

guage showing the clear intention of the court to deny such relief). The second question may be answered by noting that delays are inevitable under a form of jurisprudence where the accused is "innocent until proved guilty." As to the third, a substitution of the writ of grace (*certiorari*) for the writ of right (error) has already lightened the work of that court and it is always a means of diminishing its work. Since *habeas corpus* is also, in a limited sense, a writ of grace, no such fear is valid in this specific instance.

The principal case presents another example of the well known method of the Supreme Court in defining due process by the test of inclusion and exclusion. The right to a trial free from perjured testimony has been added to those vindicated by the *Frank*, *Moore* and *Powell* cases. Does this particular case justify fears of federal encroachment over state criminal matters? An excerpt from *Dobie, supra,* p. 308, has a good statement of an obvious answer: "It is believed that federal *habeas corpus* in cases of state custody has done more good than harm. If the lower federal courts employ the writ in the spirit manifested by the Supreme Court—if they use it, as a famous English painter once said he mixed his paints 'with brains'—there seems to be no very serious grounds for alarm, even on the part of extreme protagonists of state immunity from federal interference."

The principal case may be another striking illustration of the molding of judicial opinion by non-judicial factors. See *Cardozo* "The Nature of the Judicial Process" (1923) p. 12. What these may be are purely conjectural, at best, but some elements seem to be clear. That the *Mooney* case has been a matter of political maneuvering in California for many years is common knowledge. It is clear that the Supreme Court of that state has closed every avenue of escape to the defendant with the exception of that here suggested, *i. e., habeas corpus* from the state's highest court. Though under the California Penal Code ((Deering, 1931) §§1473-1506) the petitioner may procure a hearing on his motion for leave to file the writ, he must still convince the court that his claims are well founded. It is only necessary to read the four decisions handed down by the California Supreme Court to be convinced that this will be more easily said than done: *People* v. *Mooney* (1917) 175 Cal. 666, 166 Pac. 999; (1917) 176 Cal. 105, 167 Pac. 696; (1918) 177 Cal. 642, 171 Pac. 690; (1918) 178 Cal. 525, 174 Pac. 325. Assuming that no relief be had from that source it can scarcely be supposed that the governor of that state will render him a full pardon when every prior governor, who has considered his case, has refused to set him free. Therefore, it may be that behind the picture is a desire to set the petitioner free through judicial processes of the federal government and thereby indirectly remove a source of continual irritation to the people and courts of the State of California and at the same time preserve the integrity of its criminal procedure. At any rate, the method here used is dangerous in that it may be misinterpreted to mean, as it has been done by many, that the Supreme Court is beginning to encroach upon the right of a state to be the final judge in its own criminal trials.

RAYMOND NAJARIAN.

INHERENT POWER OF THE JUDICIARY TO MAKE RULES—TRIAL BY JURY.—[Illinois] The defendants were convicted of robbery with a gun and appealed, assigning error in that the trial judge had commented on the weight of the evidence. Rule 27 passed by the Supreme Court to govern procedure in criminal cases adopted the mode of instruction for jury trials as set out in the Illinois Civil Practice Act of 1933 for civil cases and in effect forbade the trial judge to express any opinion on the weight of the evidence. The validity of Rule 27 was attacked on the ground that the Supreme Court had been given no authority by the Civil Practice Act to formulate rules of procedure for the Criminal Court and further that it violated the constitutional guarantee of trial by jury. *Held:* on appeal, reversed. In the absence of legislative enactments upon the subject the Suprerme Court has inherent power to formulate rules of procedure governing the practice of inferior courts. Rule 27 restricting the power of the trial court to comment on the weight of the evidence is not unconstitutional as violating the right of trial by jury: *People* v. *Callopy* (Illinois 1934) 192 N. E. 634.

The decision regarding the power of the court to promulgate rules of practice is the embodiment of much that leading members of the legal profession have been strenuously advocating for a number of years. The abuses present in the judicial system and the delays of the law have been considered as resulting in some measure from the faulty system of practice enacted in code form by the various state legislatures and the remedy suggested was that the courts be given the power to formulate rules. It has been felt that the needs of lawyers and clients are better known to judges who are in constant contact with litigants than to legislators who are not conversant with problems of judicial administration. "Report of the Committee of the Conference of Bar Association Delegates" (1927) 13 A. B. A. J. 2; *Morgan,* "Judicial Regulation of Court Procedure" (1917) 2 Minn. L. Rev. 81. *Paul,* "The Rule-Making Power of the Courts" (1925) 1 Wash. L. Rev. 163.

In this country, however, the enactment of rules of procedure has nearly always been considered as a subject properly within the legislative domain. The explanation of this attitude is accounted for by the fact that the 19th Century revolution in procedure took place at a time when the legislature was in the ascendancy and, zealous in the exercise of its newly acquired sovereignty, took the lead in all things. Further the common law lawyers of the time were essentially procedural technicians who thought primarily in terms of procedure rather than substance. Because of the consequent lassitude of the bar the task of reform was relegated to the legislature: *Pound,* "The Rule Making Power of the Courts" (1926) 12 A. B. A. J. 599. The first code enacted by any legislature was the Field Code for New York passed in 1848. Starting with 400 sections it soon grew enormously and proved so cumbersome and inflexible that it was condemned by all advocates of procedural reform. Nevertheless the Field Code became the model for a great many state legislatures whose power to enact rules of procedure went unchallenged.

In England on the other hand the courts always maintained their power to make rules of practice.

When in 1833 rules of court had become undesirably complex Parliament authorized the courts to formulate more liberal rules and under this authorization the courts promulgated the Hilary Rules of 1834 simplifying practice. In 1873 the Judicature Act provided for a definite committee to make rules of procedure and this committee, consisting of lawyers, barristers, solicitors and justices of the several courts, exists with various modifications to the present day. So well has this system operated that it has been regarded as superior to any codes of practice existing in this country: *Fisher,* "The Present Status of the Rule Making Power in Wisconsin" (1927) 17 Reports of the State Bar Association of Wisconsin 217; *Rosenbaum,* "Studies in English Civil Procedure" (1914) 63 U. of Pa. L. Rev. 154.

Influenced perhaps by the success of the English system there is at the present time an ever growing tendency to delegate the procedural details of the administration of justice to the courts. A number of state courts now possess power to make rules of procedure either by constitutional provisions so authorizing them or by legislative delegations of power. *Paul,* "American Recognition of the Rule Making Power" (1926) 6 Ore. L. Rev. 51. In conformity with the present trend the Federal Supreme Court's power to make rules has been extended to authorize the making of rules for inferior courts in actions at law: 28 U. S. C. A. §§ 723b, 723c (1934). Both state and federal courts have held such delegations of power to be constitutional, holding that the power to make rules is not exclusively a legislative function but one also judicial in nature and may therefore be delegated to the courts: In re *Constitutionality of Wisconsin Statute* (1931) 204 Wis. 501, 236 N. W. 717; *Wayman* v. *Southard* (1825) 23 U. S. 1.

In the present case the notion that the court had inherent power to formulate rules without a legislative delegation of power was based ultimately upon Section 1, Article 3 of the Constitution of 1870 which granted to the Supreme Court all power judicial in nature. To ascertain the bounds of such power it was necessary to resort to the common law as it existed at the time of the adoption of the constitution. Resorting thus to the common law there can be no doubt that the King's Bench as it existed in England at that time formulated rules of procedure for its own use as well as for the use of the *nisi prius* courts: *Pound,* "Regulation of Judicial Procedure" (1915) 10 Ill. L. Rev. 171. The Illinois Supreme Court then stated that since it corresponded to the King's Bench and since the latter court had rule making power over the *nisi prius* courts the Illinois court had such power over the Criminal Court. This analysis is questionable for even if it be assumed that the Supreme Court corresponds to the King's Bench the Criminal Court does not bear a corresponding relationship to the *nisi prius* courts. These latter courts were mere *agencies* of the King's Bench. Cases begun in the King's Bench were sent to be heard by the various *nisi prius* judges of the county in which the action originated. *Nisi prius* judges represented for all purposes the King's Bench and a trial at *nisi prius* was in all respects equivalent to a trial before the full bench: 1 *Holdsworth,* "History of the English Law" (3d ed. 1922) pp. 276, 285.

The Criminal Court of Cook County on the other hand is a constitutional court endowed with defined judicial power and by no means subject to the same measure of control by the Supreme Court of Illinois that the King's Bench exercised over the *nisi prius* courts. Nevertheless the decision in the present case is a desirable one and opens the door for procedural reforms.

Because it prohibited the trial court from commenting on the weight of the evidence, Rule 27 was also attacked on the ground that it deprived a defendant of a trial by jury. The Constitution of 1870 guarantees that the right of trial by jury "as heretofore enjoyed" shall remain inviolate: Article 2 Section 5. In construing the phrase in the absence of any legislative definition the court must have recourse to the common law to ascertain the essential incident of trial by jury as they then existed: *People* v. *Bruner* (1931) 343 Ill. 146, 175 N. E. 400. It had heretofore been decided in *People* v. *Kelly* (1931) 347 Ill. 221, 179 N. E. 898, that Section 72 of the Civil Practice Act of 1907 (which has since been repealed by the Civil Practice Act of 1933) forbidding the court to comment on the weight of the evidence, did not violate the constitutional guarantee of trial by jury. It was there held that the power to comment on the evidence was a mere procedural detail of the trial and not an essential element and only the essential elements of trial by jury were said to be protected by the constitution. However, a survey of the authorities shows quite plainly that at common law, as it existed in England, the trial court had power to comment on the weight of the evidence if it was made clear to the jury that his comments were not binding; indeed it was considered as of the very essence of trial by jury: *Hale,* "History of the Common Law of England" (4th ed. 1792) p. 291; 3 *Blackstone,* "Commentaries on the Laws of England" (Wendall's ed. 1847) p. 374; *Nudd* v. *Barrows* (1875) 91 U. S. 426. *Thayer,* "Preliminary Treatise on the Law of Evidence" (1898) p. 187. In *People* v. *Callopy, supra,* however, in determining the constitutionality of Rule 27 (which was in effect a restatement of Section 72) the court had recourse to the common law of Virginia to ascertain the essential elements of trial by jury as they there existed. In Virginia the courts had never sanctioned the practice of commenting on the weight of the evidence. The court justified its resort to the common law of Virginia on the ground that Illinois had once been a part of that state, and also relied upon the Illinois case of *Sinopoli* v. *Chicago Railways Co.* (1925) 316 Ill. 609, 147 N. E. 487. There the court had stated that the right to trial by jury was the right as known in Illinois at the time of the adoption of the constitution and prior thereto in Virginia. The court in the *Sinopoli* case had however immediately quoted with approval from the case of *George* v. *People* (1897) 167 Ill. 447, 47 N. E. 741, to the effect that the common law of England afforded the basis for determining the essentials of trial by jury. In the present case in construing away the effect of the English common law the court did not state that the right to comment on the evidence was a mere procedural detail of trial by jury. Instead the court relied on the case of *Penny* v. *Little* (1841) 3 Scam. 301, wherein it had been stated that subsequent modifications

of the common law by the colonists themselves, which laws were more applicable to our present conditions and habits, should supersede the English law. This view is entirely acceptable but has no application here for the power to comment on the evidence having been assumed by the federal courts as well as by a number of state courts must be considered as entirely in conformance with our present conditions and habits. Unless the court states that the right to comment on the evidence was not an essential part of trial by jury in English law the statute incorporating the common law of England as part of our own law would seem to be of controlling force.

The present tendency in this country is in favor of restoring to the courts the power to comment on the weight of evidence. The inefficiency of the jury has been regarded as due in large measure to the fact that an inexperienced body of men has been deprived of the opinion of a trained judge. *Sunderland,* "Inefficiency of the Jury" (1914) 13 Mich. L. Rev. 302. By its stand on this point the Supreme Court has adopted a more conservative and perhaps less desirable point of view. However, by its decision regarding the power of the court to make rules of practice it has alleviated at least one of the evils present in the judicial system.

DANIEL A. PANTER.

ILLEGAL ENTRAPMENT BY POLICE OFFICER IN SALE OF UNLAWFUL WEAPONS.—[California] The appellant was charged and convicted of the unlawful selling of "billies" contrary to the statute. One Fort, acting on the instructions of the police department of Oakland, went to the defendants place of business and told him he was employed on a certain boat, and had been directed to the store by a friend, for the purpose of buying a dozen blackjacks from the defendant. The defendant said he would obtain them later and Fort returned and paid him $1.50 each for three "billies." While Fort was in the store with the defendant, the police entered and arrested them. The defendant was convicted in the lower court. *Held:* on appeal, reversed (one justice dissenting). Although decoys may be used to trap criminals and present an opportunity for one intending a crime, an officer of the law cannot create the intent in his own mind to commit the crime and then ensnare and induce innocent persons into committing the crime: *People* v. *Makovsky* (Cal. 1934) 36 P. (2d) 118.

The defendant in this case contended that this act of Fort constituted an illegal entrapment which was prompted by persuasion, deceitful representations to induce and lure him into a crime that originated in the mind of the police officers. This, of course, is illegal and many cases have decided similar fact situations in this manner. The court here relied primarily on the case of *People* v. *Malone* (1930) 117 Cal. App. 629, 4 P. (2d) 287. It said in this case, "It may be conceded that when an officer induces a person to commit a crime which he would not have done without such inducement, the law will not punish the person so lured into the crime, but this is only true where the intent originates with the officer, and where the defendant is induced to commit a crime which was not contemplated by him." See *People* v. *Tomasovich* (1922) 56 Cal. App. 520, 206 Pac. 119; *Peo-*

ple v. *Norcross* (1925) 71 Cal. App. 2, 234 Pac. 438. In the case of *Butts* v. *United States* (C. C. A. 8th, 1921) 273 Fed. 35, the court said, "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it." See *Goode* v. *United States* (1895) 159 U. S. 604, 15 S. Ct. 136; *Grimsom* v. *United States* (1894) 156 U. S. 604, 15 S. Ct. 470; *Frunkin* v. *United States* (C. C. A. 9th, 1920) 265 Fed. 1; *Smith* v. *United States* (C. C. A. 8th, 1922) 284 Fed. 673; *Robinson* v. *United States* (C. C. A. 8th, 1928) 32 F. (2d) 505.

The prosecution contended that this case was analogous to cases involving entrapment in sale of liquor and narcotics, where it has been universally held that defense of entrapment does not preclude a conviction: In re *Moore* (1925) 70 Cal. App. 483, 233 Pac. 805; *People* v. *Rainirez* (1928) 95 Cal. App. 140, 272 Pac. 608; *People* v. *Heusers* (1922) 58 Cal. App. 103, 207 Pac. 908; *People* v. *Barkdoll* (1918) 36 Cal. App. 25, 171 Pac. 440; *People* v. *Tomasovich* (1922) 56 Cal. App. 520, 206 Pac. 119. The majority opinion of the court distinguished these cases by pointing out, "There is no objection to such acts as they merely give the supposed offenders an opportunity to sell, and there is no unlawful entrapment. Here, however (in the present case) the scheme originated in the minds of the officers, and appellant so far as the record shows was not engaged in selling the instruments involved, nor was he ever suspected of doing so. The officers deliberately planned a scheme to cause or influence appellant to commit a crime so they might arrest and punish him." The majority therefore turns the case on the fact that the intent to commit the crime originated in the minds of the officers and that the defendant was an innocent victim of their deceit and misrepresentation.

The manner in which the majority distinguished the cases dealing with the illegal sale of liquor does not seem very forceful. Many federal cases have held that where the officers offered the opportunity for the sale of the liquor, and the accused accepted this did not constitute entrapment: *Jordan* v. *United States* (C. C. A. 5th, 1924) 2 F. (2d) 598; *Porter* v. *United States* (C. C. A. 8th, 1929) 31 F. (2d) 544; *Hadley* v. *United States* (C. C. A. 8th, 1927) 18 F. (2d) 507; *United States* v. *Smith* (D. C. Tex. 1930) 43 F. (2d) 173; Note (1932) 23 J. of Crim. Law 482. In this case, as shown by the evidence brought out in the dissenting opinion, the defendant had been engaged in this business for a period of ten years, and when he was offered the opportunity, he willingly participated, although he knew he was breaking the law, as was revealed by a statement he made to Fort. Therefore it seems that the case falls clearly into the same class as liquor law violations.

The dissenting Justice Knight, upholds the contention of the prosecution in a very able opinion. He points out that if this had been a burglary or robbery case the alleged fact that the design to commit the crime arose in the officer's mind and that by inducements he was enticed into the enterprise, the defense of illegal entrapment would have been valid. However, this case came under a different class of cases which under the authorities should be governed by a different rule. It

is a case wherein the accused is charged with having illegally possessed and sold certain articles, the possession and sale of which was forbidden by law, and is unquestionably in the class of cases cited above dealing with convictions for selling intoxicating liquor and narcotics. After reviewing these cases, it is noticed that this defense of entrapment in the principal case is much weaker than many that have been overruled in these liquor selling cases, particularly the *Moore* case *supra*. Mr. Justice Knight's arguments in the light of the evidence seems much more convincing.

In reversing this case on the ground of illegal entrapment it seems that the majority opinion overlooks the precedent of previous similar cases and puts undue weight on the idea of intent to commit the crime arising in the mind of the officer and fails to give sufficient weight to the fact that the accused sold and possessed illegal weapons and that he had been in such business for a number of years. To eradicate this evil was fundamentally the purpose of the statute. In a discussion of a similar case in 23 J. of Crim. Law 483 the author pointed out that the " 'Origin of the criminal intent' in whole or in part as a formula would be difficult to use in trying to allocate the time and portion of the criminal intent supplied by the defendant or the entrapping government officials." However, this is the formula the majority used, and it would then unquestionably become a question of fact, and one for a jury to decide. The jury in the principal case after hearing all of the evidence decided against the defendant. Yet, as was pointed out by the dissenting opinion, the majority of the court overruled the finding of the jury on the evidence in the case and supplemented their own.

WILLIAM G. KARNES.

THE HAUPTMANN TRIAL — THE CASE FOR THE STATE.—In this most publicized and expensive of modern trials the presentation of the state's case consumed sixteen court days during which eighty-seven witnesses were placed on the stand and two hundred and forty-seven exhibits were offered in evidence. The controlling figure in the maneuvering of this mass of evidence was Attorney General David T. Wilentz. In his opening statement Wilentz charged Hauptmann with the murder of the Lindbergh baby while attempting to take the child from his nursery. After the defense motion for a mistrial because of his inflammatory remarks had been overruled. Wilentz put Colonel Lindbergh's engineer on the stand to explain the locale of the crime to the jury. After this preliminary matter had been disposed of the state's case divided itself into four phases: that establishing the facts of the kidnapping and the payment of the ransom money to Hauptmann; that aimed at showing Hauptmann wrote the ransom notes; that setting up the *corpus delicti* and the capture of Hauptmann; and that attempting to point out a motive for Hauptmann's commission of the crime.

In the first phase of the state's case, Mrs. Lindbergh was called to relate what happened in her home on the night of the crime. Colonel Lindbergh repeated that tale, identified the fourteen ransom notes received by him and Dr. Condon, and swore that it was Hauptmann's voice he had heard calling Dr. Condon in the cemetery on the night

the ransom money was paid. Next a taxicab driver identified Hauptmann as the man who gave him a ransom note to deliver to Dr. Condon, and a native of Hopewell swore that he saw Hauptmann driving near there on the day of the kidnapping. To explain the state's failure to offer finger print identification, an expert was then brought in to swear that no finger prints could be found in the nursery or on the ladder, and as the last step in this phase Dr. Condon told of his conversation with the kidnapper in the cemetery, the payment of the ransom money, and swore that Hauptmann was the one to whom he had paid the money.

Thus far the fact of the kidnapping and the payment of the ransom had been established, and Hauptmann had been well identified as the one who received the ransom money from Dr. Condon. The second phase of the case was monopolized by the handwriting experts, eight in all, who were brought in to prove Hauptmann's connection with the ransom notes. Specimens of Hauptmann's writing were admitted without objection and all eight experts (their qualifications, as such, were not questioned) agreed that there was a sufficient volume of his writing to form an opinion. After showing that the language used, the peculiar spelling of words, like "boad" for "boat," and the signs on the corner of each note connected all of the fourteen notes, the experts testified that the similarities between that writing and Hauptmann's specimen writing proved that he had written the ransom notes. For instance, of over three hundred "i's" and "t's" in the notes, only five or six were properly dotted and crossed. The same proportion held true in the specimen writings. One of the experts said that he had previously examined over eight thousand suspected writings without finding the similarities required to connect the suspected person with the writer of the notes. A United States Internal Revenue investigator was put on the stand during this handwriting testimony to identify the $14,600 found in Hauptmann's garage as part of the ransom money. This testimony was a welcome relief from the monotony of the experts' testimony and also served to bolster up their testimony since it showed Hauptmann had been found in possession of the money demanded in the notes. On cross-examination all the experts agreed that even a clever forger could not have concealed his own writing by copying Hauptmann's, since many discrepancies would have appeared among the fourteen notes, even if one or two might have been successfully forged.

In the third phase, the jury was told how the body of the child had been found bearing the hair and clothing which Colonel and Mrs. Lindbergh had earlier identified as that of their son. The coroner was put on to show that the child had died of a skull fracture on the night of the kidnapping, a blood clot in the brain showing that the child was alive when the blow was given. After the *corpus delicti* had been thus established, the details of Hauptmann's capture were given to the jury, including the finding in his garage of $14,600 of the ransom money, and the discovery of the board containing Dr. Condon's telephone number. Thus far the prosecution had proved that the child had been kidnapped and killed, that Hauptmann had been in possession of the ransom money when cap-

tured, that he had written the ransom notes, and that he himself received payment of the ransom.

Finally, the motive which would rationalize this net of circumstances, all pointing toward Hauptmann, was shown to be entirely mercenary. This motive was established by proof of his activities immediately after the date of the ransom payment. He had quit his job at that time, and six days later he opened a new brokerage account, speculating to a greater extent after the payment. His bank accounts were also shown to the jury with the damaging proof of large deposits in silver coin since the ransom date, implying that Hauptmann was changing ransom notes for other money. Another damaging witness at this point was the cashier of a movie house who identified Hauptmann as having passed a ransom bill.

Saving the most telling blow till the last, the prosecution called in the wood expert as its last witness. His qualifications were strongly contested, but he was allowed to testify that the ladder left on the Lindbergh estate contained a board which came from the Hauptmann attic, that Hauptmann's plane was used in making the ladder, and that the ladder fitted into the car Hauptmann owned at the time of the kidnapping. Thus the jury were left with a vivid realization that the only two singular clues left at the scene of the crime—the ransom note and the ladder—placed Hauptmann there on the night of the kidnapping.

Faced at the outset with the impossibility of producing any direct evidence against Hauptmann, the prosecution had thus wound a net of circumstantial evidence about him mainly through the use of expert witnesses. The efficacy of this method of attack was borne out by the jury's verdict, but the case also shows the main obstacle to the use of expert witnesses. For it is estimated that $50,000 was needed to produce the handwriting experts and their charts, with another $10,000 going for the wood expert and his work. In addition, twenty-eight workers for the federal, state, and New York city governments spent $284,000 during the thirty months they searched for clues, while three hundred detectives of the New York City Police Department spent $300,000 more attempting to produce the evidence finally used by the experts to tie Hauptmann to this crime. As it took another $8,000 to prepare the court record, on rough estimates over $650,000 was spent to complete the case against Hauptmann. Thus reason is apparent why there are so few convictions in similar cases for it is not often that so much money and time can be spent. The national character of the victims of the defendant undoubtedly explain this exception to the rule.

It is to be noted that this comment is intended merely to summarize the significant points in the case presented against Hauptmann, as it is thought to be a good example of efficient prosecution. There is no intention to slight the defense which probably was presented as well as could be expected considering the lack of funds and the unpopularity of that side of the case. Two things seem to stand out from this case which furnishes such a wealth of material. One was the testimony of the wood expert which was unique, such testimony never having been presented in court before. Perhaps he was the forerunner of a vast array of experts

who now may be expected to come into court with their exact measurements, microscopic examinations and photographic enlargements to take their places along side of fingerprint and hand writing experts. Shall we have leather experts, iron and steel experts, glass experts, paint experts, hair experts and soap experts? Another general impression of the case was mentioned by Paul H. Sanders in a recent number of the American Bar Association Journal (XXI, p. 177) —the case shows a decided advance has been made in the detection and pursuit of criminals and shows the great advantage enjoyed by a centralized police agency not handicapped by state lines in such pursuit.

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