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IMPROPER CONDUCT OF PROSECUTING ATTORNEY AS GROUND FOR REVERSAL.—[Federal] Defendant was charged with conspiracy to utter counterfeit notes. There was persistent misconduct during the trial on the part of the United States Attorney in connection with his cross-examination of witnesses and his argument to the jury. At the conclusion of the evidence defendant moved to dismiss the indictment on the ground that the evidence was insufficient to support the charge. The motion was denied and defendant sentenced to imprisonment. The court of appeals affirmed the judgment, holding that the conduct of the prosecuting attorney, although to be condemned, was not sufficiently grave to affect the fairness of the trial. *Held:* on appeal, reversed. Though the trial judge sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them, it was impossible to say that the defendant was not prejudiced thereby, especially in view of the fact that the state's case was a weak one: *Berger* v. *United States* (1935) 55 S. Ct. 629.

This decision represents a step toward curbing the unnecessary and unethical practices of attorneys in creating false impressions and prejudices in order to win cases or obtain convictions. Such practices are to be condemned particularly in the case of prosecuting attorneys. In *Fitter* v. *U. S.* (C. C. A. 2d, 1919) 258 Fed. 567, the court said that language which might be permitted counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, and whose duty it is to act in the interest of justice. However, since the evidence of guilt was so overwhelming in that case, the language of the prosecutor was held harmless. In the instant case there was some doubt as to the defendant's complicity in the crime, and under such circumstances the courts are less reluctant in reversing because of the prosecutor's misconduct: *Chadwick* v. *U. S.* (C. C. A. 6th, 1905) 141 Fed. 225; *Johnson* v. *U. S.* (C. C. A. 7th, 1914) 215 Fed. 679; *Diggs* v. *U. S.* (C. C. A. 9th, 1915) 220 Fed. 545; *People* v. *Pilewski* (1920) 295 Ill. 58, 128 N. E. 801.

The extreme view of what an attorney may do in advocating his client's cause expressed by Lord Brougham in his defense of Queen Caroline is accepted at the present time by most criminal lawyers—"An advocate by the sacred duty he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other.

To save that client by all expedient means—to protect that client at all hazards and costs to others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment he may bring upon any other." A similar zeal in behalf of the State is apt to cause a prosecutor to forget his duty to give the accused a fair trial. The defendant's attorney is too prone to be interested merely in his reputation as an acquittal getter, the prosecutor in his personal "batting average" or record of convictions. Both too often forget that they are officers of the court. Trials degenerate into personal combats, and the man with the most spectacular display of verbal pyrotechnics stands to win. The administration of justice as the ultimate end is disregarded in the heat of the combat.

Experience shows that there is bound to be difficulty restraining attorneys who are once allowed leeway in the use of language. Nevertheless there seems to be a definite sanction for a judicious use of arm-waiving and railing accusation by prosecuting attorneys: *Chadwick* v. *U. S., supra.* In *Johnson* v. *U. S.* (C. C. A. 9th, 1907) 154 Fed. 445, it was recognized that prejudicial language was to be discountenanced, but the court said, "—invective based on the evidence and inferences legitimately to be derived therefrom are not inhibited, and it is usually within the discretion of the trial court to determine whether or not the limits of that discretion are being exceeded." Some cases hold that an instruction from the judge that the jury disregard the remarks of counsel is sufficient to protect the interests of the defendant, though in the instant case there was a reversal despite the judge's instruction: *Diggs* v. *U. S., supra; Dunlop* v. *U. S.* (1896) 165 U. S. 486, 17 S. Ct. 375. Such courts tend to hold that the initiative in preventing improper conduct is upon the opposing counsel who should object to the court. The better view is that the trial judge has the power and duty, even in absence of any objection, to stop and reprimand the overzealous counsel, or even discharge the jury if necessary. It is a delicate and irksome duty for a lawyer to interrupt and censure his opponent in the midst of his argument, and the court should relieve him of this duty as much as possible: *Union Pacific Ry. Co.* v. *Field* (C. C. A. 8th, 1905) 157 Fed. 14; *N. Y. C. R. R. Co.* v. *Johnson* (1928) 279 U. S. 310, 49 S. Ct. 300; *Brasefield* v. *U. S.* (1926) 272 U. S. 448, 47 S. Ct. 135.

The leniency of some courts in regard to conduct of counsel is to be decried, and a mere glance at the cases illustrates the untoward actions which such weakness fosters. In *Johnson* v. *U. S., supra,* the prosecutor in a white slave act action against a negro defendant deliberately charged that the defendant forced the white woman to commit a crime against nature on his body, though there was no substantiating evidence brought forth. The prosecuting attorney in *People* v. *Esposito* (1918) 224 N. Y. 370, 121 N. E. 344, attempted to sway the jury in a murder prosecution by inferring that defendant's surname was the word for one of uncertain parentage in defendant's native tongue. Appeals to race prejudice, bullying of witnesses, improper innuendoes, and similar misconduct are everyday events in the courts. In the instant case the prosecutor, among other

things, deliberately misconstrued defendant's answer to one of his questions so as to convey to the jury the impression that defendant had threatened to kill him. Such conduct must be prevented in the future, and language like that of Sutherland, J., will tend to do so. "The United States attorney is the representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. . . . While he may strike hard blows he is not at liberty to strike foul ones." It is submitted that other courts of appeal should follow the language of this opinion in reviewing cases where the trial court has been unsuccessful in preventing misconduct of counsel at its inception.

EUGENE KART.

ASSAULT AND BATTERY—NECESSITY OF PRESENCE AT TIME OF ASSAULT.—[Minnesota] The defendant was a member of the Twin Cities Cleaners' and Dyers' Association which, upon failure to keep the complaining witness from entering the cleaning business, tried to intimidate him into joining the association. Defendant, representing the association, promised that, if he would join, he would be compensated for damage previously done to his property. The witness refused, whereupon the defendant threatened him. A few days later four gangsters entered witness's shop, assaulted him, and destroyed his property. Although the state did not claim that defendant was present at the time, defendant was found guilty of assault under Minn. Stat. (Mason, 1927) §9917. *Held:* on appeal, affirmed. The defendant need not be physically present at the time the assault was committed where the connection between him and those who committed the act is clear. *State* v. *Barnett* (Minn. 1935) 258 N. W. 508.

At common law participants in crime who were not present at the commission of the crime could be held on the principle of agency or accessory. There developed many fine distinctions and technical rulings such as, "When one acts through an agent, he can himself be guilty as a principal in the first degree only when the agent is innocent. If the agent is legally responsible for his own acts, the instigator, who is not present when the crime is committed, is only an accessory before the fact": *Wixson* v. *People* (1860) 5 Parker Cr. Rep. (N. Y.) 119; see *Miller,* "Criminal Law" (1934) p. 229. An accessory is one who though not present becomes guilty of an offense, not as chief actor, but as a participator; either before or after the fact or concealment: Bl. Comm. (Sharswood) VII, 4, pp. 33-4. For one to be an accessory before the fact it is necessary that he be absent at the time the crime is committed: *Williams* v. *State* (1874) 47 Ind. 567. At common law, a principal in the first degree is he who is the absolute perpetrator of the crime; and a principal in the second degree is he who is present aiding and abetting the fact to be done: Bl. Comm., *supra.* The presence of the principal in the second degree could be constructive: *U. S.* v. *Boyd* (C. C. W. D. Ark. 1890) 45 Fed. 851; *Brannon* v. *People* (1854) 15 Ill. 511. Though distinctions such as these are still in existence and often referred to

by courts, they are in many jurisdictions abrogated by statute making all who aid and assist accessories and treating them as principals. *E. g.*, Ill. Stat. (S. H.) ch. 38, §582.

A more effective way than the common law manner of dealing with such criminals has developed by the use of the conspiracy doctrine, whereby all those associated in crime may be convicted for an act perpetrated by one of the conspirators. In *McMahon* v. *People* (1901) 189 Ill. 222, 59 N. E. 584, two men went to a house with the intent to commit burglary. They were discovered and while fleeing one of them shot a policeman. The court, in holding the defendant guilty on the basis of conspiracy, said, "All who enter into and participate in the common object for which they combine together will be guilty of murder." Similarly where a prison guard was killed in a conspiracy to escape, the defendant was found guilty of murder as a principal though the evidence did not establish who had actually killed the guard. It was held that the wilful killing was the natural result of the conspiracy: *People* v. *Creeks* (1915) 120 Cal. 368, 149 Pac. 821. There the court, referring to *People* v. *Kauffman* (1907) 152 Cal. 331, 92 Pac. 861, said, "If several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine." The general rule is that the act of one is the act of all.

Conspiracy may not only be used to hold members of a band who did not actually commit the offense, but it is a substantive crime in itself which becomes useful when it is difficult to convict for a specific crime. In a case where the defendants as officers of a union which had called a strike conspired to extort money from the owners of a restaurant the court, in holding them all guilty of conspiracy, said, "It is only necessary to show that the plaintiffs in error, either by acting together or separately, pursued a course tending toward the accomplishment of the object of which complaint is made": *People* v. *Walczak* (1925) 315 Ill. 49, 145 N. E. 660. The gist of a conspiracy is the unlawful concurrence of two or more persons in a wicked scheme: *State* v. *Ritter* (1929) 197 N. C. 113, 147 S. E. 755.

In the instant case, however, this technique was not followed. The court instead used conspiracy to convict the defendant of assault on the theory that "Every person involved in a conspiracy is deemed, in law, a party to all the acts done by any of the others in furtherance of a common design": *People* v. *Walczak, supra.*

The use of conspiracy in this manner has been facilitated in many states by means of statutes. The statute under which this defendant was convicted reads: "Every person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and every person who directly or indirectly counsels, encourages, hires, commands, induces, or otherwise procures another to commit a crime, is a principal, and shall be indicted and punished as such": Minn. Stat. (Mason, 1927) §9917.

Where there is a common design

or purpose to effect an illegal act, the presence of the accused at the time of its commission is not essential: *Mason* v. *State* (1892) 31 Tex. Cr. Rep. 306, 20 S. W. 564; *Handley* v. *State* (1902) 115 Ga. 584, 41 S. E. 992. In a case where the indictment charged that the defendant did "with force and arms kidnap one Robert Wallace—" the defendant was found guilty though he was not present when the act complained of took place. The court said, "Procuring the intoxication of Wallace, with the design of getting him on board the ship in that condition without his consent—was a kidnapping—; and it was immaterial whether the prisoner did the acts in person, or caused or advised their being done": *Hadden* v. *People* (1862) 25 N. Y. 373. In *State* v. *Hamilton* (1878) 13 Nev. 386, the defendant was convicted along with those who had actually attempted to rob a stagecoach though he was forty miles away on a mountain where he had remained to signal to his confederates the departure of the stage. The court said, "Where several confederates act in pursuance of a common plan, in the commission of an offense, all are held to be present where the offense is committed, and all are principals."

It has been held that persons who counsel or encourage suicide are guilty of murder: *People* v. *Roberts* (1920) 211 Mich. 187, 178 N. W. 690; *McMahon* v. *State* (1910) 168 Ala. 70, 53 So. 89. In the latter case it was said, "The statute—relegates to the class of principal—all persons concerned in the commission of a felony, whether they directly commit the act, or aid, or abet in its commission, though not present." A person who hires or commands another to commit a crime is held as a principal. Where a bedridden cripple told his minor son to place arsenic in the food of his intended victim, the courts said that the son was merely an instrument through which the father worked and would no more relieve the father of the crime than would an inanimate object: *Collins* v. *State* (1870) 50 Tenn. 14.

It is evident from the terms of the Minnesota statute that every one concerned with a crime is to be held equally responsible. The statute is very broad and flexible in its terms and thus enables the prosecutor to reach the gang leaders and racketeers who direct the work but never are present when the crime is committed.

W. H. THOMAS.

KIDNAPPING — FORCING FUGITIVE TO CROSS INTERNATIONAL BOUNDARY. —[Federal] A reward of seven hundred fifty dollars was offered for the arrest in the United States of one Lopez, a bond-defaulter who had fled to Mexico. Petitioner arranged with certain individuals in that country to seize Lopez, and carry him forcibly to the Rio Grande, on the other side of which petitioner awaited him with drawn revolver. Steps were immediately taken by the Mexican government to extradite Villareal, the petitioner, and to try him for the kidnapping of Lopez. The petitioner sought to obtain his freedom by means of a writ of *habeas corpus,* claiming that the acts alleged did not constitute the crime of kidnapping, either as defined by the treaty or by the Mexican statute. The petitioner appeals from an order denying the writ. *Held:* on appeal, affirmed. The acts charged would constitute the offense under either definition: *Villareal* v. *Ham-*

mond, Marshal (C. C. A. 5th, 1934) 74 F. (2d) 503.

Kidnapping is the exaggerated form of false imprisonment: 1 *Bishop,* "Criminal Law" (9th ed. 1923) §553, 2 *id.,* §750. This definition of the crime, as recognized at common law, has been considerably elaborated by statute in the several states, but where an arrest has been unlawful at its inception, it is almost universally recognized that, as a matter of law, apparently commendable motives for the seizure or the good faith of the defendant do not constitute a valid defense.

In *Collier* v. *Vaccaro* (C. C. A. 4th, 1931) 51 F. (2d) 17, the defendant was acting under a friendly agreement between the United States and Canada in an effort to stop the narcotic traffic. A suspect was waiting just over the border on the Canadian side when the defendant arrested an accomplice making a delivery of narcotics in the United States. The latter agreed to entice the suspect over the national boundary, but, when within hailing distance of the suspect, warned him of the impending arrest. Thereupon defendant pursued the suspect, overpowered him, and carried him forcibly back into the United States. The court held that, regardless of the legality of the arrest, the act constituted an extraditable offense, since the gist of the action was the forcible carrying out of the state. Even when the arrest itself is lawful, the act may constitute a kidnapping if the arresting officer does not follow strictly the law or process under which the arrest is consummated. Thus, in *People* v. *Fick* (1891) 89 Cal. 144, 26 Pac. 759, the conviction of the arresting officer for kidnapping was affirmed. He arrested, under color of valid process, one Toy Fong, a Chinese woman; but instead of incarcerating her in the county jail as was his duty, he placed her for several days in a house of ill-repute operated by one "China Molly." The court approved the doctrine laid down in the Massachusetts cases: "One who arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, or to do what the law required him to do in making the arrest, his whole justification fails." *Brock* v. *Stimson* (1871) 108 Mass. 520; *Phillips* v. *Fadden* (1878) 125 Mass. 198.

Intent, beyond an intent to do the acts proven, is unimportant in the crime of kidnapping, and the fact that the defendant thought he was acting well within his legal rights does not excuse the crime. In *People* v. *Sheasbey* (Cal. App. 1921) 255 Pac. 836, the defendant had sold the prosecuting witness a quantity of household goods on deferred payments. There was some claim that they weren't satisfactory, and the prosecuting witness refused to pay for them. Defendant called with his men at the home of the purchaser at a time when he thought the latter would be out, intending to take back the goods and avoid further trouble. However, the prosecuting witness was at home, and defendant, reasonably believing that the former was going to get his gun and prevent the removal of the goods, had him bound while the removal was being made. He then took the bound purchaser back to town with him, there releasing him. The defendant was

convicted of robbery and kidnapping. The conviction for robbery was, of course, reversed, but the kidnapping conviction was affirmed, the court saying that intent by itself constitutes no defense to the crime of kidnapping, and where no circumstances are proven which would constitute a lawful excuse, no intent is necessary. A defendant has been convicted of kidnapping where, by a display of violence, he intimidated his wife, and, over her objections, forced her to accompany him around the state: *State* v. *Kay* (1933) 176 La. 294, 145 So. 544.

The petitioner in the instant case, then, was clearly guilty of kidnapping. By intimidation and violence, he forced Lopez to leave his asylum and return to the United States, where a reward was offered for his arrest. Since intent is unimportant, the fact that Villareal intended to surrender Lopez to the proper authorities is unavailing to him as a defense.

The position of the fugitive thus illegally forced to return from his asylum is analogous to that of a defendant against whom evidence has been obtained illegally. At common law, the latter could not successfully object to the introduction of such evidence, the court holding that the defendant had his remedy, either civil or criminal, against the persons guilty of the unlawful act, but that courts would receive otherwise admissible evidence, when presented, without investigating the means by which it was obtained: *People* v. *Defore* (1926) 242 N. Y. 413, 150 N. E. 585. The former cannot plead in bar of a prosecution the fact that he was brought within the jurisdiction unlawfully; this is true whether the fugitive has been forced to cross an international or an interstate boundary: *Ker* v. *Illinois* (1886) 119 U. S. 436, 7 S. Ct. 225; *People* v. *Pratt* (1889) 78 Cal. 345, 20 Pac. 731; *State* v. *Brewster* (1835) 7 Vt. 118; Ex parte *Ponzi* (1927) 106 Tex. Cr. Rep. 58, 290 S. W. 170; *State* v. *Ross and Mann* (1906) 12 Idaho 250, 85 Pac. 897; *Leahy* v. *Kunkel* (N. D. Ind. 1933) 4 Fed. Supp. 849. See 24 J. Crim. L. 1104.

In *Leahy* v. *Kunkel, supra* the petitioner, a resident of Chicago, was indicted for bank robbery in Indiana. While in his Chicago home, a sheriff from Indiana and several police officers seized him, put him in the former's car, and drive him over the state line, all this without warrant or color of legal sanction. The court said: "There can be no doubt that the acts of the officers were wrong, were without the pale of judicial approval and should not be condoned or encouraged. But these officers are not before this court, and the only question up for decision is the alleged right of the prisoner to be discharged because of the wrongful manner of his having been brought into court to answer the charge with which he stands indicted."

Thus, although undoubtedly an officer so acting would be guilty of kidnapping, this fact cannot avail the defendant thus unlawfully brought within the jurisdiction of the court.

FRANCIS D. ROTH.

HOMICIDE—EVIDENCE TO BE CONSIDERED BY JURY IN MITIGATION OF PUNISHMENT.—[New Jersey] The defendant was indicted for a murder committed while attempting to rob a store. On the trial he admitted his guilt, all of the evidence for the defense being directed to

obtaining from the jury a recommendation of life imprisonment. Evidence offered by the defendant concerning his past life and rearing, his listening to stories of the great war, and his playing of games involving the handling of firearms was excluded. The jury found the defendant guilty of murder in the first degree without recommendation of life imprisonment, and he appealed, assigning as error the exclusion of this testimony. *Held:* on appeal, affirmed. The trial court properly excluded evidence as to the defendant's past life, for the only evidence that can be considered by the jury on the question of recommending life imprisonment is the evidence adduced on the issue of guilt or innocence: *State* v. *Barth* (N. J. 1935) 176 Atl. 183.

In New Jersey the jury is authorized by statute to recommend life imprisonment when the defendant is found guilty of murder in the first degree, and such a recommendation is binding on the court: N. J. Comp. Stat. (Supp. 1924) §§52-107. In that state and other states having similar statutes the courts hold that the question of whether or not such a recommendation shall be made is a matter within the discretion of the jury: *Green* v. *State* (1927) 93 Fla. 1076, 113 So. 121; *Aiken* v. *State* (1930) 170 Ga. 895, 154 S. E. 368; *State* v. *Martin* (1919) 92 N. J. Law 436, 106 Atl. 385; *Howell* v. *State* (1921) 102 Ohio 411, 131 N. E. 706; *State* v. *King* (1930) 158 S. C. 251, 296, 155 S. E. 409 Under such statutes some of the courts have held that any instruction by the trial court requiring the jury's recommendation to be based on the evidence, or suggesting a cause for which the jury may or ought to exercise its discretion is erroneous: *State* v. *King, supra; Cohen* v. *State* (1902) 116 Ga. 573, 42 S. E. 781. In other jurisdictions, while a recommendation of life imprisonment is said to be within the sound discretion of the jury, the rule is that this discretion may be exercised only where the evidence discloses palliating circumstances: *Howell* v. *State, supra.*

There are several states where by statute the jury may in capital cases recommend mercy, such recommendation not being binding on the court: Del. Laws (1917) c. 266; N. M. Stat. (1929) c. 105, §2226; Utah Rev. Stat. (1933) tit. 103, c. 28, §4. The courts in these states consistently hold that while the power to recommend mercy is within the discretion of the jury, it should only be exercised where the facts and circumstances as disclosed by the evidence warrant such a recommendation: *State* v. *Galvano* (1930) 34 Del. 409, 154 Atl. 461; *State* v. *Knight* (1929) 34 N. M. 217, 279 Pac. 947; *State* v. *Woods* (1923) 62 Utah 392, 220 Pac. 215.

The statutes in other states authorize the jury not merely to make a recommendation, but to fix the punishment in cases of first degree murder: Pa. Stat. Anno. (Purdon, 1930) tit. 18, §2222; Cal. Penal Code (Deering, 1931) §190; Ariz. Code (Struckmeyer, 1928) §4585; Tenn. Code Anno. (Williams, 1934) §10772; Miss. Code (1930) §1293; Ill. Rev. Stat. (Cahill, 1933) c. 38, §360; Ala. Code (Michie, 1928) §4458. In these states it is held that the matter of punishment, within the limits stated in the statute, rests in the discretion of the jury: *Mays* v. *State* (1920) 143 Tenn. 443, 226 S. W. 233; *People* v. *Heffernan* (1924) 312 Ill. 66, 143 N. E. 411. Some courts follow the doctrine that

the jury's power to fix the punishment is absolute, and it is error for the trial court to instruct the jury as to the exercise of its discretion: *Hernandez* v. *State* (Ariz. 1934) 32 P. (2d) 18; *Brister* v. *State* (1926) 143 Miss. 689, 109 So. 728. The California court refuses to adopt such a view and holds that the power of the jury is not an arbitrary one, but is to be exercised only when the jury is satisfied from the evidence that the lighter penalty should be imposed: *People* v. *Craig* (1925) 196 Cal. 19, 235 Pac. 721. It may be readily conceded that the more rational view is that statutes giving the jury the power to recommend life imprisonment or mercy, or to fix the penalty in murder cases, vest in the jury a discretion to be exercised only after a consideration of all the evidence and not arbitrarily.

The question here involved is whether the legislature in enacting such statutes intended to open the door to a new field of evidence, other than that presented on the issue of guilt or innocence, to be considered by the jury in determining the punishment. The New Jersey court in *State* v. *James* (1921) 96 N. J. Law 134, 114 Atl. 553, refused to allow the admission of evidence of the prisoner's family history to show a taint of insanity which the prisoner must have inherited, the evidence being offered in palliation of the punishment. The court, in considering the statute which provides that the jury's recommendation is to be made "after a consideration of all the evidence," said that "the legislature could never have intended to open the door to the trial of a collateral issue such as insanity in the family of the prisoner who has not pleaded insanity in himself as a defense in bar." It was also said that the statutory phrase "all the evidence" meant "all the evidence adduced between the state and the prisoner on the issue of guilt or innocence." However, the latter is a purely gratuitous assumption, for the history of this statutory phrase shows that there is no reason for the court to limit the jury's consideration to the evidence on the issue of guilt or innocence alone. The legislature amended a former statute so as to include this phrase as the result of the decision in *State* v. *Martin, supra,* where the court held that the jury's recommendation was absolutely discretionary, and that an instruction to the jury that they should consider testimony tending to show the character of the crime constituted reversible error. The motive of the legislature in amending the statute was undoubtedly to rebut the proposition that the power of the jury was arbitrary and capricious and to embody the principle that the jury's recommendation must be founded on some factual basis, and it was not the legislative intent that the evidence on the issue raised by the indictment and plea should be the only basis for such a recommendation.

In the case of *Commonwealth* v. *Williams* (1932) 307 Pa. 122, 160 Atl. 602, the Pennsylvania court considers the problem of what evidence the legislature intended should be a guide for the jury in determining the *quantum* of punishment. This court had previously held that the state might offer a criminal record in aggravation of the penalty, so the defendant contended he should therefore be able to show specific mitigating circumstances. The court held that the defendant's pre-

ferred evidence was properly excluded since the evidence showed a deliberate planned murder with profit as the motive, but it was recognized that "in a proper case" mitigating circumstances might be shown. The opinion hardly seems liberal enough on the facts, for, as Professor Wigmore says: "When the prosecution to aggravate the sentence is allowed to show a conviction for crime or the like, the accused should of course be allowed to present all facts of character or otherwise tending to rebut the aggravation and to induce mitigation": *Wigmore,* "Evidence" (Supp. 1934) §195. The California court in *People* v. *Witt* (1915) 170 Cal. 104, 148 Pac. 928, passed on the same problem, and held that the statute did not contemplate the admission of evidence as to matters not otherwise relevant to the issue of guilt or innocence, but that the jury's determination is to be based solely on such evidence as is presented on this issue. However, in later cases the California court has taken a more liberal attitude. In *People* v. *Perry* (1925) 195 Cal. 623, 640, 234 Pac. 890, and in *People* v. *Dias* (1930) 210 Cal. 495, 292 Pac. 459, the court said that evidence of the defendant's mental weakness might properly be considered by the jury in determining the punishment. Then in a recent case the same court enunciated the doctrine that in a murder case "the accused should as against technical objections be permitted to state within reasonable limitations something of his background" for the purpose of aiding the jury in fixing the penalty: *People* v. *Larrios* (1934) 220 Cal. 236, 30 P. (2d) 404. There is some language in *People* v. *Heffernan, supra,* indicating that the Illinois court is disposed to follow the same liberal view.

In deciding the question of punishment the jury should be allowed to consider all evidence which is material to its determination, including evidence in mitigation of the penalty as well as evidence of past crimes in aggravation. When the judge proceeds to fix the sentence after a plea of guilty, his inquiry is not limited by the rules applicable to jury trials in considering circumstances that should affect mitigation or aggravation of the penalty: *People* v. *Popescue* (1931) 345 Ill. 142, 177 N. E. 741. The courts should come to the realization that under such statutes as the one in the present case the jury is performing a double function: (1) determination of guilt (2) fixing of punishment. The privilege of having a jury fix the punishment is no part of the common law form of trial by jury, but is a statutory innovation by virtue of which the jury is invested with a heretofore exclusively judicial function: *Woods* v. *State* (1914) 130 Tenn. 100, 169 S. W. 558. In exercising this latter function the jury should therefore be accorded the same freedom in considering evidence as that allowed the judge in determining the sentence upon a plea of guilty.

It is necessary, however, that there be some measure of restraint to prevent confusion of issues. In *Commonwealth* v. *Williams, supra,* the Pennsylvania court feared that if such evidence as the defendant had offered was admitted in mitigation of punishment, it would give rise to no end of collateral issues. This same difficulty troubles the New Jersey court in the instant case and leads it to suggest that such matters as presented by the defend-

ant's testimony are not relevant at the trial but may only be considered by the Court of Pardons. Professor Wigmore has suggested that in those states where evidence of past crimes is admissible to aid the jury in its determination of punishment, such evidence should be reserved till after a verdict of guilty has been found and then submitted to the jury for the purpose of a supplementary verdict on the question of punishment so as not to prejudice the jury in its determination of the fact of guilt or innocence: *Wigmore,* "Evidence" (Supp. 1934) §164b. Likewise evidence in mitigation of punishment should be submitted to the jury only after it has determined the guilt of the accused so that it may render a supplementary verdict fixing the punishment. This practice would prevent collateral issues from obscuring the state's case on the issue of guilt or innocense and would allow the consideration by the jury of all matters essential to the proper exercise of its statutory discretion. The legislature may by statute authorize such a supplementary verdict for the purpose of fixing the punishment or recommending mercy, or, as Professor Wigmore believes, the courts themselves may permit the use of a supplementary verdict without waiting for legislative sanction, as the matter of procedure is exclusively within their own control: *Wigmore,* "Evidence" (Supp. 1934) §164b.

D. M. GRAHAM.

EMBEZZLEMENT—SALE OF BONDS TO TRUST ESTATE BY TRUSTEE AT A PROFIT TO HIMSELF.—[Indiana] The defendant cashier and trust officer of a bank was convicted of embezzlement for having individually purchased bonds and resold them to a guardianship account at a large profit to himself. *Held:* on appeal, affirmed, regardless of honest belief of defendant that he had a right to make the sale at a profit to himself. The law will not permit the guardian to profit at the expense of his ward's estate, nor will it permit the agent or employee of the guardian to do so, under which rule the felonious intent necessary to sustain a conviction for embezzlement is imputed to the very act itself: *Yoder* v. *State* (Ind., 1935) 194 N. E. 645.

The crime of embezzlement was unknown at common law, larceny being the chief offense when the unlawful taking of another's property was to be punished. Since, however, every larceny included a trespass, no one lawfully in possession of property could commit larceny thereof. Embezzlement is a purely statutory offense, and its essence is the violation of a fiduciary duty. Under the express terms of some state statutes, the fraudulent conversion of money or other property in the hands of a person acting as executor or administrator, guardian, or trustee, constitutes embezzlement. The statute under which the instant case was prosecuted gives no express name to the offense, merely defining the types of acts and providing the penalty for the commission thereof. Ind. Stat. Ann. (Burns, 1933) §§10-1712. The Illinois Statute, as do many others, differs only in that it provides that the embezzler shall be deemed guilty of larceny: Ill. Rev. Stat. (Smith-Hurd, 1933), c. 38, §210. The typical definition is given in *Moore* v. *United States* (1895) 160 U. S. 268, wherein embezzlement is said to consist of the fraudulent appropriation of property by a person to

whom it has been entrusted or to whose hands it has lawfully come; it is distinguished from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious attempt must have existed at the time of the taking.

The instant decision emphasizes the extremely high duty and degree of good faith imposed in favor of the *cestui qui trust* upon one occupying a fiduciary position. The defendant sought to evade conviction upon the ground that he acted in good faith fully believing that he had a right to make the personally profitable sale to the guardianship estate. Nevertheless, the court invoked the "ignorance of the law is no excuse" maxim and imputed the intent necessary to sustain a conviction. This item of intent has proven a difficult problem in varying types of cases wherein it is the gravamen of the offense: See Comment (1931) 6 St. John's L. Rev. 137. However, the established law on the subject has been well stated by Judge Keller in his oral charge to the jury in *United States* v. *Breese* (W. D. N. C., 1904), 131 Fed. 915, 922, rev. on other grounds (C. C. A. 4th, 1906), 143 Fed. 250, "Ordinarily the intent with which a man does a criminal act is not proclaimed by him. Ordinarily there is no direct evidence by which a jury may be satisfied from the declaration of the criminal himself as to what he intended when he did a certain act. . . . If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another and he voluntarily and intentionally does the act, he is chargeable in law, with the intent to injure or defraud." See also *National L. & Acci. Ins. Co.* v. *Gibson* (1907) 31 Ky. 101, 101 S. W. 895; *State* v. *Cater* (1934) 190 Minn. 485, 252 N. W. 421. The term "intent" as used in most statutes means nothing more than that general intent to injure or defraud which is said always to arise when one willfully or intentionally does that which is illegal or fraudulent and which in its necessary and natural consequences must injure another. In *Phillips* v. *State* (1867) 29 Tex. 226 the court said, "If a man intends to do what he is conscious the law, which every one is conclusively presumed to know, forbids, there need not be any other evil intent." Thus the law seems to be well settled that the color of the act, done with the knowledge of its natural or necessary results, determines the complexion of the intent: *United States* v. *Houghton* (D. C. N. J., 1882) 14 Fed. 544; *Spaulding* v. *People* (1898) 172 Ill. 40, 49 N. E. 993. It is further held that concealment is unnecessary and there may be embezzlement where the appropriation is openly made: *People* v. *Talbot* (1934) 28 p. (2d) 1057, 220 Cal. 3. Thus we may resolve in accord with *Crouse* v. *State* (1933) 163 Md. 431, 163 Atl. 699, that actual felonious intent is not a necessary element of the statutory crime of embezzlement, such intent being a conclusion of law from the actual commission of the crime described in the statute.

The fact situation in the instant case is without precedent in a criminal prosecution. Cases wherein corporate officers, agents, and others occupying a fiduciary capacity have been held guilty of embezzlement are legion, but the common instance is unlike the present case. The person

charged usually, in a more direct manner, has deliberately taken trust funds for his own use and failed to account therefor, or has misapplied the funds for purposes other than a sale of property by himself to the trust estate. The reasoning of the opinion is taken from civil cases allowing a recovery for "secret profits" realized by fiduciaries in their dealings for or with *cestui qui trust*. There are many cases wherein corporate directors and others occupying a position of trust have sold to themselves property belonging to the principal with a resulting personal gain: *Chicago Hansom Cab Co.* v. *Yerkes* (1892) 141 Ill. 320, 30 N. E. 667. In such a case the right to an accounting for such gain is well established. More in point is *Parker* v. *Nickerson* (1873) 112 Mass. 195, wherein the directors of a ferry company bought a steamboat for themselves as individuals, and, so owning it, bought it of themselves in their character of directors for the company, at a large advance upon its cost. This transaction was held *fraudulent* as against the company, and they were held bound to restore to the company the profits so made by them. In *Taylor* v. *Calvert* (1894) 138 Ind. 67, 37 N. E. 531 it became the duty of the guardian to buy a certain certificate of purchase in order to protect the ward's interest but the guardian proceeded to make the investment for himself. The holding in that case was to the effect that whenever a guardian assumes a position relation to his ward's funds, by which he puts his personal interest in conflict with theirs, or acquires any interest or title adverse to that of his wards, he will not, whether he intended any fraud or not, be permitted to retain the advantage, but the same will inure to the benefit of his wards, and he will hold what he has acquired, in trust for them, subject only to his right to be reimbursed for what he has invested. The rule as to a recovery where a conflict of interests has arisen is well stated in *Thompson*, "Liability of Agents of Corporation" (1880) ch. III, §8, p. 360: "It is a familiar doctrine of the courts of equity that a trustee will not be permitted, without the knowledge and consent of his principal, to speculate out of his trust, or to retain any gain which may have accrued to him personally therefrom, but that he must account to his *cestui qui trust* for all profits which he may make out of the trust relation." It is a familiar doctrine of equity that a trustee cannot purchase or buy at his own sale where such a conflict of interests will result in a loss to the trust estate: *Thompson, op. cit. supra*, §9.

In both a civil proceeding for recovery as in *Parker* v. *Nickerson, supra* and a criminal prosecution for embezzlement as in *Epperson* v. *State* (1887) 22 Tex. App. 694, 3 S. W. 789 the courts speak of a fraudulent appropriation of the property of another by a person to whom it has been entrusted. Although the term is used in different connections, it is, nevertheless, ever present and it may be that such a fact does reconcile the two types of suit and justify the instant conviction of the criminal charge. The same regal basis of *fraud* which underlies the doctrines allowing recovery of "secret profits" or gain involved in a conflict of interests, has been applied to make the guardian acting in breach of faith criminally liable. It is perhaps mere

accident that cases involving an individually profitable sale by a fiduciary to the trust estate, have appeared only in suits for accounting or recovery of the profit so realized, but in any event the present case furnishes an important contribution in the merging of criminal prosecution under express statutory definitions with common law doctrines imposing civil liability. The high degree of care and good faith in managing trust estates has thus taken on a wider import by its application to criminal liability.

H. Don Reynolds.