Criminal Law-Embezzlement-Intent to Defraud

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attorney,20 the manner in which the mention of insurance came out21 and the action of the judge in attempting to cure the prejudice,22 all are important in determining whether or not the prejudice which is assumed to arise on the mention of insurance was removed.

In the principal case, regardless of whether or not we agree with the holding "that the facts and circumstances as presented by the record in this case do not warrant its reversal," we have no quarrel with the court's conception and statement of the law.

L. W

Criminal Law—Embezzlement—Intent to Defraud.—Defendant was cashier in charge of trust affairs for a bank. The bank was the guardian of Mary A. Yoder. Defendant bought some bonds for $430.33 and sold them to the ward's estate for $2,000.00. Defendant was indicted under Sec. 10—1704 Burns Indiana Statutes, Annotated (1933) for embezzling $1,569.67 of the ward's funds and convicted. Defendant appeals. Held, that such a sale by a guardian to his ward is criminal even if the guardian believed that he was within his rights in doing so.1

The relation of guardian and ward is fiduciary,2 and a fiduciary is required to exercise absolute good faith.3 Because of this relation the transactions between guardian and ward are watched with jealous care.4 The guardian when acting officially must act solely for his beneficiary, and the law will look with disfavor on transactions between a guardian and his ward.5 So where a ward subsequently attacks a transaction between guardian and ward, the law will presume fraud, on the grounds of public policy, and leave it to the defendant to rebut the presumption.6 So where a guardian acquired an interest adverse to that of his ward he may be removed,7 nor will he be allowed to retain any advantage derived from this adverse interest.8

In the instant case we have a prosecution for embezzlement. Embezzlement is the fraudulent appropriation or conversion of the goods of another by one who is rightfully in possession of them.9 The embezzlement statutes were primarily intended to reach and punish the fraudulent conversion of property which could not be punished as larceny because of the absence of a trespass and their object must be borne in mind in construing them.10 There can be no embezzlement under the statutes where there is no intent to defraud,11

2 Bogert, Trusts (1921), 34.
3 Flynn v. Colbert (1925), 251 Mass. 489, 146 N. E. 784.
4 Euler v. Euler (1913), 55 Ind. App. 547, 102 N. E. 356.
5 National Surety Co. v. State (1913), 181 Ind. 54, 103 N. E. 108.
6 National Surety Co. v. State (1913), 181 Ind. 54, 103 N. E. 108.
7 Sec. 2233, California Civil Code (1931).
8 Taylor v. Calvert (1893), 138 Ind. 67, 37 N. E. 534.
10 Commonwealth v. Hays (1859), 80 Mass. 64.
and the intent must be present at the time of the taking.\textsuperscript{12} If there were direct evidence of intent in this case the court's task would have been simple, but the fact that the defendant maintained his honest belief that he had a right to sell these stocks to himself as guardian seems to have resulted in the court invoking the doctrine that wrongful intent can be inferred from the wrongful act if the act is one prohibited by statute, provided it is shown that the defendant intended to do the act. That an act prohibited by statute can be made the basis for a conviction, in the absence of a showing of any intent other than to do the prohibited act, has been held.\textsuperscript{13} But these were cases of acts mala prohibita, acts which are made offenses by positive laws, usually passed in the exercise of the police power. Criminal or fraudulent intent is not an essential element of such crimes.\textsuperscript{14} But even in those crimes where a fraudulent intent is necessary it is usually proved by circumstantial evidence,\textsuperscript{15} and this court has gone even further and upheld a presumption of wrongful intent from the general conduct of the defendant.\textsuperscript{16} That this presumption applies in cases of embezzlement has also been held both in Indiana\textsuperscript{17} and in other jurisdictions.\textsuperscript{18} It would seem that the application of the presumption in the case of a guardian accused of embezzlement is supported by the same reasons that have led to its use in other types of embezzlement; that is, that the state of the accused's mind, although an existing fact,\textsuperscript{19} can not be definitely proved or proved beyond a reasonable doubt as required by criminal law if he does not wish to divulge it.

The statute under which the defendant was prosecuted sets out specific acts under none of which the transaction here could be appropriately placed and then says—"or appropriates with intent to defraud."\textsuperscript{20} The question of fraudulent appropriation is simple where there has been an actual physical taking, but it need not be that obvious; it may be constructive.\textsuperscript{21} The Illinois Court has held that whether there has been sufficient conversion to make out the crime of embezzlement is always dependent upon the attendant circumstances and relations of the parties.\textsuperscript{22} So it has been held that a sale which under the circumstances looks like a device for the sole purpose of effecting a fraud is fraudulent appropriation of the proceeds.\textsuperscript{23} In Agar v. State the

\textsuperscript{12}Ridge v. State (1923), 192 Ind. 659, 137 N. E. 759.
\textsuperscript{14}Armour Packing Co. v. United States (1907), 153 Fed. 1.
\textsuperscript{15}People v. Connors (1912), 253 Ill. 266, 97 N. E. 648. "The intent or purpose exists only in the mind of the accused, and, like malice, or any feeling, emotion, or mental status, is manifested by external circumstances capable of proof."
\textsuperscript{16}Fletcher v. State (1874), 49 Ind. 126, Marmont v. State (1874), 48 Ind. 32.
\textsuperscript{17}Price v. State (1929), 201 Ind. 461, 168 N. E. 579.
\textsuperscript{18}United States v. Breese (1904), 131 Fed. 915, Marcus v. Maryland Fidelity Co. (1914), 149 N. Y. S. 1020; People v. Flynn (1909), 118 N. Y. S. 553.
\textsuperscript{19}Harper, Law of Tort (1933), 452.
\textsuperscript{20}Sec. 10—1704 Burns Indiana Statutes, Annotated (1933).
\textsuperscript{21}State v. Ensley (1909), 177 Ind. 483, 97 N. E. 113.
\textsuperscript{22}People v. Ehle (1916), 273 Ill. 424, 112 N. E. 970.
\textsuperscript{23}Parker v. Nickerson (1873), 112 Mass. 195.
court says, "Therefore, when an agent or employee has authority to sell or otherwise dispose of property and does sell or otherwise dispose of it, not for the purpose authorized but with fraudulent intent to appropriate it or its proceeds to his own use, he is guilty of embezzling the property itself as much as if he had no authority to sell or otherwise dispose of it, for the sale or disposition of the property with said fraudulent intent is a conversion."24

The importance of this decision lies in the fact that, so far as this writer has been able to learn, this is the first instance in which a fraudulent appropriation in the civil sense has been held sufficient for fraudulent appropriation in the criminal sense. This takes on added significance when we remember that this was a case where fraudulent criminal intent was not directly proved but had to be inferred from the act. It seems that the court has taken another step in the direction of merging criminal prosecutions 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.26

DAMAGES—Liquidated DAMAGES—Penalty.—Plaintiff sued defendant to recover liquidated damages for defendant buyer's breach of a contract to purchase certain brands of flour manufactured by plaintiff seller. The contract provided for liquidated damages in case of buyer's failure to furnish shipping instructions, on the basis of 1/4 cent per day per barrel of flour from date of sale to date of termination as expense of carrying, plus twenty cents per barrel as cost of selling, plus or minus the amount or the difference between the market value at date of sale and the market value at date of termination of the amount of wheat necessary to manufacture the number of barrels of flour undelivered. Defendant contends that the contract provision for liquidated damages is invalid as the measure of damages in Indiana for breach of contract for sale of goods is the difference between the contract price and the market price at the date of breach. Held, the contract provisions for liquidated damages were valid and the damages assessed were not excessive.1

Damages, as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract. Damages are awarded by a jury, by the court in applying the rules of damages, or by the parties to a contract when they liquidate the damages by attempting in advance to estimate in good faith the actual damage which will probably flow from the breach.

Liquidated damages have not been permitted by the courts when they had the characteristics of a penalty rather than a bona-fide attempt by the parties to estimate their probable injury. As a general rule the intent of the parties is controlling as to whether a provision is for liquidated damages or is a penalty,2 but the courts are not bound by the name given to the agreement by the parties in determining the character of the sum payable on

24 (1911), 176 Ind. 234, 247, 94 N. E. 819, 824.
26 26 Journal of Criminal Law and Criminology, 289.
1 LeTellier et al. v. Abilene Flour Mills Co. (1935), 198 N. E. 111.
2 United States v. Bethlehem Steel Corp. (1907), 205 U. S. 105.