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Embezzlement-Required Application of Section More Specifically Applying to the Accused

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enactment in 1857 of a statute making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor divested Congress of the power to punish for such. His third is that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted.

The first contention is disproved by the history of the legislative exercise of the contempt power; the many cases wherein Congress punished for contempt because of bribery or assault are all examples of the fact that Congress has the power to punish a private citizen for a past and completed act solely for punishment. The second contention is refuted by In re Chapman, wherein it was recognized that the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment, and by the fact that Samuel Houston was indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House. The third contention is briefly disposed of by the Court on the ground that it does not affect the question of jurisdiction or power of the Senate to punish for contempt, but is merely a factor to be considered with respect to the guilt or innocence of the petitioner and as such is within the province of the Senate.

The most important phase of the principal case and that with which the Court was most concerned is the power of the Senate (and of legislative bodies) to punish for contempt as punishment and not for the purpose of removing an obstruction to the legislative process. As said heretofore, the contempt power is a necessary and inherent part of the legislative power and may be exercised whenever some function of the legislature has been obstructed. The fact that the obstruction no longer exists is without legal significance. The House of Commons has punished contumacious witnesses under circumstances indicating that punishment was the sole object. In view of its historical derivation of the contempt power from that body, it is only logical that Congress may exercise it to the same extent as the House of Commons. Further, there is a well established presumption in favor of the legality and regularity of official action, especially where such action is that of a coordinate branch of the government. This presumption is usually recognized by the courts with respect to the exercise of the contempt powers of legislative bodies. Thus, the decision in the principal case is a recognition and an endorsement by the Supreme Court of the exercise of the legislative power to punish for contempt even though the contumacious act is completed and the legislative function no longer obstructed.

H. P. C.

Embezzlement—Required Application of Section More Specifically Applying to the Accused. Appellant was president of a retail music house and contracted with the H. Sales Co. for it to consign pianos to appellant's com-

16 Willis, Power of Legislative Bodies to Punish for Contempt (1927), 2 Ind. L. J. 615; Jurney v. MacCracken, Jr. (1935), 79 L. Ed. 408, Notes 4, 5.
17 166 U. S. 661 (1896).
20 Potts, Power of Legislative Bodies to Punish for Contempt (1926), 74 U. Pa. L. Rev. 828.
21 Jurney v. MacCracken, Jr. (1935), 79 L. Ed. 408.
22 Jurney v. MacCracken, Jr. (1935), 79 L. Ed. 409, Note 7.
23 Potts, Power of Legislative Bodies to Punish for Contempt (1926), 74 U. Pa. L. Rev. 815.
pany. The contract's terms provided for the payment to the consignor of the consignment value of the pianos, i.e., the invoice price, within a certain time as well as the retention by the consignee of certain cash payments. Consignee was to pay all expenses of the handling of the goods, and to endorse and transfer to the consignor and guarantee payment of all notes, contracts, or leases taken. He was also to report to the consignor at the first of each month all instruments consigned and settled for, in stock, and in possession of prospective customers. The state subsequently indicted appellant on counts of grand larceny and embezzlement and he was convicted on the latter count. The indictment and trial were predicated upon Sec. 2470, Burns' 1926, dealing with embezzlement by "officer, agent, attorney, clerk, servant, or employee". Held, the verdict was not sustained by sufficient evidence and therefore contrary to law, because the facts in the case bring it clearly within the letter of Sec. 2471, Burns' 1926, applying to embezzlement by a factor or other persons enumerated therein who converts to his own use property intrusted or consigned to him, or the proceeds thereof.¹

Such a decision presents a very vital problem to public prosecutors. It is the purpose of this note to ascertain whether or not the court was justified in feeling bound so to hold. Here we have two sections of the statutes, under either of which, it is submitted, the appellant's acts may have come. The question then is, whether the conviction to be sustained, must have been based on the statute which most specifically applied to the appellant, even though he is included in the wording of the section used.

The court here, of course, realized that a "factor is in the last analysis an agent".² That they are merely one of a species of agents is elementary.³ Yet the court refused to permit a conviction of appellant as an agent in the light of coexisting statute dealing specifically with embezzlement by factors.⁴ To do so, it felt, would nullify the utility of the latter section, and it believed that it was thus bound to give effect to the various sections of the Indiana laws on embezzlement.⁵ As the rationale of its duty so to maintain the distinction between these two sections, the court set out the simple and fundamental rule that in Indiana crimes "are defined and punished by the statutes of the state and not otherwise".⁶ Being so as to crimes in general, such rule would undoubtedly apply to the crime of embezzlement, which is purely statutory throughout its comparatively short history.⁷ It is merely a statutory larceny created in an apparently bungling attempt to eliminate the trespass element from the common law offense. Instead of legislating that element out of the makeup of larceny, the legislative thought turned then, as it does now, to merely the common instances which it sought to deal with. Those common instances of theft without a trespass were exemplified at the time by cases of servants appropriating to their own use money and goods intrusted to them and such was the specific situation legislated against. The American states followed this lead, which is palpably defective. The various legislatures have been occupying themselves ever since in putting patches on it to cover

¹ Robertson v. State (1934), 194 N. E. 887 (Ind.).
² Robertson v. State (1934), 192 N. E. 887, 888 (Ind.).
³ Mechem, Outlines of Agency (3d ed. 1923), Sec. 32 and 36; American Law Institute, Restatement of Agency, Sec. 1d.
⁴ Burns' 1926, sec. 2474; Burns' 1933, sec. 10-1708.
⁵ In further justification of the court's position, it should be pointed out that the section dealing with agents (Burns' 1926, sec. 2470; Burns' 1933, sec. 10-1704) differs considerably in the punishment provided from the section dealing with factors (Burns' 1926, sec. 2474; Burns' 1933, sec. 10-1708).
⁶ Burns' 1926, sec. 2400; Burns' 1933, sec. 9-2401; Hackney v. State (1857), 8 Ind. 494; Jones v. State (1877), 52 Ind. 229; Beal v. State (1860), 15 Ind. 378.
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other situations which might occur, instead of doing the effective thing which we thus see to have been the true course from the beginning. A Delaware jurist summed up the resultant status of this problem as follows, "Because the statutes vary so much in their terms, embezzlement is after all what the particular statute defines it to be. And the offense, so far as it may be punished by the statute, can only be committed by the classes of persons enumerated, and of the kinds of property designated in the particular statute." But do such rules necessitate such results as that in the instant case? Before answering, it must first be pointed out that this note makes no attempt to lay the old but quite real ghost concerning variations between allegations and proof, especially as to embezzlement in view of the preceding paragraph. However, the question here is not whether the accused came within the terms of the section alleged to be violated. The concession of the court, and the authorities on this point, have already been set out. The sole question is whether the prosecution of necessity must have been conducted, not under the statute applying specifically to the accused, but under that section applying most specifically to him. The point can only be left to the courts to answer. Legal periodicals and texts dealing with statutory construction and interpretation are devoid of an opinion on this single issue. Of course, there is the doctrine against variances between allegations and proof; but it has already been submitted that no variance exists where the allegation is against an agent and the proof shows him to be a factor. Again there is the rule concerning strict construction of criminal statutes. If an application of this rule is to result in saying that a conviction within the terms of a certain section cannot be sustained because another section more specifically deals with the situation, its use in such instances is to be deprecated. In fact, twelve states have already repudiated the rule by statute as a guide for their courts and although it undoubtedly has the good feature of protection of the social interest in personal liberty, its spread to reach decisions which so astound and chagrin laymen should be frowned on.

The fact remains, however, that our Indiana court has said that to convict a factor as an agent (even though conceding factors are agents) would make the section dealing with factors useless. Thus is added additional onerousness to the prosecutor's duty of bringing justice to bear on those suspected of questionable anti-social activities. In framing his indictment and conducting the trial, he must not only be sure that the statute upon which he is predicking his work, includes the accused

9 Foster v. State (1899), 18 Del. 111, 43 Atl. 265, 267. It is to be noted, however, that the court here deemed the appellant to be an agent within the contemplation of the statute.
within its terms, but also that no other statute applies more specifically to the accused's particular status. If the courts insist on such position, and this court did, it remains for the legislature to step in with a needed broadening of the statutes and elimination of surplusage. The court in the principal case feared that permitting a conviction under the general statute would be nullifying the more specific one. If this is an intimation that were it not for the presence of the latter section, there would be less judicial difficulty in trying a factor as an agent, the court is pointing the way to this desired simplification. If elimination of a section dealing with embezzlement by factors will facilitate the application of other sections to these acts, why not eliminate such sections? Of course, if certain ones are removed, others must be broadened to include whatever additional situations the former might have covered. It must be remembered that such a need is distinguishable from the corollary one for reform of adjective criminal law, concerning which there has been considerable hue and cry in recent years. It is the substantive law as set out by the necessarily statutory elements of these statutory crimes with which this deals. The object is to be able to prosecute under the provisions of a statute dealing with a certain crime without the danger of reversal just because this particular phase of the same type of crime is dealt with more specifically under an entirely separate section of the laws.

The latest excellent and instructive example of the type of remedial legislation suggested is found in the California Penal Code, where an amendment defines the crime of theft as amalgamating the crimes of larceny, embezzlement, false pretenses, and kindred offenses without changing the elements of the crimes themselves. Theft is then provided with its usual two degrees, grand and petty, with the varying punishments for each. Although the various provisions of the old crimes are still on the books, such as when certain persons would be guilty of embezzlement the information or indictment may merely charge theft and that will be sufficient allegation that defendant unlawfully took property of another, regardless of the means or the character in which he was acting. Of course, it is obvious that the primary purpose of this legislation in California was to eliminate the necessity of alleging whether the acts be larceny, embezzlement, or obtaining property by false pretenses, which legislation incidently would not be amiss in any jurisdiction. But one can also see its effect as to what is suggested here. Why not remove as the test of a defendant's guilt whether he was an employee, agent, innkeeper, factor, or carrier? This can certainly have its proper place in ascertaining whether one committed the acts alleged, but for it to be the ultimate test evidences a defect in that part of the substantive law which is a result of judicial construction.

H. A. A.

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15 Calif. Penal Code (Deering 1931), sec. 484 and following annotations.


17 Calif. Penal Code (Deering 1931), sec. 486.

18 Calif. Penal Code (Deering 1931), sec. 487.

19 Calif. Penal Code (Deering 1931), sec. 488.

20 Calif. Penal Code (Deering 1931), secs. 489 and 490.

21 Calif. Penal Code (Deering 1931), secs. 504 to 508, inclusive.

22 Calif. Penal Code (Deering 1931), secs. 950, 951, and 952.