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Comments and Casenotes

The Procedural Problem Resulting From The Distinction Between Larceny And Embezzlement

*Nolan v. State*¹

The defendant was employed as office manager for the prosecutor finance company. Payments made by the prosecutor's customers were placed in the cash drawer of the office. At the end of each day a clerk, an accomplice of the defendant, prepared a report showing daily cash receipts. The defendant then took and put in his pocket varying amounts of cash. Under the defendant's instructions, his accomplice would recompute the daily reports to equal the remaining cash.

The trial court found the defendant guilty of embezzlement. The defendant appealed on the ground that the evidence showed his crime to be larceny and not embezzlement. On appeal, in reversing, the Court noted that a distinction between larceny and embezzlement has been maintained by the leading textbook authorities and early English cases. "Goods which have reached their destination are constructively in the owner's possession though he may not yet have touched them; and hence, after such termination of transit, the servant who converts them is guilty, not of embezzlement, but of larceny."² The majority concluded that under the authorities cited and under the testimony in the case, there was not sufficient evidence to find the defendant guilty of embezzlement.

Judge Prescott concurred in the reversal on other grounds, but cautioned that the reestablishment of many of the "tenuous niceties between larceny and embezzlement with which the early English cases are replete" would embarrass many future prosecutions.³

¹ 213 Md. 298, 131 A. 2d 851 (1957).

² *Ibid.*, 314, citing 2 WHARTON'S CRIMINAL LAW (12th ed. 1932) 1590, §1276.

³ Maryland enacted its first general embezzlement statute in 1820 (Md. Laws 1820, Ch. 162, §2). However, under Article 15, Section 5 of the Maryland Constitution [9 MD. CODE (1957) 199] in the trial of all criminal cases, the jury is the judge of the law as well as of fact. It was not until the 1950 amendment to Section 5, which added the phrase "except that the Court may pass upon the sufficiency of the evidence to sustain a conviction" that an appeal of the Nolan type was possible. Hence it was 137 years after the enactment of an embezzlement statute in this State that the Court of Appeals first ruled that a conviction must be reversed because

The early rules of law required that a trespass be committed before there could be a felony. Therefore, in order for the taking of personal property to constitute the common law felony of larceny, one of the principal requirements was that the property be in the possession of another. Where a servant converted property belonging to his master, a distinction was made according to whether the servant had possession or custody. The rule became fixed that property received from the master usually remained in the master's possession, the servant securing "mere charge or custody" of it; but that property received from a third person for the master was in the servant's possession, and he was therefore not guilty of a felony if he converted it.⁴

Distinctions thus drawn between custody and possession, however tenuous in appearance, were by no means academic in effect. The requirement that a trespass be committed made it impossible to prosecute those servants who were given possession, as opposed to custody, of their master's property and had converted it to their own use.⁵ There was available a civil action for breach of trust, but this, quite obviously, was of little worth against most servants.

The statutory crime of embezzlement grew out of the need to provide penalties for these conversions resulting from a breach of trust. During the 18th and 19th centuries, with the growth in size of business organizations and the advent of absentee ownership through corporations, such conversions by employees and agents became a constantly recurring problem. The first general embezzlement statute was passed in England in 1799 as a result of the famous case of *The King v. Joseph Bazeley*.⁶ As a bank teller, Bazeley had received a deposit of £100 which he put directly in his pocket and applied to his own purposes. He

the State misconceived larceny for embezzlement. Cases indicating other weaknesses and peculiarities of our criminal laws are now free to come before the Court of Appeals.

⁴ HALL, *THEFT, LAW AND SOCIETY* (2nd ed. 1952) 35.

⁵ 3 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883) 151. Stephen goes on to suggest that common law requirement of a felonious taking as an essential part of the definition of theft may have been based on the sentiment that people ought to be protected by law against open violence, but that they could protect themselves against breaches of trust by not trusting people — a much easier matter in simple times, when commerce was in its infancy, than in the present day.

⁶ 2 Leach 835, 168 Eng. Rep. 517 (1799). Prior to Bazeley's case only some special embezzlement acts had been passed, e.g.: 9 Ann. c.10 (1710); 5 Geo. III, c.25 (1765); 7 Geo. III, c.50 (1766), dealing with servants of the Post Office; and 15 Geo. II, c.13 (1742), with reference to embezzlement by officers and servants of the bank of England.

was tried for larceny and acquitted, because he, and not the bank, had possession of the deposit at the time it was converted.

Shortly after Bazeley's acquittal, the first general embezzlement statute⁷ was passed. This statute applied to servants and clerks and although it extended beyond employees of bankers, it still bore the mark of Bazeley's case. Embezzlement statutes to cover other groups of persons in whom the possession of personal property had to be entrusted followed in a piecemeal manner over the next 50 years.⁸ These acts were finally combined in a wider form in the Larceny Act of 1861.

Enactment of these embezzlement statutes introduced much intricacy into the law. They were intended to make certain definite exceptions to the general rule that where possession of property was honestly acquired, its subsequent fraudulent misappropriation was not a criminal offense. The English courts consistently refused to treat these statutes as an extension of common law larceny, and insisted that they were passed solely and exclusively to provide for cases which larceny did not include.⁹ This maintenance of larceny and embezzlement as separate and distinct crimes led to a long series of cases which elaborately distinguished between the two. "They turn upon discussions as to the nature of possession, which are as technical and unsatisfactory as all attempts to affix a precise meaning to a word which has no precise meaning, must necessarily be."¹⁰

⁷ 39 Geo. III, c.85 (1799).

⁸ 52 Geo. III, c.63 (1812) bankers, merchants, brokers, attorneys and other agents misappropriating property entrusted to them; 6 Geo. IV, c.94 (1825) factors, fraudulently pledging goods entrusted to them for sale; 20 & 21 Vic. c.54, §1 (1857) trustees under express trusts fraudulently disposing of trust funds; 20 & 21 Vic. c.54, §3 (1857) persons under powers of attorney for sale or transfer of property who converted the property to their own use; 20 & 21 Vic. c.54, §4 (1857) bailees stealing the goods bailed to them. One further alteration in the law closely connected with the subject was made after the Larceny Act of 1861 [24 & 25 Vic. c.96 (1861)], *i.e.*, 31 & 32 Vic. c.116 (1868), dealing with co-partners and other joint owners who steal property in their possession.

⁹ 2 WHARTON'S CRIMINAL LAW (12th ed. 1932) 1574, §1258, which continues:

"Hence, nothing that is larceny at common law is indictable under the English embezzlement statutes, and those of a similar type; and nothing that is indictable under these statutes is larceny at common law."

Reference is made to WHARTON'S CRIMINAL LAW (12th ed. 1932) because ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE (1957), which is based on the earlier work, has omitted much of the historical detail and because references by court and counsel in the subject case were to the older work.

¹⁰ 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 154.

Since the general embezzlement statutes were not enacted in England until after the American Revolution, they are not a part of our common law. Embezzlement is therefore purely statutory in this country. Statutes passed in the various states differ greatly, and a uniform view of the law is very difficult. Generally, however, one honestly in possession of goods, who later converts them is guilty of an embezzlement type of offense.

Naturally the problem arises most often in the master-servant relationship. Usually where the servant obtains goods from the master to be used in the course of his employment under the close supervision or in the immediate vicinity of the master, he receives only custody. When he has considerable freedom of action with respect to the goods granted him by the master, he obtains possession. Where the servant receives goods for his master from a third person, the servant obtains possession which he retains until he delivers the property to the master. If the servant sets aside the goods for the master, as by placing them in the master's receptacle (e.g. a cash drawer) the goods are deemed to have reached their destination and possession is held to have shifted constructively to the master even though he may never have seen or actually controlled them. However, if when the servant places the goods in the master's receptacle, he does so with the intention of later withdrawing them for his own purposes, his state of mind will defeat a shift of possession to the master.¹¹

The question of possession may also arise when the conversion is by a person who is not a servant. One who receives goods as a bailee normally obtains possession. His subsequent conversion cannot be larceny unless he had a felonious intent to steal the property at the time he received it, or unless the conversion occurs after the bailment has terminated.¹² Other independent persons may obtain mere custody; for example, one who requests change for a bill and on receiving the change refuses to hand over the bill.¹³

Although in each case the distinction is clearly between possession and custody, the facts are often so confusing and the terms themselves so ambiguous that it is impossible to be sure which crime took place.

¹¹ *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364 (1892).

¹² *CLARK & MARSHALL ON CRIMES* (5th ed. 1952) 489, §348.

¹³ *Op. cit.*, *ibid.*, 442, §319.

In Maryland the general embezzlement statute, Article 27, Section 154, in the words of the court in *State v. Tracey*.¹⁴

“ . . . is borrowed almost verbatim from 39 Geo. III, ch. 85, and 7 and 8 Geo. IV, ch. 29, sec. 47. * * * Having borrowed the law from England, where an established construction prevails and has long obtained, it is reasonable to hold, that we have adopted it with the interpretation there accorded to it.”

In the subject case, the above quoted section of the *Tracey* opinion was restated, the distinctions maintained by the early English Courts were adopted, and the conviction of embezzlement was set aside on the possession theory. This distinction between embezzlement and larceny supported by the court in the subject case has been maintained in many jurisdictions. The books are replete with dismissals and reversals on the ground that the indictment or conviction was for the wrong crime.¹⁵

The result of this distinction has been the rise of an obvious procedural dilemma. Whichever the offense charged, defendants have grasped the opportunity of urging that they should have been charged with the other.¹⁶

¹⁴ 73 Md. 447, 448, 450, 21 A. 366 (1891).

¹⁵ Larceny conviction reversed because the facts proved embezzlement: *York v. State*, 140 Tex. Crim. Rep. 199, 143 S. W. 2d 770 (1940); *State v. Smith*, 2 Wash. 2d 118, 98 P. 2d 647 (1939); *Morgan v. Commonwealth*, 242 Ky. 713, 47 S. W. 2d 543 (1932). Embezzlement conviction reversed because the facts proved larceny: *People v. Bergman*, 246 Mich. 68, 224 N. W. 375 (1929); *Jackson v. State*, 211 Miss. 823, 52 So. 2d 914 (1951); *Phelps v. State*, 25 Ariz. 495, 219 P. 589 (1923). For two cases which illustrate the length to which such an insistence on the distinction between larceny and embezzlement can lead, see: *Commonwealth v. O'Malley*, 97 Mass. 584, 586 (1867), where the defendant, having been acquitted of larceny, was convicted of embezzlement only to have the second conviction set aside on the ground that the evidence established larceny. In its opinion the court said:

“The defendant had been previously acquitted of larceny upon proof of the same facts; and it is therefore of great importance to him, if the offense committed, if any, was larceny, that it should be so charged.” And *Nichols v. The People*, 17 N. Y. 114, 120 (1858), where the defendant, a carrier of pig iron, was acquitted of larceny for breaking the bulk, and then convicted under an embezzlement statute intended to cover the taking by a carrier without breaking the bulk. The latter conviction was reversed on appeal, the majority finding that the defendant had broken the bulk and stating:

“This case turns upon a narrow point, and no actual injustice to the prisoner, perhaps, would be done by affirming the judgment below; but our decisions are precedents for future cases, and although this prisoner may go unwhipt of justice in consequence thereof, yet we must propound the law as we find it, whatever the consequence may be in this particular case.”

¹⁶ See Justice Holmes' opinion in *Commonwealth v. Ryan*, 155 Mass. 523, 30 N. E. 364, 365 (1892).

As was done in the subject case, the defendant usually refers to an authority such as Wharton,¹⁷ who says:

"No inconvenience can arise from the maintenance of this distinction, since it is allowable *as well as prudent*¹⁸ to join a count for larceny to that for embezzlement. But great inconvenience would follow from the acceptance of the principle that the embezzlement statutes absorb all cases of larceny by servants."¹⁹

The State failed to include a count for larceny in the indictment in the subject case.²⁰ But even if it had, the problem is not solved by permitting indictments charging both offenses in multiple counts so long as an election is required at the trial or a conviction of one crime is held to be unsupported by evidence which establishes the other.²¹ Suppose the indictment had included a count for larceny. If at the completion of the testimony, the prosecution had elected by mistake to pursue the count for embezzlement and to save the larceny count, would not the Court of Appeals still have reversed and required a new trial for a larceny conviction?²² Even more interesting,

¹⁷ 2 WHARTON, CRIMINAL LAW (12th ed. 1932) 1591, §1277.

The writer has been unable to find any treatment of this point in ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE (1957), *op. cit.*, *supra*, n. 9.

¹⁸ This phrase was printed in italics in the majority opinion, Nolan v. State, 213 Md. 298, 314, 131 A. 2d 851 (1957).

¹⁹ While in the Nolan case both the appellant's brief, on page 31, and the majority opinion cited these sentences from Wharton, neither the brief nor the opinion included this passage from the same section:

"Yet while such is the case in principle, it is in full accordance with the modern policy of simplification of pleading that it should be provided by statute that if the case should turn out to be one of larceny there should be no acquittal if the evidence show the case to be embezzlement, and the indictment, or bill of particulars, give adequate notice of the offense."

²⁰ The indictment included a count for embezzlement and a count for larceny after trust. The trial court entered a directed verdict for the defendant on the count of larceny after trust and it was thereafter abandoned by the prosecution. (According to the Maryland Code it seems that embezzlement, 3 MD. CODE (1957), Art. 27, §126, and following, especially §129, applies to the converting servant who receives possession from a third person for the master; while larceny after trust, Art. 27, §353, applies to the converting servant who has received possession directly from the master himself.)

²¹ MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940) 545.

²² On the question of whether jeopardy attaches to counts in an indictment which are not given to the jury at the end of a trial, some jurisdictions have held that the defendant waives the defense of double jeopardy by appealing or that no jeopardy can attach until the proceedings are finally terminated. But even if these doctrines are rejected, as they were for federal trials by the majority of the court in the recent case of Green v. U. S., 355 U. S. 184 (1957), probably jeopardy would not attach in Mary-

suppose the prosecution, instead of making the election, had allowed both counts to go to the jury, and the jury in error had held that the defendant was guilty of embezzlement, thereby implying that he was not guilty of larceny. In that case, if the Court of Appeals later reversed the embezzlement conviction, or if the trial court had granted the defendant a new trial, would not the State be barred from later seeking a larceny conviction?²³

There appears to be little justification for the continuation of this procedural entanglement resulting from the distinction between larceny and embezzlement, since the offenses require similar treatment, the penalties are practically the same²⁴ and the original theories of the actions seem to have retained little of their significance.²⁵ Judge

land since its law of double jeopardy is based entirely on the common law pleas of *autrefois acquit* and *autrefois convict*. See *Anderson v. State*, 86 Md. 479, 38 A. 937 (1897), where the court held that when the jury in the former trial was dismissed before rendering a verdict, the plea of former jeopardy was not available to the defendant because no man is in jeopardy until a verdict has been rendered.

²³ There are very few reported cases on this subject. See 80 A. L. R. 1106; and *State v. Balsley*, 159 Ind. 395, 65 N. E. 185 (1902), which held that a conviction of larceny did not amount to an implied acquittal of embezzlement where the defendant was granted a new trial; *State v. Casey*, 207 Mo. 1, 105 S. W. 645 (1907), where a conviction of larceny and an express acquittal of embezzlement were held to make a retrial impossible when the larceny conviction was reversed on appeal; *Guenther v. The People*, 24 N. Y. 100 (1861), which held that a conviction of embezzlement where the indictment contained counts for both larceny and embezzlement was equivalent to a verdict of not guilty of the larceny charged; and *Alexander Lithgow v. The Commonwealth*, 2 Va. Cas. 297 (1822), where the defendant was convicted on one count of larceny and acquitted on four counts of embezzlement and the larceny conviction was reversed on appeal, it was held that the defendant could be tried again only on the larceny count and not on the embezzlement counts.

²⁴ Maryland Statutes: Larceny — 3 Md. CODE (1957), Art. 27, §340 (\$100 or more). The defendant must pay back the value thereof, and he may be fined not more than one thousand dollars or be imprisoned in the penitentiary for not more than fifteen years, or in the house of correction or jail for not more than ten years, or be both fined and imprisoned in the discretion of the court.

Embezzlement — 3 Md. CODE (1957), Art. 27, §129. The defendant may be imprisoned in the jail or house of correction for not more than three years, or in the penitentiary for not more than fifteen years. (The amount embezzled may be recovered by a civil action.)

²⁵ As Judge Cardozo said in *Van Vechten v. American Eagle Fire Ins. Co.*, 239 N. Y. 303, 146 N. E. 432, 433 (1925), a case involving the coverage of an automobile insurance policy:

"[W]e do not say that theft is to be limited to what was larceny at common law. We assume that larceny by a bailee or a fiduciary would be theft within the policy, though at common law it would be classified under the heading of embezzlement. . . . The distinction, now largely obsolete, did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim. The crimes are one to-day in the common speech of men, as they are in moral quality."

Prescott stated in his concurring opinion in the subject case:

"Probably the solution of this rather difficult problem lies in the course followed by several of our sister States (and as was done in England) where the legislative power has provided that under an indictment for larceny, or for larceny in one count and embezzlement in another, there may be a conviction of either offense."²⁶

In most jurisdictions where the legislature has acted to eliminate the procedural problem resulting from the distinction between these two particular crimes, they have done so as a part of a statute intended to minimize the procedural effects of distinctions between all types of theft offenses. Varying approaches to this objective have been taken by the statutes passed to date.

Massachusetts has made all forms of larceny, embezzlement and false pretenses punishable under an indictment for stealing, without further particularization of the offense.²⁷ The statute entitles the defendant to a bill of

²⁶ 213 Md. 298, *conc. op.* 316, 320, 131 A. 2d 851 (1957).

²⁷ 9 ANNOTATED LAWS OF MASSACHUSETTS (1956):

Ch. 266, §30

"Whoever steals, or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, . . ."

Ibid., 9A:

Ch. 277, §39

"The words used in an indictment may, except as otherwise provided in this section, be construed according to their usual acceptance in common language; but if certain words and phrases are defined by law, they shall be used according to their legal meaning.

"The following words, when used in an indictment, shall be sufficient to convey the meaning herein attached to them: . . . *Stealing. Larceny.* — The criminal taking, obtaining or converting of personal property, with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement and obtaining by criminal false pretences."

Ch. 277, §40

"The court may, upon arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime, shall so order at the request of the defendant if the charge would not be otherwise fully, plainly, substantially and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, to prepare for

particulars so that he may have reasonable knowledge of the nature and grounds of the crime charged. A variance between the indictment and the proof on account of distinctions among the theft crimes is impossible under the simplified indictment. A variance between the bill of particulars and the evidence may be remedied by the courts ordering amendment of the bill; the court in such case may grant a postponement of the trial. This places upon the defendant the burden of requesting the particulars, and relieves the state of the threat of a reversal on the grounds that the defendant did not have sufficient notice in order adequately to prepare his defense.

The Model Penal Code (which is at present only in draft form), in abolishing the distinct crimes against personal property and establishing the single crime of theft in their place, appears to adopt a procedure similar to that of Massachusetts. Section 206.60²⁸ provides:

“An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, despite particularization in the indictment or other specification regarding the manner in which the theft was committed, subject only to the power of the court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice of the charge or by surprise.”

Under the English Larceny Act of 1916,²⁹ the attempt is made to eliminate the procedural problem by allowing:

1. A conviction for larceny, if proved, although the indictment charged embezzlement,
2. A conviction for embezzlement or fraudulent conversion if either is proved, although the indictment charged larceny,

his defense, the defendant desires information as to the time and place of the alleged crime or the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid.”

Ch. 277, §41

“In an indictment for criminal dealing with personal property with intent to steal, an allegation that the defendant stole said property shall be sufficient; and such indictment may be supported by proof that the defendant committed larceny of the property, or embezzled it, or obtained it by false pretences.”

²⁸ Tentative Draft Number 4, 82 (Apr. 25, 1955).

²⁹ 6 & 7 Geo. V, c.50, §44, (2), (3), (4) (1916).

3. A conviction for false pretenses if proved, although the indictment charged larceny,
4. A conviction for false pretenses as charged in the indictment, although larceny is proved by the facts.³⁰

However the larceny Act by itself, does not completely solve the procedural problem, since under its provisions a reversal still would be possible should the trial court be mistaken in its determination of which crime is proven by the facts. This problem, however, is eliminated by Section 5 of the Criminal Appeal Act of 1907³¹ which permits the Court of Criminal Appeal to substitute, for the verdict of the jury, a conviction of another offense included within the indictment if the court believes that the jury must have found the facts which established the other offense.³² It is the interaction of these two statutes which makes a reversal of the type in the subject case unlikely in England.

The New York Penal Code, Section 1290, appears to consolidate the various theft offenses into larceny. However, procedural entanglements have not been completely eliminated in the cases involving false pretenses. Section 1290a requires that if false pretenses are in any way involved, they must be alleged in the indictment before proof of them will be admitted in evidence.³³

³⁰ The subsection on false pretenses has been adopted in Maryland. 3 M₁. CODE (1957), Art. 27, §140.

³¹ 7 Edw. VII, c.23 (1907).

³² MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940) 547, fn. 1.

³³ See *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325 (1887), where a conviction of larceny was reversed on the grounds that the indictment in failing to allege false pretenses and differing from the evidence did not properly notify the defendant in order that he could adequately prepare his defense, and *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927), where the prosecuting witness was induced to give up title to his money as a result of false statements by the defendant, a conviction of larceny was reversed. The Court said, at 672:

"The section includes in the definition of larceny 'every act which was larceny at common law besides other offenses which were formerly indictable as false pretenses or embezzlement' . . . but a defendant must be charged with the particular offense the people claim he has committed."

In *People v. Lobel*, 298 N. Y. 243, 82 N. E. 2d 145 (1948), relying upon Section 1290a [PENAL LAW, §1290a] of the statute, the appellants contended that the thefts were "effected" by false pretenses and, since false pretenses were not charged in the indictment, evidence to that effect was erroneously received at the trial. On appeal, the court held that the theft was not "effected" by the false pretenses since the owner did not intend the appellants to have the money, and it was therefore not necessary that they be alleged in the indictment. The dissenting opinion said that the decision had the effect of recognizing the distinct crimes which the statute had intended to wipe out. The wording of Section 1290a was subsequently changed from "effected" to "in the course of accomplishing, or in aid of, or in facilitating the theft." [See PENAL LAW, §1290a (1951)].

If Maryland should enact legislation to eliminate the procedural problem in the administration of theft offenses, it appears that a provision similar to either the Massachusetts law or the draft Model Penal Code would be the most simple and effective choice.

CHARLES CAHN, II
