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Comments and Casenotes

LARCENY IN MARYLAND — A CRIME AGAINST OWNERSHIP OR POSSESSION?

By ROBERT S. FERTITTA

Two Maryland cases[1, 2] raise an interesting question: Does the Maryland Court of Appeals consider larceny to be a crime against ownership or a crime against possession?

In *Sippio,* a truck driver employed by the Panzer Pickle Co. was parked at a street corner after having made several deliveries for his employer. Three boys approached the truck and, during the course of a conversation with the driver, one boy opened the truck door, grabbed a money box and ran away. The defendant was identified as one of the three boys. The indictment charged the defendant with stealing $201.44 belonging to the Panzer Pickle Co., Inc. On appeal from a judgment of conviction, the defendant contended that the state had neither proved, as alleged in the indictment, that the Panzer Pickle Co. was a corporation nor that it "owned" the stolen property. In reversing, the Court of Appeals held that, while in a criminal prosecution "formal proof"[3] of a corporation's existence was not necessary, the one specific mention of the company name in the testimony without referring to it as a corporation was insufficient,[4] and that satisfactory proof of ownership of the stolen property, an essential element in the proof of the crime of larceny, was wholly lacking.[5]

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[1] Sippio v. State, 227 Md. 449, 177 A. 2d 261 (1962).

[2] Wersten v. State, 228 Md. 226, 179 A. 2d 364 (1962).

[3] See also Richardson v. State, 221 Md. 85, 156 A. 2d 436 (1959). This case stated that formal proof — such as corporation papers — is unnecessary in a criminal prosecution. The court said a corporation's existence might be proven orally or even by reputation.

[4] The fact that the Panzer Pickle Co. was a corporation was never mentioned during the trial. Indeed, the company name was only mentioned once in the course of the entire trial: first question of the driver's direct examination "you are employed by the Panzer Pickle Company . . .?" See Brief for Appellant, p. E. 3, Sippio v. State, 227 Md. 449, 177 A. 2d 261 (1962). However, in Richardson v. State, *ibid.*, the company was mentioned several times as a corporation without objection by the prosecution. The court in Richardson said that this was sufficient proof of its existence.

[5] In fact the court found that there was a complete absence of direct evidence that the money belonged to the company. The court said that the implications of the testimony were that the money belonged to the truck driver. During the testimony of the driver he was asked: "Did anything unusual happen to you that day?" He answered, "Yes, I was robbed." See Brief for Appellant, p. E. 4, Sippio v. State, 227 Md. 449, 177 A. 2d 261 (1962).

In *Wersten* the defendant was charged with the crimes of breaking and entering the storehouse of one Chris Neumeister and with the larceny of Neumeister's property from a safe in the storehouse. Evidence introduced by the state at the trial indicated (1) that the premises were occupied by the Eichenkranz Society, an incorporated restaurant, (2) that the goods allegedly stolen were the property of the corporation, and (3) that Chris Neumeister, rather than being an occupier of the premises and owner of the goods, was merely an employee of the corporation.[6] In reversing the lower court conviction, the Court of Appeals held that the state did not develop "the actual ownership of the property involved, and [did not develop] whether Neumeister had a sufficient interest or special property therein to permit ownership to have been laid in him."[7] The court reviewed its earlier decisions involving larceny and reiterated "that an allegation of the ownership of the property alleged to have been stolen is a necessary requisite in a larceny indictment . . . and proof of ownership as laid in the indictment is an essential factor to justify a conviction."[8]

The consistent use of and the apparent importance given to the word *ownership* in the Maryland decisions[9] involving the crime of larceny suggests that Maryland's requirements for larceny may differ from those stated in the traditional common law definition of the crime.

At common law, larceny was "the felonious taking and carrying away of the personal goods *of another*."[10] A modern textwriter defines larceny as "the trespassory taking and carrying away of the personal property *of another* with intent to steal same."[11] The use of the term "of another" seems to refer to possession, as might be expected from the nature of trespass. Professor Perkins has said, "larceny involves the act of wrongful dispossession, the vital question is not who has title . . . but who has the legally-recognized possession."[12] Thus, a person with title to property can commit larceny of the property by taking

[6] Mr. Neumeister was the manager of the corporation's enterprise, the restaurant.

[7] 228 Md., at 229. Note that here it would seem that the court is saying that actual ownership — title — is not necessary for ownership to be laid in a person.

[8] *Id.* at 228.

[9] See note 17 *infra*.

[10] 4 BLACKSTONE, COMMENTARIES 230 (Lewis ed. 1898). (Emphasis added.)

[11] PERKINS, CRIMINAL LAW 190 (1957). (Emphasis added.)

[12] *Id.*, 195.

it from a person who is in rightful possession.[13] No dissent from the rule as it is stated by Professor Perkins has been found among the treatise writers.[14] The Maryland Court of Appeals has made statements to the effect that proof of *ownership* is an essential element of the crime of larceny,[15] and the court requires that an indictment for larceny contain an allegation of ownership.[16] The question presented is what the court means or may mean when it

[13] 2 BISHOP, CRIMINAL LAW 603 (9th ed. 1923): "[A]n article may be stolen from one who is either the general or special owner of it." MAY, LAW OF CRIMES § 237, at 343 (4th ed. 1938): "A general owner may be guilty of larceny of his own goods, if at the time of taking he has no right to their possession. . . ."

[14] CLARK & MARSHALL, LAW OF CRIMES § 12.03, at 724 (6th ed. 1958): "To constitute larceny, the goods taken must be the property of another than the accused. . . . It is not meant by this, however, that the *general ownership* must necessarily be in another. A special ownership or *possession* is enough." (Emphasis added.) *Id.*, § 12.00 at 707: "Trespass against *possession* is the matrix of the simple common-law larceny concept. * * * The [early] English cases . . . mirror a judicial struggle to ascertain who has *possession*. Obviously, then, an accused cannot, in legal contemplation, trespass against a person's property, if that person does not have *possession*." (Emphasis added.)

An English authority, although making it clear that larceny is a crime against possession, implies that the word "owner" — though loosely construed — is still used to describe the larceny victim in England. TURNER, KENNY'S OUTLINES OF CRIMINAL LAW § 227, at 257 (18th ed. 1962): "Larceny was always conceived as an offense against possession, and naturally so, since English law has never recognized in a subject of the realm any absolute right of ownership of chattels, our 'owner' being merely the person who has the best right to possess the thing."

[15] *E.g.*, see statement of facts of principal cases in body.

[16] 2 WHARTON, CRIMINAL LAW § 1172, at 1491 (12th ed. 1932) states the requirement as it should be: "To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or special property of the alleged owner. . . ." *Id.*, § 1177, at 1495-96: "General owner may be charged with stealing from special owner. . . . [O]ne having the property [title] in goods may be guilty of larceny in stealing them from one to whom [*e.g.*, a bailee] he has given them in custody as special possession. In such case ownership must be laid in the bailee." *Id.*, § 1179, at 1497: "As against strangers, property [here Wharton probably means ownership] may be laid either in bailor or bailee."

But another writer seems to recognize at least a practice of alleging ownership, since he finds it necessary to state: "A general or special ownership by another is sufficient to sustain the allegation that the property is his. Even a thief has sufficient ownership to support the allegation as against another thief." MAY, *op. cit. supra* note 13, § 245, at 351.

Also see: JOYCE, TREATISE ON THE LAW GOVERNING INDICTMENTS § 427, at 487-89 (2d ed. 1924):

> "There are some offenses, such as larceny or embezzlement, where the criminal act is directed against the personal property of another, and in charging which, it is essential to the sufficiency of an indictment, that, in describing the property affected, there should be an averment of ownership, custody or possession. So to constitute a good indictment for larceny the thing stolen must be charged to be the property of the actual owner, or of a person having a special property as bailee, and from whose possession it was stolen. * * * In the application of this rule it has been held sufficient under the facts of particular cases to lay the ownership of property in the one having the lawful possession. . . ."

uses the word "ownership" rather than the word "possession" in its discussions of the crime of larceny. To facilitate the present discussion, four possible reasons for the court's use of the word "ownership" are set forth. Although they are treated separately, it should be noted at the outset that any combination of the four may in fact be the reason for the use of the word in a given instance.

I. IN MARYLAND LARCENY IS A CRIME AGAINST TITLE

When a person states that he "owns" certain property he is usually understood to mean that he has "title" to the property. Since the Court of Appeals uses the word "ownership" without defining it, it might be assumed that it intends this commonly understood meaning. If it does, and thus interprets the crime of larceny as being one against title, the court is in direct conflict with the text authorities. Because of the seriousness of such a conflict, a close scrutiny of several Maryland larceny cases would be valuable at this point.

Although many cases have discussed larceny in terms of ownership,[17] the clearest statement of the requirement of an allegation of ownership is found in *State v. King*,[18] where, in reference to larceny indictments, the court stated that "among the essential requisites of an indictment for larceny is a sufficient allegation of ownership."[19] The court did not attempt to explain what would be a "sufficient alle-

[17] See, *e.g.*, Putinski v. State, 223 Md. 1, 161 A. 2d 117, 82 A.L.R. 2d 859 (1960); Richardson v. State, 221 Md. 85, 156 A. 2d 436 (1959); Murray v. State, 214 Md. 383, 135 A. 2d 314 (1957); Burgess v. State, 161 Md. 162, 155 Atl. 153 (1931); State v. Barnett, 148 Md. 153, 128 Atl. 744 (1925); State v. McNally, 55 Md. 559 (1881); and two non-larceny cases: State v. Tracey, 73 Md. 447, 21 Atl. 366 (1891), an embezzlement case reciting the requirement for larceny indictments; and State v. Blizzard, 70 Md. 385, 17 Atl. 270 (1889), a case dealing with obtaining property by false pretenses reciting the requirement for larceny indictments. See also two English cases cited therein: Reg. v. Martin, 8 Ad. & E. 481, 112 Eng. Rep. 921 (1838) and Sill v. R., 1 El. & Bl. 553, 118 Eng. Rep. 542 (1853), particularly Lord Campbell's opinion at 556.

[18] 95 Md. 125, 51 Atl. 1102 (1902). The question in this case was whether an indictment was demurrable which described money as "goods and chattels" in the clause alleging ownership. The court's answer was that it was not.

[19] *Id.* at 128. The King case, after quoting the following statement, relating to criminal indictments generally, from Kearney v. State, 48 Md. 16, 24 (1877): "It has always been held that it is an essential requisite in every indictment that it should allege all matters material to constitute the particular crime charged with such positiveness and directness as not to need the aid of intendment or implication" stated: "We may supplement this here by saying it is also held by all the authorities that among the 'essential requisites' of an indictment for larceny is a sufficient allegation of ownership."

gation of ownership." One of the reasons given by the court in *King* for this requirement was "that the Court must be able to determine judicially that the property alleged to have been stolen was the *property of* another and not the *property of* the accused, and it is therefore essentially descriptive of the crime charged."[20] Here again, as with the word "ownership", the court uses words that connote "title", *i.e.*, by using the words "property of". Considering for a moment that larceny traditionally is a crime against "rightful possession", it is possible that the court, taking cognizance of this view, meant only that the court must be able to determine that the defendant had no right to possession. But by using the term "property of" the court seems to have been thinking in terms of title and not in terms of rightful possession.

While *King*, by the use of the terms "ownership" and "property of", raises the possibility that the court was thinking in terms of title, a later case seemed to make such an interpretation probable. In *Canton National Bank v. American Bonding and Trust Co.*,[21] the court stated that "[i]n every larceny there must also be a taking and a trespass, that is to say, there must be a taking from the possession of the owner against his will."[22] By the use of the word "owner" in such a manner, there is little room to argue that the court meant something less than the title holder.

Although there are many other larceny cases where such terms as "ownership", "owner", and "property of" are used by the court in such a way as to imply title with-

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[20] *Supra* note 19. (Emphasis added.) See also Hearn v. State, 55 So. 2d 559, 561, 28 A.L.R. 2d 1179 (Fla. 1951). The Hearn case states its reason this way: "The names of the owners of the stolen property constitute no part of the offense. They are stated . . . [in the indictment] primarily as a matter of description for the purpose of identification and to show *ownership* in a person or persons other than the accused." (Emphasis added.)

[21] 111 Md. 41, 73 Atl. 684 (1909).

[22] *Id.* at 45. This was a suit by the Bank against its surety on a surety bond. Under the terms of the bond the surety agreed to reimburse the Bank for any loss caused by conduct of an employee which amounted to larceny or embezzlement. The Bank alleged several acts of its cashier which it contended amounted to larceny. The court's decision was concerned primarily with whether or not the specified acts amounted to larceny. The cashier was alleged to have written many drafts on accounts of depositors of the Bank and then authorized a teller to pay the drafts to third persons when in fact the accounts drawn on did not have sufficient funds to cover them. The court held that these allegations were not sufficient to show larceny since if the teller had full knowledge of the circumstances the cashier would merely be an accessory before the fact. But more important for present purposes, the court also held that there was no specific allegation that the money paid out came out of the Bank's funds. The statement quoted here was made by the court in defining larceny. Query: Considering these details of the case, did the court intend the quoted statement to mean what it seems to mean on its face?

out much hint of a contrary implication,[23] the case of *Richardson v. State*[24] seems to clarify the Maryland position. The facts of this case are of particular interest. The Pleasant Valley Shoe Co. had delivered some of its merchandise to Horn's Motor Express, Inc., in Baltimore for shipment to an out-of-state customer of the Shoe Co. The merchandise was taken from one of Horn's sealed trucks while parked at its platform in Baltimore. Ownership in the indictment was laid in Horn's Motor Express, Inc. The evidence at the trial, however, showed that in fact the Shoe Co. had title to the goods. The Court of Appeals, after quoting the requirement of "sufficient allegation of ownership" from *King* and also the reasons for the requirement, stated:

> "However, it is generally held that in a prosecution for larceny, an allegation of the ownership of stolen goods is supported by proof of any legal interest or special property in the goods, as, for instance, where the person named in the indictment is in lawful possession as a bailee or common carrier."[25]

It appears that the court in *Richardson* interpreted the words used in *King* — "sufficient allegation of ownership" — to mean "allegation of sufficient ownership", and further held that "any legal interest or special property in the goods" would be sufficient ownership.[26] "Special property" has been defined as "Property of a qualified, temporary, or limited nature; as distinguished from absolute, general, or unconditional property. Such is the property of a bailee in the article bailed, of a sheriff in goods temporarily in his hands under a levy, of the finder of lost goods while looking for the owner. . . ."[27]

In *Richardson* the court held that ownership was properly laid in Horn's Express, Inc. It seems clear that Horn's interest fits into the definition of "special property". A reexamination of the court's holding in *Wersten* shows that the court said that the state did not "develop the actual ownership of the property involved, and [did not develop] whether Neumeister had a sufficient interest or special property therein to permit ownership to have been laid in him."[28] In *Wersten* the indictment laid the ownership of

[23] See cases cited note 17 *supra*.
[24] 221 Md. 85, 156 A. 2d 436 (1959).
[25] *Id.* at 88.
[26] See, 2 WHARTON, EVIDENCE IN CRIMINAL CASES § 1070, at 1881 (11th ed. 1935): "The possession of the property stolen and the right to possession have been held sufficient to sustain the allegation [of ownership]."
[27] BLACK, LAW DICTIONARY 1383 (4th ed. 1957).
[28] 228 Md. 226, 229, 179 A. 2d 364 (1962).

the property in the manager of the corporation that had title to the property. It would appear that he was in "rightful possession" of the property or, in other words, had a "special property" in the money. Perhaps, then, if the state in *Wersten* had "developed" this "special property" in more detail, the court would have held the allegation and proof sufficient.

The important point is that it seems almost certain after *Richardson* that the court is not thinking in terms of title when it uses the word "ownership". However, some doubt still remains, since even in *Richardson* the court recited the requirement that an allegation of ownership is essential. Why is not an allegation of rightful possession enough? Perhaps because the court still believes larceny to be basically a crime against title, with certain exceptions, as in the case of a bailee or common carrier. No matter how doubtful this last possibility may seem to be, the continued use of the word "ownership" by the court still connotes title. Apparently the court sees no problem in its use of such a vague term since the court has made no further attempt to clarify its meaning or substitute a more realistic requirement in larceny cases.[29]

II. To Be The Subject of Larceny Goods Must Be Owned by Someone

It is possible that the court uses the word "ownership" to mean title when it requires an allegation of ownership in the indictment to satisfy the basic rule that, in order for property to be the subject of larceny, someone must actually own it,[30] *i.e.*, have legal title to it. Abandoned property cannot be the subject of larceny since it has no owner.[31] However, the identity of the owner need not be known, with the result that lost property can be the subject of larceny.[32] In a case where the identity of the owner is not known, it would seem that the court might allow proof that the holder of the goods was in rightful possession to sustain the allegation that "ownership" was in him under the holding of *Richardson*. But in *Richardson* the title holder was known and the problem there was whether

[29] See Byrd v. State, 229 Md. 148, 182 A. 2d 47 (1962). This case involved larceny of an automobile. The defendant contended that the state failed to prove the existence of the corporation alleged as the owner of the auto, and that the state also failed to prove "ownership". In a per curiam decision the court dismissed the appeal, citing the Richardson, Sippio and Wersten cases. See also Hardison v. State, 229 Md. 291, 182 A. 2d 487 (1962).

[30] See, Hochheimer, Law of Crimes & Criminal Procedure 393 (2d ed. 1904).

[31] *Ibid.*

[32] See Perkins, *op. cit. supra* note 11, at 205.

the holder of the goods had sufficient interest in the goods to allow "ownership" to be laid in him. The argument that the court means that the allegation of ownership is necessary to satisfy the rule that the goods are not abandoned and that it does not mean that larceny is a crime against title is weaker because of the fact that in cases such as *Sippio* and *Wersten* there seemed to be little doubt that the goods were not abandoned. The court in those cases seemed to be more interested in *who* had title to the goods rather than if *anyone* had title. It seems unlikely that the court means nothing more than that the goods must be shown not to be abandoned.

III. THE REQUIREMENT IS ONE OF FAIR PROCEDURE

It is quite possible that the requirement of an allegation of ownership has nothing to do with the substantive crime of larceny. The requirement might have been instituted as a matter of fair criminal procedure. Arguably, there is nothing more than a requirement that the defendant is entitled to know whose property he is supposed to have stolen, and that this property can best be identified in terms of ownership. There is language in *State v. King*[33] to support this, as one of the reasons for the requirement of an allegation of ownership: "[T]he accused is entitled to be informed of the exact accusation against him."[34]

The facts of both *Sippio* and *Wersten* seem to support this argument. In both cases there seemed to be ample proof of an agency relationship between the apparent title holder and the person holding the property. Whenever an agency relationship exists, the question arises whether the agent, servant or employee had possession of the property or merely custody. Without going into the distinctions between agents, servants and employees, it should be noted that servants usually have only the custody of property received from their masters.[35] The possession in such a case is said to remain in the master. However, an agent usually has possession of the property owned by his principal.[36] The distinction seems to depend on the amount of trust and confidence between an agent and principal. Depending on the circumstances of a given situation, an employee may have custody of some property of his employer and possession of other property of his employer.

[33] 95 Md. 125, 51 Atl. 1102 (1902).
[34] *Id.* at 128.
[35] See PERKINS, *op. cit. supra* note 11, at 197-98.
[36] *Ibid.*

Since larceny traditionally is a crime against the person in rightful possession, it is important for the defendant to know exactly what the relationship was between the person or corporation with title to the goods and the person in whose hands the goods were at the time of the taking. If the holder of the property merely has custody of the goods, an indictment laying "ownership" in him would appear to be defective even if "ownership" is interpreted to mean "rightful possession". In such a case "ownership" would have to be laid in the master. There is little doubt that the defendant is entitled to know against whom he has allegedly committed larceny, but if this is the reason for the requirement, the court has made no attempt to say so.

IV. Misinterpretation By Later Courts of Requirements Originated Much Earlier

The fourth possible reason for the court's use of the word "ownership" is that it came into use accidentally in the many cases where goods were stolen directly from the person who had the legal title and who was also in rightful possession. It is not difficult to conceive how courts, confronted with the same situation so often, began to describe the property right violated as ownership. From frequent usage, it might have come to be mistakenly supposed that ownership must be alleged in the indictment,[37] that proof of title, rather than proof of possession, is at the heart of the crime, and that allowing proof of possession instead is a relaxation of the "original" rule dealing with ownership.[38] If this is the reason for the court's use

[37] An examination of the larceny indictment forms used by Maryland State's Attorney's offices furnishes little help in determining if there is a reason for the requirement, because of the simplicity of the language: "of the goods and chattels, moneys and properties *of*. . . ." (Emphasis added.) It is difficult to imagine from examining this phrase that the word "of" would mean that the state's attorney would have to insert the owner's name following it. It could just as easily be interpreted to mean in the rightful *possession of*. Little aid is forthcoming from the Maryland statutory law relating to indictments, since no requirement of alleging ownership is contained in these provisions. 3 Md. Code Art. 27, § 603 ff. (1957). Although the word "owner" is used several times in the Maryland statutory law relating to larceny, there is no specific statement that an allegation of ownership is an essential element of the crime. 3 Md. Code Art. 27, §§ 340-53 (1957).

[38] In 1916 the English Larceny Act recognized the possibility of confusion. See: Archbold, Pleading, Evidence & Practice in Criminal Cases 540 (32nd ed. 1949):

> "The essence of larceny is the taking of property without the consent of the owner, but the expression 'owner' is not limited to the person who is legal owner of the property stolen. By section 1 (2) (iii) of the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), 'owner' is defined to

of the word ownership, the court should correct the accident of time and circumstances by simply abandoning its use.

V. IS IT IMPORTANT TO MAKE A DISTINCTION BETWEEN OWNERSHIP AND POSSESSION IN LARCENY CASES?

Since the Maryland Court of Appeals seems to allow proof of rightful possession to support an allegation of ownership whenever it is important to the decision in a particular case, it may be argued that the court means "possession" when it uses the word "ownership," and that no real problem exists. However, this argument ignores an important fact — that no one can be sure that the court in the future in a given case will so interpret the word. A distinction between the words "ownership" and "possession" should be made in order to eliminate possible future misconception as to what amounts to the crime of larceny. As long as the Court of Appeals adheres to the vague rule that proof of ownership is an essential element of larceny, there is room for confusion and uncertainty. The Maryland Court of Appeals would do well to enunciate a clear, definitive statement of what it means by "ownership" as used in larceny cases.[39]

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include any part owner, or person having possession or control of, or a special property in, anything capable of being stolen. * * * It must be proved upon the trial, that the goods stolen are the absolute or special property of the persons named in the indictment."

[39] It is true that other courts have used the words "ownership" and "possession" interchangeably as perhaps the Maryland Court of Appeals is doing. *E.g.*, People v. Edwards, 72 Cal. App. 102, 236 Pac. 944 (1925). But the court in this case made it clear that it did not intend to change the common law definition of the crime. See p. 950: "Considered as an element of larceny, 'ownership' and 'possession' may be regarded as synonymous terms; for one who has the right of possession as against the thief is, so far as the latter is concerned, the owner." This brief statement shows how simply the problem can be dealt with.