His studies and scholarship in English legal history had won for him the sympathetic attention and interest of American law teachers and indicated him as especially qualified for the appointment as Carpentier Lecturer in the academic year 1919-20.

His winning personality and his qualities as a man and as a teacher attracted the respect and affection of his students and associates, who feel deeply his death as a personal loss and as a loss to American legal scholarship.

[redacted]

MILTON HYMES STERNFELD, Secretary of the REVIEW from June 1919, until his graduation from the Columbia University School of Law in February, 1920, died suddenly on March 11, 1920. Although he was no longer connected with the REVIEW at the time of his death, the editors, who were associated with him for many months, keenly feel his loss and cherish his memory as that of a brilliant and self-sacrificing co-worker and a cheerful and inspiring companion.

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NOTES

LARCENY, EMBEZZLEMENT AND OBTAINING PROPERTY BY FALSE PRETENCES.—What are the boundaries between the crimes of larceny, embezzlement and obtaining property by false pretences? This is a question which has been the source of infinite difficulty in the criminal law. An illustration of this fact is found in the recent case of *People* v. *Mills Sing* (Cal. Dist. Ct. of App., 2nd Dist. 1919) 183 Pac. 865.

Certain potato growers agreed to sell the defendant potatoes which the defendant was to call for and which were to be paid for in cash on their delivery upon the following day. The next day, part of the potatoes were delivered to the defendant, without his paying for them, on the strength of his statement (after the seller had asked him for the purchase money) that his company was a "big company" and that he would bring the money the next day. On the following day, the defendant was allowed to haul away more potatoes without paying for them. On the third day, a fellow-conspirator of the defendant came for the rest of the potatoes, and when asked for the purchase money stated that his company was a "very big company", and asked the seller to accompany him to the neighboring town where the potatoes were stored, saying, "I will pay right away". The seller, accordingly, accompanied the last lot of potatoes to a garage where they were stored, and was there given a card with the office address of the company printed thereon, and told that if he went to the office the next morning he would receive the money. The seller remained outside the garage watching the potatoes until morning, when he went to the address given but found no "office" and no "big company". On the seller's return to the garage, the potatoes had been removed by the defendant and converted to his own use. The court, after discussing whether the

crime was larceny, embezzlement, or obtaining property by false pretences, held the offense to be larceny.

Originally the courts held that every larceny includes a trespass; that no taking is felonious unless possession is taken without the consent of the owner,[1] and had this continued to be the law, much of the confusion which afterward ensued in the decisions could have been avoided. In 1779, however, the decision in *Pear's Case*[2] introduced the doctrine of larceny by trick, a doctrine which has been the cause of much questionable sublety in the law.[3] Still later, when the statutes against embezzlement and obtaining property by false pretences were passed, the task of marking off the limits between these various offences became hard indeed.

In *Pear's Case*,[2] a horse was hired by the prisoner, his pretext being that he wished to use the horse in taking a journey; his actual intent being to steal the horse. This was held to be larceny. The difficulty that possession was voluntarily given by the owner and that there was, therefore, no trespass, the court overcame to its own satisfaction by holding that, inasmuch as the intention of the prisoner was fraudulent, the nature of the possession had not changed, but remained in the owner even after the bailment. This being so, there was trespass and larceny. This doctrine, although opposed to the principles governing consent in sales,[4] in rape,[5] and in assault,[6] is nevertheless the basis of the law of larceny by trick to-day.[7]

Wright, in his "Essay on Possession", states a radically different explanation of the doctrine of larceny by trick as follows: "But if the one party means only to give a bailment of the thing and the other accepts the thing meaning not to hold it as upon a bailment but to appropriate it contrary to the known intention of the bailor, this may be of itself a theft and no further complication arises, for there is no concurrence of intention or contract *ad idem*. It is not that the contract is avoided by the fraud, but that there is no contract, and here the possession does not pass by contract but by wrong and is trespassory."[8]

It is submitted that the above view is erroneous. While the inward intent determines the existence of a *mens rea*, the disclosed intent alone determines the existence of a contract, and in the case we are consid-

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[1]Bracton, 150b; Rex *v.* Raven (1663) Kelyng 24.

[2]Rex *v.* Pear (1779) 2 East P. C. 685; 1 Leach (4th ed.) 212.

[3]See Beale, The Borderland of Larceny, 6 Harvard Law Rev. 244.

[4]Hickey *v.* McDonald Bros. (1907) 151 Ala. 497, 44 So. 201; Williston, Sales, § 635.

[5]Regina *v.* Barrow (1868) 11 Cox C. C. 191.

[6]Regina *v.* Clarence (1888) 16 Cox C. C. 511.

[7]Smith *v.* People (1873) 53 N. Y. 111; People *v.* Miller (1902) 169 N. Y. 339, 62 N. E. 418; McKinney *v.* State (1915) 12 Ala. App. 155, 68 So. 518; State *v.* Fitzsimmons (Del. 1918) 104 Atl. 838.

[8]Pollock and Wright, Possession, 204. See also p. 218 to the same effect. These views have been cited with approval: Oppenheimer *v.* Frazer [1907] 2 K. B. 50 (*per* Kennedy, L. J.); Whitehorn Bros. *v.* Davison [1911] 1 K. B. 463, 485 (by the same judge).

ering, there is a disclosed intent on the part of the recipient of the property to become a bailee, and this determines his contractual status.[9]

In the principal case, the defendant contended that under the California law the offense proved is embezzlement and not larceny, but the court held to the contrary.

The decision in *Bazeley's Case*,[10] holding that a servant who receives possession of his master's goods from a third party, and then converts them to his own use, is not guilty of larceny, caused the enactment of the statute from which the modern crime of embezzlement is derived.[11] This statute punished embezzlements by servants or clerks of property received by virtue of their employment for or in the name or on account of their masters. The foregoing statute was held to apply only to cases like *Bazeley's Case* where the goods were received from a third party for the master, and not where they were received from the master himself.[12]

In the United States, while the above English statute and its successors were widely copied in the various states, some states soon changed the language of the English statutes by omitting the words "for or in the name or on account of his master", and provided that any servant or agent embezzling any of his employer's property received "by virtue of his employment", should be "deemed guilty of simple larceny".[13] Under statutes of this type it has been held that an employee may be convicted where he has embezzled property received by him by virtue of his employment, although he obtained the property from the employer himself.[14]

In some states, such statutes have even been held to include cases where the employee secured only a bare custody of the property received by him from the master and hence was guilty of larceny at common law.[15] In one case, an agent obtained possession of money from another agent of the principal, by fraudulently overstating the amount required for the particular business of the principal which he had in charge, the agent's intent being to steal the excess thus obtained. Assuming that the agent thus obtaining the money was not a mere servant, this would be a case of larceny by trick at common law, but the court held that, even admitting this fact, the defendant was nevertheless guilty under an embezzlement statute which punished the fraudulent conversion of property by an agent where the property was obtained "by virtue of

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[9]O'Donnell *v.* Clinton (1888) 145 Mass. 461, 463, 14 N. E. 747 (*per* Holmes, J.); Langdell, Contracts (2nd ed.) § 180; Holland, Jurisprudence (12th ed.) 260.

[10]Rex *v.* Bazeley (1799) 2 Leach (4th ed.) 835.

[11]39 Geo. III, c. 85.

[12]Rex *v.* Murray (1830) 1 Moody 276.

[13]Mass. Gen. Stat. (1860) c. 161, § 38. For similar statutes see Ala. Cr. Code (1907) § 6828; Me. Rev. Stat. (1916) c. 122, § 8; R. I. Gen. Laws (1909) c. 345, § 16.

[14]People *v.* Dalton (N. Y. 1836) 15 Wend. 581; Eggleston *v.* State (1901) 129 Ala. 80, 30 So. 582.

[15]Planters' Ins. Co. *v.* Tunstall (1882) 72 Ala. 142, 150; People *v.* Sherman (N. Y. 1833) 10 Wend. 298; People *v.* Dalton, *supra*, footnote 14; *contra*, Commonwealth *v.* Berry (1868) 99 Mass. 428.

his employment". To the objection that the offense was already punishable under the law of the state in question as common-law larceny, the court said: "It is not inadmissible to punish by a statute what is already punishable at common law".[16] The court also states that a conviction under the statute in such a case may be pleaded in bar to a subsequent indictment for larceny at common law on the same facts.[17] Thus the two offences are not mutually exclusive.

In the principal case, a nice question arises under the California Penal Code as to whether the act of the defendant in converting the potatoes to his own use is larceny or embezzlement. Larceny is defined in this code in the same terms as at common law.[18] Embezzlement is broadly defined as "the fraudulent appropriation of property by a person to whom it has been intrusted",[19] and a subsequent section of the code specifically provides that "Every person intrusted with any property as bailee . . . who fraudulently converts the same or the proceeds thereof to his own use, is guilty of embezzlement".[20]

Assuming, as the court does, that title to the goods did not pass by the delivery, is the defendant's offence larceny by trick or embezzlement by a bailee? It seems that in strict logic it is both. While it is true that the bailment has been obtained by fraud, nevertheless from the standpoint of the owner of the goods, and under the law itself, which looks in matters of contract only at the expressed intent of the parties, there is an actual bailment, and a conversion of the bailed goods by the bailee; but, since this bailment has been obtained by fraud, it is also a case of larceny by trick. The California court, however, influenced doubtless by the idea that it was not the purpose of the framers of the code to make this identical act two different crimes, and by the fact that such an act had been larceny by trick at common law, held the offence to be larceny and not embezzlement.[21]

It was also contended in the principal case that the defendant was guilty not of larceny but of obtaining property by false pretences. Here again we have an offence which borders closely upon larceny by trick. The distinction usually drawn between these two offences is that in the case of obtaining property by false pretences, there is a fraudulently obtained title, whereas in the case of larceny by trick there is a fraudulently obtained possession,[22] and if this distinction had always been observed, the law on the subject would now be in simpler and sounder condition.

In accordance with the foregoing distinction, the fraudulently obtained loan of a horse, *animo furandi,* would be larceny by trick,[23]

[16]State *v.* Taberner (1883) 14 R. I. 272, 276. To the same effect see Lowenthal *v.* State (1858) 32 Ala. 589, 595; People *v.* Dalton, *supra,* footnote 14. In a similar case in California, the offence was held to be larceny by trick. People *v.* Campbell (1899) 127 Cal. 278, 59 Pac. 593.

[17]State *v.* Taberner, *supra,* footnote 16, at p. 277.

[18]Cal. Penal Code (1915) § 484. "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another."

[19]*Ibid.* § 503.

[20]*Ibid.* § 507.

[21]People *v.* Mills Sing (Cal. 1919) 183 Pac. 865, at p. 868.

[22]Commonwealth *v.* Barry (1878) 124 Mass. 325.

[23]Rex *v.* Pear, *supra,* footnote 2.

whereas a loan of money obtained under like circumstances would constitute the offence, of obtaining property by false pretences. The loan of the horse creates a mere bailment while a loan of money creates a debt, and title passes to the debtor.[24]

Unfortunately, there are decisions holding that there may be an obtaining of property by false pretences where, though the title is dealt with, only possession passes. For instance, where *A* falsely states that he is agent for *B*, and thus obtains a loan from *X* on *B's* behalf, the offence is held to be obtaining property by false pretences and not larceny by trick, although, owing to the non-existence of the asserted agency, no title ever passes.[25] On principle, these cases seem to be clearly larceny by trick, inasmuch as the only logical need for having such an offence as obtaining property by false pretences arises from the impossibility of a thief's stealing goods of which the title and possession are both in him; clearly, he cannot steal from himself that which is his own. Assuming the doctrine of larceny by trick to be established law, however, the foregoing difficulty does not exist where, owing to the non-existence of the principal to whom the sale was to have been made, no title passed to any one. Several cases have correctly held such acts to be larceny.[26]

The court held that the principal case was one of larceny because, in spite of the delivery of the potatoes, inasmuch as the sale was to be for cash, the title did not pass. In such cases, the delivery of possession by the seller to the buyer may indicate that the transaction is to be a cash sale, a conditional sale, or a credit sale, according to the intention of the seller. The delivery, though evidence of an intent to pass title and give credit, is not conclusive, the effect of the transaction being a question of fact for the jury on all the evidence.[27] In the present transaction, the insistent demand of the seller for the purchase price and the fact that he accompanied the last installment of the potatoes, and watched over them after delivery until the following morning, would justify a jury in finding that he did not intend title to pass until the buyer had paid for the goods. If this be so, the transaction would probably be most logically interpreted as a conditional sale;[28] and, title remaining in the seller, the conversion of the goods is larceny by trick. The decision, therefore, although the question of fact is close, seems sound.

From a practical standpoint, it is hard to exaggerate the bad results

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[24]Rex *v.* Coleman (1785) 2 East P. C. 672, 673; Williams *v.* State (1875) 49 Ind. 367. In two California cases (People *v.* Rae (1885) 66 Cal. 423, 6 Pac. 1; In re Clark (1917) 34 Cal. App. 440, 167 Pac. 1143) the facts seem to show a loan of money and not a bailment, and these two decisions holding the defendant in each case guilty of larceny appear to be erroneous.

[25]Rex *v.* Coleman, *supra,* footnote 24; Rex *v.* Atkinson (1799) 2 East P. C. 673; Lewer *v.* Commonwealth (Pa. 1827) 15 S. & R. 93.

[26]Harris *v.* State (1888) 81 Ga. 758, 7 S. E. 689; Mitchell *v.* State (1893) 92 Tenn. 668, 23 S. W. 68; Bryant *v.* Century Bank (1915) 155 N. Y. Supp. 1010; Collins *v.* Ralli (N. Y. 1880) 20 Hun 246; compare with this last case Whitehorn Bros. *v.* Davison, *supra,* footnote 8.

[27]Williston, Sales, 554.

[28]*Ibid.* p. 557.

that flow from the possibility of conflicting decisions on the nice distinctions that we have been considering. No more unseemly spectacle can exist in a court of justice than that of a defendant admittedly guilty of some sort of theft (in the broad sense of the term) who must, nevertheless, either go free or receive a new trial, merely because the particular character of his theft has not been properly set forth in the indictment.[29]

Some endeavor has been made to cure these defects in the law by further legislation. Thus in New York a simplification was reached by consolidating all three of the foregoing offences into one crime called larceny.[30] Still, even such a consolidation does not do away with the requirement that the indictment must sufficiently inform the accused of the crime charged against him. As a result, even since the above statutory change, the New York courts have held that an indictment which charges facts amounting to larceny at common law is not sustained by proof of facts showing larceny by obtaining property through false pretences, or by proof of facts amounting to embezzlement.[31] Assuming, however, that the indictment states a set of facts showing any one of the statutory forms of larceny, the consolidation of these offences under one name does away at least with the danger of a misnomer of the crime in the indictment.

In England, some of the foregoing difficulties have been removed by a statute[32] which enables juries to convict of larceny on an indictment for embezzlement, or of embezzlement on an indictment for larceny. A subsequent section of the same statute[33] provides that on an indictment for obtaining property by false pretences, it shall be no ground for an acquittal that the facts show that the accused obtained the property in such manner as to amount in law to larceny. These English statutes seem a step in advance of the New York statute, as interpreted by the New York decisions just cited; under the English statutes the accused, if guilty of one kind of stealing, cannot escape merely because he is indicted for another kind.

By far the best remedy, however, seems to have been reached in the legislation enacted in Massachusetts. As an initial step in this legislation a statute was passed making larceny, embezzlement and obtaining property under false pretences one crime under the name of larceny.[34] It was then further provided that in an indictment for larceny the allegation "that the defendant stole said property" should be sufficient to charge, in reference to the property described in the indictment, any one of the various sets of facts included in the statute under the name of larceny; that is, larceny, embezzlement or obtain-

[29]See Commonwealth *v.* O'Malley (1867) 97 Mass. 584. In this well known case, the defendant was indicted for larceny and acquitted; he was then indicted for embezzlement on the same facts and convicted; on appeal, after this second trial, his conviction was set aside on the ground that his offence was not embezzlement but larceny.

[30]Penal Law, § 1290, N. Y. Consol. Laws c. 40 (Laws of 1909 c. 88) § 1290.

[31]People *v.* Dumar (1887) 106 N. Y. 502, 13 N. E. 325; People *v.* Brenneauer (1917) 101 Misc. 156, 166 N. Y. Supp. 801.

[32]24 & 25 Vict. c. 96, § 72.

[33]*Ibid.* § 88.

[34]Mass. Stat. 1899, c. 316, § 1; Mass. Rev. Laws (1902) c. 208, § 26.

ing property by false pretences.[35] The right of the defendant to be more fully informed of the facts with which he is charged than he is by the indictment, where such further information may be necessary, is protected by giving him the right to demand a bill of particulars. In case of a material variance between the proof and such bill of particulars, the court may order the bill to be amended, and, in addition, may in its discretion in such a case postpone the trial or order a trial before a new jury.[36] Finally, in the schedule of the forms of criminal pleading annexed to the foregoing legislation a simple form of indictment is given,[37] with the provision that this form shall be sufficient to charge the crime to which it is applicable.[38] The courts of Massachusetts have held that this legislation fully protects the right of the accused to be sufficiently informed of the real accusation made against him.[39] It has also been held that an indictment alleging that the defendant did "feloniously steal, take and carry away" certain money, will, under these statutes, support a conviction founded on embezzlement.[40]

Nothing can be more admirable than the simplicity, ingenuity and fairness of this masterly legislation which fully protects the rights of the accused, while at the same time it does away with wasting the time of the court in deciding subtleties of law, which, far from being of any practical use, are a positive impediment to justice.

R. W. G.

STATE TAXATION OF FOREIGN CORPORATIONS MEASURED BY INCOME.—Within the next five years the United States Supreme Court will doubtless have to pass upon some new and important developments in the ever-troublesome problem of taxing foreign corporations. The recent case of *Underwood Typewriter Co.* v. *Chamberlain* (Conn. 1919) 108 Atl. 154, indicates the difficulties involved. The Underwood Co. was a Delaware corporation, with its sole manufacturing plant at Hartford, Conn.; its revenue was derived chiefly from sales of its machines throughout the country, but a small percentage was from transactions wholly without the state of Connecticut. Connecticut taxed the concern in the following manner: The real estate and tangible personal property of the corporation within the state was taxed at its fair market value.[1] The corporation was then also required to pay a tax of two per cent on such proportion of its total net income as the value of its tangible real and personal property within the

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[35]Mass. Stat. 1899, c. 409, § 24; Mass. Rev. Laws (1902) c. 218, § 40.

[36]Mass. Stat. 1899, c. 409, §§ 10, 13, 14, 16, 24, 27; Mass. Rev. Laws (1902) c. 218, § 39.

[37]"(1) That A. B. did steal one horse of the value of more (or less as the case may be) than one hundred dollars of the property of C. D. Or (2) That A. B. did steal six cows, each of the value of twenty dollars of the property of C. D." Mass. Rev. Laws (1902) c. 218, § 67, p. 1849.

[38]Mass. Rev. Laws (1902) c. 218, § 67, p. 1845.

[39]Commonwealth *v.* Kelley (1903) 184 Mass. 320, 323, 68 N. E. 346.

[40]Commonwealth *v.* McDonald (1905) 187 Mass. 581, 73 N. E. 852.

[1]Conn. Gen. Stat. Rev. 1918 §§ 1197-8.