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Criminal Law—Larceny by Bailee—Criminal Intent

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offer to the entire world. Further, this collateral agreement which was entered into prior to any possible oral contract between the agent and the buyer, and which certainly was not intended to be a memorandum of contract, should not be construed as part of a memorandum subscribed by the party sought to be charged.

CRIMINAL LAW—LARCENCY BY BAILEE—CRIMINAL INTENT—Defendant was the president and general manager of S Corporation which operated a sawmill. The complaining witnesses were partners in a similar business. A carload of lumber made up of lumber owned by both parties was shipped and sold by S Corporation. The proceeds of the sale were received by the defendant but no amount was paid to the partnership. One of the complaining witnesses testified that there was no agreement whereby the defendant could keep the proceeds of the sale and that the defendant said he would turn over to the partnership its rightful share upon receipt of the money. The defendant was convicted of larceny of property held by him as bailee. On appeal to the Supreme Court of Montana, *held,* reversed. The state failed to prove the requisite criminal intent since there was no showing of a concealment and the amount was treated on the books of both firms as an open account. *State v. Smith,* 334 P.2d 1099 (Mont. 1959).

In most bailments a bailee's initial possession of the property is legal. Therefore, unless the felonious intent to appropriate exists at the time the bailee takes possession, there can be no larceny because of the absence of the necessary trespass. This was the rule at common law and, except where expressly modified by statute, it is the rule today.[1] Because of this apparent defect in the law of larceny, the strictly statutory crime of embezzlement was created by many legislatures.[2] Embezzlement differs from larceny in that the property comes into the possession of the taker lawfully and is later fraudulently or unlawfully appropriated to another's use.[3] In some jurisdictions the conversion of property by a bailee is made larceny by statute, but statutes establishing the crime of larceny by bailee are more analogous to those of statutory embezzlement than to common law larceny.[4]

Revised Codes of Montana, 1947, section 94-2701, in defining the statutory offense of larceny by bailee, provides in part:

> Every person who, with the *intent* to permanently deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person either . . . or, (2) Having in his possession, custody, or control, as *bailee* . . . any money, property, evidence

[1] 32 AM. JUR. Larceny § 57 (1941).

[2] State v. Mathews, 143 Tenn. 463, 226 S.W. 203, 13 A.L.R. 314 (1920).

[3] Moore v. United States, 160 U.S. 268 (1895); Eggleston v. State, 129 Ala. 80, 30 So. 582 (1901). For an excellent annotation concerning the distinction between larceny and embezzlement see 146 A.L.R. 532 (1942).

[4] State v. Keelen, 103 Ore. 172, 203 Pac. 306 (1922).

> of debt, or contract . . . appropriates the same to his own use, or that of any other person other than the true owner, or person entitled to the benefit thereof, steals such property and is guilty of larceny. (Emphasis added.)

Thus a conversion by a bailee, if done with the requisite criminal intent to deprive the bailor of his property, is expressly made a larceny under the Montana statute. However, the legislature also undoubtedly intended the statute to require that the taker must intend to *permanently* deprive the owner of the property as in common-law larceny.

There are some factors in the principal case to indicate a criminal intent on the part of the defendant. Knowing he was without right, the defendant used the funds belonging to the complianants for his own purposes and for two years persistently refused to make payment on repeated demand. On the other hand, the funds were taken openly and this amount was carried on the books of the partnership as an account receivable. These accounting entries may not, however, be evidence that the debt was merely part of an open account, but may simply indicate that the complainants had hopes one day of recovering the stolen money.

The issue in the case is whether these facts should have been sufficient to sustain a jury finding of criminal intent. In *State v. McGuire*[5] a conviction under this same statutory provision was reversed. In discussing the requirement of criminal intent the court adopted the following statement from a Michigan case: "Mere neglect to pay over money is not sufficient proof of a fraudulent conversion to one's own use, for there may be losses and failures to pay or even account where the failure is due to misfortune or other cause not criminal."[6] There was more than a mere neglect to pay over the money in the instant case. The defendant deposited the partnership's share of the proceeds, together with his own, in the corporation's account. This was apparently done with full knowledge that he had no right to do so. This cannot be classified as mere neglect, but is more reasonably interpreted as a fraudulent appropriation of another's property to one's own use.

Whatever the conclusion concerning intent to appropriate wrongfully, there was no real evidence that the defendant intended more than a temporary deprivation of the proceeds. The court quoted from other cases which state that the requisite criminal intent is one to *permanently* deprive the owner of his property. The Montana court early stated this rule, in *Territory v. Paul*,[7] as follows: "To constitute the crime of larceny, the intent which accompanies the act of taking must be the criminal intent to deprive the owner of his property, not temporarily, but permanently." This rule has been consistently applied by the Montana Supreme Court.[8] An intention to repay at some future time would seem to be a natural or at least a permissible inference from the fact that both parties carried

[5]107 Mont. 341, 88 P.2d 35 (1938).
[6]*Id.* at 347, 88 P.2d at 36.
[7]2 Mont. 314, 319 (1875).
[8]See State v. Labbit, 117 Mont. 26, 156 P.2d 163 (1945); State v. Wallin, 60 Mont. 332, 199 Pac. 285 (1921).

the proceeds as open accounts in their respective books. Further, the fact that the defendant notified the complaining witnesses of the receipt of the funds would indicate that he did not intend to permanently withhold the funds from the partnership.

The outcome of the instant case would seem correct, but it is submitted that certain emphasis in the case is somewhat misleading. The court states:[9]

> The *only possible circumstance* which would indicate an intent to fraudulently deprive the Grizzly Bear Company of its money permanently is the assertion by Ted Gustafson, one of the complaining witnesses, that the defendant did not inform him of his receipt of the proceeds until some two or three weeks after the car was loaded and shipped. However, there is nothing in the record to indicate even roughly the date this remittance was received by Smith so we are in no way able to infer that he *concealed*, even for a short time, his receipt of the money. (Emphasis added.)

The court in the instant case seems to place great weight on the fact that there was no concealment of the money by the defendant. Concealment is almost terated as an essential element of the crime. Conceding that concealment is nearly always present in cases of larceny, it would seem that its absence would not make a criminal act any less unlawful. Can it be said that a person who performs all the elements necessary for the crime of larceny can escape prosecution simply by taking and holding the stolen property openly and notoriously? Such a position would clearly be untenable and erroneous.

Undue stress was also given to the fact that the owner was lax for a time in enforcing payment. Logically it does not seem that the bailor's subsequent conduct should have anything to do with whether a crime was committed. If a bailee intends to permanently convert the property at the outset, the crime should be completed at that time. If the crime is then complete, the owner's subsequent conduct should not exculpate the offender.

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DIVORCE—MODIFICATION PROCEEDING AFTER FINAL DECREE—COUNSEL FEES—In 1954, the defendant wife was granted a final decree of divorce from the appellant. She was awarded custody of their minor children subject to visitation rights of the appellant. In 1955, after the statutory time for appeal of a divorce decree had expired, the appellant filed for a modification of the custody order, seeking to restrict the residence of the children. The lower court denied the appellant's motion and allowed the wife counsel fees. On appeal to the Montana Supreme Court, *held,* af-

[9]Instant case at 1102.