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Penal Law §§ 1290 and 1290a--Larceny Redefined

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to be heard according to the merits of the particular case based upon reasonable and practical rules of procedure rather than some arbitrary fanciful rules that were as varied and many as the cases from which they arose.

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PENAL LAW §§ 1290 AND 1290a—LARCENY REDEFINED.—When § 1290 of the Penal Law was passed, it was thought that the common law distinctions between obtaining money under false pretenses, embezzlement and larceny, were extinguished in New York. Larceny, under this section was to include all these three.¹ When put into practice, however, it was found that these old distinctions were eliminated in name only. Although the indictment did not have to allege a particular type of larceny by name,² it was still necessary to allege facts to prove the particular offense charged.³ For example, an indictment alleging common law larceny, could not be sustained by proof of an act which would constitute the crime of embezzlement or false pretenses.⁴ This was true despite the fact that all these were "larceny".

A great deal of confusion arose because of the subtle distinctions which arose from decisions differentiating between the various classes of larceny. If an accused had induced the victim to pass only possession to him, the crime was larceny by trick and device. If the victim intended to pass title to the thief, the crime was obtaining goods by false pretenses.⁵ Another distinction was that between embezzlement and larceny by trick and device. If a person obtained the property of another and thereafter appropriated it to his own use, the crime was embezzlement if the intent to use the property for his own purposes was formed *after* he received the property. If, however, such intent was formed *before* the receipt of the property, the crime was larceny by trick and device.

Prosecuting attorneys found themselves faced with a very difficult task. Many a defendant was freed because the indictment charged one type of larceny while the facts showed defendant was guilty of another. In some cases, it was impossible for the prosecutor to deter-

¹ *People v. Krumme*, 161 Misc. 278, 292 N. Y. Supp. 657 (1936); *People v. Katz*, 209 N. Y. 311, 103 N. E. 305 (1913); *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902).

² *People v. Dunn*, 53 Hun 381, 6 N. Y. Supp. 305 (1889).

³ *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325 (1887).

⁴ *People v. Sloane*, 165 Misc. 444, 300 N. Y. Supp. 1032 (1938), *mod.*, 254 App. Div. 780, 4 N. Y. S. (2d) 784 (1938), *aff'd*, 279 N. Y. 724, 18 N. E. (2d) 679 (1939).

⁵ *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927); *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325 (1887) (It is interesting to note the dissenting opinion of Judge Crane in the *Noblett* case).

mine what type of larceny had been committed, until he heard the facts as brought out on the trial. But then it was too late. This was a technical rule of pleading and did not have anything to do with defendant's guilt.⁶

Such a situation was intolerable and cried out for relief. The remedy was provided by passing of a new § 1290 and the addition of § 1290a.⁷ The sections are prospective in nature and a preface to the Act declares⁸ that the best interests of the state will be served by abolishing the distinctions which formerly existed between common law larceny by trick and device, obtaining property by false pretenses, and embezzlement. The language of the statute is explicit and evidences the clear intent of the Legislature. Under the new law, it is no longer necessary to determine whether the accused obtained title to the property received or merely possession. In either case he is guilty of the crime of larceny regardless of the fact that the victim intended to part with possession or title.

The new Section 1290a relates to pleading and proof. This provision provides as follows:

In any prosecution for larceny it shall be sufficient if:

1. The indictment or information charges that the accused, with the intent to deprive or defraud another of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of some person other than the true owner, stole any property of any of the kinds mentioned in section 1290 of this article. If, however, the theft was effected by means of any false or fraudulent representation or pretense, evidence thereof may not be received at the trial unless the indictment or information charges such means: but as long as one of the false or fraudulent representations or pretenses alleged

⁶ This was the point made by Judge Crane in the *Noblett* case.

⁷ N. Y. Laws 1942, c. 732, § 2. "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker or of any other person other than the true owner, wrongfully obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

"Hereafter it shall be immaterial in, and no defense to a prosecution for larceny that: 1. the accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property, or

3. The person from whom the accused obtained such property intended to part with title to as well as possession of, such property, or with possession as well as title, or

4. The purpose for which the owner was induced to part with possession of such property was immoral or unworthy."

⁸ N. Y. Laws 1942, c. 732, § 1.

be proven any other related representation or pretense, though not alleged may be given in evidence.

2. The indictment or information is supported by proof of the commission by the accused of any one of the acts that constituted larceny as defined in this article.

Under the old law, it was sufficient in an indictment to allege one such representation. On the trial, evidence of other false representations would be admissible.⁹ The new section expressly states the old rule and thus is declarative of the existing policy. By the clear words of the statute and the declared intent of the Legislature, one of the most confusing branches of the law has been simplified with a view toward attaining justice without undue hardship on prosecutors or defendants.

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⁹ *People v. Sattlekau*, 120 App. Div. 42, 104 N. Y. Supp. 805 (1st Dep't 1907); *People v. Rothstein*, 180 N. Y. 148, 72 N. E. 999 (1904); *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883 (1897), *aff'g*, 12 App. Div. 626, 43 N. Y. Supp. 1160 (1896).