

Crimes--Larceny by Trick and Device--Sufficiency of Evidence to Sustain a Conviction of Larceny by Trick and Device (People v. Stiller, 255 App. Div. 480 (1st Dept. 1938))

St. John's Law Review

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parties and hence interstate commerce was contemplated, and thus the tax became a direct burden. Judge Finch in his dissent,¹⁹ however, points out that the oil contracted for in the *Compagnie* case was procurable in New York and elsewhere in the open market and in a few instances had been furnished from those other sources. It might just as reasonably have been argued that the grade and quality of merchandise kept in the foreign states was the thing bargained for in the *Sears* case. The true reason for the distinction seems to be the court's feeling that in the *Sears* situation there was more probability of deliberate avoidance of the tax by the use of extrastate warehouses. In addition the court is influenced by the fact that local stores, warehousing their merchandise in New York, would be discriminated against if the plaintiff in the *Sears* case were not taxed.

In *National Cash Register v. Taylor*²⁰ a situation similar to that in the *Sears* case was presented with the exception that in the former the orders taken in New York were made "subject to acceptance * * * at Ohio."²¹ Yet, the same court held the sales tax as a direct interference with interstate commerce on the grounds that interstate commerce was contemplated by the parties. It would seem to follow that a method of avoiding the sales tax is to consummate the sales contract without the state. Then, to be consistent, the court must hold that interstate commerce was contemplated by the parties.²²

J. Z.

CRIMES—LARCENY BY TRICK AND DEVICE—SUFFICIENCY OF EVIDENCE TO SUSTAIN A CONVICTION OF LARCENY BY TRICK AND DEVICE.—The defendant told complainant that he had a controlling interest in "Vancouver Island Gold Mine Stock" and could get for him 2,000 shares at ten cents per share, delivery to be made as soon as a transfer fee was paid. The complainant handed over to defendant \$200, with the idea in mind, so he testified, that the money

¹⁹ *Matter of Compagnie Generale Transatlantique v. McGoldrich*, 279 N. Y. 192, 199, 18 N. E. (2d) 28, 30 (1938).

²⁰ *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208, 11 N. E. (2d) 881 (1937).

²¹ *Id.* at 211, 11 N. E. (2d) at 882 (1937).

²² It will be interesting to note what steps the Sears Company will now take in merchandising their goods and what decisions the court will render to justify their perplexing precedents.

Suggestions to overcome difficulties caused by state sales tax and interstate commerce include (a) a federal sales tax with proceeds distributed to states, and a prohibition on local sales taxes, and (b) federal legislation enabling taxation of interstate sales by the state of the destination. See Warren & Schlesinger, *Sales and Use Taxes* (1938) 38 COL. L. 49; Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1933) 12 N. C. L. REV. 99; Legis. (1936) 9 So. CAL. L. REV. 259; Note (1936) 45 YALE L. J. 708.

was to be used for the specific purpose of buying the aforementioned stock. He testified that no loan was intended. As a matter of fact the defendant had no stock and did not use the money to buy any. The case was submitted to the jury on the sole issue as to whether or not there was larceny by trick and device. The defendant was convicted. *Held*, affirmed. The evidence was sufficient to justify the jury in finding that complainant never intended to part with title to his money; but that he delivered the money for a special purpose only; that a conviction of larceny by trick and device, the intent to trick and steal being present, was warranted. *People v. Stiller*, 255 App. Div. 480, 7 N. Y. Supp. (2d) 865 (1st Dept. 1938).

An essential element of larceny is that there be an unlawful taking from the possession of another.¹ Possession may be either actual or constructive.² What constitutes constructive possession in the complainant is not always easy to ascertain. It has been decided that constructive possession is present when a merchant puts money in a drawer in his shop;³ when one hands another a large bill expecting change;⁴ when one delivers to another a draft for collection;⁵ when a servant puts coal in his master's cart;⁶ when a person delivers money for a special purpose.⁷ At times it is necessary to inquire into the possession of the taker. Thus, a partner cannot be convicted of lar-

¹ N. Y. PENAL LAW § 1290 provides as follows:

"A person who, with the intent to 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:

"1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any person other than the true owner or person entitled to the benefit thereof.

"Steals such property, and is guilty of larceny. * * *"

The crimes of embezzlement, obtaining money under false pretenses, and common law larceny are embraced within the definition of larceny given by this section. *People v. Krumme*, 161 Misc. 278, 292 N. Y. Supp. 657 (1936). As used in this discussion the term "larceny" refers to common law larceny.

² In *Brown v. Volkening*, 64 N. Y. 76, 80 (1876), the court says, "Actual possession exists where the thing is in the immediate occupancy of the party; constructive is that which exists in contemplation of law, without actual personal occupation."

³ *People v. Smith*, 86 Hun 485, 33 N. Y. Supp. 989 (1895).

⁴ *Hildebrand v. People*, 56 N. Y. 394 (1874).

⁵ *People v. McDonald*, 43 N. Y. 61 (1870).

⁶ *Regina v. Reed*, 6 Cox C. C. 284 (1854).

⁷ *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902); *People v. Stiller*, 255 App. Div. 480, 7 N. Y. S. (2d) 865 (1st Dept. 1938).

ceny of the firm property because he, himself, is in possession of it as co-owner.⁸ For the same reason, joint tenants and tenants in common cannot be convicted of larceny of the joint property.⁹ At common law, a wife may not be convicted of larceny of her husband's goods because of the concept of the unity of man and wife.¹⁰

Larceny by trick and device is based on the notion that the complainant has constructive possession of property which is obtained from him by trick. The same thought is conveyed by saying that the taker has only a "bare custody" or that the goods were delivered to him "for a special purpose."¹¹ In this type of crime a trespass need not be shown for the fraud takes its place.¹² Thus, one who hires a mare¹³ or a carriage¹⁴ as a pretext for stealing it is guilty of larceny. Where the defendant obtained a watch and other valuables from a woman on the pretext that he would pawn them and use the money to bail her husband out of jail, the offense was larceny by trick and device.¹⁵ Other examples occur where the complainant's money is taken by means of a fraudulent throwing of dice,¹⁶ or horse-racing scheme,¹⁷ or where the bare custody of money is obtained by trick.¹⁸ These cases are on the border line between larceny, as known at common law, and false pretenses. If the complainant means to pass title to the property the offense is false pretenses and not larceny.¹⁹ Thus, where a prospective tenant paid his rent in advance without reservation or condition, title passed, and the offense if any was false pretenses.²⁰ To the same effect are cases in which money is delivered absolutely in return for deeds to real property,²¹ and where by trick the defendant induces the complainant to part with the title to his money absolutely.²²

T. G.

⁸ *People v. Hart*, 114 App. Div. 9, 99 N. Y. Supp. 758 (1st Dept. 1906); *State v. Reddick*, 2 S. D. 124, 48 N. W. 846 (1891) (neither can partner be convicted of embezzlement).

⁹ *Commonwealth v. Libbey*, 11 Met. 64 (Mass. 1864).

¹⁰ *Lamphier v. State*, 70 Ind. 317 (1870).

¹¹ *Smith v. People*, 53 N. Y. 111 (1873); *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902); *People v. Stiller*, 255 App. Div. 480, 7 N. Y. S. (2d) 865 (1st Dept. 1938).

¹² *Rex v. Pear*, 2 East P. C. 685 (1779); *State v. Dobbins*, 152 Iowa 632, 132 N. W. 805 (1911); *Georgis v. State*, 110 Neb. 352, 193 N. W. 713 (1923).

¹³ *Rex v. Pear*, 2 East P. C. 685 (1779).

¹⁴ *Rex v. Sullens*, 1 Moody C. C. 129 (1826).

¹⁵ *Smith v. People*, 53 N. Y. 111 (1873).

¹⁶ *Loomis v. People*, 67 N. Y. 322 (1876).

¹⁷ *State v. Dobbins*, 152 Iowa 632, 132 N. W. 805 (1911).

¹⁸ *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902) (defendant promised high interest returns); *Smith v. People*, 53 N. Y. 111 (1873); *People v. Stiller*, 255 App. Div. 480, 7 N. Y. S. (2d) 865 (1st Dept. 1938).

¹⁹ *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927).

²⁰ *Ibid.*

²¹ *People v. Sloane*, 165 Misc. 444, 300 N. Y. Supp. 1032 (1937).

²² *Thorne v. Turck*, 94 N. Y. 90 (1883); *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927).