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William Edelson

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losses on stocks occurred from over-staying the market, and that it is better to sell out too soon than too late."

Surrogate Slater's conclusion in the Clark case is the culmination of a series of warnings expressed in a few recent decisions through the medium of dicta. To this effect is the Matter of Channing,²⁷ wherein the Court said, in considering such a discretion as we are here concerned with:

"It is well to reiterate the caution frequently expressed in this court that even in the face of this authority, vigilance and alert judgment will be always required and the surcharging of losses upon the trustee in future accountings is not beyond the range of possibilities in spite of said authority."

The logic of the principle enunciated in the Clark case is persuasive. That a discretion vested in a trustee should be allowed to pervert our every concept of a trustee is repugnant to the connotation of justice. In spite of any discretion or permission, the trust company was still a trustee.²⁸ As such, it was bound to exercise that degree of care and fidelity which the law required.²⁹ Its failure so to act makes its surcharging a necessary corollary.

JOSEPH A. SCHIAVONE.

LARCENY GENERICALLY, AND THE OFFICE OF A BILL OF PARTICULARS IN RESPECT TO AN INDICTMENT.*

In a recent opinion handed down by the Court of Appeals, the Court again had occasion to discuss the meaning of larceny by trick, and obtaining property by false pretense.¹ If the opinion in this case merely discussed the definition of these two crimes, then the subject could well be disregarded for it has been amply covered in the past by judicial opinion and controversial legal literature.² The decision, how-

²⁷ 129 Misc. 393, 394, 222 N. Y. Supp. 351 (1927); see Matter of Frank, 124 Misc. 664, 208 N. Y. Supp. 254 (1925).

²⁸ Carrier v. Carrier, *supra* Note 23.

²⁹ King v. Talbot, Matter of Hall, Costello v. Costello, all *supra* Note 2.

* Reprint from (1927) 1 St. John's L. Rev. 176, which issue is out of circulation.

¹ People v. Noblett, 244 N. Y. 355 (1927).

² Thus, in Hilderbrand v. People, 56 N. Y. 394 (1874), the prosecuting witness handed the prisoner, who was a bartender in a saloon, a fifty-dollar bill to take ten cents out in payment for a soda. It was held that it was an incomplete transaction, to be consummated in the presence of and under the personal control of the complainant. The delivery of the bill and the change were to be simultaneous acts, and until the latter was performed, the delivery was not complete. The rule thus enunciated was further extended in a later case, Justices of Court of Special Sessions v. People, 90 N. Y. 12 (1882), where the same conclusion was reached, when the prosecuting witness gave the prisoner a twenty-dollar bill and requested him to go out and get it changed, on

ever, has new importance. Judge Crane, who dissented in that case, scorned a decision which sets a criminal free because the defendant was convicted of larceny by trick when, according "to an artificial distinction," he should have been tried for obtaining property by false pretenses. Judge Lehman, who spoke for the majority, seemed

the ground that the prosecutor intended to give up only his custody, but not possession, for a special purpose.

Contra: In England it was decided, on almost the identical facts, that the "prosecutor had divested himself, at the time of the taking of the entire possession of the money and that consequently there was not sufficient trespass to constitute larceny." *Reg. v. Reynolds*, 2 Cox C. C. 170 (1847); *Reg. v. Thomas*, 9 C. & P. 741 (1841).

It is submitted, however, that the New York Rule is the sounder one. When the prosecuting witness turned over the bill and requested the prisoner to go out and get it changed, the relation between them was substantially that of master and servant, and a servant, having only the custody of the bill, is guilty of larceny in converting it.

In *State v. Walker*, 65 Kan. 92, 68 Pac. 1085 (1902), a person gave to another money to be changed into a different form and put in a letter to be deposited in the post office. The one to whom it was given took the money, made the change, put it in the letter, and, without mailing it, kept it and refused to return it to the giver. It was held that the one who refused to complete the direction given and the return of the money was guilty of larceny. In *State v. Marnes*, 26 Wash. 160, 66 Pac. 431 (1901), goods were intrusted to another to sell, he to return the same or account therefor by producing the money realized from their sale, retaining a certain per cent. as commission. It was held that there was no relation of debtor and creditor and, on failure to account, the agent is guilty of larceny. In *Bailey v. State*, 58 Ala. 414 (1877), where one gave a ten-dollar bill in over-payment of a two-dollar debt and defendant subsequently appropriated such over-payment to his own use on discovering the mistake it was held to constitute larceny provided that the defendant had knowledge of the mistake at the time it was made. This distinction is well drawn in the case of *Wilson v. People*, 39 N. Y. 459 (1868). Accord: *State v. Williamson*, *Haust. Cri. Cases (Del.)* 155 (1864); *Farrell v. People*, 16 Ill. (6 Peck) 506 (1855); *Commonwealth v. Barry*, 124 Mass. 325 (1878); *State v. Ducker*, 80 R. I. 394 (1880). *Cf. Regina v. Hehir*, 2 Ir. R. 709 (1895).

"Larceny and embezzlement belong to the same family of crimes; the distinguishing feature being that to constitute larceny there must have been a trespass or wrong to the possession, but where one gains possession of the property so as to constitute only a bare charge, or custody, or procures it by subterfuge, it does not divest the possession of the true owner; he is still in constructive possession and the offense of appropriating the property is larceny." *Boswell v. State*, 1 Ala. App. 178, 56 So. 21, 22 (1911); *People v. Grider*, 13 Col. App. 703, 118 Pac. 729 (1911); *cf. Welch v. State*, 126 Ga. 495, 55 S. D. 83 (1906). But see 2 *Bishop, Criminal Law* (9th ed., 1923), sec. 824 (2).

The distinction between larceny and false pretenses is, in the former the owner of goods has no intention to part with his property therein, while in the latter the owner does intend to part with his property, which intention is the result of fraudulent contrivances. *Zink v. People*, 77 N. Y. 114 (1879), this case may be distinguished from the cases of *Smith v. People*, 53 N. Y. 111 (1873); *Loomis v. People*, 67 N. Y. 322 (1876), and *Hilderbrand v. People*, 56 N. Y. 394 (1874); in that in those cases the complainant gave up his custody for a special purpose while in the principal case the prisoner was vested with the indicia of ownership, an order bill of lading on which he paid the freight. *People v. Dumar*, 106 N. Y. 503 (1887), decided after the passage of the Penal Code, made the same distinction between larceny and obtaining property by false pretenses.

to sympathize with Judge Crane's views. He held, however, that the change must be made by Legislative Enactment and not by judicial decision for courts cannot disregard the plain import of the larceny statute in order to hold a person who apparently had committed a crime. If propriety could be placed on wings, one might be tempted not only to disagree with Judge Crane, but, also, to reject the sympathy that Judge Lehman declares for the view expressed by his dissenting brother.³

At early common law, to constitute the crime of larceny, there had to be a felonious taking and carrying away of the personal goods of another.⁴ This rule obtained until the year 1779 when larceny by trick and device first came into the law. In the famous case of *King v. Pear*,⁵ the defendant obtained a horse from the prosecuting witness and agreed to return it one week later. In fact, the defendant intended to convert the horse to his own use. For the first time, it was held that if a person is induced to surrender to another the right to possession of his property through the perpetration of a trick or device, the wrong-doer has committed larceny. The Court apparently proceeded on the theory that the owner would not have surrendered possession but for the fraud of the wrong-doer, and, therefore, the Court reached the conclusion that the law should treat such a situation as though possession had been obtained through a wrongful taking. Of course, this argument is unsound in theory and a myriad of cases in the law of sales declared a contrary rule.⁶ Nevertheless, forever

³ *People v. Noblett*, *supra* Note 1, per Lehman, J.: "Narrow technical distinctions by which a wrong-doer may escape the consequences of a crime hinder the administration of justice. The courts which administer the law fail to function properly when the penalty which the law has placed upon the commission of a crime may be evaded by the proven criminal through subtle reasoning based on obsolete theory. These are truisms, which should require no repetition, but they may not lead the court to create a new definition of a particular crime because judges may believe that the limits previously fixed are too narrow. It is the function of the Legislature to determine whether modern conditions dictate a wider definition of acts which subject the wrong-doer to criminal responsibility. We may not assume that function even where the established definition of crime may be based upon distinctions which seem at the present time inconsequential. We may not hold that acts come within such definition which, under recognized authority, have been hitherto included."

⁴ *Rex v. Raven*, Kel. 224 (1663).

"All felony includes trespass, and every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away." 1 *Hawkens P. C.*, ch. 33, par. 2.

⁵ *King v. Pear*, 2 East P. C. 685 (1779).

⁶ It has long been held in the law of sales that a contract tainted with fraud by the buyer (what might reasonably be called "trick and device by the prisoner in the criminal law) is merely voidable, and not void. *Hunter v. Hudson River Iron, etc., Co.*, 20 Barb. (N. Y.) 493 (1855); *Matteawan Co. v. Bently*, 13 Barb. (N. Y.) 641 (1852); *Pikes Peak Paint Co. v. Mansury*, 19 Cal. App. 286, 74 Pac. 796 (1903); *Fleming v. Hanley*, 21 R. I. 141, 42 Atl. 520 (1899).

after, the name "larceny by trick or device" was given to those cases where the owner of the property was induced to make a voluntary surrender of possession because of some simulation concocted by the wrong-doer to obtain possession to distinguish these cases where the possession is obtained by the wrong-doer through a wrongful taking from those where possession is obtained by trick, learned writers gave to the original category the name of "larceny by trespass."⁷

The generic term "larceny" thereafter embraced the cases of larceny by trespass and larceny by trick or device. To this day the distinction exists in the law. When possession is obtained through a wrongful taking, it constitutes larceny by trespass. When possession is obtained through artifice, it constitutes larceny by trick or device.

In 1799, embezzlement first came into the law. The Court having declared in *Rex v. Bazeley*,⁸ that it did not constitute crime for a servant to convert the property of his master which the servant obtained from a third party, the English Parliament passed a statute making embezzlement a crime.⁹

There are other situations that sound in larceny, and yet do not come within the technical meaning of that term. It should be remembered that, originally, larceny meant taking property of another by trespass. It was the opinion of English people that the law cannot protect human beings who fail to take the proper caution to protect themselves. As indicated, larceny by trick came many years after larceny by trespass had become firmly established.

A fourth situation was presented by those cases where a person with criminal intention held himself out as a prospective purchaser and where the owner of personal property, not knowing of the scheme, made a sale of his merchandise to one who never had the intention to pay therefor.¹⁰ The courts could not hold this to be

In *Nichols v. Pinner*, 18 N. Y. 295, 306 (1858), it was held, "But on the other hand, if the purchase was made with the dishonest purpose of subjecting the goods to the payment of other debts, thus defrauding the plaintiffs, *the sale was voidable * * **"

Since a voidable title presupposes at least a legal possession in the beginning, it is inconceivable how it can be said that in case of larceny by trick and device the possession is wrongful. It may only be explained by calling such a finding a fiction of the law.

⁷ "Some other crime, where there is no trespass, therefore no larceny, may be constituted by the transaction." 2 Bish. Crim. Law (9th ed., 1923), sec. 800 (1).

⁸ *Rex v. Bazeley*, 2 Leach (4th ed.) 835 (1799).

⁹ 39 George, III., ch. 85.

¹⁰ In *Regina v. Slowly*, 12 Cox C. C. 269 (1873), the complainant unloaded some onions at a place designated by the defendant, relying upon his statement that "you shall have your money directly the onions are unloaded," when, in fact, there never was any intention of paying therefor. The defendant was held guilty of larceny since the passing of title to the onions and payment for them were intended to be simultaneous, and, until the payment was made, delivery was incomplete. The Court also said that if it had been intended by the prosecutor to give credit for the price of the onions even for a single hour it would not have been larceny. To the same effect is the case of *Queen v. Russett*, 2 Q. B. D. 312 (1892); *Shipley v. People*, 86 N. Y. 375 (1881).

larceny by trespass because the property was voluntarily surrendered. The owner had completely divested himself of every indicia of ownership and not merely of bare possession. To remedy that situation, the statute of 30 George II¹¹ was passed. This statute was considered to extend to every case where a party had obtained money or property by falsely representing himself to be in a situation in which he was not. This statute is really the forerunner of our present statutes with regard to obtaining property by false pretenses.¹²

As the law now stands, there are four situations on which Government can lay an indictment. First, where a person wrongfully takes the property of another. That we call larceny by trespass. Second, where a person induces an owner to surrender mere possession to him through trick or device; as for instance, when a person obtains property under a bailment arrangement, when, in fact, the purported bailee never intends to return the property but intends to convert it to his own use. That we call larceny by trick or device. The third classification includes those cases in which a person who is either an attorney, trustee or a servant, who receives property from a third person for his master, comes rightfully into possession of property, but after receiving possession, converts the property to his own use. That we call embezzlement.¹³ In the fourth category are those cases

But see *Thorn v. Truck*, 94 N. Y. 90 (1883): "Where one is induced to part with his property by fraudulent means, but he actually intended to part with it and delivered up possession absolutely, it is not larceny."

¹¹ 30 George II.

¹² Penal Code, sec. 1290:

A person who, with intent to deprive or defraud the true owner of his property, or the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

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 pretense or representation, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any other 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;

Steals such property, and is guilty of larceny.

¹³ However, in connection with this classification it should be noted that different situations might arise in which the question of possession is the controlling factor and, as Blackstone tersely sums up, "But if he had not the possession but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law." 4 Black Comm. 230, 231.

So, in *Crocheron v. State*, 86 Ala. 64, 5 So. 649 (1888), the prosecuting witness hired the prisoner as a farm hand. The prisoner was given the custody of a mule daily in order to plow a field and one day he failed to return the mule, having converted it to his own use. It was held, "That the prosecutor had parted only with the custody of the animal, as distinguished from possession, which was still in him as owner, although the prisoner had the custody as a mere employee or servant. It has often been decided, and is now settled law, that goods in the bare charge or custody of a servant are legally in the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use." 2 Bishop, Criminal Law (7th ed.), ch. 1, sec. 639.

in which a wrong-doer induces the owner of property to give to him not only possession, but also title, and the owner is induced to part with title through the fraud of the wrong-doer. That we call obtaining property by false pretenses.¹⁴

Difficulty at times arises in cases dealing with larceny by trick and obtaining property under false pretenses. It has been urged that the distinction between the two crimes is so technical that a statute should be passed not merely consolidating the two crimes, as New York State has already done, but at the same time to give by statute discretion to the trial Court to charge the jury on any one of the four crimes *regardless of the evidence adduced*, even where the indictment charges *common law larceny*. If this subject were merely viewed on the technical basis that writers have urged, there would perhaps be reason to make this change in our law. Larceny by trick means that the wrong-doer obtained possession through artifice. Obtaining property under false pretenses means obtaining not only possession but also title to the property through some scheme.

It was urged in the Noblett case as well as by the late Professor Gifford,¹⁵ that since the distinction is between obtaining bare possession on the one hand and possession and title on the other, that there is no fundamental distinction in the two crimes. Instead of viewing

But when a third party delivers a chattel to the servant of another, in such a case, converting the chattel to his own use, before some act of appropriation which would tend to reduce to the possession of the master, the servant is guilty of embezzlement. Thus, in *Regina v. Reed*, 6 Cox C. C. 284 (1854), "there can be no doubt that, in such a case, the goods must have been in the actual or constructive possession of the master; and that, if the master had not otherwise possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself, this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass * * *. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute * * * that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar of which the prisoner had charge."

Hatcher v. State, 74 Fla. 112, 476 So. 694 (1917); *Rhode v. United States*, 34 App. D. C. 249 (1910); *Barrow v. State*, 126 Ga. 92, 54 S. E. 812 (1906); *State v. Coster*, 170 Mo. App. 539, 157 S. W. 85 (1913).

No doubt a final deposit of money in the till of a shop would have the same effect. *Waite's case*, 2 East P. C. 570, 571 (1779); *Bull's case*, 2 East P. C. 572 (1779). But "if the prisoner before he placed the money in the drawer, intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it, just afterward, larceny."

Commonwealth v. Ryan, 155 Mass. 523, 30 N. E. 354 (1892); *Sloan v. Merrill*, 135 Mass. 17 (1883); *Jeffords v. Alvard*, 151 Mass. 94, 23 N. E. 734 (1890); *Commonwealth v. Drew*, 153 Mass. 588, 27 N. E. 593 (1891).

¹⁴ *Supra* Note 2.

¹⁵ (1920) 20 Col. L. Rev. 318.

this situation in terms of possession and title, it would be well to try and visualize the situation as it actually appears in court. A man is indicted for having stolen property. By our traditions, he is presumed innocent until his guilt is established. Under our law an indictment is not evidence that the defendant is guilty of the crime with which he is charged. Has a person so situated the legal and moral right to demand that he be told whether he is charged merely with obtaining the use of personal property of another through fraud or whether he is charged with having bought the property without the intention to pay? It would seem that the difference existing in those two situations is fundamental. Year after year, hundreds of cases are tried under the General Larceny Statute and courts and district attorneys seem to know the difference in the fundamental concept that exists between larceny by trick and obtaining property under false pretenses. Every ten or fifteen years an error is committed and then writers and judges urge that obsolete decisions lead to a miscarriage of justice when a man who has committed a crime is set free because of technical rules.¹⁶ It would seem wiser to permit these rare cases to occur

¹⁶ *People v. Noblett*, *supra* Note 1.

Although such errors sometimes creep in and lead to a miscarriage of justice, the opposite is sometimes true, and the meaning of the different phases of larceny is stretched to prevent a travesty on justice. Thus, in *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902), the prisoner, by a representation or promise to pay a dividend of ten per cent. weekly until the deposit was withdrawn, induced and duped a large number of people to invest their moneys with him. These moneys were to be used by a syndicate for speculative purposes and under a guaranty that they would be returned at any time at one week's notice. In fact, the syndicate was never formed and the money never invested. The Court held, reversing the ruling of the Appellate Division that the "depositor" never intended to pass title to the moneys so deposited. The prosecuting witness (depositor) intended to part only with the manual custody of the moneys so delivered, unless or until the moneys were used for the purpose for which they were delivered, delivery was incomplete and title did not pass. This arbitrary ruling may be explained only by a careful scrutiny of the facts presented, inasmuch as the judges themselves inferred that a conviction for obtaining money under false pretenses would have been highly improbable, and to allow the prisoner to escape unpunished, because of some technicality of the law, would be a travesty on justice.

While it is conceded that in view of the facts of the case the holding is a just one, yet it is submitted that it is technically unsound. In the ordinary course of business, one who has complete control over money, who is to use it or not as he sees fit, obligated only to pay dividends and return the money on notice, who bears the loss in case of robbery, etc., stands in the position of a debtor to the original owner of the money and to all intents and purposes is the owner thereof, not merely the custodian. The Appellate Division, in reversing the conviction at the trial term per *Hirschberg, J.*, 64 App. Div. 450-458 (2nd Dept., 1901): "She [complainant] intended to give the prisoner her money to gamble with in his own name if he saw fit, only stipulating that she should receive the interest for the use of the money and to be repaid upon demand. The money was not delivered for any special purpose, or to be used or invested in any way for her. It was his money * * *. In other words, she did not intend to vest the prisoner with the mere naked custody and possession of the money for safe keeping * * * she gave it to him so that he might gamble with

rather than to deny to a person the right that it is proclaimed exists in our criminal law, that a person charged with crime is entitled to know the crime with which he is charged before he is called upon to make his defense.¹⁷

In the Noblett case, the facts appeared to be that in March, 1926, the defendant was the tenant of an apartment on Riverside Drive in the city of New York. The term of his lease had expired, but the right of occupation and possession continued under the statutes known as the Rent Laws. He inserted an advertisement in the *New York Times* offering to sub-rent by month or year his furnished apartment. The complaining witness read the advertisement on March 12. He communicated with the defendant and, pursuant to appointment, met the defendant at his apartment. On the following morning, the complaining witness paid the defendant a sum of money which represented the agreed rental, but he did not receive possession of the apartment which defendant agreed to rent to him, either on the day when the contract was made or at any other time.

On these facts it would seem obvious that when the complaining witness gave to the defendant the sum which was supposed to represent the rental for the apartment, he intended that the defendant would have that money as his own and that the complaining witness in return would receive possession of the apartment. Actually it is admitted that the defendant never intended to give to this complaining witness the possession of the apartment; that the defendant intended to obtain this money and wrongfully convert it to his own use. It, nevertheless, is true that when the complaining witness sur-

it in Wall Street as he saw fit and expected interest for the use of the money, whether he lost or not * * *"

In the Noblett case, *supra*, the Court attempted to distinguish the case from the Miller case, *supra*, in saying: "The owner parted with possession of the property only for the purpose of enabling the prisoner to effectuate some specific benefit in favor of the owner, whereas in the principal case [Noblett], the owner parted absolutely with all control of the money and vested in the prisoner the complete right to use it for his own purpose and benefit, relying upon the prisoner's promise to transfer in the future the stipulated consideration for the money." This distinction may well be regarded as arbitrary as the holding in the Miller case.

¹⁷ The proper office of a bill of particulars is to enlighten the defendant as to charges made against him so as to enable him to prepare a defense. It does not have to disclose the nature of the plaintiff's case. *Matthews v. Hubbard*, 47 N. Y. 428 (1872); *Stern v. Wabash R. R. Co.*, 98 App. Div. 619 (1st Dept., 1904). There is no fixed and inflexible rule as to when a party is entitled to a bill of particulars. The court may, in the exercise of its sound discretion, in a case where a party cannot properly prepare for trial or justice cannot be done unless he is notified of the charges against him, order the submission of a bill of particulars. *Cunard v. Franklyn*, 111 N. Y. 511, 19 N. E. 92 (1888); *Tilton v. Beecher*, 59 N. Y. 176 (1874).

As a general rule the effect of a bill of particulars is to restrict the submitter thereof in the nature of his proofs. His evidence must fall within the allegations of the bill of particulars. *St. Albans Beef Co. v. Aldridge*, 112 App. Div. 803 (3rd Dept., 1906); *Murray v. Mabie*, 8 N. Y. Supp. 289 (5th Dept., 1889). *Contra*: Massachusetts Rules, *infra* Note 25.

rendered this sum to the defendant, he parted with title to it. He intended that that money should thereafter be the money of the defendant. It is conceded that if the complaining witness had known of this scheme concocted by the defendant, he never would have surrendered the money to him, but, under the arrangement, the defendant was to have the money and the complaining witness was to receive the possession of the apartment. If the defendant was to have the money, then title passed to the defendant and he would be amenable to the statute with regard to obtaining money under false pretenses.

The indictment against the defendant contained two counts. The first count charged, in effect, that the defendant obtained the sum of \$550 from the complaining witness by false and fraudulent pretenses. The second count charged the defendant with committing larceny by trick. The trial took place; the Government rested; and then both district attorney and trial Court could not decide whether the evidence adduced would support the first count of the indictment which charged the obtaining of money under false pretenses, or whether the evidence in the case would sustain the second count of the indictment which charged larceny by trick. Quite a good deal of time was spent by Court and district attorney discussing this aspect of the case. Finally a choice had to be made and the trial Court decided that this evidence would sustain the second count of the indictment which charged larceny by trick.

It would seem that any person conversant with the fundamental concepts of criminal law would have known that this evidence could not sustain the second count of the indictment which charged larceny by trick; that this evidence clearly sustained the first count of the indictment which charged obtaining money by false pretenses.

The trial Court, having decided that this evidence supported the second count of the indictment, dismissed the first count and then charged the jury with regard to larceny by trick. Defendant was found to be guilty and judgment was entered.

The Court of Appeals, Crane, *J.* and Andrew, *J.*, dissenting, reversed the judgment and dismissed the indictment. Judge Lehman, who wrote for the majority, bemoans the fact that a wrong-doer escapes punishment because of technical distinctions in the law, but declares that "it is the function of the Legislature to determine whether modern conditions dictate a wider distinction of acts which should subject the wrong-doer to criminal responsibility."¹⁸

Judge Crane, in his dissenting opinion, urges that since under the Code of Criminal Procedure, it is sufficient if the indictment contains a plain and concise statement of the acts constituting the crime,

¹⁹ *Supra* Note 3.

that this conviction should therefore be sustained.¹⁹ Judge Crane apparently views this as a matter of proper wording of an indictment. It should be remembered that, in this case, the defendant was charged in two counts; that the Government under the indictment could adduce all its proof; that the Government was not compelled to make an election until after it rested; and that at that late stage both Court and district attorney could not decide whether the crime constituted larceny by trick or obtaining money under false pretenses.

Judge Lehman, in his majority opinion, indicates improvements that have been made both in England²⁰ and in Massachusetts.²¹

Under the English statute, the trial Court may in a proper case charge the jury with regard to the crime of larceny even though the indictment was predicated on obtaining property by false pretense. The late Professor Gifford likewise praises this improvement in the law.²²

It is submitted that both the courts and writers have overlooked the fact that this statute merely enables the crown to adduce evidence with regard to larceny when the indictment charges the defendant with obtaining property under false pretenses. Under this English statute a trial Court cannot charge a jury with regard to larceny when the evidence can only support a charge with regard to false pretense. The same difficulty that the Court of Appeals recently

¹⁹ Code Criminal Procedure, sec. 275:

The indictment must contain:

(1) The title of the action, specifying the name of the court to which the indictment is presented, and the name of the parties;

(2) A plain and concise statement of the acts constituting the crime, without unnecessary repetition.

²⁰ *England*: In an indictment for embezzlement or fraudulent application or disposition of property, the defendant may be found guilty of simple larceny, or larceny as a clerk or servant or person employed in the public service or police, and on an indictment for simple larceny the defendant may be found guilty of embezzlement or fraudulent application or disposition of property. (Larceny Act, 1861, 24 and 25 Victoria, ch. 96, sec. 72). A defendant on an indictment for false pretenses may be found guilty, even though it appears that the offence amounted to larceny (*ibid.*, sec. 88).

²¹ *Massachusetts*: The court may, upon the arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime, shall so order at the request of the defendant if the charge would not be otherwise fully, plainly, substantially, and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial. * * *. R. L. of 1902, ch. 218, sec. 39.

In an indictment for criminal dealing with personal property with intent to steal, an allegation that the defendant stole said property shall be sufficient; and such indictment may be supported by proof that the defendant committed larceny of the property, or embezzled it, or obtained it by false pretenses. R. L. of 1902, ch. 218, sec. 40—formerly Laws of 1899, ch. 409, sec. 12.

²² *Supra* Note 15.

encountered in the Noblett case likewise appeared in England even after the enactment of these statutes, and in Crown Cases Reserved a conviction had to be quashed.²³

Again both writers and judges are inclined to praise the Massachusetts system. Under the Massachusetts Statute of 1899, it is sufficient to charge in the indictment that the person accused did steal without making the usual descriptive averments of asportation or means used to obtain possession of the property, and larceny is defined as "the criminal taking, obtaining or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement and obtaining by criminal false pretenses."

Under R. L. C., chapter 218, subdivision 39,²⁴ the defendant is given the right to a bill of particulars but the statute gives the Government the right to amend its bill even at the trial if the evidence adduced should vary from the bill of particulars originally given.

The Massachusetts courts have interpreted this section to mean that the granting of the bill no longer rests in the sound discretion of the court but that instead the defendant can demand such a bill as a matter of absolute right.²⁵

Therefore, the only advantage to be achieved from these Massachusetts statutes which judges and learned writers praise, is that the Government is not obliged to determine whether the facts will support larceny by trick or false pretense at the time when the indictment is found. The indictment can be worded in general language, charging the defendant with stealing property. Under the laws of procedure of our state, the state can charge the defendant in four separate counts.²⁶ It can charge him in the first count with larceny by

²³ Regina v. Solomons, 62 Law Times, 672.

²⁴ *Supra* Note 22.

²⁵ Speaking of the right of the defendant to a bill of particulars, the Massachusetts Court in Commonwealth v. Kelly, 184 Mass. 317, 324, 68 N. E. 346-348 (1903), makes the following statement: "This is a sufficient protection to the accused. Indeed it is manifest that since under the former practice the right to a bill of particulars was a matter that lay within the discretion of court and therefore could not be claimed as of right. Commonwealth v. Wood, 4 Gray 11. This statute, which makes the right to such a bill absolute, places the accused in a better position than he was before."

Again, in Commonwealth v. McDonald, 187 Mass. 581, 585, 73 N. E. 852-853 (1905): "If the defendant desired further information to enable him to meet a more definite claim by the Government than was shown by its formal allegations or more fully to make his defense, it was open to him as of right to ask for specifications setting forth such additional facts. R. L., ch. 218, sec. 39. This statutory provision preserved his constitutional rights and offered him ample protection from being misled or rendered unable to meet the real accusation made against him."

But compare the New York Rule, *supra* Note 17.

²⁶ Code Criminal Procedure, sec. 279: The crime may be charged in separate counts to have been committed in a different manner or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts.

trespass; in the second count with larceny by trick; in the third count with embezzlement, and in the fourth count with obtaining money under false pretenses.

In the instant case, the indictment did contain two counts. The defendant was charged under one count with false pretense. He was charged in the second count with larceny by trick. Under the Massachusetts Law, the district attorney may amend his bill of particulars even at the trial. But the statute does not permit a judge to charge a jury with regard to larceny when the evidence can only sustain a charge of false pretense.

In the Noblett case, the district attorney was not called upon to make a choice until the State had rested. How could the Massachusetts statute in any way affect the result in the instant case? Difficulty arose only after the Government had rested, when Court and district attorney could not determine which of the two counts the evidence supported. As previously indicated, even after the statute of Victoria, in Crown Cases Reserved, a conviction had to be quashed because the Crown did not know the difference between false pretense and larceny.²⁷

Courts and writers seem to have forgotten that laws are not self-executing and a statute cannot make them so. Consequently, if the general views expressed by Judge Crane should be adopted it would be insufficient to enact a statute formulated on the Massachusetts plan. The change must be even more revolutionary. The act would have to deny to a defendant the right to a bill of particulars even though under the Massachusetts law the defendant can demand it as of right. In substance, it would mean that only after the highest court has decided on the law and the facts would a defendant know the crime with which he had been charged, and of which he had been found guilty. Probably no judge or student of the law would urge so radical a change.

People v. Adler, 140 N. Y. 331, 35 N. E. 644 (1893); People v. McCarthy, 110 N. Y. 309, 18 N. E. 128 (1888); People v. Willson, 109 N. Y. 345, 16 N. E. 540 (1888). But in no event must the proof adduced vary from the crime charged. Thus where the indictment charges one crime and the evidence adduced proves another, such variance is fatal and the indictment must be dismissed. People v. Dumar, 106 N. Y. 503 (1887); People v. Dunn, 6 N. Y. Supp. 805 (1st Dept., 1889). In People v. Dumar, *supra*, the indictment charged that the defendant "unlawfully and feloniously did steal, take and carry away" the property described. It was held that the indictment could not be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations. In People v. Dunn, *supra*, the indictment charged that the defendant "did take, steal, and carry away" certain property. It was held that there was no variance between the indictment and the proof which showed that the defendant was a bank teller and had taken the money while in his custody. It was also held not to be error in allowing the amendment of the indictment so that it alleged the property belonged to the "President & Director of the Manhattan Co." and not to the "Bank of Manhattan Co."

²⁷ *Supra* Note 23.

These views, therefore, could not be adopted unless ancient tradition were completely repudiated. It would lead to the conclusion that it would be wiser to proceed on the premise that every man who is indicted is guilty of the charges set forth in the indictment, and then to effectuate this theory, adopt the wisdom of the Queen in "Alice of Wonderland"—we will have the execution first and the judgment afterward.

WILLIAM EDELSON.

ACCOUNTANT'S LIABILITY TO THIRD PERSONS.

With the growth of any profession or industry to economic importance, there is a concomitant evolution in the law in its application to that particular enterprise.¹ Basic principles of law remain the same, but unforeseen situations demand new interpretations of old rules. The profession of accountancy has provided us with a question which, though possessing analogies in the law, has a flavor peculiar to the auditing field. The increasing use of auditor's financial statements and certificates as a basis for the extension of credit has led to the query: What is the liability of an auditor who, in a statement, has certified to the accuracy of the accounts of his client? Does the accountant owe any duty of care to strangers who extend credit on the faith of his certificate, or is his sole obligation a matter of contract with his client?

A noted English accountant has said ² of the auditor's responsibility:

"Although the auditor is responsible primarily to the shareholders, yet in the light of modern company development a somewhat wider view should be taken, I think, by the auditor himself. He should remember that balance sheets of public companies are, for practical purposes, public documents; they are studied by the stock exchange and the prospective investor when forming an opinion as to the value of the share and the debenture capital; are made available to traders as an indication of the financial stability, and they are used by the companies themselves when raising bank loans and making other financial arrangements."

¹ Cardozo, *Nature of the Judicial Process*, p. 62.

² Plender, *Accountant's Certificate in Connection with the Accountant's Responsibility*, *J. of Accty.*, vol. 43, p. 253 (1926).