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STUDENT NOTES

LARCENY IN WEST VIRGINIA

Realizing the difficulty of embodying all the elements of larceny as interpreted by the adjudicated cases into one comprehensive definition, the West Virginia court, after citing definitions by various recognized authorities, states that "None of these definitions are believed to be perfect..." but all agree that the same elements enter into its composition. These factors include obtaining possession of personal property, by a trespass in the taking and carrying away, from the possession of another, with the felonious intent to deprive him of his ownership therein. The various incidents of these factors will be presented under the headings of (1) subject matter, (2) the asportation, (3) the trespass, and (4) the animus furandi.

1. Subject Matter. Declaratory of the common law is the statutory provision that every form of personality comprehended in the term "goods and chattels" is subject to larceny. Thus there is no difficulty in showing that ordinary goods are subject to larceny, such as hogs, hens, horses, wine, tires, saddle and horse, whiskey, money, automobile, and furs. The difficulty arises when statutes remedial of the common law attempt to extend the subject matter. Real property and things savoring of realty were not subject to larceny. This has generally been changed by statute, as in this state wherein such things as are "of substance" of a freehold though "affixed thereto" are the subject of larceny, "although there be no interval between the severing and taking away."

*The scope of this note does not include statutory larceny as by embezzlement, false pretense, etc.

1 State v. Chambers, 22 W. Va. 779, 786 (1883).
2 W. VA. CODE (Michie, 1937) c. 61, art. 3, § 13.
4 State v. Winsam, 100 W. Va. 418, 130 S. E. 607 (1925).
7 State v. Cooper, 111 W. Va. 255, 161 S. E. 30 (1931).
8 State v. Blair, 63 W. Va. 695, 60 S. E. 795 (1908).
9 State v. Bailey, 63 W. Va. 668, 60 S. E. 785 (1908).
15 W. VA. CODE (Michie, 1937) c. 61, art. 3, § 16. At common law such things must be first converted to chattels by a severance, then a subsequent carrying off at another time constituted larceny. Commonwealth v. Steimling, 156 Pa. 400, 27 Atl. 297 (1893).
To disperse any doubt that might exist at the common law and
to lower the amount which divided the offense into a misdemeanor
and felony, boats, skiffs, timber and appliances are expressly made
subject to larceny by statute.18

Bank notes, checks, and other writings and papers of value
not subject to larceny at the common law17 have been made so by
statute.18 The papers or writings of value alleged to have been
stolen need not technically come within the express terms of the
statute.19 The value to be placed on them, is their face value, as
chooses in action, and it is the value to the owner, not to the thief.20

Though common law larceny was classified as simple or com-
 pound, in West Virginia all larceny not amounting to robbery is
simple larceny,21 classified by statute as petit larceny if the value
of the goods taken is under twenty dollars, and grand larceny if
the value is twenty dollars or over.22 The market value, if any, of
stolen goods may be used to convict of grand larceny if proved as
of the time and place of the theft; and a bona fide offer to buy the
thing stolen within a few months after the larceny is admissible
to sustain a grand larceny charge, if the value has not declined.23

Where property is stolen from the same owner and from the
same place by a series of acts, whether each taking is a separate
crime or together constitute a single larceny, depends upon whether
there is a separate impulse motivating each taking, or a single im-
 pulse for the entire group motivated by a general fraudulent
scheme.24 In a relevant West Virginia case where an agent law-
fully collected small sums of money at various times and converted

18 W. Va. Code (Michie, 1937) c. 61, art. 3, § 17. Differing from the penalty
prescribed in the general larceny statute, the offense is a misdemeanor if the
value of the goods is under ten dollars and a felony if the value is above that
amount. Quære, if the value is found to be exactly ten dollars.
17 State v. McCoy, 63 W. Va. 60, 59 S. E. 758 (1907). Such papers were
evidence of mere rights. Regina v. Watts, 6 Cox Cr. Cases 304 (1854).
20 State v. Crumby, 61 W. Va. 287, 94 S. E. 137 (1917). Larceny of unstamped, undated, and unverified railroad and ferry tickets not available for
transportation, held not to be grand larceny unless valuable to the conductor as
receipts, even though the thief by slight alterations could render the tickets
valid. Only the intrinsic paper value could be shown.
21 State v. Chambers, 22 W. Va. 779 (1883). There is no longer any dis-
tinction between larceny from the person and ordinary larceny.
stolen a cow, and the owner testified that he had refused a hundred dollar offer
for it, and that the offeror was well acquainted with the local cow market.
 Conviction for grand larceny reversed for failure to show that the value had
not declined in the meantime.
24 (1924) 36 C. J. § 219,
them to his own use, it was not a distinct and independent conversion of each sum, but the conversion of each sum as one transaction, a single embezzlement. The agent was tried for the embezzlement of the aggregate sum of all the transactions. Where the cashier of a bank had embezzled several small sums the court said "the jury could well infer that the many small sums of money, taken at various and sundry times, were taken in furtherance of, and pursuant to, a preconceived and continuing design to appropriate it to his own use."28

Under the early common law animals not fit for food, and having no intrinsic value, were not the subject of larceny. Numerous statutes have changed the rule especially in regard to domestic animals, such as dogs. Dogs are made subject to taxation and declared to be personal property "within the meaning and construction of the laws of West Virginia", and unless this is construed to be limited to tax purposes, then dogs may well be "goods and chattels" subject to larceny under the statute.30

To enable the court to determine if the goods taken are the proper subject of larceny, it is necessary to give a sufficient description of the goods. And since the common law requires an allegation of ownership, it is important that the goods be capable of ownership. An indictment for the larceny of a note "the property of the estate of said T.... M., deceased" is defective, for "One who is dead can not own property."33 Nor are goods the subject of

28 State v. Moyer, 58 W. Va. 146, 52 S. E. 30 (1905).
29 State v. Wetzel, 75 W. Va. 7, 18, 83 S. E. 68 (1914).
27 4 Bl. Com. 235. It is doubtful if this early principle would be followed today. MILLER, CRIMINAL LAW (1934) 343.
28 (1924) 36 C. J. 739.
30 W. Va. Code (Michie, 1937) c. 61, art. 3, § 13. In the case of State v. Blake, 95 W. Va. 467, 121 S. E. 488 (1924), on an indictment containing two counts, the first count of common law grand larceny of a dog of the assessed valuation of $75 was quashed on the ground that at common law a dog was not the subject of larceny. However, the second count of unlawfully stealing, taking and carrying away was held good under W. Va. Acts 1908, c. 29, § 9-a-1, which section no longer appears in the code, and being general, rather than local in nature, is presumably repealed by W. Va. Code (Michie, 1937) c. 63, art. 1, § 1.
33 State v. Cutlip, 78 W. Va. 239, 88 S. E. 829 (1916) stating that ownership may be in a living person, or the personal representative of a deceased person, or it can be alleged to be in "persons unknown" to the grand jurors, if such be the case.

If there is no personal representative of a deceased person, an allegation of ownership in the widow may be sufficient. State v. Heaton, 23 W. Va. 773 (1883).
larceny which are alleged to belong to a nonexistent corporation. 34

The fact that articles are illegally possessed does not preclude the taking thereof from being larceny, as where the defendant was convicted of grand larceny of 339 poker chips, used for gambling. 35

Under the statute which makes embezzlement "larceny", various other properties are expressly made subject to embezzlement and therefore larceny, including "any effects or property of any other person" coming under the defendant's control by virtue of his office, place or employment. 36 These more properly fall within the scope of embezzlement.

2. The Asportation. This element of larceny is clearly explained in the case of State v. Chambers, 37 the first West Virginia decision to consider the law of larceny at any length. There must be a felonious and complete severance of the property from the owner's possession, and the thief must have had at least for an instant of time complete and absolute possession of the property; and during such possession he must have feloniously removed the same from the place it occupied just before he seized or laid hold of it. The slightest removal from the place it occupied, even a hair's breadth, makes the offense complete, although the whole of the article so taken be not removed from the whole space which the whole article occupied before it was taken. Yet if every part thereof be removed from the space which that particular part occupied just before the taking, such is sufficient asportation to be larceny. Where the thief thrust his hand into the pocket of another, seized a pocketbook, and with the intent to steal, lifted or raised it to the top of the pocket, and upon being detected, released his grasp. leaving the pocketbook hanging partly out of the pocket, this is sufficient "taking and carrying away." The thief has had a complete and absolute possession and control. 38

The facts in a very recent decision stated that the defendant was arrested with his hands, clothes and shoes freshly bloodied, as he attempted to run from a barn where three hogs, belonging to

34 State v. Ferree, 88 W. Va. 434, 107 S. E. 126 (1921). A charge in the indictment that the goods were of the United States Railroad Administration, D. & O. Railroad, when such person or corporation had never been created by act of Congress or presidential proclamation is defective.
35 Bales v. State, 3 W. Va. 685 (1868). Each chip cost twenty-five cents, so the intrinsic value was well over twenty dollars and thus grand larceny. The court did not infer what value would be used had the intrinsic value been less than twenty dollars, though the fixed value for gambling purposes may be above that amount.
37 22 W. Va. 779 (1883).
38 State v. Chambers, 22 W. Va. 779 (1883).
another, had just been surreptitiously butchered. The hogs were found lying together, closely side by side, with entrails removed. The court said, "That situation could not reasonably have existed unless the hogs had been shifted after they were killed," and reiterated that a removal by a mere "hair's breadth" was sufficient, citing the Chambers case.39

Apparently the Chambers case has rather comprehensively dealt with the various incidents of the asportation element, as attested by the lack of larceny cases reaching the supreme court wherein the element of asportation was a major issue.

3. The Trespass. This element must be considered in relation to the possession of the owner of the goods stolen, and his relation with the thief. Goods may be taken from the actual or constructive possession of the owner,40 and there is a sufficient ownership of the goods in a person who has only a special property in them, as a lessee for years, a bailee, a pledgee, a carrier, etc.41 There need be no actual violence in the trespass.42

Larceny by trick is a doctrine well recognized at common law and in this state. Where a person by means of some fraud or trick procures the delivery of goods to him by the owner, with the intent to steal at the time of the delivery, this amounts to a taking within the definition of larceny, unless the intent was to pass title in addition to possession, and a subsequent conversion by the taker is larceny. This is based on the theory that if the taker had the preconceived design to convert the goods when he obtained possession, then it is implied that the taking is against the will of the owner, hence the trespass.43

40 State v. Bailey, 63 W. Va. 668, 60 S. E. 785 (1908); State v. DeBerry, 75 W. Va. 632, 84 S. E. 508 (1915).
41 State v. Heaton, 23 W. Va. 773 (1883). An owner of goods can be guilty of larceny but taking his own goods from one to whom they have been pledged, the pledgee having a special property in them until the pledgor has performed the condition of the pledge. Henry v. State, 110 Ga. 750, 36 S. E. 55 (1900).
43 State v. Edwards, 51 W. Va. 220, 41 S. E. 429 (1902). This was the first case of larceny by trick to come before the court. D and X had ousted A into a card game playing for money, and it was pretended that A and D had jointly won from X $2000. As a condition precedent to receiving the money, D pretended to put up $1700, inducing A to put up $300 to total an amount equal to X's $2000, and the $4000 was then put into a tin box, prior to dividing it up between A and D. Later A was given the tin box to keep the money, until D should come to A's house and make the division. A later discovered there was no money in the box. Held, larceny by trick. A had put the money into the box for a special and limited purpose, to add it to D's $1700 as a condition precedent to an equal division by A and D, and A parted only with possession when D, by artifice, extracted the money from the box.
Supplementing this doctrine is the decision in a later case that even if the owner intends to pass title when the defendant received the goods, it may still amount to larceny if the intent is to pass title only under specified conditions, and the goods are converted before those conditions have been fulfilled.44

4. The Animus Furandi. In every larceny the taking must be with a fraudulent intent. "To 'take' an article signifies 'to lay hold of, seize or grasp it with the hands or otherwise'." Doing the same act, animo furandi, constitutes a felonious taking.45 But if the defendant denies his intent to steal, the inferences to be drawn from all the attendant circumstances, including such explanations as he can and does make for his acts, are questions for the jury.46 However, the taking must be without any claim of right and with the intent to deprive the owner of it permanently, by appropriating it to himself.47 A taking under an honest claim of right is not larceny, even though the thief takes with knowledge of the adverse claim of another, and his own claim proves to be untenable.48 But facts and circumstances indicating lack of confidence in the claim of right under which the property was taken and carried away,

44 State v. Wiseman, 111 W. Va. 183, 161 S. E. 437 (1931) quoting from (1924) 36 C. J. § 140. A delivered furs to D who said he would pay cash for them, first requesting permission to take them to a nearby town to get the approval of his fiancee, and that he would be back in two hours. D later refused to either pay or give up the furs. Held, he became a bailee for a specified purpose and time, i.e., the approval of his fiancee within the next two hours, and that A had never intended to part with title until he received payment.
47 State v. Cascie, 103 W. Va. 442, 137 S. E. 886 (1927). D admitted the taking of a car but denied the intent to steal. But the court said that giving a name other than his own when he stored the car, and also leaving town suddenly when he was accused of larceny, was probably a reasonable basis for the jury's verdict of larceny. Cf. State v. Shores, 31 W. Va. 491, 7 S. E. 413 (1888). D and others, after buying, drinking, and paying for cider at a store, returned later, ordered more cider, then left before drinking or paying for it, because of a disturbance, and broke in later at night in the presence of others and drank the cider. The court thought it was very probable that D thought the cider belonged to them, though it had only been ordered, and not yet paid for.
48 State v. Flanagan, 48 W. Va. 115, 35 S. E. 862 (1900). A deserting wife claiming that certain fruit deposited in her husband's cellar belonged to her, instigated D to get possession of it and ship it to her without her husband's knowledge. D did so under the belief that it belonged to the wife, and the court held the evidence would not sustain the verdict of larceny.

The court mentions the curious common law rule that, though a friend assist a wife in carrying away her husband's property with intent to deprive him thereof, it is not larceny on the part of the friend, unless he and the wife had, or intended to commit adultery; and a wife in no event would be guilty of larceny for converting her husband's goods, because at the common law the husband and wife were but one person. Id. at 119.
and the determination to defeat the adverse claim by putting property beyond the reach of legal process such as concealment, disposition, or destruction thereof, tend to prove lack of good faith on the part of the taker.\textsuperscript{49} Thus, it must be more than a mere colorable pretense to get possession, and whether the claim of right is \textit{bona fide} or not is a question for the jury.\textsuperscript{50} And if a claim of right is made, it must be to \textit{all} that was taken.\textsuperscript{51} The case of \textit{State v. Caddle}\textsuperscript{52} raised the \textit{quaerere}: "Does a mere \textit{bona fide} claim of right to the thing itself exclude larceny, if there is no such claim of right to do the act by which it is obtained?" Apparently this question remains unanswered.

The intent must be to deprive the owner permanently of possession\textsuperscript{53} and therefore borrowing a chattel without the owner's consent, for temporary use and without claiming ownership is not larceny.\textsuperscript{64} But once the crime of larceny has been committed, restitution or abandonment of the goods is no defense.\textsuperscript{55}

The necessity of \textit{lucri causa}, a question greatly disputed at common law, has been settled in West Virginia. Taking goods \textit{lucri causa}, "for the sake of gain", does not form an essential element of larceny.\textsuperscript{56} In the \textit{Caddle} case, whiskey was the subject matter of the larceny, and the court said "What matters it to the owner . . . whether they took it for gain or not, so that they took it with the intent . . . by appropriating it to themselves, in order to destroy,

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\begin{enumerate}
\item State v. Bailey, 63 W. Va. 668, 60 S. E. 785 (1908). \textit{A} and \textit{B} had deposited whiskey at \textit{D}'s distillery which was in the hands of receivers. There being some dispute about who had title to the whiskey, \textit{D} had his agent haul away four barrels of it, claiming later he thought it belonged to him. Held, the company of its whereabouts after its removal evinced guilty intent; an attempt to defeat the adverse claim, not by establishing a superior title but by putting the subject matter beyond the reach of the courts, and is in the nature of an admission that the claim was groundless and untenable. (Reversed on other grounds.)
\item State v. Bailey, 63 W. Va. 668, 60 S. E. 785 (1908); State v. Caddle, 35 W. Va. 73, 12 S. E. 1098 (1891).
\item State v. Caddle, 35 W. Va. 73, 12 S. E. 1098 (1891). \textit{D} claimed a pint and a half of whiskey was due him, but he took two or three gallons.
\item 35 W. Va. 73, 12 S. E. 1098 (1891) syl. 3. Claiming \textit{A} owed him some whiskey, \textit{D} broke into \textit{A}'s house late in the evening and took some whiskey from his wife, presumably at the point of a gun. By way of dictum the court said \textit{D} made no claim of right to all he took, or to the manner in which it was taken. He was convicted of burglary.
\item State v. Caddle, 35 W. Va. 73, 12 S. E. 1098 (1891).
\item State v. Chambers, 22 W. Va. 779 (1883); State v. Goldstrohm, 84 W. Va. 129, 99 S. E. 245 (1919).
\item State v. Caddle, 35 W. Va. 73, 12 S. E. 1098 (1891).
\end{enumerate}
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as they did in part by pouring it out, to drink, to sell, to give away or throw away?" As long as there is the intent to deprive the owner of the goods, it matters little what the motive or reason for the theft be.

J. S. M.

PROMISSORY ESTOPPEL IN WEST VIRGINIA

Ever a shock to the conscience of the newly-fledged law student engaged in a perusal of Professor Williston's Cases on Contracts is the decision rendered in Kirksey v. Kirksey. Defendant Kirksey promised his widowed sister-in-law, Antillico, that he would provide a home for her and her family. Antillico, relying upon the defendant's promise gave up government land on which she had been living and traveling some sixty miles established a home upon the land so generously proffered by the defendant. At the end of two years defendant Kirksey ordered Antillico to move off the land.

Under the strict common law consideration requirements, as pointed out by the court in the above case, defendant Kirksey's promise would not be binding and could be repudiated at will. Since there had been no "bargained-for-exchange," but only a promise to bestow a mere gratuity, "sister Antillico", who had relied upon the promise to her detriment, was without a remedy.

To avoid the harsh results and patent injustice compelled by a strict adherence to the doctrine of consideration in the Kirksey case and in similar cases the common law has in part effected an internal reorganization. One expression of this remedial tendency is found in the Restatement of Contracts:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

It is to be noted that "promissory estoppel", as this curative doctrine is generally termed, applies only to promises; it does not

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67 The dissenting judge argued that lucri causa is the civil law equivalent to the common law animus furandi, and points out that it has been accepted by several courts as a part of the common law, and that there can be no larceny unless some benefit was expected by the taker.

1 8 Ala. 131 (1845).

2 This term is the essence of Williston's explanation of consideration. See WILLISTON, CONTRACTS (1927) §§ 100, 102 et seq.

3 1 RESTATEMENT, CONTRACTS (1932) § 80.