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Historical Evolution of the Law of Larceny

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I I S T O R I C A L E V O L U T I O N O F T H E

L A W O F L A R C E N Y .

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In tracing the development of the law of larceny and its results it becomes of importance, to note first, the language of Blackstone in speaking of crimes. He says:- "That the knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and ajusts to it its adequate and necessary penalty is of the utmost importance to evry individual in the State. For, (as Sir Michael Foster, a master of the crown law has observed upon a similar occasion), no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches The infirmities of the best among us, the vices, and ungovernable passions of others, the instability of all human affairs, and the numberless unforseen events, which the compass of a day may bring forth, will teach us upon a moments re-

flection that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobediance may expose us, is a matter of universal concern.

In the light of this is behoves us to find the real origin. Going back to the ancient times we find it a little difficult to determine it with exact precision. In studying the Roman system of laws, the importance of the distinction between Criminal law and Penal law becomes extremely marked. It has been remarked that the notion of a crime was of exceedingly slow development in Rome, and probably in the earliest history there was no real criminal law in existance. "It was only when theRebublic was in a state of decline, and consequently it did not appear at Rome until a much later stage of legal history than it did in England."

With this before us, we must observe a few definitions. Lord Coke says:-"Larceny, by the common law, is a felonious or fraudulent taking or carrying away, by any man or woman, of the mere personal goods of another."

Hawkin's says:-"A felonious and fraudulent taking and carrying away by any person, of the mere personal goods of another."

Blackstone-" The felonious taking and carrying away of the personeal goods of another.

East- "The wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place with a felonious intent to convert them to his (the takers) own use, and make them his own property, without the consent of the owner."

Groose Judge- "The felonious taking the property of another without his consent or aginst his will, with intent

to convert it to the use of the taker."

Erye Judge, in substance says:-"The wrongful or fraudulent taking and carrying away by any person of the mere personal chattels of another, from any place with the intent without excuse or color of right to deprive the owner, not temporally but permanently, of his property and convert it to the taker's use and make it his without the consent of the owner."

Proposed by the English Commissioners in 1844. "Taking and removing of some thing, being the property of some other person and of some value, without such consent as is hereinafter mentioned, with intent to despoil the owner, and frauduently appropriate the thing taken and removed."

Proposed by the English Commissioners in 1847. "Theft is the wrongfully obtaining possession of any movable thing which is the property of some other person and of some value

with the fraudulent intent to deprive him of such thing, and to have or deal with it as the property of some other person than the owner."

Proprosed by the New York Commisioners in 1864. "Larceny is the taking of personal property accompanied by fraud or stealth, and with intent to deprive another thereof."

From these definitions we can see to a certain extent the evolution of the law, and a study of them becomes of more importance when we consider the fact that it is only a little over one hundred years ago that larceny in England was punishable by death, which further shows that the law has undergone a wonderful change within a comparitively short space of time. Larceny is derived from the Latin term Latrocinum. The meaning of this term it seems in the original ~~term~~ was robbery. The contradistinction between the

terms latrocinium and furtum (meaning theft) is that the one means robbery more e specially while the other is broader, meaning the taking of any article of personal property. The two terms are so nearly related in their meaning and conception that it seems necessary to treat them both under the same head.

Theft is in modern legal systems, universally treated as a crime, but the conception of theft as a crime is not one belonging to the earliest stage of law. To its latest period, Roman Law regarded theft as a wrong, prima facie, pursued by a civil remedy for a penalty, and also a remedy for the stolen property itself or its value. In later times, no doubt, a criminal remedy to meet the graver crimes gradually grew by the side of the civil, and in the times of Justinian the criminal remedy, where it existed took precidence of the civil. But to the last criminal proceedings

could only be taken in serious cases, viz. aginst the stealers of cattle or the clothes of bathers. The punishment was death, banishment, or labor in the mines, or on public works.

In the main the Roman Law of theft coincides with the English law and the definition as given by Bracton corresponds very closely to that given in the Institutes. It only seems to differ in one essential respect, and that is the motive of the crime. In English law the motive is immaterial while in the Roman law it was of very great importance.

The term as used in the Roman Law, ~~is~~ furtum, is on the whole a more comprehensive term than theft. This difference arises, no doubt to extend the bounds of a wrong and to limit the bounds of crime. Thus it was furtum but it would not be theft at English common law to use a deposit of a pledge contrary to the wishes of the owner, to retain

goods found, or to steal a human being, such as a slave. The latter in English law would be an abduction under certain circumstances, but not a theft. On the other hand one of two married persons could not commit furtum as aginst the other, but theft may be committed in England since recent legislation. As the Roman term was merely a wrong, the obligation could be extinguished by agreement between the parties; it will be seen that this cannot be done in England.

In another direction English law is more considerate of the rights of third parties than was the Roman. As will appear hereafter, the thief can give a good title to stolen goods; in the Roman law he could not do so except in one single instance.

The development of the law at Rome is historically interesting, for even in its latest periods is found a relic of one of the most primitive thories of law adopted by courts

of justice. They took as their guide the measure of vengence likely to be exacted by an aggrieved person under the circumstances of the case. This explains the reason of the division of the manifest and non-manifest.thief. The manifest thief was one taken in the act, taken with the manner of old English law . The twelve tables demanded the punishment of death aginst the manifest thief, for that would be the penalty demanded by the indignant owner in whose place the judge stood. The severity of this penalty was afterwards mitigated by the praetor, who substituted for it the payment of quadruple the value of the thing stolen. The same penalty was also given by the praetor in case of a theft from a fire or wreck. No doubt the object of this large penalty was to induce injured persons to refrain from taking the law into their own hands. The Twelve Tables made the

punishment double the value of the thing stolen. The actions for penalties were in addition to the action for the stolen goods themselves or their value, and the quadruple or double penalties still remain in the legislation of Justinian. The search for stolen goods as it existed in the time of Gaius, was a survival of a period when the injured person was, as in the case of summons, his own executive officer. Such a search by the twelve tables, might be conducted in the house of the supposed thief by the owner in person, naked except for cincture and carrying a plater in his hand, safe guards apparently aginst a violation of decency and aginst any possibility of his making a false charge by depositing some of his own property on his neighbor's premises. This mode of search became obsolete before the time of Justinian.

Robbery was violence added to the Roman law of theft, and quadruple the value would be recovered if the action were brought within a year, only the value if brought after the expiration of a year. This value is to be noted, included the stolen thing itself so that the penalty in effect was only a triple one, and not cumulative, as in theft proper.

In England, theft appears to have been very early regarded by legislators as a matter calling for special attention, and the pre-conquest compilation of law are full of provisions on the subject. It is noticeable that the earlier ones appear to regard theft as a wrong which may be compounded for by payment, while a considerable distinction of persons are made both in regard to the owner and the thief. Thus, by the laws of Ethelbert, if a freeman stole from a king he was to restore nine-fold, if from a private

person or from a dwelling only three-fold. In the laws of Alfred ordinary theft was still only civil, but he who stole in a church was punished by the loss of his hand. The laws of Ina named as a penalty death or redemption according to the situation of the criminal. By the same laws he might be slain on the spot if he fled or resisted. At a later date the criminal was placed at the king's mercy, and his hands were forfeited as well as putting out the eyes and other kinds of mutilation were often resorted to. This principle of severity continued down to the present century and until 1827 theft of certain kinds remained capital. Both before and after the conquest local jurisdiction over theives was a common franchise of Lords of Manners, attended with some of the advantages of modern summary jurisdiction. It might be exercised over theives who commited a theft or were apprehended within the lordship or over these inhabi-

tants thereof. Either or both of these franchises might be enjoyed by grant or prescription. In the old law there is to be found two interesting survivals of the primitive legal notions which were found in Roman law and up to a comparatively recent date a distinction analogous to that of the manifest and non-manifest thief was of importance in English criminal practice. The criminal apprehended in the act was by the Statute of Westminister the First not to be admitted to bail, while in the modern procedure the probable guilt or innocence of the accused is not so much to be considered in a question of this character as the probability of his appearance at the trial. The other matter worthy of notice was the old pursuit by what was called hue and cry. In the pre-conquest codes the owner was generally allowed to take the law into his own hands, as in early Roman law, and recover his goods by force if he could, and no doubt the

assistance of neighbors when it was possible. From this arose the development of this method as a recognized means of pursuring the criminal. The statutes of Westminister the first also enacted that all men should be ready to pursue and arrest fellons, and ten years later another statute of 1285 enforced upon all the duty of keeping arms for the purpose of following this means of procedure. As justice became more settled, this primitive mode of punishment was regulated more and more by law, and lost much of its natural simplicity, consequencely it became gradually obsolete, though the above statutes are still nominally law as far as they relate to this method of pursuit.

The term theft in the modern English law is often used as a synonym of larceny, though sometimes in a more comprehensive sense. In the latter it is used by Mr. Justice Stephen, who defines it as"the act of dealing from any

motive whatever, unlawfully and without claim of right, with anything capable of being stolen in any of the ways in which it can be commited", with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof." In this broader sense the term applies to all cases of depriving another of his property, whether by removing or witholding it. It thus includes larceny, robbery, cheating, embezzlement, and breach of trust. Embezzlement is a statutory crime and created as a separate form of offence in the last century. The distinction between larceny and embezzlement turns mainly on the fact of the person being in actual or constructive possession of the stolen property.

The earliest statutes of England dealing with larceny proper appears to have been in 1225 by which fine or impri-

sonment was inflicted for stealing the King's deer and the next act appears to be the statute of Weastminster, the first, dealing again with the same offense. From this time on it seems as though the beginning of legislation on the subject was for the purpose of protecting the chases and parks of the King and nobility. An immense mass of these old acts will be found named in the repealing act of 1827, and an act of the same date also removed the old distinction between grand and petit larceny. The former was the theft of goods above the value of twelve pence in the house of the owner and must not have been from the person or committed by night which was a capital crime. It was petit larceny where the value was twelve pence or under, the punishment being of a less severe nature as imprisoment and other similar methods.

The distinction between grand and petit larceny first

appears in statute law in the Statute of Westminster, the first, but it was not created for the first time by this statute, as it seems to have been in some of the pre-conquest codes.

The distinction between simple and compound larceny is still found in the books. The latter it seems is larceny accompanied by circumstances of aggravation as that in a dwelling house or from the person. The law is now contained chiefly in the larceny act of 1861, which is a comprehensive enactment including larceny, embezzlement, fraud by bailees, agents, bankers, factors and trustees, burgulary, house-breaking, robbery, obtaining money by threats, or by false pretences, and receiving stolen goods, and prescribing procedure, both civil and criminal. There is still, however, some earlier acts in force dealing with special cases of larceny such as stealing the goods of the King, and the

Post Office, and merchant shipping acts. Later acts provide for larceny by a partner of partnership property, and by husband or wife of the property of the other. Proceedings aginst persons subject to military and naval law depend upon the naval discipline act of 1866 and the army act of 1881. There are also several acts before and after 1861 directing as to the mode of indictments for stealing the goods of counties, friendly societies, trade unions &.

The principal conditions which must exist in order to constitute larceny are these : First, There must be an actual taking into the possession of the thief, though the smallest removal is sufficient. Second, There must be an intent to deprive the owner of his property for an indefinite period, and to assume the entire dominion over it, and an intent often described in Bracton's words as animos furiendi. Third, That intent must exist at the time of taking.

Fourth, The thing taken must be one capable of larceny either at common law or by statute.

One or two cases falling under the law of larceny are of special interest. It was held on several that a servant taking corn for the purpose of feeding his master's horses, but without any intention of applying it for his own benefit, was guilty of larceny. To remedy this hardship 26 and27 Vict. Chap. 103, was passed to declare such an act not to be a felony. The caes of appropriation of goods which have been found has led to some difficulty. It now seems to be the law that in order to constitute a larceny of lost goods there must be a felonious intent at the time of taking, that is an intent to deprive the owner, coupled with reasonable means at the same time of knowing the owner. The mere retention of the goods when the owner has become known to the finder does not make the retention criminal.

Larceny of money may be committed when the money is paid by mistake if the prisoner took it animo furendi. In two recent cases the question was argued before a full court and in each one there was a difference of opinion. In a case where the prisoner, a depositer in a post office savings bank, received by mistake of the clerk a larger sum than he was entitled to, the jury found that he had the animo furendi at the time of taking the money, and that he knew it to be the money of the post master general. The majority for the court held it to be larceny. In another case, where the prosecutor gave the prisoner a sovereign beleiving it to be a shilling and the prisoner took it under that beleif, but afterwards discovered its value and retained it, the court was equally devided as to whether the prisoner was guilty of larceny at common law, but held that he was not guilty of the crime as a bailee.

The procedure in prosecutions has been considerably affected by recent legislation. The inconveniences of the common law rules of interpretation of indictments led to certain amendments of the law, now contained in the larceny act, for the purpose of avoiding the frequent failures of justice owing to the strictness with which indictments were construed. Three larcenies of property of the same person within six months may now be charged in one indictment. On an indictment for larceny the prisoner may be found guilty of embezzlement and vice versa; and if the prisoner be indicted for obtaining goods by false pretences, and the offence turned out to be larceny, he is not entitled to be acquitted of this misdemeanior. A count for receiving may be joined with the count for stealing. In many cases it is unnecessary to allege or prove the ownership of the property which is the subject of the indictment. The act

also contains numerous provisions as to venue and the apprehension of offenders. In another direction the power of courts of summary jurisdiction have been extended,[23] in the case of charges for larceny, embezzlement, and receiving stolen goods, and actions aginst children and aginst adults pleading guilty or waiving their right to trial by jury.

What has thus far been said pertains almost wholly to the laws of England. At the time of our adoption of the common law the crime was devided into compound and simple; grand and petit. Petit larceny has ceased to exist in England and in a large part of the United States, therefore the term grand larceny has lost its usefulness as a legal term within many of the States. It is in use, however, in a few where the statutory provisions makes the distinction between grand and petit larceny. The statutory provisions of the criminal code under which the courts practice have

expanded and probably in a few isolated cases contracted the common law provisions. The law as construed nowadays in order to bring an indictment for larceny, things to be the subject of the crime must have an owner in fact, though it is not necessary that such owner be known to the thief or to the grand jury which would indict him, as according to our definition the things stolen need only be another's

As to form of indictment. In the case of the people v Dumar, The indictment for grand larceny charged the act constituting the crime as follows :- that defendant "unlawfully and feloniously did steal, take and carry the property described." The court held that the indictment would not lie because the proff showed that he obtained the goods by false pretenses and not by common law larceny. Although ~~the~~ the code treats larceny as including notionly the offense at common law and Revised Statutes, but also embezzlement,

obtaining property by false pretenses and felonious breach of trust, yet the prisoner was entitled to be informed of the real act charged aginst him in the pleading. The court says, that the important difference between the former law and the present is that they are no longer compelled to decide whether an offense is larceny, embezzlement or false pretenses because each one is larceny, yet the general principle of pleading has not been changed. In the case the People v. Dimmick, (107 N. Y.[13]), the court says , the indictment must contain a plain and concise statement of the act constituting the crime without unnecessary repetition, and it is sufficient if the act charged as a crime is plainly and concisely set forth with such a degree of certainity as to enable the court to pronounce judgment upon a conviction according to the right of the case, and no indictment is insufficient by reason of any imperfection in matter of form which does not

tend to the prejudice of the substantial rights of the defendant upon the merits. Such an indictment as this will stand the test. Again in the case of the People v. Jeffery, (38 N. Y. S. Rep.), the court held that an indictment charging the defendant with the crime of obtaining property under false pretenses is fatally defective because it charges a crime aginst the defendant which is not defined by the Statutes of the State.

As the law recognizes in things personal at the present time two kinds of ownerships, general or special, an article may be stolen from either the general or special owner of the property in question. Goods in the hands of a bailee articles of clothing worn by an infant, even goods stolen from a thief may be the subject of the crime by the Code. Also one by stealing his own goods, they being in the possession of a special owner, may commit larceny upon them.

If goods are attached by an officer the latter becomes a special owner and the general owner may commit larceny upon them, and so it was held in the case of Palmer v. People, where articles were levied upon by a constable under an execution aginst the owner, and the latter took them from the officer's possession, and accused himof having wrongfully appropriated them and sued him for their value when the court sustained aginst thisowner an indictment, the property being alleged to be that of the officer's . In these cases as in others to constitute the crime there must not only be the wrongful taking but the particular wrongful intent which the law requires. Therefore the English judges were devided on the question wether a man may be guilty of larceny of his own goods, when the intent and effect of the act was simply to defraud the Crown of revenue. But in a Massachusetts case on an indictment of the general owner

for larceny of the goods from an attaching officer, he was permitted to show in his defense that his object was not to charge the officer with their value, which would have made the transaction larceny; but to prevent other creditors from placing upon them additional attachments. This though unlawful would not constitute the crime.

As to asportation. In the language of the definitions of larceny goods taken must be carried away, but they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is that any removal however slight of the entire article which is not attached either to the soil or to any other thing not removed is sufficient, while nothing short of this will answer. Therefore if the thief has the absolute control of the thing but for an instant, the larceny is complete. Thus in the case where one lifted a bag which he meant to steal

from the bottom of a coach, but before it was completely above the space it occupied he was detected; yet every part of it having been raised from where the particular part had lain, the court held that the asportation was sufficient. And in another case where one with a felonious intent seized another's pocket-book in the vest pocket and lifted it about three inches from the bottom of the pocket when his operation were intersepted, it was held to be a complete larceny. But the asportation was held not sufficient when a person who was in a wagon set a bale upon its end, and cut the wrapper the entire length, yet was apprehended before he had taken anything out of the bale. Again merely to turn on its side a barrel turpentine, which stood on its end, was not an aduquate asportation of it to constitute larceny, and where goods in a shop were tied to a string fastened to one end of the counter, when a thief carried them away as far as the

string would permit, he was held not to have committed larceny because of their being thus attached. The same rule was applied where a purse was fastened in this way to a bunch of keys and was taken from the pocket, while the keys remained in the pocket. It was held that there was no asportation, since there was no complete severance from the person. In these several cases the prisoners control over the thing was not for an instant perfect; if it had been it would have been sufficien even though the control the next instant had been lost. So the court held that when a man's watch and chain were forced from his pocket, but the key of the watch immediately caught and fastened itself upon a button that the larceny was complete.

As to whether the thief can give a good title. It seems that if the thief obtained the goods by common law larceny he cannot give a good title. In the case of Saltau v.

Gerdau, (119 N. Y. 380. ', a broker obtained possession of goods by a common law larceny from the true owner, the court held that he could not give a good title to a boni fide holder, and that the factor's act would not protect such a holder, as the owner never intended inlaw to part with the possession.

As to whether it is necessary that the property should be taken Lucri Causa. There seems to some difficulty as to the law on this point. In the case of Delk v. State, (64 Mississippi 77), they held that it was not necessary to constitute larceny that the taking should be lucri causa, but the taking need only be fraudulent. Again in Wilson v. State (18 Texas App. 278, it was held that to constitute the crime, it must be with intent of permantly appropriating it to the use of the taker. And in Pence v. State, (110 Ind. 95), it seems that it is necessary that there should be a

felonious intent to steal the same, and the taking must be for the purpose of gain. Again in the case of People v. Woodard, (31 Iun ??), it was held that must be an intent on the part of the taker to obtain some advantage from such taking. This it would seem is the prevailing doctrine though disputed by some of the authorities.

As to the intent. In Wolfstein v. People, it was held that one who receives from another money to which he is not entitled to, and which he knows has been paid to him by mistake yet appropriates it to his own use, is guilty of larceny because of the fraudulent intent. Again in Hilde-brand v. The People, (56 N. Y. 397.), it is said that when the property is delivered voluntarilly, without fraud or artifice to induce it, the animus furandi will not make it larceny because in such a case there can be no trespass and there can be no larceny without trespass.

Larceny from the person is either by privately stealing or by open and violent assault which is usually termed robbery. A conviction of the offense of privately stealing from a person or by picking his pockets without his knowledge, was attended by a more severe punishment than the ordinary larceny of the common law and by the Statute of Elizabeth, the culprit was debarred the benefit of clergy.

Thus we have shown the evolution of the laws governing the crime of larceny; its definition in different times and different ages and under different codes, from the commencement of the Christian era down to the present time. We have also shown that it is attended with a less severe punishment than formerly, because as men become more enlightened they frame their laws not so much to avenge the wrongdoer but to correct the evil.