

FULTON vs. THE STATE.

In order to constitute larceny, there must be a taking of the goods either actual or constructive; and the felonious intention must exist at the time of the taking; otherwise, no subsequent felonious intention will render the previous taking felonious.

The crimes of larceny and embezzlement are wholly separate and distinct, and the same evidence will not support an indictment for both offenses. The 5th sec. of Art. 3, ch. 51, Dig., was designed simply to extend and lay down with greater particularity the crime of embezzlement, and make the punishment the same as in larceny.

Evidence tending to establish the offense of embezzlement, is not admissible under an indictment for larceny; nor can the law defining the former and prescribing the punishment govern on an indictment for the latter offense.

Appeal from Pulaski Circuit Court.

THIS was an indictment for stealing a horse. The proof was that the owner loaned the horse to the prisoner to ride to a neighbor's house. The prisoner went to the neighbor's, and on the next day came to Little Rock, and sold the horse at public auction. Verdict of guilty and judgment. The defendant appealed.

JORDAN and P. TRAPNALL, for the appellant. Evidence of embezzlement will not support an indictment for larceny, although the *Rev. Stat., ch. 126*, declare that a party who embezzles money or goods, shall be deemed by so doing to have committed the crime of larceny. *Com. v. Simpson*, 9 *Metc.* 138.

There must be a trespass to support larceny. *Felter v. The State*, 9 *Yerg.* 397. *Hile v. The State*, *ib.* 204. 5 *Yerg.* 154. *Porter v. State, Mar. & Yerg.* 526.

The felonious intention must exist at the time of taking, else there can be no theft. 2 *Stark. Ev.* 606. *The People v. Ander-*

son, 14 J. R. 294. 3 Dev. 473. 1 Breese 277. East P. C. 694.
1 Ry. & M. 160.

CLENDENIN, Attorney General, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The appellant was indicted for the crime of larceny, and the first question presented, for the consideration of this court is, whether the charge is sustained by the proof.

In order to constitute larceny, there must be a taking of the goods, either actual or constructive. An actual taking, is where the goods have been actually taken out of the owner's possession, against his will or without his consent; and a constructive taking, is where the owner delivers the goods, but either he does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud and in pursuance of a previous intent to steal them. See *Arch. Cr. P.* 274, and the authorities there cited.

It is contended, in behalf of the appellant, that the indictment being for larceny, it is not sustained by the evidence, as that could not establish a higher species of crime than that of embezzlement. The 5th sec. of Art. 3 of chap. 51, of the *Digest* enacts that "If any carrier or other bailee shall embezzle or convert to his own use, or make way with, or secrete with intent to embezzle, or convert to his own use, any money, goods, rights in action, property, effects or valuable security which shall have come to his possession, or have been delivered to him, or placed under his care or custody, such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, shall be deemed guilty larceny, and, on conviction, shall be punished as in cases of larceny."

It will be conceded by all, we think, that, before the passage of the act referred to, the crimes of larceny and embezzlement were wholly separate and distinct, and that evidence appropriate to support an indictment for the one, was not admissible to sustain one for the other. The true point, then, to be determined is,

whether this statute was designed to confound the two offences, or, in other words, was it intended to extend the sphere and definition of larceny, and to recognize such facts as theretofore would only show an embezzlement, as being sufficient to sustain an indictment for larceny. We are of opinion that such a construction would not be fair and legitimate from the spirit and intent, or even from the words of the act. The act was not designed to dispense with the necessity of indicting for embezzlement, but simply to extend and to lay down, with greater particularity, the crime of embezzlement, and to raise the punishment to the same degree as that which was denounced against persons guilty of larceny.

The case of *The Commonwealth v. Simpson*, reported in 9 *Metcalfe*, at pages 141, 2 and 3, is strongly in point. In that case, the court said, "We have, however, at the request of counsel, and with reference to further proceedings in this case, considered the general question, whether an indictment for simple larceny is an appropriate and legal form for charging a case of embezzlement under the *Rev. Sts., ch. 126, sec. 30*. The statute, in express terms, says, that the persons doing certain acts 'shall be deemed, by so doing, to have committed the crime of simple larceny.' Treating this statute as one defining the offence of larceny, and, under the legislative authority, embracing within it a larger range of offences, to be hereafter known and recognized as larcenies, it would well authorize all offences described in it to be charged as larcenies, relying upon the statute as an authority for the position, that the cases may be punished as larcenies. But we do not feel authorized to give so broad a construction to this statute, and one which would entirely merge the crime of embezzlement in that of larceny. The general object of the various statutes in relation to embezzlement, in England and in this Commonwealth, doubtless was to embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party, screened him from punishment. They were therefore de-

clared crimes punishable by law. The purposes of this statute may, as it seems to us, be sufficiently attained without any infringement of those rules of criminal pleading which require the charge to be particularly and certainly set forth. The defendant should, as far as is reasonably practicable, be apprised by the indictment of the precise nature of the charge made against him. This, in embezzlement, so far as respects the nature of the offence or character of the crime charged, may be easily indicated by setting forth the fiduciary relation or the capacity in which the defendant acted, and by means of which the property came into his possession, and by charging the fraudulent conversion. Such seems to have been the practice under the English Sts. 21 *Hen.* 8, c. 7: 39 *Geo.* 3, c. 35, and 52 *Geo.* 3, c. 63. See the forms of indictment in 3 *Chit. Crim. Law*, (4 *Amer. Ed.*) 961 *et seq.* *Arch. Crim. Pl.* (1st *Ed.*) 156. The court are of opinion that the two offences of larceny and embezzlement are so far distinct in their character, that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and that in cases of embezzlement, the proper mode is, notwithstanding the statute to which we have referred, to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. Although the party, in the language of the statute, "shall be deemed to have committed the crime of simple larceny," yet it is a larceny of a peculiar character, and must be set forth in its distinctive character.

We conceive the two statutes to be substantially the same, and consequently subject to the same construction. If then evidence going to establish the offence of embezzlement, was not admissible under this indictment, it is clear that the court erred in reading the act concerning embezzlement to the jury, and in stating to them that that was the law by which the case must be governed, in case the evidence should be found sufficient to make out the offence contemplated by it.

The court also erred in refusing to give in charge the second instruction submitted by the counsel for the appellant. This was, "That, unless the defendant had a felonious intention at the

time of taking the horse, that no subsequent felonious intention will render the previous taking felonious." This instruction was predicated upon the law, and under the circumstances of the case the appellant was clearly entitled to the benefit of it. The proof utterly fails to show an actual taking, or that the appellant obtained possession of the property against the will or without the consent of the owner; but, on the contrary, it appears, beyond a doubt, that it was voluntarily delivered to him. This being the true state of case, the most material, and indeed the only question left to be determined by the jury, was whether he so obtained it *bona fide*, or *animo furandi*. Having obtained the property by the consent of the owner, he cannot be legally convicted upon the present indictment, unless it shall appear from the facts as developed in the cause, that he harbored at the time an intention wrongfully to convert it to his own use. This is a familiar principle in the criminal law and was expressly recognized by the supreme court of New York, in the case of *The People v. Anderson*, 14 *Johnson Reports*, page 298.

The court in that case say, "It was urged on the part of the people, that the same test ought to be applied in the case of the finding of a chattel and its subsequent conversion to the use of the finder, to ascertain the felonious intention, as has been applied where goods, and particularly horses and carriages, have been feloniously obtained, under the pretence that the person applying for and obtaining them, would use them for a certain specified purpose, and then has gone off with them, and converted them to his own use. On a slight examination, the cases will be found to be very dissimilar. In the latter case, there must have been an original felonious intention, and unless this can be fairly deduced from all the facts in the case, it is no felony. Where that original felonious intention exists, although the person having it has obtained the consent of the proprietor to let him have the possession for one purpose, he intended to get it for another and far different purpose; and he therefore never had had the possession for this different and fraudulent purpose, and may be fairly said to have acquired possession feloniously." The intention,

therefore, with which the appellant obtained possession of the horse, was the turning point in the case, and consequently it was his undoubted right to have the jury pass upon all the facts in order to ascertain whether such intention existed at the time of taking, or whether it was the result of subsequent reflection.

We are clear, therefore, that in these respects, the court below, erred, and that consequently its judgment ought to be reversed. The judgment of the Pulaski circuit court herein rendered, is consequently reversed, annulled and set aside, and the cause remanded, with instructions to be proceeded with according to law, and not inconsistent with this opinion.
