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The Problem of Similar Offenses

CRIMINAL LAW

THE PROBLEM OF SIMILAR OFFENSES

L., a sales department manager, feloniously took goods from his own and other departments and removed them, during and after store hours, from the establishment where he was employed. He had no authority to remove goods from the premises without procuring a requisition. L. delivered the goods to G., who knew that they had not been legally obtained. G. subsequently sold them, sharing proceeds with L. Charged with grand larceny, L. pleaded guilty. G. was later tried and convicted for receiving stolen goods. Motion for new trial on grounds that verdict was contrary to law and not sustained by sufficient evidence overruled. Ruling assigned as error. *Conviction*, reversed: Statute[1] defines distinct offenses of feloniously receiving stolen goods and feloniously receiving embezzled goods. Where affidavit charged receipt of stolen goods and evidence showed receipt of embezzled goods, the variance requires reversal. *Gentry v. State*, —— Ind.——, 61 N.E. (2d) 641 (1945).

This case presents the anomalous situation of a defendant charged with and convicted of receiving stolen goods from a person who plead

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5. Bank of Morgan v. Reid, 27 Ga. App. 123, 107 S.E. 555 (1921); Fricke v. Angemeier, 53 Ind. App. 140, 101 N.E. 329 (1913); Burk v. Ottawa Gas and Elec., Company, 87 Kan. 6, 123 Pac. 857 (1912). But see Guaranty Trust Co. of N.Y. v. Grand Rapids G. H. and M. Ry Co., 7 F. Supp. 511, 520 (W.D. Mich. 1931).
6. Eyster v. Centennial Board of Finance, 94 U.S. 500 (1876).

1. Ind. Stat. Anno. (Burns' 1933) § 10-3097: "Receiving Stolen Goods. Whoever buys, receives, conceals, or aids in the concealing of, anything of value, which has been stolen, taken by robbers, embezzled, or obtained by false pretenses, knowing the same to have been stolen, taken by robbers, embezzled, or obtained by false pretenses, shall, . . . "

   The problem presented in the principal case would not arise in any of the states cited in the Burns' list of comparative legislation. Under a similar statute, the Ohio court has held averment of the character of the offense by which the property was originally wrongfully obtained unnecessary. Whiting v. State, 48. O.S. 220 (1891). The other legislation is not strictly parallel: Idaho has a separate statute defining receipt of embezzled goods; Illinois and Oregon classify embezzlement as larceny and goods obtained by embezzlement are "stolen"; California and New York have theft legislation and the property would be "stolen" regardless of the species of theft involved.

guilty[2] of larceny escaping initial liability[3] because the court determined that the original taker had not "stolen" the goods but had "embezzled" them. Since there was no evidence from which the jury could find larceny,[4] "stolen goods" had not been received; a material

2. "Nobody had talked to him about the difference between larceny and embezlement." Brief for Appellant, p. 70, Gentry v. State, —— Ind. ——, 61 N.E. (2d) 641 (1945). With the problem presented in the text, compare the effect of an improvident plea of guilty made through mistake of law concerning the offense committed: Overruling a timely motion to permit withdrawal of the plea stating that the defendant was not guilty of the crime charged would be an abuse of discretion. Capps v. State, 200 Ind. 4, 161 N.E. 8 (1928). Motion for new trial will not be entertained. Meyers v. State, 156 Ind. 388, 59 N.E. 1052 (1901). Appeal may be made, however, to test sufficiency of charge to which the plea was addressed. Pattee v. State, 109 Ind. 545, 10 N.E. 421 (1886). In Indiana, no appeal would lie on behalf of the state. The error of law does not prevent an effective plea of double jeopardy to the correct charge for the same transaction. State v. Morrison, 165 Ind. 461, 75 N.E. 968 (1905). A writ of coram nobis might be available. Trattner v. State. 185 Ind. 188, 113 N.E. 243 (1916); Orfield, "Write of Error Coram Nobis" (1932) 8 Ind. L. J. 247. Granting a writ of coram nobis would constitute a waiver of the plea of double jeopardy. Kleihege v. State, 202 Ind. 546, 177 N.E. 59 (1931). It remains unlikely that any attempt would be made to contest a lighter sentence, e.g. larceny rather than embezzlement.

3. Motion for new trial constitutes a waiver of the plea of double jeopardy. State v. Balseley, 159 Ind. 395, 65 N.E. 185 (1902). Statute of limitations is tolled during pendency of the motion.

4. "In our opinion only one reasonable inference can be drawn from the facts in this case . . . that the merchandise . . . was embezzled." Principal case at 641. The statement of facts given in the text includes facts not contained in the opinion. Compare principal case at 641. L. testified that he "worked inside the store," that he took a drill and tires "from the service station" which was "out of my department." Certified transcript of evidence quoted in Brief for Appellant, pp. 64, 68, 61, 66, Gentry v. State, —— Ind. ——, 61 N.E. (2d) 641 (1945). The store manager testified that "under the rules of the company or under any of my rules," L. or any other employee "was not privileged to take any merchandise belonging to our company out of the store unless it was properly recorded." Id. at 93. L. admitted he had not obtained requisitions. Id. at 68, 96.

The embezzlement statute specifies a misappropriation by an employee of the employer's property to which he has access, control or possession "while in such employment." Ind. Stat. Anno. (Burns' 1933) 10-1704. The statute incorporates the crime of larceny by servant, making the nebulous distinction betwen custody and possession relatively unimportant. State v. Wingo, 89 Ind. 204 (1863). The determinative question is whether "the property at the time of the conversion is rightfully in the control or possession of the wrongdoer, by virtue of his employment." Wynegar v. State, 157 Ind. 577, 580, 62 N.E. 38 (1901); Note (1921) 11 A.L.R. 801. The property must be obtained within the scope of employment. Colip v. State, 153 Ind. 584, 55 N.E. 739 (1899); Bowen v. State, 189 Ind. 644, 128 N.E. 926 (1920). The conversion must occur during the employment. Wynegar v. State, supra at 580.

In the instant case, it is submitted that no special trust

element of the crime charged had not been established.[5] The defendant had been convicted for a crime of which he was innocent. The fact that he was guilty of another and similar offense which might have been charged is legally irrelevant; the conviction was contrary to law.[6]

The court preferred, however, to justify the reversal on the ground of variance.[7] In Indiana, a variance "which does not tend to prejudice the substantial rights of the defendant upon the merits" is to be deemed immaterial.[8] Whether a variance affects substantial rights is to be determined by reference to the principles underlying the general rule of criminal procedure that allegations and proof must correspond; namely (1) that the accused shall be definitely informed as to "the nature and cause of the accusation against him," so that he may be enabled to present his defense and not be taken by surprise by the evidence offered in trial;[9] and (2) that he may be protected

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existed regarding property taken from departments other than L.'s own; property taken after closing hours is not taken "during employment." Similar fact situations have supported convictions for larceny rather than embezzlement. Marcus v. State, 26 Ind. 101 (1866); Com. v. Davis, 104 Mass. 548 (1870); Com. v. Barry, 116 Mass. 1 (1874); Zysman v. State, 52 Tex. Cr. Rep. 432, 60 S.W. 669 (1901); Note (1940) 125 A.L.R. 373: 87 Am. St. Rep. 19 (1902); 88 Am. St. Rep. 559 (1903). The rationale most consistent with the embezzlement statute is that the physical possession was not obtained within the scope of employment; many of the cases cited in the annotations depend on the trespass to the constructive possession of the master by a servant having merely custody. The recent decision of Warren v. State, —— Ind. ——, 62 N.E. (2d) 624, is in the same category. "The facts in Gentry v. State, supra, clearly distinguish it from the case at bar." Id. at 625. It is submitted that the facts reported in the opinion do distinguish the cases but that the facts certified from the trial court afford no clear ground for distinction.

5. Davis v. State, 196 Ind. 213, 147 N.E. 766 (1925).
6. Deal v. State, 140 Ind. 354, 39 N.E. 930 (1895); Luther v. State, 177 Ind. 619, 98 N.E. 640 (1912).
7. Principal case at 642.
8. Ind. Stat. Anno. (Burns' 1933) § 9-1127 cl. 10. Thirty-one states have comparable legislation. This type of legislation reflects a relaxation of the rigor of old common law rules of criminal pleading which made any variance fatal. The earlier rules "were merely artifices of mercy developed not to protect innocence, but to shield guilt from the unjustifiable savagery of the common law." Kavanagh, "Improvement of Administration of Criminal Justice by Exercise of Judicial Power" (1925) 11 A.B.A.J. 217, 220. For discussions of the practices culminating in such legislation see Perkins, "Absurdities of Criminal Procedure" (1926) 11 Iowa L. Rev. 297; Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 A.B.A.Rep. 395.
9. U.S. Const. Amend. VI; Ind. Const. Art I, § 13. "The words 'nature and cause of the accusation' have a well-defined meaning, . . . that meaning is that the gist of an offense shall be charged in direct and unmistakable terms." Hinshaw v. State, 188 Ind. 447, 124 N.E. 458 (1919); "For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth . . ." United States v. Cruikshank,

against another prosecution for the same offense.[10] Accordingly, a variance is not prejudicial where allegations and proof substantially correspond, or where the variance is not of a character which "could have misled the accused on trial," or where the allegation is surplusage.[11] A variance is prejudicial whenever the indictment or information charges a specific offense and the proof establishes commission of a different crime not included in that charged.[12]

When tested by the basic principles stated above, the latter rule seems in at least two situations to result in an insistence upon technicality at the cost of substantial merit: (1) where a single transaction may constitute one of several (as opposed to one or more) related offenses depending upon elements external to the immediate fact situation;[13] and (2) where subdivisions are found to exist within crimes having the same gist.[14] The instant case illustrates both sit-

92 U.S. 542, 558 (1875); Berger v. United States, 295 U.S. 78, 82 (1935); cf. Ind. Stat. Anno. (Burns' 1933) § 9-1104.

10. Berger v. United States, 295 U.S. 78, 82 (1935); Edwards v. State, 220 Ind. 490, 494, 44 N.E. (2d) 304, 306 (1942). See generally, Millar, "The Function of Criminal Pleading" (1922) 12 J. Cr. L. & Crim. 500.

11. E.g. in the offense of receiving stolen goods. Substantial correspondence: Miller v. State, 165 Ind. 566, 76 N.E. 245 (1905) (description of property received). Not misleading: Marco v. State, 188 Ind. 540, 547, 125 N.E. 34, 40 (1919) (conviction for receiving stolen goods affirmed as against contention that variance existed because property had been taken by robbers; the conceded variance was "not erroroneous as being misleading, uncertain or ambiguous.") (distinguishable from principal case on ground that robbery includes larceny). Surplusage: Blum v. State, 196 Ind. 675, 148 N.E. 193 (1925)) (value of property received). See generally Berger v. United States, 295 U. S. 78, 83 (1935).

12. For Justice Marshall's reasons see The Hoppet v. United States, 7 Cranch 389, 394 (U.S. 1813); Note (1931) 73 A.L.R. 1484.

13. E.g. the external element distinguishing embezzlement from larceny is the employment relation; that fact of employment is within the peculiar knowledge of the employee. Assuming that he has been charged with feloniously taking the goods of X whom he cannot but know to be his employer, it is difficult to see how he could be misled on trial by introduction of evidence of his employment, i.e. why allegation of act and intent is not sufficient information as to the nature and the cause of the accusation against him. Where the offenses are mutually exclusive, a conviction for one is a bar to prosecution for the other on the same transaction. See Orfield, "Federal Criminal Appeals" (1936) 45 Yale L. J. 1223; Miller "Appeals by the State in Criminal Cases" (1927)) 36 Yale L. J. 486. In such situations, both requirements are met. When, however, one or more distinct crimes are committed by the same transaction, the requirement for a valid plea of double jeopardy does not generally exist as against a subsequent charge of the different offense. See Horack, "The Multiple Consequences of a Single Criminal Act" (1937) 21 Minn. L. Rev. 805. The second requirement is not met.

14. E.g. the Indiana decisions (1) that a conviction under a general statute cannot be sustained when the evidence establishes violation of a more specific statute. Robertson v. State, 207 Ind. 374, 192 N.E. 887 (1934) criticized in Note (1935) 10 Ind. L. J. 467; Note (1921) 12 A.L.R. 603. (2) that, if the statute defines two sep-

uations. The absence of prejudice in fact[15] does not, however, warrant sustaining a conviction for one offense because the accused is guilty of another. The principle that all material elements of the crime charged must be established to justify conviction must not be relaxed.

While, on the one hand, the present decision represents a worthwhile effort to preserve important principles, on the other hand, it raises serious problems that result from confused substantive law. The solution lies in legislative simplification of the definitions of crimes.[16]

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arate or distinct offenses, a conviction founded upon violation of one section cannot be sustained upon proof of violotion of the other. Rogers v. State, 220 Ind. 374, 44 N.E. (2d) 343 (1942), 143 A.L.R. 1074, 1076 (1943). Cf Todd v. State, 31 Ind. 514 (1869). Contra: United States v. Nixon, 235 U.S. 231 (1914); Maresca v. United States, 277 Fed. 727 (C.C.A. 2d 1921). Notes (1932) 76 A.L.R. 1534.

15. Consider: the defendant was definitely informed as to what acts of his were the ground for the accusation. He could not have been misled on trial. Marco v. State, 188 Ind. 540, 125 N.E. 34 (1919). The prosecutor need not have alleged either the name of the person who wrongfully obtained the property or the manner in which it was obtained. Semon v. State, 158 Ind. 55, 62 N.E. 625 (1902); Werthheimer & Goldberg v. State, 201 Ind. 572, 169 N.E. 40 (1929), 68 A.L.R. 179, 187 (1930). On subsequent trial, the defendent would be sentenced under the statute entitled "Receiving Stolen Goods" and subjected to the identical punishment imposed. The gist of the offense—feloniously receiving property wrongfully obtained by another—remained identical whether the property had been stolen or embezzled.

16. § 5 of the Criminal Appeal Act of 1907 (7 Edw. VII, c. 23) allows the Court of Criminal Appeal to substitute for the jury's verdict a verdict of another offense, if it appears that the jury found facts warranting such a verdict. Lawson and Keedy, "Criminal Procedure in England" (1910) 1 J. Cr. L. & Crim. 595, 748. Several States have comparable legislation, but the courts have consistently interpreted the provision conservatively. Note 1938) 22 Minn. L. Rev. 211. There is authority that such a change in the "nature of the offense charged" would be unconstitutional. Notes (1920) 7 A.L.R. 1516. This is indicative that an effective solution must be by revision of the initial definitions. E.g. the instant result would not have occurred under a statute which specified merely that the property received must have been unlawfully obtained by another. The area of greatest substantive confusion remains the various allied property offenses. Notes: "Larceny, Embezzlement and Obtaining Property by False Pretenses" (1920) 20 Col. L. Rev. 318; Note (1942) 11 Fordham L. Rev. 323; Beale, "The Borderland of Larceny" (1892) 6 Harv. L. Rev. 244. A statutory amalgation of the crimes of larceny, embezzlement, false pretenses, etc. under the cognomen of theft seems the most satisfactory method to relieve courts from questions arising from the contentions that the evidence shows commission of an offense similar to, but distinct from, that charged. E.g. Cal Penal Code (Deering's 1931) 484 ff. A statement of the facts constituting the offense becomes sufficient charge of the cause against the defendant. In Indiana, permissive joinder of different charges arising from the same transaction is deemed adequate to reconcile effective administration with protection to innocence. Cooprider v. State, 218 Ind. 122, 31 N.E. 53, 132 A.L.R. 553, 557 (1941). Multiple charging of property offenses submitted to the jury without necessity of election by the state and presumptions of a verdict to the valid count indicate practical elimination of the technical distinctions and the desirability, on other grounds, for the simplification suggested.