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Another Larceny-Embezzlement Case

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CRIMINAL LAW

ANOTHER LARCENY-EMBEZZLEMENT CASE

Appellant, member of a maintenance crew working under a foreman, took several cans of Prestone from his employer. Appellant, as well as foreman, had a key to the building where the Prestone was kept. The chief engineer maintained control of the Prestone, and a requisition was required for the appellant to receive Prestone. Appellant admits he had no requisition for this abstraction, nor for his previous wrongful takings.¹ Appellant was bonded by employer for embezzlement, but was convicted of larceny. Appellant contends that his employment was such as to make his crime embezzlement rather than larceny. Held: affirmed. "We regard as immaterial the fact that he was bonded against embezzlement. It perhaps was a circumstance which the court might have taken into consideration in determining the relationship of the parties, but it was in no sense controlling." *Warren v. State* — Ind. —, 62 N.E. (2d) 624 (1945).

The above result is consistent with the common law.² However, all crimes in Indiana are statutory,³ and the act to punish embezzlement⁴ "was intended only to punish acts not before made criminal" . . . and . . . it cannot be held to embrace any taking which before would have been larceny."⁵ 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."⁷ The fact that the employee had access to or control of the article by virtue of employment,

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1. Similar transactions may be shown to prove felonious intent, knowledge, and other similar states of mind. *Anderson v. State*, 218 Ind. 299, 32 N.E. (2d) 705 (1941); *Hart v. State*, 220 Ind. 469, 44 N.E. (2d) 346 (1942).
 2. A servant in or about the house or stable does not have possession since the goods are truly under the master's control. Holmes, "The Common Law" (1881) p. 226.
 3. "Crimes and misdemeanors shall be defined and punishment therefor fixed by statutes of this state and not otherwise." IND. STAT. ANN. (Burns, 1933) §9-2401.
Although under this section all crimes are presumed to be defined and punishment fixed by statute, yet where a crime is not well defined by statute, the courts may look to the common law for a fuller definition thereof. *Simpson v. State*, 197 Ind. 77, 149 N.E. 53 (1925).
 4. "Every . . . employee . . . who, having access to, control or possession of any money, article or thing of value, to the possession of which his employer is entitled, shall, while in such employment, take . . . or in any way whatever appropriate to his own use . . . shall be deemed guilty of embezzlement . . ." IND. STAT. ANN. (Burns, 1933) §10-1704.
 5. In the legislation in New York the law of embezzlement has been uniformly treated as not supplementary to but as more or less amendatory of the law of larceny. The same may be said of the legislation of Alabama. Wharton, *Criminal Law* (12th ed. 1932) §1278.
 6. *Smith v. State*, 28 Ind. 321, 324 (1867).
 7. *Wynegar v. State*, 157 Ind. 577, 580, 62 N.E. 38, 39 (1901); *United States v. Allen*, 150 Fed. 152 (E. D. Ark. 1906).

without a special trust, does not constitute the requisite possession for embezzlement.⁸

In *Colip v. State*,⁹ which was quoted with approval in the principal case, the court speaking of the embezzlement statute said, "Something more than mere physical access or opportunity of approach to the thing is required. There must be a relation of special trust in regard to the article appropriated . . . even where the servant has the care and oversight of property belonging to the master the felonious appropriation of it by the servant is larceny."¹⁰ "The intent was to limit . . . the (embezzlement) statute to cases in which such persons have, as an element of their employment a special trust concerning the money, article or thing . . ." ¹¹ This line of reasoning has been followed in other jurisdictions.¹² A servant authorized to dispose of goods "at his discretion" would have the requisite possession to make his misappropriation embezzlement,¹³ only where the particular facts of the case pointed to the necessary "relation of special trust."¹⁴

Therefore, in the penumbral cases it would seem that the common law possession and custody distinction has made its presence felt through the medium of "special trust."

The suggestion that "Our embezzlement statute is much broader than the earlier statutes and under it an employee may be guilty of embezzlement when he merely has 'access to or control of' any . . . thing of value . . . and it is not necessary that he have possession of the money or thing of value"¹⁵ was dismissed as "dictum" in the principal case.

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8. *Axtel v. State*, 173 Ind. 711, 91 N.E. 354 (1910); *Caldwell v. State*, 193 Ind. 237, 137 N.E. 179 (1922); *Currier v. State*, 157 Ind. 114, 60 N.E. 1023 (1901), *Vinnedge v. State*, 167 Ind. 415, 79 N.E. 353 (1906); *Davis v. State*, 196 Ind. 213, 147 N.E. 766 (1925); *State v. Winstandley*, 155 Ind. 290, 58 N.E. 71 (1900); *Schoenrock v. State*, 193 Ind. 580, 141 N.E. 351 (1923) But cf. *Gentry v. State*, — Ind. —, 61 N.E. (2d) 641 (1945); *State v. Wingo*, 89 Ind. 204 (1883); *Wynegar v. State*, 157 Ind. 577, 62 N.E. 38 (1901).
 9. 153 Ind. 584, 55 N.E. 739 (1899). Here a farmhand who had access to wheat in order to feed stock, took wheat from the granary and sold it, was convicted of larceny.
 10. *Id.* at 586, 55 N.E. at 740.
 11. *Vinnedge v. State*, 167 Ind. 415, 420, 79 N.E. 353, 355 (1906).
 12. *United States v. Strong*, 27 Fed. Cas. No. 16,411 (C.C.D.C. 1821); *Sweeney v. State*, 25 Ala. App. 220, 143 So. 586 (1932); *Roeder v. State*, 39 Tex. Crim. Rep. 199, 45 S.W. 570 (1898); *People v. Moore*, 243 Ill. App. 378 (1927); *Commonwealth v. Brandler*, 81 Pa. Super. 585 (1923); *Komito v. State*, 90 Ohio St. 352, 107 N.E. 762 (1914).
 13. *Colip v. State*, 153 Ind. 584, 587, 55 N.E. 739, 740 (1899), cited *supra* note 9.
 14. *Davis v. State*, 196 Ind. 213, 223, 147 N.E. 766, 770 (1925); accord *Marcus v. State*, 26 Ind. 101 (1866).
 15. *Young v. State*, 204 Ind. 331, 337, 183 N.E. 100, 102 (1932).