



Kentucky Law Journal

Volume 57 | Issue 3

Article 11

1969

Theft in Kentucky

Glen S. Bagby
University of Kentucky

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Recommended Citation

Bagby, Glen S. (1969) "Theft in Kentucky," *Kentucky Law Journal*: Vol. 57 : Iss. 3 , Article 11.
Available at: <https://uknowledge.uky.edu/klj/vol57/iss3/11>

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THEFT IN KENTUCKY

I. INTRODUCTION

The proposed revision of the criminal code for Kentucky attempts to deal with the myriad problems of theft¹—an attempt in accord with other jurisdictions which are troubled with the same difficulties perplexing the Commonwealth.² This paper will examine the common law and statutory law of theft in Kentucky, the proposed code, and the effects it will have on the operating system.

Kentucky is not the first state to attempt revision of its criminal law of theft. Similar efforts have been made in California, New York, Massachusetts, Wisconsin and other jurisdictions, often in conjunction with a general revision of the criminal code of the state.

At common law, larceny was defined as the wrongful taking and removing of the personal property of another by trespass by any person with a felonious intent to permanently deprive him of his property without his consent.³ Many states, including Kentucky, incorporated the common law of larceny into their statutes without further definition. The requirement of a trespass left theft by a servant, although of equal moral turpitude, outside the statute. Specifically, a thief who gained possession of property *with* the permission of the owner could not be guilty of larceny if he formed the intent to steal it *after* receiving the property. Thus, theft by a servant was covered by a stop-gap statute; the offense has come to be known as embezzlement.⁴ The sole distinguishing feature between the offenses of larceny and embezzlement was whether the thief gained initial possession of the goods by trespass.

A further twist was added where a thief, by misrepresentation, defrauded a victim who gave the thief not only possession, but also *title* to the property. This was not larceny, where the thief obtained only possession, nor was it embezzlement, where the thief acquired the property rightfully. As a result, a new crime arose by statute—theft by false pretenses.

¹ See 1 J. BISHOP, CRIMINAL LAW (9th ed. J. Zane & C. Zollmann 1923) [hereinafter cited as BISHOP]; J. HALL, THEFT, LAW AND SOCIETY (2d ed. 1952); J. MAY, LAW OF CRIMES (4th ed. K. Sears & H. Weihofen 1938).

² There have been two summaries of the Kentucky law of theft. See J. GREGORY, KENTUCKY CRIMINAL LAW PROCEDURE AND FORMS (1918) [hereinafter cited as GREGORY]; J. ROBERSON, KENTUCKY CRIMINAL LAW AND PROCEDURE (2d ed. 1927) [hereinafter cited as ROBERSON].

³ *Alexander v. Commonwealth*, 14 Ky. L. Rptr. 290, 20 S.W. 254 (1892).

⁴ 1 BISHOP § 567.

II. THE CURRENT LAW

A. *Larceny*

Kentucky Revised Statute [hereinafter referred to as KRS] § 433.220 provides in part:

Any person guilty of larceny of . . . property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years.⁵

As the Kentucky statute does not define larceny, it is interpreted in terms of the common law:⁶ the unlawful taking and carrying away the goods or property of another, with the felonious intent to appropriate them permanently to the use of the trespasser.⁷

The act of taking and carrying away requires some movement from the place the object occupies,⁸ by trespass,⁹ but does not necessitate the actual removal of the property from the owner's premises. Larceny is not complete until the thief acquires such dominion over the property as to enable him to take control of it.¹⁰ It appears that the property must be taken only from the constructive possession of the owner, as an indictment may properly describe either the true owner or an agent or bailee.¹¹

The original limitation of the subject matter of larceny was personal property which was of at least slight value¹² and which might be taken or carried away.¹³ Larceny in Kentucky has been enlarged by statute to include bonds, deeds, wills, bills obligatory and other paper¹⁴ which at common law were mere evidences of debt and not the subject matter of larceny.¹⁵

Real property has been excluded, as a rule. This exception has resulted in the following distinction:

It is not larceny to take and carry away grass, crops, fruit, trees, fixtures, coal, ores, etc., where the property taken was a part of the realty,

⁵ In addition to KY. REV. STAT. [hereinafter cited as KRS] § 433.220 (1962), there are several larcenies which relate to special property. See KRS Chapter 433; GREGORY §§ 333-50. Petit larceny is covered by KRS § 433.230 (1962).

⁶ *Wombles v. Commonwealth*, 317 S.W.2d 169 (Ky. 1958).

⁷ *Triplett v. Commonwealth*, 28 Ky. L. Rptr. 974, 91 S.W. 281 (1906); see also 1 BISHOP § 566.

⁸ *Wombles v. Commonwealth*, 317 S.W.2d 169 (Ky. 1958).

⁹ *Alexander v. Commonwealth*, 14 Ky. L. Rptr. 290, 20 S.W. 254 (1892).

¹⁰ *Adams v. Commonwealth*, 153 Ky. 88, 154 S.W.381 (1913).

¹¹ *Thomas v. Commonwealth*, 1 Ky. L. Rptr. 407 (1880). See ROBERSON § 813.

¹² For the difficulties in determining value, see *Allen v. Commonwealth*, 148 Ky. 327, 146 S.W. 762 (1912).

¹³ *Eaton v. Commonwealth*, 235 Ky. 466, 31 S.W.2d 718 (1930).

¹⁴ KRS § 433.170 (1962).

¹⁵ ROBERSON § 810.

and the severance and carrying away were parts of the same continuous transaction, so that there was no time between the severance and the carrying away for the property to lose its character as real property, and become personal.¹⁶

The larceny is not complete unless the accused takes the property without the consent of the owner,¹⁷ and with the intent to permanently deprive the owner of his property.¹⁸ In the absence of this intent there is no larceny:

To take property in the absence of an intent to steal, that is, an intention to convert the same to the use of the taker and permanently deprive the owner thereof, is not larceny, though under proper conditions it may constitute trespass.¹⁹

Felonious intent is an essential element and must exist at the time of the taking.²⁰ So where one takes under a bona fide belief that he has a right to the property, although his ignorance of the law does not relieve him, his lack of felonious intent bars conviction for larceny.²¹

And, further, where one takes property with an intent not to permanently deprive the owner, but to return or replace it, there is no larceny. If a man hires a horse in good faith with the intention of returning it and is arrested on the owner's charge of theft before he has a chance to return it, he is not guilty of larceny.²² Similarly, larceny does not include short joy rides in stolen cars or a "borrowing" of property.²³ The permanency requirement may allow a valid defense for the accused:

While it is a defense to a charge of stealing that the prisoner pawned or pledged the property with the intention of redeeming it, it is not a defense to be encouraged, yet if clearly made out in proof, it should prevail; but to make the defense available, there must not only be the intent, but the ability, to redeem.²⁴

¹⁶ *Id.* at § 808. Appropriately enough, the Kentucky Court has held that moonshine whiskey may be the subject of larceny. *Commonwealth v. Collins*, 291 Ky. 685, 165 S.W.2d 357 (1942); *Ray v. Commonwealth*, 230 Ky. 656, 20 S.W.2d 484 (1929).

¹⁷ *Hudspeth v. Commonwealth*, 195 Ky. 4, 7, 241 S.W. 71, 73 (1922).

¹⁸ *Brennon v. Commonwealth*, 169 Ky. 815, 185 S.W. 489 (1916).

¹⁹ *Ford v. Commonwealth*, 175 Ky. 126, 130, 193 S.W. 1026, 1028 (1917).

²⁰ *Cooper v. Commonwealth*, 110 Ky. 123, 60 S.W. 938 (1901).

²¹ *Triplett v. Commonwealth*, 28 Ky. L. Rptr. 974, 91 S.W. 281 (1906).

See GREGORY § 322.

²² *Smith v. Commonwealth*, 129 Ky. 433, 112 S.W. 615 (1908).

²³ *Blackburn v. Commonwealth*, 28 Ky. L. Rptr. 96, 89 S.W. 160 (1905). KRS § 434.040 (1962) "was designed to cover a special situation in the handling of motor vehicles which should be treated as larceny." *Dublin v. Commonwealth*, 372 S.W.2d 416, 418 (Ky. 1963). Although a separate crime, this may also be prosecuted under a general larceny statute. *Clark v. Commonwealth*, 209 Ky. 184, 272 S.W. 430 (1925).

²⁴ ROBERSON § 819.

B. *Embezzlement*

An essential element of larceny was a trespass. But theft by a servant who had obtained the property without trespass was of equal moral turpitude. In efforts to include such theft within the scope of common law larceny, the courts went so far as to say that a servant was guilty of larceny if he had the felonious intent when he gained possession of the property.²⁵ But where the servant took the property in the regular course of his services and thereafter formed the intent to steal it and did so, there was no larceny. In the face of this increasingly common situation, the statutory offense of embezzlement was established to fill the gap.²⁶

Kentucky has two key embezzlement statutes;²⁷ KRS § 434.101 provides:

Any officer, agent or employee of any corporation who embezzles or fraudulently converts to his own use or the use of another bullion, money, bank notes, or any other property belonging to the corporation or any person, which has come to his possession or has been placed in his care or under his management as officer, agent or employee, and the person to whose use the bullion, money, bank notes or other property were fraudulently converted if he assented to the embezzlement or conversion, shall be confined in the penitentiary for not less than one nor more than ten years.

The elements of this offense are that the money or property in question belonged to a corporation;²⁸ that it was lawfully in the possession of the accused by virtue of his office or employment;²⁹ and that he converted it with the fraudulent intent to deprive the owner of his property.³⁰ KRS § 434.220 is not limited to theft from corporations, and provides, in part:

"Any person who sells, disposes of or converts to his own use or the use of another, any money, property or other thing of value without the consent of the owner, shall . . . be imprisoned. . . ."³¹

²⁵ *Id.* at § 898.

²⁶ 1 BISHOP § 567.

²⁷ For an in-depth study of embezzlement in Kentucky, see ROBERSON §§ 897-935.

²⁸ *Runyan v. Commonwealth*, 215 Ky. 689, 286 S.W. 1076 (1926). Kentucky has held that a partner cannot be guilty of embezzling partnership funds, "since the requirement that the property taken shall be that of another means that 'wholly of another,' and partnership funds are not 'wholly of another,' . . ." *Pierce v. Commonwealth*, 210 Ky. 465, 276 S.W. 135 (1925).

²⁹ ROBERSON §§ 906-07. The specified relations are strictly upheld under the statute, and debtor-creditor relationships do not fall within the statute. *Napier v. Commonwealth*, 234 Ky. 724, 29 S.W.2d 24 (1930); *Commonwealth v. Abele*, 160 Ky. 800, 170 S.W. 191 (1914).

³⁰ *Fortney v. Commonwealth*, 290 Ky. 659, 162 S.W.2d 193 (1942).

³¹ KRS § 434.030 (1893) provides penalties for the embezzlement of property
(Continued on next page)

The Kentucky Court of Appeals has interpreted the statute:

This section embraces all cases of fraudulent conversion of funds belonging to individuals by agents, employees or persons acting in a fiducial capacity which were formerly denominated breaches of trust and not indictable under other embezzlement statutes.³²

The accused must be lawfully in possession of the property, because, as has been seen before, if the thief obtained the money by trespass, then the offense would fall under the larceny statute.³³ The property must have come into his possession by virtue of his agency:

While larceny and embezzlement are generally regarded as separate and distinct offenses, *Morgan v. Com.*, 242 Ky. 713, 47 S.W.2d 543, yet the two crimes frequently overlap. In attempting to determine whether a particular crime was larceny or embezzlement, the courts have made subtle distinctions between lawful possession and custody, but in view of the comprehensive provisions of our statute such distinctions are inapplicable.³⁴

KRS § 434.220 "should be construed to include only the misappropriation of funds or property held in a fiduciary capacity."³⁵ This interpretation by the Kentucky Court of Appeals destroys the possibility that the broad language of the statute would include the conversion of money paid, or property conveyed by mistake, which is no other offense and apparently, after *Barney v. Commonwealth*,³⁶ is not embezzlement either.

Criminal intent is a necessary element under any embezzlement statute³⁷ and must generally be determined from the acts of the accused and the circumstances surrounding the case.³⁸ Possible de-

(Footnote continued from preceding page)

entrusted to persons for delivery. The statute embraces carriers who are guilty of fraudulent secreting or converting of property entrusted to them for delivery or carriage. *Warmoth v. Commonwealth*, 81 Ky. 133 (1883). There are other specific embezzlement statutes applying to public officials and those with fiduciary duties. See ROBERSON §§ 915-18.

³² *Runyan v. Commonwealth*, 215 Ky. 689, 692, 286 S.W. 1076, 1077 (1926). See also *Commonwealth v. Barney*, 115 Ky. 475, 74 S.W. 181 (1903).

³³ Unless a person has the intent to steal property at the time he is given possession, he cannot be guilty of larceny. *Fugate v. Commonwealth*, 308 Ky. 815, 215 S.W.2d 1004 (1949).

³⁴ *McGlothen v. Commonwealth*, 310 Ky. 48, 51, 219 S.W.2d 1003, 1005 (1949). But see *Clark v. Commonwealth*, 386 S.W.2d 458 (Ky. 1965). For a revealing insight into the difficulties the Kentucky Court has faced, see the rule as discussed in the earlier case of *Warmoth v. Commonwealth*, 81 Ky. 133 (1883).

³⁵ See *Commonwealth v. Kelly*, 125 Ky. 245, 250, 101 S.W. 315, 316 (1907).

³⁶ 115 Ky. 475, 74 S.W. 181 (1903). See *Cooper v. Commonwealth*, 110 Ky. 123, 60 S.W. 938 (1901), which held that one who received an overpayment by mistake is not guilty of larceny unless he knew of the overpayment at the time it was made and then intended to convert the extra money.

³⁷ See *Robinson v. Commonwealth*, 311 Ky. 867, 226 S.W.2d 29 (1950); *Bell v. Commonwealth*, 202 Ky. 163, 259 S.W. 29 (1924).

³⁸ *National Life & Accident Ins. Co. v. Gibson*, 31 Ky. L. Rptr. 101, 101 S.W. 895 (1907).

fenses to a charge of embezzlement would be that the money was lost;³⁹ that the accused had a bona fide belief that he had a right to hold the property;⁴⁰ and that the money was paid by mistake;⁴¹ but not that the accused intended to return the money later.⁴²

C. False Pretenses

KRS § 434.050 provides, in part:

Any person who, by any false pretense, statement or token, with intent to commit a fraud, obtains from another money, property or other thing which may be the subject of larceny, or who obtains by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making of which would be forgery, shall be confined. . . .

Generally, a false pretense is a misrepresentation of fact by a person who knows the fact to be untrue and who makes it to induce the victim to part with title to his property.⁴³ To constitute the crime of obtaining money or property by false pretenses, the following have been held necessary by the Kentucky Court of Appeals:

(1) a false pretense; (2) the false pretense must be made by the defendant, or by someone, whom he has induced to make it; (3) the defendant must have had knowledge of the falsity of the statement, token or pretense when he made it; (4) the person defrauded must have relied upon the pretense and been induced thereby to part with his property or money; (5) the property or money must have been obtained by the defendant or by someone in his behalf; (6) the defendant must have had an intent to defraud; (7) and lastly, an actual defrauding must have resulted.⁴⁴

A short summary of these elements will show that this offense is technical and of narrow coverage.

The false pretense by which the property is obtained need not be some symbol or token⁴⁵ and may be only "a representation of something as fact, calculated to mislead, which is false to the knowledge of the pretending party."⁴⁶ It need not even be expressed in words and is sufficient if communicated through an act by implication.⁴⁷ It need

³⁹ *Cline v. Commonwealth*, 161 Ky. 678, 171 S.W. 412 (1914).

⁴⁰ *Commonwealth v. Shilladay*, 311 Ky. 478, 224 S.W.2d 685 (1949); *Westerfield v. Prudential Ins. Co. of America*, 264 Ky. 448, 94 S.W.2d 986 (1936).

⁴¹ *Cooper v. Commonwealth*, 110 Ky. 123, 60 S.W. 938 (1901).

⁴² *Mottow v. Commonwealth*, 157 Ky. 486, 163 S.W. 452 (1914).

⁴³ ROBERSON § 938; GREGORY § 376.

⁴⁴ *Rand v. Commonwealth*, 176 Ky. 343, 346, 195 S.W. 802, 805 (1917); *see Taylor v. Commonwealth*, 384 S.W.2d 333 (Ky. 1964); *Rowland v. Commonwealth*, 355 S.W.2d 292 (Ky. 1962).

⁴⁵ 1 BISHOP § 571.

⁴⁶ *Id.*

⁴⁷ *Commonwealth v. Harper*, 195 Ky. 843, 243 S.W. 1053 (1922).

not be made by the defendant himself and is sufficient "if it be done by some one instigated by him to do so."⁴⁸

The victim must have relinquished title to the property in reliance on the statement or pretense which the defendant believed to be false when he made it. If the representation is not false, or if the victim knows that it is false, or if the victim does not rely on the misrepresentation, then there is no offense of false pretenses.⁴⁹ Further, the deception need not be of the standard necessary to deceive persons of ordinary intelligence. The Kentucky rule is that the deception need only be calculated to deceive the person defrauded,⁵⁰ as the purpose of the law is not only to protect the average man, but also to protect the weak from the strong.⁵¹

The subject matter of the first portion of the Kentucky false pretenses statute is expressly limited to the subject matter of larceny which has already been considered. The rightful owner must have parted with something of some value,⁵² although the value of the property obtained is said to be immaterial.⁵³ Similarly, the value or purpose of an instrument is said to be immaterial under the second portion of the statute, where the offense is the securing of a signature on an instrument when the false making of it would have been forgery.⁵⁴ Finally, the title to the property must be secured by the fraudulent device and not just its possession for the offense of false pretenses.⁵⁵

In a case of false pretenses, there must be an intent on the part of the defendant to defraud the victim.⁵⁶ An intent to return the property will not relieve one from criminal liability for false pretenses.⁵⁷ Further, the false pretense must have been material to the

⁴⁸ *Commonwealth v. Harper*, 195 Ky. 843, 847, 243 S.W. 1053, 1055 (1922); see *Commonwealth v. Boyd*, 181 Ky. 382, 205 S.W. 390 (1918).

⁴⁹ *Rand v. Commonwealth*, 176 Ky. 343, 195 S.W. 802 (1917); *Commonwealth v. Beckett*, 119 Ky. 817, 84 S.W. 758 (1905). In *Day v. Commonwealth*, 38 Ky. L. Rptr. 560, 110 S.W. 417 (1908), the Kentucky Court of Appeals held:

[N]o principle is better settled than that the deception must be upon a material point, its falsity known to the maker, made for the purpose of deceiving, and must, in fact, be relied upon by and deceive the party to whom it is made to his prejudice. *Id.* at 419.

⁵⁰ *Finney v. Commonwealth*, 190 Ky. 536, 227 S.W. 999 (1921). See ROBERSON § 940.

⁵¹ See *McDowell v. Commonwealth*, 136 Ky. 8, 123 S.W. 313 (1909).

⁵² ROBERSON § 954.

⁵³ *Jackson v. Commonwealth*, 86 Ky. 1, 4 S.W. 685 (1887).

⁵⁴ *Commonwealth v. Lacey*, 158 Ky. 584, 165 S.W. 971 (1914). See GREGORY § 379; ROBERSON § 996.

⁵⁵ *Commonwealth v. Schang*, 131 Ky. 405, 115 S.W. 218 (1909). See GREGORY § 382; ROBERSON § 958.

⁵⁶ *But see Commonwealth v. Ferguson*, 135 Ky. 32, 121 S.W. 967 (1909), which held that it is immaterial whether the victim actually or ultimately suffers a loss.

⁵⁷ *Commonwealth v. Schwartz*, 92 Ky. 510, 18 S.W. 775 (1892).

defrauding of the victim.⁵⁸ This is sufficient even if the false representations were not made to the owner of the property.⁵⁹

Where there is no false representation, there is clearly no offense under this section,⁶⁰ but where one does exist, the misrepresentation must concern the existence of a past or existing fact.⁶¹ A false statement concerning a future act is said to put one on guard due to the uncertainty of future events.⁶² Therefore, a false pretense concerning a future event is insufficient to constitute an offense.⁶³ The exception is where it is coupled with a false statement concerning a past or existing fact which induces another to rely upon the false promise. This is within the statute.⁶⁴

The uttering of a worthless check which the drawer knows will not be paid is "a degree of the offense of obtaining money by false pretenses."⁶⁵ However, a cold check is covered by a separate statute, KRS § 434.070, under which it is not necessary to show that a false pretense was made, which, as has been seen, is a requirement under KRS § 434.050.⁶⁶

Finally, a distinction is drawn between a false pretense and a statement of opinion. A statement merely expressing the opinion of the maker as to the value or suitability of a location are considered "dealer's talk" and do not come under this section. This distinction is made between superlatives of praise and statements of fact.⁶⁷

III. APPROACHES TO A SOLUTION OF THE PROBLEM

The technical distinctions in the law of theft are the result of historical development. Presently, the courts are required to labor through these distinctions in case after case in a time consuming effort to dispense justice under present law in Kentucky.⁶⁸ A quote from a

⁵⁸ Sweeton v. Commonwealth, 210 Ky. 340, 275 S.W. 827 (1925). For a discussion of materiality of fraud to a false pretense, see ROBERSON § 938.

⁵⁹ Commonwealth v. Johnson, 167 Ky. 727, 181 S.W. 368 (1916).

⁶⁰ Edmonds v. Commonwealth, 149 Ky. 242, 147 S.W. 881 (1912).

⁶¹ Commonwealth v. Harper, 195 Ky. 843, 243 S.W. 1053 (1922).

⁶² GREGORY § 378.

⁶³ See Day v. Commonwealth, 33 Ky. L. Rptr. 560, 110 S.W. 417 (1908).

⁶⁴ Commonwealth v. Tidwell, 162 Ky. 114, 172 S.W. 102 (1915); McDowell v. Commonwealth, 136 Ky. 8, 123 S.W. 313 (1909); Commonwealth v. Murphy, 96 Ky. 28, 27 S.W. 859 (1894).

⁶⁵ Daily v. Commonwealth, 248 S.W.2d 425, 426 (Ky. 1952).

⁶⁶ Commonwealth v. McCall, 186 Ky. 301, 217 S.W. 109 (1919). See ROBERSON §§ 975-78.

⁶⁷ See ROBERSON §§ 960, 972.

⁶⁸ See Note, *Pleading Under the Consolidated Larceny Statute*, 9 FLA. L. REV. 209 (1956):

By clever manipulation of pleading technicalities, defendants were afforded an almost unlimited opportunity to escape or postpone their just

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recent decision by the Kentucky Court of Appeals illustrates this often over-looked fault in the statutes:

Appellant next contends that she was improperly tried under KRS 434.010 [embezzlement by officer, agent or employee of corporation], but should have been tried under KRS 434.050 [false pretenses] or under KRS 433.170 [larceny]. Appellant argues that she did not have possession of the checks or proceeds but only mere custody, and if she did have possession of the checks or proceeds, the possession was not lawfully acquired as required for a conviction under KRS 434.010 Appellant's contention is that an agent or employee of a corporation cannot be guilty of embezzlement of his principal's property if he has formed the intent to appropriate it before it comes into his possession. This contention was expressly rejected⁶⁹

These problems have been recognized in a number of jurisdictions and accordingly have been the subject of diverse remedies.⁷⁰ Primarily two approaches have been taken, one procedural and the other substantive.

The joinder procedure has been a common device.⁷¹ The Kentucky Rules of Criminal Procedure allow joinder of two or more offenses in the same indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together . . .,"⁷² and allow two or more indictments to be tried together if the offenses "could have been joined in a single indictment or information."⁷³ Although this procedure allows the prosecutor to allege larceny, embezzlement and false pretenses, and to proceed to trial on that basis, the burden of deciding which of the three (or more) offenses the accused did commit, if any, is merely shifted to the jury.⁷⁴ This cover does not alleviate the problem but creates lengthy, complex indictments⁷⁵ and a general circumventing of the criminal

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punishment. Recognizing this, the legislatures of several states enacted statutes combining larceny, obtaining property by false pretenses and embezzlement into one crime, termed 'theft' in some states and 'larceny' in others. The purpose of these statutes is to simplify pleading. Most of them provide language of a general nature as a legally sufficient charge for any one of the three crimes. *Id.* at 210.

⁶⁹ *Brundage v. Commonwealth*, 416 S.W.2d 728, 729 (Ky. 1967).

⁷⁰ Peterson, *Needed—A Consolidated Theft Statute in Georgia*, 23 GA. B. J. 461 (1961); Scurlock, *The Element of Trespass in Larceny Under the Statutes*, [hereinafter cited as Scurlock] 22 TEMP. L.Q. 253 (1959); Stumberg, *Criminal Appropriation of Movables—A Need for Legislative Reform*, 19 TEXAS L. REV. 117, 300 (1941).

⁷¹ See 42 C.J.S. *Indictments and Information* § 161 (1944).

⁷² Ky. R. CRIM. P. 6.18.

⁷³ Ky. R. CRIM. P. 9.12. See *Roark v. Commonwealth*, 217 Ky. 539, 290 S.W. 314 (1927).

⁷⁴ Scurlock 255-58. Larceny and embezzlement were early held to be distinct offenses which had to be set out in sufficient terms as to indicate which was being charged. *Commonwealth v. Clifford*, 96 Ky. 4, 27 S.W. 811 (1894).

⁷⁵ Scurlock 258.

procedure. The only effective manner of handling the problem is through proper legislation by the state legislature effecting a substantive change in the statutes.

When conversion through breach of trust and false pretenses arose to challenge the scope of the crime of larceny, they were judicially declared not to be within its scope. This decision, which required additional statutes specifying these acts as criminal conduct, has been recognized as an unfortunate decision and the cause of current problems.⁷⁶ That historical decision may be counteracted today by the state legislature in enlarging the scope of the crime of larceny. However, the repeated construing of the word "larceny" through the years prevents the use of this established term. Rather, the term "theft," which has been described by the Kentucky Court of Appeals as wider than larceny,⁷⁷ is the more appropriate term for a statute which combines the historic crimes of larceny, embezzlement and false pretenses.

Insight into the necessity for such statutory change is not unique to Kentucky. Many other states have enacted legislation to handle the theft problems passed to them by the English common law.⁷⁸ Two general types of statutes have been passed and several judicial interpretations have been handed down, some unfavorable. Statutes were passed in some jurisdictions providing that those who obtained property by embezzlement or false pretenses were "guilty of larceny."⁷⁹ Similar statutes were construed in a variety of ways by different courts, often defeating their intended purpose.⁸⁰ It is significant to note that this procedure retained the old forms of the crimes. The only change is that there is, in effect, an incorporation of the three offenses under one heading, "larceny."

The beauty of such a method is the *certainty* of the criminal law after its adoption, because the constituent crimes remain in the same common law language obviating consideration of the meaning and extent of new terminology. The efficacy of the statute must depend upon the legislature making its meaning clear and the courts construing the statute accordingly. The effectiveness of these statutes has depended on the interpretation given them by the courts.

⁷⁶ 1 BISHOP § 567.

⁷⁷ *McKenzie v. Travelers' Fire Ins. Co.*, 239 Ky. 227, 39 S.W.2d 239 (1931).

⁷⁸ The list includes Wisconsin, New York, Indiana, California, Louisiana, Kansas, Virginia, Florida, North Carolina and Massachusetts.

⁷⁹ Virginia and West Virginia use language of this type. It follows the rationale of several statutes of similar effect in Kansas and North Carolina.

⁸⁰ *State v. Burks*, 159 Mo. 568, 60 S.W. 1100 (1901); *see* *Scurlock* 253. *Contra*, *State v. Wallace*, 118 W.Va. 127, 189 S.E. 104 (1936); *Pitsnogle v. Commonwealth*, 91 Va. 808, 22 S.E. 351 (1895).

There has continued to be an issue as to the constitutionality of the consolidating statutes.⁸¹ Does the accused have the right to know of which of the three crimes he is accused? Under the solution above, as the crimes are still separate in form and apparently only incorporated in effect, there is, at least, a strong argument that the accused is entitled to know of which of the three crimes he stands accused.

A second substantive approach is the consolidation of the various theft offenses into a complete theft statute, replacing the former triumvirate of offenses with *one* crime under *one* statute. This, the most radical approach, is exemplified by the Model Penal Code, and is found under the general heading of "stealing" or "theft" with the offense resting on key concepts such as "appropriation," "control," "obtaining," or "conversion."⁸²

Such a statute provides the opportunity for eliminating the distinctions between the three basic forms of theft. It is questionable whether such statutes assure greater clarity and certainty in the law. The effectiveness varies with the composition of statutes and their interpretation. Most provide for a bill of particulars which enables the accused to request and obtain a more concise statement of the crime with which he is charged in an effort to assure the constitutionality of the statute. But these bills are not generally required to state which of the historic crimes constitutes the theory on which the state has charged the accused and will proceed against him. And even if the theory must be enumerated, there is no variance in the indictment and the conviction if the state changes the nature of its theory from that stated in the bill. There is a question whether such a bill will furnish the defendant with sufficient information:

When the defendant is informed by the bill or the indictment as to the nature of the property alleged to have been taken, the name of the party from whom taken, the time and general circumstances, and other such matters, he has all the significant information needed in order to prepare his defense. If he can prove that he did not take or convert another's property with criminal intent, he will successfully meet any evidence that the Commonwealth may introduce under the indictment. To require the prosecution to elect in such cases would be to continue to afford an opportunity for the frustration of the ends of justice.⁸³

The initial uncertainty of the meaning of such legislation will call for judicial decision as to the meaning and scope of new terms in the statute. Peculiar to the consolidating statutes which rewrite the law

⁸¹ Scurlock 265-69.

⁸² See Hall, *Theft, Law and Society—1968*, 54 A.B.A.J. 960, 961-62 (1968).

⁸³ Scurlock 271-72.

of theft in new terms is the danger of statutes which are too broad.⁸⁴ The subject matter and acts declared criminal may be outside the intended scope of the statute,⁸⁵ but there are certain areas in theft which might properly be extended. One is the subject matter of theft, which might well include real, as well as non-corporeal,⁸⁶ property. The "severance" distinction which continues in Kentucky could be a distinction without a difference as to culpability, if not in law.⁸⁷

Different statutes have been adopted by nearly every jurisdiction which has attempted reform in this area. This is especially true of the consolidating statutes. The basic pattern, and continuing reference, has been the tentative drafts of the Model Penal Code. The key concept, "control," has been accepted by the American Law Institute instead of the traditional element of asportation. The older concept, with generations of interpretation and development was a convenient point at which to distinguish criminal from non-criminal acts. The change has brought criticism from the leading scholar in the field of theft, Professor Jerome Hall of Indiana University:

'Asportation' is an extremely precise test to differentiate the attempt from the consummated crime; and although the difference between attempt and mere preparation is not a precise one, common law formulas and case law provide much help in determining that question The above difficulties concerning 'control' raise serious doubts about the entire plan of the new statutes, since that term is central in most of them.⁸⁸

In the same article, Professor Hall expresses concern about several other parts of the Model Penal Code, which relate to Kentucky theft law. Larceny in Kentucky has traditionally been divided into petit and grand larceny, according to the value of the property stolen. The value at which petit and grand larceny were split has been as low as twenty dollars and presently stands at one hundred dollars.⁸⁹ The related offenses are not separated into degrees. In the new statutes

⁸⁴ See Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608 (1963):

While, as has been noted, some portions of the Code strive too hard for simple, broad general principles, and cause confusion in so doing, others confuse because of the draftsmen's too fertile and too fully-expressed imaginations. *Id.* at 621.

⁸⁵ See Peterson, *Needed—A Consolidated Theft Statute in Georgia*, 23 GA. B.J. 461, 477 (1961).

⁸⁶ See Hall, *supra* note 82, at 961.

⁸⁷ See MODEL PENAL CODE § 223.2 (Tent. Draft No. 5, 1956) distinguishing "movable" and "immovable" property, but including both in the subject matter of theft.

⁸⁸ Hall, *supra* note 82, at 962.

⁸⁹ The distinction between petit and grand larceny under Carroll's KY. STATS. §§ 1194 & 1243 (1893) was \$20. Today the value of demarcation is \$100 under KRS § 433.220 (1962) and KRS § 433.230 (1962). The Proposed Kentucky Criminal Code would set the value at \$250.

with combined offenses, the question of degrees and appropriate pigeon-holing according to the culpability of the crime involved is a serious undertaking.⁹⁰ This division into degrees is necessary in theft statutes, but should not be incorporated into them until research and study assure that the divisions correspond to the seriousness of the crime. The plan incorporated into the Model Penal Code has been criticized on several points.⁹¹ Although he is the "heart of the theft problem," the receiver of stolen property is still treated by most codes as a less serious criminal than, or on a par with, one who steals property of similar value. Professor Hall expresses his concern in a recent article:

The central role of the receiver in the field of theft is ignored when no distinction is made between receiver and thief, and basing the gravity of the offense of receiving on the value of the property received ignores the fact that a junk dealer who buys stolen goods from the neighborhood boys commits harm far greater than that designated by the small value of the stolen property in the individual transaction.⁹²

IV. ISSUES RELATED TO A GENERAL THEFT STATUTE

The distinctions between theft and related offenses are not the sole problems in the criminal appropriation of property. There is an additional issue of whether to include real and non-corporeal property in the subject matter of theft. The intricate problems concerning the establishment of degrees of theft and their scope, as well as those concerning the receiver of stolen goods who continues to escape effective punishment, have been considered. In addition, several other problems must be resolved in any re-examination of theft.

In Kentucky, one who converts an overpayment made to him by mistake is not guilty of larceny unless he knew of the overpayment at the time it was made and at that time intended to convert it.⁹³ And similarly, conversion of lost property does not constitute larceny unless the converter took the property with the intention to convert it to his own use.⁹⁴ This gap is best filled with a statute which specifically makes this conversion a "theft" just as larceny and related offenses. This is the approach taken by the Model Penal Code which requires the finder of lost property or the receiver of an overpayment to take "reasonable measures to restore the property to a person entitled to

⁹⁰ MICHIGAN PROPOSED CRIMINAL CODE [hereinafter cited as PROPOSED MICH. CRIM. CODE] §§ 3206-08 (Final Draft Sept. 1967).

⁹¹ Hall, *supra* note 82, at 961-62.

⁹² *Id.* at 963.

⁹³ *Cooper v. Commonwealth*, 110 Ky. 123, 60 S.W. 938 (1901); For the rule in embezzlement, see ROBERSON § 897.

⁹⁴ *Commonwealth v. Metcalfe*, 184 Ky. 540, 212 S.W. 434 (1919).

have it."⁹⁵ The drafters of the Code deemed it "unnecessary to attempt to spell out" a definition of "reasonable measures" as a section had in an earlier draft.⁹⁶

Since embezzlement is only committed "where there is a trust or confidence intentionally reposed by one party and voluntarily assumed by the other,"⁹⁷ statutes may be passed by the legislature to cover specific relationships. KRS § 434.010 is limited to "officers, agents, and employees," but KRS § 434.220 pertains to "any person." Typically, the Michigan Proposed Code, in covering anyone who "exerts unauthorized control over the property of the owner,"⁹⁸ avoids any difficulty arising from the failure of the existence of such a relationship; "the stress on 'unauthorized control' over the property of the 'owner' removes from consideration any issue of the specific character of the relationship."⁹⁹ This same stress on "control" was the subject of criticism by Professor Hall:

at many points doubts would arise as to where non-criminal action ends where 'control' begins, and there would be no established way to resolve them objectively.¹⁰⁰

The greatest difficulty in false pretenses is that the misrepresentation must be as to a present or past event or fact. Misrepresentations as to future acts do not come within the statute. This requirement in Kentucky, though historically accurate, has been criticized and abolished in several jurisdictions.

An intent to permanently deprive the owner of his property is a requirement in larceny. However, in embezzlement and false pretenses this requirement is not necessary, since the wrongful taking of another's property is sufficient. Therefore, in larceny, an intent to restore or return the property is a valid defense, but in embezzlement and false pretenses, an intent to return the property is not a defense. Legislators, in consolidating any of these offenses will have to consider the effect to be given this requirement; for if the requirement is added to embezzlement, for example, the embezzler may defend that he had only the intent to use the property and intended to return it, but was stopped from doing so by his apprehension for theft. It has been noted that such an additional requirement in embezzlement

⁹⁵ MODEL PENAL CODE § 223.5 (Tent. Draft No. 5, 1956).

⁹⁶ MODEL PENAL CODE § 223.5, Comment (Tent. Draft No. 5, 1956). *But see* PROPOSED MICH. CRIM. CODE § 3215(2): "Reasonable measures" includes but is not necessarily limited to notifying the identified owner or any peace officer."

⁹⁷ ROBERSON § 897. *See also* *Oliver v. Commonwealth*, 251 Ky. 42, 64 S.W.2d 439 (1933); *Commonwealth v. Weddle*, 176 Ky. 780, 197 S.W. 446 (1917).

⁹⁸ PROPOSED MICH. CRIM. CODE § 3205(1)(a) (1967).

⁹⁹ *Id.* at Comment 2.

¹⁰⁰ Hall, *supra* note 82, at 962.

situations "may increase the difficulty of convicting embezzlers who, under present rules, need not have had that intention."¹⁰¹

V. CONCLUSION

An effort to revise the Kentucky theft statutes should contain a combining statute of the kind which provides that those who commit larceny, obtain by false pretenses or embezzle shall be guilty of *theft*. This would solve the problem of the distinctions in the several offenses without adding problems of further interpretations of the language of the separate parts of the new offense. As has been mentioned before, this could have been the law as it was handed down through the centuries had the common law crime of larceny been enlarged, rather than restricted. Certainly this is the way laymen believe the law to be—without the traditional distinctions of trespass, possession and title. The understood crime is the appropriation of the personal property of another without his consent.

The objective of such a statute could be achieved as well through one of the other approaches which eliminate the technicalities that exist in pleading and proof. But this form would retain statutes and case law foundations on which the Commonwealth presently operates and would leave the present law, in the event of any difficulty in the combining statute, under judicial scrutiny.

A bill of particulars should enable the accused to learn under which of the theories the Commonwealth intends to proceed in court, but the Commonwealth should be allowed subsequent amendment in the event of a change in evidence at trial. It should be made clear that this would not require an amendment of the indictment and would not constitute a variance in the indictment and the proof.¹⁰²

Further, the section should make clear that the intent of the legislature and the purpose of the statute is to combine the offenses of larceny, embezzlement and false pretenses in order to avoid distinctions between them. The statute should indicate specifically if it is meant to include non-corporeal property and real property, or either, in the subject matter of the larger crime, theft. Finally, the statute should

¹⁰¹ *Id.* at 963.

¹⁰² See *Commonwealth v. Harper*, 195 Ky. 843, 243 S.W. 1053 (1922). In *Braswell v. Commonwealth*, 339 S.W.2d 637 (Ky. 1960), the Court held:

Generally, a variance between the indictment and the proof is not regarded as material unless it misleads the accused in making his defense or exposes him to the danger of a second conviction of the same offense. . . . The immunity sought to be invoked is a constitutional one against putting an accused in jeopardy twice for the same offense. *Id.* at 638.

clearly state whether it is intended to include misrepresentations as to future acts.

In addition to the above statute, in-depth study should be given the problem of effective legislation against the crime of receiving stolen property.¹⁰³ It has been suggested that this crime should also be combined into the general crime of theft, as it is difficult in some cases to determine whether the accused was the actual thief or the receiver of the stolen property.¹⁰⁴ Effective action by the Legislature in this field is the only significant way in which it can combat the theft rate which comprises eighty-seven per-cent of all reported crimes.¹⁰⁵ These studies should also consider the proper differentiations to be made in dividing crimes against property into degrees. Finally, an effective analysis should be made of the desirability of a theft of services statute in Kentucky similar to the 1966 telephone statute.¹⁰⁶ Such a statute has been suggested as statute 1425 of Chapter 14 of the proposed Kentucky code.

Glen S. Bagby

¹⁰³ See J. HALL, *THEFT, LAW AND SOCIETY* 155-232 (2d ed. 1952).

¹⁰⁴ See Stumberg, *Criminal Appropriation of Movables—A Need for Legislative Reform*, 19 TEXAS L. REV. 300, 318 (1941).

¹⁰⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 19 (1967).

¹⁰⁶ KRS § 434.510(2) (1966). Theft of services was traditionally outside the scope of the theft offenses. The scope of new statutes covering theft of services includes public services (as telephone), transportation, professional services, admission to exhibitions, use of equipment, "labor" and accommodations in hotels and restaurants.

Where compensation for service is ordinarily paid immediately upon the rendering of such service . . . refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay. MODEL PENAL CODE § 223.7 (Tent. Draft No. 5, 1956).