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# CRIMES - PROCEDURE - INDICTMENT - INCLUDED OFFENSE

CRIMES — PROCEDURE — INDICTMENT — INCLUDED OFFENSE — Defendant was indicted for burglary with intent to commit larceny. The jury found him guilty of larceny. *Held*, reversed, burglary not being a compound felony including larceny. *State v. Henderson* (Iowa 1931) 239 N. W. 588.

An indictment or information is necessary to give the court jurisdiction to try one for a criminal offense. *Collins v. Commonwealth*, 195 Ky. 745, 243 S. W. 1058 (1922); *State v. Hataway*, 153 La. 751, 96 So. 556 (1923); *Jones v. State*, 100 Ark. 195, 139 S. W. 1126 (1911). Its purposes are to inform the court of the nature of the cause, to notify the defendant of what he is accused so that he may properly prepare and present his defense, and to enable him to plead acquittal or conviction in bar to a subsequent prosecution for the same offense. *State v. Laflamme*, 116 Me. 41, 99 Atl. 772 (1917);

*State v. Allen*, 12 Ind. App. 528, 40 N. E. 705 (1895). Since the indictment is jurisdictional, a verdict and judgment not supported by a proper indictment are mere nullities. *State v. Duhon*, 142 La. 919, 77 So. 791 (1918). But where one crime includes a lesser, an indictment for the higher confers jurisdiction on the court to try defendant for the lesser. *Watson v. State*, 116 Ga. 607, 43 S. E. 32 (1902); *State v. Matthews*, 111 La. 962, 36 So. 48 (1903); *Mulloy v. State*, 58 Neb. 204, 78 N. W. 525 (1899). To be an included crime it must appear that if, from the elements of the crime charged, certain elements may be taken away, there will be left the necessary elements of another offense. *State v. Marshall*, 206 Iowa 373, 220 N. W. 106 (1928). Tested by these rules the decision of the instant case is right. Burglary may be committed without larceny. An indictment containing every element of burglary would not necessarily contain all of the essential elements of the crime of larceny or support a conviction thereof. *State v. Goodman* (Mo. 1916) 183 S. W. 321; *State v. Johnson*, 167 La. 986, 120 So. 620 (1929); *People v. Curtis*, 76 Cal. 57, 17 Pac. 941 (1888). *Contra, Butts v. State*, 26 Ga. App. 40, 105 S. E. 372 (1920); *Hughes v. State*, 147 Tenn. 241, 246 S. W. 834 (1923). It is a familiar rule that the indictment must contain every allegation necessary to be proved. No allegation is necessary in charging burglary to the effect that the defendant actually took and carried away property. No such allegation appears in the instant case. Therefore no larceny is charged. Obviously, if the accusation is necessary to confer jurisdiction on the court, it is error to instruct or convict as to theories of guilt not supported by the indictment. *State v. Hamilton*, 80 Or. 562, 157 Pac. 796 (1916); *People v. Wallace*, 316 Ill. 120, 146 N. E. 486 (1925); *State v. Leonard*, 135 Iowa 371, 112 N. W. 784 (1907). Logically, then, the court was quite correct in the instant case. Although burglary and larceny are separate crimes, an exception has been raised to the rule requiring an indictment to set out only one crime in the case where both the burglary and larceny grow out of the same transaction. Under such circumstances an indictment charging both is not duplicitous. *State v. Leasman*, 208 Iowa 851, 226 N. W. 61 (1929); *People v. Sharp*, 58 Cal. App. 637, 209 Pac. 266 (1922); *Hancock v. State*, 79 Fla. 701, 85 So. 142 (1920); *People v. Fitzgerald*, 297 Ill. 264, 130 N. E. 720 (1921). *Contra, State v. Frey*, 206 Iowa 981, 221 N. W. 445 (1928). This could have been done in the instant case and the verdict would have been justified, since defendant would then have had sufficient notice. Some courts under such an indictment convict of both offenses under a general verdict of guilty. *People v. Snyder*, 74 Cal. App. 138, 239 Pac. 705 (1925). Others hold that such an indictment will support a conviction of either, but not both. *Thomas v. State*, 18 Ga. App. 101, 88 S. E. 917 (1916). Still other courts hold that the accusation of larceny merely shows the intent and that burglary is the only crime charged. *Thomas v. Commonwealth*, 150 Ky. 374, 150 S. W. 376 (1912). The necessary conclusion is, therefore, that the court in the instant case was right in refusing to sustain the conviction.