



6-1-1957

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Recommended Citation

Henry H. Isaacson, *Criminal Law -- Applicability of the National Motor Vehicle Theft Act to Embezzlement and False Pretenses*, 35 N.C. L. REV. 496 (1957).

Available at: <http://scholarship.law.unc.edu/nclr/vol35/iss4/10>

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background. It is one thing to allow the creditor to exercise his traditional right to pursue either remedy in the first instance; but it is quite a different thing to nullify the statutory policy against deficiency judgments by circumlocution. If the creditor may obtain judgment on the note, levy on the debtor's general assets, and then make up any balance due by foreclosure, he would be in effect obtaining a deficiency judgment in advance.

It is held in North Carolina that a mortgagee cannot subject the mortgagor's equity of redemption to sale under execution for the mortgage debt.²⁰ If North Carolina were also to hold, in accord with Oregon, that foreclosure is waived by suit on the note, it would seem that suit on the note would put the security beyond the reach of the creditor.

ROBIN L. HINSON.

Criminal Law—Applicability of the National Motor Vehicle Theft Act to Embezzlement and False Pretenses

In *United States v. Turley*,¹ the Supreme Court of the United States has settled a conflict between the circuits as to the applicability of the National Motor Vehicles Theft Act² to such crimes as embezzlement and obtaining goods by false pretenses. The Act, more commonly known as the Dyer Act, reads as follows:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."³

The area of controversy has been whether to interpret the term "stolen" as synonymous with common-law larceny, or to allow a broader interpretation which would include the crimes of embezzlement and obtaining goods by false pretenses.

The fifth,⁴ eighth⁵ and tenth⁶ circuits have held that the term "stolen" should be limited to the definition of common-law larceny. In

²⁰ *McPeters v. English*, 141 N. C. 491, 54 S. E. 417 (1906); *Camp v. Cox*, 18 N. C. 52 (1834).

¹ 77 Sup. Ct. 397 (1957).

² 41 STAT. 324 (1919), as amended, 18 U. S. C. § 2312 (1952).

³ *Ibid.*

⁴ *Murphy v. United States*, 206 F. 2d 571 (5th Cir. 1932).

⁵ *Ackerson v. United States*, 185 F. 2d 485 (8th Cir. 1950); *United States v. O'Carter*, 91 F. Supp. 544 (S. D. Iowa 1949).

⁶ *United States v. Hand*, 227 F. 2d 794 (10th Cir. 1955) (dictum); (jury found the defendant intended to steal car from the inception); *Hite v. United States*, 168 F. 2d 973 (10th Cir. 1948).

*Hite v. United States*⁷ where the automobile was obtained by false pretenses, the tenth circuit said:

“. . . When a Federal criminal statute uses a term known to the common-law and does not define that term, the courts will apply the common-law meaning of the term unless the context indicates a contrary intent on the part of Congress. . . . The word ‘steal’ in a criminal statute ordinarily imports the common-law offense of larceny.”⁸

Conversely, the fourth,⁹ sixth,¹⁰ and ninth¹¹ circuits have given the term “stolen,” as used in the Act, a broader interpretation which would include embezzlement and obtaining goods by false pretenses.¹² The language of Judge Shackelford Miller, Jr., in *United States v. Adcock*,¹³ a district court case, is adopted by several of the courts taking this view:

“The word stolen as used in the Dyer Act is not used in the technical sense of what constitutes larceny, but in its well-known and accepted meaning of taking the personal property of another for one’s own use without right or law; and that such taking can exist whenever the intent comes into existence and is deliberately carried out regardless of how the person so taking the automobile may have originally come into possession of it.”

Common-law larceny is the obtaining of possession of personal property, by trespass in the taking and carrying away of the same, from the possession of another, and with the felonious intent to deprive him of his ownership therein.¹⁴ Thus, there seems to be no problem of interpretation when an automobile has been taken and carried away with felonious intent, and without the owner’s consent. The difficulty in interpreting the term “stolen” arises when the title and possession of an automobile are obtained from the owner by means of a worthless check or the like, or under circumstances which amount to a bailment. Those courts which hold the term “stolen” as synonymous with common-law larceny will not apply the Act here. An example of the reasoning in these cases is

⁷ 168 F. 2d 973 (10th Cir. 1955).

⁸ *Id.* at 974-75.

⁹ *Boone v. United States*, 235 F. 2d 939 (4th Cir. 1956); *United States v. Turley*, 141 F. Supp. 527 (Md. 1956) *rev’d* 77 Sup. Ct. 397 (1957). *Contra*, *Ex Parte Atkinson*, 84 F. Supp. 300 (E. D. S. C. 1949).

¹⁰ *Breece v. United States*, 218 F. 2d 819 (6th Cir. 1954); *Wilson v. United States*, 214 F. 2d 313 (6th Cir. 1954); *Collier v. United States*, 190 F. 2d 473 (6th Cir. 1951); *Davilman v. United States*, 180 F. 2d 284 (6th Cir. 1950); *United States v. Adcock*, 499 F. Supp. 351 (W. D. Ky. 1943).

¹¹ *Smith v. United States*, 233 F. 2d 744 (9th Cir. 1956).

¹² *United States v. Sicurella*, 187 F. 2d 533 (2d Cir. 1951) (dictum) (The defendant intended to convert automobile when driven away from the house).

¹³ 49 F. Supp. 351 (W. D. Ky. 1943).

¹⁴ MILLER, HANDBOOK OF CRIMINAL LAW § 109 (1934).

Ackerson v. United States.¹⁵ In that case, defendant wanted to purchase *F*'s car. In return for defendant's check, *F* gave him title and possession to the car. Payment of the check was refused by the bank. In reversing the conviction under the Act, the court held that when an owner of property, although induced by fraud, intends to and does part with his title voluntarily, as well as with his possession of the property, not expecting the property to be returned or disposed of according to his direction, it is not larceny, and therefore, not punishable under the Act.

The courts which hold that the term "stolen" is not the same as common-law larceny, however, will allow these additional crimes to come within the scope of the Act. In *Smith v. United States*,¹⁶ defendant agreed to drive *R*'s car to Arizona. Without authority, he drove in and out of several states and was finally arrested in California. In upholding the conviction of the defendant, the court said: ". . . automobile thieves may obtain cars in many ways. Typically an unattended car is taken. However, a thief may give a dealer a worthless check for a certificate of title. A trusted employee of an automobile dealer may have lawful possession of the stock of cars and later take them into another state and wrongfully sell them. These are larceny, false pretenses, and embezzlement situations; but the evil is the same. The owner of the car is deprived of it and state law is ineffective to protect him.

"Congress would have no reason to differentiate among the various theft crimes. . . . The courts should not graft such a distinction on the statute."¹⁷

In the principal case,¹⁸ the Supreme Court, in a six to three decision handed down by Mr. Justice Burton, reversed the district court and decided the case in accord with the views of the fourth, sixth, and ninth circuits that "stolen," as used in the Act, includes embezzlement and obtaining goods by false pretenses. The Court said:¹⁹

" . . . The Government's interpretation is neither unclear nor vague. 'Stolen' as used in 18 U. S. C. § 2312, 18 U. S. C. A. § 2312 includes all felonious takings of motor vehicles with intent to deprive the owner of the right and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny."

¹⁵ 185 F. 2d 485 (8th Cir. 1950). The same result would obtain if the situation were embezzlement.

¹⁶ 233 F. 2d 744 (9th Cir. 1956). These courts would hold the same way where the automobile had been obtained by false pretenses.

¹⁷ *Id.* at 747.

¹⁸ 77 Sup. Ct. 397 (1957).

¹⁹ *Id.* at 402.

In the course of its decision, the Court recognized the fact that when a federal statute involving criminal law uses a term of established meaning at common-law, without otherwise defining it, that term is given its common-law meaning.²⁰ The Court quotes with approval language found in *Boone v. United States*,²¹ a case which relies mainly upon lexicographers and a quotation from Blackstone, that the term "stolen" was not equated with larceny at common-law. The Court found support for its position in the legislative history of the Act, placing particular reliance on the fact that in the committee reports and floor debates of Congress, there was no mention of excluding embezzlement and false pretenses from the Act, and therefore such crimes were intended to be included within the coverage of the Act. "No mention is made of a purpose to distinguish between different forms of theft as would be expected if the distinction had been intended."²²

From a reading of the Court's opinion, it would seem that the authorities and legislative history of the Act militate to require the result reached.

Notwithstanding those authorities cited by the Supreme Court in the majority opinion, there is much authority for the proposition that at common-law the word "steal" was synonymous with larceny.²³ In *Gardiner v. State*,²⁴ the court said: "The word steal or stealing in a criminal statute when unqualified by the context signifies a taking which at common-law would have been denominated felonious and imports the common-law offense of larceny." And in *Dunnell v. Fiske*,²⁵ Chief Justice Shaw said: "The natural and most obvious import of the word 'steal' is that of a felonious taking of property, or larceny."

Further, in the crime of receiving stolen goods, we find evidence of the common-law meaning of the term "stolen." Bishop, in his work

²⁰ *United States v. Carlil*, 105 U. S. 611 (1881); *United States v. Smith*, 18 U. S. (5 Wheat.) 153 (1820); *United States v. Brandenburg*, 144 F. 2d 656 (3rd Cir. 1944).

²¹ 235 F. 2d 939 (4th Cir. 1954).

²² 77 Sup. Ct. 397, 401 (1957).

²³ *Murphy v. United States*, 206 F. 2d 571 (5th Cir. 1953); *Hite v. United States*, 168 F. 2d 973 (10th Cir. 1948); *Ex Parte Atkinson*, 84 F. Supp. 300 (E. D. S. C. 1949); *State v. Frost*, 289 S. W. 895 (Mo., 1926); *Cohoe v. State*, 79 Neb. 811, 113 N. W. 532 (1907); *Gardiner v. State*, 55 N. J. L. 58, 26 Atl. 30 (1892); *State v. Uhler*, 32 N. D. 483, 156 N. W. 220 (1916); *Riley v. State*, 64 Okla. Crim. 183, 78 P. 2d 712 (1938); *Huges v. Territory*, 8 Okla. 32, 56 Pac. 708 (1899). See also 26 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 769-70 (2d ed.); WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1952). "Steal: to take and carry away feloniously and usually, unobserved; to take or appropriate without right or leave, and with intent to keep or make use of wrongfully. . . ."; BLACK, LAW DICTIONARY (4th ed. 1951). "Steal: the term is commonly used in indictments for larceny . . . and denotes the commission of theft, that is, the felonious taking and carrying away of the personal property of another, and without right and without leave or consent of owner. . . ."

²⁴ 55 N. J. L. 58, 60, 26 Atl. 30, 33 (1892).

²⁵ 52 Mass. (11 Met.) 551, 554 (1846).

on criminal law, seems to indicate that at common-law "stolen," in this sense, meant larceny. He points out that it is only by statute that the receiving of goods obtained by embezzlement and false pretenses is made punishable.²⁶

The committee reports and floor debates,²⁷ which constitute the legislative history of the Act, taken as a whole, give the impression that Congress was confronted with a situation which was purely larceny, and the Act was passed in order to meet this situation.²⁸ There is no mention of embezzlement or obtaining goods by false pretenses in these reports; and although the Supreme Court assumed that if Congress meant to exclude embezzlement and obtaining goods by false pretenses from the Act it would have mentioned such a distinction, it seems just as logical to infer that these crimes were not expressly distinguished, because Congress was not concerned with those situations.

Three times, at the suggestion of the Justice Department, amendments were proposed to clarify this ambiguous situation by including these additional crimes. In each instance, the amendment passed one house of Congress, but failed to come to a vote in the other.²⁹

Mr. Justice Frankfurter writing the dissent³⁰ tersely points out that the majority of the Court has gone a bit too far in construing the Act. "If Congress desires to make cheating, in all its myriad varieties, a federal offense when employed to obtain an automobile that is then taken across a state line, it should express itself with less ambiguity than by

²⁶ 2 BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* §1137(3) (9th ed. 1923): "Some of the modern statutes in their terms embrace the receiving not only of stolen but of embezzled goods, those obtained by false pretenses, and the like. In the absence of such statutes it will not be punishable to receive embezzled goods." *Id.* § 1140 (7): "Though the thing stolen was not the subject of larceny at the common-law, if it was made such by a statute, the receiving of it is a receiving of stolen goods." *Id.* § 1141 (1): "Where embezzlement is an offense distinct from larceny, and the statute contains merely the words 'stolen goods,' the receiving of embezzled goods is not within the prohibition." See also *O'Connell v. State*, 55 Ga. 216 (1875); *Commonwealth v. King*, 9 Cush. 284 (Mass. 1852); *People v. Montage*, 71 Mich. 318, 39 N. W. 60 (1888); *People v. Seaton*, 15 N. Y. Supp. 270 (1891).

²⁷ H. R. Rep. No. 312, 66th Cong., 1st Sess. (1919); S. Rep. No. 202, 66th Cong., 1st Sess. (1919); 58 Cong. Rec. 5470-78, 6433-35 (1919).

²⁸ 58 Cong. Rec. 5470-78 (1919), Rep. Newton of Missouri said: ". . . There is no evil from which there is a greater need for relief than the larceny of automobiles which is being perpetrated by bands of thieves throughout the United States.

" . . . and yet any citizen in any part of the country who leaves his automobile upon the street while he goes to his office, to the church or the theatre has the constant dread in his mind that when he returns his automobile may be gone.

"So prevalent has this evil become that scores of anti-theft and auto locking devices, have been invented . . . and yet so ingenious are the automobile thieves of the country that as rapidly as devices are invented with which to thwart their evil work they devise schemes to overcome them. . . ."

²⁹ S. 1483 (S. Rep. No. 358) 81st Cong., 1st Sess. (1949); S. 675 (S. Rep. No. 2364) 83rd Cong. 2d Sess. § 2 (1953); H. R. 3702 (H. R. Rep. No. 919) 84th Cong., 1st Sess. § 2 (1955).

³⁰ *United States v. Turley*, 77 Sup. Ct. 397 (1957) (dissent).

language that leads three Courts of Appeals to decide that it has not said so and three that it has." Another point raised by the dissent is that Congress has included the additional crimes in question here in other statutes. Section 2314 of Title 18, U. S. C.,³¹ which deals with the transportation of stolen goods, securities, monies, or articles used in counterfeiting, expressly provides for false or fraudulent pretenses, representations, or promises.

In view of the authorities which apparently can be relied upon for support of either of the divergent views, possible arguments in favor of one view or the other must ultimately resolve themselves into differences of opinion on the concept of the judicial function of which the Supreme Court is final arbiter. Clearly, the decision has resolved the conflict and possibly the decision will effect the result which the Congress would have chosen had it finally passed on this issue. The Supreme Court, however, may have overlooked the language of Mr. Justice Holmes in *McBoyle v. United States*,³² which involved an interpretation of the same statute:

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies or upon the speculation that if the legislature had thought of it, very likely, broader words would have been used."

HENRY H. ISAACSON.

Criminal Law—Federal Courts—Appealability of Order Suppressing and Returning Evidence

In *United States v. Ponder*,¹ election officials were indicted for election fraud. Fourteen months earlier the District Court had ordered certain election ballots, books, and returns impounded on application of the U. S. District Attorney. After the indictment, and before trial, the defendants moved for the return and suppression of evidence of the im-

³¹ 48 STAT. 794 (1934), as amended, 18 U. S. C. § 2314 (1952), as amended, 18 U. S. C. A. § 2314 (Supp. 1956); See also 37 Stat. 670, as amended, 18 U. S. C. § 659 (1952) (stealing and embezzlement).

³² 283 U. S. 25 (1931).

¹ 238 F. 2d 825 (4th Cir. 1956).