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CRIMINAL LAW AND PROCEDURE — CHARGING ONE THEFT AS SEVERAL LARCENIES, A SERIES OF THEFTS AS A SINGLE LARCENY—The gist of the crime of larceny both at common law and under statutes is a fraudulent taking of the personal property of another with an intent to appropriate it.[1] One taking coupled with the necessary intent normally constitutes a single offense of larceny, and normally the courts limit their inquiry to whether there is such taking and intent; if the finding is in the affirmative the crime of larceny is established. Yet the courts tend to go beyond these limits of inquiry where the problem arises whether a single offense or several distinct offenses have been com-

[1] 2 WHARTON, CRIMINAL LAW, 12th ed., § 1096 et seq. (1932).

mitted. Two types of situations present themselves: (1) where there is a *single taking* of several articles, *at the same time*, and the articles belong to *different persons*; (2) where there are several *distinct takings* each coupled with a criminal intent. In the first type of situation the courts tend to split the offense into as many different offenses as there are wronged owners.[2] In the second type of situation there normally exist as many offenses as there are takings, since each of them involves the necessary subjective and objective elements of the crime. Yet early precedents are found where several takings at different times extending over a period of many years were combined by the courts to form a single offense.[3] Thus a thief who committed acts which normally would amount to several petty larcenies (misdemeanors) could be convicted under certain circumstances of a single grand larceny (felony).[4]

It is the purpose of this comment to explore the causes and development of this situation and to indicate the present state of the law.

I.

The splitting of a single taking into several offenses evidently originated in a misleading analogy to the civil liability of a thief. If several articles belonging to different owners were taken at the same time and place, the thief was held to have committed as many torts as there were different owners. The use of this analogy disregards the fact that civil liability for damages has nothing to do with criminal liability for the offense against the public. This applies with particular force to those cases where several articles, although owned by different persons, were taken from the possession of one person at the same time and from the same place.[5] However, where several articles are taken at the same time and from the same place from the distinct possessions of several persons, it may be argued that, since a larceny is a felonious taking by trespass *from the legal possession* of another, the taking con-

[2] 32 AM. JUR. 894 (1941); cases collected in 31 L. R. A. (N. S.) 693 at 723 (1911); 42 L. R. A. (N. S.) 967 (1913).

[3] Regina v. Bleasdale, 2 Car. & K. 765, 175 Eng. Rep. 321 (1848); King v. Ellis, 6 B. & C. 145, 108 Eng. Rep. 406 (1826).

[4] The same problem arises in connection with the offenses of embezzlement, receiving stolen property, obtaining property by fraudulent representation and others, as well as in connection with the offense of larceny in those jurisdictions not recognizing degrees of grand and petty larceny but making the degree of punishment depend upon the value of the property stolen.

[5] In State v. Hennesey, 23 Ohio St. 339 at 347 (1879), the court stated: "The particular ownership of the property which is the subject of a larceny, does not fall within the definition and is not of the essence of the crime. . . . neither the legal nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one . . . is the several property of different persons." See also, State v. Egglesht, 41 Iowa 574 (1875).

stitutes as many crimes as there are distinct possessions and trespasses.[5a]

The result reached by the courts is often influenced by the manner in which the problem is presented. Upon an indictment for a single offense, the defendant may raise the question by demurrer upon the ground of duplicity, by objecting at the trial to the introduction of evidence concerning the taking of objects belonging to more than one person, or by a motion that the state be ordered to prosecute only for the taking of objects belonging to one owner. When the question is thus presented, the great weight of authority holds that a single taking of several objects belonging to different owners is a single offense.[6] On the other hand, where defendant is charged with taking one object belonging to *A*, and he pleads in bar a previous prosecution for stealing at the same time and place an object belonging to *B*, the authorities are evenly divided. Some reach the logical conclusion that a single offense was committed, thereby barring a second prosecution,[7] while others, seeking to avoid the consequences of the double jeopardy clause, find distinct offenses.[8] A few courts grant the prosecutor an election to treat the taking as a single offense or several separate offenses.[9]

It is difficult to support the view of those courts which find several distinct offenses. The reasoning, based on the analogy to civil liability, is not persuasive; and open to question is the policy of avoiding the protection against double jeopardy established by both state and federal constitutions.

2.

The second aspect of the problem involves the practice of tying together several distinct takings from a single person into a single offense, although the takings occurred at different times. In a recent New York case a subway employee was convicted of grand larceny for stealing, over a period of time, fares deposited in turnstiles by passengers. He claimed that he had committed many petty larcenies rather

[5a] Phillips v. State, 85 Tenn. 551 (1887); Commonwealth v. Andrews, 2 Mass. 409 (1807).

[6] People v. Johnson, 81 Mich. 573, 45 N. W. 1119 (1890); Chanock v. United States, (App. D. C. 1920) 267 F. 612; 36 C. J. 803 (1924); 18 AM. & ENG. ENCYC. LAW, 2d ed., 531, 468 (1901).

[7] Cases collected in 42 L. R. A. (N. S.) 967 at 973 (1913); State v. Bynum, 117 N. C. 752, 23 S. E. 219 (1895); Wilson v. State, 45 Tex. 76 (1876).

[8] N. Y. Const., art. 1, § 6, "No person shall be subject to be twice put in jeopardy for the same offense. . . ." The Federal Constitution and nearly all state constitutions have similar provisions. The vagueness of the double jeopardy clauses complicates the picture. Some courts hold, for instance, that whereas previous conviction of larceny of property belonging to *A* bars the subsequent prosecution for stealing property of *B* at the same time and place, the acquittal under the same circumstances does not. Wright v. State, 37 Tex. Cr. 629, 40 S. W. 491 (1897).

[9] 42 L. R. A. (N. S.) 967 at 970 (1913).

than a grand larceny, since he did not take at any one time an amount necessary to the crime of grand larceny. Said the New York Court of Appeals in affirming the conviction of grand larceny:

> "... Where the property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a *separate, independent impulse,* each is a separate crime; but if the successive takings are all pursuant to a *single, sustained, criminal impulse* and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act."[10]

Two groups of decisions unanimously support this view. Whenever commodities such as electricity, gas, water, oil, heat, power, etc., are stolen over a period of time, the courts without exception have found a single larceny, a continuous offense.[11] Thus, where a defendant was charged with the taking of a stated quantity of gas on a certain day, an English court held that one continuous transaction rather than a series of acts was proved, the evidence indicating that the stealing extended over a period of years and that the gas was shut off each night at the burner.[12] Similarly the Supreme Court of Illinois found a

[10] People v. Cox, 286 N. Y. 137, 36 N. E. (2d) 84 at 86 (1941), quoting 36 C. J. 798 (1924) (italics added). Substantially the same rule is stated in 2 WHARTON, CRIMINAL LAW, 12th ed., § 1171 (1932). Some consideration should be given to the conception of a "single criminal impulse" or "general scheme." The criminal intent itself is a mere state of mind. There is no direct way to prove it. Under the above rule a new irrational element veiled by the psychological term of "impulse" is added to the already too many irrationalities in the criminal law. The question was first presented to the Court of Appeals of New York in 1926, People v. Gutterson, 244 N. Y. 243, 155 N. E. 113 (1926), but it was not decided because of defendant's failure to raise the point properly. Yet Justice Lehman, writing the opinion for the court, remarked (244 N. Y. at 248) that "conviction ... [would hardly be] less certain if such distinctions were drawn." In view of these observations, the decision in the Cox case handed down 15 years later (Justice Lehman concurring) is not a surprise. In 1939 a bill was introduced in the state legislature of New York adding a new section to the Penal Code. It provided that "the crime of grand larceny may be established by proof either of a single taking or of a series of takings over a period of time, provided that in the latter case it is proved that said takings or appropriations were from the possession of the same person and provided, further, that said several takings or appropriations constituted one single transaction or were motivated by a single intent, impulse, or desire or constituted parts of a common scheme and plan and were committed pursuant to said common scheme and plan." The bill was defeated. SCHWARTZ and GOFFEN, NEW YORK CRIMINAL LAW 412, 413 (1941). Two years later the court unanimously adopted the rule quoted in the text.

[11] The "continuous offense" is described in 2 WHARTON, CRIMINAL LAW, 12th ed., § 1171 (1932). It was known in its technical sense to the Romans and is established in many continental systems.

[12] Regina v. Firth, L. R. 1 Cro. Cas. Res. 172 (1869). The court stressed the fact that the connecting pipe was at all times buried in the earth and that it always contained some of the stolen gas.

single larceny where the defendant's burners were connected continuously to the pipes of the gas company.[13] And the fact that the means by which the defendant deflected the stolen current did not remain continuously in place has been held in a more recent decision to be irrelevant and insufficient to prevent the finding of a continuous transaction.[14]

The second group of decisions in which the courts invariably adhere to the rule of the New York court deals with agents and servants who have embezzled sums of money by several distinct takings over a period of time.[15] In some cases the decision is based upon the fact that the "specific separate peculations cannot be identified and determined," and "unless the mere result of the whole series of transactions may become the basis of one continuous offense no offense is susceptible of proof."[16] This difficulty of proving separate offenses is probably the historical reason for the rule although some courts reach the same result, especially in the more recent cases, in the absence of such difficulties. Their decisions are based on the fact that many acts are systematically instituted and carried out.[17] In other cases there appear both a systematic series of conversions and an impossibility of establishing any separate act.[18] Where the impossibility of establishing the separate offenses of embezzlement is absent, the public policy factors urging the finding of a single offense are not as persistent. And yet, even though every distinct act of embezzlement could be proven sepa-

[13] Woods v. People, 222 Ill. 293, 78 N. E. 607 (1906); 113 A. L. R. 1282 at 1286 (1938); 7 L. R. A. (N. S.) 520 (1907). In the Woods case again the continuous connection to the pipes by a rubber hose seems to be emphasized as essential for the continuous character of the transaction.

[14] United States v. Carlos, 21 Philippine 553 (1911). One cannot escape the conclusion that an uninterrupted taking of commodities constitutes a single offense. The logic, however, does not compel the finding of a single offense where the taking was interrupted (as for instance where the device by which it was effected was periodically removed and reattached). In extending the notion of the "continuous offense," the courts were evidently influenced by the difficulty of proving the various single takings. It is equally clear that there is not much left of the "continuous offense" doctrine in the technical sense.

[15] 1 WHARTON, CRIMINAL PROCEDURE, 10th ed., § 598 (1918). Regulated by statutes in at least three states: California, Louisiana, Massachusetts; also in England.

[16] State v. Peters, 43 Idaho 564 at 571, 253 P. 842 (1927). See also Jackson v. State, 76 Ga. 551 (1886), where a president of a corporation embezzled money over a period of several years and falsified the books to conceal the crime. Ker v. People, 110 Ill. 627 (1884); State v. Reinhart, 26 Ore. 466, 38 P. 822 (1895); State v. Kurth, 105 Mont. 260, 72 P. (2d) 687 (1937).

[17] Willis v. State, 134 Ala. 429 at 450, 33 So. 226 (1901); State v. Wetzel, 75 W. Va. 7, 83 S. E. 68 (1914), where a cashier embezzled over a period of years money of his bank. The bill of particulars set up with minuteness the dates and amounts of money appropriated at various times.

[18] State v. Dawe, 31 Idaho 796, 177 P. 393 (1918).

rately, there would be "almost as many counts in the indictment as there were dollars in the money embezzled,"[19] if all of them were to be charged as distinct offenses.

Aside from these two groups of decisions the authorities are not unanimous. In England, in situations where the difficulty of proving single takings was very serious, if not insuperable,[20] the older decisions declared that "A number of distinct petty larcenies cannot be combined so as to constitute grand larceny."[21] But in a leading and more recent case,[22] an English court held that where the lessee of a coal mine stole coal over a period of four years from many different owners, the shaft extending into many different counties, there was but a single offense. In the long line of cases, this one seems to be the only one where the court hesitatingly found a single offense where the several takings occurred by trespass upon the distinct legal possessions of different owners.

No American authority has gone so far as this English case, but the majority of the courts which have passed upon the question have agreed with the New York view. However, there are some variations in the application of the rule. In a Mississippi case, a lessee who unlawfully removed loads of trees, all of which were owned by his lessor, throughout an entire winter (none of the single loads exceeding the amount of a petty larceny) was found guilty of grand larceny.[23] On the other hand, where the defendant had stolen different parts of machinery from one owner, and sold them regularly to a junk dealer, the court

[19] Brown v. State, 18 Ohio St. 496 at 513 (1869). General discussion in State v. Peters, 43 Idaho 564, 253 P. 842 (1927).

[20] See: Regina v. Henwood, 22 L. T. R. 486 (1870); Regina v. Shepherd, L. R. 1 Cro. Cas. Res. 118 (1868).

[21] King v. Petrie, 1 Leach 294, 168 Eng. Rep. 249 (1784), where a servant had stolen his master's property at different times. See also Rex v. Williams, 6 Car. & P. 626, 172 Eng. Rep. 1392 (1834), where a servant was indicted in one count for taking a certain sum on a particular day and it developed that the money was taken in different sums on different days; the court held that the prosecutor had to make an election and confine himself to one sum and one particular day.

[22] Regina v. Bleasdale, 2 Car. & K. 765, 175 Eng. Rep. 321 (1848). This case could also be included in the group of cases dealing with thefts of electricity, gas, water, oil, etc., coal being of a character somewhat similar to these commodities. Thirteen years after the sweeping Bleasdale decision had been rendered, a statute was enacted in England, 24 & 25 Vict., c. 96, § 71 (1861), ordering the prosecutor to elect under certain circumstances not more than three of the distinct takings on which to proceed. The courts helped the prosecutor to avoid the election by finding that there were no "distinct takings" within the meaning of the statute, but a continuous transaction. Regina v. Henwood, 22 L. T. R. 486 (1870). A similar statute has been enacted in West Virginia and the courts have accepted the English interpretation. W. Va. Code (1931), § 62-2-13; State v. Wetzel, 75 W. Va. 7, 83 S. E. 68 (1914).

[23] Dodson v. State, 130 Miss. 137, 93 So. 579 (1922). Compare Scarver v. State, 53 Miss. 407 (1876).

found that the various thefts did not constitute a "continuous transaction."[24] In a Texas case,[25] the court, attempting to set limits to the notion of what constitutes a "continuous transaction," held that, although several asportations from a single owner committed on one night might be considered to be a single offense of grand larceny, multiple thefts from a single owner committed on various nights could not be considered one single offense. The court looked to the letter of the Texas Code, and speaking about thefts committed on different nights declared that, "Under our statute (Penal Code, Art. 726) these would be separate and distinct offenses." However, there is nothing in the statute which would preclude a ruling that distinct takings executed in one night were also to be considered "separate and distinct offenses." The unfortunate difficulty of the dilemma is clearly reflected in the opinion. Whereas this court pointed to the letter of the code aiming to set limits to the "continuous transaction," the California court invoked its code for the contrary purpose in a rather ingenious manner.[26]

3.

From a consideration of the cases various factors may be suggested as bearing upon the question whether a person who has stolen may be convicted of several distinct larcenies or of only one single larceny.

(1) The courts require that the different takings occur at the same place.[27]

(2) The time elapsing between the takings has been declared

[24] Patterson v. State, 171 Miss. 1, 156 So. 595 (1934).

[25] Lacey v. State, 22 Tex. App. 657, 3 S. W. 343 (1887). See also Flynn v. State, 47 Tex. Cr. 26, 83 S. W. 206 (1904); Cody v. State, 31 Tex. Cr. 183, 20 S. W. 398 (1892).

[26] People v. Dillon, 1 Cal. App. (2d) 224 at 229, 36 P. (2d) 416 (1934). Invoking § 20 of the Penal Code, the court declares that "When appellant once formed the felonious intent to take . . . a certain quantity of merchandise . . . but one offense is committed, though there may have been several deliveries, for in such case there occurs the union or joint operation of act and intent prescribed by law." Cal. Penal Code (Deering, 1937), § 20, reads: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Undoubtedly this provision was intended to embody solely the requirement of both subjective and objective elements of the crime. The fact that the court reads in more demonstrates the difficulty in finding support for the decision in the code. Two judges dissented. See also People v. Mills B. Sing, 42 Cal. App. 385, 183 P. 865 (1919).

[27] When different objects were taken from wagons standing on the same yard, the Missouri court held that different places were involved. State v. Maggard, 160 Mo. 469, 61 S. W. 184 (1901). Where objects were taken from conveyances standing 300 feet apart, an Ohio court held that the taking was from the same place. State v. Smith, 10 Ohio Dec. Reprint 682, 23 Wk. L. Bull. 85 (1890). In Regina v. Bleasdale, 2 Car. & K. 765, 175 Eng. Rep. 321 (1848), the court frankly declared that although the coal was taken from different places, a single offense may be established. No American case has gone that far.

irrelevant in many decisions, but there is authority, especially in older cases, attributing some importance to the time factor.[28] Where there are successive takings from the same place on the same criminal expedition (there being no premeditated plan), the courts seem to require that the takings follow "closely" upon each other.[29]

(3) The articles taken at different times must be taken from the same owner. The courts do not indicate the basis for this requirement, but a possible explanation lies in the definition of larceny as a felonious taking by trespass from the legal *possession* of another. It would seem that the courts have substituted the requirement of single *ownership* for the requirement of a single legal *possession* on the assumption that possession and ownership are united in the same person.[30]

(4) A "single criminal impulse" is required. It is difficult to foresee with certainty the situations in which the court will allow the jury to find such an impulse, but this must be determined by scrutininzing as a whole all the circumstances of the crime, e.g., the regularity of the thefts, the general scheme pursuant to which they have been committed, and the relation between the thief and his victim.[31]

(5) The manner in which the question arises is a factor of importance, and peculiarly so in those cases where there is but one taking of several articles owned by different persons.

Where the question arises on the issue whether or not a thief may be convicted of grand larceny by combining several petty larcenies into

[28] Lacey v. State. 22 Tex. Cr. 657, 3 S. W. 383 (1887).

[29] In Rex v. Birdseye, 1 Car. & P. 386, 172 Eng. Rep. 751 (1830), it was held that where there was an intermission of two minutes between the taking of several articles, this was one transaction; but that it was otherwise when there was an intermission of half an hour. See also In re Jones, 46 Mont. 122, 126 P. 929 (1912); 32 AM. JUR. 894-896 (1941).

[30] There is authority which may be relied upon to justify the abandonment of this requirement. See Regina v. Bleasdale, 2 Car. & K. 765, 175 Eng. Rep. 321 (1848).

[31] The following circumstances coupled with other facts led the courts to find a "single criminal impulse." A conspiracy embracing all the takings, making a "racket" out of the regular takings and hiring a safety box for the money regularly stolen, People v. Cox, 286 N. Y. 137, 36 N. E. (2d) 84 (1941); acting pursuant to a single offer to pay for the several criminal acts, State v. Ray, 62 Wash. 582, 114 P. 439 (1911); the fact that the victim was drunk during the execution of all the criminal acts, Flynn v. State, 47 Tex. Cr. 26, 83 S. W. 206 (1904). Where a lessee steals objects on the leased premises or an employee commits thefts in the place of his employment, the court will be more likely to find a single general scheme than in the case of a stranger stealing regularly from the same place. Dodson v. State, 130 Miss. 137, 93 So. 743 (1922); State v. Patterson, 171 Miss. 1, 156 So. 595 (1934). A master-servant relation combined with the probability that the takings occurred within a short absence of the employer warranted the finding of the necessary "general scheme." West v. Commonwealth, 125 Va. 747, 99 S. E. 654 (1919). See also State v. Mandich, 24 Nev. 336, 54 P. 516 (1898).

one offense, the view illustrated by the New York court[82] seems desirable. Such a decision undoubtedly tends to satisfy the demand for expiation and deterrence, which still are the aims of the criminal law. And when consideration is given to the difficulties which the prosecutor often has to face in proving the several takings, one cannot deny the force of this conclusion. On the other hand, the language of the statutes dealing with the crime of larceny does not lend itself readily to the interpretation that several distinct takings may be combined into a single offense. Furthermore, the vague and hopelessly irrational element of a "single criminal impulse" and the possibility of an unlimited extension of the rule are not without danger and would suggest a legislative solution of the problem.[83]

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[82] People v. Cox, 286 N. Y. 137, 36 N. E. (2d) 84 (1941), discussed supra at note 10.

[83] At least two continental views should be mentioned. The Austrian Penal Code, § 173, provides for the computation of the values of the objects stolen in the following manner: "it does not make any difference whether this amount consists of values resulting from a single or from several, simultaneous or repeated attacks, or whether it was stolen from one or several owners, or whether the theft was committed on one or on several objects." LAMMASCH, GRUNDRISS DES ÖSTERREICHISCHEN STRAFRECHTES, 5th ed., 275 (1926). On the other hand, 4 CARRARA, PROGRAMMA DEL CORSO DI DIRITTO CRIMINALE, 6th ed., parte speciale, § 2064 (1898), claims that the doctrine of the continuing theft is a pure fiction (since in fact there are distinct offenses) and can therefore never be used for increasing the punishment and was introduced in the legal system only to help out the defendant where the punishment for the distinct offenses would exceed that for the continuing transaction as a single offense.