CRIMINAL LAW: Justice of the Peace who collects fines and fails to turn them over is guilty of larceny or embezzlement.

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Honorable Walter C. Hotaling
Prosecuting Attorney
Linn County
Linneus, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "I should like the opinion of your department as to the following situation.
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> "In Linn County it has heretofore been the custom for Justices of the Peace in state cases to collect fines assessed instead of the constables.
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> "In several instances some of the Justices of the Peace have failed to turn over these fines so collected to the County Treasurer as is required of the constables charged with their collection.
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> "Inasmuch as these Justices are not legally charged with the collection of fines, I should like your opinion as to just what offense such conduct constitutes."

Section 3846, R. S. Mo. 1939, provides in part as follows:

> "It shall be the duty of the justice before whom any conviction may be had under this article, if there be no

> appeal, to make out and certify, and, within ten days after the date of the judgment, deliver to the treasurer of the county and clerk of the county court each a statement of the case, the amount of the fine and return day of the execution, and the name of the constable charged with the collection thereof; and the county treasurer shall charge the constable with the amount of such fine, * * *."

In view of the above section, and especially the underlined parts, it will be seen that the duty of collecting the fines is imposed upon the constable and the justice of the peace has no right or authority to collect the same.

Section 4456, R. S. Mo. 1939, provides as follows:

> "Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Embezzlement by an agent is provided for in Section 4471, R. S. Mo. 1939, and reads:

> "If any agent, clerk, apprentice, servant or collector of any private person, or of any copartnership, except persons so employed under the age of sixteen years, or if any officer, agent, clerk, servant or collector of any incorporated company, or any person employed in any such capacity, shall embezzle or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or convert to his own use,

> without the assent of his master or employer, any money, goods, rights in action, or valuable security or effects whatsoever, belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for stealing property of the kind or the value of the articles so embezzled, taken or secreted."

In Section 4473, R. S. Mo. 1939, embezzlement by a bailee is made a crime, and Section 4478, R. S. Mo. 1939, prohibits embezzlement by a public officer.

Larceny at common law was defined as a taking, stealing and asportation of the goods of another (9 Laws of England 628-636). In Missouri the statute dealing with this crime is but declaratory of the common law. State v. Loeb, 190 S. W. 299. Our courts have defined larceny as "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his own use and make them his own property without the consent of the owner." State v. Stark, 249 S. W. 57; State v. Weatherman, 202 Mo. 6, 100 S. W. 482. At common law the courts held that every larceny includes a trespass and that no taking is felonious unless possession is taken without the consent of the owner. Bracton 150B; Rex v. Raven (1663), Kelyng 24. However, in 1779 the decision in Rex v. Pear, 2 East P. C. 685, introduced the doctrine of larceny by trick. That case held that where a person hired a horse, his pretext being that he wished to use the horse in taking a journey, but his actual intent being to steal the horse, that such an action constituted larceny. The court held that although the possession was voluntarily given to the owner, that inasmuch as the intention of the defendant was fraudulent the nature of the possession had not changed but remained in the owner even after the bailment. This being so, there was trespass and larceny (for identical set of facts see State v. Williams, 35 Mo. 229, in which the Pear Case is cited.).

Embezzlement is purely a statutory offense and it did not exist at the common law. State v. Wilcox, 179 S. W. 482;

State v. Harmon, 106 Mo. 635, 18 S. W. 128. It has been defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. State v. Burgess, 268 Mo. 407, 188 S. W. 135; State v. McWilliams, 267 Mo. 437.

The crime of obtaining money under false pretenses is closely allied to that of larceny. The distinction between the two crimes lies in the intention in which the owner parts with the property. If the owner in parting with the property intends to invest the accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretense. But, if the intention of the owner is to invest the accused with the mere possession of the property and the latter with the requisite intent receives it and converts it to his own use, it is larceny. 25 C. J. 657; State v. Kosky, 191 Mo. 1, 90 S. W. 454; State v. Mintz, 189 Mo. 268, 88 S. W. 12.

Therefore, under the facts in the instant case, since the person paying the fine did not intend to pass title to the justice of the peace but merely to invest him with the mere possession of the property to turn it over to the proper person, the crime of obtaining money under false pretenses was not present.

There is still another reason why the justice of the peace in question would not be guilty of obtaining money under false pretenses. In civil actions the rule is that a misrepresentation as to a matter of law cannot constitute fraud. Security Savings Bank v. Kellems, 9 S. W. (2d) 967, Easton-Taylor Trust Co., v. Loker, 205 S. W. 87; Gilmore v. Ozark Mutual Ass'n., 21 S. W. (2d) 633. The foundation for this rule is that everyone is presumed to know the law and that for that reason any misrepresentation as to a matter of law would not be fraud because a person to whom it is made is presumed to know that it was untrue.

In State v. Edwards, 227 N. W. 495, the Supreme Court of Minnesota held that criminal prosecution for false pretenses could not be based upon a fraudulent misrepresentation as to a matter of law. Thus, if the justice of the peace conveyed, either by action or words, to the person who paid the fine that he was the person who was to

collect such fine, this was a misrepresentation as to the law, because, as a matter of law, he had no right to collect the same and, therefore, there was no fraud present.

However, we do believe that the justice is guilty of either larceny by trick or embezzlement, depending upon the time when the intent to deprive the owner of his property was formed. The traditional distinction as to time of intent in embezzlement on one hand, and larceny on the other, has been that intent to deprive the owner of his property must be formed after a lawful possession, to constitute embezzlement, whereas, intent must exist at the time of the taking, to constitute larceny. State v. Gould, 329 Mo. 828, 46 S. W. (2d) 886. Keeping this distinction in mind, we turn to the crime of larceny by trick.

In Farmers Loan & Trust Co., v. Southern Surety Co., 226 S. W. 926, 285 Mo. 621, our Supreme Court said (l. c. 641):

> "Although the rule is that there must, to constitute larceny, be a taking against the will of the owner, still an actual trespass is not necessary. If a person, with a preconceived design to appropriate property to his own use, obtain possession of it by means of fraud or trickery, the taking amounts to larceny, because the fraud vitiates the transaction and the possession of the wrongdoer is still presumed to be the possession of the owner (Frazier v. State, 85 Ala. 17; Grunson v. State, 89 Ind. 533; Commonwealth v. Lannan, 153 Mass. 287; Defrese v. State, 3 Heisk, 53), or, as, is sometimes said, the fraud or trick is equivalent to a trespass (Commonwealth v. Flynn, 167 Mass. 460; People v. Shaw, 57 Mich. 403). In this State it has been settled that where both the possession and title to property has been obtained from the true owner by fraud and falsehood there is no larceny, because the crime is characterized by the terms of Section 4565,

> supra, as obtaining it by false pretenses (State v. Anderson, 186 Mo. 25); but that the crime is larceny where possession of the property is obtained by fraud and trickery with intent to convert it to the use of the wrongdoer, which is afterward accomplished. (State v. Mintz, 189 Mo. 268.) It is by this rule that the present transaction must be judged."

In the early case of State v. Hall, 85 Mo. 669, Judge Sherwood said (l. c. 672):

> "And if defendant obtained possession of the deed of release under the pretense that it was only for a temporary purpose, and, thus securing possession of it, had it placed upon record, this was such a trick or artifice as amounted to a constructive taking and was evidence of an original felonious intent. 3 Greenleaf on Evidence, sec. 160; 1 Bishop Crim. Law, sec. 583; Roscoe's Crim. Evid., 623, 626; 2 Arch. Crim. Pl. & Prac., 1201."

In the case of State v. Scott, 256 S. W. 745, 301 Mo. 409, the defendant told another he could procure for him a suit of clothes at half price. The defendant took the money, returned, gave the purchaser a box and disappeared. When the purchaser reached home and opened the box he found it contained only rags. The court said (l. c. 412):

> "The distinction between the two offenses (larceny and false pretenses) has been very clearly and very definitely defined by this court in several cases. The character of the crime depends upon the intention of the parties. Where by fraud or by artifice, possession of personal property is obtained with a felonious intent to convert it and to deprive the owner of it, and where the title to the property remains in the owner, the offense is larceny. If the owner is induced by

> artifice or fraud to part with the title, then the offense is false pretense. If the owner is induced to part with possession by means of artifice or fraud he is deprived of his property without his consent, the same as if he had been secretely deprived of possession. * * *
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> "It is not contended that the evidence in this case would show embezzlement, or that the action of the court in taking that charge away from the jury's consideration was improper. If, after receiving the money, the defendant had conceived the idea of converting it to his own use, it would have been embezzlement. The evidence shows that when he received the money he intended to convert it to his own use."

The court held these acts constituted larceny by trick because the purchaser intended only to give possession of the money to the defendant for a certain purpose, that is, to buy a suit of clothes, and also that the defendant at the time he received the money intended to convert it to his own use. They, however, pointed out that if the intent to convert had arisen after the money had been given, then the crime would be that of embezzlement because the possession then would have been lawful.

It must be noted that the fraud or trick present in the instant case is not the fraudulent misrepresentation that the Justice of the Peace had the authority to collect the fines, since this was merely a misrepresentation as to law. But, the fraud was that the person paying over the money was induced so to do upon the fact that the justice of the peace would pay over this money to the proper authorities.

We direct your attention to the case of Domer v. State, 199 N. E. 237, decided by the Supreme Court of Indiana. In that case the defendant was Secretary of the Police Department to whom one Coe paid a judgment of fine and cost totaling $40.00. Under the laws of Indiana the secretary of the police department had no authority or right to collect such fines.

The court held that this was larceny by trick, as the Judge pointed out (l. c. 238):

> "* * * In such case the trick or fraud avoids the legal effect of the owner's consent, and the taking is the same as though it had been without the consent of the owner."

However, the court pointed out (l. c. 238):

> "So, in the instant case, if Gee's consent to the taking of the money by Domer had been secured through any trick, fraud, misrepresentation, or deception of the latter, express or implied, as to his authority to receive the money to be applied on the judgment, the effect of Gee's consent to the taking would have been avoided, and Domer's taking would have been unlawful and larcenous."

It will be seen that this court ignores or fails to recognize the doctrine of fraud as to a matter of law. The conclusion of the court seems to be correct but the reasoning we do not believe would be sustained in the State of Missouri.

If the evidence shows that the intent to convert the money arose after the money had been paid, the Justice of the Peace in question would then be guilty of embezzlement. The question then arises as to under what statute he should be charged.

As noted above, Section 4478, R. S. Mo. 1939, provides that if any officer of any municipal township shall convert to his own use any moneys "which may be in his possession, or over which he may have the supervision, care or control by virtue of his office, agency or service, or under color or pretense thereof," shall be guilty of embezzlement.

In State v. Bolin, 110 Mo. 209, 19 S. W. 650, it was held that an officer who collects moneys which he has no authority to do cannot be convicted under this section, because such moneys did not come into his possession by virtue of his office. This holding seems to be in accordance

with the weight of authority. Hartnett v. Texas, 119 S. W. 855; Moore v. State, 53 Neb. 831, 74 N. W. 319; and cases collected in 23 L. R. A. (N. S.) 761. The court further held that this money did not come into the possession of the officer under color or pretense of the office. While this seems to be contrary to the general rule (See 99 A. L. R. 647), still under such a ruling the Justice of the Peace in question could not be charged under Section 4478, supra.

Section 4473, R. S. Mo. 1939, provides for embezzlement by bailee and states, "If any carrier, bailee or other person who shall embezzle or convert" then he shall be punished in the same manner described by law for stealing of property of the nature or value of the article so embezzled. It would seem that when the Justice of the Peace in question received the money that he thereupon became the bailee for the person who so paid him for the purpose of paying such money over to the proper authorities. As was said in Moore v. State, supra "that where an officer receives money which he is not by law authorized to receive, such money is not received by him in his official capacity, and that any duty which he may owe of paying the money is only that which rests upon any debtor or bailee." However, our Supreme Court in State v. Grisham, 90 Mo. 163, 2 S. W. 223, held that a person given a mortgage to be taken to the office of the recorder of deeds and recorded, who converted said mortgage was not guilty under Section 4473 because that section referred to carriers and other bailees, and the court applied the rule of ejusdem generis and held that such a bailee was not included within the scope of the statute. This case has never been overruled. We cannot presume that it will be and therefore under the law at the present time we do not see how the Justice of the Peace in question would be liable under this section.

Section 4471, R. S. Mo. 1939, which is quoted in full at the beginning of this opinion, is the statute relating to embezzlement by an agent. In 2 C. J. 438, it is said:

> "The inference of an agency may be drawn from the facts, together with other circumstances that one is given money to invest or pay over to another."

To the same effect is the Restatement of the Law of Agency, Paragraph 15. Therefore, when the person paid the fine to

the Justice of the Peace he is presumed to know that under the law such Justice of the Peace had no authority to collect the same and that therefore he made him his agent to pay said money over to the proper authorities. So the Justice of the Peace became his agent and would be guilty, under Section 4471, of embezzlement.

We would like to note, in passing, the case of Hamuel v. State, 5 Mo. 260, in which it was held that a person charged as an agent, when in fact he was a bailee, could not be convicted. But, in view of the Grisham Case, supra, we cannot see any other statute under which the Justice of the Peace in question may be convicted but that of embezzlement by an agent.

We suggest that the Justice in question be charged with larceny and if the facts show that he is guilty of embezzlement then the jury can return a verdict that such person is not guilty of larceny but is guilty of embezzlement. State v. Thompson, 144 Mo. 314, 46 S. W. 191; State v. Burgess, 268 Mo. 407, 188 S. W. 135. This procedure is provided for in Section 4842, R. S. Mo. 1939, which provides as follows:

> "If, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not, by reason thereof, be entitled to be acquitted, but the jury shall return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement; and no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts."

Conclusion.

It is, therefore, the opinion of this Department that a justice of the peace who collects fines and converts them unto his own use is guilty of larceny by trick if the intent to convert existed at the time of the taking of possession. However, if the intent arose subsequently, then such person is guilty of embezzlement by an agent.

Respectfully submitted,

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APPROVED:

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