

Summer 1937

Word-Magic and the Embezzlement of Real Property

Orvill C. Snyder

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Orvill C. Snyder, Word-Magic and the Embezzlement of Real Property, 28 Am. Inst. Crim. L. & Criminology 164 (1937-1938)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

WORD-MAGIC AND THE EMBEZZLEMENT OF REAL PROPERTY

ORVILL C. SNYDER*

Can real property be embezzled? If the reader will try this question on lawyer or layman, he will receive conflicting responses. To the lawyer, the question seems one for decision under the wording of the embezzlement statute of each state, and nothing more. To the layman, the social and economic results attendant upon one or the other answer seem of chief significance. I, as a lawyer address myself to the legal aspect; but I do this in full recognition that, if a judicial decision entails immoral, anti-social, or uneconomic consequences, it is high time for lawyers to re-canvass the processes whereby that decision was reached, to discern whether after all the legal auspices themselves have really been read aright.

Can real property be embezzled? In the case of *People v. Roland*,¹ the Second District Court of Appeals in California answers "yes." In *Manning v. State*,² the Supreme Court of Georgia answers "no." From the layman's point of view, this divergence transcends understanding. To him, the lawyer's acceptance of legal verbiage as a sufficient explanation of the conflict is an irritating example of that verbal consistency, which Emerson said is never the concern of great minds. But, what difference does it make whether real property can be embezzled or not?

Importance of Subject—Purpose of Paper

In these days, when a great deal of property is held in trust, when we have systematic and efficacious campaigns to make people trust-minded, it may be neither unimportant nor immoral to protect the interests of the beneficiaries of these trusts by means of the strong arm of the criminal law. According to the Georgia case, trustees may sell land which they hold in trust, however unjustifiably, and still escape criminal punishment. They may completely destroy all claims of beneficiaries to the land by selling to innocent third parties and, even if judgment-proof themselves so that any

* Raymond Fellow, Northwestern University School of Law. Member of the Ohio Bar.

¹ 134 Cal. App. 675, 36 P. 2d 517 (1933).

² 175 Ga. 875, 166 S.E. 658 (1932).

civil remedy against them means nothing, escape; for in such a case only criminal punishment can reach or deter them in any effective way. That such doctrine should be laid down and followed seems bizarre in the extreme.³ For the purpose, therefore, of showing that the Georgia case is both dangerous in its practical results and fallacious in its reasoning, that it ought not to be followed in other states as a precedent and ought to be overruled in Georgia, this paper is written.

There is a further purpose. The California case is ruled on the sole basis of the peculiar wording of the California Penal Code. This fact may militate against its general use as a precedent. An attempt will be made, therefore, to suggest that the decision can just as well be made to rest on fundamental ideas generally adopted by courts. Thereby its usefulness as a precedent may be enhanced.

The Judicial Function

Can real property be embezzled? The two cases named stand alone, it seems, in the United States on the precise question. And, as some (those not gifted to see that the law is the perfection of reason) would say, the courts, as was to be expected, split wide open. To those who are curious about such phenomena, the most intriguing aspect of the two judicial performances is the methods used to discover an answer to the question. All this brings to mind Justice Cardozo's revelations on the judicial process:

"It [deciding cases] is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be

³In these days of trust-mindedness, it might be that even an occupant of a supreme bench would leave by will the old home farm in trust to his banker friend so that his honor's wife would be assured of an income in case the testator is "gathered to his Fathers first." It also is not beyond the realm of supposition that the will might be proudly exhibited to the said wife. The wife then might learn of an opinion such as *Manning v. State* rendered by the selfsame provident testator. Probably in such a conjunction of circumstances, only married men, long calloused in the chains of matrimonial bondage, could imagine what she would say about this opinion.

the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: 'For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate.' The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition."

The significant question is. What are matched, words or facts?

Word-Matching vs. Fact-Matching

If the "Man from Mars" were to descend upon us, it seems not unpardonable to suppose that he would know nothing about apples, lemons, and oranges. He might be shown a pile of these fruits, given a sample red apple, a lemon, and an orange, and told to sort the pile. From the samples he could express in words a test—red, yellow, orange. If the pile should contain only red apples, lemons, and oranges, the test would work. But suppose that a second pile contains yellow apples. No amount of consideration of the *words* of the test would ever enable him to separate the yellow apples from the lemons. But he could go to his samples, the things already determined to be apples, lemons, and oranges and by studying them could form a new test, including taste for instance. However, if some venerable authority had written down the red, yellow, and orange test in a book many years past, this going back of the words would probably be considered bad form.

Word-Magic in Larceny Cases

To the practical man—one, as Whitehead says quoting Beaconsfield, who practices the errors of his forefathers—all this is nonsense. But let us take a matter closely related to the problem of our cases of *People v. Roland* and *Manning v. State*. Let us think about "man's best friend," the dog. Even to the twentieth century, courts are struggling with the question whether or not a dog is the subject of larceny. Coke wrote in his *THIRD INSTITUTE* that a dog was not the subject of larceny, Hale repeated in his *PLEAS OF THE CROWN*, and Blackstone followed in his *COMMENTARIES*. That settled it for

the word-matchers. In a case in which the word "dog" appeared, the books were searched for the word "dog." In *Regina v. Robinson*,⁴ Lord Campbell, C. J., said: "It is clear that dog stealing was not felony at common law; the reason why it was not is immaterial." And he then proceeded to wave away a statute. In *Ward v. State*,⁵ the court held that a dog was not the subject of larceny, quoting Blackstone and making remarks reminiscent of Hale about not serving for food. In *State v. Doe*,⁶ the court held that a dog was not the subject of larceny, citing Hale and Blackstone. In *State v. Harriman*,⁷ the court held that a dog was not within a statute making criminal the killing of domestic animals, quoting Blackstone. In *State v. Lymus*,⁸ the court held that a dog was not the subject of larceny, relying on Blackstone. But, in *Kinsman v. State*,⁹ the court held that a dog was within a statute making it criminal to injure property maliciously. In *Mullaly v. State*,¹⁰ the court held that a dog was within the larceny statute, the unhappy defendant relying on Coke, Hale, and Blackstone. In *State v. Langford*,¹¹ the court held that a dog was the subject of larceny, relying on tax statutes in an opinion free from references to Coke, Hale, and Blackstone, and to English cases. In *State v. Brown*,¹² the court held that a dog was within the statute on larceny, but had to struggle against the weight of Blackstone to do so. The dissenting opinion of Appleton, J., in *State v. Harriman*, is notable for presence of American authorities and absence of English authorities.¹³

What, If Anything, Is Behind the Word?

It may be not uninformative to note that, in these dog cases, the courts held him within the law of larceny, when they got their minds on the American cases and statutes—which can be said to be manifestations of what has been going on here. When they riveted their attention on the words of Coke's, Hale's, and Blackstone's pages, they were guided, not by the factual situation existing here nor by what it was in the seventeenth and eighteenth centuries, but

⁴ Bell C. C. 34 (1859).

⁵ 48 Ala. 161 (1872).

⁶ 79 Ind. 7 (1881).

⁷ 75 Me. 562 (1884).

⁸ 26 Ohio St. 440 (1875).

⁹ 77 Ind. 132 (1881).

¹⁰ 86 N. Y. 365 (1881).

¹¹ 55 S. C. 322, 33 S. E. 370 (1899).

¹² 68 Tenn. (9 Baxt.) 53 (1876).

¹³ See also: Notes, 67 Am. S. R. 297, 88 Am. S. R. 588, and 99 A. L. R. 212.

by words written about what happened then, whether it happened or not. Thus Blackstone: "As to those animals which do not serve for food, and which, therefore, the law holds of no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure," there is no larceny, only a base property and civil actions. A footnote to Blackstone refers to Hale. Hale adds nothing except "baseness of their nature, as mastiffs, spaniels, grayhounds, bloodhounds." This statement about "baseness of nature" is found in Coke's THIRD INSTITUTE, and a marginal note there (edition of 1648) takes us to the YEAR BOOKS of 12, 14, and 18 Henry VIII. In the YEAR BOOKS cited, are found a civil case about herons and shovelers, and a felony case about a peacock. In the peacock case, the losing side made reference to mastiffs and spaniels but the argument was rejected, all the justices holding that taking the peacock was felony.¹⁴ Another case¹⁵ is an action of trespass for taking a dog called a "bloud-hound." Here the argument was made that no civil action lay for taking the "bloud-hound," because it was said that no appeal of larceny could be had. It was mentioned that it was no felony to take a horse in the Isle of Man [It seems safe, since horse-stealing is not what it used to be, to let this out where erstwhile enterprising counsel might get hold of it], and all the arguments were made about whim and pleasure and not for profit, about *ferae naturae*, about selling for a large sum, but not the one about not serving for food. *The court held that the action lay.*

In passing, it may be observed that Hale seems to have originated the "serving for food" argument, but not in connection with dogs. Since he states that young hawks in the nest are the subject of larceny, he does not seem to have thought the test universal. He uses the "baseness of nature" argument about the dog, but says that reclaimed hawks are noble and the subject of larceny. In the YEAR BOOK case on the "blood-hound," the baseness of nature argument was heard and inferentially rejected.

Thus, only an argument, unsuccessfully advanced, referring to dogs in a criminal case on stealing of a peacock and a similar argument, likewise unsuccessfully advanced, in a civil case on taking a "blood-hound" were behind the sweeping pronouncement about "mastiffs, bloodhounds," and "other kind of dogs and cats" in Coke's pages. And these arguments but asserted that the dog was outside the law of larceny not because he was a dog but because he was

¹⁴ YB 18 Hen. VIII, Mich. 11, f. 2.

¹⁵ YB 12 Hen. VIII, Trin. 3, f. 3.

thought to be kept merely for whim and pleasure rather than for serious uses or with the prospect of being sold for money. The dog's character as property had not been decided in any actual criminal case and the arguments had lost in the civil case which involved a dog as they had lost in the criminal case involving the peacock. The point seems to be, and always to have been, not dogs as such, but dogs having value as a matter of fact, like other domestic animals having value as a matter of fact. However, the word "dog" was in the books and that was enough for the word-matching.

What Shall Govern, Words or Facts?

Value of two kinds is recognized. Pollock & Maitland say that the value in money of the thing taken was part of composition in Anglo-Saxon times. After Henry II had introduced the process of indictment, the line which determined whether or not the thief should be hanged was drawn at twelve pence, the historians denominating this a re-appearance. Thus, exchange-value must, from the earliest times, have been known to the law of larceny. The YEAR BOOK case on the peacock discussed use-value, holding value of this kind enough to support a felony prosecution. Hence, the value to support a charge of larceny could be either use-value or exchange-value. What then is the difference—as to the conduct of the accused, as to the prior relation of the "owner" to the thing taken, as to the asportation or physical movement of the thing, or as to value—in the cases of stealing a horse, an ox, or a dog? What was significant about stealing a horse? If we look at the "facts," at just what happened, are the significant aspects of stealing a horse not the same as the most obvious factual aspects of stealing a dog? Should these govern?

Turning out jobs of word-matching has produced the legal proposition that stealing an old "plug" of a horse is a crime but taking a shepherd's dog or a valuable hunting dog is not, although the shepherd's dog is as useful as the cowboy's best pony and her pups can be sold for a good price and although a well-trained hunting dog commands a high figure. Such rules as this afford what justification there is for the taunt that the law is an ass. However, the absurd result could have been avoided if, instead of searching for words in a book, the facts constituting an indubitable example of larceny, such as a case of "cattle-lifting" or of horse-

stealing, had been studied for their significant factual aspects and these matched against the facts obtaining when a dog was taken.

More Judicial Confusion

If a method attending to the "facts" from time immemorial adjudicated to constitute larceny had been utilized, the courts need never to have fallen into the confusion (from which they had to be rescued by the arm of legislation) in another class of larceny cases—the taking and carrying away of valuable documents.¹⁶ Here the wonderful nonsense about "intrinsic value" did the dirt. What happens when a written instrument to pay money is asported, with intent, etc.? The owner suffers loss which is measured in money, loss in exchange-value, by the defendant's unauthorized moving of a physical thing. Is that not just what happens when a horse or a piece of lead is stolen? Particularly if the horse or lead is held by a dealer in those commodities, is the likeness clear. Later, when horses were taken for the purpose of inducing the offer of a reward and then returned and the reward collected, the courts held the taking larceny.¹⁷ The definition of larceny required that the intent accompanying the taking be to deprive the owner permanently of his "property." It was thought, under the influence of the "intrinsic value" theories, that this meant that the intent must be to deprive permanently of the physical thing asported. However, no such intent existed in the reward cases. But the courts decided that larceny had been committed by using, instead of "property," the words "property or its value." They thus achieved an understanding of larceny as a working of economic loss to the owner, a loss measured in money, by the defendant's act of asporting a physical thing. This is precisely what "cattle-lifting" is and has always been.

Can Real Property Be Embezzled?

We can now return to our first quest and observe the judicial process going about finding an answer to the question with which we started. By one process, the California court arrives at a decision which is calculated to punish the dishonest and protect the just expectations of those who have entrusted them. By a different process—a case-law technique as contrasted with a technique of

¹⁶ See Hall, *LAW THEFT and SOCIETY*, pp. 41-55.

¹⁷ *Commonwealth v. Mason*, 105 Mass. 163 (1870); *Berry v. State*, 31 Ohio St. 219 (1877).

statutory interpretation—the Georgia court arrives at a different result.

The California Case

In the California case, a principal conveyed to his agent by deed a parcel of real estate in trust. Later, upon demand by the principal-*cestui* for re-conveyance, the agent-trustee refused, claiming beneficial ownership in full in himself. No question as to the validity of the trust, no question as to the duty to re-convey on demand, and no question as to the refusal and disclaimer constituting conversion, need bother us. The sole question is, is real property the subject of embezzlement?

In its opinion, the California court points out that the cases cited to it, with the exception of the Georgia case of *Manning v. State*,¹⁸ are on obtaining property by false pretenses and not on embezzlement. The court found the solvent of its difficulties in the words of the California Penal Code. The first clause of the first sentence of section 484 (which defines *theft*), designates conduct by means of the words "steal, take, carry, lead, or drive away" and designates the *thing* which can be stolen, taken, carried, led, or driven away with the words "personal property." But the second clause, of the same first sentence of section 484, designates conduct by means of the words "fraudulently appropriate property which has been entrusted to him," and thus contains the word "property" standing alone.¹⁹ Another section defining *embezzlement*, section 503, is as

¹⁸ The court mentions that the defendant relied on *Manning v. State*, but does not discuss the case, although it was the only embezzlement case cited.

¹⁹ In the course of the opinion, the court mentions that the defendant relied upon *People v. Cummings*, 114 Cal. 437, 46 P. 284 (1896); *People v. Folcey*, 78 Cal. App. 62, 247 P. 916 (1926); and *Manning v. State*. The court calls attention to the fact that *People v. Cummings* had been overruled in *People v. Rabe*, 202 Cal. 409, 261 P. 303 (1927); but says that the latter case is not decisive, since it was based directly upon an amendment to section 532 of the Penal Code made after *People v. Cummings* had been decided. A quotation from *People v. Folcey* will make this distinction clearer: "The Legislature, after the decision of the case of *People v. Cummings*, 114 Cal. 437, 46 P. 284, amended section 532 by inserting the words 'whether real or personal' and neglected entirely in said section to make any other amendment whatsoever. In *People v. Cummings*, supra, the Supreme Court stated directly that, since real estate is not the subject of larceny, the words 'punishable in the same manner and to the same extent as for larceny of the money or property so obtained' are meaningless in relation to real property." The Court of Appeal, by this line of reasoning in *People v. Folcey*, held, even after the amendment, that real property is not included in the false pretenses section; but, as the court in *People v. Roland* pointed out, the Supreme Court held in *People v. Rabe*, that it is. Continuing in *People v. Roland*, the court cites *People v. Maddux*, 102 Cal. App. 169, 282 P. 996 (1929) in which the defendant relied on *People v. Cummings* and *People v. Folcey* but the court followed *People v. Rabe*. (It must be remembered that all these cases are on obtaining by false pretenses.)

follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted." At this point, the court was much in doubt as to whether or not the word "property" must be held to have the same meaning, in the two places where it stood alone as the words "personal property" in the first clause of the first sentence of section 484.²⁰ Their Honors then turned the pages to section 7, subdivision 10 of the Penal Code, and read: "*The word 'property' includes both real and personal property.*" Here they were satisfied that they found conclusive answer that real property can be embezzled.²¹

No notice is taken of the aspect that the conduct condemned by the first clause of the first sentence of section 484 must embrace physical movement of a physical thing and, hence, that "personal property" there designated must be asportable personal property; nor that the conduct condemned by the second clause of the first sentence of section 484 and by section 503 may, but need not, embrace physical movement of a physical thing and, hence that "property" there designated can be both asportable and non-asportable property. From the character of the acts condemned, the meaning of the words designating property is necessarily broader in embezzlement than is the meaning of those designating property in larceny.

The Georgia Case

The holder of title to real estate conveyed by deed that title to one Johnson at the instigation and instance of the defendant, Manning. Manning "was holding himself out as a lawyer" and in the

²⁰ The court goes on to cite four cases on obtaining by false pretenses to show that real property has been held to be the subject of that offense. These cases are: *Morse v. State*, 9 Ga. App. 424, 71 S. E. 699 (1911); *State v. Eno*, 131 Iowa 619, 109 N. W. 119 (1906); *State v. Toney*, 81 Ohio St. 130, 90 N. E. 142 (1909); and *State v. Blake*, 36 Utah 605, 105 P. 910 (1909). Three of the cases support the point, but *State v. Eno* is opposite, and is a principal case relied upon by the Georgia Supreme Court in *Manning v. State* to hold that real property cannot be embezzled.

²¹ The weakness of the case of *People v. Roland* as a general precedent is commented on in a note in 8 So. Cal. Law Rev. 44. This reflection is confirmed by reading *State v. Klinkenberg*, 76 Wash. 466, 136 P. 692 (1915). In this latter case, the court had before it a section of the Washington penal statutes similar to section 7, subdivision 10 of the California Penal Code, and expressly ruled that such section did not require the interpretation of the word "property" in the section on obtaining by false pretenses to include real property.

As an interesting commentary on the way lawyers work, it is worthwhile to note that in *People v. Roland* the court specifically calls attention that, although section 7, subdivision 10 was part and parcel of the California Penal Code at the time, it nowhere appears that it was considered in *People v. Cummings*, and also that in *People v. Roland* no brief referred to the section even so much as to indicate its existence.

course of certain transactions with the owner and the owner's wife in which he purported to be acting as their attorney procured the transfer of title to Johnson, who was under his influence and control. The title was then transferred by Johnson to an innocent purchaser, whereby the owner "lost the title of his property, and his possession thereof and all of his rights therein forever." This transfer was made without the owner's knowledge, and without authority. The case is, therefore, one of the sale of real property by a person holding it in trust to an innocent purchaser. Manning was prosecuted as principal in the second degree.

The Georgia statute under which the prosecution was instituted in *Manning v. State* reads:

"If any person who has been intrusted by another with any note, bill of exchange, bond, check, draft, order for the payment of money, cotton or other produce, or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished by imprisonment and labor in the penitentiary for not less than one year nor longer than five years." Sec. 192 of the Penal Code of 1910.

In the Supreme Court opinion no point is covered except real property as the subject of embezzlement.²²

The court begins its opinion with the ritual, so familiar to all who have read more than three cases or more than one text on embezzlement, of recalling that embezzlement is a statutory offense. It mentions that embezzlement was unknown at common law and that the statutes were passed to take care of defects in the common law of larceny, citing *Robinson v. State*,²³ to show that Georgia

²² Attention is called to the fact that the Penal Code of Georgia, "by express terms, limits embezzlement to the acts of public officers and officers and employees of public and private corporations. A private individual, under the criminal law" of Georgia, "cannot be guilty of embezzlement, unless he is an officer or an employee of a corporation. All ordinary bailees, or persons intrusted with the property of another, who convert the property to their own use, fraudulently, or who, with a fraudulent purpose, divert property from the uses of the trust, are guilty of statutory offenses which are defined in a series of Code sections under the general heading of Fraudulent Conversion, which" Georgia lawyers "commonly call Larceny after Trust." The present writer is indebted to the Honorable Charles H. Garrett for the foregoing accurate technical statement on the Georgia law.

However, important as the specific provisions are in the procedural details of Georgia prosecutions, the act of "fraudulent conversion" is a species of conduct and a legal conception common to technical embezzlement and technical fraudulent conversion. In *Manning v. State*, the court finds it unnecessary to make any distinction. Hence, for our present purposes, it is correct to treat embezzlement, larceny after trust, and fraudulent conversion as convertible terms.

²³ 109 Ga. 564, 35 S. E. 37 (1899).

embezzlement statutes were enacted "for the purpose of supplying defects and protection in instances not included under the penal statutes applying to larceny." It notes that embezzlement has often been called "larceny after trust," citing four Georgia larceny-after-trust cases.²⁴ It then cites Wharton²⁵ for the proposition that embezzlement covers only cases which common law larceny does not include; and *Bromberger v. United States*,²⁶ quoting to the effect that in embezzlement a statute is dealt with and not common law. The court then cites *Hagood v. State*,²⁷ and says that in that case "it was held that the words 'fraudulent conversion' are synonymous with the words 'taking with intent to steal' in ordinary larceny." The court again refers to *Keys v. State* to mention that the indictment there termed the offense "larceny after trust," and then adds: "This is merely mentioned as an indication that section 192 defines an offense which, *if not in its essence a larceny* under our code (*italics the present writer's*), is of such near kin that calling it larceny is no substantial misnomer."

Here the court leaves the larceny-after-trust cases and takes up authorities on obtaining by false pretenses; but it does not mention the change or intimate that this change makes any difference, as the California court did. The court then quotes from *State v. Eno*, to stress the element of larcenous asportation; and cites in further support *People v. Cummings*, and two treatises.²⁸ It next quotes from *State v. Klinkenberg*, again to stress larcenous asportation, throws in citations of *CORPUS JURIS*²⁹ and *State v. Layman*,³⁰ and ends by holding that real property cannot be embezzled.

Queries Suggested By Georgia Case

It is significant that neither California nor Georgia have a statute making breach of trust, as such, criminal. Since the United States Supreme Court has said that property not protected by the criminal law is only partial and imperfect,³¹ unless it is held that

²⁴ *Alderman v. State*, 57 Ga. 367 (1876), involving fraudulent conversion of a hog; *Keys v. State*, 112 Ga. 392, 37 S. E. 762 (1900), involving fraudulent conversion of money; *Martin v. State*, 123 Ga. 478, 51 S. E. 334 (1905), involving fraudulent conversion of money; and *Lewis v. State*, 17 Ga. App. 567, 87 S. E. 1087 (1915), involving fraudulent conversion of money.

²⁵ 2 CRIMINAL LAW 1489.

²⁶ 128 F. 346, 350 (1904).

²⁷ 5 Ga. App. 80, 62 S. E. 641 (1908).

²⁸ 2 Bishop, secs. 476-479; 2 Brown & Hadley Com. 532.

²⁹ 25 C. J. 608, sec. 37, note 99a.

³⁰ 8 Blackford (Ind.) 330 (1846).

³¹ *Sentell v. New Orleans & Carrollton R. Co.*, 166 U. S. 698, 701 (1897).

land can be embezzled, the beneficiaries of trusts are put to a great hazard. But this is not all. If the theory of the Georgia case is correct, and asportation must be involved for fraudulent conversion to occur, there would be no difference if a chattel were held in trust. Let us suppose that an automobile is in a storage garage and that it is not moved. The title is in *A* in trust for *B*, *A* having a bill of sale clear on its face. *A* sells to *C*, an innocent purchaser, and gives him a bill of sale. There has been no asportation, although the car is lost to *B* irrevocably. Is there an embezzlement? The Georgia Supreme Court evidently thinks not. Such a conclusion, necessitated by the reasoning of the Georgia court, justifies asking a few questions. Why did the Supreme Court disregard *Morse v. State* decided in its own state in 1911? Section 37, 25 CORPUS JURIS 608, is cited and footnote 2 to that section contains *Morse v. State*; and the case appears also in the Solicitor-General's brief. The reason cannot be that this is a decision of an inferior Georgia court, from which the Supreme Court could not be expected to take its authorities; for *Hagood v. State* and *Lewis v. State* are cited for support by the Supreme Court.³² It is true that *Morse v. State* is a prosecution under section 719 of the Penal Code of 1910 and not under section 192; but that point does not seem to be decisive or even material, since the court called Morse's offense obtaining by false pretenses and the Supreme Court relies strongly on false pretenses cases. *People v. Cummings* and *State v. Eno* were considered in *Morse v. State* and distinguished on the point that they dealt with obtaining the fee, whereas Morse was charged with obtaining possession of real estate under a defectively executed three-year lease, a mere chattel interest. But if this is the distinction, asportation is not important. There was no asportation in the Morse case. If we revert to our supposed automobile case, we may guess that it is not asportation as a fact but a thing capable of asportation that is significant. Still *Morse v. State* includes no thing asportable, no possible asportation. Is *Morse v. State* overruled by *Manning v. State*? It would be enlightening had the Supreme Court considered the case on obtaining by false pretenses in Georgia, instead of taking its cases from Iowa and Washington.

³² It is interesting to note that *Hagood v. State*, at the point referred to by the Supreme Court in *Manning v. State*, deals not with the act of conversion but with the specific intent which must accompany the act. The court in *Hagood v. State* says that "fraudulent conversion" and "taking with intent to steal" are alike in that both import an intent which must be found to have accompanied the act of conversion or the act of taking. Nothing is said about how conversion is performed nor how taking is done.

Why, when the Supreme Court rests its decision upon cases on obtaining by false pretenses rather than upon Georgia larceny-after-trust cases, does it select the Iowa and Washington cases instead of *State v. Toney* in Ohio? Section 37, 25 CORPUS JURIS 608, is cited and footnote 2 to that section contains reference not only to Georgia's own case of *Morse v. State*, but also to *State v. Toney*, to *Moline v. State*,³³ and to *Yoakum v. State*.³⁴ *State v. Toney* appears also in the Solicitor-General's brief. The statute considered in *State v. Toney* is much more like the Georgia statute than are the statutes of Iowa and Washington in the cases relied upon. The Iowa statute designates the subject of obtaining by false pretenses with the words "any money, goods, or other property"; the Washington statute, with the words "any property"; and the Ohio statute, with the words "anything of value, or procures the signature of any person, as maker, indorser, or guarantor thereof, to any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness." The Georgia statute considered in *Manning v. State* designates the subject with the words "any money, note, bill of exchange, bond, check, draft, order for the payment of money, cotton or other products, or any other article or thing of value." It seems that the Georgia statute is more extensive than the Ohio statute; for "article of value" might refer to property capable of asportation and "thing of value" include those not capable of asportation. Both are used. Is one superfluous? The Ohio statute has only "thing of value."

What is the purpose of the judicial ritual of constant reference to statutory offense and to dealing with a statute and not with common law? The re-iteration, in the opinion of *Manning v. State*, that the offense of embezzlement was not known at common law, that the statutes were enacted to escape limitations of common law larceny, might induce one to believe that the court was about to announce the wholly reasonable and salutary rule that the language must be interpreted with these facts in mind and so as to escape the limitations (to escape which the statutes were enacted), rather than to imprison the statute within these limitations. It is surprising, after such a beginning, to see the court prove by these very statements that the common law concept of larceny still governs. Is the effect of all this to indicate that courts are jealous of legislative enactments, and that a defendant accused of a statutory offense must

³³ 72 Neb. 361, 100 N. W. 810 (1904).

³⁴ 68 Tex. Cr. 254, 150 S. W. 910 (1912).

be exonerated if any construction can be devised which can be made to do so?

Conversion in Larceny and Conversion in Embezzlement

The interpretation of the pertinent statute in either the California or the Georgia case can be approached from the point of view that each proscribes certain types of human conduct. A crime is always thought of as an act not a thing. In the first clause of the first sentence of section 484 of the California Penal Code, the conduct reprobated is designated by the words "steal, take, carry, lead, or drive away" and the thing stolen, taken, carried, led or driven away by the word "personal property." The conduct is that of physically moving some thing. Now, if the change should be made that some one had stolen, taken, carried, led, or driven away an item of personal property, to wit, a credit not evidenced by any physical instrument, it seems clear that the conduct indicated by the words is not the same as what must have been done by the accused. There is no factual way of physically moving the intangible claim. There could, of course, be asportation of the receipt, note, or any other instrument evidencing the credit; but if there is no such instrument, there can be no act of asportation.³⁵ Hence, the words "personal property" cannot include such a credit, although, for instance, "personal property" does include such a credit in settling an estate. This makes sense because our attention is fixed on the conduct which is pointed out by the words, not merely on the words. The meaning so gathered does what the criminal law is supposed to do, namely, designate what conduct violates the statute. If we should say that the words designate that kind of conduct which is the physically carrying away of a physical thing and then say that it also designates conduct which is the non-physical carrying away of a non-physical thing, it is impossible to know what conduct or what things are included or how to obey the law.

All this seems word-magic too. How do we tell? The process is to take a set of facts which indubitably constitute larceny—the stealing of a horse or of a wagon, for instance—and match the facts at bar with the facts of this indubitable case. The process of taking the word "property" and trying to find what it means leads to confusion, because the word points out one kind of fact in larceny cases but another kind in construing a will, and perhaps a third in adjudicating a bankruptcy.

³⁵ *People v. Ashworth*, 222 N. Y. S. 2d, 220 App. Div. 498 (1927).

Let us now advert to the second clause of the first sentence of section 484 of the California Penal Code. Here the conduct condemned is pointed out by the words "fraudulently appropriate property which has been entrusted to him." Evidently we are dealing with appropriation of property by a person to whom it has been entrusted. Then there is a difference because in larceny (see first clause) the property is not entrusted. Can real property be entrusted? Can personal property be entrusted? The answer to both queries is "yes." Can personal property not a physical movable be entrusted, as a credit not evidenced by any instrument? And the answer is "yes." It seems sure then that we have here a complex of conduct different decisively from that designated by the first clause. The property which can be entrusted is a much wider category than the property which can be moved physically of the first clause.

The conduct of the first clause is physically moving a physical thing. Let us take an indubitable case of embezzling a piece of personal property which is a physical thing. A bailee has a wagon of the bailor in his possession. Can the bailee "convert" or "appropriate"³⁶ it by asportation? The answer is "yes." Can he "convert" or "appropriate" without any physical moving of the wagon whatsoever? The answer is "yes." If the bailee announces to the bailor that the wagon belongs to him (the bailee) and that the bailor has no claim to it, even though the bailor is not demanding or trying to get it and the wagon stands perfectly still, he has converted it. Hence, the conduct designated by the word "appropriate" in the second clause is broader than the conduct designated by the words of the first clause. Suppose that instead of bailor and bailee, we take a trustee having legal title to the wagon for the benefit of another. The trustee makes the same disclaimer as above. It is a conversion or appropriation. How does this conduct, admittedly embezzlement (if with fraudulent intent, i. e., not in good faith as under an honest mistake) differ from such a disclaimer by a trustee of real property? How do the facts at bar match with the facts of an indubitable embezzlement as to the conduct involved, or economic injury produced? What ought we to follow, the associations of the verbal symbol or the analogies to conduct admittedly condemned?

The statute involved in the Georgia case can be viewed in the

³⁶ See 30 Ill. L. R. 1004 note 48. "Conversion" is what the "act" in embezzlement is always called.

same way. One of the cases³⁷ cited in the opinion of *Manning v. State* emphasizes the distinction that in larceny the possession or control of the property has not been lawfully obtained before the conversion, while in larceny after trust or embezzlement the act of entrusting must have preceded the conversion. Conversion by one into whose hands the property has lawfully come without any act of asportation is well known in that state and has often been there the subject of adjudications.³⁸ How then the Supreme Court mistook asportation as an essential element of a defendant's act in order for him to "fraudulently convert" "any other article or thing of value" with which "he has been entrusted by another," and how the court failed to observe that conversion by one entrusted is different from conversion by one not entrusted, are curiosities for which it is to be hoped that the court will easily find the means of correction.

Where We End

This paper, I hope, has suggested, however vaguely and feebly, that the California case need not be considered as a little, narrow precedent merely on the precise wording and structure of the California Penal Code. It is available for use in any state; for it is in accord with a broad and practical conception of how a person entrusted with property acts to convert it. This conception is part and parcel of every embezzlement statute in the Union. The suspicion has been justified also that the Georgia decision is based upon a misconception.

We started with the lawyer's and layman's points of view. No doubt the layman (if one has read this) has had a lot of amusement over the lawyer's efforts. Whether he has been satisfied or not, he ought to be content in the thought that we can "bewardle" the cases to produce results with which the most tendered-minded sociologist can be enraptured just as verbosely as we "bewardle" them to produce results which give him pains. Surely, there ought to be

³⁷ *Martin v. State*, Note 24, *supra*.

³⁸ This is old experience and old doctrine, judicially dealt with and affirmed in Georgia in *Liptrot v. Holmes*, 1 Ga. (1 Kelly) 381 (1846); in *Marxwell v. Harrison*, 8 Ga. 61 (1850); in *Young v. Durham*, 15 Ga. App. 678, 84 S. E. 165 (1915); and recognized in "larceny after trust" prosecutions in *Martin v. State*, 123 Ga. 478, 51 S. E. 334 (1905), and in *Lewis v. State*, 17 Ga. App. 667, 81 S. E. 1087 (1915).

Further, upon non-asportation conversions in embezzlement, it may be observed that failure to account has been held to constitute embezzlement. (See 30 Ill. L. R. 1005, note 59 for list of cases. Note also the same article, p. 1004, note 48). It has been held that a credit not evidenced by any instrument can be embezzled. (*Higbee v. State*, 74 Neb. 331, 104 N. W. 748 (1905).) The case of *Weinhandler v. United States* (C. C. A. 2d 1927), 20 F. 2d 359, is also instructive.

no difficulty in convincing such a person that the theories which compete for judicial acceptance all seem the progeny of the law and that the court is, therefore, not too much hampered in making its selection by consulting what is honesty and fair-dealing between man and man. To the hard, practical common lawyer, who snorts that the law has nothing to do with social uplift and the protection of incompetents but must be definite and certain, may be left the task of defining just what this abstract certainty is, just how a legal rule producing harmful results is entitled to what kind of respect, and just why the law has nothing to do with the effects of the conduct it regulates. When terrific words about certainty and predictability are hurled at us, we shall perhaps be faced with some very dull and tiresome fellow, unless our accuser has the insight into his own mental processes which enables him to laugh a little at himself. As in the situation which "The Virginian" made famous, it will probably be appropriate to say something about smiling when those words are used.