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Larceny of Referendum Petitions

(CONCLUDED)

I. American Decisions.

New York made a false start in 1810.[1] Payne was convicted of stealing a letter, charged to be "a piece of paper, on which a a certain letter of information was written, of the value of twelve dollars and fifty cents." The poorly considered *per curiam* opinion reasoned thus, in quashing the conviction:

> "The letter was of no intrinsic value, not importing any property in possession of the person from whom it was taken. A bond, bill, or note, was not the subject of larceny, at the common law; and they certainly had as much worth in themselves as this letter. (1 Hawk, C. 33, S. 22)."

Such may be expected to be the result when courts and writers attempt to give a justification for a rule that arose as a *dictum* and always remained without a sound principle. The reasoning of the New York court, however, is based upon a premise that ignored half that was said to justify the common law rule as to choses in action. With a chose, if the writing was gone the obligation remained. With a letter if the writing was gone all was gone unless perchance the contents had been memorized.

Defendant was convicted of receiving personal property knowing it to have been stolen. Part of the property stolen was "ten promissory notes, commonly called bank notes", "complete in form but not issued".[2] In answer to counsel for defendant,[3] the court said:

> "The charge refers to written contracts filled up and remaining at the bank, which, on being lawfully put in circulation, would have subjected the bank to pecuniary liability. That such papers were the property of the bank, is entirely clear; and this answers the exception. It is now said

1. *Payne* v. *People* (1810) 6 Johnson (N. Y.) 103.
2. *People* v. *Wiley* (1842) 3 Hill (N. Y.) 194.
3. "The court erred in ruling that the bank bills described in the indictment were *property*, within the meaning of the statute". l. c. 201.

> they were of no value; but that was not the exception. It is obvious, however, they were of some value; and that, I apprehend, is enough. - - - - - - - The recent case of *Payne* v. *The People* (6 *John, R.* 103.) went on the ground that the letter stolen was of no intrinsic value whatever, even as a piece of paper. There is no color here for saying that, of the bank issues. There are several cases in point. (*The King* v. *Clarke,* 2 Leach, 1036; *Rex* v. *Vyse* Ry. & Mood. Cr. Cas. 218.)"[4]

This case accords with the English cases in holding generally that written instruments are subject matter for larceny. It should be contrasted with the doctrine urged by defendant in the case under review that the petitions became public documents before they were filed.

In *People* v. *Loomis*[5] the indictment was for larceny of "a certain receipt". Defendant owed one Shepard seven dollars and proposing to pay the debt took out of his pocket some bank notes and a prepared receipt. The latter was handed to Shepard for signature. The notes were handed to Ramsdell (joint defendant) and the defendant told Shepard that the money was ready as soon as the receipt was signed. Shepard signed the receipt and gave it to Ramsdell who failed to transfer the bank notes but ran away with defendant at latter's request.[6] The Supreme Court of New York ordered a new trial, following conviction, stating that "the prisoners should have been acquitted".[7]

The court argued that under neither the English statutes nor the legislation in New York (punishing the theft of written instruments creating or affecting obligations) could the theft of an ineffective written instrument be punished. Then it was argued that the receipt there was totally ineffective because of the fraud

4. *People* v. *Wiley* (1842) 3 Hill (N. Y.) 1. c. 211.
5. (1847) 4 Denio 380.
6. The receipt was in the following words: "Rec'd of G. W. W. Loomis seven dollars in full of all demands of every name and nature up to this day. Dated." etc. 4 Denio 380.
7. (1847) 4 Denio 380.

connected with its execution. It is not clear but apparently the court conceived of the legislation in New York as the sole source of authority to punish for larceny. There was no residuum of common law. If such was the point of view it constituted a bold stroke and one that was not suggested by the English cases decided after English statutes extended the scope of larceny.

There seems, however, a basis for justifying the decision as a matter of principle. It was noted in the outset that the indictment was for theft of "a written receipt". There is no mention of a second count for theft of "a piece of paper". If there had been such a count the decision might have been contrary.[8] Otherwise, one of two things would have been fairly certain: (a) statutory legislation wiped out the common law; or (b) common law conceptions were hopelessly confused.

It is also possible to justify the result upon the assumption of a second count charging the theft of "a piece of paper". The *paper* on which the receipt was written was the *property* of *defendant*. It is also certain that it was in his *possession* until he handed it to Shepard *for signature*. It is *arguable* that thereby he transferred only *custody* of the paper to Shepard and that *possession* always remained in defendant. If so, there was no larceny.[9]

In *People* v. *Griffin* the charge was larceny of "a tin box of the value of five dollars, and certain papers described as instruments in writing, consisting of three several receipts for money, and three certificates of stock in incorporated companies".[10] It was held by Kings County Court of Sessions that un-

8. The court in discussing the common law stated: "But although such instruments could not, in strictness, be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description have frequently taken place." Among others, *Clarke's Case*, R. & R. 181, *Vyse's Case*, 1 Moody 218, *Rex* v. *Bingley*, 5 C. & P. 602 and *Rex* v. *Mead*, 4 C. & P. 535, were cited. See a discussion of these cases in 21 Law Series p. 13 ff.
9. See 21 Law Series p. 18, note 46 and p. 23, note 60.
10. (1869) 38 Howard's Pr. Rep. 475.

der the statute[11] "common" receipts were not subject of larceny.[12] The court distinguished "between common receipts and accountable receipts, warehouse receipts and others of such nature". "Receipts of this latter description are undoubtedly the subject of larceny, but I am satisfied that common receipts were not intended to be and are not embraced within the provisions of the statute."[13] So much goes only to the question of the proper interpretation of the statute. Apparently, no consideration was given to the thought that a "common" receipt considered as a piece of paper constituted "goods", "chattels", and "effects" within the meaning of the statute. Apparently also, as usual in New York cases, there was no charge in the indictment of the theft of "a piece of paper".

Furthermore, the court argued that "common" receipts are not instruments.[14] If this be true it is difficult to understand

11. The statute defined personal property to mean "goods, chattels, effects, evidence of right in action, and all written instruments by which any pecuniary obligation or any right or title to property, real or personal, shall be created, acknowledged, transferred, increased, defeated, discharged or diminished". l. c. 477. See *People* v. *Babcock* (1810) 7 Johns, 201, 5 Am. Dec. 256: (Obtaining a written receipt and request by a false assertion does not constitute a cheat, because (1) no false token used and (2) ordinary prudence guards against it. Whether a written instrument is subject matter of cheat not argued.) *Phelps* v. *People* (1878) 72 N. Y. 334 (Conviction affirmed for larceny of a draft under a statute defining personal property so as to include "all written instruments by which any pecuniary obligation - - - - shall be created, acknowledged, transferred" etc.)
12. The Supreme Court of New York made a contrary suggestion in *People* v. *Loomis* (1847) 4 Denio. l. c. 384: "It perhaps admits of no doubt that a receipt for the payment of a debt or demand may be the subject of larceny, under the revised statutes, - - - - -." The "revised statutes" seems to refer to the same provision as set forth in note",[11] *supra.*
13. *People* v. *Griffin* (1869) 38 Howard's Pr. Rep. l. c. 478. Compare *State* v. *Scanlan* (1903) 89 Minn. 244, 94 N. W. 686.
14. "Now common receipt such as are described in the indictment cannot be properly called instruments at all, for such documents have

how the decision was helpful to defendant in *State* v. *McCulloch.* The argument in the latter case was built upon the premise that a referendum petition is a written instrument. Whether the premise is acceptable depends upon terminology. The New York court gave no satisfactory definition of a written instrument.

As to that part of the charge involving certificates of stock the court held that the subject matter was covered by the statute but a new trial was ordered for failure to prove sufficient value to show grand larceny.

In 1885 the Supreme Court (fifth department) of New York rendered a decision similar to that in *People* v. *Loomis, supra.*[15] Ella Comstock, the owner of a house and lot, had mortgaged the same to Sarah Comstock and then made an agreement to sell the property to defendant. The mortgagee prepared a discharge of the mortgage lien to be used upon certain conditions which were never met. The discharge was secured by defendant through fraud and placed on record. For this defendant was convicted of larceny but a new trial was ordered. The court reasoned that: (a) the instrument was not effective or operative for any purpose at the time the defendant acquired possession; and (b) "to constitute larceny of a written instrument, the paper must be effective and operative when taken".[16] There is no difficulty in agreeing with proposition (a) but as to (b) it must be recorded that the statement is contrary to many decisions in cases where the indictment charged the stealing of a piece of paper.[17] Furthermore, it is interesting to notice that

no legal effect as instruments whatever, they are at most but acknowledgments in writing of full or partial payment and may be used in evidence to prove such payment. But they cannot be pleaded, and when proven may be explained or contradicted; they are mere written admissions and can only be treated as such. - - - - - There is a broad distinction between legal instruments which are acts and mere written admissions which are only evidence."

15. *People* v. *Stevens* (1885) 38 Hun. 62, 3 N. Y. Cr. R. 583.

16. *People* v. *Stevens* (1885) 38 Hun. 62 l. c. 64, 3 N. Y. Cr. 583.

17. See review of English decisions in 21 Law Series p. 13 ff.

the position of the New York court seems contrary to that taken by counsel for defendant in *State* v. *McCulloch*.[18]

The court was not at liberty to reverse the conviction on the common law theory that the instrument "savoured" of the realty. In the first place it would seem proper to point out that the instrument was not a deed of release until it had been delivered. Whether the common law exemption as to instruments "savouring" of the realty applied *only* to valid and effective instruments is not possible of dogmatic assertion.[19] In any event a New York statute[20] made an instrument by which "any pecuniary obligation, right or title to property" is transferred or defeated personal property and by inference subject to larceny. Another statute[21] provided that certain specified instruments in complete form but not effective as obligations

18. Counsel for defendant in *State* v. *McCulloch* deemed it of importance to convince the court that the instruments were completed in order to say that they were *not*, therefore, subject matter of larceny. The following is typical of the position taken: "If the instrument is completed, that is all that is necessary, and the charge must be for taking the instrument, and such an instrument is not the subject of larceny; and this is true, irrespective of the fact whether it is or is not a public document."
19. This particular point was not considered by the court. It was content with announcing that if the instrument had been complete the act would have been larceny under the statute. To that extent the statute changed the common law as to instruments "savouring" of the realty.
20. The Penal Code defined personal property as "every description of money, goods, chattels, effects, evidence of rights in action, and all written instruments by which any pecuniary obligation, right or title to property, real or personal, is created, acknowledged, transferred, increased, defeated, discharged, diminished, and every right and interest therein." *People* v. *Stevens* (1885) 38 Hun. l. c. 65, 3 N. Y. Cr. R. 583. Compare: R. S. Mo. 1909, Sec. 4927, now R. S. Mo. 1919, Sec. 3716.
21. "An instrument for the payment of money, an evidence of debt, a public security, or a passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner." *People* v. *Stevens* (1885) 38 Hun. l. c. 65, 3 N. Y. Cr. R. 583.

should be subject to larceny. The latter statute did not include the instrument under consideration and the court did not think of the statute as merely declaratory of a part of the common law. Apparently it was thought that the statute by mention of certain instruments assumed that the common law was different as to other ineffective instruments. Accordingly, *People* v. *Wiley, supra,* was treated as an exceptional case. It seems fair to say that this interpretation derives no support from the cases decided in England.

As in *People* v. *Loomis, supra,* there was a failure, apparently, to add a second count to the indictment charging the theft of "a piece of paper". If that had been done the story might have been a different one.

People v. *Hall*[22] is perhaps the unfortunate offspring of *Payne* v. *People.*[23] Defendant in attempting to obtain title to a tract of land had negotiations with Mrs. Burham with reference to her claim of a lease of part of the property. As a result he signed the following instrument:

> "I hereby agree to pay Mrs. C. M. Burham the sum of $200 for a release of twenty feet of ground on side of building, and this note is to be null and void if Mrs. Enie V. Coppelman does not pay me $1,000."

Later defendant snatched the instrument from Mrs. Burham's hand and destroyed it. The court (two to one) held that the conviction would have to be reversed, saying in part:

> "The note or paper was not property. It rested on nothing. Mrs. Burham made no written agreement to release, and her verbal promise was void - - - - - - -. The note was only a provision by Hall to take a title which Mrs. Burham was not bound to give, nor Hall to take. Such a paper is not the subject of larceny. *Payne* v. *People,* 6 Johns, 103."

The dissenting judge held that the instrument was "evidence of debt or contract" under the statute.[24] This position may be

22. (1893) 74 Hun. 96, 26 N. Y. Supp. 403.
23. See p. 00 *supra.*
24. The statute included as subjects of larceny "any money, personal property, thing in action, evidence of debt or contract, or articles of value of any kind."

questioned if the instrument created no obligation. It does not appear how the instrument was described in the indictment. Except for *Payne* v. *People, supra,* and cases following it in New York, there is no reason why the conviction could not have been sustained as larceny of a piece of paper if the indictment had been properly drawn.

The decisions in New York are far from satisfactory. Not once has a court in that state (so far as cases reviewed have disclosed) shown any thoroughgoing appreciation of the common law doctrine as to written instruments as it was developed in England. On the contrary the decisions give the impression that New York as to this matter was a star out of its orbit, accepting the worst part of the past as fundamental and ignoring the developments in the British courts. Part of it may be accounted for in the false start in *Payne* v. *People, supra,* a poorly considered opinion. Part of it may be due to an apparent failure of prosecuting officials to adopt the simple devise of adding counts to indictments charging theft of "a piece of paper". Part of it may be attributed to an unfortunate tendency to consider statutes as a substitution for the entire common law as to larceny rather than as changes of that law with a view of making it more adaptable to social needs.

After it was too late, so far as New York was concerned, a North Carolina judge displayed a real knowledge of the fundamentals. At least, Merrimon, J., in *State* v. *Campbell*[25] seems to have had a clear conception of the common law rule as to written instruments as developed in the Enlish cases. The charge was for stealing "one due-bill of the value of fifty-four cents, of the goods, chattels and moneys", etc., under a statute penalizing the theft of "any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles". There was evidence that the due bill stolen was one that had been taken up by the person who issued it. The lower court declined to instruct that if the

25. (1889) 103 N. C. 344, 9 S. E. 410.

due bill had been paid off and taken up and was worthless it was not the subject of larceny. The Supreme Court held that the refusal was error and ordered a new trial.

The court exhibited a clear understanding of the common law rule as to choses in action[26] and stated a due bill would be an "obligation" within the meaning of the statute but that a paid

26. "They are valuable and useful as such evidence, and, for the purposes of the statute cited, have no other property or quality of value; however, the paper or other thing on which they may be written might possibly be treated as bits of personal property of trifling value, and therefore the subject of larceny at common law. Indeed, in cases similar to the present one, it has been not uncommon as a measure of caution, to put two or more counts in the indictment, charing in the first one, the larceny of a note, bond, or other thing mentioned in the statute; and also, in a second one, the larceny of the paper on which they were written. - - - - - It would not comport with just and settled criminal procedure to indict a person for the larceny of a promissory note, and allow him to be convicted upon such charge of stealing a piece of paper."

Compare the statement of Shaw, C. J., in *Commonwealth* v. *Rand* (1844) 7 Met. (Mass.) 475: "No question was made at the argument, though it was open on the exceptions, whether bank bills, after they are redeemed by the bank, are the subject of larceny. Bank notes are expressly made the subject of larceny by the Rev. Sts. c. 126, par. 17. Is there any implied exception of bank notes redeemed by the bank issuing them? We think not. The bank in the present instance, were owners of the paper, which was of some value to be re-issued, and they had the actual possession, by their agent, and the perfect right of possession. But a consideration of more importance is, that notwithstanding the bills were stolen, yet, on being passed to a *bona fide* holder, the bank would have been bound to him for the payment of them, in the same manner as if they had not been redeemed. The injury to the bank is therefore the same."

Kearney v. *State* (1877) 48 Md. 16: (statute prohibited receiving a stolen bond. The indictment charged defendant with receiving "*four pieces of printed paper* commonly called 'United States five-twenty bonds'." Held bad for failure to distinctly charge that the "four pieces of printed paper" were bonds. *Arguendo*: "It has been sometimes the practice, under statutes similar to this section of our Code, to introduce into the indictments *separate counts,* charg-

due-bill ceased to be an "obligation" and therefore not "the subject of larceny as a 'due-bill' or an 'obligation'". The suggestion was made that if the indictment had contained a count for larceny of the paper on which the due-bill was written the defendant might have been convicted properly. The New York cases of *People v. Loomis, People v. Griffin, People v. Stevens* and *People v. Hall, supra,* might have been handled on the same basis.

In 1815 the Supreme Court of North Carolina[27] quashed an indictment charging petty larceny of "one half ten shilling bill of

ing the larceny or receiving of 'one piece of paper of the value of one penny', and in several cases which have been cited by counsel for the state, such counts have been held sufficient to support a conviction. This practice was adopted in order to obviate the difficulty in setting out doubtful instruments, or to meet a failure of proof as to instruments duly charged in other counts. If there had been such separate count in the present indictment, it might, under these authorities, have been sustained." l. c. 26)

Keller v. *United States* (1909) 168 Fed. 697: (indictment charging theft of "six blank checks with stubs attached, each of the value of one cent, of the goods and personal property of the United States" held sufficient to sustain a conviction.)

People v. *McGrath* (1888) 5 Utah 525, 17 Pac. 116: (conviction for theft from a court reporter of "11 of his books, containing a phonographic report of the testimony of witnesses examined on the trial" of a certain case.)

State v. *James* (1877) 58 N. H. 67: (held that printed list of names of subscribers to a newspaper together with dates of the periods to which they had paid subject of larceny as a chattel and not as evidence of a debt.)

People v. *Carides* (1915) 21 Cal. App. 836, 154 Pac. 1061: (held that lottery ticket, void because issued in violation of law, could not be subject of a *grand* larceny as a lottery ticket. Said as *dictum*: "Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however small, would have sufficed to make the wrongful taking of it petit larceny, and, if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer.") See 4 Calif. Law Rev. 251.

27. *State* v. *Bryant* (1815) 4 N. C. 249.

the currency of the state" etc. The rather meaningless opinion was as follows:

"The thing charged to be stolen is not stated with the requisite precision and distinctness, to authorize the court to pronounce judgment upon the offense, in the event of a conviction. Considered as currency of the state, it is of no value, since no one is compellable to receive it; it is not a tender in payment. Nor could the defendant, by the description in this indictment, protect himself from a future prosecution for the same larceny. As it is actually described, there is no such thing known in the currency of the state; as it was probably meant to be described, it is not punishable as a larceny. Being therefore destitute alike of artificial and intrinsic value, the indictment cannot be supported."

This decision was rendered before the English doctrine of indicting for theft of a piece of paper had been well developed[28] and there was here no count of such import.

28. 21 Law Series p. 15.

Boyd v. *Commonwealth* (1842) 1 Rob. (Va.) 691.(semble, larceny of "divers *goods and chattels*" shown by proving theft of "divers checks, bank notes, and *United States* treasury notes". Whether decision was under statute or common law not clear.)

Ryland v. *State* (1857) 4 Sneed (Tenn.) 357. (theft of pocket book containing bank notes. "It is not, nor could it be, controverted that genuine bank notes are the subject of larceny in this state.")

Thomasson v. *State* (1857) 22 Ga. 499 l. c. 505: ("At common law, bank notes being mere evidences of debt, were held to be not such goods and chattels of which larceny might be committed. Cobb 793. Our statute, however, declares that the taking and carrying away a bank bill belonging to another, with intent to steal the same, shall be simple larceny.")

Johnson v. *State* (1860) 11 Ohio State 324: (bank bills held not to be money with in the meaning of the statute. Court willing to give such a construction except that other sections in the statutes forbade such a construction.)

United States v. *Morgan* (1805) Fed. Case No. 15808: (held that charge of receiving a bank-note under federal statute mentioning "goods and chattels" only could not be supported. Strict following of common law rule that a bank-note being a chose in action is not subject matter for larceny.)

In *Culp* v. *State*[29] the indictment charged of the theft of: (1) "seven paper bills of credit, on the Bank of the United States", (2) "seven bank notes on the United States Bank" and (3) "seven paper bills of credit." The judgment of conviction was arrested. An Alabama statute made "promissory notes for the payment of money" subject matter of larceny. The first count was held defective because the Bank of the United States was prohibited from issuing bills of credit of the value of those described. The second count was held defective because bank notes were not within the terms of the statute.[30] The third count was bad because a state could not issue bills of credit under the federal constitution. Congress had exercised its power through the Bank of the United States alone and from this point of view they were bad for reasons stated above. Whether bills of credit could have been issued by an individual or private corporation was not discussed. Observe also that there was no count for theft of seven pieces of paper.

State v. *Colvin* (1849) 22 N. J. L. 207: (receiving stolen bank-bills not a violation of statute punishing the reception of stolen "goods and chattels.")

United States v. *Bowen* (1817) Fed. Case No. 14628: (stealing bank note no offense at common law.) *U. S.* v. *Carnot* (1824) Fed. Case 14726, accord.

29. (1834) 1 Porter (Ala.) 33, 26 Am. Dec. 357.
30. The Court argued that bank notes and promissory notes were so different "in legal apprehension and common acceptation" as to forbid the deduction that one was embraced by the other "in contemplation of the legislature". Compare: *Wilson* v. *State* (1834) 1 Porter (Ala.) 118: (prosecutor under agreement made out four promissory notes. Later he delivered them to defendant upon condition that latter pay the sum stipulated; but defendant escaped from prosecutor's presence without doing so and disposed of the notes as his own property. Held not larceny under statute since notes were invalid. *Rex* v. *Phipoe*, 21 Law Series, note 60, cited.)

Collins et al v. *People* (1866) 39 Ill. 233: (U. S. treasury notes held to be goods and chattels so far as the formality of the indictment is concerned. The statute is not set out but apparently included "bond, bill, note" as subject of larceny. Held, also, that there could be no conviction unless the notes were genuine. Nothing

In *Moore* v. *Commonwealth*[31] the indictment under a statute punishing false pretences alleged in part that defendant did "by means of the aforesaid false pretence, obtain from the said Philip Harman, *a receipt* of great value, to-wit, *a receipt* in full for the payment of money, to-wit, for the payment of $8.78", etc.[32] (Italics supplied.) The evidence was that defendant was indebted to Philip Harman and in part payment gave Harman a five dollar bank note, the said bank note having been issued by a bank that had failed several years before. The statute punished the obtainment by false pretence "any *money, personal property,* or *other valuable things.*" The Supreme Court by a three to two decision reversed the judgment of conviction. Two reasons seem to have prompted the decision: (a) the receipt was of no value; and (b) the object of the statute "was to prevent the obtaining of money or goods or other valuable things by false tokens or false pretences, and has no relation to the payment and settlement of old debts and accounts".[33]

It is to be observed that the indictment was in one count and there was no charge of obtaining "a piece of paper". The decision means, therefore, that a voidable receipt was not *as such* personal property under the Pennsylvania statute. It is not a decision that "a piece of paper" is not personal property within the protection of the criminal law. The suggestion that property must have a saleable value does not seem correct on principle.[34]

W. J. Wilson was indicted for the theft of "the following

to show that they were otherwise than genuine and court was not presented with the problem of considering whether as pieces of paper they might be the subject of larceny.)

State v. *Dobson* (1840) 3 Harr. (Del.) 563: (indictment for larceny of bank notes. Held must be some proof of genuineness.)

State v. *Tillery* (1817) 1 Nott & M'Cord 9: (theft of bank note in violation of statute. Held that necessary to prove that it is a "true" note and that something is due thereon.)

31. (1848) 8 Penn. St. 260.
32. (1848) 8 Penn. St. l. c. 261.
33. (1848) 8 Penn. St. l. c. 264.
34. See 21 Law Series p. 13, note 29.

described personal property" - - - "to-wit, one railroad passenger ticket printed, issued and signed by the Oregon-Washington Railroad & Navigation Company, a private corporation, as evidence of the right of a passenger to transportation on the railroad of said company".[35] Judgment of conviction was affirmed in a liberal opinion. The facts were that the defendant abstracted the ticket from the rack in the company's office. He then stamped the ticket and was apprehended while trying to sell it. It will be observed, therefore, that the ticket had never been issued by the company and was not evidence of a chose in action. It would seem, in truth, to have been nothing more than "a piece of cardboard". It is believed that in England ordinarily the indictment would have charged the theft of "a piece of cardboard".[36] It is entirely possible to argue that the Oregon court thought the facts were within the Oregon statute. The opinion is not particularly clear but there is language to indicate that the conviction would have been sustained even though the statute had made no mention of a railroad ticket as subject of larceny.[37]

35. *State* v. *Wilson* (1912) 63 Oregon 344, 127 Pac. 980. The Oregon statute provided: "If any person shall steal any goods or chattels or any Government note, bank note, promissory note, bill of exchange, bond or other thing in action, - - - or any railroad, railway, steamboat or steamship passenger ticket or other evidence of the right of a passenger to transportation which is the property of another, such person shall be deemed guilty of larceny."
36. See p. 18, 21 Law Series.
37. "Within the meaning of the case of *Jolly* v. *United States*, this railroad ticket, although yet in the possession of the company, would be the subject of larceny because it is comprehended within the general term of 'any goods or chattels' used in our statute." l. c. 350.

    The brief for defendant in *State* v. *McCulloch* quotes the decision as standing for the proposition that a railroad ticket was not the subject of larceny at common law. If it be assumed that the ticket has been issued by the carrier that would seem correct on principle. See, however, *Regina* v. *Boulton* (1849) Denison 508, 21 Law Series 18.

    State v. *Musgang* (1892) 51 Minn. 556, 53 N. W. 874; (theft of "a book containing about 100 blank forms for passes" prepared

for use of employees on railroad. They had not been countersigned by the officer, without whose signature they were of no avail. Held, not larceny under statute providing that crime of larceny should apply to "a passage ticket completed and ready to be issued or delivered, although the same has never been issued or delivered by the maker thereof to any person as a purchaser or owner". Apparently no attempt to indict for theft of a "book" or so many "pieces of paper".)

Millner v. *State* (1885) 15 Lea 179: (railroad ticket subject of larceny under statute making it an offense to steal "any instrument or writing whereby any demand, right or obligation is created, ascertained, increased, extinguished or diminished, or any other valuable writing".) See *State* v. *Morgan* (1902) 109 Tenn. 157, 69 S. W. 970; *State* v. *Wilson* (1895) 95 Iowa 341, 64 N. W. 266; *State* v. *Brin* (1883) 30 Minn. 522, 16 N. W. 406.

McCarty v. *State* (1890) 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152: (information charged theft of "ninety-three railroad passenger tickets, of the aggregate value of one hundred and twenty dollars". Held invalid: "The value of each ticket should have been alleged, and the information should have shown that they were geniune, effective, railroad tickets, as an unstamped, undated, and unsigned railroad ticket is not the subject of larceny - - - - - - - Without these qualifications, the so-called railroad tickets had no more value that the intrinsic value of the paper on which they are printed, with the cost of preparing them. As this information did not charge the value of the paper, it could not be proven." See *Commonwealth* v. *Randall* (1875) 119 Mass. 107; *State* v. *Holmes* (1894) 9 Wash. 528, 37 Pac. 283.

Patrick v. *State* (1906) 50 Tex. Cr. Rep. 496, 14 Ann. Cas. 177: (indictment charged theft of "six railroad tickets reading from Texarkana, Texas, to Kansas City, said tickets of the value of fourteen and 65/100 dollars each, and of the aggregate value of eighty-seven and 90/100 dollars". Held defective: should have alleged (1) name of railroad; (2) that it was incorporated; and (3) that tickets had been issued, if such was the case. "It may be that the indictment was good for theft of any unissued railroad tickets, but it was certainly not good for railroad tickets that had been issued by the company and entitling the holder thereof to transportation." Considered as "bits of paper" the value alleged in the indictment could not have been sustained and that no doubt would be important in determining the degree of crime and the punishment.)

William Lawless[38] was indicted for larceny of "a certain paper writing, called and being a 'discharge' from the military service of the United States of the value of one hundred dollars". The discharge paper was not offered in evidence and it did not appear what were its contents or what was its value except that two witnesses spoke of it as a discharge from the military service of the United States. It was not argued that the written instrument was not the subject of larceny unless the jury should find that it had no value. The jury did not so find and "they were instructed that the paper was of no value unless the Commonwealth proved it to be of some value". There was no evidence that the particular paper had any peculiar value. The court contented itself with saying: "Its name, and its description in the indictment and by the evidence, sufficiently informed the jury what it was, and enabled them to judge whether it was or might be of value to the owner".[39] The defendant was held to have been properly convicted of larceny.

Whether a postage stamp is a written instrument depends upon what is included in the latter term. There is very little in written language upon the ordinary postage stamp but there is an implied contract on behalf of the federal government upon the sale of the stamp even though the obligation may be an imperfect one. In *Jolly* v. *United States*[40] it was held that postage stamps in the possession of government agents, which had not been is-

38. *Commonwealth* v. *Lawless* (1869) 103 Mass. 425.

39. *Commonwealth* v. *Lawless* (1869) 103 Mass. l. c. 431.

Commonwealth v. *Brettun* (1868) 100 Mass. 206, 97 Am. Dec. 95: (statute made promissory notes the subject of larceny. Indictment for larceny of 'one promissory note of the value of three hundred dollars, and one piece of paper of the value of three hundred dollars, of the goods and chattels of James H. Anthony' held good without further description.)

State v. *Thatcher* (1872) 35 N. J. L. 445 l. c. 452: (statutory terms "other valuable thing" included the act (thing) of signing as surety on a negotiable note of which defendant was maker, and on which prosecutor was fradulently induced to sign as surety.)

40. (1898) 170 U. S. 402.

sued to customers, were the subject of theft under a statute punishing one who feloniously took away "any kind or description of personal property".[41] The court was mindful of the fact that stamps like bank notes were incapable of being distinguished and "are not mere obligations but a species of valuable property in and of themselves the moment they are out of the possession of the Government". This represented a step in advance of the doctrine that bank notes were choses in action and therefore not subject of larceny.

It is also satisfying to know that the court was aware of the English doctrine permitting prosecution for theft of the paper or parchment on which an instrument was written.[42]

It is a possible view that the postage stamps were public documents. If so, the decision is an authority against the view so strongly presented to the Criminal Court of Greene County, Missouri, that public documents are not subject of larceny.[43] As to

41. The court made this sufficient argument: "There is, while the stamps are in the possession of the Government, some intrinsic value in the stamps themselves as representatives of a certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps." l. c. 406.

42. "Although at common law written instruments of any description were not the subject of larceny, as not being personal goods; that is, movables having an intrinsic value, yet although such instruments could not in strictness be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description frequently took place in England." l. c. 407. The statement seems too broad. If the instrument was a chose in action theft could not be committed of the paper on which it was written.

43. "If the petitions are completed instruments, the charge must be laid for taking them as such, having absorbed the paper and such writings are not the subject of larceny at common law. If they are public documents, they are not the subject of larceny at common law and, furthermore, not the subject of private or personal ownership by Heilman." Brief for defendant (*State* v. *McCulloch*) p. 48.
"They are therefore public documents because devoted solely to a public purpose and are not the subject of larceny." Opinion by Judge Patterson, 21 Law Series, p. 7.

the argument in *State* v. *McCulloch* that the petitions were not "the subject of private or personal ownership by Heilman" it might be suggested that in *Jolly* v. *United States* the second count charged that the theft of the postage stamps was "from the possession of Thomas McClure, the postmaster". The conviction was upon both the first and second counts. Of course, it may be said that the stamps were the property of the United States. The reply is that larceny is a violation of possession and not of property.

II. MISSOURI AUTHORITIES

It would seem that from the very outset the Supreme Court of Missouri refused to accept the common law as to larceny of choses in action. In *State* v. *Newell*[44] there was an indictment for obtaining bills of exchange by false pretenses. The court in holding the indictment sufficient as to demurrer stated as follows:

"The words of the statute on which this indictment seems to be predicated, are: 'If any person or persons, knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons, moneys, goods, or merchandise, or effects whatever, with intent to cheat or defraud such person or persons of the same, he shall, on conviction,' etc. The first question is, will the word 'effects' embrace a bill of exchange? This appears to be a question of construction. The design of the Legislature seems to have been to embrace every kind of case; they, therefore, after mentioning all sorts of personal things in possession, say, or effects whatever; no doubt intending to embrace something more than money, goods, or merchandise. By name, effects will embrace lands, tenements, etc. Effects in law must mean everything which is subject to the laws of property and ownership, whether real or personal; and of the personalty whether of possession or in action. A bill of exchange is not money, but is a security for money, because it contains the proof that money is due, and a promise to pay it. It is also a species of merchandise,

44. (1822) 1 Mo. 249.

or rather answers the end of money, in passing like money. It is effects, within the meaning of the statute; and this Court have already decided, that promissory notes are effects; (see the case of the Bank of Missouri v. Douglass.) But it is said, these bills are not effects, till they have passed out of the hands of the drawer. My opinion is, that if A, by false pretenses, cheats B, into making a bill of exchange, to be delivered to him, and to be used by him, that this is cheating B of effects, or means of living. The statute was made to prevent the wicked and cunning part of mankind from preying on the less wicked and cunning; to protect the unwary; to be the guardian of the ignorant and unwise. The end and the means by which the fraud is effected, is perfectly immaterial. Experience has shown that men grow cunning in new devises as speedily as law can be made to prohibit the old. The statute, therefore, uses general words, and prohibits the act to be done, without regarding the means by which it is effected."

The language of the court is rather remarkable and certainly displayed no tendency to ignore the needs of society.[45] Three points should be noticed. The decision makes no mention of any statute making choses in action the subject of larceny or false pretenses. There seems to be a desire to disregard the common law rule. In the second place it seems doubtful whether if it be assumed that a bill of exchange is an "effect" within the statute the same should be held as to a bill of exchange, the drawer of which is the prosecutor. In such a case it would seem that the bill is not valid and that all the accused secures is a piece of paper. If the accused furnished the paper it would not seem that he obtained any property by securing the signature of the prosecutor. The third point is that the Supreme Court had a broad and liberal attitude in construing the statute. The word "effects" was given a wide meaning and there was not the slightest disposition to apply the rule of *ejusdem generis*

45. "Here, by false pretenses, a right or chose in action has been obtained; it is an effect, and the transaction is, in an eminent degree, the object of criminal law." 1 Mo. l. c. 250.

so as to hold that "effects" was a general term following the particular words "moneys, goods, or merchandise" and therefore to be limited in its meaning.

It has been pointed out that the common law rule as to choses in action logically meant that a bank-note was not subject matter of larceny. Some decisions went that far. The Supreme Court of Missouri apparently had no faith in such a notion. In *McDonald* v. *State* is the following:

"Third. The thirty-second section of the third article of the act concerning crimes and punishments, is in these words: 'Every person who shall steal, take and carry away any money or personal property of another, etc., shall be deemed guilty of larceny', etc. The indictment charges that he did steal, take and carry away a bank-note, for the payment of ten dollars, of the value of five dollars. A bank note is personal property; it is personal effects. In *State* v. *Newell,* 1 Mo. R. 248, a bill of exchange is decided to be personal property or effects."[46]

In *State* v. *Logan*[47] the Supreme Court in passing on the sufficiency of an indictment argued in this fashion: "We cannot conceive how it is necessary that the title of the book should be given. The substance of the offense is stealing a book of the value of three dollars. It cannot be material, whether the book was printed, written or blank. If this book was in blank, it could have no title page, yet it would be the subject of larceny." Probably no one would deny the soundness of the argument. The indictment in *State* v. *McCulloch* charged the taking of "three hundred and sixty-nine (369) paper pamphlets each of which pamphlets contained eight (8) leaves." The difference between a book and a pamphlet for the present purposes seems unreal.

These seem to be the precedents in Missouri aside from the decisions depending on statutes changing the common law

46. *McDonald* v. *State* (1843) 8 Mo. 283 l. c. 285. Compare *U. S.* v. *Moulton Federal* Case 15827 and *U. S.* v. *Davis* (1829) Federal Case 14930.

47. (1825) 1 Mo. 532.

rule. The authority is meagre but so far as it goes it exhibits a wholesome tendency and one that lends no sanction to the decision rendered in the Criminal Court of Greene County, Missouri.

There is another proposition that was urged by the attorneys for defendant in *State* v. *McCulloch* and was adopted, apparently, by Judge Patterson in rendering his decision: "Under section 4927[48] of our statutes only such written instruments as affect pecuniary obligations or such written instruments as affect title to property are personal property and, as such property, the subject of larceny."[49] Section 4927 reads as follows:

"The term 'personal property', as used in this law,[50] shall be construed to mean goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, or any right or title to property, real or personal, shall be created, acknowledged, assigned, transferred, increased, defeated, discharged or diminished."[51]

The argument was that the referendum petitions were not evidences of rights in action nor the sort of written instruments mentioned in the statute. That much must be granted. It does not follow, however, that there are no other written instruments except those mentioned. The inference is to the contrary and any fair definition of the term "written instrument" would seem to confirm the inference. The attorneys for defendant gave an acceptable definition in stating in effect that a written instrument is a piece of paper containing writing.[52] Upon the basis of this definition it becomes apparent that Section 4927 has not included all written instruments. No doubt, the court rendering the de-

48. R. S. Mo. 1909.
49. See p. 7, 21 Law Series.
50. The phrase "in this law" is assumed to refer to the chapter dealing with crimes and punishment.
51. Now Section 3716, R. S. Mo., 1919.
52. Reply brief for defendant, p. 18. It is proper to suggest that cloth, parchment, metal or stone would do as well as paper. The symbols may be printed, typewritten, written, carved,—in fact any known method that is reasonably permanent should be sufficient.

cision in *State* v. *McCulloch* would have admitted as much as a premise for a conclusion that since no written instrument was subject of larceny at common law only such as are included within Section 4927 are subject of larceny in Missouri. It has been the purpose, however, of all that has been heretofore written to demonstrate that the authorities are overwhelmingly against the view that no written instrument was subject matter for larceny at common law if the indictment was properly drawn.

It should be observed, also, that Section 4927 includes "goods, chattels, effects" within the meaning of the term personal property. Missouri decisions, quoted above, held a bill of exchange and a bank note to be effects. The same would seem to be true of any other written instrument, including a referendum petition.

The apparent purpose of Section 4927 was to make certain sorts of written instruments—choses in action and instruments "savouring" of realty—subject of larceny by classifying them as personal property. To hold that the legislature in doing this succeeded in depriving all other written instruments of the protection of the criminal law would be a strange construction. Surely, no one would deny that the purpose of legislation dealing within the subject matter of larceny has been to liberalize the common law conceptions. The construction given to Section 4927 by the court in question was restrictive and resulted (if the major premise of this article is correct) in withdrawing written instruments protected by common law from any security of the criminal law of Missouri.

Section 4927, however, is not the last word in the determination of the decision under review. The indictment was based upon Sections 4250 and 4528.[53] The former defined the crime of burglary in the second degree as breaking into certain enclosures in which any "goods, wares, merchandise or other valuable thing" is kept or deposited with intent to steal or commit a felony. The latter section provides the procedure in case

53. R. S. Mo., 1909; now Sections 3297 and 3305 R. S. Mo., 1919.

"any person in committing burglary shall also commit a larceny". The term "larceny" is not defined in that section.

It is worthy of particular attention that the words "personal property" do not occur in Section 4520. How is it possible, then, for Section 4927 to have any application? The only question that seems to arise is whether a referendum petition is a valuable thing. Honest reasoning compels an affirmative answer. There is no occasion for extending the fictitious reasoning of Coke's time with reference to choses in action.

To ascertain what is meant by the term "larceny" as used in Section 4528 it seems necessary to keep in mind the accepted common law and refer to Sections 4535 and 4548.[54] Section 4535 specifies the subject matter of grand larceny as "any money, goods, rights in action, or other personal property or valuable thing whatsoever" of the value of thirty dollars or more.[55] Section 4548 specifies the subject matter of petit larceny as "any money or personal property or effects of another under the value of thirty dollars". It is to be noticed that the two sections differ in the terms used even though there seems to be no occasion for a difference in specifying the subject matter. It is a fair illustration of the proposition that statutes are seldom symmetrical or even self sufficient.

Conceding that Section 4927 (under whatever interpretation may be decided upon) controls the words "personal property" as they appear in both sections what is to be said of the terms "valuable thing whatsoever" and "effects"?[56]

Labor and material go into referendum petitions the same as other written instruments. They represent a certain expenditure of society's productive forces and sound judgment would

54. R. S. Mo., 1909; now Sections 3312 and 3325, R. S. Mo., 1919.
55. Certain animate objects, regardless of value, are also specified.
56. Since the indictment charged the value to be less than thirty dollars it would seem that Section 4548 rather than 4535 would control. But it seems preferable to hold that the decisive factor would be the understanding at common law as to subjects of larceny and in addition any subjects which may have been added by statute.

seem to compel an admission that they are either valuable things or effects even if it be admitted that they are not personal property within the meaning of Section 4927. If this is true then the taking of referendum petitions may be larceny under Sections 4535 and 4548 regardless of the interpretation to be given Section 4927.

Counsel for defendant[57] in *State* v. *McCulloch* suggested that the rule of *ejusdem generis* applied and that the words "valuable thing whatsoever" should be restricted by interpretation to apply only to things of the same general class as those included within the preceding words "personal property" as defined by Section 4927.

It is doubtful whether Section 4535 is an apt statute for the application of the rule. The important words in the section are "money, goods, rights in action, or other personal property or valuable thing whatsoever". This is not a collection of specific or particular terms followed by a generic term. Other words among those quoted seem as general as "valuable thing".

Even if it be conceded that the rule of *ejusdem generis* should be applied it must be remembered that the rule is at most only a guide to the legislative intent.[58] The rule is not an end within itself. Surely, it is not to be believed that the Missouri legislature intended by the adoption of Section 4535 to eliminate from the subject matter of larceny anything that was larceny at common law.

Finally, it is to be observed that the argument by defendant's counsel takes no heed of Section 4548, defining petit larceny. Furthermore, the whole argument as to the application of the rule requires a conviction that Section 4927 has removed from the protection of the criminal law of Missouri those written instruments which (it is submitted) were subject to larceny at common law.

57. Brief for defendant, p. 54.
58. Sutherland on Statutory Construction, Section 279.

III. CONCLUSION

The decision under review has attracted unusual attention in view of the fact that it was rendered by a trial court. It was harshly criticised in a learned article which appeared in the Central Law Journal.[59] Some of the more pertinent paragraphs should be copied here.

"There are three clear fundamental errors in this opinion. First, it does not correctly state the common law rule; secondly, it does not fairly construe the state statute; thirdly, it does not accurately define the term 'property'. In the first place the common law did not exclude all 'written instruments' as subjects of larceny. In the second place the Missouri statute does not exempt certain property from this common law rule, but provides generally that persons may be convicted of larceny who steal 'any money, goods or other personal property or valuable thing whatsoever'. In the third place in seeking to show that referendum petitions are not 'personal property', within the terms of this statute, the court improperly confines the meaning of this term to absolute interests in chattels, when it obviously includes anything in which one may have any right of user whatever, whether absolute or qualified or whether it has a market value or a value based only on a particular use of it by the possessor thereof.

"We have already referred to the old case in the Year Books which held that stealing the title deeds to property was not larceny. Lord Coke, by a process of technical refinements, applied this principle to all evidences of choses in action. The common-law rule, however, did not go any further. May on Criminal Law, Sec. 272; Stephen's History of the Criminal Law (3rd Ed.), p. 143. The reason for this rule as stated by Coke and the early common law judges was that where a written instrument was merely the evidence of an obligation, a theft of the paper did not affect the obligation which still existed independent of the writing, and therefore nothing of value was taken. That reason is not even a decent reason for the absurd rule which

59. Vol. 91, p. 241.

it seeks to sustain; it certainly is no reason whatever to sustain the rule when applied to written instruments which do not represent pecuniary obligations and whose value inheres in the paper itself, and what is written thereon. Therefore, in the absence of statutes, all written instruments other than evidences of obligations and title may be the subjects of larceny.

"But the Missouri statute, as quoted above, is as broad as the statute in any other state where the effort has been made to abrogate this absurd rule of the common law. But the court refuses to take even this opportunity to escape the effect of a rule which he believed existed at the common law. It would seem that any judge should jump at the chance to relieve the jurisprudence of his state from the burden of an inherited rule of law which is ridiculous enough to make a Hottentot laugh. * * * * * * * * * * * * * * * * *

"The trial court's argument to show that a referendum petition was not personal 'property' under the Missouri statute is superficial and illogical. Anything is my property in which I have a lawful right of user. The term 'property' is nothing but the bundle of rights which the law declares an individual may have or enjoy in a thing. A sheet of paper is a thing. It has dimensions and it has value. Even if the writing thereon makes it merely the evidence of a chose in action, as a note, at common law the writing could be and frequently was disregarded and the thief prosecuted for petit larceny for stealing a 'scrap of paper'. 2 Russell, Crimes, 74-80.

"Nor need the value of the thing be 'appreciable', as the court alleges, if by that is meant a market value. The thing may be a Chinese laundry ticket and be worthless to everyone but a Chinaman and yet be valuable to him *

"Nor had the referendum petitions in the principal case become public records; they were still the property of the circulators until they were deposited with the proper authorities and from that time only did they exert their influence as legislative documents. No property ceases to be mine until I have parted

with it. A deed is not a deed until it is delivered. A note is not a note until it is negotiated. A declaration or answer, drawn up and signed does not become a pleading until filed with the clerk. In all these cases the owner of the writing retains his ownership or right of user in the paper or document until he parts with it.

"It is a matter of regret to every lawyer that cases involving wrongs to society must ride off to defeat on mere technicalities even when properly understood, but it is little short of a catastrophe when judges go out of their way to give effect to technical objections that have no relevancy whatever to the case.

"English lawyers often marvel at the rigidity with which our courts adhere to the letter of the decisions of an ancient and barbarous age from which their courts have long since departed. The only explanation of this tendency is that our courts fail to exercise any independent judgment of their own, but are too ready to take some other judge's opinion or some superficial text writer's generalization as the law without any inquiry either as to the soundness of the original rule or its exact limitations in view of the facts of the particular case or the state of the law or of society at the time the decision was rendered."

Nevertheless, the decision has found a defender in the St. Louis Law Review.[60] Therein the writer views Judge Patterson as courageously refusing to indulge in judicial legislation. It seems necessary, however, to point out that the author was in error in saying that the petitions "were in the custody of one of the Election Commissioners".[61] Moreover, no authority is cited for the author's conclusions except Sections 4520 and 4927.

Furthermore, there need be no apology in insisting that courts do not devitalize our substantive law. Such seems to have been the fear of W. L. Sturdevant who protested in Journal Issued by American Bar Association, in this fashion:[62]

"It is not our purpose here to discuss the merits of the

60. Vol. 6, p. 54.
61. 21 Law Series, p. 6.
62. Vol. VI, p. 113.

legal question involved in this prosecution; but we think it would not be out of place to suggest that this is but one more example of a judicial proceeding that has caused people, not only by thousands, but by hundreds of thousands, to express, in their various ways, their utter contempt for the law and its administration. It is such judicial fiascos that shock the common sense of the masses of people and sow the seeds of anarchy; and this is equally true whether due to defects in the law itself or in its administration. The average man cannot, will not, understand, how the perpetration of a great wrong, affecting a public or a private interest, can be accomplished without a violation of the law."

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