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Larceny by Trick in Pennsylvania

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LARCENY BY TRICK IN PENNSYLVANIA

It is the purpose of this article to point out one of the areas wherein the offense known to the common law as larceny was blatantly deficient in its attempts to protect the right of possession and ownership of personal property the efforts of the courts to remedy this deficiency in the law and the manner in which the Pennsylvania judiciary coped with the problem.

The early common law courts were faced with the anomalous situation wherein a person who had obtained possession of the goods of another by a direct physical act of trespass would be liable to sanction, but another who had obtained possession "peaceably" from the owner by means of fraud was not so liable. This distinction led to the development of the crime known as "larceny by trick".

At common law and in Pennsylvania the crime of larceny has been defined as "the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner, without his consent".[1]

The *Penal Code* of Pennsylvania does not define the crime of larceny, nor does it define the crime of larceny by trick, but merely states that, "Whoever commits larceny, is guilt of felony. . . ."[2] Since the offense constituting larceny and larceny by trick is not defined by the *Penal Code,* the common law definition applies in Pennsylvania.[3]

From the beginning, the physical element of the crime of larceny was limited to situations where there was a wrongful taking from the possession of the owner without his consent and a carrying away of the property obtained in this manner.[4] Thus it is readily apparent, and the cases so held that the taking must be under such circumstances as to amount technically to a trespass.[5] It has been stated:

> "Every larceny includes a trespass; from whence it follows that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away."[6]

Thus, the property must be taken from the actual or constructive possession of the owner,[7] and it must be without his consent.[8] It therefore follows that one who is himself in lawful possession of goods cannot commit a trespass upon those goods in converting them to his own use and hence could not be guilty of larceny

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1 Thomas v. Kessler, 334 Pa. 7, 5 A.2d 187 (1939), citing 2 Wharton, Criminal Law § 1097.

2 Act of June 24, 1939, P.L. 872, § 807, 18 P.S. 4807; "In spite of the declaration, however, 'whoever commits larceny' is not under any and all circumstances 'guilty of a felony' for it is specifically provided that one who commits larceny of 'growing property'—Sec. 811, ibid, or 'coal or iron ore'—Sec. 812, ibid, is guilty of a misdemeanor". Hitchler, The Common Law Felonies in Pennsylvania, 48 Dick. L. Rev. 57.

3 Commonwealth v. Doran, 145 Pa. Super. 173, 20 A.2d 815 (1941).

4 May, Criminal Law § 240, (4th Ed., 1938).

5 "Larceny is a wrong against possession, and every larceny contains within it a trespass de bonis asportatis." Commonwealth v. Meinhart, 173 Pa. Super. 495, 98 A.2d 392 (1953).

6 Commonwealth v. Barrett, 28 Pa. Super. 112 (1905), citing 1 Hawkins, Pleas of the Crown c. 19, p. 208.

7 Commonwealth v. Helmick, 119 Pa. Super. 256, 180 Atl. 759 (1935).

8 Commonwealth v. Dehle, 42 Pa. Super. 300 (1910).

of such goods.[9] Nor can trespass or larceny be committed by the taking of the goods where such is done with the voluntary consent of the owner.[10]

Where the owner, however, had been induced by fraud to part with his goods, the common law courts' requirement of a trespassory taking frustrated the application of criminal justice, and the illicit undertakings of a rogue often went unpunished.

With the rise of commerce and industry and the attendant commercial transactions, it soon became apparent that the growth of complicated commercial transactions and the more subtle means of illicit deprivation of property increased the necessity of the development and expansion of the traditional crime of larceny to include situations where the owners of goods were induced to voluntarily part with possession of them through fraudulent means, or to create new crimes.[11]

Mr. Justice Holmes, in recognition of this problem, stated:

> "The evil is the same whether the misappropriation is made by a man into whose hands the owner has put the property, or by one who has wrongfully taken it away. But primitive law in its weakness did not get much beyond an effort to prevent violence, and very naturally made a wrongful taking a trespass, part of its definition of the crime. In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device the crime is committed. This really was giving up the requirements of a trespass and it would have been more logical, as well as truer to present object of the law, to abandon the requirement altogether."[12]

The courts, however, did not adopt such a realistic approach but attacked the problem in a manner frequently resorted to, by the use of a fiction.

In 1779, the crime of common law larceny was radically extended by the process of judicial construction, in the case of *Rex v. Pear*,[13] to include another method by which the obtaining of the goods of another through fraud, rather than by a direct overt act of trespass, became punishable. In this case, the defendant hired a horse under the pretense of taking a journey. On the same day he sold the horse and delivered it to a stranger, such having been his intention from the very beginning. The court held this to be larceny in spite of delivery by the owner, for the original intent having been fraudulent, "the parting with the property had not changed the nature of the possession, but . . . it remained unaltered in the prosecutor

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9 Commonwealth v. Tluchak, 166 Pa. Super. 16, 19, 70 A.2d 657 (1950), citing 52 C.J.S. § 31 and § 1.
10 Commonwealth v. Van Foerster, 79 Pa. Super. 174 (1922).
11 The early development was mainly a threefold one with the creation by the legislature of the crimes of obtaining property by false public token; 33 H. VIII, c. 1, and by false pretenses; 30 Geo. II, c. 24; and the decision in Rex. v. Pear, 2 East P.C. 685, 1 Leach C.C. 212 (1779).
12 Miller, Criminal Law, 357-358 (1934), citing Mr. Holmes from 10 Harv. L. Rev. 459, 470.
13 2 East P.C. 685, 1 Leach C.C. 212 (1779).

at the time of the conversion".[14] The decision in the *Pear* case led to the development of the doctrine which today is known in the law as "larceny by trick".

> "The rule seems to be well established in this country that where one obtains *possession* of property by fraud, deceit or device, such possession in the defendant and consent on the part of the owner does not exonerate the defendant from prosecution for larceny, if at the time the defendant obtained the possession he had the secret intention of appropriating the goods to his own use. Though the crime of larceny is founded upon a trespass in the taking; nevertheless, if the possession of the property be obtained by fraud and deceit, the fraud will take the place of the trespass or is equivalent thereto."[15]

The decision in the *Pear* case at once raised the question whether the common law felony of larceny by trick now covered the entire area of the fraudulent obtaining of goods of another, or whether it and the crime of false pretenses then in existence,[16] a statutory misdemeanor, were mutally exclusive. The crimes were similar in the following respects. In both crimes (1) the defendant obtains possession of the property with the consent of the owner; (2) the owner of the property is induced by fraud to part with possession; and (3) the defendant intends to deprive the owner thereof permanently.

The courts, however, were quick to draw a distinction. Perhaps the major reason at the time for making this distinction is well expressed by Justice Paxson in *Commonwealth v. Eichelberger*[17] where he stated:

> "The distinction between larceny [by trick] and false pretense is a very nice one in many instances. In some of the old English cases, the difference is more artificial than real and rests purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time many of the cases were decided, larceny was a capital felony in England and the judges naturally leaned to a merciful interpretation of the law out of a tender regard for human life."

The *Eichelberger* case is the first and only Pennsylvania Supreme Court decision which has dealt directly with the distinction between the crimes of larceny by trick and of obtaining property by false pretenses and which has held a defendant guilty of larceny by trick. Justice Paxson quotes extensively from an opinion which he had written several years prior to the *Eichelberger* decision in 1889, while

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14 "That this decision was a novelty, and an unwarranted modification of the law of larceny appears upon an examination of the authorities cited by the court", says Joseph H. Beale, Jr. in "The Borderland of Larceny," 6 Harv. L. Rev. 244, (1892), after which he goes into an excellent and thorough analysis of the cases used by the court to justify their decision, and then how later decisions have blundered in the application of the doctrine of the case. But Beale concedes, "It is too late, however, to quarrel with the decision in Pear's Case. It was followed within a few years by a number of cases; and its doctrine, under the name of larceny by trick, is a most vigorous one today."

15 13 Miss. L. J. 270 (1941).

16 Act of 30 George II, c. 24 punished for a misdemeanor ". . . . all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any person or persons of the same." In America this act was not part of the common law except in a few states, but similar statutes have universally been enacted.

17 Commonwealth v. Eichelberger, 119 Pa. 254, 13 Atl. 422 (1888).

he had been on the bench of the Court of Common Pleas of Philadelphia County. In that case, *Commonwealth v. Yerkes,*[18] Justice Paxson wrote:

> "The distinction between larceny and cheating by false pretenses is well stated in Russel on Crimes, 5th Amer. ed., 28. After an exhaustive review of the cases the learned author says: 'The correct distinction in cases of this kind seems to be, that if by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with, not only the possession of the goods but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses.' I could not add to this were I to write a volume."

Upon completion of this quotation, Justice Paxson continues:

> "The rule itself is distinct and clearly cut; the difficulty consists in its application to the facts of each particular case, varied as they are by the ingenuity of the particular rogue who makes the facts."

By adoption of the rule as stated by Russel, the Pennsylvania Supreme Court recognized the common law doctrine of larceny by trick and made it part of the law of the Commonwealth.

The rule as thus laid down in the *Eichelberger* case has been successfully applied by the Pennsylvania courts in many instances and without much difficulty. A brief survey will follow.

In the first reported case after the decision in *Commonwealth v. Eichelberger,*[19] D purchased certain goods from V at a public sale, the conditions of which were cash and no removal of the goods until they were paid for. D gave V a check for an amount in excess of the price of the goods which V accepted as full payment and satisfaction of the purchase price, and returned the difference which was in excess of the money given over the money due, in cash. There was no money to support the check thus made by D. The court charged the jury with the law as stated in the *Eichelberger* case and then further charged that if the jury believed that V intended to part with both title and possession when he accepted D's check, the latter would not be guilty of larceny. It was held that D was not guilty.

In *Commonwealth v. Pioso,*[20] V purchased some horses from D the payment for which he made in the form of a note which D discounted. When the note became due and V wanted to renew the obligation by another note, V made out a second note and gave it to D to deliver to the bank for the purpose of lifting the first note given "and for no other purpose". In violation of this confidence, D discounted the second note also and appropriated the proceeds of it to his own use. In application of the general principle, the jury decided that V did not intend to part with the title in the note to D and hence held him guilty of larceny.

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18 Commonwealth v. Yerkes, 29 Leg. Int. 60 (1872).
19 Commonwealth v. Diffenderfer, 8 Lanc. L. R. 209 (1891).
20 Commonwealth v. Pioso, 19 Lanc. L. R. 145 (1902).

D was indicted and convicted for larceny of $5,280.30 in *Commonwealth v. Perrine.*[21] Here D, an insurance agent, induced V to make application to the Traveler's Life Insurance Company for a policy in the sum of $100,000 on the promise that the first annual premium would be only $325, instead of the regular cost of $5,280.30. D further induced V to draw a check for the larger amount to the order of cash or bearer and to allow him to accompany V to the bank. The proceeds of the check were placed upon the desk in front of the parties, and before V could get it, D seized all of the money and left the bank. Upon these facts, the court said it was clear that D's scheme was to get possession of the money representing the full amount of the check by fraud and trickery and to thereafter appropriate the same to his own use. The check was never delivered to D, nor was the money parted with by V willingly or intentionally. The court cites *Commonwealth v. Eichelberger* to support its decision and quotes from it extensively.

In *Commonwealth v. Quinn,*[22] D, appellant, with divers other persons was charged with various crimes, one of which was larceny by trick. D, with a conspirator, entered various business establishments with a "John Doe" warrant. By the use of such warrant, they seized several pinball machines and other machines and informed the Vs that they would be getting a notice for a hearing "in a few days" on the charge of illegal possession of gambling machines. The Vs never received any such notice. D, with his conspirators, was using the warrant as a means of procuring the possession of the machines and would, in turn, sell the machines to other business establishments. A verdict of guilty on the charge of larceny was rendered in the lower court.[23] In affirming the conviction on appeal, the court stated:

> "Using a warrant to facilitate the stealing of another's property is no different from using an artifice or trick. Where by means of any trick or artifice, the owner of property is induced to part with possession only, still retaining the right of property, the taking by such means amounts to larceny if done animo furandi."

The *Eichelberger* case is used by this court as the basis for this part of its decision.

Commonwealth v. Van Foerster[24] illustrates again the general rule as applied by the courts that where the owner intended to part with the property in the thing which was delivered over to the defendant, the crime is not one of larceny. The conviction of larceny was reversed because here "the prosecutor delivered the property in question absolutely, with the understanding that the one receiving the property might thereafter proceed to apply it to his own use." The evidence showed that D was engaged in the promotion of the sale of lots in a certain tract of land. V, at the solicitation of one of his friends, became interested in the enterprise and

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21 Commonwealth v. Perrine, 46 Pa. Super. 637 (1911).
22 Commonwealth v. Quinn, 144 Pa. Super. 400, 19 A.2d 526 (1941).
23 There were various incidents and "arrests", but the above is indicative of them all.
24 See n. 10, supra.

subsequently purchased one of the lots for which D gave a deed. The enterprise fell short of V's expectancy. At the trial V testified that he intended to part with his money upon receiving title to the property.

D was indicted and convicted of larceny by trick in *Commonwealth v. Helmick,* and the conviction was sustained[25] when it appeared that D had purchased a ring on a bailment lease, obtaining a credit against the purchase price by another ring given by V to D, and made a gift of the leased ring to V, who, at the time, had no knowledge that the latter gift was under lease. Later D, for the purpose of surrendering the ring to the bailors upon their demand, because of his failure to make the necessary payments, induced V to part with possession so that he might have it insured. Subsequently, the bailors returned the ring to D who refused to return it to V on demand. D retained the ring for several months after which it was finally redelivered to the bailors.[26]

In an application of the facts in the above cases, the Pennsylvania courts seemed to experience little difficulty with the doctrine of larceny by trick as distinguished from obtaining property by false pretenses as announced in the *Eichelberger* case. The courts, however, have not found a practical application of the rule to the particular facts of each case as simple as the rule and have experienced the same difficulties as the courts of other states. It has been stated:

> "An investigation of the modern law of larceny gives an impression of utter confusion, a field for the courts to exercise their abilities in making fine, technical, and narrow distinctions. Frequently it appears to be largely a matter of guess-work as to whether or not the offense committed is larceny, embezzlement, obtaining property by false pretenses, or some other form of statutory offense created by the legislature in a vain attempt to fill up some loophole in the existing laws."[27]

A brief survey and analysis will follow of the Pennsylvania cases in which the writer believes the courts have confused the correct application of the rule in order to reach a desired end.

The Pennsylvania courts, in an attempt to do justice in the particular case before them, found it necessary at times to interpret the facts in such a way as to make the offense fit the hard and fast definition of the crime which they were trying to apply.[28]

In *Commonwealth v. Yerkes,*[29] which was used by Justice Paxson as a basis for his holding in the *Eichelberger* case, D, who was not an employee of the city

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25 Commonwealth v. Helmick, 119 Pa. Super. 256, 180 Atl. 759 (1935).
26 The court also found as a matter of law that V had enough of a property interest in the ring to satisfy the "of another" element of larceny.
27 30 Yale L. J. 613 (1921).
28 This has been a common error by many courts. For a more complete discussion of the difficulty in drawing the distinction and the confusion into which other courts have fallen see Beale's article cited in n. 15, supra; 20 Col. L. Rev. 318 (1920); and 16 N.Y.U.L.Q. Rev. 487 (1939).
29 See n. 18, supra.

but who was authorized thereby to purchase bonds and mortgages on the account of the sinking fund of Philadelphia, procured from the city clerk a check in the amount of $33,000 which he stated, at the time of obtaining it, was to be applied as payment on bonds which he allegedly had procured. As a matter of fact, the bonds were never purchased by D. Upon obtaining the check from the clerk, D immediately deposited it to his own personal account and subsequently drew therefrom a number of checks to his personal use. The court speaking through Justice Paxson stated that, "We do not think this a case of false pretenses because there was not any intention on the part of the city officers to part with the property in the check but with the possession merely and no relation of debtor and creditor arose out of the transaction." Here, the court reasons further, D had merely received the check for purposes of transmission to the persons from whom he claimed to have purchased the stock. The city did not intend to pass to him the right of property as evidenced by the check.

Justice Paxson's reasoning in this case shows the beginning of the straining by the courts to reach a certain goal. By his ability to cope with such a barrier, he reasoned that it was true the city had intended to part with its property in the check, but "certainly not in favor of the defendant". Thus, in order to continue to follow the traditional distinction between the crimes of larceny by trick and the obtaining of property by false pretenses and still give the defendant the just punishment he deserved for such an illicit act, Justice Paxson created an apparent modification to the larceny by trick doctrine to the effect that if the victim intended to pass title in the property (which is obviously the situation here and thus would normally constitute the crime of obtaining by false pretenses) but not to the defendant, only intending to give the defendant possession, then the offense is still larceny by trick.

In the next case,[30] D, being indebted to a bank in the form of a note for $1600, paid the cashier the discount thereon for another ninety days and, in exchange for the original note, gave him one for $16 with the deliberate intent and design to defraud the bank, the cashier believing he was giving him a note for $1600. Justice Paxson, now sitting as a justice on the Pennsylvania Supreme Court, affirmed his earlier decision of *Commonwealth v. Yerkes, supra,* rendered when he was occupying a seat on the bench of the Court of Common Pleas of Philadelphia County. He again follows the same line of reasoning as in the *Yerkes* case to find again that the facts constituted larceny by trick. He remarked:

> "It would be the baldest technicality, a mere sticking in the bark, to hold that the bank intended to part with any right of property by a mere delivery to the defendant of a piece of paper which, qua paper, was of no value. It did not intend to deliver the evidence of its debt, because it supposed it was getting another of equal value and would have received it, but for the trick and fraud of the defendant."

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30 See n. 17, supra.

The last case to be considered in this connection is *Commonwealth v. Dehle.*[31] D, after meeting by chance V, a foreigner, pretended to find $50, which was in fact a worthless confederate bill. D offered to divide the money with V, and V, being ignorant of the character of the bill, gave V $25 in current money and took the confederate bill in exchange for his share. D was held guilty of larceny by trick. Again the passage of both title and possession in the $25 was obviously effected, and again the court in an attempt to arrest one of "the devices through which rogues have deceived honest men in making change", very cleverly justified and confirmed the conviction of larceny by trick. Here, Justice Porter quotes from 1 *Hawkin's P.C.* 145:

> "When property is obtained with a preconcerted design to steal it, the possession is *supposed* to continue with the true owner, whatever may be the means or the pretense under which the property is obtained."

He then quotes from 2 *East's P.C.* 677:

> "When goods or money are delivered with the understanding and intention that the property shall remain in the presence of the owner until the goods are paid for, or other money is immediately returned in exchange for that delivered, the legal possession remains in the owner till the property is altered by the perfection of the contract, which remains inchoate until perfected by the parties."

Thus, in effect, Justice Porter is stating that even though V may have attempted to part with the title to the particular money in question, because the defendant had a preconcerted design to steal when he practiced his fraud, the possession is supposed to continue in V. Then, to further support the opinion and conviction, the court accepts fully the rule of the *Eichelberger* case. [32]

It is to be regretted that the law writers and courts have undertaken to create a fixed distinction between the crimes of larceny by trick and the obtaining of property by false pretenses by a hard and fast rule, and then have proceeded to render the distinction valueless by reasoning which, although rendering just results, cannot be reconciled with the rules so broadly laid down. The Court has remarked:

> "In fact all false pretense is practically larceny by trick and the attempt to hold that this statutory offense has a fixed and definite line of demarkation from the common law offense of larceny is not logical and does not work out in practice, as is well illustrated in the Eichelberger and Dehle cases."[33]

There remains to be considered in this discussion another important situation, whether a defendant would be guilty of the offense of larceny by trick or of the offense of obtaining property by false pretenses where the victim intended to part

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31 See n. 8, supra.

32 "The suggestion that the prosecutor by accepting the $50 Confederate bill in exchange for his money, parted not only with the possession, is conclusively answered by Commonwealth v. Eichelberger, . . ." from which he quotes extensively.

33 Commonwealth v. Adler, 48 Pa. C.C. 544 (1918).

with the title, but it did not actually pass. The only Pennsylvania case deciding this is *Lewer v. Commonwealth*,[34] decided in 1823, in which Chief Justice Tilghman refuses to extend the crime of larceny to cover any class of case except where the property was taken against the will of the owner, and he holds that where it was the owner's intent that the possession should never return to him there was no larceny.[35] The decision is a correct one and in line with the general rule at the time. The majority view today, however, would hold the offense to be larceny by trick.[36] In view of the courts' attempt to sustain more convictions of larceny, it seems quite apparent that when the Pennsylvania Supreme Court is called upon again in this situation it will hold the offense to be larceny by trick.

Will the Supreme Court of Pennsylvania sustain the traditional distinction between the crimes of larceny by trick and obtaining property by false pretenses the next time it is called upon to do so, in the light of four recent developments in the law which are extremely important and which bear directly upon the matter?

(1) Some states have abolished the distinction between the two crimes by statute.[37]

(2) The *Penal Code* of Pennsylvania now provides: "If, upon the trial of any person indicted for such felony [false pretenses], it shall be proved that he obtained the property in question in such manner as to amount in law to larceny, he shall *not*, by reason thereof, be entitled to be acquitted for such felony. No person tried for such felony shall be liable to be afterwards prosecuted for larceny upon the same facts."[38]

(3) On May 21, 1943, the general statute in Pennsylvania on the offense of obtaining property by false pretenses[39] was amended to make the crime a felony. Therefore, since 1943, both crimes are felonies in Pennsylvania.

(4) The deemphasis of title in the *Uniform Commercial Code*,[40] and its basic change from the common law "property" approach in comercial transactions may have an affect. Since purported commercial trans-

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34 Lewer v. Commonwealth, 15 S. & R. 93 (1826). Here D fraudulently induced V to sell him certain goods for his brother by stating that he, D, was acting as the agent for his brother, and that the latter had sent the money to D who would in turn pay V. D presented a letter allegedly written by his principal, substantiating D's statement of the alleged principal-agency relationship. In reality D never had a brother and had falsely written the letter himself. When D gave V his personal check, V intended to part with title to the goods to D's alleged, but non-existant, principal.

35 "I have seen no judicial decision, which is authority in this court, carrying the doctrine of what may be called constructive larceny, beyond the case where possession only was intended to be delivered; and I am for stopping there, because we have a line distinctly marked, which is of great importance in criminal law".

36 See n. 14, supra.

37 For example, the Ohio General Code, § 12447-1, enacted September 16, 1943, provides, "Whoever obtains possession, or title to, anything of value with the consent of the person from whom he obtains it, . . . is guilty of larceny by trick."

38 Act of June 24, 1939, P.L. 872, § 836, 18 P.S. 4836.

39 Entitled "Cheating by fraudulent pretenses". Made a felony by the amending Act of May 21, 1943, P.L. 306, § 1.

40 Act of April 6, 1953, P.L. 3, §§ 1-101 to end, 12A P.S. 1 to end.

actions are the basis of many criminal indictments, the influence of the *Code* and its novel approach may affect the importance and emphasis placed by the criminal courts on the common law "property and possession" concept in making distinctions between various crimes.

In conclusion, in Pennsylvania the common law crime of larceny by trick is well established. If one obtains possession of goods from the owner or possessor by some trick, artifice or fraud, with the intent, at the time of so obtaining, to appropriate the goods to his own use, and the owner intends to pass merely possession and not title, he commits the crime of larceny by trick if and when he converts the goods to his own use.

Larceny by trick is to be distinguished from the crime of obtaining property by false pretenses where the owner intends to part absolutely with both title and possession to the goods in question.[41]

If the owner intends to part with title, but title does not pass, the present Pennsylvania view is in accord with the minority and older view and holds the crime to be the obtaining of property by false pretenses.

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41. One further distinction between the two crimes which should be noted is that the crime of larceny by trick may be committed by the use of any trick, artifice, design or fraud, whereas in the crime of false pretenses, the defendant must make a statement, as distinguished from a promise, of a past or present fact.