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# Misappropriation without Violence in Texas

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terclaim because of the jurisdictional limits of the court, and if this defendant shall assert his cause of action in the proper court and make a motion to consolidate the two suits, then the two suits may be consolidated in the higher court where each party may present his claims.

### CONCLUSION

The main problem in the field of concurrent jurisdiction between the federal courts and the state courts lies in the simple question of which court shall act when both courts are petitioned at the same time with causes of action which arise from the same transaction. Since each court is bound only by the necessity of orderly procedure in our court systems, the simple question becomes complex.

The passage of the compulsory counterclaim rule for the federal system has alleviated many of the probems within this sphere. However, the more important fact as concerns Rule 13a is the construction given to the rule by the state courts when a cause of action is asserted there, which cause of action should have been a compulsory counterclaim in a prior pending action in the federal courts. It is felt that the abatement of the action by some state courts in favor of the prior jurisdiction of the federal courts has been the proper construction and a wise solution to a complex problem. It is hoped that other state courts when faced with the problem will follow the lead.

*Jere G. Hayes.*

## MISAPPROPRIATION WITHOUT VIOLENCE IN TEXAS

### PREFACE

The purpose of this comment is to analyze the law of theft by false pretext, swindling, embezzlement, and theft by bailee in Texas. The emphasis of the discussion will be on the law as it actually exists; suggestions of what the law should be will be limited to the discussion of conflicting cases.[1]

[1] For suggested legislative reform see Stumberg, *Criminal Appropriation of Movables — A Need for Legislative Reform*, 19 TEXAS L. REV. 117 (1941).

The text will be presented in outline form. The crimes naturally group themselves into two segments: the swindling—theft by false pretext unit, and the embezzlement—theft by bailee unit. At the beginning of each unit the reader will find a short explanation of the statutes without reference to the case law. Following will be a discussion of the elements of the crimes, and finally a discussion of the overlap and confusion which exists between them.

## SWINDLING — THEFT BY FALSE PRETEXT

### *Statutes Applicable*

Swindling is defined as follows:

> "Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to approriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same.[2]

Theft by false pretext is described in this manner:

> The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.[3]

It appears from a comparison of the two statutes that the definition of swindling is an extension of the definition of theft by false pretext, including a more complete description of the type of property subject to the crime and the deceit necessary for the consummation of the offense. The only obvious distinction between the two crimes is provided by Art. 1548, TEX. PEN. CODE (1925).[4] This statute declares that for the crime of swindling it is not necessary

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[2] TEX. PEN. CODE (1925), art. 1545.

[3] TEX. PEN. CODE (1925), art. 1413.

[4] "It is not necessary in order to constitute the offense of swindling that any benefit shall accrue to the person guilty of the fraud or deceit, nor that any injury shall result to the person intended to be defrauded if it is sufficiently apparent that there was a wilful design to receive benefit or cause an injury."

that the accused derive any benefit or cause any injury as long as he has the intent to do so. This seems to be opposed to the language of Art. 1413, which defines theft by false pretext and expressly states that the accused must have the intent to appropriate the goods and that the goods must be so appropriated.

Although it might appear that the statutes are repetitious of each other, they were actually designed to cover two distinct crimes. As the next few pages will demonstrate, the distinctions have gradually disappeared until at present the crimes are, in fact, very similar.

### *Elements of Swindling*

The concept of swindling was evolved to cover a hiatus in the common law of theft. At common law there could be no theft if the title to the stolen goods had passed from the victim to the accused, for if title had passed there could be no wrongful taking. This point was aptly expressed in *Kellog v. State:* [5]

> Where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by the fraudulent pretenses of the taker, the taking and carrying away do not constitute larceny. The title vests in the taker, and he cannot be guilty of larceny. He commits no trespass. He does not take and carry away the goods of another, but the goods of himself.

The crime of swindling was conceived to cover the circumstance where by misrepresentations of one sort or another a person was induced to part with the title as well as the possession of his property. Thus the element of passage of title is an essential part of the crime of swindling.[6] Other than the element of intent, the only other important component of swindling is the type of misrepresentation used by the accused. The misrepresentations may not be in the nature of promises or predictions of future events, but must relate solely to the present or past.[7] This point, along with the fact that the misrepresentation must be relied upon, often

[5] 26 Ohio St. 15, 19 (1874).

[6] For a discussion of the passage of title as a distinction between swindling and theft by false pretext see pp. 419-420.

[7] Anderson v. State, 177 S.W. 85 (Tex. Crim. 1915); Dixon v. State, 215 S.W.2d 181 (Tex. Crim. 1948). Nor is it necessary that the misrepresentations be verbal in nature; the conduct and acts of the party are sufficient.

causes confusion as will be explained more fully in the section analyzing the overlap between swindling and theft by false pretext.

These four elements—passage of title, misrepresentations of the present or past, reliance upon the misrepresentation, and intent at time of taking—complete the crime of swindling. Since the passage of Art. 1549, declaring that the State may elect to prosecute for either swindling or theft by false pretext where the facts indicate both crimes, and the liberal interpretation given this statute by such cases as *King v. State*,[8] indictments for swindling are rare.

### *Elements of Theft by False Pretext*

The most obvious element of theft by false pretext is, as the name implies, the use of a false pretext to carry out the act. A good example of the confusion this element has caused is *Roe v. State*, which involved a sale of cattle.[9] The seller never received payment due to the fact that the defendant misrepresented the size of his bank account. The trial court refused to give the jury charges concerning the misrepresentations that were made, leaving the case to be decided upon the element of intent at the time of taking. The Court of Criminal Appeals reversed on the grounds that the trial court's refusal was error. On motion for rehearing the State argued that the presence or absence of false representations was not essential to the crime, and relied on the word "or" as contained in the definition of theft by false pretext.[10] The court held this to be an unsound theory. Judge Graves dissented, agreeing with the State that the statute clearly sets out two separate methods of prosecution.

It appeared that the problem of whether or not the use of a false pretext is a necessary element of the crime was conclusively settled when in 1946 the court decided the case of *Hesbrook v. State*.[11] In this case the court made the following emphatic statement:

> It is now the settled law of this State that a false pretext is necessary to constitute the crime of theft by false pretext. The intent to deprive

[8] 213 S.W.2d 541 (Tex. Crim. 1948).
[9] 144 S.W.2d 1104 (Tex. Crim. 1940).
[10] "... if the taking ... was obtained by any false pretext, *or* with any intent to deprive the owner of the value thereof ..." TEX. PEN. CODE (1925), art. 1413. [Emphasis added.]
[11] 194 S.W.2d 260 (Tex. Crim.).

> the owner of the property and subsequent appropriation of it, alone, is not sufficient.[12]

Unfortunately the law on this point is unsettled once more due to the recent decision in *Wade v. State*.[13] In this case the defendant borrowed his friend's car and converted the property he found in the trunk. A conviction for theft by false pretext was upheld without even so much as a discussion of the point of whether any false pretext was used to induce the transfer of possession (apparently it was not). As Judge Davidson pointed out in his dissent,

> ... the majority opinion overrules, without justification or reason, a long line of established precedents [speaking of *Hesbrook* decision among others] and, in so doing, leaves the law relative to theft by false pretext under Art. 1413, Vernon's P.C. ... in a state of confusion and uncertainty.[14]

A close reading of the majority opinion in the *Wade* case will indicate that the court did not actually overrule the earlier decisions on the point of use of a false pretext, but rather ignored the problem completely.

In those cases where a false pretext *is* used (thereby avoiding the question of whether or not it is necessary) there is the further qualification that it must be the inducing cause for the transfer of possession of the property from the injured to the accused.[15] In other words, the false pretext must be relied upon. In addition, and contrary to the law on swindling, the false pretext may consist of a promise of things to come in the future.[16]

Another element of the crime is that the property must be actually appropriated to the use and benefit of the taker.[17] Therefore, the venue for the crime is always in the county where the property is actually received, and not necessarily the county where the representations or promises are made.[18]

The remaining element of theft by false pretext is passage of title. As pointed out earlier, the crime of swindling was based

[12] *Id.* at 261.
[13] 275 S.W.2d 665 (Tex. Crim. 1955).
[14] *Id.* at 667.
[15] Nichols v. State, 109 S.W.2d 1057 (Tex. Crim. 1937).
[16] Gibson v. State, 214 S.W. 341 (Tex. Crim. 1919).
[17] King v. State, 213 S.W.2d 541 (Tex. Crim. 1948).
[18] Sims v. State, 13 S.W. 653 (Tex. Crim. 1890).

upon the need for a statute to cover situations where the felonious act would have constituted theft, except that the title to the property passed with the possession. For this reason the earlier cases held that if the title to the property passed, the crime *must* be swindling, but if the title did not pass then the crime was theft by false pretext.[19] Oddly enough, the Court of Criminal Appeals usually concerned itself with the question of whether it was intended by the parties that the title should pass, rather than the question of whether the title had actually passed as a matter of law. This gave rise to some confusing doctrine, as illustrated by the case of *Anderson v. State*[20] which held that the use of false representations in a sales transaction would block the passage of title. Needless to say, the notion that false representations or promises prevent title from passing is not sound. If false statements or promises prevented title from passing then there could never be a swindle, for the very misrepresentations which are a necessary element of the crime of swindling would avert the passage of title which is also a necessary element of the crime. This point created so much confusion[21] that the court soon came up with another theory to solve the problem. In *Contreras v. State*[22] the court held that the passage of title was a distinction between the two crimes but was not to be considered controlling.

The most recent cases on the subject have gone so far as to declare that the element of passage or non-passage of title as a distinction between theft by false pretext and swindling is a "fallacy"[23] and no longer exists in Texas.[24] It is to be hoped that this point is forever settled.

One collateral issue should be considered at this time. It may seem from the foregoing analysis of these two crimes that they present an ideal medium for a merchant selling on credit to coerce his customers into payment by threatening criminal prosecution for breach of their promise to pay. Apparently the court has seen the danger in such a situation. In the case of *Rundell v.*

[19] Bink v. State, 98 S.W. 249 (Tex. Crim. 1906).

[20] 177 S.W. 85 (Tex. Crim. 1915).

[21] Segal v. State, 265 S.W. 911 (Tex. Crim. 1924); De Blanc v. State, 37 S.W.2d 1024 (Tex. Crim. 1931).

[22] 39 S.W.2d 62 (Tex. Crim. 1931).

[23] Johnson v. State, 162 S.W.2d 980, 982 (Tex. Crim. 1942).

[24] Bomar v. Insurors Indemnity & Ins. Co., 150 Tex. 484, 242 S.W.2d 160, 162 (1951).

*State* Judge Morrow by way of concurring opinion said, "If property is obtained on credit by false representations of existing facts, there may be a prosecution for swindling, but if the credit is obtained upon the simple promise to pay, accompanied by no fraudulent representations of existing facts, the prosecution for theft cannot be maintained." [25] It is submitted that this is a sound rule of law and should be followed in all cases which involve the common credit sale transaction between merchant and customer.

The elements of theft by false pretext may be summarized as follows:

1. Intent at the time of taking.
2. Appropriation to the use and benefit of the accused.
3. False representation of the present, past, or future (possibly this element is not necessary).
4. Reliance upon the misrepresentation (if present).
5. Title may or may not pass (true under most recent theory).

*Swindling—Theft by False Pretext: Overlap*

Now that the court has settled the point that passage of title is not a distinction between the crimes of theft by false pretext and swindling, the main source of confusion is the fact that for swindling there can be no misleading statements or promises concerning future events. This is made complex because of the inducing cause rule discussed earlier.[26] Where there are misrepresentations of all three types (past, present, and future) it is often extremely difficult to determine which statement is the inducing cause of the crime. The conclusion ultimately reached is often no more than the personal opinion of the court deciding the particular case, and this naturally leads to inconsistent opinions.

*Boscow v. State* [27] was a case involving a defendant who misrepresented that he was a doctor and promised to cure the wife of Mr. D; in return Mr. D gave the defendant advance payments. The defendant was indicted for swindling, his defense being that

[25] 235 S.W. 908, 911 (Tex. Crim. 1920). See also Massey v. State, 266 S.W.2d 880, 885 (Tex. Crim. 1954).

[26] *Supra* note 15.

[27] 26 S.W. 625 (Tex. Crim. 1894).

the fraudulent promise took the facts out of the scope of the crime. The court said:

> It is true that, if the witness Dunn had relied alone on the promise, it could not be swindling; but, where the promise is connected with the false pretense of an existing fact, as that he was a physician, and at that very time associated with other physicians . . . it would support the charge.[28]

The same line of reasoning was followed by the court in the case of *Pickens v. State* [29] where the misrepresentation was that the defendant was in a position to get one McNulty a job on the police force and the fraudulent promise was that he would do so upon the payment of ten dollars. Once again the indictment was for swindling, and once again the defendant contended that the fraudulent promise took the facts out of the scope of that crime. The court reasoned, "In this case, however, his promise or guaranty to do something in future was an incident of his false representations, etc., that he was in a position and able to secure for McNulty a position on the police force." [30] These two decisions failed to influence the court in the case of *New v. State*.[31] The defendant, who was indicted for swindling, had represented to Mr. R that he was an agent of the Ben E. New Co. and that if Mr. R would assign his bank account to the defendant, he would deliver in return guaranteed bonds of the United Post Office Corp. The Court of Criminal Appeals held that since the inducing misrepresentation was of a future event (that the bonds would be delivered) the indictment for swindling could not stand. The court held further that the fact that some of the representations were of present facts (that the defendant was an agent of the Ben E. New Co. and that the bonds were guaranteed) was no indication that crime was swindling because they were not the inducing cause of the transaction. When, on motion for rehearing, the State called the court's attention to its holdings in the *Boscow* and *Pickens* cases, the court replied:

> We are not unmindful of the holdings in the cases named, nor of expressions in other cases which make it difficult for prosecuting

[28] *Id.* at 626.
[29] 180 S.W. 234 (Tex. Crim. 1915).
[30] *Id.* at 235.
[31] 83 S.W.2d 668 (Tex. Crim. 1935).

> officers and trial courts to know what is the proper course to pursue under a given state of facts. Whether successful or not, we have made an earnest effort in the cases cited in our original opinion to clear away some of the doubt occasioned by the state of our decisions on the point under consideration. If the result of our effort has been to add further confusion, it is much to be regretted.[32]

These cases aptly illustrate the inherent difficulty of applying the inducing cause rule, but it is respectfully submitted that much of the difficulty has been caused by the court itself. The court has failed to adopt a theory for application of the rule, such as found in the *Boscow* case, and apply it consistently by use of the principle of stare decisis. The result has been numerous conflicting opinions, each a theory unto itself.

### *Swindling—Theft by False Pretext: State's Election*

Much of the confusion caused by the inducing cause rule has been alleviated by the passage of Art. 1549 declaring that where the elements of both crimes are present the State may elect to prosecute for either. Thus if the State chooses to prosecute for theft by false pretext, which it usually does, it is no defense to say that the crime is swindling.[33] Although the statute requires that the elements of both crimes be present, it has been interpreted liberally and used successfully in many cases which present only a trace of the elements of both crimes. In *King v. State*,[34] for example, the defendant bought an automobile and paid for it by check. He represented that he had the money in the bank (a present misrepresentation) and that the check would be paid upon presentation (a promise). Under the inducing cause rule it seems that the promise would be ignored and the crime would be swindling; however, by virtue of the statute now under discussion, the court upheld a conviction for theft by false pretext in the face of the defense that the crime was swindling. The court said:

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[32] *Id.* at 670.

[33] "Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner that the acquisition thereof constitutes both swindling and some other offense, the party thus offending shall be amenable to prosecution at the state's election for swindling or for such other offense committed by him by the unlawful acquisition of said property in such manner." TEX. PEN. CODE (1925) art. 1549.

[34] 213 S.W.2d 541 (Tex. Crim. 1948). See also Johnson v. State, 162 S.W.2d 980 (Tex. Crim. 1942).

> If, however, the facts of this case should be held to constitute swindling under art. 1545, P.C., it cannot be successfully asserted that the facts would not authorize a jury to find that possession of the automobile was obtained by false pretext, . . . with the intent to appropriate the same to the use and benefit of the appellant. Under such circumstances, he would also be guilty of theft by fraudulent pretext.[35]

## *Conclusion*

It is submitted that according to the most recent decisions the crime of theft by false pretext now includes the crime of swindling. Swindling requires an intent at the time of taking, as does theft by false pretext. For swindling the title to the property in question must pass, but for theft by false pretext it makes no difference. For swindling there must be a misrepresentation of a present or past fact, while for theft by false pretext the false statement (if necessary at all) may even extend to a promise of things to come in the future. The only time that it might be said that theft by false pretext does not include the crime of swindling is in a circumstance where the defendant has derived no benefit from the act, or caused injury thereby, so that Art. 1548[36] is applicable.

The fact that theft by false pretext embraces the crime of swindling, when taken in connection with Art. 1549,[37] provides a tool which may be used by the prosecutor to avoid all of the conflicting cases and confusion discussed earlier. The answer to the whole problem is that the prosecutor should *always* bring his indictment for theft by false pretext.

Suppose a case where X and Y are good friends. X represents that he has just inherited $10,000 and promises that he will give it all to Y in return for a deed to Y's house. Y delivers the deed. In fact X is lying and Y is never paid. Suppose further that the prosecutor brings an indictment for swindling. The court is immediately met with the problem of interpreting the inducing cause rule, for in order to convict for swindling it must be established that the inducing cause of the transfer was *not* the promise to pay, but the statement that X had inherited $10,000. On the other

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[35] *Id.* at 543.
[36] *Supra* note 4.
[37] *Supra* note 33.

hand, if the prosecutor brings the indictment for theft by false pretext the inducing cause rule is not an issue. It is believed that the court, through the use of Art. 1549, has come to the point of holding that as long as there is a fraudulent promise in the facts the crime may be theft by false pretext regardless of whether or not the promise was the inducing cause. This was apparently the basis of the decision in the *King* case.[38] In other words, as long as the indictment is brought for theft by false pretext the problem of which statement is the inducing cause is immaterial.

For further illustration consider the recent case of *Massey v. State*.[39] The prosecuting witness testified that he sold property to the defendant solely in reliance on the defendant's statement that a check was in the mail. This was a perfect case of swindling; the title to the goods had passed and the only false statement made was one concerning a present or past fact. The court sustained a conviction for theft by false pretext and said:

> Whether the facts show theft by false pretext or swindling need not be determined, for the state was authorized to maintain this prosecution for theft by false pretext upon facts which might also show swindling. [citing Art. 1549 and the King case][40]

As previously indicated, the only time an indictment should ever be brought for swindling is in a situation where the accused has derived no benefit from his crime. An example of this would be where the accused by the use of false statements secures a check from his victim, but is apprehended before he has a chance to cash it. In such a case the prosecutor would be forced to bring the indictment for swindling and contend with the agonizing problems of inducing cause and passage of title. Fortunately such situations are rare.

## EMBEZZLEMENT—THEFT BY BAILEE

### *Statutes Applicable*

The statute defining theft by bailee prescribes that:

> Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall

[38] *Supra* note 35.
[39] 266 S.W.2d 880 (Tex. Crim. 1954).
[40] *Id.* at 885.

> without consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft, and shall be punished as for theft of like property.[41]

Embezzlement is defined as follows:

> If any officer, agent, clerk, employé, or attorney at law or in fact, or any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employé of any private person, copartnership or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply or convert to his own use without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property.[42]

The embezzlement statute includes the term "bailee" as one who can be guilty of the crime of embezzlement, but since the statute defining theft by bailee is broad enough to cover any kind of bailment, it is believed that it could be used exclusively. At least there is nothing apparent from the face of the statutes themselves which would indicate otherwise. The following discussion of the cases will disclose that this interpretation of the statutes has not been followed.

### *Elements of Theft by Bailee*

The most complex part of the crime of theft by bailee is the nature of the bailment itself. The type of bailment contemplated by the statute is usually defined in this way:

> A bailment is a delivery of goods for some purpose under contract, express or implied, that after the purpose has been fulfilled, they should be redelivered to the bailor, or afterwards dealt with according to his direction, or kept until he reclaims them.[43]

This definition of bailment has three elements: delivery, contractual purpose, and return of the goods.

A perfect example of a case where there was no delivery so as

[41] TEX. PEN. CODE (1925), art. 1429.
[42] TEX. PEN. CODE (1925), art. 1534.
[43] Northcutt v. State, 131 S.W. 1128, 1129 (Tex. Crim. 1910).

to satisfy the definition is *Dunlap v. State.*[44] The defendant made a deal to trade his farm with Rogers. Deeds were executed and delivered. When the defendant moved he took with him some fence posts which were on the premises. Rogers contended that the defendant was the bailee of these posts, and everything else on his farm, from the day the deeds were signed. The court reversed a conviction for theft by bailee for the reason that Rogers never had actual possession of the posts, and obviously did not deliver them to the defendant.

As pointed out, the bailment must also have some definite purpose. In *Fulcher v. State* [45] the defendant was given $500 too much by mistake when he cashed a check at the bank. The state attempted to prosecute for theft by bailee. The Court of Criminal Appeals reversed for the reason that there was no contractual purpose in the delivery of the money, and so there was no bailment as that term is used in the statute.

Although the definition of bailment as set out above expressly requires a return of the goods, there has been some confusion on this point. Some cases require that there must be an intent, at least in the mind of the bailor, that the exact same goods be returned,[46] while at least one case has held that this is not necessary.[47] It is submitted that the latter rule is the more realistic.

Collateral to the definition of bailment is the fact that the statute will not support a conviction where the bailment is for the exclusive benefit of the bailor,[48] although it will support a conviction where the bailment is for the sole benefit of the bailee.[49]

The remaining element of the crime, that of intent, is now settled in Texas. The intent to appropriate to the use of the accused may exist at the time of the taking [50] or may be formed after the goods have come into his possession as a bailee.[51] Furthermore, the property must actually be so appropriated.[52]

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[44] 160 S.W.2d 529 (Tex. Crim. 1942).
[45] 25 S.W. 625 (Tex. Crim. 1894).
[46] Brown v. State, 270 S.W. 179 (Tex. Crim. 1925).
[47] Lee v. State, 193 S.W. 313 (Tex. Crim. 1917).
[48] Gose v. State, 84 S.W.2d 234 (Tex. Crim. 1935); Lee v. State, 193 S.W. 313 (Tex. Crim. 1917).
[49] Williams v. State, 16 S.W. 760 (Tex. Crim. 1891).
[50] Alvarez v. State, 2 S.W.2d 849 (Tex. Crim. 1928).
[51] Lewis v. State, 87 S.W. 831 (Tex. Crim. 1905).
[52] Purcelley v. State, 13 S.W. 993 (Tex. Crim. 1890).

The elements of the crime may be broken-down and summarized as follows:

1. There must be an actual delivery of the goods from the bailor to the bailee.
2. The bailment must have some definite purpose.
3. It must have been the intent of the bailor that the goods be returned (not clear whether identical goods are necessary).
4. There must be a mutual benefit bailment, or one for the sole benefit of the bailee.
5. The intent may exist at the time the goods are bailed or may be formed subsequently.
6. There must be an actual appropriation of the goods to the use and benefit of the accused.

*Theft by Bailee—Theft by False Pretex: Overlap*

In the case of *Lewis v. State* [53] the defendant rented horses, stating that he was going to take them to a particular place. Instead he went in the opposite direction and sold the horses. The conviction was for theft by false pretext, and the defense was that the crime was theft by bailee. The court said:

> The same transaction may be an offense under both statutes; the distinction between the offenses being that under art. 861 [now art. 1413] the fraudulent intent must exist at the very time of obtaining possession of the property, while under art. 877 [now art. 1429] it is not necessary that the fraudulent intent should have existed at the time the possession of the property was obtained, but may be formed afterwards.[54]

If a bailment is induced by some false statement and there exists at the time an intent to appropriate to the use and benefit of the accused there seems to be no reason why the State should not have the choice of indicting for theft by false pretext or theft by bailee since both statutes have been violated. However, as is usually the case, if the bailment is induced by a simple request on the part of the defendant without any misstatement of facts or false promises it is believed that the crime is limited to theft by

[53] *Supra* note 51.
[54] *Ibid.*

bailee. A conviction for theft by false pretext in such a situation is a violation of what seems to be one of the established principles of that crime, namely that a false pretext or promise must be present.[55]

*Elements of Embezzlement*

At the common law embezzlement was unknown for the reasons illustrated in the case of *The King v. Joseph Bazeley*.[56] Bazeley worked in a bank. He took in some money from a customer and put it directly into his pocket. The court discussed the existing law and cases holding that theft was the felonious taking of an article from the "possession" of another, and decided that there was no larceny here because the money in question was never in the "possession" of the complaining owners of the bank. The court said, "The rule that the possession of the servant is the possession of the master cannot be extended to a case in which the property never was in the master's possession. . . ." [57] As a result of this case the first embezzlement statute was passed in England.[58]

In order to prove the crime of embezzlement in Texas today it must be shown: [59]

1. That the defendant was the agent of the person or corporation as alleged, and by the terms of his employment was charged with the duty of receiving the money or property of his principal.
2. That he did so receive money belonging to his principal.
3. That he received it in the course of his employment.
4. That he embezzled, misapplied, or converted it to his own use.

The most obvious point is that the accused must be an agent, and the injured party his principal.[60] The difficulty comes in deciding just when the accused is an agent and when he is not. It

[55] There is one case to the contrary, *supra* note 13.
[56] 2 Leach 835, 168 Eng. Rep. 517 (1799).
[57] Id. at 520.
[58] An Act to Protect Masters and Others Against Embezzlement by Their Clerks or Servants, 39 GEO. 3, c. 85.
[59] Taylor v. State, 16 S.W. 302 (Tex. Crim. 1891); Webb v. State, 8 Tex. Crim. App. 310 (1880).
[60] New v. State, 74 S.W.2d 697 (Tex. Crim. 1934).

was the practice of the court at one time to demand that the defendant be an agent within the strict terms of the law. In *Brady v. State*,[61] decided in 1886, the defendant was employed as a clerk and cotton weigher. He collected some bills owed his employer and converted the money. The court reversed a conviction for embezzlement on the grounds that the clerk had not been given the authority to collect bills and hence was not an agent at the time of the act. Other early cases might be cited [62] in which the court demanded that before a person could be convicted of embezzlement it must be shown that at the time he acquired the property he was acting within the limits of his express authority as an agent, and not simply implied authority.

Apparently the first case to break with this strict theory was *Smith v. State*.[63] The court distinguished the *Brady* case on the facts and said:

> It ought not to be required by the state that in prosecutions for embezzlement it should be in peril of sustaining defeat in a just prosecution, because of some technical lack of specific authority in respect to some particular act, if, under all the circumstances such authority might reasonably *be implied* and found as a fact by the jury in light of the relation existing between the parties. [emphasis added][64]

Despite the fact that there was a strong dissent, the reasoning of this case has been followed in one instance [65] and has been followed and quoted from extensively in another.[66]

One further situation requiring discussion is that of embezzlement arising out of a bailment. It will be recalled that the term "bailee" is used in the embezzlement statute as well as in the statute covering the crime of theft by bailee. The statute defining embezzlement was enacted in 1858. The case of *Reed v. State*,[67] decided in 1884, restricted the term "bailee" as used in the embezzlement statute to the type of bailee found in a bailment for the sole benefit of the bailor. The court reached this conclusion by use of the rule of *ejusdem generis*, and although the result may

[61] 21 Tex. Ct. App. 659.
[62] Loving v. State, 71 S.W. 277 (Tex. Crim. 1902).
[63] 109 S.W. 118 (Tex. Crim. 1908).
[64] *Id.* at 121.
[65] Powell v. State, 198 S.W. 317, 320 (Tex. Crim. 1917).
[66] McCue v. State, 65 S.W.2d 314, 316 (Tex. Crim. 1933.)
[67] 16 Tex. Ct. App. 586.

have been sound legally, it seems unnecessary practically. Undoubtedly because of this holding the statute covering theft by bailee was enacted in 1887.[68] As previously discussed this statute is broad enough to cover any kind of bailment, and probably was intended to do so by the legislature. Nevertheless, the law in Texas today remains that if a theft arises from a mutual benefit bailment, or one for the sole benefit of the bailee, the crime is theft by bailee; if the theft arises from a bailment for the sole benefit of the bailor, the crime is embezzlement.[69]

*Embezzlement—Theft by False Pretext: Overlap*

In an earlier discussion under the sections dealing with theft by bailee it was explained that where the bailment is brought about by the use of some false pretext, the State virtually has an election between prosecuting for theft by false pretext or theft by bailee. Logically the same reasoning would apply in embezzlement cases where the agency relation is created by false pretext. An ideal situation was presented in the case of *Johnson v. State*.[70] The injured party (Mr. P) went to a hotel to secure a room. There he met the defendant who told Mr. P that he was working at the hotel and that if Mr. P had any money he had better give it to him for safe keeping overnight. The next morning the defendant was gone and Mr. P discovered that he did not work at the hotel. It is an established principle that a landlord who keeps money for his tenant is a bailee for the sole benefit of the bailor,[71] so this was a case of embezzlement under a bailment induced by false pretext. The court reversed a conviction for embezzlement on the grounds that the crime was theft by false pretext, reasoning that the crime could not be embezzlement because the false pretext which was used kept any fiduciary relation from existing between the parties such as is necessary for embezzlement.

Apparently contra to the holding in the *Johnson* case is *Brown*

[68] Johnson v. State, 159 S.W. 849 (Tex. Crim. 1913).

[69] There may be a trend to the contrary. See discussion of *Erwin* case, *infra* note 75.

[70] 80 S.W. 621 (Tex. Crim. 1904).

[71] *Supra* note 68.

*v. State* [72] where the defendant got money from a victim by representing that he was a policeman, and was taking the money to pay the victim's fine for violation of a city ordinance. The conviction was for embezzlement, the defendant contending that he was guilty of theft by false pretext, if anything. The court admitted that "the question is of some interest," [73] but went on to say that the defendant was an agent despite the fact that the relation was created by false pretext. The same facts arose in the case of *Haley v. State,* [74] and a conviction for theft by false pretext was affirmed. The court did not raise the issue of whether or not the defendant could be considered an agent.

These cases are altogether too contradictory for a conclusion to be drawn. Yet it might be said that there is no logical reason why the State should not have the right to prosecute for theft by false pretext or embezzlement at its own election provided the facts of the crime are such that they clearly violate both statutes.

### *Theft by Bailee—Embezzlement: Overlap*

The confusion existing between these two crimes has two sources; first, the failure of the court to apply the well established rule that a bailment for the sole benefit of the bailor comes within the crime of embezzlement, and second, the fact that in some cases a bailee may also be an agent.

An example of the court's failure to apply the law concerning thefts arising from bailments for the sole benefit of the bailor is *Erwin v. State.*[75] In this case one Moore requested the defendant to take his (Moore's) car and get some money to get Moore out of jail. Instead, the defendant appropriated the car. The court expressly recognized that this was a bailment for the sole benefit of the bailor, and yet upheld a conviction for theft by bailee. This case may indicate a new trend on the part of the court to broaden the application of Art. 1429 defining theft by bailee, but until the established precedents are expressly overruled such attempts only create confusion.

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[72] 270 S.W. 179 (Tex. Crim. 1925).
[73] *Id.* at 180.
[74] 75 S.W.2d 272 (Tex. Crim. 1934).
[75] 212 S.W.2d 183 (Tex. Crim. 1948).

There are numerous cases involving conviction for theft by bailee where it appears that the bailee was actually a servant or agent of the injured party.[76] In the case of *Rick v. State* [77] the defendant was hired to go to another city to secure an automobile. To pay for the automobile he was given a check which he converted to his own use. The court upheld a conviction for theft by bailee without discussing the obvious employment relationship which could make the crime embezzlement. Apparently in these situations the State may elect to prosecute for either embezzlement or theft by bailee at its discretion. There is authority for this proposition in an early Texas case.[78]

## CONCLUSION

The elements of these crimes when taken separately are actually not difficult; the confusion arises from the fact that the crimes are so similar in nature, and when taken as a whole their elements become a maze of fine distinctions calculated to drive even the most astute to despair. Part of the confusion is undoubtedly caused by lack of adequate time to completely research the law on each case presented.[79]

It is encouraging to note that the court has apparently solved most of the problems connected with the crimes of swindling and theft by false pretext. In so doing they received valuable assistance from the legislature in the form of Art. 1549, TEX. PEN. CODE (1925). Unfortunately, many problems still exist in the embezzlement-theft by bailee area such as the nature of the bailment necessary to come within the term "bailee" as it is used in the statutes defining both crimes, whether or not an agency may be created by fraudulent misrepresentations, and exactly when is a person an agent or a bailee.

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[76] Lee v. State, 193 S.W. 313 (Tex. Crim. 1917); Alvarez v. State, 2 S.W. 2d 849 (Tex. Crim. 1928).

[77] 207 S.W.2d 629 (Tex. Crim. 1947).

[78] Wilson v. State, 82 S.W. 651, 652 (Tex. Crim. 1904): "Although the act may have constituted theft of property acquired by bailment under article 877, Pen. Code 1895, that affords no reason why it should not also constitute embezzlement under the general statute."

[79] *Cf.* Edwards v. State, 286 S.W.2d 157 (Tex. Crim. 1955); and Branford v. State, 66 S.W.2d 330 (Tex. Crim. 1933). Note that the facts are identical but the results are contra, and that the *Edwards* case fails to cite the *Branford* case.

It is hoped that the court's progress in solving the swindling-theft by false pretext problems may be taken as an indication of forthcoming solutions in the law of embezzlement and theft by bailee.[80]

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[80] For statutory solutions adopted by other states, see, LA. REV. STAT. § 14:67 (1950); WIS. STAT. § 943:20 (1955); N.Y. PENAL LAW § 1290 (1944).