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# Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284

John Wesley Bartram\*

## I. Introduction

Section 19.2-284 of the Virginia Code of Criminal Procedure<sup>1</sup> addresses proof of property ownership in theft offenses.<sup>2</sup> The statute provides:

In a prosecution for an offense committed upon, relating to or affecting real estate, or for stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any personal estate it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of such estate was in the person or entity alleged in the indictment or other accusation to be the owner thereof.<sup>3</sup>

Section 19.2-284 has remained virtually unchanged for a century and a half.<sup>4</sup> Over that period, very few cases have relied on the statute or its predecessors, and none have suggested that the statute might serve as a vehicle for the consolidation of the theft crimes in Virginia. Yet, theft consolidation is exactly what § 19.2-284 can achieve.

The Commonwealth of Virginia has always purported to treat the three basic theft crimes of larceny, embezzlement, and false pretenses as separate and distinct offenses.<sup>5</sup> Virginia maintains separate statutes for each crime.<sup>6</sup>

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1. See VA. CODE ANN. §§ 19.2-1 to -409 (Michie 1995 & Supp. 1998) (containing Virginia's criminal procedure statutes).

2. See *id.* § 19.2-284 (discussing proof of ownership in theft offenses).

3. *Id.*

4. See VA. CODE, ch. 207, § 8 (1849) (current version at VA. CODE ANN. § 19.2-284 (Michie 1995)) (illustrating almost no change between 1849 and 1995 versions).

5. See *infra* note 6 (listing each statute).

6. See VA. CODE ANN. § 18.2-95 (Michie Supp. 1998) (defining grand larceny); VA. CODE ANN. § 18.2-96 (Michie 1996) (defining petit larceny); *id.* § 18.2-111 (defining embezzlement); *id.* § 18.2-178 (defining false pretenses).

However, over the past 130 years, court decisions and statutory amendments have blurred the distinction among the theft offenses. Some older court cases suggest a trend toward consolidation,<sup>7</sup> while more recent decisions reaffirm the distinctions.<sup>8</sup> Likewise, some older versions of Virginia's theft statutes codified rules that caused the crimes to overlap.<sup>9</sup> These rules are now absent from the current version of Virginia law.<sup>10</sup>

These conflicting authorities create ambiguity in Virginia's body of theft law. Some jurists assert that the theft crimes overlap;<sup>11</sup> others view them as separate and distinct.<sup>12</sup> Section 19.2-284 may resolve these inconsistencies. This statute eliminates – if not completely, at least substantially – the elements that distinguish larceny, embezzlement, and false pretenses from one another. The end result is most likely the effectual consolidation of larceny, embezzlement, and false pretenses. Thus, § 19.2-284 brings Virginia into conformity with the majority of American jurisdictions, which have already consolidated these crimes.<sup>13</sup>

Part II of this Note provides the general background of Virginia's theft statutes and the circumstances giving rise to the suggestion that § 19.2-284 is a consolidation vehicle.<sup>14</sup> Parts III through V analyze the relationship between § 19.2-284 and larceny, embezzlement, and false pretenses. Part III traces the historical development of larceny and contends that § 19.2-284 is consistent with Virginia's interpretation of common law larceny.<sup>15</sup> Part IV describes the

7. See *Pitsnogle v. Commonwealth*, 22 S.E. 351, 352 (Va. 1895) (noting that proof of embezzlement will sustain larceny indictment); *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 566 (1873) (noting that proof of false pretenses will support larceny indictment).

8. See *Baker v. Commonwealth*, 300 S.E.2d 788, 789 (Va. 1983) (refusing to allow proof of larceny by trick to support false pretenses conviction); *Cera v. Commonwealth*, No. 0432-94-4, 1995 WL 250816, at \*2 (Va. Ct. App. May 2, 1995) (noting that "embezzlement and larceny are separate offenses with different elements").

9. See VA. CODE ANN. § 18.2-111 (Michie 1982) (amended 1994) (noting that Commonwealth deems embezzler guilty of larceny and may indict embezzler for larceny and that proof of embezzlement will support larceny indictment).

10. See VA. CODE ANN. § 18.2-111 (Michie 1996) (lacking rules suggesting trend towards consolidation).

11. See, e.g., *Pitsnogle*, 22 S.E. at 352 (noting that proof of embezzlement will support larceny indictment); *Anable*, 65 Va. (24 Gratt.) at 566 (noting that proof of false pretenses will support larceny indictment); *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 690-92 (Va. Ct. App. 1995) (expanding embezzlement to cover what would have been common law larceny).

12. See *Baker*, 300 S.E.2d at 789 (refusing to allow proof of larceny by trick to support false pretenses conviction); *Cera*, 1995 WL 250816, at \*2 (noting that larceny and embezzlement are distinct offenses).

13. See *infra* note 23 and accompanying text (listing states with unitary theft statutes).

14. See *infra* notes 21-59 and accompanying text (providing summary background).

15. See *infra* notes 60-129 and accompanying text (arguing that § 19.2-284 is consistent with Virginia's common law definition of larceny).

origin and development of embezzlement.<sup>16</sup> This Part highlights the elements that distinguish embezzlement from larceny and concludes that § 19.2-284 sufficiently blurs these elements to the point that embezzlement and larceny merge.<sup>17</sup> Similarly, Part V discusses the evolution of false pretenses and the characteristics that distinguish it from larceny by trick.<sup>18</sup> Part V contends that larceny and false pretenses merge in all but one circumstance.<sup>19</sup> Part VI synthesizes the foregoing analysis and concludes that § 19.2-284 completes the consolidation of the three basic offenses against property.<sup>20</sup>

## II. Background

Throughout history, larceny, embezzlement, and false pretenses have converged several times.<sup>21</sup> The element of possession inherent in common law larceny has often become so ambiguous that it threatens to blur the distinctions among the three crimes.<sup>22</sup> Tracking this evolutionary process, most American states now have unitary theft statutes that consolidate, at a minimum, the three basic theft crimes of larceny, embezzlement, and false pretenses.<sup>23</sup>

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16. See *infra* notes 130-223 and accompanying text (providing historical development of embezzlement).

17. See *infra* notes 212-23 and accompanying text (contending that § 19.2-284 consolidates larceny and embezzlement).

18. See *infra* notes 224-331 and accompanying text (tracing development of false pretenses).

19. See *infra* notes 328-31 and accompanying text (arguing that § 19.2-284 consolidates false pretenses and larceny).

20. See *infra* notes 332-46 and accompanying text (concluding that § 19.2-284 completes consolidation of larceny, embezzlement, and false pretenses).

21. See JEROME HALL, *THEFT, LAW AND SOCIETY* 35 (2d ed. 1952) (noting convergence of theft crimes).

22. See *id.* ("At times the concept of 'possession' as used in the traditional definition of larceny becomes so fine-spun that it threatens to obliterate entirely the distinctions between the three crimes.")

23. See ALA. CODE §§ 13A-8-1 to -23 (1994) (consolidating theft offenses); ALASKA STAT. §§ 11.46.100 to .295 (Michie 1996) (same); ARIZ. REV. STAT. ANN. §§ 13-1801 to -1810 (West 1989) (same); ARK. CODE ANN. §§ 5-36-101 to -397 (Michie 1997) (same); COLO. REV. STAT. ANN. §§ 18-4-401 to -416 (West 1997) (same); CONN. GEN. STAT. ANN. §§ 53a-118 to -125b (West 1994) (same); DEL. CODE ANN. tit. 11, §§ 840-859 (1995 & Supp. 1996) (same); FLA. STAT. ANN. §§ 812.005 to .176 (West 1994 & Supp. 1998) (same); GA. CODE ANN. §§ 16-8-1 to -86 (1996 & Supp. 1997) (same); HAW. REV. STAT. §§ 708-830 to -858 (1993 & Supp. 1996) (same); 720 ILL. COMP. STAT. ANN. 5/16-1 to 5/16A-10 (West 1993 & Supp. 1997) (same); IND. CODE ANN. §§ 35-43-4-1 to -6 (Michie 1994) (same); IOWA CODE ANN. §§ 714.1 to .25 (West 1993 & Supp. 1998) (same); KAN. STAT. ANN. §§ 21-3701 to -3704 (1995) (same); KY. REV. STAT. ANN. §§ 514.010 to .150 (Michie 1990 & Supp. 1996) (same); LA. REV. STAT. ANN. § 14:67 (West 1997) (same); ME. REV. STAT. ANN. tit. 17-A, §§ 351-362 (West 1983 &

Virginia is not among that majority. The Commonwealth maintains separate offenses for each of the three basic theft crimes.<sup>24</sup> Larceny retains its common law definition. The larceny statutes discuss only the grading of the offenses.<sup>25</sup> Neither the grand larceny nor the petit larceny sections explain the elements of the actual offense,<sup>26</sup> rather, courts have performed this task.<sup>27</sup> In

Supp. 1997) (same); MINN. STAT. ANN. §§ 609.52 to .551 (West 1987 & Supp. 1997) (same); MO. ANN. STAT. §§ 570.010 to .220 (West 1979 & Supp. 1998) (same); MONT. CODE ANN. §§ 45-6-301 to -319 (1997) (same); NEB. REV. STAT. §§ 28-510 to -518 (1995) (same); N.H. REV. STAT. ANN. §§ 637:1 to :11 (1996) (same); N.J. STAT. ANN. §§ 2C:20-1 to -37 (West 1995 & Supp. 1998) (same); N.Y. PENAL LAW §§ 155.00 to .45 (McKinney 1988 & Supp. 1998) (same); N.D. CENT. CODE §§ 12.1-23-01 to -10 (1997) (same); OHIO REV. CODE ANN. §§ 2913.01 to .82 (West 1997 & Supp. 1997) (same); OR. REV. STAT. §§ 164.005 to .140 (1997) (same); 18 PA. CONS. STAT. ANN. §§ 3901-3923 (West 1983 & Supp. 1998) (same); S.D. CODIFIED LAWS §§ 22-30A-1 to -21 (Michie 1998) (same); TEX. PENAL CODE ANN. §§ 31.01 to .11 (West 1994 & Supp. 1999) (same); UTAH CODE ANN. §§ 76-6-401 to -412 (1995 & Supp. 1998) (same); WASH. REV. CODE ANN. §§ 9A.56.010 to .270 (West 1988 & Supp. 1998) (same); WIS. STAT. ANN. §§ 943.20 to .62 (West 1996 & Supp. 1997) (same); WYO. STAT. ANN. §§ 6-3-401 to -410 (Michie 1997) (same).

24. See VA. CODE ANN. § 18.2-95 (Michie Supp. 1998) (describing penalty for common law grand larceny); VA. CODE ANN. § 18.2-111 (Michie 1996) (defining embezzlement); *id.* § 18.2-178 (defining false pretenses).

25. VA. CODE ANN. § 18.2-95 (Michie Supp. 1998). This section provides only for punishment:

Any person who (i) commits larceny from the person of another of money or other thing of value of \$5 or more, (ii) commits simple larceny not from the person of another of goods and chattels of the value of \$200 or more, (iii) commits simple larceny not from the person of another of any firearm, regardless of the firearm's value, shall be guilty of grand larceny, punishable by imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than \$2,500, either or both.

*Id.* Similarly, § 18.2-96 merely sets the punishment for petit larceny. VA. CODE ANN. § 18.2-96 (Michie 1996). Section 18.2-96 states:

Any person who:

1. Commits larceny from the person of another of money or other thing of value of less than \$5, or

2. Commits simple larceny not from the person of another of goods and chattels of the value of less than \$200, except as provided in subdivision (iii) of § 18.2-95, shall be guilty of petit larceny, which shall be punishable as a Class 1 misdemeanor.

*Id.*

26. See VA. CODE ANN. §§ 18.2-95 to -96 (Michie 1996 & Supp. 1998) (discussing penalties for larceny conviction but failing to outline elements of larceny).

27. See *Dunlavy v. Commonwealth*, 35 S.E.2d 763, 764 (Va. 1945) (defining elements of larceny).

contrast, embezzlement<sup>28</sup> and false pretenses<sup>29</sup> are statutory in nature, and the statutes clearly define the elements of the crimes.<sup>30</sup>

Nonetheless, as theft crimes, the three offenses remain closely related. For example, embezzlement and false pretenses carry the same punishment as larceny.<sup>31</sup> This suggests that no moral difference exists among the offenses.<sup>32</sup> However, if larceny, embezzlement, and false pretenses survive in Virginia as separate offenses, the *technical* distinctions among them must remain. Jurisdictions that continue to employ separate theft offenses are susceptible to failed prosecutions even though proof at trial establishes that the accused committed a related offense.<sup>33</sup> As a result, prosecutors must be extremely

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28. VA. CODE ANN. § 18.2-111 (Michie 1996). This section provides:

If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, he shall be guilty of embezzlement. Embezzlement shall be deemed larceny and upon conviction thereof, the person shall be punished as provided in § 18.2-95 or § 18.2-96.

*Id.*

29. *Id.* § 18.2-178. The false pretenses statute provides:

If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be guilty of a Class 4 felony.

*Id.*

30. *See id.* § 18.2-111 (defining embezzlement); *id.* § 18.2-178 (defining false pretenses).

31. *See id.* § 18.2-111 (providing that embezzlement carries same punishment as larceny); *id.* § 18.2-178 (noting that Commonwealth deems false pretenses to be larceny).

32. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 8.8(a)(2), at 412 (1986). LaFave and Scott state: "The fact that the statutory punishment is almost always the same for false pretenses and embezzlement as it is for larceny supports the notion that there is no moral difference between the activities of the thief, the embezzler and the swindler." *Id.* LaFave and Scott also note that "it can hardly make a difference to the victim whether he loses his property by another's stealth, or by his fraudulent conversion or through his falsehoods." *Id.*; *see also* *Van Vechten v. American Eagle Fire Ins. Co.*, 146 N.E. 432, 433 (N.Y. 1925) (noting no moral difference among theft crimes). Justice Cardozo, writing for the court in *Van Vechten*, noted: "The distinction, now largely obsolete, did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim. The crimes are one to-day in the common speech of men as they are in moral quality." *Id.*

33. *See* MODEL PENAL CODE § 223.1 cmt. on consolidation of theft offenses at 133 (1980) (noting that defense that accused actually acquired property by different wrongful method often defeats charges based on one method of wrongfully obtaining property). A comment to the Model Penal Code states:

wary and specific as to what offense they allege and what they may ultimately prove. As one of the jurisdictions that chooses to preserve the trinity of basic theft offenses, Virginia must require precision in its prosecutions. Although occasionally problematic, the system of technical precision has at least appeared clear.

However, a recent Virginia Court of Appeals decision threatens to alter fundamentally this entire system.<sup>34</sup> In *Catterton v. Commonwealth*,<sup>35</sup> the defendant appealed a bench trial conviction for the larceny of a motor vehicle in violation of Virginia's grand larceny statute.<sup>36</sup> The indictment against Catterton alleged that he "did unlawfully and feloniously, take, steal, and carry away a 1986 Ford Bronco . . . belonging to Debora Brooke, with the intent to permanently deprive the owner thereof."<sup>37</sup>

Debora Brooke, the true owner of the Bronco, took the vehicle to a mechanic for repair work.<sup>38</sup> When she returned to claim the car, her Bronco was missing.<sup>39</sup> Law enforcement officers later pursued the Bronco in conjunction with a hit-and-run accident and apprehended Catterton as he fled from the vehicle.<sup>40</sup> The Commonwealth tried and convicted Catterton for grand larceny.<sup>41</sup> On appeal, Catterton contended, consistent with the traditional common law approach, that when Ms. Brooke left her Bronco at the repair shop, the mechanic, as bailee, became the "owner" of the car for the purpose of

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The real problem arises from a defendant's claim that he did not misappropriate the property by the means alleged but in fact misappropriated the property by some other means and from the combination of such claim with the procedural rule that a defendant who is charged with one offense cannot be convicted by proving another.

*Id.*

34. See *Catterton v. Commonwealth*, 477 S.E.2d 748, 749-50 (Va. Ct. App. 1996) (affirming larceny conviction when defendant allegedly misappropriated automobile from repair shop, but indictment charged misappropriation from true owner).

35. 477 S.E.2d 748 (Va. Ct. App. 1996).

36. *Catterton v. Commonwealth*, 477 S.E.2d 748, 749 (Va. Ct. App. 1996); see VA. CODE ANN. § 18.2-95 (Michie Supp. 1998): In *Catterton*, the victim took her automobile to a mechanic's shop for repairs. *Catterton*, 477 S.E.2d at 749. Catterton allegedly stole the vehicle from the mechanic/bailee. *Id.* However, the indictment charged that Catterton stole the vehicle from the true owner. *Id.* At trial, the mechanic did not testify. *Id.* The Commonwealth subsequently convicted Catterton of larceny from the true owner of the vehicle. *Id.* On appeal, Catterton contended that the mechanic/bailee, not the true owner, was the owner of the vehicle for the purposes of proving larceny. *Id.* The court of appeals disagreed, finding that "[o]wnership for purposes of proving larceny may belong either to the true owner or to the owner's bailee." *Id.* at 750.

37. *Catterton*, 477 S.E.2d at 749 (citation omitted).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

proving larceny.<sup>42</sup> Traditional common law larceny is a crime against possession.<sup>43</sup> In this case, the mechanic/bailee was in possession.<sup>44</sup> Thus, if a larceny occurred, Catterton argued that it was from the mechanic and not the true owner of the vehicle.<sup>45</sup> Though Catterton may have committed some wrongful act, the Commonwealth alleged an offense that he did not commit.

A three-judge panel of the Virginia Court of Appeals decided the matter differently.<sup>46</sup> The panel found that:

When Ms. Brooke took her vehicle to the repair shop, she relinquished possession to the repair shop only for the special purpose of fixing her brakes. She retained both her ownership and her right to reclaim possession. Ownership for purposes of proving larceny may belong either to the true owner or to the owner's bailee.<sup>47</sup>

In reaching this conclusion, the court resurrected *Latham v. Commonwealth*,<sup>48</sup> a 1946 Virginia Supreme Court decision that ruled that in order "[t]o sustain an indictment for larceny it is only necessary to prove that the goods alleged to have been stolen are either the 'absolute or the special property of the alleged owner.'<sup>49</sup> The court in *Latham* believed that such a rule was consis-

42. *Id.*

43. See ROGER D. GROOT, *CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA* 334 (4th ed. 1998) ("Common law larceny was a crime against possession rather than ownership."); 2 LAFAYETTE & SCOTT, *supra* note 32, § 8.1(a), at 328 (noting elementary requirement of possession for larceny conviction); ROLLIN M. PERKINS, *CRIMINAL LAW* 238 (2d ed. 1969) ("Larceny is an offense against possession.").

44. *Catterton v. Commonwealth*, 477 S.E.2d 748, 749 (Va. Ct. App. 1996).

45. See *id.* (noting Catterton's contention that mechanic/bailee was "owner").

46. See *id.* (noting that court disagreed with Catterton's contention that mechanic/bailee was "owner").

47. *Id.* at 749-50.

48. 37 S.E.2d 36 (Va. 1946).

49. *Latham v. Commonwealth*, 37 S.E.2d 36, 38 (Va. 1946) (quoting 2 WHARTON'S *CRIMINAL EVIDENCE* § 1070, at 1879-80 (11th ed. 1935)). Wharton states that:

To sustain an indictment for larceny or for similar offenses in which the gist and essence of the crime charged is the taking and carrying away of the personal goods of another without the consent of the owner, it is sufficient that the goods alleged to have been stolen are proved to be either the absolute or the special property of the alleged owner. Hence, the allegation of ownership of stolen property is sustained by the proof of any legal interest or special ownership which may be less than absolute title to the property.

2 WHARTON'S, *supra*, § 1070, at 1879-80.

In *Latham*, the Commonwealth indicted the defendant for the larceny (receiving stolen goods) of three cases of cigars. *Latham*, 37 S.E.2d at 37. The El Producto Cigar Company delivered the cases to the Pennsylvania Railroad Company for shipment. *Id.* Upon arrival in Norfolk, Virginia, the cases of cigars passed to the Norfolk and Western Railway Company. *Id.* Subsequent inspection of the boxcar that contained the cases revealed that the cigars were missing. *Id.* Investigation led the police to Latham's store where they discovered the three



tent with what was at the time Code of Virginia § 4872.<sup>50</sup> This statute survives today as § 19.2-284.<sup>51</sup> The *Latham* court, focusing on the element of special property, supplemented § 4872 with the general rule of special ownership "that where chattels are taken feloniously from any bailee or other special owner . . . the ownership may be laid either in such possessor or the real owner, at the election of the pleader."<sup>52</sup> These two rules suggest a consolidation at least in the sense that larceny may be more than merely a crime against the prior possessor—a startling suggestion indeed. However, in the fifty years between this decision and *Catterton*, no Virginia court has relied on *Latham*.<sup>53</sup>

cases of cigars. *Id.* at 37-38. The police found that "[a]ll three cases had been broken open and cigars taken therefrom." *Id.* at 38. The Commonwealth indicted and convicted Latham of larceny. *Id.* at 37. Latham contended that the verdict was in error because the cigars were not the property of the Pennsylvania Railroad Company and were not in its possession at the time of the alleged taking. *Id.* at 38. The Virginia Supreme Court affirmed the conviction. *Id.* at 39. In so doing, the court relied on Code of Virginia § 4872, which provides: "In a prosecution for . . . stealing . . . or fraudulently receiving . . . any personal estate, it shall be sufficient to prove that, when the offense was committed, the actual or constructive possession, or a general or special property . . . was in the person or community alleged in the indictment . . . to be the owner thereof." *Id.* at 38 (citing VA. CODE ANN. § 4872 (Michie 1942) (current version at VA. CODE ANN. § 19.2-284 (Michie 1995))).

50. *Latham*, 37 S.E.2d at 38.

51. VA. CODE ANN. § 19.2-284 (Michie 1995). This statute provides:

In a prosecution for an offense committed upon, relating to or affecting real estate, or for stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any personal estate it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of such estate was in the person or entity alleged in the indictment or other accusation to be the owner thereof.

*Id.*

52. See *Latham*, 37 S.E.2d at 39 (quoting 2 JOEL PRENTISS BISHOP, BISHOP'S NEW CRIMINAL PROCEDURE § 721, at 326-27 (4th ed. 1896)). Bishop also states that in cases in which there is both a general and special owner, "the rule is nearly universal that the pleader may charge the goods belonging to either, though often the convenience of making proof will suggest practical grounds for choice." 2 BISHOP, *supra*, § 720, at 326.

53. Cf. *Richardson v. Maryland*, 156 A.2d 436, 438 (Md. 1959) (citing *Latham*, 37 S.E.2d 36). Only the Maryland Court of Appeals in *Richardson v. Maryland* has followed *Latham*'s reasoning. In *Richardson*, a larceny case, the State alleged that the ownership of the property stolen was in Horn's Motor Express, Inc. *Id.* at 437. The "property alleged to have been stolen had been delivered by the Shoe Company to Horn's, through whom it shipped all of its merchandise, to be transported to a customer in Georgia; and the property was stolen from one of Horn's sealed trailers." *Id.* at 438. Defendant assigned error contending that the State had proved that the ownership was actually in Pleasant Valley Shoe Company. *Id.* at 437. The court found:

It is generally held that in a prosecution for larceny, an allegation of the ownership of stolen goods is supported by proof of any legal interest or special property in the goods, as, for instance, where the person named in the indictment is in lawful possession as a bailee or common carrier.

*Id.* at 438.

Similarly, few cases have relied on § 19.2-284.<sup>54</sup>

The reasons for the lack of attention to § 19.2-284 among courts and scholars are unclear. It is quite possible that Virginia's legal community has yet to realize the potential of § 19.2-284 to alter the current system. The fact that Virginia maintains the formal distinctions among larceny, embezzlement, and false pretenses when other states have consolidated these offenses bolsters the suggestion that the Commonwealth is unaware of this possible mechanism for consolidation. The span of fifty years between *Latham* and *Catterton* is significant. During that period, the Commonwealth resorted to § 19.2-284 only to affirm the rare case in which proof of the possession/ownership element of the offense alleged differed slightly from the indictment.<sup>55</sup>

Even before *Latham*, the courts made little mention of this mysterious procedure statute. However, as early as 1867, the Virginia Supreme Court of Appeals did attempt to clarify the meaning of the statute.<sup>56</sup> After citing

54. Cf. *Tammaro v. Commonwealth*, No. 0504-94-1, 1995 WL 117900, at \*1 (Va. Ct. App. Mar. 21, 1995) (citing VA. CODE ANN. § 19.2-284 (Michie 1995)). The one exception is *Tammaro v. Commonwealth*, a 1995 unpublished disposition involving the destruction of property, not larceny. *Id.* *Tammaro* involved the concept of constructive possession. *Id.* The court stated:

Although the indictment described the woman named in the indictment as the owner of the automobile which the defendant damaged, she did not have legal title to the property. However, the evidence demonstrated that the woman had possession of the automobile and that she was to receive title to it under an agreement with her former husband, who did have legal title to the property. Proof that the person alleged in the indictment to be the owner of such property has actual or constructive possession of the property is sufficient in a prosecution for this offense.

*Id.* (citing VA. CODE ANN. § 19.2-284 (Michie 1995)).

55. See *Catterton v. Commonwealth*, 477 S.E.2d 748, 750 (Va. Ct. App. 1996) (affirming larceny conviction in bailment context when evidence showed possession to be in mechanic and not in true owner); *Tammaro*, 1995 WL 117900, at \*1 (affirming destruction of property conviction when evidence showed ownership of property destroyed to be in one who did not have legal title).

56. See *Hughes v. Commonwealth*, 58 Va. (17 Gratt.) 565, 567 (1867) (expounding on meaning of statute). In *Hughes*, the Commonwealth indicted a freedwoman for the larceny of several articles of woman's clothes, said to be the property of one Mrs. Robert H. Montague. *Id.* at 565. The evidence appearing at trial showed that Mrs. Montague was a married woman. *Id.* Under the common law, the Commonwealth could not allege, in an indictment for larceny, a married woman to be the owner of stolen property. *Id.* at 566. The court noted that "[h]usband and wife are in law one person. Her legal entity is merged in his; and in all legal proceedings, criminal or civil, he is regarded as the owner of property in her possession (if it not belong to a third person), even though it be her wearing apparel." *Id.* *Hughes* moved the court to instruct the jury that if it believed Mrs. Montague to be a married woman, it should find *Hughes* not guilty. *Id.* at 565. The court did not give the instruction, and the jury convicted *Hughes*. *Id.* The Supreme Court of Appeals reversed and remanded for a new trial. *Id.* at 569. The court found that even in the face of the code, the person alleged to have owned the stolen

chapter 207, § 8,<sup>57</sup> the nineteenth century version of § 19.2-284, the court noted:

This statute was not intended to dispense, and does not dispense with the necessity of stating in an indictment for larceny the name of the owner of the property stolen, nor to enable any person to be such owner who was not capable of being so at common law. Its only object was to get rid of the difficulties which often existed at common law in regard to the proper person to be stated as the owner of the property in an indictment for larceny or other offences against property. . . . But the person named in the indictment as owner of the property must still, under the statute, as under the common law, be a person competent in law to be such owner.<sup>58</sup>

Despite what appears to be an invitation to push for theft consolidation, no one has suggested that the Commonwealth could use § 19.2-284 as a tool in this process, which would greatly simplify the task of alleging and proving such offenses. Even *Catterton* did not contemplate this premise. Surprisingly, *Catterton* did not even directly rely on § 19.2-284.<sup>59</sup>

Nonetheless, the ramifications of *Catterton* may blur the distinctions among the three basic theft crimes to the point that the Commonwealth emerges with a unitary working definition of theft. The result may be a judicial consolidation of the theft crimes. If so, consolidation via § 19.2-284 demonstrates a unique backdoor and unconscious approach to remedying the problems inherent in a separate offense jurisdiction and hints of an evolutionary process rather than a conscious legislative effort to consolidate. This Note considers whether consolidation of the theft offenses is a probable result in the wake of *Catterton* and the rediscovery of § 19.2-284.

### III. Larceny and § 19.2-284

Larceny is a common law crime.<sup>60</sup> Authorities describe the offense in several ways, but in general, larceny is the "(1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to

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property must have been a person capable of owning such property at common law. *Id.* at 567. Mrs. Montague, as a married woman, was incapable of ownership of the stolen property. *Id.* at 566. Therefore, the court concluded, the lower court should have given an instruction requiring the jury to acquit if it believed Mrs. Montague to be married. *Id.* at 568.

57. See VA. CODE, ch. 207, § 8 (1849) (stating language almost identical to § 19.2-284).

58. *Hughes*, 58 Va. (17 Gratt.) at 567.

59. See *Catterton*, 477 S.E.2d at 750 (relying solely on *Latham v. Commonwealth*, 37 S.E.2d 36 (Va. 1946), as authority for rule).

60. See 2 LAFAYE & SCOTT, *supra* note 32, § 8.1(a), at 328 (noting that larceny is "a common-law crime (invented by the English judges rather than by Parliament) committed when one person misappropriated another's property by means of taking it from his possession without his consent").

steal it."<sup>61</sup> Some states have adopted statutes defining larceny, while others make use of definitions that are merely declarative of the common law.<sup>62</sup> Virginia retains a common law definition of larceny.<sup>63</sup> The statutory sections for grand and petit larceny<sup>64</sup> do not define the crime; they merely determine the punishments.<sup>65</sup> Virginia case law provides the definition of the elements of larceny. *Dunlavey v. Commonwealth*<sup>66</sup> defines larceny as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently."<sup>67</sup> Even the most recent larceny cases employ this definition.<sup>68</sup>

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61. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 706 (2d ed. 1986); see PERKINS, *supra* note 43, at 234 ("Larceny is the trespassory taking and carrying away of the personal property of another with intent to steal the same."); 3 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 342, at 347 (15th ed. 1995) ("At common law, larceny is the trespassory taking and carrying away of the personal property of another with the intent permanently to deprive."); cf. 52A C.J.S. *Larceny* § 1(1) (1968) (providing common law definition of larceny). The C.J.S. defines common law larceny as

the taking and carrying away from any place, at any time, of the personal property of another, without his consent, by a person not entitled to the possession thereof, feloniously, with intent to deprive the owner of his property permanently, and to convert it to the use of the taker or of some person other than the owner.

*Id.*

62. See *Larceny*, *supra* note 61, § 1(3)(a) (discussing statutory larceny).

63. See GROOT, *supra* note 43, at 330 (citing *Smith v. Cox*, 435 F.2d 453, 457 (4th Cir. 1970), *vacated sub nom.* *Slayton v. Smith*, 404 U.S. 53 (1971)) (noting that larceny retains its common law definition).

64. See VA. CODE ANN. § 18.2-95 (Michie Supp. 1998) (discussing grand larceny); VA. CODE ANN. § 18.2-96 (Michie 1996) (discussing petit larceny).

65. See GROOT, *supra* note 43, at 330 (noting that "[s]ections 18.2-95 and 18.2-96 divide larceny into degrees and set penalties, but do not define the crime").

66. 35 S.E.2d 763 (Va. 1945).

67. *Dunlavey v. Commonwealth*, 35 S.E.2d 763, 764 (Va. 1945) (citing *Vaughn v. Lytton*, 101 S.E. 865, 867 (Va. 1920)). In *Dunlavey*, the Commonwealth indicted the defendant for the larceny of an automobile. *Id.* at 763. Louis Hall and Raymond White had stolen an automobile. *Id.* Three days later, defendant Dunlavey agreed to push the stolen automobile with his car in order to start the stolen vehicle. *Id.* at 763-64. Dunlavey had also agreed to buy certain parts from the stolen car. *Id.* at 764. After the stolen car started, those involved in the theft drove the car to a park three miles distant. *Id.* Dunlavey followed in his vehicle. *Id.* While the men were in the park, a park policeman discovered them. *Id.* Hall, White, and an unidentified person fled the scene. *Id.* Dunlavey remained, and the policeman took him into custody. *Id.* The police found parts from the stolen automobile in Dunlavey's automobile. *Id.* Following a conviction for larceny, Dunlavey contended on appeal that based on this evidence the Commonwealth could not convict him of larceny, but only of knowingly receiving stolen goods. *Id.* However, the court found that the "crime here consisted of moving the automobile by the accused in order to get it started and not in receiving the parts taken from it." *Id.* at 765. Moreover, larceny is a continuous offense. *Id.* Dunlavey's acts were part of one continuous transaction; therefore, the court found him guilty of larceny. *Id.* at 765-66.

68. See *Walker v. Commonwealth*, 486 S.E.2d 126, 130 (Va. Ct. App. 1997) (defining

There are two basic forms of larceny in Virginia: (1) larceny by stealth and (2) larceny by trick.<sup>69</sup> Larceny by stealth ("larceny") simply refers to the original version of the common law offense<sup>70</sup> and occurs when one person intentionally misappropriates property from the possession of another without the prior possessor's consent.<sup>71</sup> In other words, larceny involves a trespassory taking.<sup>72</sup>

Originally, common law larceny, as a crime against possession, could not account for all cases of misappropriated property, especially when it appeared that the thief lawfully possessed the allegedly stolen property.<sup>73</sup> One such situation was a case in which the thief obtained possession of the property with the consent of the owner by telling lies, all the while intending to abscond with that property.<sup>74</sup> Because the owner/prior possessor had voluntarily given the property to the wrongdoer, it was difficult to find a breach of possession.<sup>75</sup> The law eventually assimilated such conduct into larceny as larceny by trick.<sup>76</sup>

larceny as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently" (quoting *Jones v. Commonwealth*, 349 S.E.2d 414, 417 (Va. Ct. App. 1986)).

69. See GROOT, *supra* note 43, at 330 (noting two types of larceny in Virginia).

70. See JOHN B. MINOR, *MINOR ON CRIMES AND PUNISHMENTS* 98-99 (1894) (providing Virginia's definition of common law larceny). Larceny in Virginia is as follows: "(1), A wrongful or fraudulent taking; (2), Of *personal goods* of some intrinsic value; (3), *Belonging to another*; (4), *Without the owner's assent*; (5), *With the intention to deprive the owner thereof permanently*." *Id.*

71. See GROOT, *supra* note 43, at 330 (noting that larceny "occurred when [a] thief interrupted the possession of the prior possessor without his consent"); 2 LAFAVE & SCOTT, *supra* note 32, § 8.1(a), at 328 (noting that larceny occurred "when one person misappropriated another's property by means of taking it from his possession without his consent").

72. See MINOR, *supra* note 70, at 99 (discussing element of taking). Minor states:

The *taking*, which is the first element of larceny, is the *getting possession* of the thing by seizure or bodily act, such as *constitutes a trespass*, not merely *touching or handling it*. There must be a severance from the actual or constructive possession of the owner. Hence, *taking* includes the *exportation* or carrying away, which is satisfied by the *least removal*. Hence, also, *taking* excludes the idea of the *owner's consent*, and thus leads to the distinction between *embezzlement*, or breach of trust, where possession is *voluntarily yielded* by the owner; and *larceny*, where it is taken.

*Id.* (citations omitted).

73. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.1(a), at 328 (describing situations originally beyond scope of common law larceny).

74. See *id.* § 8.1(a), at 330 (describing situations originally beyond scope of common law larceny).

75. See *id.* (noting such case to be inconsistent with common law larceny).

76. See GROOT, *supra* note 43, at 330 (noting assimilation of such conduct into concept of larceny).

Unlike other developments in the law of theft, larceny by trick did not originate by statute.<sup>77</sup> It is entirely attributable to *The King v. Pear* (*Pear's Case*),<sup>78</sup> decided in 1779.<sup>79</sup> In that case, Pear hired a horse with the intent to sell it and to flee with the proceeds.<sup>80</sup> It appeared that because Pear had the owner's consent to possess the horse, he had not committed larceny. However, the court found that the acquisition of consent by a false promise constituted a breach of possession.<sup>81</sup> This result stemmed from the theory that consent obtained by fraud did not equal true consent.<sup>82</sup> Thus, larceny by trick emerged. Virginia incorporates larceny by trick into its common law definition through the use of the word "fraudulent."<sup>83</sup>

77. See HALL, *supra* note 21, at 41 (noting that "[l]arceny by trick was not, like most other major eighteenth century developments in the law of theft, the product of legislative enactment").

78. 168 Eng. Rep. 208 (Old Bailey 1779).

79. See HALL, *supra* note 21, at 41 (noting that larceny by trick "may, in fact, be attributed entirely to *Pear's Case*, decided in 1779"); see also *The King v. Pear* (*Pear's Case*), 168 Eng. Rep. 208, 209 (Old Bailey 1779) (giving rise to larceny by trick). In this case, Pear hired a horse from a livery-stable-keeper to go to Sutton and back again. *Id.* However, instead of returning, Pear sold the horse on the very day he hired it. *Id.* at 208-09. The court instructed the jury that the case hinged on when Pear formed the intent to steal the horse. *Id.* at 209. If the jury believed Pear formed the intent to sell the horse at the time he rented it, then the jury should acquit Pear. *Id.* However, if the jury found that Pear formed the intent to sell prior to hiring the horse, the jury should find that fact specifically for the opinion of the judges. *Id.* The jury found that Pear "had hired the horse with a fraudulent view and intention of selling it immediately." *Id.* The judges then found the prisoner guilty of felony. *Id.*

80. *Pear's Case*, 168 Eng. Rep. at 208.

81. *Id.* at 209. The court found that "the parting with the property had not changed the nature of the possession, but that it remained unaltered in the prosecutor at the time of the conversion; and that the prisoner was therefore guilty of felony." *Id.* Some authorities interpret this to mean that the breach of possession did not occur until Pear actually sold the horse. See 2 LAFAYE & SCOTT, *supra* note 32, § 8.1(a)(3), at 330 (noting that majority of judges in *Pear's Case* indulged fiction "that the owner of the mare retained possession until the time of its sale by the defendant"). Other authorities take the view that the fraud vitiated the consent and, thus, the breach of possession occurred at the moment Pear took the horse from the true owner. See PERKINS, *supra* note 43, at 246. Perkins states:

[I]f one, who intends to appropriate another's horse permanently to his own use, fraudulently pretends that he merely wishes to borrow it for the afternoon, and by this fraudulent representation receives the owner's consent to ride away on the horse, this is a trespassory taking despite the consent, because "fraud vitiates the transaction," and such a taking is larceny.

*Id.* (footnote omitted).

82. See GROOT, *supra* note 43, at 330 (stating court's theory that "consent obtained by fraud" was not true consent).

83. See *id.* (noting that "Virginia definition, by use of the word 'fraudulent' has adopted this doctrine and often applied it").

Traditionally, common law larceny has been a crime against possession.<sup>84</sup> Although this premise seems quite simple, some situations involve very fine distinctions. Suppose a Master gives her Servant property to use or keep for the Master. It would seem that while the Servant holds the property, the Servant has possession.<sup>85</sup> However, in this situation, the Servant merely has custody of the property; the Master retains constructive possession.<sup>86</sup> As a general rule, if a person receives property for only a limited or temporary purpose, that person acquires custody rather than possession.<sup>87</sup> An important result of this legal fiction is that the wrongdoer who misappropriates chattels in his/her custody may be guilty of larceny.<sup>88</sup>

Nonetheless, the distinction between custody and possession is not always as clear as in the previous example. In some cases, servants, in whom a master places an unusual element of trust, have possession.<sup>89</sup> The following example illustrates this subtle distinction. Suppose *S* operates a cash register in a grocery store. At the beginning of her shift, *M* (the owner of the store) gives *S* a till containing \$200. Because of her position of trust, *S* is in possession of this money.<sup>90</sup> If *S* were wrongfully to take any amount from the sum *M* originally entrusted to her, she would not have committed larceny because there would be no breach of possession.

Additionally, if a third person (for example, a customer) gives property to the Servant to deliver to his Master, the Servant acquires possession.<sup>91</sup>

84. See 3 TORCIA, *supra* note 61, § 342, at 347-49 ("It is an offense against the right of property or possession.").

85. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.1(a), at 329 (noting that "[o]ne would think that, while the property was in the servant's hands, he has possession of it; his dominion over the property looks, feels, smells and tastes exactly like possession").

86. See *id.* (discussing custody versus possession); see also GROOT, *supra* note 43, at 331 (discussing use or charge versus possession). Professor Groot explains that if the servant's dominion over the property "amounts only to a bare use or charge of the chattel, possession remains in the person from whom the use of the chattel was obtained. . . . The servant has a use or charge and the master has possession . . ." *Id.*

87. 3 TORCIA, *supra* note 61, § 358, at 417.

88. See GROOT, *supra* note 43, at 331 (noting that one with custody only is guilty of larceny for misappropriation); see also 3 TORCIA, *supra* note 61, § 358, at 415 (describing custody). Torcia states that "[a] caretaker, watchman, or other person, who has mere custody of personal property, as distinguished from legal possession, is guilty of larceny when he appropriates the property to his own use." *Id.*

89. See PERKINS, *supra* note 43, at 241 (discussing positions of unusual confidence and trust).

90. See *id.* (providing example). Perkins notes that "a bank teller is held to have possession of funds of the bank which have been intrusted to him for the purpose of transacting the business of the bank." *Id.*

91. See 3 TORCIA, *supra* note 61, § 363, at 422 (discussing property received from third person). Torcia notes that "[i]f a third person gives property to a servant to deliver to his master, the servant is deemed to have possession." *Id.*

Thus, *S* possesses the additional money that she accumulates over the course of the day as a result of her sales. The Master does not acquire possession until the Servant delivers the property to the Master or puts it in a place or receptacle that the Master has designated or intends as the place where the Servant should put the property.<sup>92</sup> If *S* were to place the money acquired from customers immediately in her pocket instead of placing it in the receptacle or place that *M* designated (the till), she would not be guilty of larceny because possession had not yet passed to *M*.<sup>93</sup>

On the other hand, possession of the money *S* adds to the till does pass to *M*. If *S* were to misappropriate some of this money, she would be guilty of larceny.<sup>94</sup> This result may change with *S*'s intent. If *S* intends all along to misappropriate the money she acquires from customers and merely places the cash in the till, awaiting a more opportune moment, possession would *not* pass to *M*.<sup>95</sup> A subsequent conversion of such money by *S* would

92. See *id.* (noting that master does not acquire possession until servant puts property "in a receptacle or place designated or intended by" the master); see also 2 LAFAVE & SCOTT, *supra* note 32, § 8.2(b), at 336 (stating that "if the property comes to the servant from a third person for the master, the servant has possession until he puts it in some receptacle (such as a cash drawer) designated by the master for its reception").

93. See *The King v. Bazeley* (Bazeley's Case), 168 Eng. Rep. 517, 523 (Ex. Ch. 1799) (struggling with question of whether prisoner or bank had possession). In this case, a bank teller, whose duty it was to receive money on behalf of the bank, placed a £100 note in his pocket and subsequently converted it to his own use. *Id.* at 517-18. The judges finally "agreed that it was not felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner: though it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it." *Id.* at 523 n.(a); see also 2 LAFAVE & SCOTT, *supra* note 32, § 8.1(b), at 331 (providing summary of *Bazeley's Case*). LaFave and Scott note:

One might think that, as long as the judges had been pretending that, when an employer hands property to his employee, he still keeps possession, they might as easily pretend that, as soon as the depositor handed the money to the employee, possession (of the "constructive" sort) immediately lodged in the employer, the employee acquiring mere "custody," so that his misappropriation would amount to larceny.

*Id.* However, as indicated above, the judges decided that such an employee maintained possession until the employee deposited the property in some receptacle provided by the employer. *Id.*

94. See 3 TORCIA, *supra* note 61, § 363, at 422 (discussing property received from third persons). Torcia notes:

If the servant, after delivering the property to his master or putting it in a receptacle or place designated or intended by the master, returns later to appropriate it to his own use, he would of course be guilty of larceny because he would then be taking from the possession of another.

*Id.*

95. See *id.* § 363, at 423 (discussing receipt of property from third persons). Torcia notes:

[I]f the servant, after receiving possession of the money, intends to appropriate it to his own use and drops it into the cash register with the intent to take it out later at a more convenient or opportune time, remaining upon the scene exercising dominion and control over such cash register, possession does not pass to the master . . . .

*Id.*



not amount to larceny.<sup>96</sup>

Bailments differ from the master-servant context. The law deems bailees to be in lawful possession.<sup>97</sup> If a bailee, after rightfully acquiring possession, converts the property to his own use, he may be guilty of embezzlement.<sup>98</sup> The bailee cannot be guilty of larceny because no taking from the possession of another occurs.<sup>99</sup> Note that if the bailee's intent to misappropriate the property precedes, or coincides with, the acquisition of possession, the bailee has committed larceny by trick.<sup>100</sup> Interestingly, a bailor may commit larceny. Once the true owner bails the goods, and the bailee acquires legal possession, the true owner/bailor may commit larceny by stealing the property back from the bailee.<sup>101</sup> Under this theory, for example, the owner of a watch who bails

96. See *id.* (noting that possession does not pass to master when servant always intended to steal money).

97. See GROOT, *supra* note 43, at 331 (discussing possession in bailment context).

98. See 3 TORCIA, *supra* note 61, § 359, at 418 (noting that bailee may be guilty of embezzlement).

99. See *id.* (noting that bailee in lawful possession cannot be guilty of larceny because there is no trespassory taking).

100. See *id.* (noting possibility of larceny in bailment context). Torcia notes that "[o]f course, if the bailee, with the intent to misappropriate, fraudulently induced the owner to part with the possession of his property, his act of misappropriation would constitute larceny by trick." *Id.*; see *Starkie v. Commonwealth*, 34 Va. (7 Leigh) 752, 757 (1836) (noting difference between obtaining possession lawfully and by fraud). *Starkie* is Virginia's version of *Pear's Case*. *Starkie* was an employee of Wilson. *Id.* at 753. He obtained Wilson's consent to borrow a horse for two hours. *Id.* *Starkie* did not return with the horse; he sold it the following day to a third person. *Id.* at 753-54. Authorities subsequently apprehended *Starkie*, who eventually confessed to selling the horse. *Id.* at 754-55. *Starkie* professed that when he borrowed the horse, he had not yet formed the intent to steal it. *Id.* at 755. The Commonwealth tried and convicted *Starkie* for the larceny of the horse, saddle, and bridle. *Id.* at 752-53. On appeal, *Starkie* argued that the evidence showed only a breach of trust, not a breach of possession. *Id.* at 755-56. The court noted two grounds for sustaining the conviction. *Id.* at 756-57. First, because Wilson lent the horse to *Starkie* for temporary use only, *Starkie* did not acquire legal possession. *Id.* at 756. Second, the court found that the evidence supported the jury's conclusion that *Starkie* obtained the use of the horse fraudulently. *Id.* In refusing *Starkie's* writ of error, the court concluded:

We think the law well settled, that where a person obtains the goods of another by lawful delivery, without fraud, although he afterwards converts them to his own use, he is not guilty of felony; but if such delivery be obtained by any fraud or falsehood, and with an intent to steal, though under pretence of hiring, borrowing, or even purchase, where no credit is intended to be given, the delivery in fact by the owner will not pass the legal possession, so as to save the party from the guilt of larceny.

*Id.* at 757.

101. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.4(c), at 356 (noting that larceny occurs when owner steals from bailee); PERKINS, *supra* note 43, at 239 (stating that "[e]ven the owner himself may commit larceny by stealing his own goods if they are in the possession of another and he takes them from the possessor wrongfully with intent to deprive him of a property interest therein").

that watch to a jeweler for repairs is guilty of larceny if the owner regains possession of the watch without the jeweler's consent.

Reasoning by analogy, it would appear that a stranger who steals from the bailee is guilty of larceny from the bailee alone, because only the bailee has legal possession. After all, common law larceny is a crime against possession, not ownership, and can occur only against a possessor.<sup>102</sup> Such a premise tends to suggest that *Catterton* is a derogation from the common law. *Catterton* was a case in which a stranger stole from a bailee, but Virginia convicted him of stealing from the true owner.<sup>103</sup> In fact, *Catterton*'s suggestion of a derogation from the common law was the essence of his unsuccessful appeal.<sup>104</sup> Because § 19.2-284 provided the foundation for the derogation in *Catterton*,<sup>105</sup> one commentator has accused this statute of altering the common law rules in Virginia.<sup>106</sup>

Yet despite this criticism, some authority suggests that *Catterton* is consistent with the common law.<sup>107</sup> Both the real owner and the bailee may have interests in the property sufficient to warrant protection from thieving strangers.<sup>108</sup> In the nineteenth century, Virginia apparently subscribed to this

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102. See GROOT, *supra* note 43, at 334 (noting that common law "larceny could be committed only against a possessor").

103. See *Catterton v. Commonwealth*, 477 S.E.2d 748, 749-50 (Va. Ct. App. 1996) (noting that *Catterton* stole from bailee, but Commonwealth convicted him of stealing from true owner).

104. See *id.* at 749 (noting *Catterton*'s argument).

105. See *id.* at 750 (citing *Latham v. Commonwealth*, 37 S.E.2d 36, 38-39 (Va. 1946)) (providing authority for decision). *Latham*, in turn, relies on Code of Virginia § 4872. *Latham*, 37 S.E.2d at 38 (citing VA. CODE ANN. § 4872 (Michie 1942)). This section remains virtually unchanged as § 19.2-284. VA. CODE ANN. § 19.2-284 (Michie 1995).

106. See GROOT, *supra* note 43, at 334 (stating that "these common law rules have been substantially altered by § 19.2-284").

107. See *Larceny*, *supra* note 61, § 81(1)(a) (noting that state may ordinarily allege ownership of property to be in owner or person in possession at time of theft). The C.J.S. notes that "[t]he ownership of property stolen from the possession of a bailee may be laid either in the bailor or the bailee." *Id.* § 81(2)(b) (footnote omitted).

108. See 2 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS \*156-57 (discussing special property in ownership of goods). Russell states:

There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a *special property* in them; and that they may be laid as the goods and chattels of such person in the indictment. A *lessee* for years, a *bailee*, a *pawnee*, a *carrier*, and the like, have such special property; and the indictment will be good, if it lay the property of the goods, either in the real owners, or in the persons having only such special property in them.

*Id.*; see 2 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 16, § 90, at 652 (1806). East states:

Any one [sic] who has a special property in goods stolen may lay them to be his in an appeal or indictment for larceny; as bailee, pawnee, lessee for years, carrier,

rule.<sup>109</sup> In a bailment context, the Commonwealth may have alleged the stolen property to be in either the bailor or the bailee.<sup>110</sup> There was one exception. In an indictment for larceny, it was not necessary to state that the defendant took the property from the *possession* of anyone.<sup>111</sup> However, if the indictment did allege a taking from the possession of someone, the proof had to conform to that allegation.<sup>112</sup> Thus, when an indictment alleged that a person stole *from the possession* of the bailor, proof that the accused actually took from the bailee could not support the charge.<sup>113</sup> When the indictment was silent on the issue of possession, proof that the accused stole from either the general owner or the special owner would suffice.<sup>114</sup> The Virginia Supreme

or the like; a fortiori, they may be laid to be the property of the respective owners; and the indictment is good either way.

*Id.*; see 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN \*512-13 (noting that "[i]f *A.* bail goods to *B.* to keep for him, or carry for him, and *B.* be robbed of them, the felon may be indicted for larc[e]ny of the goods of *A.* or *B.* and it is good either way, for the property is still in *A.* yet *B.* hath the possession").

109. See MINOR, *supra* note 70, at 108 (noting that in case of bailment, Commonwealth may allege property to be in either general owner or bailee).

110. See *id.* (noting that in case of bailment, Commonwealth may allege property to be in either general owner or bailee).

111. See Thompson v. Commonwealth, 4 Va. (2 Va. Cas.) 135, 135 (1818) (finding that indictment need not charge that accused stole property from owner or any other person). The Commonwealth indicted Thompson for the larceny of a hat belonging to one Robert Moore. *Id.* However, the indictment did not state that the accused took the hat from Moore's possession. *Id.* The court found that such a requirement was not necessary. *Id.*

112. See MINOR, *supra* note 70, at 108 (stating that it "is not necessary to state that the property was taken *from the possession* of any one, but if it is so averred it *must be proved as alleged*, and the possession of the bailee is *not that of the bailor*").

113. See 2 RUSSELL, *supra* note 108, at \*157 n.[1] (noting that "where the indictment alleges that property was stolen 'out of the possession' of the bailor, proof that it was taken from the bailee will not support the charge"). Thus, when an indictment alleged the larceny of a slave *from the possession* of one Elizabeth Edwards, but the evidence showed larceny *from the possession* of Thomas Edwards, the charge was not sustainable. See Commonwealth v. Williams, 3 Va. (1 Va. Cas.) 14, 14-15 (1791). An indictment alleging the larceny of a slave *belonging to* (and not from the possession of) Elizabeth Edwards would have supported the charge. See MINOR, *supra* note 70, at 108 (noting that allegation of possession in larceny indictment is not required).

114. See 23 RULING CASE LAW § 20, at 1154 (1919) (discussing ownership of property) [hereinafter 23 R.C.L.]. The Ruling Case Law notes:

The great majority of the reported cases uphold the rule that an indictment for larceny, robbery, or some other crime based on a larceny, which alleges ownership in a certain person, will be sustained by proof that such person is the agent or bailee of the true owner, or has, in behalf of the owner, the control, care, and management of the property stolen. In a few cases, the allegation of ownership has been held insufficient; but, in these cases, for the most part, the general rule is asserted, the court holding, however, that the person in whom the ownership was laid did not

Court reaffirmed this rule in *Booth v. Commonwealth*.<sup>115</sup> This case provided the basis for the decision in *Latham*.<sup>116</sup> *Latham*, in turn, provided the nexus between the common law rule and what is now § 19.2-284.<sup>117</sup> The *Latham* court noted that the rule stated in *Booth* is consistent with Virginia's statute regarding possession of stolen goods.<sup>118</sup> Fifty years later, *Latham* would provide the authority for the Court of Appeals's decision in *Catterton*.<sup>119</sup>

Thus, *Catterton*, traced through this indirect genealogy, appears legitimate. The indictment against *Catterton* charged the larceny of a Ford Bronco "belonging to Debora Brooke."<sup>120</sup> The indictment was silent on the issue of possession.<sup>121</sup> The common law did not obligate the Commonwealth to prove, as *Catterton* contended,<sup>122</sup> that *Catterton* took the Bronco from the mechanic/bailee, nor did it require the Commonwealth to prove that *Catterton* took the vehicle from Brooke.

bear the relationship of agent or bailee to the true owner. There is no distinction made by the cases between the different crimes, and the same rule is equally applicable to larceny or robbery, or other crimes based on a larceny.

*Id.*; see *Larceny*, *supra* note 61, § 99(b)(1) (discussing quality and character of ownership). The C.J.S. notes that "[i]n a prosecution for larceny, an allegation of ownership of stolen goods is supported by proof of any legal interest or special property in them, although less than the absolute title." *Id.*

115. See *Booth v. Commonwealth*, 183 S.E. 257, 258 (Va. 1936) (quoting 23 R.C.L., *supra* note 114, § 20, at 1154) (noting proof of theft from either general or special owner sufficient for indictment that is silent on issue of possession). *Booth* appealed his robbery conviction on the ground that there was a fatal variance between the indictment and the proof. *Id.* at 257. The Commonwealth arrested *Booth* for the robbery of D. Pender Grocery Company. *Id.* at 258. The indictment stated that the money stolen belonged to R.E. Thompson, the manager of the store. *Id.* *Booth* contended on appeal that the evidence produced at trial showed the property actually belonged to D. Pender Grocery Company, not R.E. Thompson. *Id.* at 257. The court found that "an indictment for larceny . . . which alleges ownership in a certain person, will be sustained by proof that such person is the agent or bailee of the true owner, or has, in behalf of the owner, the control, care, and management of the property stolen." *Id.* at 258 (quoting 23 R.C.L., *supra* note 114, § 20, at 1154). Because Thompson was in charge of the store, he had custody of the stolen money. *Id.* Therefore, the allegation that he was the owner was sufficient. *Id.*

116. See *Latham v. Commonwealth*, 37 S.E.2d 36, 38 (Va. 1946) (relying on *Booth*).

117. See *infra* note 118 and accompanying text (noting that *Latham* court regarded common law rule to be consistent with what is now § 19.2-284).

118. *Latham*, 37 S.E.2d at 38 (citing VA. CODE ANN. § 4872 (Michie 1942) (current version at VA. CODE ANN. § 19.2-284 (Michie 1995))).

119. *Catterton v. Commonwealth*, 477 S.E.2d 748, 750 (Va. Ct. App. 1996) (citing *Latham*, 37 S.E.2d at 38-39).

120. *Id.* at 749.

121. See *id.* (illustrating absence of possession element in indictment).

122. See *id.* (noting *Catterton*'s contention that bailee became "owner" for purpose of proving larceny).

Moreover, as old as these rules are, they are consistent with Virginia's current definition of larceny.<sup>123</sup> Although larceny is traditionally a crime against possession,<sup>124</sup> Virginia chooses instead to focus on the element of ownership.<sup>125</sup> Such a focus escapes the technical rigidity of a reliance on possession in which there can be only one prior possessor. Although ownership and possession may be synonymous,<sup>126</sup> the focus on ownership more readily allows the incorporation of the concepts of special and general property. Thus, § 19.2-284, which creates this incorporation by statute,<sup>127</sup> is not a departure from the common law, but rather a codification.<sup>128</sup> The fact that this statute has survived, virtually unchanged, since the Virginia Code of 1849<sup>129</sup> further supports its consistency with the common law. In sum, § 19.2-284 does not alter the current substance of the law of larceny. The next two Parts consider whether this is the case with respect to embezzlement and false pretenses.

123. See *Dunlavey v. Commonwealth*, 35 S.E.2d 763, 764 (Va. 1945) (citing *Vaughan v. Lytton*, 101 S.E. 865, 867 (Va. 1920)) (defining larceny as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently"); *Walker v. Commonwealth*, 486 S.E.2d 126, 130 (Va. Ct. App. 1997) (quoting *Jones v. Commonwealth*, 349 S.E.2d 414, 417 (Va. Ct. App. 1986)) (same).

124. See *supra* note 43 (noting that larceny is crime against possession).

125. See *Walker*, 486 S.E.2d at 130 (noting an "intention to deprive the owner thereof permanently" (emphasis added)).

126. See *Larceny*, *supra* note 61, § 13(b) (discussing what constitutes ownership in larceny context). The C.J.S. states: "Considered as an element of larceny, 'ownership' and 'possession' may be regarded as synonymous terms, for one who has a right to the possession of goods as against the thief, as far as he is concerned, is the owner of them." *Id.*

127. See VA. CODE ANN. § 19.2-284 (Michie 1995) (noting that "it shall be sufficient to prove that when the offense was committed . . . a general or special property . . . was in the person . . . alleged in the indictment or other accusation to be the owner thereof").

128. See *Latham v. Commonwealth*, 37 S.E.2d 36, 38-39 (Va. 1946) (noting consistency between common law rules and Code of Virginia § 4872 (current version at VA. CODE ANN. § 19.2-284 (Michie 1995))).

129. Compare VA. CODE, ch. 207, § 8 (1849) (current version at VA. CODE ANN. § 19.2-284 (Michie 1995)) (stating that "[i]n a prosecution for an offence, committed upon or relating to or affecting real estate, or for stealing, embezzling, destroying, injuring or fraudulently receiving or concealing, any personal estate, it shall be sufficient to prove, that when the offence was committed, the actual or constructive possession, or a general or special property, in the whole or any part of such estate, was in the person or community alleged, in the indictment or other accusation, to be the owner thereof") with VA. CODE ANN. § 19.2-284 (Michie 1995) (stating that "[i]n a prosecution for an offence committed upon, relating to or affecting real estate, or for stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any personal estate it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of such estate was in the person or entity alleged in the indictment or other accusation to be the owner thereof").

IV. *Embezzlement and § 19.2-284*

Embezzlement is the conversion of lawfully possessed property.<sup>130</sup> However, unlike larceny, embezzlement was not a crime at common law.<sup>131</sup> Larceny required a trespassory taking.<sup>132</sup> As a result, those individuals who had lawfully acquired possession of property could not be guilty of larceny for subsequently misappropriating that property.<sup>133</sup> In order to mend these interstices, the English Parliament created the statutory crime of embezzlement.<sup>134</sup>

The problems associated with the gaps that larceny left uncovered culminated in 1799 with *The King v. Bazeley (Bazeley's Case)*.<sup>135</sup> Bazeley, in his capacity as a bank teller, received a £100 note for deposit.<sup>136</sup> After recording the transaction, Bazeley placed the note in his own pocket and later used it to pay off a personal debt.<sup>137</sup> At that time, servants who misappropriated property received from third persons for their master committed only a civil breach of trust.<sup>138</sup> The judges concluded that Bazeley was not guilty of felony (that

130. See HALL, *supra* note 21, at 289 (noting that embezzlement is usually conversion of legally possessed property).

131. See 2 LAFAYE & SCOTT, *supra* note 32, § 8.6, at 368 (noting that embezzlement is statutory crime); PERKINS, *supra* note 43, at 286 (noting that embezzlement is not common law crime); 3 TORCIA, *supra* note 61, § 383, at 465 (noting that embezzlement is creature only of statute).

132. See GROOT, *supra* note 43, at 185 (noting that common law larceny required taking from possession of another); 2 LAFAYE & SCOTT, *supra* note 32, § 8.1, at 328 (noting that larceny requires "trespass in the taking").

133. See 3 TORCIA, *supra* note 61, § 383, at 463-64 (noting that such misappropriation could not "constitute larceny because there is no trespassory taking from the possession of another"); see also GROOT, *supra* note 43, at 185 (noting that "one who was lawfully in possession and converted the goods to his own use could not be convicted of larceny").

134. See 2 LAFAYE & SCOTT, *supra* note 32, § 8.6, at 368 (discussing need for crime of embezzlement). LaFave and Scott note that "there was a large gap in larceny caused by larceny's requirement of a trespass in the taking. . . . So the English legislature created the new crime of embezzlement to fill this loophole." *Id.*; see PERKINS, *supra* note 43, at 286 (noting that embezzlement "is the result of legislative efforts to make provision for an unreasonable gap which appeared in the law of larceny as it developed"); 3 TORCIA, *supra* note 61, § 383, at 464-65 (noting that "it was to fill this gap in the law of larceny that the offense of embezzlement, a creature only of statute, found its way into Anglo-American law" (footnote omitted)).

135. *The King v. Bazeley (Bazeley's Case)*, 168 Eng. Rep. 517 (Ex. Ch. 1799). Bazeley worked as a bank teller. *Id.* at 517. After receiving money for deposit, Bazeley placed the money in his own pocket. *Id.* He later used the money to pay a personal debt. *Id.* at 518. The reviewing court concluded that there was no offense because possession of the money had not yet passed to the bank. *Id.* at 523.

136. *Id.* at 517-18.

137. *Id.* at 518.

138. See HALL, *supra* note 21, at 37 (discussing birth of embezzlement). Hall notes that "[t]he rule that a servant who converted goods or money received from a third person for his

is, larceny) because, at the time of the taking, possession of the note had not shifted to the bank.<sup>139</sup> Thus, despite his wrongful conduct, Bazeley went unpunished.<sup>140</sup>

The court decided *Bazeley's Case* in April 1799.<sup>141</sup> In July of that year,<sup>142</sup> the English legislature responded with the first general embezzlement statute.<sup>143</sup> However, this statute<sup>144</sup> was not a panacea. The statute applied to little more than facts analogous to *Bazeley's Case*.<sup>145</sup> It covered only clerks and servants<sup>146</sup> and left several loopholes unremedied.<sup>147</sup> Thus, from 1812 to

master committed merely a civil breach of trust, provided a constantly recurring problem until 1799." *Id.*

139. *Bazeley's Case*, 168 Eng. Rep. at 519. The court noted:

The prosecutors in the present case had only a right or title to possess the note, and not the absolute or even qualified possession of it. It was never in their custody or under their controul [sic]. . . . [A]t the time therefore of the supposed conversion of this note, it was in the legal possession of the prisoner.

*Id.*

140. *Id.* at 523.

141. See HALL, *supra* note 21, at 38 (noting that parties argued *Bazeley's Case* on April 24, 1799).

142. See 39 Geo. 3, ch. 85 (1799) (Eng.) (punishing embezzlement by clerks and servants), repealed by 7 & 8 Geo. 4, ch. 27 (1827) (Eng.). The statute passed on July 12, 1799. 39 Geo. 3, ch. 85 (1799) (Eng.).

143. See *The King v. Bazeley (Bazeley's Case)*, 168 Eng. Rep. 517, 523 (Ex. Ch. 1799) (noting that "in consequence of this case the statute 39 Geo. III. c. 85 was passed"); 3 TORCIA, *supra* note 61, § 383, at 466-67 (noting English embezzlement statute passed as result of *Bazeley's Case*); see also 2 EAST, *supra* note 108, ch. 16, § 18, at 574 (discussing ramifications of *Bazeley's Case*). East notes:

This decision, however just in leaning to the merciful side on a doubtful question of law, having opened a door to the most alarming and extensive frauds by servants in general, and particularly in those instances where from the very nature of their employment they were unavoidably entrusted with the receipt of large sums of money in commercial transactions, the legislature thought it necessary to interfere immediately, and accordingly the declaratory act of the 39 Geo. 3. ch. 85. was passed . . .

*Id.*

144. 39 Geo. 3, ch. 85 (1799) (Eng.).

145. See HALL, *supra* note 21, at 39 (noting scope of statute). Hall notes that "[t]hough it extended beyond employees of bankers, it still bore the mark of Bazeley's Case." *Id.*

146. See 39 Geo. 3, ch. 85 (1799) (Eng.) (criminalizing embezzlement by servants and clerks). The statute was entitled: "An act to protect masters against embezzlements by their clerks or servants." *Id.*

147. See *The King v. Walsh*, 168 Eng. Rep. 624, 637 (Ex. Ch. 1812) (finding that misappropriation of money by agent was not felony). Walsh, in his capacity as a stockbroker, received a check from his principal with directions to purchase certain stock. *Id.* at 625. Walsh purchased the stock with part of the money and absconded with the remainder. *Id.* at 624-25. Such conduct did not fall under the existing embezzlement statute, 39 Geo. 3, ch. 85, because it was

1857, Parliament passed a series of laws that brought agents, trustees, and bailees within the scope of embezzlement.<sup>148</sup>

The American states generally followed the English pattern.<sup>149</sup> Embezzlement was a new offense, created by statute and designed to fill the gaps in larceny.<sup>150</sup> Generally, embezzlement is the misappropriation of property with which one is entrusted.<sup>151</sup> Despite its relation to larceny, embezzlement was a distinct offense; the two crimes did not overlap.<sup>152</sup> However, in cases in which the facts might support either charge, the distinction became very fine.

One example of this fine distinction was when a servant (employee) had dominion over his master's (employer's) property. The servant did not have

a mere breach of trust. See HALL, *supra* note 21, at 39 (noting that Walsh's conduct did not fall within meaning of 39 Geo. 3, ch. 85).

148. See 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 157-58 (1883) (discussing criminal breach of trust). Stephen notes:

The fraudulent misappropriation of property is not a criminal offence, if the possession of it was originally honestly acquired, except in the case of

(1) Servants embezzling their masters' property, who were first excepted in 1799.

(2) Brokers, merchants, bankers, attorneys, and other agents, misappropriating property intrusted to them, who were first excepted in 1812.

(3) Factors fraudulently pledging goods intrusted to them for sale, who were first excepted in 1827.

(4) Trustees under express trusts fraudulently disposing of trust funds, who were first excepted in 1857.

(5) Bailees stealing the goods bailed to them, who also were first excepted in 1857.

*Id.* at 158-59.

149. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.6, at 368-69 (noting general adherence to England's practice); PERKINS, *supra* note 43, at 287 (noting that legislative history of embezzlement in America is comparable to that in England).

150. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.6, at 369 (discussing evolution of embezzlement in America). Embezzlement was an invention "created by the legislature for the specific purpose of plugging loopholes left by the narrowness of the crime of larceny." *Id.*

151. See *id.* (noting that embezzlement is fraudulent conversion of property by one entrusted with that property); see also PERKINS, *supra* note 43, at 288 (discussing legislative history of embezzlement in America). Perkins notes:

[The American embezzlement] statutes had one element in common in addition to the fact that they all applied to the fraudulent conversion of property which is accomplished without trespass. This was that the property had been *entrusted* to the converter either by or for the owner. The statutes are frequently worded in such terms and the tendency has been to supply this element by interpretation where it is not expressed.

*Id.* (footnote omitted).

152. See PERKINS, *supra* note 43, at 289-90 (noting distinction between larceny and embezzlement). Because embezzlement and larceny evolved separately, "courts have generally held or assumed that these crimes do not overlap, that they are mutually exclusive." 2 LAFAVE & SCOTT, *supra* note 32, § 8.6(a), at 369.



possession of that property.<sup>153</sup> As a result, this servant could not commit embezzlement by misappropriating the property; such conduct amounted to larceny.<sup>154</sup> However, the common law treated employees with special responsibilities as agents rather than servants.<sup>155</sup> If the agent received more than simple charge of the property for a limited purpose, the agent stood in possession and, thus, could commit embezzlement, but not larceny.<sup>156</sup>

Although Virginia generally adheres to these classical rules,<sup>157</sup> the Commonwealth's embezzlement statute<sup>158</sup> does not fully parallel the traditional definition of that crime.<sup>159</sup> Virginia's interpretation of embezzlement is

153. See *supra* notes 84-88 and accompanying text (discussing custody versus possession issue); see also 1 HALE, *supra* note 108, at \*506 (noting that "[h]e, that hath the care of another's goods hath not possession of them"); PERKINS, *supra* note 43, at 240 (noting that "the control of an employee for his employer usually results in custody only").

154. See PERKINS, *supra* note 43, at 289 (discussing embezzlement). Perkins states: "The ordinary employee who receives possession from his employer has custody only and not possession. His fraudulent appropriation of the property so received is larceny, hence he may properly be convicted if the charge is larceny but not if it is embezzlement." *Id.* (footnotes omitted).

155. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 355 (3d ed. 1982) (describing employee with special responsibilities as agent).

156. See 3 TORCIA, *supra* note 61, § 361, at 421 (discussing taking by agent). Torcia states:

If the agent receives bare charge of the property for some limited purpose, he is deemed merely to have custody and is in a position similar to that of a servant; in which case he is guilty of larceny when he appropriates the property to his own use. If the agent is deemed to be in possession of his principal's property, and he appropriates it to his own use, he may be guilty of embezzlement but, because there is no taking from the possession of another, he cannot be guilty of larceny.

*Id.* (footnote omitted).

157. See GROOT, *supra* note 43, at 185 (noting that "[a]t common law larceny and embezzlement were distinct crimes and the same is generally true in Virginia").

158. VA. CODE ANN. § 18.2-111 (Michie 1996) (defining embezzlement). Virginia's embezzlement statute states:

If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, he shall be guilty of embezzlement. Embezzlement shall be deemed larceny and upon conviction thereof, the person shall be punished as provided in § 18.2-95 or § 18.2-96.

*Id.*

159. See *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 691 (Va. Ct. App. 1995) ("The definition of embezzlement in Code § 18.2-111 does not parallel the traditional definition of that crime; rather it proscribes a broad category of theft offenses, including embezzlement, which fall outside the common law definition of larceny.").

somewhat broader in scope.<sup>160</sup> Section 18.2-111 is a general embezzlement statute encompassing at once the whole series of English embezzlement statutes.<sup>161</sup> Over the years, this expansive interpretation of embezzlement has created inconsistent results that blur the distinction between embezzlement and larceny and may indicate a trend towards consolidation. For example, although the Virginia courts have generally followed the rule that employees with special authority are embezzlers,<sup>162</sup> the courts have sometimes treated similar cases in which the accused employees have substantial authority as larcenies.<sup>163</sup>

Additionally, Virginia deems embezzlement to be larceny.<sup>164</sup> This is especially true for punishment purposes.<sup>165</sup> The fact that the punishment for embezzlement is the same as for larceny suggests that there is no moral difference between the two crimes.<sup>166</sup> Yet, Virginia deems embezzlement to be larceny for more than purposes of punishment.<sup>167</sup> In *Pitsnogle v. Commonwealth*,<sup>168</sup> the Virginia Supreme Court of Appeals took the view that on an indictment for larceny, proof of embezzlement would sustain the charge.<sup>169</sup> Prior to 1994, Virginia maintained a codification of this rule in its embezzle-

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160. See *id.* (noting broad definition of embezzlement). The court in *Gwaltney* stated that "[i]n this Commonwealth, our legislature has addressed the problem by adopting a broad definition of embezzlement, deeming it to be punishable as larceny and defining an array of activities which fall within its ambit." *Id.*

161. See VA. CODE ANN. § 18.2-111 (Michie 1996) (incorporating agents, bailees, employees, and trustees).

162. See *Simmons v. Commonwealth*, 247 S.E.2d 359, 359 (Va. 1978) (charging embezzlement when employee had special responsibility); *Lee v. Commonwealth*, 105 S.E.2d 152, 152 (Va. 1958) (same).

163. See *Foster v. Commonwealth*, 163 S.E.2d 601, 601 (Va. 1968) (charging larceny by employee); *Walker v. Commonwealth*, 35 Va. (8 Leigh) 743, 743-44 (1837) (finding employee with substantial control over goods in store and money in cash drawer guilty of larceny).

164. See VA. CODE ANN. § 18.2-111 (Michie 1996) (stating "[e]mbezzlement shall be deemed larceny").

165. See *id.* (stating that upon conviction of embezzlement, person shall be punished according to larceny statute).

166. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.8(a)(2), at 412 (noting that same punishment suggests equal moral character).

167. See *Pitsnogle v. Commonwealth*, 22 S.E. 351, 352 (Va. 1895) (finding proof of embezzlement sufficient to sustain larceny indictment).

168. 22 S.E. 351 (Va. 1895).

169. *Pitsnogle v. Commonwealth*, 22 S.E. 351, 352 (Va. 1895). The Commonwealth indicted and convicted *Pitsnogle* for the larceny of a gold watch. *Id.* at 351. On appeal, *Pitsnogle* contended that the Commonwealth had failed to prove larceny; rather the Commonwealth had proved embezzlement. *Id.* *Pitsnogle's* argument was that proof of embezzlement would not support an indictment for common law larceny. *Id.* However, the court found that on an indictment for larceny, proof of embezzlement would suffice. *Id.* at 352.

ment statute.<sup>170</sup> However, the statute provided a possible means with which to defeat this operation.<sup>171</sup> A defendant facing a larceny indictment could, prior to trial, require the Commonwealth to elect the crime on which it would rely.<sup>172</sup> Such language implies that if the Commonwealth elected to proceed on the theory of larceny, proof of embezzlement at trial would not support a conviction. Thus, when a defendant exercised his election right, larceny and embezzlement remained distinct.<sup>173</sup> However, when the defendant failed to require the Commonwealth to elect, upon a larceny indictment at least, embezzlement and larceny consolidated.<sup>174</sup>

For a span of one hundred years, this rule seemed crystallized. However, in 1994, the Virginia legislature amended its embezzlement statute.<sup>175</sup> The Commonwealth still deems embezzlement to be larceny, but the amended statute eliminated the clause allowing the Commonwealth to indict embezzlement as larceny and the clause permitting proof of embezzlement to sustain a charge of larceny.<sup>176</sup> The amendment significantly altered the meaning of

170. See VA. CODE ANN. § 18.2-111 (Michie 1982) (amended 1994) (defining embezzlement). The embezzlement statute provided in part:

If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, *he shall be deemed guilty of larceny thereof, may be indicted as for larceny, and proof of embezzlement under this section shall be sufficient to sustain the charge.*

*Id.* (emphasis added).

171. See *id.* (noting that defendant may demand that Commonwealth elect offense upon which it will rely).

172. See *id.* (noting that defendant may demand to know offense upon which Commonwealth plans to rely). The statute provided:

On the trial of every indictment for larceny, however, the defendant, if he demands it, shall be entitled to a statement in writing from the attorney for the Commonwealth designating the statute he intends to rely upon to ask for conviction. Such statement shall be furnished to the defendant, or his attorney, no later than five days prior to the date fixed for trial on the indictment provided the demand is made more than five days prior to such date.

*Id.*

173. See GROOT, *supra* note 43, at 185-86 (noting that election maintains distinction between larceny and embezzlement).

174. See *id.* at 185 (noting that Commonwealth is probably permitted to prove embezzlement when it alleges larceny).

175. See 1994 Va. Acts ch. 554 (current version at VA. CODE ANN. § 18.2-111 (Michie 1996)) (amending and eliminating second half of embezzlement statute).

176. See VA. CODE ANN. § 18.2-111 (Michie 1996) (eliminating half of former statutory language). The statute now merely provides:

the remainder of the statute.<sup>177</sup> The pre-1994 version deemed someone violating the embezzlement statute to be guilty of *larceny*.<sup>178</sup> The amended version now defines such conduct as *embezzlement*.<sup>179</sup> By altering the nature of the offense, the Virginia legislature has resurrected the distinction between larceny and embezzlement. *Pitsnogle*<sup>180</sup> remains valid law, but the omission of the statutory codification of that rule in the amended embezzlement statute<sup>181</sup> suggests a reactionary trend. Larceny and embezzlement are separate and distinct offenses, and Virginia deems embezzlement to be larceny only for purposes of punishment.<sup>182</sup>

Nonetheless, further evidence of a trend towards consolidation exists. One year after the Virginia legislature amended its embezzlement statute, the Virginia Court of Appeals, in *Gwaltney v. Commonwealth*,<sup>183</sup> expanded embezzlement to cover what would have constituted larceny at common law.<sup>184</sup>

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If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, he shall be guilty of *embezzlement*. Embezzlement shall be deemed larceny and upon conviction thereof, the person shall be punished as provided in § 18.2-95 or § 18.2-96.

*Id.* (emphasis added).

177. See *id.* (amending embezzlement statute so embezzler is guilty of embezzlement and not larceny).

178. See VA. CODE ANN. § 18.2-111 (Michie 1982) (amended 1994) (deeming conduct statute prescribed as larceny).

179. See VA. CODE ANN. § 18.2-111 (Michie 1996) (defining infraction as embezzlement).

180. See *Pitsnogle v. Commonwealth*, 22 S.E. 351, 352 (Va. 1895) (noting that proof of embezzlement will support larceny indictment).

181. See VA. CODE ANN. § 18.2-111 (Michie 1996) (omitting rule allowing proof of embezzlement to sustain larceny indictment).

182. See 29A C.J.S. *Embezzlement* § 5(b) (1992) (discussing punishment of embezzlement and larceny). The C.J.S. notes that "[w]hile some statutes designate embezzlement as larceny, or provide that it shall be punishable as such, the two offenses are nevertheless generally regarded as separates and distinct." *Id.* (footnote omitted).

183. 452 S.E.2d 687 (Va. Ct. App. 1995).

184. See *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 690-92 (Va. Ct. App. 1995) (noting that Gwaltney's conduct might be larceny at common law). Gwaltney worked as a bank teller. *Id.* at 689. At work, she misappropriated \$1000 from the till of a co-worker. *Id.* The Commonwealth indicted and convicted Gwaltney of embezzlement. *Id.* at 688. Gwaltney argued to the appellate court that the evidence was insufficient to prove the entrustment relationship that embezzlement required because she took the money not from her own till, but from that of a co-worker. *Id.* at 690. Her argument was that the bank did not entrust her with the money in other tellers' tills. *Id.* Therefore, she was not in possession of that money and could not have committed embezzlement. *Id.* at 691. The court found that Gwaltney's position of trust extended throughout the bank, not merely to her own till. *Id.* at 691-92. Through the trust of

Gwaltney, in her capacity as a bank teller, misappropriated \$1000 from the till of a co-worker.<sup>185</sup> The Commonwealth convicted her of embezzlement.<sup>186</sup> On appeal, Gwaltney argued that the evidence adduced at trial was insufficient to prove the entrustment relationship that embezzlement requires because she took the money not from her own till, but from that of another teller.<sup>187</sup> Because the bank did not entrust her with the money in her co-worker's till, she was not in possession of that money.<sup>188</sup> Absent possession, Gwaltney argued that she could not have committed embezzlement.<sup>189</sup> However, the court found that although Gwaltney was directly responsible only for her own cash register, her position of trust was not confined to her till.<sup>190</sup> The scope of her entrustment extended throughout the bank.<sup>191</sup> Thus, "by virtue of [her] office, trust or employment,"<sup>192</sup> Gwaltney was able to misappropriate the money.<sup>193</sup> Accordingly, she was guilty of embezzlement.<sup>194</sup>

Although this case may be distinguishable on the grounds that it deals with and is limited to bank tellers, in whom employers place some heightened

her employment, Gwaltney was able to misappropriate the money. *Id.* at 692. Thus, she was guilty of embezzlement. *Id.*

185. *Id.* at 689-90.

186. *Id.* at 688.

187. *Id.* at 690.

188. *Id.*

189. *See id.* at 691 (noting that "a 'black letter' embezzlement statute requires proof of a lawful possession prior to or contemporaneous with an intentional conversion by misappropriation").

190. *Id.* at 691-92.

191. *Id.* The court added:

Gwaltney was placed in a position of trust by her employer. While she was directly responsible for accounting only for the receipt and disbursement of funds to and from the cash drawer assigned to her, Gwaltney's position of trust extended beyond the confines of her station to the entire teller line and other areas of the bank where her duties would bring her into proximity of her employer's property.

*Id.*

192. VA. CODE ANN. § 18.2-111 (Michie 1996) (defining embezzlement).

193. *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 692 (Va. Ct. App. 1995). The court noted:

The entrustment was inherent in her employment rather than in the daily act of receiving into her possession and dispersing funds from a specific cash drawer. But for the trust placed in her by her employer, Gwaltney would not have been able to accomplish the conversion of cash from another teller's cash drawer to her own use. Accordingly, the Commonwealth established the wrongful taking of money received "by virtue of [her] office, trust or employment" in violation of Code § 18.2-111.

*Id.* (quoting VA. CODE ANN. § 18.2-111 (Michie 1996)).

194. *Id.*

quantum of trust, *Gwaltney* nonetheless suggests that Virginia now interprets the entrustment element of embezzlement, at least in one employment context, as a function of access. Any employee who, by virtue of her employment, merely has access to the employer's property is capable of embezzlement.<sup>195</sup> Such an inference blurs the custody-possession distinction inherent between common law larceny and traditional embezzlement.<sup>196</sup> In cases involving employees, the two crimes overlap. Under this interpretation, the Commonwealth always should charge embezzlement in employee-theft cases.<sup>197</sup> Charging embezzlement will permit conviction of any employee, whereas charging larceny may preclude conviction in cases involving an employee with special responsibilities or managerial status.<sup>198</sup> Thus, independent of § 19.2-284,<sup>199</sup> the Commonwealth has taken a step toward theft consolidation through this broad interpretation of embezzlement.

However, even after *Gwaltney's* expansive interpretation of embezzlement,<sup>200</sup> some Virginia jurists continue to interpret larceny and embezzlement as separate and distinct offenses.<sup>201</sup> In *Cera v. Commonwealth*,<sup>202</sup> the Court of Appeals of Virginia reiterated the distinction between the two crimes.<sup>203</sup>

195. See *id.* at 691-92 (noting employee's position of trust extended to anywhere her duties brought her into *proximity* of employer's property).

196. See *supra* notes 84-96 and accompanying text (discussing distinction between custody and possession in common law larceny and traditional embezzlement).

197. See GROOT, *supra* note 43, at 186 (noting that safest course for Commonwealth in employee-theft cases is to charge embezzlement).

198. See *id.* at 185-86 (discussing election to charge embezzlement in employee-theft cases). Professor Groot notes: "That choice will clearly permit conviction of an employee who has managerial status. The choice will apparently permit conviction of any employee." *Id.* at 186 (footnote omitted).

199. See VA. CODE ANN. § 19.2-284 (Michie 1995) (discussing proof of ownership in theft related offenses).

200. See *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 691-92 (Va. Ct. App. 1995) (interpreting Virginia's embezzlement statute broadly).

201. See *Cera v. Commonwealth*, No. 0432-94-4, 1995 WL 250816, at \*2 (Va. Ct. App. May 2, 1995) (noting distinction between larceny and embezzlement).

202. 1995 WL 250816 (Va. Ct. App. May, 2 1995).

203. See *Cera v. Commonwealth*, No. 0432-94-4, 1995 WL 250816, at \*2 (Va. Ct. App. May 2, 1995) (discussing distinction between larceny and embezzlement). The *Cera* court stated:

A person who takes personal property from the possession of another without the owner's consent and with intent to deprive him of possession permanently is guilty of common law larceny. A person entrusted with possession of another's personalty who converts such property to his own use or benefit is guilty of the statutory offense of embezzlement.

*Id.* (citing *Smith v. Commonwealth*, 283 S.E.2d 209, 210 (Va. 1981)). In *Cera*, the Commonwealth arrested Cera for embezzlement in January 1993. *Id.* at \*1. The district court found probable cause of embezzlement in a preliminary hearing on February 16, 1993. *Id.* However,

The court found embezzlement and larceny to be separate offenses with different elements.<sup>204</sup> According to the court, larceny involves a trespassory taking, whereas embezzlement involves misappropriation of property held with the owner's permission.<sup>205</sup> *Cera* suggests that despite the rule in *Pitsnogle*,<sup>206</sup> Virginia maintains the distinction between larceny and embezzlement. Moreover, a consistent reading of the two cases presents a lose-lose dilemma for defendants. A defendant loses when the Commonwealth proves embezzlement on a larceny indictment because the two offenses are the same.<sup>207</sup> Furthermore, a defendant loses a speedy trial claim<sup>208</sup> when the Commonwealth arrests on a warrant charging embezzlement, but the grand jury indicts on larceny, because the offenses are separate and distinct.<sup>209</sup>

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on March 9, the grand jury indicted Cera for grand larceny. *Id.* A jury convicted Cera of that charge on December 1, 1993. *Id.* Prior to trial, Cera moved for a dismissal on the ground "that the Commonwealth violated his right to a speedy trial under Virginia Code § 19.2-243 by prosecuting him for grand larceny more than nine months after his preliminary hearing on the embezzlement charge." *Id.* Cera argued that embezzlement and larceny are the same offense. *Id.* Thus, "the nine months must run from the date of the preliminary hearing on the embezzlement charge, not from the date of the indictment on the grand larceny charge." *Id.* The court noted embezzlement and larceny are the same for the purpose of punishment, but found the offenses otherwise distinct. *Id.* at \*2. The two crimes are not the same offense for determining time limits under the speedy trial statute. *Id.* As a result, the nine-month limitation began when the Commonwealth indicted Cera because there was no preliminary hearing on the grand larceny charge. *Id.*

204. See *infra* note 205 and accompanying text (noting distinctive elements).

205. See *Cera*, 1995 WL 250816, at \*2 (noting difference between larceny and embezzlement). The court noted: "[E]mbezzlement and larceny are separate offenses with different elements. The key distinction between embezzlement and larceny is that larceny involves a trespassory taking of property while embezzlement involves a conversion of property received with the owner's consent." *Id.*

206. See *Pitsnogle v. Commonwealth*, 22 S.E. 351, 352 (Va. 1895) (noting that proof of embezzlement will sustain larceny indictment).

207. See *id.* (noting proof of embezzlement sufficient to sustain larceny indictment).

208. See VA. CODE ANN. § 19.2-243 (Michie 1995) (discussing limitations on prosecution of felony due to lapse of time after finding of probable cause). This statute provides that in a prosecution for felony, if the Commonwealth establishes probable cause in a preliminary hearing, the Commonwealth must try the accused within five months if the accused remains in custody, or within nine months if the accused does not remain in custody. *Id.* The statute further provides:

If there was no preliminary hearing in the district court, or if such preliminary hearing was waived by the accused, the commencement of the running of the five and nine months periods, respectively, set forth in the section, shall be from the date an indictment or presentment is found against the accused.

*Id.*

209. See *Cera v. Commonwealth*, No. 0432-94-4, 1995 WL 250816, at \*2 (Va. Ct. App. May 2, 1995) (noting that larceny and embezzlement are "separate offenses with different elements").

Virginia formulated the *Pitsnogle* rule over one hundred years ago,<sup>210</sup> and the codification of this rule in the Commonwealth's embezzlement statute is now notably absent.<sup>211</sup> Thus, despite the fact that *Gwaltney* blurred the line between the two offenses, the age of *Pitsnogle*, the 1994 statutory amendment, and the recent distinction in *Cera* represent strong evidence that Virginia still considers larceny and embezzlement to be separate crimes.

However, this conclusion is not an end to the inquiry. Even if larceny and embezzlement are separate offenses with little overlap, it is likely that § 19.2-284<sup>212</sup> cuts across the custody-possession distinction between the two crimes.<sup>213</sup> Section 19.2-284 provides that:

In a prosecution . . . for stealing [or] embezzling . . . it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of such estate was in the person . . . alleged in the indictment . . . to be the owner thereof.<sup>214</sup>

General property is the interest in the property held by the true owner.<sup>215</sup> Special property, on the other hand, is an interest in property held for a tem-

210. See *Pitsnogle*, 22 S.E. at 352 (noting proof of embezzlement sufficient to sustain larceny indictment).

211. Compare VA. CODE ANN. § 18.2-111 (Michie 1979) (amended 1994) (incorporating *Pitsnogle* rule and holding person committing prescribed conduct guilty of *larceny*) with VA. CODE ANN. § 18.2-111 (Michie 1996) (eliminating *Pitsnogle* rule and holding person committing prescribed conduct guilty of *embezzlement*).

212. See VA. CODE ANN. § 19.2-284 (Michie 1995) (discussing proof of ownership in theft offenses).

213. See *Smith v. Commonwealth*, 283 S.E.2d 209, 210 (Va. 1981) (noting possession distinction between larceny and embezzlement). The Supreme Court of Virginia distinguished larceny from embezzlement:

A person who takes personal property from the possession of another without the owner's consent and with intent to deprive him of possession permanently is guilty of common law larceny. A person entrusted with possession of another's personalty who converts such property to his own use or benefit is guilty of the statutory offense of embezzlement.

*Id.* (citing VA. CODE ANN. § 18.2-111 (Michie 1979); *Hewitt v. Commonwealth*, 194 S.E.2d 893, 894 (Va. 1973)).

214. VA. CODE ANN. § 19.2-284 (Michie 1995). The entire statute reads:

In a prosecution for an offense committed upon, relating to or affecting real estate, or for stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any personal estate it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of such estate was in the person or entity alleged in the indictment or other accusation to be the owner thereof.

*Id.*

215. See BLACK'S LAW DICTIONARY 1217 (6th ed. 1990) (defining general property).



porary or limited nature, such as a bailee's interest in the property bailed.<sup>216</sup> This statute appears to eliminate completely the possession element on which the distinction between larceny and embezzlement turns.<sup>217</sup> Whether the charge is larceny or embezzlement, as long as the Commonwealth can prove that the victim named in the indictment is either the true owner or has some special interest in the property, the Commonwealth may obtain a conviction.<sup>218</sup> For example, the Commonwealth may convict a bailee with lawful possession and an employee with managerial status or special responsibilities of *larceny* from the true owner because the victim is the general owner.<sup>219</sup> For the same reasons, the Commonwealth may convict an employee with custody only of *embezzlement* from the true owner.<sup>220</sup> Thus, had the *Gwaltney* court predicated its decision on § 19.2-284, there would have been no need to expand the sphere of entrustment.<sup>221</sup>

The focus under § 19.2-284 is not on the concept of custody or possession; rather, the focus is on the victim's relationship to the property at issue.<sup>222</sup> It appears that as long as the Commonwealth alleges misappropriation from someone having an interest in the property, a conviction for either larceny or embezzlement is sustainable if the proof of "ownership" conforms to the allegation.<sup>223</sup> As a result, embezzlement merges with larceny; all embezzlers may be convicted of larceny, and all thieves may be convicted of embezzlement. Section 19.2-284, therefore, completes the process that *Pitsnogle* began last century: consolidation of larceny and embezzlement.

216. See *id.* at 1218 (defining special property).

217. See VA. CODE ANN. § 19.2-284 (Michie 1995) (discussing proof of ownership in theft offenses).

218. See *id.* (discussing proof of ownership in theft cases).

219. See *id.* (noting that in theft offense, it is sufficient to prove general property in victim). Section 19.2-284 states: "In a prosecution for . . . stealing . . . it shall be sufficient to prove . . . a general . . . property . . . was in the person . . . alleged . . . to be the owner [of the misappropriated property]." *Id.*

220. See *id.* (noting that in theft offense, it is sufficient to prove general property in victim). Section 19.2-284 states: "In a prosecution for . . . embezzling . . . it shall be sufficient to prove . . . a general . . . property . . . was in the person . . . alleged . . . to be the owner [of the misappropriated property]." *Id.*

221. See *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 691-92 (Va. Ct. App. 1995) (expanding scope of entrustment to entire teller line). The Commonwealth prosecuted *Gwaltney* for embezzling money from a bank where she worked as a teller. *Id.* at 688. She took the money from the till of a co-worker. *Id.* at 689. *Gwaltney* claimed she did not have possession of the money in another's till and, thus, could not be convicted of embezzlement. *Id.* at 690. Under § 19.2-284, this issue would not be relevant. It would be sufficient to show *Gwaltney* misappropriated the money from the general owner. VA. CODE ANN. § 19.2-284 (Michie 1995).

222. See VA. CODE ANN. § 19.2-284 (Michie 1995) (noting that in theft offense, it is sufficient to prove general property in victim).

223. See *id.* (noting that in theft offense, it is sufficient to prove general property in victim).

*V. False Pretenses and § 19.2-284*

"Obtaining property by false pretenses," shortened to merely "false pretenses,"<sup>224</sup> was not a crime at English common law.<sup>225</sup> As was the case with embezzlement, the English Parliament created the crime of false pretenses to fill a loophole in the law of larceny.<sup>226</sup> At common law, a person who, with intent to steal, fraudulently induced another to pass possession of some property, and subsequently converted that property, was guilty of larceny by trick.<sup>227</sup> However, one who, by fraudulent inducement, obtained both possession and *title* to the property in question was guilty of no crime at all.<sup>228</sup> The wrongful acquisition of title to another's property merely gave rise to civil action.<sup>229</sup> The one exception existed when a person, who by fraud, acquired possession and title by use of a false symbol or token such as a false weight or measure.<sup>230</sup> This, the common law recognized as cheat.<sup>231</sup> In response to this gap in the common law, Parliament enacted the first general false pretenses statute in 1757.<sup>232</sup>

Although this statute is old enough for states to consider it to be part of American common law,<sup>233</sup> most of the states now have false pretenses statutes

224. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.7(a), at 383 (noting that obtaining property by false pretenses is often called false pretenses).

225. See *id.* at 382 (noting statutory nature of false pretenses); PERKINS, *supra* note 43, at 296 (noting that false pretenses was unknown at common law); 3 TORCIA, *supra* note 61, § 410, at 517 (noting that false pretenses is creature only of statute).

226. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.7(a), at 383 (noting that Parliament created false pretenses to plug loophole left by larceny); PERKINS, *supra* note 43, at 297 (noting that false pretenses was legislative effort to fill gap in law of larceny); 3 TORCIA, *supra* note 61, § 410, at 517 (noting that false pretenses fills gap in larceny).

227. See *supra* notes 73-83 and accompanying text (discussing larceny by trick).

228. See 3 TORCIA, *supra* note 61, § 410, at 516 (noting that no common law crime covered misappropriation of title of another's property by fraud).

229. See PERKINS, *supra* note 43, at 296 (noting that "the wrongful act of obtaining title to another's property by fraud was held not to constitute a crime but merely to give rise to a civil action").

230. See *id.* (noting common law cheat exception).

231. See *id.* (discussing common law cheat and loophole left in larceny); 3 TORCIA, *supra* note 61, § 410, at 516 (describing common law cheat).

232. See 30 Geo. 2, ch. 24 (1757) (Eng.) (criminalizing false pretenses). The statute provided in pertinent part that "[a]ll persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same . . . shall be deemed offenders against law and the publick [sic] peace." *Id.*

233. See PERKINS, *supra* note 43, at 297 (noting that states regard 30 Geo. 2, ch. 24 as part of our common law). But see 2 LAFAVE & SCOTT, *supra* note 32, § 8.7, at 383 n.4 (discussing whether statute is part of American common law). LaFave and Scott note:

of their own.<sup>234</sup> Yet despite the different statutes, the nature of the offense has remained basically unchanged. In a majority of the American jurisdictions, false pretenses consists of five basic elements: "(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim."<sup>235</sup>

False pretenses and larceny by trick are closely related.<sup>236</sup> However, despite a certain amount of overlap, the crimes remain separate and distinct in two important respects.<sup>237</sup> First, false pretenses traditionally requires a false representation of a material *fact*.<sup>238</sup> A false opinion, false prediction, or false promise is not a false fact.<sup>239</sup> The fraudulent misrepresentation must concern a fact that exists now or has existed in the past.<sup>240</sup> Thus, a statement of one's belief about something, a statement concerning only the future or a promise for future conduct, do not qualify as factual for the purposes of false pretenses.<sup>241</sup>

Second, the passage of title requirement inherent in false pretenses also distinguishes false pretenses from larceny by trick.<sup>242</sup> Generally speaking, if

The English statute, being dated 1757, is not part of the American common law (where common law crimes are recognized) in those states which take the view that the English common law, and statutes in aid thereof, must have been in effect in 1607 (founding of Jamestown) in order to be received as part of the state's common law. But in some states, which make the crucial date 1775, false pretenses may be a common law crime.

*Id.*

234. See PERKINS, *supra* note 43, at 297 (noting state false pretenses statutes).

235. 2 LAFAYETTE & SCOTT, *supra* note 32, § 8.7, at 382-83 (defining elements of false pretenses).

236. See 35 C.J.S. *False Pretenses* § 3, at 804 (1960) (noting relation between larceny and false pretenses).

237. See *id.* § 3, at 804-07 (distinguishing false pretenses from other crimes).

238. See PERKINS, *supra* note 43, at 301 (noting requirement that representation be one of fact).

239. See *id.* at 301-03 (noting that false opinion, prediction, and promise are not representations of fact).

240. See *id.* at 302 (noting that "[o]nly what exists now or has existed in the past is a *fact*").

241. See *id.* at 301-03 (noting that false opinion, prediction, and promise do not qualify as fact).

242. See *False Pretenses*, *supra* note 236, § 3, at 804 (distinguishing larceny from false pretenses). The C.J.S. states:

The distinction between the crimes of obtaining by false pretenses and larceny lies in the intention with which the owner parts with the property; if the owner, in parting with the property, intends to invest accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretenses, provided the means by which it is acquired are such as in law are false

a wrongdoer acquires title and possession with the intent to defraud, the crime is false pretenses.<sup>243</sup> On the other hand, if the wrongdoer acquires possession only, the Commonwealth must charge larceny by trick.<sup>244</sup>

In some cases, it appears that larceny by trick and false pretenses completely overlap. For example, when, through a fraudulent misrepresentation of a material fact, both title and possession pass to the wrongdoer, a charge of either larceny by trick or false pretenses would seem proper. Possession passes; therefore, larceny by trick should be chargeable. Title also passes, indicating that a charge of false pretenses is likewise proper. In this instance, larceny by trick almost merges into false pretenses.

Such a construction would render larceny by trick and false pretenses distinct offenses in only two situations. The first is a case in which both title and possession pass to the wrongdoer, but the misrepresentation is of something other than a material fact.<sup>245</sup> The second is the rare case in which the wrongdoer fraudulently misrepresents a material fact, but only title, not possession, passes.<sup>246</sup> As logical as such reasoning may appear, it is not the rule.<sup>247</sup> By the time the legal fiction of larceny by trick developed,<sup>248</sup> English law had already determined that unless the wrongdoer employed some false token, it was not a crime to obtain title by fraud.<sup>249</sup> Thus, under a classical

pretenses, but if the intention of the owner is to invest accused with the mere possession of the property, and the latter, with the requisite intent, receives it and converts it to his own use, the crime is larceny.

*Id.*; see 32 AM. JUR. 2D *False Pretenses* § 4, at 226 (1995) (elaborating on distinction between larceny and false pretenses). *American Jurisprudence* states:

Although generally the subjective intent of the victim is the important test in determining whether title was transferred, it is the actual obtaining of title to the property that is the necessary element of the crime of obtaining property by false pretenses. Consequently, where the victim intended to transfer title, but by failing to comply with statutory requirements did not actually transfer title, as where he failed to execute and deliver a certificate of title as required by statute, the person receiving the property cannot be convicted of obtaining property by false pretenses.

*Id.* (footnote omitted).

243. See 3 TORCIA, *supra* note 61, § 410, at 516-17 (noting difference between false pretenses and larceny).

244. See *id.* (noting difference between false pretenses and larceny).

245. See *supra* notes 238-41 and accompanying text (discussing examples of nonfactual misrepresentations).

246. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.7(d), at 393 (noting passage of title and not possession sufficient for false pretenses conviction in some jurisdictions).

247. See PERKINS, *supra* note 43, at 296 (discussing relation between false pretenses and larceny by trick).

248. See *supra* Part III (discussing development of larceny by trick).

249. See PERKINS, *supra* note 43, at 296 (noting that "the fiction of establishing the trespass needed for larceny by a fraud-vitiates-consent concept developed at a relatively late

analysis, when title passes as a result of a fraudulent misrepresentation of a material fact, the charge must be false pretenses.<sup>250</sup> As a result, larceny and false pretenses are separate and distinct.

In Virginia, false pretenses is a statutory crime.<sup>251</sup> The relevant statute does not precisely define the offense; the courts have performed that task.<sup>252</sup> In general, for an offense to constitute false pretenses, the Commonwealth must prove four elements: (1) an intent to defraud, (2) the commission of an actual fraud, (3) the use of false pretenses to perpetrate the fraud, and (4) that the false pretenses caused the victim to part with his property.<sup>253</sup> Moreover, the false pretense relied upon must be a representation of an existing or past fact.<sup>254</sup> In addition, it is not sufficient merely to show that the accused knowingly misstated the truth; the Commonwealth must prove that it was the wrongdoer's intent to defraud.<sup>255</sup> Indeed, intent to defraud is the very "gist" of the offense.<sup>256</sup> The Virginia Supreme Court also has held that the accused must have had the intent to defraud at the time he or she made the false pretenses.<sup>257</sup> Determining whether the requisite intent existed at the commission of the offense often may prove difficult because intent is "a secret operation of the mind."<sup>258</sup> Thus, courts examine both the conduct and the representations of the wrongdoer in order to ascertain intent.<sup>259</sup>

period" and "[b]y that time it had been held for generations that it was no crime to obtain title to chattel by fraud unless a false token was employed").

250. See *False Pretenses*, *supra* note 236, § 4 (noting that it is false pretenses if victim parts with both title and possession).

251. See VA. CODE ANN. § 18.2-178 (Michie 1996) (criminalizing false pretenses). The statute provides in pertinent part that "[i]f any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof." *Id.*

252. See *Riegert v. Commonwealth*, 237 S.E.2d 803, 807 (Va. 1977) (noting four essential elements of false pretenses); *Bourgeois v. Commonwealth*, 227 S.E.2d 714, 717 (Va. 1976) (same); *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 567-68 (1873) (same).

253. See *Anable*, 65 Va. (24 Gratt.) at 567-68 (outlining four essential elements of false pretenses).

254. See *Riegert*, 237 S.E.2d at 807-08 (noting that false pretense must be representation of existing fact or past event); *Bourgeois*, 227 S.E.2d at 717 (same); *Hubbard v. Commonwealth*, 109 S.E.2d 100, 104 (Va. 1959) (same).

255. See *Trogdon v. Commonwealth*, 72 Va. (31 Gratt.) 862, 872 (1878) (noting that Commonwealth must prove intent to defraud).

256. See *id.* (noting that intent to defraud is very gist of false pretenses).

257. See *Fay v. Commonwealth*, 69 Va. (28 Gratt.) 912, 918-19 (1877) (noting that "fraudulent intent must have existed at the time the false pretenses were made").

258. See *Trogdon*, 72 Va. (31 Gratt.) at 872 (noting that intent is "a secret operation of the mind").

259. See *id.* (noting that intent can only be ascertained by acts and representations of wrongdoer); see also *Riegert v. Commonwealth*, 237 S.E.2d 803, 808 (Va. 1977) (same).

An additional essential element of false pretenses in Virginia is that both title and possession of the property in question must pass from the victim to the wrongdoer.<sup>260</sup> Thus, the rare case in which title alone passes cannot amount to false pretenses in Virginia. Indeed, it is the requirement that both title and possession pass to the wrongdoer that truly distinguishes false pretenses from larceny in the Commonwealth.<sup>261</sup> Such a requirement indicates that the Commonwealth currently views these two offenses as separate and distinct.

For example, in *Bray v. Commonwealth*<sup>262</sup> the Court of Appeals of Virginia reversed a conviction of false pretenses when the defendant obtained only possession of the property in question.<sup>263</sup> Bray secured the rental of a farmhouse through the use of a bad check.<sup>264</sup> The Commonwealth indicted and convicted Bray for obtaining the key to the farmhouse by false pretenses.<sup>265</sup> However, on appeal, the court found that the worthless check secured only possession of the premises in question, not ownership.<sup>266</sup> Ownership of the key did not pass to Bray because Bray had to return the key at the end of the lease.<sup>267</sup>

Likewise, in *Baker v. Commonwealth*<sup>268</sup> the Supreme Court of Virginia reversed a false pretenses conviction because only possession of the property in question passed to the wrongdoer.<sup>269</sup> Baker went to an automobile dealer-

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260. See *Cunningham v. Commonwealth*, 247 S.E.2d 683, 685 (Va. 1978) (noting that essential element of false pretenses is passage of both title and possession); *Bray v. Commonwealth*, 388 S.E.2d 837, 840 (Va. Ct. App. 1990) (quoting *Quidley v. Commonwealth*, 275 S.E.2d 622, 624 (Va. 1981)) (noting that gravamen of false pretenses is obtainment of ownership of property).

261. See *Davies v. Commonwealth*, 423 S.E.2d 839, 840 (Va. Ct. App. 1992) (noting that "[t]he requirement that the defendant obtain ownership of the property, rather than mere possession distinguishes the offense of . . . false pretenses from the offense of larceny").

262. 388 S.E.2d 837 (Va. Ct. App. 1990).

263. *Bray v. Commonwealth*, 388 S.E.2d 837, 840-41 (Va. Ct. App. 1990). The issue in the case was whether Bray, by means of a bad check, obtained possession and title to the key of a rental farmhouse. *Id.* at 837. The court found that ownership (title) of the key did not pass to Bray because the owner required Bray to return the key upon termination of the lease. *Id.* at 841.

264. *Id.* at 838.

265. *Id.*

266. *Id.* at 841.

267. *Id.*

268. 300 S.E.2d 788 (Va. 1983).

269. *Baker v. Commonwealth*, 300 S.E.2d 788, 789 (Va. 1983). The issue in this case was whether a false pretenses conviction required proof of passage of both title and possession. *Id.* Baker failed to return to the dealership a vehicle he took for a test drive. *Id.* The Commonwealth indicted and convicted Baker of false pretenses. *Id.* at 788-89. The jury instruction did

ship for a test drive.<sup>270</sup> The dealership required customers to leave a vehicle as security during test drives.<sup>271</sup> Baker left a truck that he had previously fraudulently obtained elsewhere and drove away in a Jeep belonging to the dealership.<sup>272</sup> He did not return the Jeep.<sup>273</sup> The Commonwealth indicted and convicted Baker of false pretenses.<sup>274</sup> The appellate court reversed the conviction because there was no evidence that the dealership passed title of the Jeep to Baker for the test drive.<sup>275</sup>

The Commonwealth argued that even if it had failed to prove all the elements of false pretenses, the evidence adduced at trial was still sufficient to support a conviction for larceny by trick.<sup>276</sup> The Supreme Court of Virginia agreed that the evidence appeared consistent with larceny by trick, but nonetheless refused to affirm the conviction on that ground, reasoning that, under the Virginia Constitution, a defendant is entitled to be clearly informed of the offense charged against him.<sup>277</sup> In *Baker*, the proof at trial was not of the offense charged.<sup>278</sup> Thus, in Virginia proof of larceny will not sustain a conviction of false pretenses. Under such analysis, false pretenses and larceny are truly distinct.

Despite these cases, there is some evidence of a trend toward consolidation of larceny and false pretenses in Virginia. *Davies v. Commonwealth*<sup>279</sup> appears to be in direct conflict with the rule in *Bray* and *Baker* that requires proof that both title and possession pass in a false pretenses case.<sup>280</sup> In *Davies*,

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not state that passage of title was an element of false pretenses. *Id.* at 789. The Virginia Supreme Court reversed the conviction because false pretenses requires a showing that both title and possession passed to the defendant. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 788-89.

275. *Id.* at 789.

276. *Id.*

277. *Id.* (citing VA. CONST. art. I, § 8).

278. *Id.*

279. 423 S.E.2d 839 (Va. Ct. App. 1992).

280. *Davies v. Commonwealth*, 423 S.E.2d 839, 840-41 (Va. Ct. App. 1992). The issue in this case was whether it was error for the trial court to delete from the jury instructions the requirement that the Commonwealth prove that both title and possession pass in a false pretenses case. *Id.* at 839. *Davies* filled out credit applications at two electronics stores using a false name. *Id.* at 839-40. After the stores approved his credit, *Davies* purchased several items and took them from the stores. *Id.* at 840. The Commonwealth later indicted *Davies* for false pretenses. *Id.* at 839. The trial judge deleted from defendant's proposed jury instruction the requirement that the jury find that title passed to *Davies*. *Id.* at 840. The jury convicted *Davies*

Davies filled out credit applications at two electronics stores using a false name.<sup>281</sup> After the stores approved his credit, Davies purchased electronic merchandise and removed the items from the stores.<sup>282</sup> The Commonwealth subsequently indicted Davies for false pretenses.<sup>283</sup> At trial, the judge deleted the portion of defendant's proposed jury instruction requiring proof that both possession and title passed to him.<sup>284</sup> The jury convicted Davies of false pretenses.<sup>285</sup>

On appeal, Davies relied upon *Baker*, in which the Supreme Court of Virginia reversed a false pretenses conviction because the trial court did not instruct the jury that passage of title was a necessary element of false pretenses.<sup>286</sup> The Court of Appeals of Virginia distinguished *Baker* on the grounds that it involved an automobile, title to which passes only upon transfer of the paper certificate of title.<sup>287</sup> In contrast, Virginia law deems title of retail goods to pass upon the seller's delivery of the goods.<sup>288</sup> Thus, the court affirmed Davies's conviction.<sup>289</sup> As a result, the rule for false pretenses cases involving retail goods is fundamentally different from other false pretense cases. The Commonwealth need not prove passage of title in a false pretenses case involving retail goods because the law deems title to pass with possession.<sup>290</sup> *Davies* all but eliminates the passage of title requirement from this line of false pretenses cases and allows the Commonwealth merely to prove larceny by trick.

Such a conclusion is directly contrary to *Baker*, in which the Supreme Court of Virginia refused to allow proof of larceny by trick to support a false

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of false pretenses. *Id.* at 839. The Court of Appeals refused to reverse the conviction, finding that, in retail sales cases, it is sufficient to show that possession passed to defendant because Virginia law deems title to pass when the seller delivers the goods. *Id.* at 841 (citing VA. CODE ANN. § 8.2-401(2) (Michie 1996)).

281. *Id.* at 839-40.

282. *Id.* at 840.

283. *Id.* at 839.

284. *Id.* at 840.

285. *Id.* at 839.

286. *Id.* at 841.

287. *Id.*; *cf.* *Baker v. Commonwealth*, 300 S.E.2d 788, 789 (Va. 1983) (noting that false pretenses in automobile cases requires passage of title).

288. *Davies v. Commonwealth*, 423 S.E.2d 839, 841 (Va. Ct. App. 1992) (citing VA. CODE ANN. § 8.2-401(2) (Michie 1996)); *see* VA. CODE ANN. § 8.2-401(2) (Michie 1991) (describing when title passes between buyer and seller). Code of Virginia § 8.2-401(2) provides in pertinent part: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . ." *Id.*

289. *Davies*, 423 S.E.2d at 841.

290. *See id.* (noting that Virginia law deems title to pass upon delivery).



pretenses conviction.<sup>291</sup> The inference presented is that, in at least some cases, Virginia will currently allow proof of larceny to support a false pretenses conviction if the misrepresentation is one of fact. Similarly, a conclusion that proof of obtaining retail goods by false pretenses will support a larceny conviction is probably also accurate.<sup>292</sup> However, even in retail goods cases, a *false promise* causing delivery of goods probably remains insufficient for false pretenses.<sup>293</sup> Regardless of how courts in the future approach this issue, one thing is clear: The *Davies* decision blurs the distinction between false pretenses and larceny.<sup>294</sup> *Davies* documents a small step toward consolidation.

Further evidence of a trend toward consolidation exists. As with embezzlement, Virginia deems false pretenses to be larceny.<sup>295</sup> The fact that the Commonwealth punishes false pretenses as larceny<sup>296</sup> suggests that there is no moral difference between the two crimes.<sup>297</sup> Virginia also deems any person committing false pretenses to be guilty of *larceny*.<sup>298</sup> Moreover, proof of false pretenses will sustain a larceny indictment.<sup>299</sup> Such was also the case with embezzlement prior to 1994.<sup>300</sup> Virginia considered an embezzler to be guilty of larceny, and proof of embezzlement would support a larceny indictment.<sup>301</sup> This fact tended to indicate a consolidation of larceny and embezzlement.<sup>302</sup>

291. See *Baker*, 300 S.E.2d at 789 (refusing to allow proof of larceny by trick to support false pretenses conviction).

292. See *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 566 (1873) (noting that Commonwealth may show false pretenses under indictment for larceny).

293. See GROOT, *supra* note 43, at 212 (noting that even after *Davies*, false promise remains larceny by trick).

294. See *id.* (noting that "in retail transactions, false pretenses and larceny by trick are almost merged").

295. See VA. CODE ANN. § 18.2-178 (Michie 1996) (deeming false pretenses as larceny). The statute provides: "If any person obtain, by any false pretense or token, from any person, with the intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof. . . ." *Id.*

296. See GROOT, *supra* note 43, at 211 (noting that Commonwealth punishes false pretenses as larceny).

297. See 2 LAFAYE & SCOTT, *supra* note 32, § 8.8(a)(2), at 412 (noting that same punishment suggests equal moral character).

298. See VA. CODE ANN. § 18.2-178 (Michie 1996) (deeming person committing offense of false pretenses guilty of larceny).

299. See *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 566 (1873) (noting that proof of false pretenses will support larceny indictment).

300. See *supra* notes 170-74 and accompanying text (discussing pre-1994 rules).

301. See VA. CODE ANN. § 18.2-111 (Michie 1982) (current version at VA. CODE ANN. § 18.2-111 (Michie 1996)) (deeming embezzler guilty of larceny and allowing proof of embezzlement to sustain larceny charge).

302. See *supra* notes 168-74 and accompanying text (discussing evidence of consolidation with respect to embezzlement and larceny).

However, in 1994, the legislature amended the embezzlement statute, omitting this language from the text.<sup>303</sup> The effect of the change implies that Virginia considers larceny and embezzlement to be separate and distinct offenses.<sup>304</sup>

Virginia did not, however, directly alter the false pretenses statute. This suggests that at least when the Commonwealth alleges larceny, false pretenses and larceny merge. Nonetheless, Virginia law previously permitted a defendant to maintain the distinction by forcing the Commonwealth to elect which crime it would proceed with at trial.<sup>305</sup> In cases in which the Commonwealth proceeded on a theory of larceny, proof of false pretenses was not sufficient. As a result, false pretenses remained a distinct offense.<sup>306</sup> The election provision no longer exists.<sup>307</sup> In all cases, it now appears proof of false pretenses will support a larceny conviction. The result is a partial consolidation of the two crimes.

It is difficult to reconcile such a result with the decision of the Supreme Court of Virginia in *Baker*.<sup>308</sup> Relying on the Virginia Constitution, the *Baker* court declined to affirm a false pretenses conviction even though the Commonwealth may have proved larceny by trick because a defendant is entitled to be informed clearly of the charge against him.<sup>309</sup> This raises a question as to whether the rule that proof of false pretenses may support a larceny indictment is even constitutional in Virginia. If the offenses are separate and distinct, it is doubtful such a rule is consistent with the Virginia Constitution. However, if the crimes truly overlap, there is probably no constitutional issue.

Regardless of the constitutional questions, *Baker*<sup>310</sup> appears to contradict the rule laid down over one hundred years ago that proof of false pretenses will support a larceny indictment.<sup>311</sup> If the Commonwealth alleges larceny,

303. See VA. CODE ANN. § 18.2-111 (Michie 1996) (altering embezzlement statute).

304. See *supra* Part IV (discussing evidence of consolidation of larceny and embezzlement).

305. See VA. CODE ANN. § 18.2-111 (Michie 1982) (current version at VA. CODE ANN. § 18.2-111 (Michie 1996)) (allowing defendant to force Commonwealth to elect which crime it will prosecute). Although Virginia's embezzlement statute contained the election provision, the legislature intended it to apply with equal force to false pretenses. See VA. CODE ANN. § 4451 Revisors' Note (Michie 1919) (noting that legislature added election provision with false pretenses in mind).

306. See ROGER D. GROOT, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA 189 (3d ed. 1994) (noting that election preserved distinction between false pretenses and larceny).

307. See VA. CODE ANN. § 18.2-111 (Michie 1996) (eliminating election provision).

308. *Baker v. Commonwealth*, 300 S.E.2d 788 (Va. 1983); see *supra* notes 268-78 and accompanying text (discussing *Baker v. Commonwealth*).

309. *Baker*, 300 S.E.2d at 789 (citing VA. CONST. art. I, § 8).

310. *Id.* at 788.

311. See *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 566 (1873) (noting that proof of false pretenses will support larceny indictment).

but proves false pretenses, it is arguable whether the Commonwealth has clearly informed the defendant of the charge against him – unless, of course, false pretenses and larceny overlap. The problem is compounded by the fact that the legislature deleted from Virginia law the election provision by which a defendant could require the Commonwealth to inform him clearly of the pending charge.<sup>312</sup> Indeed, the legislature may have originally added the election provision with article I, section 8 of the Virginia Constitution in mind. The old rule<sup>313</sup> and the decision in *Davies*<sup>314</sup> suggest a trend toward consolidation, while the recent decision in *Baker* retreats from that proposition. Just how the courts will resolve the question as presented is unclear. Section 19.2-284 may provide the answer.<sup>315</sup>

Section 19.2-284 probably eliminates the passage of title element that false pretenses requires. The result is basically a merger of false pretenses and larceny. Section 19.2-284 provides:

In a prosecution for . . . stealing . . . or fraudulently receiving . . . any personal estate it shall be sufficient to prove that when the offense was committed the actual or constructive possession, or a general or special property, in the whole or any part of such estate was in the person . . . alleged in the indictment . . . to be the owner thereof.<sup>316</sup>

As is the case with larceny, § 19.2-284 does not explicitly address false pretenses.<sup>317</sup> Nevertheless, the statute incorporates larceny through its historical equivalent, "stealing."<sup>318</sup> Similarly, "fraudulently receiving"<sup>319</sup> most likely refers to, or at least includes, false pretenses. "Fraudulently receiving"<sup>320</sup> may also encompass receipt of stolen property.

In essence, § 19.2-284 shifts the focus of false pretenses from the passage of title-possession element to the relationship of the victim to the property in question.<sup>321</sup> Thus, when the charge is false pretenses, as long as the alleged

312. See *supra* notes 172, 305-07 and accompanying text (discussing election provision under Virginia law).

313. See *Anable*, 65 Va. (24 Gratt.) at 566 (noting that proof of false pretenses will support larceny indictment).

314. See *Davies v. Commonwealth*, 423 S.E.2d 839, 841 (Va. Ct. App. 1992) (deciding that jury instruction on passage of title in false pretenses case was not necessary because Virginia law deems title to retail goods to pass upon seller's delivery).

315. See VA. CODE ANN. § 19.2-284 (Michie 1995) (discussing proof of ownership in theft offenses).

316. *Id.*

317. See *id.* (lacking precise names of larceny and false pretenses).

318. See *id.* (including stealing).

319. See *id.* (including fraudulently receiving).

320. *Id.*

321. See *id.* (noting proof of general or special property in victim sufficient in false pretenses prosecution).

victim of the offense has an interest in the property, a conviction is sustainable.<sup>322</sup> Similarly, when the charge is larceny by trick, proof that the alleged victim has an interest in the property will sustain a conviction.<sup>323</sup>

The result is an almost total consolidation of larceny and false pretenses. For example, application of § 19.2-284 to the facts in both *Baker* and *Bray* discussed above would allow false pretenses convictions. In *Bray*, the alleged victim, as owner of the key, clearly had a property interest in the key to the rental farmhouse.<sup>324</sup> Likewise, in *Baker*, the automobile dealership, as owner of the test-driven Jeep, clearly had a property interest in the vehicle.<sup>325</sup> In each case, if the Commonwealth proves ownership of the property in question to be in the respective victims, false pretenses convictions are proper.<sup>326</sup> Passage of title is, therefore, irrelevant. Thus, § 19.2-284 also appears to resolve the conflict that the rule in *Davis* creates, under which title to retail goods passes upon seller's delivery.<sup>327</sup> If passage of title is irrelevant, § 19.2-284 vindicates the Court of Appeals of Virginia's aberrant decision in *Davies*.

In consolidating larceny and false pretenses, § 19.2-284 also resolves the issue of whether a defendant is clearly informed of the charge against him when the Commonwealth charges larceny and proves false pretenses.<sup>328</sup> Because the offenses are arguably the same, this issue is unimportant.<sup>329</sup> However, despite § 19.2-284, false pretenses and larceny by trick remain distinct offenses in one respect. The crime of false pretenses still may never occur as a result of a *false promise*.<sup>330</sup> Even under § 19.2-284, the Common-

322. See *id.* (covering fraudulently receiving property).

323. See *id.* (covering stealing).

324. See *Bray v. Commonwealth*, 388 S.E.2d 837, 841 (Va. Ct. App. 1990) (noting that ownership of key and premises remained with true owner and did not pass to Bray).

325. See *Baker v. Commonwealth*, 300 S.E.2d 788, 789 (Va. 1983) (noting that there was no evidence that title to Jeep passed to Baker).

326. See VA. CODE ANN. § 19.2-284 (Michie 1995) (discussing proof of ownership in theft offenses).

327. See *Davies v. Commonwealth*, 423 S.E.2d 839, 841 (Va. Ct. App. 1992) (noting that Virginia commercial code deems title of retail goods to pass upon seller's delivery).

328. See *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 566 (1873) (noting that proof of false pretenses is sufficient to support larceny indictment).

329. See 2 LAFAVE & SCOTT, *supra* note 32, § 8.8(c), at 414 (noting that convictions under consolidated theft schemes survive challenge that defendant is not clearly apprised of pending charge). LaFave and Scott note:

[A] defendant is entitled to notice in the indictment or information of the charge against him, but this means notification of the basic facts upon which the charge is based; he is not entitled in addition to a charge that "makes a noise" like one of the three formerly separate, but now consolidated, crimes.

*Id.* at 414-15.

330. See GROOT, *supra* note 43, at 211 (noting that opinion, promise, or prediction is not sufficient for false pretenses).

wealth may not convict of false pretenses those thieves employing a *false promise* to effect their crime.<sup>331</sup> But apart from this distinction, false pretenses and larceny otherwise appear consolidated. All thieves misrepresenting a material fact may be guilty of false pretenses, and all swindlers, regardless of the character of their representation, may be guilty of larceny by trick. Thus, with the noted exception, § 19.2-284 effects the consolidation of larceny (by trick) and false pretenses.

### VI. Conclusion

The power of § 19.2-284 to alter fundamentally Virginia's theft scheme is undeniable. Although § 19.2-284 only reaffirms that Virginia's interpretation of larceny is consistent with common law larceny,<sup>332</sup> this statute sufficiently blurs the distinguishing characteristics among the three crimes so that embezzlement and false pretenses merge with larceny.<sup>333</sup> With respect to larceny and embezzlement, § 19.2-284 eliminates the element of possession, on which the distinction between the two crimes turns.<sup>334</sup> Similarly, with respect to false pretenses, § 19.2-284 eliminates the passage of title requirement, which previously distinguished false pretenses from larceny by trick.<sup>335</sup> In either case, the Commonwealth need only allege a victim and prove that the victim has an interest in the stolen property.<sup>336</sup>

Thus, larceny and embezzlement completely merge. The Commonwealth may indict and convict all thieves of embezzlement, and it may also indict and convict all embezzlers of larceny. However, false pretenses may not totally merge with larceny. The offense of false pretenses cannot occur as a result of a false promise.<sup>337</sup> Therefore, even after application of § 19.2-284, the Commonwealth may not convict of false pretenses a wrongdoer who misappropri-

331. See *id.* (noting that promise is not sufficient for false pretenses); see also PERKINS, *supra* note 43, at 302-03 (noting that false promise is insufficient for false pretenses).

332. See *supra* Part III (arguing that § 19.2-284 is consistent with common law larceny).

333. See *supra* Part IV (suggesting that larceny and embezzlement merge under § 19.2-284); *supra* Part V (suggesting that false pretense and larceny merge under § 19.2-284).

334. See *supra* notes 217-23 and accompanying text (discussing elimination of possession distinction between larceny and embezzlement).

335. See *supra* notes 315-31 and accompanying text (discussing elimination of passage of title element previously distinguishing larceny by trick and false pretenses).

336. See VA. CODE ANN. § 19.2-284 (Michie 1995) (noting that in theft offense, "it shall be sufficient to prove . . . the actual or constructive possession, or a general or special property . . . was in the person . . . alleged in the indictment . . . to be the owner thereof").

337. See MODEL PENAL CODE § 223.1 cmt. on consolidation of theft offenses at 132 (1980) (noting that "a rule that a false promise is not a criminal false pretense will not be changed merely by consolidating false pretenses with larceny"); GROOT, *supra* note 43, at 211 (noting that false promise is not sufficient for false pretenses).

ates through the use of a false promise. Such conduct must be larceny by trick. Nonetheless, the Commonwealth may easily overcome this problem by simply alleging larceny in every case. Thus, the issue of a false promise would never arise.

Some doubt may also exist as to whether larceny and false pretenses merge in cases involving a paper title (for example, automobile cases). The recent rule in *Baker* that false pretenses in an automobile case occurs only after paper title passes<sup>338</sup> may survive § 19.2-284. In other words, the passage of title requirement would remain in cases involving a paper title. However, *Baker* tends to run against the 130-year trend toward consolidation that continues to exist, sometimes in spite of *Baker*. For example, the decision in *Davies*, in which the court reasoned around *Baker* to determine that title of retail goods passes upon delivery by the seller,<sup>339</sup> stands for authority subsequent to *Baker* suggesting a merger of false pretenses and larceny by trick. With this general trend toward consolidation in mind, it is probable that § 19.2-284 will apply with equal force to cases involving the passage of paper title.<sup>340</sup>

Regardless of how this conflict works out, the Commonwealth may easily circumvent potential problems by simply alleging larceny in every case. It appears that even if title passes, a conviction for larceny will be proper because, under § 19.2-284, all swindlers are also thieves in Virginia. Thus, regardless of the possible exceptions, § 19.2-284 will complete the consolidation of the theft crimes if the Commonwealth always alleges larceny.

The primary purpose of consolidation is the elimination of problematic procedural technicalities.<sup>341</sup> One commentator describes these distinctions as "useless handicaps" that inhibit justice.<sup>342</sup> For example, maintaining distinctions among the theft offenses allows an otherwise guilty defendant the opportunity to avoid punishment<sup>343</sup> by claiming that he misappropriated property by

338. See *supra* notes 268-78 and accompanying text (noting that paper title must pass to be false pretenses).

339. See *supra* notes 279-94 and accompanying text (discussing *Davies*).

340. See MODEL PENAL CODE § 223.1 cmt. on consolidation of theft offenses at 134-35 (1980) (suggesting that consolidation of theft offenses will overcome paper title hurdle).

341. See *id.* at 133 (noting that objective of consolidation is to overcome procedural problems); 3 TORCIA, *supra* note 61, § 382, at 460 (noting that primary purpose of consolidation is to simplify pleadings).

342. See PERKINS, *supra* note 43, at 319 (noting that "the distinctions between larceny, embezzlement and false pretenses serve no useful purpose in the criminal law but are useless handicaps from the standpoint of the administration of criminal justice").

343. See 2 LAFAYE & SCOTT, *supra* note 32, § 8.8(a)(2), at 412 ("It is thus apparent that to retain these technical distinctions between the three crimes serves mainly to present a guilty defendant with an opportunity to postpone and perhaps altogether escape his proper punishment.").

a wrongful method other than the one charged.<sup>344</sup> Most states have responded to these problems by unifying their theft statutes under the label of "larceny" or "theft."<sup>345</sup> Virginia remains one of the few jurisdictions that has not yet formally unified its theft crimes. Nevertheless, over the past century and a half Virginia's courts have leaned toward consolidation through opinions causing the theft crimes to overlap.<sup>346</sup> A criminal procedure statute takes up where the courts left off. Section 19.2-284 almost totally completes the consolidation of larceny, embezzlement, and false pretenses in Virginia.

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344. See MODEL PENAL CODE § 223.1 cmt. on consolidation of theft offenses at 134-35 (1980) (noting that consolidation is most effective way of preventing "a charge based on one method of wrongfully obtaining property from being defeated by the defense that the property was acquired by a different wrongful method").

345. See *supra* note 23 (listing jurisdictions with unified theft statutes); see also 3 TORCIA, *supra* note 61, § 382, at 460 (noting consolidated statutes typically labeled "larceny" or "theft").

346. See, e.g., *Pitsnogle v. Commonwealth*, 22 S.E. 351, 352 (Va. 1895) (noting that proof of embezzlement will support larceny indictment); *Anable v. Commonwealth*, 65 Va. (24 Gratt.) 563, 566 (1873) (noting that proof of false pretenses will sustain larceny indictment); *Gwaltney v. Commonwealth*, 452 S.E.2d 687, 691-92 (Va. Ct. App. 1995) (noting that possession extends to entire sphere of entrustment); *Davies v. Commonwealth*, 423 S.E.2d 839, 841 (Va. Ct. App. 1992) (noting that title to retail goods passes upon passage of possession).