McCann, Philip alias James vs State of Missouri 1853 St. Louis 326/13

566/21

Christmas shopping

$7.80 from Eatherton, William
Larceny purse

Ryland/affirmed

$10 paper "in exchange for an eagle."

1 The State of Missouri. Ss.

At a term of the Saint Louis Criminal Court begun and held at the City of Saint Louis, within and for the County of Saint Louis on the first Monday of January, being the third day of said month and in the year of our Lord one thousand eight hundred and fifty three, were present the Honorable James B. Holt, Judge, Henry A. Glover, Esq. Circuit Attorney, David Bayles Esq. Marshal of Saint Louis County, and Richard I. Howard Clerk of said Court.

The Marshal returns here into Court the Venire facias to him directed with a panel of Grand Jurors thereon endorsed, who being called come as follows, to-wit:

Grand Jury } John K. Lightner — who is by the Court appointed foreman, Oliver D. Filley, Enoch Price, Edward Milligan, John W. Dill, Francis Watkins, Christian Ott, Henry Pickington, Thomas Hargant, Patrick Dugan, Stewart McKee, Louis Bach, Samuel Donovan, Robert G. Coleman, Frederick Schulenberg and George Mehl, sixteen good and lawful men, who being duly empannelled and sworn, and having received their charge from the Court, retire to consider of their presentments.

Monday 3d January 1853.

Mo. to pay money to Marshal = On motion of the Circuit Attorney, it is ordered that James Cashells, Jailor of this County, pay over the money, amounting to the sum of Twenty Dollars, in his possession, taken from the said defendant, to David Bayles, Marshal of this County.

Saturday 22d January 1853.

The Grand Jurors return to the bar and deliver the following indictment as a True bill, to-wit:

2 State of Missouri } ss. St. Louis Criminal Court,
County of St. Louis. } January Term, 1853.

Indictment } The Grand Jurors of the State of Missouri within and for the body of the County of Saint Louis, now here in Court, duly empannelled, sworn and charged upon their oath, present That Philip McCann alias James McCann late of Saint Louis in Saint Louis County, on the Tenth day of January in the year of our Lord one thousand eight hundred and fifty three at Saint Louis, in St. Louis County seven promissory notes commonly called bank notes each of the denomination and of the value of one dollar, three promissory notes commonly called bank notes, each of the denomination and value of two dollars, two promissory notes commonly called bank notes each of the denomination and value of three Dollars, one promissory note commonly called a bank note of the denomination and value of five dollars, one five franc piece of the value of ninety three cents all of the property of William Catherton then and there being found feloniously did then and there steal take, and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

R. A. Glover Circuit Attorney.

"Endorsed, "A true bill J. W. Lightner Foreman."

Afterwards on the 26th day of January A.D. 1853 the following Capias was issued, to wit

County of Saint Louis, ss.

Capias } The State of Missouri.

To the Marshal of St. Louis County Greeting.

We command you to take Philip McCann alias James McCann if he be found in your bailiwick and him safely keep, so that you have his body before the

3

Honorable Judge of the Saint Louis Criminal Court now in session at the City of Saint Louis within and for the County of Saint Louis forthwith, to answer an indictment found against him by the Grand Inquest of the State of Missouri, for the body of the County of Saint Louis, for Grand Larceny contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State and have you then there this Writ, with your return thereon how you execute the same. (L.S.) Witness, Richard I. Howard, Clerk of our said Court, with the Seal thereof hereto affixed at office, in the City of St. Louis, this 26th day of January in the year of our Lord eighteen hundred and fifty three

R. I. Howard Clerk

Marshal's Return } Executed this Capias and have the within named M Cann in the Custody of the Gaoler of St. Louis County this 26th Janr. 1853.

D. Bayles Marshal

Thursday 10th February 1853

Plea of Not Guilty } Now at this day the said defendant being brought into Court, and having had hearing of the said indictment says he is not guilty as therein charged, and for his trial puts himself upon the Country, and the Circuit Attorney doth the like.

Saturday 19th February 1853

Now at this day comes the said defendant by his Attorney and by leave of Court here, withdraws his plea of not guilty heretofore pleaded by him, and files a motion to have the said indictment quashed. Which said Motion is as follows, to-wit:

St. Louis Criminal Court

1853.

4 Motion to Quash

State
vs
Philip alias James McCann } Indict. for Larceny

Now at this day comes the said defendant and the leave of the Court first being had and obtained moves the court to quash the indictment and discharge the defendant for the following reasons "to wit"

First. Because the indictment does not aver that the notes charged to have been stolen were the legal issue of any legally constituted Bank or banking institution of this State or the United States or any of them.

Second. that the property charged to have been stolen was not the subject of larceny.

Third – That the indictment is bad for insufficiency of description of the property charged to have been stolen

Fourth, That supposing the property mentioned to have been subject to larceny it being personal. it was unnecessary for the indictment to aver that it was feloniously taken from the possession of some living person under the peace of this State.

Hening p.d

Monday 21st February 1853.

" Overruled Plea of not guilty re-entered

Now at this day come the parties aforesaid by their Attorneys. and submit to the Court. the defendant's motion to have the said indictment quashed. which being by the Court here fully understood. it is therefore considered by the Court that said motion be overruled: thereupon the said defendant re-enters his plea of not guilty. and for his trial puts himself upon the Country. and the Circuit Attorney doth the like.

5
Cont.

Wednesday 23d February 1853.

This cause is continued on account of the absence of a material witness for the State.

Monday 14th March 1853.

Now at this day comes the Circuit Attorney who prosecutes for the State, and the said defendant having been brought into Court, thereupon come a Jury, to-wit:

Jury & Verdict

Geo. B. Brua, O. J. McCormick, Wm. Smith, Francis Lefevre, Herman Merten, Edward Merten, J. J. Montgomery, Wm. Buckley, Joseph Baker, Robert Anderson, John Buchanan and Richard Harding twelve good and lawful men who being duly elected, tried and sworn, the traverse between the parties aforesaid well and truly to try, after hearing all the evidence in the cause, upon their oath aforesaid, say they find the said defendant guilty of Grand larceny as charged in the indictment, and assess his punishment as imprisonment in the Penitentiary for the term of Two years.

Wednesday 16th March 1853.

Motions for a new trial and in arrest of judgment filed by the said defendant, which said motions are as follows, to-wit:

Motion for a new Trial

In the St. Louis Criminal Court — 1853 —

State of Missouri
against
Philip alias James McCann

Indictment for Larceny

Now at this day comes the said defendant and moves the Court to set aside the Verdict & to grant him a new trial for the reasons following, to-wit:

Because the Court refused proper instructions on the part of the defendant.

Because the verdict was against law.

Because the verdict was against evidence.

Because the verdict was against the weight of evidence. I. H. Heming Atty for Defendant

Motion in Arrest

State of Missouri
vs
Philip alias James McCann

In the St. Louis Criminal Court — 1853.
Larceny.

Now at this day comes the said defendant and moves the Court to arrest the Judgment in the above entitled cause and to discharge this defendant from the indictment in said cause for the following reasons, To-wit —

First, Because the said indictment is defective for insufficiency of description of the property charged to have been stolen,

Second, Because the indictment is bad for uncertainty, and otherwise defective and insufficient. —

Ino. H. Heming Atty for Deft.

Saturday 26th March 1853.

Now at this day come the parties aforesaid by their Attorney and argue the defendants motion for a new trial and submit the same to the Court. But the Court here not being fully advised what judgment to render in the premises. takes time to consider thereof.

Saturday 2d April 1853.

Motions in Arrest & for a New trial overr.

The defendants motion for a new trial having been heretofore submitted to the Court. and the Court here being now fully advised of and concerning the premises. therefore it is considered by the Court that said Motion be overruled. thereupon the defendants motion in arrest of judgment being submitted to the Court, and by the Court here fully understood therefore its is considered by the Court that said motion be overruled.

7

Tuesday 12th april 1853.

Now at this day the said defendant being brought into Court to receive his sentence in persuance of the verdict rendered against him. therefore it is considered by the Court that the said defendant for his offence of Grand Larceny aforesaid be imprisoned in the Penitentiary of this State for the term of Two years. that he pay the costs of this prosecution, and stand committed till this sentence be complied with.

Sentence

Thursday 14th April 1853

On motion of the said defendant this day filed herein. it is ordered that proceedings be stayed upon the judgment of this Court rendered against the said defendant on the twelfth instant till further order of this Court. which said motion is as follows. to-wit:

Motion to stay proceedings

State of Missouri vs Philip alias James McCann } In the Criminal Court Grand Larceny

Defendant by his attorney comes here into court and prays the Court to stay the execution of the sentence passed upon him in order to give him time to obtain the judgment of the Supreme Court in his cause. And defendant states that this application is not founded upon any other motive or reason than the one just mentioned.

Jno K. Kenny Atty for Deft.

Friday 15th April 1853.

Appeal

On motion of the said defendant. an appeal is granted him to the Supreme Court. from the judgment of this Court rendered against him on the twelfth instant. and by consent of the Circuit Attorney time till the first day of the next term is given the said defendant to file his Bill of Exceptions herein.

Monday 13th June 1853

Bill of Exceptions filed which is as follows, to-wit:

Bill of Exceptions

State of Missouri } In the St. Louis Criminal Court,
as March Term 1853.
Philip M'Cann } Indictment for Grand Larceny.

Be it remembered that on the — day of March 1853. the above cause coming on to be heard, a jury was sworn to try the same and the witnesses being called and sworn the following evidence was given Wm. Catherlon, on behalf of the state testified that on the Friday before christmas of the last year I had occasion to go to a store in this county (St. Louis) for the purpose of making some purchases. — After making the same and paying for them I left the store. — When I had been absent from the store some fifteen minutes, in feeling my pockets I discovered that I had lost my purse & money. — I immediately returned to the store that I had left & enquired & searched for my purse but could not find it, but was told that the Deft had left the store and I was pointed out the direction he had taken. learning which way they had taken in leaving the store, I mounted my horse and in company with two of my neighbors took the same direction. — After riding about a mile, we came in sight of and soon overtook defendant. — Defendant was walking tolerably fast when we came in sight of him. — I was then at the head of the party and when I came up to Deft, I stopped beside him. Deft then stopped and turning to me, enquired if I was the man who lost the purse. — I told him that I had lost mine. — Deft then put his hand into the breast of his coat and took out a rag in which $7.80 of my money were wrapped and handed it to me. — Myself and companions then arrested Deft & took

9 him before a J. P. by whom he was examined & committed. When deft was searched by the officer twenty dollars was found upon his person in 2 ~~X~~ $10. bills but this was not my money. — on our reaching the Deft he asked me if I was the man who lost the purse I told I was, he hauled out some paper money from his breast apparently wrapped in a rag. I asked him where purse was, he would not tell me. — would not state where it was — he said the purse was not worth carrying he had taken the money out of the purse and thrown it, the purse, away he said this on his Examination before Squire Dafpington. — There was more money in the purse than was found on the person of the Deft. the store was Daniel Andrews about a mile from my house. — this was about 11 o'clock in the forenoon. I never saw him until that day. There was no other person in the store when I first went in, but the deft with two others came in afterwards and were in the Store when I left. I left my purse on the Counter. Mrs Andrews was behind the Counter. I do not Know exact how much money was in the purse. There was $10. of paper money in the purse which I had gotten from a neighbour in Exchange for an Eagle, and some other paper besides & some silver $3. $2. bills. five. franc piece, a 50 cent piece & some 5 & 10 cent pieces. — That morning at the Store I spent but 30 cents out of it. I left the purse on the Counter on account of carelessness. — I left alone. I went down the road, I got down the road some 80 or 100 yards before I missed my purse, I went back to the Store. The two men who were with the deft the were gone deft was not in the store when I got back. It could not have been more than a mile, very muddy. — going as fast — I was riding pretty fast — The first

thing that was said was are you the man who lost the purse? I stated to him I was.

Cross Examined. — When I and my companions came up with deft. he was walking along the public highway and his gait was not more rapid than an ordinary business walk Deft stopped just as we did in the highway without being hailed by us and without any signal other than our stopping beside him on the highway. — I cannot state positively how much money was in my purse at the time that I lost it. I had not examined it with a view to see how much money was in it for more than two days prior to the time I lost it. — while I was in the store I had the purse out upon the counter and I am certain that I did not return it to my pocket prior to the time of my leaving the store for home, which is in a different direction from where I found Deft. There was no mark upon the purse, nor any note therein by which I could have been identified as its owner.

Farris, on the behalf of the State, testified I was with Mr. Catherton at the time that deft was arrested Deft did not appear surprised or confused when he was stopped in the highway by Catherton but handed the amount mentioned to him before any demand was made. — There are two other stores in the immediate vicinity of the one mentioned by Catherton I was in and about there on the morning when the purse & money were lost, but did not see deft in either of them. — I think if deft had been to either of them I would have known. — Besides these there are no stores between the place where the purse was lost & the place where we came up with defendant

11 I was at the Magistrates office when Deft was searched & helped to search him. Witness Eatherton was in the office at the time, but did not pay much attention to the proceedings & did not lay claim to any of the money found in searching, on defts person. Deft had upwards of Twenty dollars on him when he was searched. at the time the prosecutor missed his purse he supposed it was left at the Store, but was uncertain whether he had certainly left it there or had lost it on the road. He did leave the purse at the Store. — The State having closed its case, the Deft also closed his case whereupon the court of its own motion gave the following instructions on behalf of the State

If the jury believe from the evidence that the Deft either by himself or with others <u>others</u> did steal take and carry away the money charged in the indictment the property of William Eatherton, and that the value of said money so stolen was of the value of ten Dollars or upward - and that the deft either by himself or with others stole the money with the intent to convert it to his own <u>your use</u>, and that he did so steal within three years next before the finding of this indictment and in St. Louis Co. you will find the Deft Guilty of Grand Larceny.

If you find the Deft — of Gr.d Larceny you will apply the punishment to imprisonment in the penitentiary for a term not less than two nor more than five years.

Without you believe from the evidence that the deft took the money with the intent to steal it or aided and abbetted any other person or persons with the intent to steal you will find the Deft Not Guilty.

If you entertain a reasonable doubt as to the guilt

of the Deft you will acquit.

The doubt in the law to authorize an acquital upon that ground must be a rational doubt of some fact necessary to constitute the guilt and not a mere possibility that the Deft may be innocent. — To the giving of which the defendant objected, but the Court overruled the objection and gave the said instructions, to which ruling of the Court in giving the said instructions, Deft. by his counsel excepted. — And thereupon the deft by his counsel asked the following instructions,

Addition by the Court

If the jury believe that the money was lost & found by the defendant they cannot find deft guilty unless the evidence satisfies them that deft knew to whom the money belonged or that the purse or vessel containing the money was so marked obviously & clearly to show to whom the money belonged. ——

——— But if the jury believe from the evidence that the money was left on the counter & the deft knew it, and that he took the money or aided any other person or persons in taking it with the intent to steal it in that case you will find the Deft Guilty.

Which were given and also the following other instructions which were refused,

Rejected

(2) If the money was lost & found by Deft the jury cannot find him guilty unless they are satisfied beyond a rational doubt that at the time he converted the money to his own use he knew to whom the money belonged. If the deft did not know to whom the money belonged at the time he converted it to his own use you must acquit.

Rejected

(3) The fact that the money was found in the possession of the defendant will not of itself be suf=

13 Rejected

ficient to sustain the charge of a felonious taking so that the defendant can be found guilty of Larceny.

To which ruling of the court in refusing to grant the said instructions for deft. he by his counsel excepted. — The Jury having heard the evidence & received the instructions of the court, retired and upon deliberation found the defendant guilty of Grand larceny and assessed his punishment at two years imprisonment in the penitentiary. — And afterwards, To-wit: on the — day of — 1853 defendant filed his motion for a new trial:

State of Missouri against Philip alias James McCann } In the St. Louis Criminal Court — 1853. — Indictment for Larceny

Now at this day comes the said defendant and moves the court to set aside the verdict & to grant him a new trial for the reasons following — To-wit:

Because the court refused proper instructions on the part of the defendant.

Because the verdict was against law.

Because the verdict was against evidence.

Because the verdict was against the weight of evidence. J. K. Fleming Atty for Defendant; —

For the reasons therein set forth, which motion on the — day of — 1853, coming on to be heard the Court overruled the same and refused to grant the Deft a new trial. To which ruling of the court in refusing to sustain the said motion and grant the defendant a new trial the defendant by his counsel excepted. — And afterwards, To-wit, on the — day of — 1853, the defendant filed his motion to arrest the verdict & judgment in his case and to discharge & acquit him of the charge in the indictment for the reasons in said motion mentioned. —

14 State of Missouri } In the St. Louis Criminal
Court — 1853 —
Philip alias James McCann } Larceny

Now at this day comes the said defendant and moves the court to arrest the Judgment in the above entitled cause and to discharge this defendant from the indictment in said case for the following reasons. Forit —

First, Because the said indictment is defective for insufficiency of description of the property charged to have been stolen.

Second. Because the indictment is bad for uncertainty and otherwise defective and insufficient. —

Jno H. Hening Atty for Deft. —

By the court refused to sustain the said motion and to arrest the judgment in said cause to which ruling of the court in refusing to arrest the judgment in said cause, the defendant by his counsel excepted and here prays the court to sign, seal & make apart of the record this his bill of exceptions.

J. B. Colt, Judge & C. (Seal)

State of Missouri } s.s.
County of St. Louis } I. Richard I. Howard, clerk of the Saint Louis Criminal Court in and for said County Certify the foregoing to be a full and complete Transcript of the Record and proceedings in the case of the State of Missouri against Philip alias James McCann as the same now remains in my office.

In Testimony whereof I hereto set my hand and affix the seal of said Court at office, in the City of St. Louis. this 7th day of July, A. D. 1853,

R. I. Howard
Clerk

15

Index

	Page
Grand Jury	1
Indictment & Capias	2
Marshal's Return & Plea of Not Guilty	3
Motion to Quash	4
Jury & Verdict. Motion for a New Trial &	5
Motion in Arrest.—Overruled	6
Sentence. Motion to stay proceedings. Appeal	7
Bill of Exceptions	8 to 14

85

(21)

October. T. 1853

State

Respondent

&

Philip McCann

alias &c

Appellant.

Transcript from St Louis Criminal Court.

Appeal from Criminal Court.

Transcript $4.60
Certificate. 50
$5.10

In the Supreme Court
Oct Term 1853

State of Missouri, Resp—
vs } Appeal from Crim Court St Louis County
Philip McCann, Appt—

Now at this day comes the aforesaid appellant and for error in the record of the proceed-ings in the court below, assigns the following to wit—

(1) The court erred in overruling the motion to quash the indictment against the defendant

(2) The court erred in giving the instruc-tions granted on behalf of the State

(3rd) The court erred in refusing the instructions asked by defendant, Nos 2d + 3d—

(4th)
The Court erred in overruling the motion of defendant to set aside the judgment + for a new trial

(5th) The court erred in overruling the motion in arrest of Judgment

Lewis + Fleming
for defts—

85

State of Missouri
Respondent

vs

Philip McCann
Appellant

Assignment of Errors

Lewis & Hiring
for Appellant

Filed 22nd October 1853
Wm L Glamm
Clerk

In Supreme Court

State of Mo
vs } Larceny
Philip McCann — Statement of Case

Philip McCann was indicted at the January Term 1853 of the St Louis Criminal Court for Grand Larceny tried, convicted & sentenced to 2 years imprisonment in the Penitentiary
The facts in the case are these, viz:— A few days prior to the last Christmas William Eatherton the prosecuting witness (as he testifies) lost his purse containing upwards of ten dollars in banknotes and silver, at or near a store in St Louis County, — He left the store to return home and after being absent a few moments missed his purse and returned to the store to seek it From information received there he was led to suspect that the purse was in the possession of defendant or one of his comrades, (two in number) who were in the store at the time Eatherton left it; — Eatherton and his companions mounted their horses and took the road that defendant had taken & overtook defendant at about a mile from the store, walking along the highway — When Eatherton came up with defendant, Defendant stopped

and asked Latherton "if he was the man who lost the purse,?" and upon L's replying that he was the defendant drew out a rag in which was wrapped some seven or eight dollars of the said Latherton's money & handed it to him. — There was no mark on the purse or paper in it by which Defendant could possibly have identified it. —

Defendant was taken before a magistrate & committed — He was indicted at the January Term of the Criminal Court for grand Larceny. — The cause was tried at the March Term, convicted and sentenced as aforesaid. —
On the trial the defendant asked the following instructions, by his counsel
(1st) If the money was lost & found by defendant, the Jury cannot find him guilty unless they are satisfied beyond a rational doubt that at the time he converted the money to his own use, he knew to whom the money belonged. — If the defendant did not know to whom the money belonged at the time he converted it to his own use you must acquit. —
and also the following

(2nd) The fact that the money was found in the possession of the defendant will not of itself be sufficient to sustain the charge of a felonious taking, so that the deft can be found guilty of larceny

Which instructions were refused and the court's refusal being excepted to & the court having overruled the defendant's motions for a new trial & in arrest of judgment the case is brought here by appeal

Lewis & Henning
Attorneys for Defendant
and appellant

85

State
vs } Larceny
McCann

Appeal from St Louis
Crim Court

Appellant's Statement

Lewis & Henry
Attys

Filed 5th November 1873
Wm L. Glennon
Clerk

State vs McCann

The defendant was indicted at the January term 1853 of the criminal court of Saint Louis County, for grand larceny, at the March term following, he was tried and found guilty; and his punishment assessed to two years imprisonment in the State Penitentiary —

He moved for a new trial, which was overruled, and he excepted. He also moved in arrest of judgment which being overruled, he likewise excepted - and brought the case here by appeal —

The testimony preserved in the bill of exceptions, shews, that the money charged to have been stolen was the property of William Fatherton as charged in the indictment; that Fatherton on the Friday before last Christmas was trading in a store in Saint Louis County; purchasing some articles; that he laid his purse down on the Counter and went out of the store, and in a few minutes felt his pockets, and found that he had lost his purse - he returned to the store, and ascertained which way the defendant started; and he the said Fatherton and a neighbor or two of his, put off after the defendant - that when he was trading

in the store and had his purse ~~[illegible]~~ ~~[illegible]~~, the defendant was present in the store. When Eatherton overtook the defendant on the road, he stopt and the defendant also stopt, and defendant asked Eatherton "are you the man, that lost the purse"? Eatherton said, he had lost his purse. the defendant then put his hand into the breast of his coat and pulled out $7.80 wrapped up in a kind of rag of Eatherton's money and gave it to him. Defendant was asked where the purse was; he would not answer — would not state where it was. He said the purse was not worth carrying, he had taken the money out of the purse, and thrown the purse away. There was more money in the purse, than was handed over by the defendant. Eatherton stated, that there was no other person in the store when he first went in; but the defendant and two others came in afterwards and were in the store when he left it. Eatherton says, he left his purse on the Counter. The Store belonged to Daniel Andrews. Mrs. Andrews was behind the Counter. Says he does not know exactly how much money there was in the purse. there was ten dollars of paper money in the purse, which he had got from a neighbor in exchange for an eagle — and some other paper besides

and some silver - $3. $2 bills, five franc piece, a fifty cent piece and some 5 & 10 cent pieces - says that morning he spent but 20 cents out of the purse - says the first thing said when he overtook the defendant on the road, was, "are you the man that lost the purse" - he said he was - Gatherton also says there was no marks or names about the purse by which any one could have told to whom it belonged — This is about the substance of the testimony - The defendant offered none -

The Court - instructed the jury that if they believed from the evidence that the defendant either by himself or with others, did steal take and carry away the money of the defendant as charged in the indictment and that the value of said money so stolen was of the value of ten dollars or upwards and that the defendant either by himself or with others stole the money with the intent to convert it to his own use and that he did so steal within three years next before the finding of this indictment and in Saint Louis County they will find the defendant guilty of Grand Larceny -

Without the jury believe from the evidence that the defendant took the money with the intent to steal it or aided and abetted any other person or persons with the

intent to steal, they will find the defendant not guilty — The Court also instructed the jury about the time of imprisonment for grand larceny; and about the reasonable doubt — which instructions are thought not necessary to be noticed —

The defendant excepted to the instructions given by the Court — and moved for the following —

"If the jury believe that the money was lost, and found by the defendant, they cannot find defendant guilty, unless the evidence satisfies them that defendant knew to whom the money belonged or that the purse or vessel containing the money was so marked obviously and clearly to show to whom the money belonged. (the Court gave this instruction, but added the following) "But if the jury believe from the evidence, that the money was left on the Counter and the defendant knew it, and that he took the money or aided any other person or persons in taking it, with the intent to steal it, in that case you will find the defendant guilty" —

These The Court refused the following instructions — "If the money was lost and found by the defendant, the jury cannot find him guilty unless they are satisfied beyond a rational doubt, that at the time he converted the money to his own

use, he knew to whom the money belonged. If the defendant did not know to whom it belonged at the time he converted it to his own use the jury must acquit.

3rd. The fact, that the money was found in the possession of the defendant will not of itself be sufficient to sustain the charge of a felonious taking, so that the defendant can be found guilty of larceny.

The defendant excepted to the refusal to give these instructions to the jury.

This case differs widely in its important facts from the case of State vs Conway & others decided at last term of this Court (the Glenoe Safe case). Here a man leaves his purse on the counter of a store, in the presence of the defendant. In a few minutes search is made for it. he starts off after the defendant and when he overtakes him, the defendant says first, before any thing else is spoken "are you the man who lost the purse" - and when answered in the affirmative, he puts his hand in the breast of his coat, and pulls out the money which had been taken from the purse and wrapped in a rag and hands to the owner $7.80

The Counsel for the prisoner seems to rest the whole force of the defence upon the words used and the answer given to this first question - "Are you the man who lost the purse? Yes, I lost mine" - from these expressions "lost", he concludes that the money was lost in reality; he loses sight of the facts of the case, and takes it for granted the money was lost - the purse was lost, and being unmarked the owner could not be known and larceny could not be committed — Now the leaving the purse in this case in the presence of the defendant on the Counter, was not such a losing of it, as is contemplated in the cases cited by this Court in the Glencoe Safe Case - It matters not if the defendant did not know the man's name to whom the purse belonged if he saw the man put the purse on the Counter and leave it - He knew who put it - who left it there - it was not in reality so lost, that larceny could not be charged against the finder, who saw the owner leave it -

The instructions put the law of the case very fairly before the jury; especially the one asked by defendants' Counsel and given with an additional explanation by the Court

and the Court did very right to re-
-ject the other two — Instructions
should be always based upon the facts
and the law arising thereon in every case:
and should be so drawn as to assist the
jury in forming a just and proper
conclusion upon the ~~facts~~ evidence before
them —

It will not always answer to give
instructions, though drawn in the very
phraseology of judicial determi
nation — Instructions must have some
relation to the facts in proof —
abstract propositions should always
be refused —

And this Court will not reverse
for not giving instructions, wherever
we see, that proper instructions
embracing the law of the case
have ~~already~~ been given —

The cases cited by the defendant's
counsel differ in facts from the one now be
fore us — The cases of the People vs Anderson
14 John. 294. and People vs Campbell 1st Hill. 94.
and the cases in Yerger, are cited and com
mented on by this Court in the Case of the
State vs Maughon & others — last term —
The Doctrine of the Tennessee Courts is
reiterated —

The cases of The people vs McGar
ren 17 Wend. 460. Regina vs Peters 1 Carring
ton & Kirwan (47 Eng. Com. Law Rep 245.)
State vs Ferguson 2 McMullan 502 — Regina

vs Rebecca Kerr 8th Car. & Payne 176. (34th Eng. Com Law. Rep. 341. State vs Weston & al. 9 Conn. 527, are authorities bearing directly on the case now before us — and are strong against the position taken by defendants' counsel, and in favor of the ruling of the court below —

The case in Wendell, is similar to this — the defendant McGarren was indicted for petit larceny in stealing a whip worth two dollars, the property of one Stephen Northrop — the defendant was a merchant in Utica, and Northrop came to his store to buy cloth — after spending some time in looking at cloths, he went off, without making a purchase, leaving his whip in the store — the defendant concealed it. Within a few minutes Northrop returned and enquired for it; and was told by the defendant, he had not seen it. Northrop returned repeatedly in the day, and always received the same answer — It was given in evidence, that when Northrop left the store, defendant expressed his dissatisfaction that he had not made a purchase, but observed, he has left his whip, and I will keep it, and accordingly put it away. — That previous to Northrop's return the last time, the defendant had found out that he had purchased cloth elsewhere, and he then told Northrop, if he had bought the cloth of him, he would not have lost his whip — It was also

in proof, that after Northrop left, the last time, the defendant told his clerks, if Northrop called again to give him his whip - It was also stated, that defendant said he intended to return the whip — The Court charged the jury that the whip, though left in defendant's store, was not so in the defendant's possession as not to be the subject of larceny by him; but was in contemplation of law, in the possession of the owner and not lost, - and that a larceny of it, could be committed by the defendant or any one else; and if they believed, that the defendant took the whip, from the place where it was laid, by the owner, with the intention of appropriating it, to his own use and defrauding the owner, they should find the defendant guilty - The jury convicted the defendant, and he was fined $75. He excepted to the decision of the Court and the charge to the jury, and sued out his writ of Error - This was affirmed in the Supreme Court - I have examined the numerous cases on this doctrine, and could cite others, but it is deemed unnecessary - The weight of authority is against considering property situated as the purse of Eatherton was in this case, so lost, that larceny could not be committed of it - The indictment is considered sufficient, and the motion in arrest properly overruled - The judgment of the lower

85

State vs McCann

Opinion

Ryland

Filed 1 December 1853
Wm. F. Glanville
Clerk

trial Court is therefore with the concurrence of the other Judges affirmed.

John D. Ryland

In the Supreme Court.

The State of Missouri vs Philip McCann	Appellee Appellant

Indictment for Larceny.

The only questions desired to be discussed in this case I believe are

I. Was the property taken lost property

II. Could the defendant under the circumstances be guilty of larceny.

1. The question of felonious intent was put to the Jury by the instructions, and they have passed upon that point by their verdict

2. The property was not lost in such sense as to bring the defendant within the principle of the rule that the finder of lost property cannot be guilty of theft.

Instance. If I leave my watch under my pillow, placed there for safety during the night, and quitting the premises have no Recollection or present knowledge of its whereabouts, I cannot be said to have lost it, and the taker with the intent of converting to his own use is guilty of larceny.

3. All the circumstances of this case warrant the finding of the jury as to the original felonious intent.

The property was not lost it was left it was left in a store on the counter, the defendant was a stranger to that store. he took it furtively, he concealed evidence of property, he appropriated portions of the money morally and legally he is guilty of larceny.

Authorities

The People vs McGarren 17 Wend 460.

The State vs Ferguson 2 McMullan 502

The State vs Weston 9 Conn 527
The State v Jenkins 2 Tyler 379

Regina v Kerr 8 Carr & P. 176. 34 Eng Com Law Rep p 341.
"A Servant indicted for stealing bank notes
"the property of her master in her dwelling house set up
"as her defence that she found them in the passage
"and not knowing to whom they belonged, kept
"them to see if they were advertised, Held that
"she ought to have enquired of her master whether
"they were his or not, and that not having done
"so, but having taken them away from the house
"she was guilty of stealing them".

Regina v Peters 1 Carr & Kir 245. 47 Eng C.L. Reps p 245

Regina v Mole 1 " " 416 " " " " - p 416

Regina v Thurdon 2 Carr & Kir N.P. 839. 61 Eng C.L. Rep p 839

Regina v Reed et ux 1 Carr & Marshman p 306
41 English Com. Law Reps p 170.

Property left by a passenger in Railway Carriage
"The law with regard to the finder of
lost property does not apply to the case of prop=
=erty of a passenger accidentally left in a
railway carriage and found there by a ser=
=vant of the Company, and such servant is guilty
of larceny, if instead of taking it to the station
or superior office, he appropriates it to his own
use
R. v. Pierce and other 20 L. T. 182 (per Williams J)
and case of sheep stealing quoted in
American Law Reg April 1853.

Merry v Green 7 M & W. 623
Cartwright v Green 8 Ves. 435. 2 Leach 952.

Anon 2 Russ. C & M. 102. Lawrence
Rex v James 2 Russ C & M 102 Gibbs
Rex v Wynne 1 Leach C.C. 413.
2 Easts P.C. 664. 697. Lambe Case
S. P. Rex v Sears 1 Leach C.C. 415. n.

Mucklow's case 1 Moody's Crown Cases 160.
All cited in Roscoe's Criminal Digest pages 474. 475.

The old authorities in Hale and Hawkins
3 Inst 108. 1 Hawk C. 33 § 2 1 Hale 506
to the effect that if a man lose goods and another find them, and not knowing the owner convert them to his own use there is no larceny even although he deny the finding of them or secrete them. must be taken with limitations

Whenever ownership is abandoned, the thing is bonum vacans, and any one may take it but if the ownership be not abandoned the thing is not the property of the finder, if in addition to this, the person who finds it shows no intention to finder or return it, that person is guilty of larceny.

The conclusion of all the authorities seems to be what was the reasonable presumption of the party finding as to whether the owner did or did not know where the property could be found.

To judge of this, the place where left or found is a material consideration in judging of the reasonable presumption in the mind of the picker up or finder

Again what was the animus of the person picking up or finding at the time of the act done

If then he intends to deprive the owner whom he reasonably presumes can be found, of his dominion over his property and with the intent of converting to his own use he is guilty of larceny.

No after formed intention of his can convert an innocent first possession into a guilty after one

If property be found in the highway or street, with no marks upon it by which the owner can be known, these being places where the finder cannot reasonably presume that the owner knew where it could be found

even if the finder immediately after finding unlawfully deny the possession and convert to his own use, he is not guilty of larceny the rule as to lost property above stated being applicable.

The trespass necessary to constitute larceny need not be actual, it may be constructive. and even if I should casually have left my property in my neighbours house without my or his present knowledge, it is yet in my constructive possession.

H. S. Clover
for State.

85

The State of Me

vs

Philip McCann

Indictment for Larceny

Points and Authorities

A. A. Clover
for State

In the Supreme Court

State of Missouri, Respondent

against

Philip alias James McCann, Appellant

Lewis & Henry for appellant insist —

First, That the court committed error in refusing the second instruction asked for the defendant (appellant here) —

The weight of authority in this country whenever the question has been discussed has been in favor of the adoption of definition of larceny as given by writers at common law and the adoption of this definition necessarily negatives the idea that bona fide lost property can be the subject of larceny

"A Bona fide finder of lost articles is not guilty of larceny by a subsequent secretion or appropriation of the same"

14th Johns, Rep — p 294

"Larceny cannot be committed unless the thing be taken against the will of the owner" — 2 Taylor Rep — p 31 —

To constitute larceny there must be a trespass in the original taking the taking must be invito domino and the property in the actual or constructive possession of the owner — 9th Geiger Rep — 198

5th " " — 154

The case in Yerger's Tennessee Reports last mentioned and also the case of People vs Ogdell, 1st Hill's Reps p 91 were quoted and at least in their general tenor approved by this Court in the case of the State of Ms vs Conway et al decided at the last Term of this Court In the latter case this court said that the "indictment must charge that the defendant in such case felonious cepit as well as asportavit" and that in order to constitute larceny there must be a trespass in the original taking and if there be no trespass therein no subsequent conversion will make the offence a larceny.

In the cause now before the court Catherton the prosecuting witness, says ~~again & again~~ in giving testimony that he lost the purse and after this there is no evidence embraced in the bill of exceptions showing that the defendant feloniously took or even converted the property found to his own use. Under the ruling of the Court in this State & by the authorities cited, it is impossible to present a clearer case of error than that committed by the Criminal Court in the refusal of the ~~fo~~ second instruction asked by deft —

Second

The authorities cited and the recent opinion of this Court in case of the State vs Conway et al, apply with equal force to the charge that the Court committed error in refusing the 3d instruction asked by the Counsel for the defence. —

For if the defendant was a bona fide finder of the purse & money that Gatherton lost the weight of authority is in favor of the position that no subsequent secreting or appropriating thereof to his own use could render him guilty of larceny. —

The fact of a felonious taking and not, (as in this case) of a loss, must be established before the presumption of law ~~can~~ arising from possession of the goods can be brought to bear with fatal force against the Deft. It is not the possession, unaccounted for of lost, but of Stolen goods, which raises the presumption of larceny by the party found in possession. —

If this position be true, then the instruction referred to (the third for defts) should have been given and the Court committed error in refusing it. —

Defendant further insists that the Court committed error in overruling the motion for a new trial. —
The Jury clearly found against law and evidence if the first instruction of the court is properly applied to to the testimony in regard to the marks upon the purse and the means that defendant had of ascertaining the ownership of the lost property. —
In 1st Hill page 94 above quoted The court decided that to make the finder of lost property guilty of larceny he must be shown to know the owner instanter. —

85

State of Mo

vs

Philip alias James McCann

Appellant's brief.

Lewis & Fleming

Attys for Appellant