

LEXSTAT CA PENAL CODE § 484

DEERING'S CALIFORNIA CODES ANNOTATED  
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THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND  
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

PENAL CODE  
Part 1. Of Crimes and Punishments  
Title 13. Of Crimes Against Property  
Chapter 5. Larceny

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Pen Code § 484 (2008)*

**§ 484. What constitutes theft; Determination of value of property; Presumptions**

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

(b)

(1) Except as provided in *Section 10855 of the Vehicle Code*, where a person has leased or rented the personal property of another person pursuant to a written contract, and that property has a value greater than one thousand dollars (\$1,000) and is not a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 10 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(2) Except as provided in *Section 10855 of the Vehicle Code*, where a person has leased or rented the personal property of another person pursuant to a written contract, and where the property has a value no greater than one thousand dollars (\$1,000), or where the property is a commonly used household item, intent to commit theft by fraud

shall be rebuttably presumed if the person fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.

(d) The presumptions created by subdivisions (b) and (c) are presumptions affecting the burden of producing evidence.

(e) Within 30 days after the lease or rental agreement has expired, the owner shall make written demand for return of the property so leased or rented. Notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement and to any other known address shall constitute proper demand. Where the owner fails to make such written demand the presumption created by subdivision (b) shall not apply.

**HISTORY:**

Enacted Stats 1872. Amended Stats 1927 ch 619 § 1; Stats 1935 ch 802 § 1; Stats 1965 ch 1602 § 1; Stats 1967 ch 1335 § 1; Stats 1980 ch 1090 § 1; Stats 2000 ch 176 § 1 (SB 1867).

**NOTES:**

**Amendments:**

**1927 Amendment:**

Prior to 1927 the section read: "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another."

**1927 Amendment:**

Amendment amended the section to read: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of additional employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

**1935 Amendment:**

Substituted "any additional employee or employees" for "additional employees" at the beginning of the last sentence.

**1965 Amendment:**

Added the second paragraph.

**1967 Amendment:**

(1) Designated the former first paragraph to be subd (a); (2) deleted the former second paragraph which read: "The presenting of identification to a renter which bears a false or fictitious name or address and failure to return any motor vehicle, trailer, equipment, or tool rented within 10 days after the lease or rental agreement has expired, shall be prima facie evidence of fraudulent intent. Nothing herein contained shall relieve the lessor or renter from making demand for return of property so rented. Notice addressed and mailed to the lessee at address given at the time of the making of the lease or rental agreement shall constitute proper demand."; and (3) added subds (b) -(d).

**1980 Amendment:**

(1) Deleted ", or if one presents to the owner identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental agreement" at the end of subd (b); (2) added subd (c); (3) redesignated former subds (c) and (d) to be subds (d) and (e); and (4) substituted "subdivisions (b) and (c)" for "subdivision (b)" in subd (d).

**2000 Amendment:**

(1) Added "or her" after "entrusted to him", and after "report falsely of his" in the first sentence of subd (a); (2) designated former subd (b) to be subd (b)(1); and (3) amended subd (b) (a) substituting subd (b)(1) for the former subd which read: "(b) Except as provided in *Section 10855 of the Vehicle Code*, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented."; and (b) adding subd (b)(2).

**Historical Derivation:**

(a) Crimes and Punishment Act §§ 60, 61 (Stats 1850 ch 99 §§ 60, 61), as amended Stats 1851 ch 95 §§ 2, 3, Stats 1856 ch 139 §§ 7, 8.

(b) Field's Draft NY Pen C § 584.

(c) NY Pen C § 528.

**Cross References:**

Intent to defraud: *Pen C § 8*.

How intent manifested: *Pen C § 21*.

Presentation of false claims to state: *Pen C § 72*.

Obtaining money or property by fraudulent game or trick: *Pen C § 332*.

Forgery and counterfeiting: *Pen C §§ 470 et seq.*

Stealing of electricity, gas and water: *Pen C § 498*.

Evidence in trial for theft or embezzlement of money: *Pen C § 501*.

Embezzlement: *Pen C §§ 503 et seq.*

False personation and cheats: *Pen C §§ 528 et seq.*

Fraudulent recovery from insurer: *Pen C § 548*.

Removal and appropriation of articles from dead body: *Pen C § 642*.

Soliciting commission of grand theft: *Pen C § 653f*.

Transfer of sound recordings, for sale, without consent of owner: *Pen C § 653h*.

Punishment for scheme to defraud owner: *Pen C § 670*.

Jurisdiction when property is feloniously taken in one county and brought into another: *Pen C § 786*.

Jurisdiction of criminal action of theft of property in other state that is brought into this state: *Pen C § 789*.

Requirement of hearing prior to own recognizance release: *Pen C § 1319.5*.

Disposal of property stolen or embezzled: *Pen C §§ 1407 et seq.*

Search warrant for property taken by embezzlement: *Pen C § 1524*.

High Technology Theft Apprehension and Prosecution Program: *Pen C §§ 13848 et seq.*

Presumptions affecting burden of producing evidence: *Ev C §§ 603, 630*.

Possession of property of bank by its director, officer or employee with intent to defraud: *Fin C § 3352*.

Abstracting or misapplying bank funds, property or credit as felonious: *Fin C § 3361*.

Unlawful marking and branding of livestock: *Fd & Ag C §§ 17551 et seq., 17701, 17702*.

Wrecking, sinking, injuring or destroying vessel or cargo with intent to defraud: *H & N C § 304*.

Making fraudulent manifest, invoice, bill of lading, ship's register, or protest: *H & N C § 306*.

Sale of cemetery plot under misrepresentation that plot is under endowment care: *H & S C § 8780*.

Misrepresentation of insurance policies: *Ins C §§ 780 et seq.*

Conversion of funds received by insurance agent or broker: *Ins C § 1733*.

Misappropriation of property put up by employee or applicant for employment, as bond: *Lab C § 405*.

Conversion of military or naval property of state or United States: *Mil & Vet C § 421*.

Theft or injury of vehicles: *Veh C §§ 10850 et seq.*

### **Collateral References:**

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Governmental Authority §§ 58, 151.

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Property §§ 1, 8, 10, 13, 16, 26, 42, 43, 45, 46, 52, 56, 58, 129, 191, 223.

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Public Peace and Welfare §§ Ch 5 - 263.

Witkin & Epstein, Criminal Law (3d ed), Criminal Trial § 528.

Witkin & Epstein, Criminal Law (3d ed), Elements § 64.

Witkin & Epstein, Criminal Law (3d ed), Introduction To Crimes §§ 16, 24, 60, 61.

Witkin & Epstein, Criminal Law (3d ed), Pretrial Proceedings § 183.

Witkin & Epstein, Criminal Law (3d ed), Punishment §§ 374, 375.

12 Witkin Summary (10th ed) Real Property § 616.

Cal Jur 3d (Rev) Creditors' Rights and Remedies § 491; Criminal Law §§ 1127, 1128, 1130, 1134, 1136, 1138, 1143, 1146, 1149, 1166, 1177, 1178, 1184, 1189, 1190, 1199, 1203, 1218, 1222, 1228, 1233, 1249, 1250, 1273, 1285, 1314-1321, 2058, 3127; Delinquent and Dependent Children § 184.

Miller & Starr, Cal Real Estate 3d §§ 31:51, 34:79.

1 Witkin Cal. Evidence (4th ed) Burden of Proof and Presumptions § 62.

*Cal Criminal Defense Prac., ch 143, "Crimes Against Property"*.

*Cal. Legal Forms, (Matthew Bender) § 52.17[3]*.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1600, Robbery.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1750, Receiving Stolen Property.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1800, Theft by Larceny.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1801, Theft: Degrees.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1804, Theft by False Pretenses.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1805, Theft by Trick.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1805, Theft by Trick.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1806, Theft by Embezzlement.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 1807, Theft From Elder or Dependent Adult.

**Forms:**

Suggested forms are set out below, following Notes of Decisions.

**Law Review Articles:**

Theft, law and society. *54 ABAJ 960.*

"Property rights" in goods illegally held. *11 Cal LR 369.*

Maker of possession of property wrongfully detained and converted. *17 Cal LR 372.*

Sufficiency of indictment. *17 Cal LR 426.*

Embezzlement, false pretenses, and larceny distinguished. *25 Cal LR 367.*

"Things." *28 Cal LR 421.*

Series of payments of money in reliance on one representation as constituting separate offenses. *28 Cal LR 774.*

False promises as false pretenses. *43 Cal LR 719.*

Obtaining contractual obligation by false pretenses as criminal offense. *12 Hast LJ 321.*

People v Sobiek: Punishing the embezzling partner. *25 Hast LJ 1266.*

Asportation as necessary element of larceny. *2 SCLR 84.*

Realty as subject of embezzlement. *8 SCLR 44.*

Statutory consolidation and prior decisions on elements of larceny, embezzlement, and false pretenses. 8 *SCLR* 59.

Unlawful taking of oil in place in land and its severance from land. 8 *SCLR* 357.

Subject matter of larceny. 20 *SCLR* 299.

Former jeopardy and doctrine of included offenses. 23 *SCLR* 107.

Distinctions between larceny and false pretenses. 25 *SCLR* 367.

Attempted grand theft by false pretenses where victim is not deceived. 33 *SCLR* 227.

Cancer quackery and applicable provisions of Penal Code. 40 *SCLR* 390.

Attempted theft as lesser included offense in burglary case. 44 St BJ 73.

Protection from multiple trials for burglary and larceny. 11 *Stan LR* 740.

California Judges Benchguide S216: Mandatory criminal jury instructions. Cal Center Jud Edu & Research No. 11.

#### **Attorney General's Opinions:**

When the owner of a vehicle has been arrested for driving without a valid license and the vehicle has been impounded, the owner may be found guilty of grand theft for removing the vehicle from the impounding agency's custody without permission or authority prior to the expiration of the 30-day impoundment period. 80 *Ops. Cal. Atty. Gen.* 142.

#### **Annotations:**

Gambling or lottery paraphernalia as subject of larceny, burglary, or robbery. 51 ALR2d 1396.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions. 78 ALR2d 1359.

Taking, and pledging or pawning, another's property as larceny. 82 ALR2d 863.

Criminal responsibility for embezzlement from corporation by stockholder owning entire beneficial interest. 83 ALR2d 791.

Conversion by promoter of money paid for a preincorporation subscription for stock shares as embezzlement. 84 ALR2d 1100.

Drawing of check on bank account of principal or employer payable to accused's creditor as constituting embezzlement. 88 ALR2d 688.

Stolen money or property as subject of larceny or robbery. 89 ALR2d 1435.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case. 91 ALR2d 1046.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations. 94 ALR2d 570.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses, and the like. 6 ALR3d 241.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim. 10 ALR3d 572.

Larceny: cotenant taking cotenancy property. 17 ALR3d 1394.

Liability of corporate directors for negligence in permitting mismanagement or defalcations by officers or employees. 25 ALR3d 941.

Single or separate larceny predicated upon stealing property from different owners at the same time. 37 ALR3d 1407.

Criminal offenses in connection with rental of motor vehicles. 38 ALR3d 949.

Imposition of constructive trust in property bought with stolen or embezzled funds. 38 ALR3d 1354.

Criminal prosecution based upon breaking into or taking money or goods from vending machine or other coin-operated machine. 45 ALR3d 1286.

Criminal liability of corporation for extortion, false pretenses or similar offenses. 49 ALR3d 820.

Criminal prosecution or disciplinary action against medical practitioner for fraud in connection with claims under Medicaid, Medicare or similar welfare program for providing medical services. 50 ALR3d 549.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 ALR3d 727.

Series of takings over a period of time as involving single or separate larcenies. 53 ALR3d 398.

Asportation of motor vehicle as necessary element to support charge of larceny. 70 ALR3d 1202.

Larceny as within disorderly conduct statute or ordinance. 71 ALR3d 1156.

What constitutes larceny "from a person". 74 ALR3d 271.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 ALR3d 842.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses or similar crimes. 77 ALR3d 689.

Retaking of money at gambling as robbery or larceny. 77 ALR3d 1363.

False pretense or allied criminal fraud by partner with respect to partnership property. 82 ALR3d 822.

Embezzlement, larceny, false pretenses or allied criminal fraud by a partner. 82 ALR3d 822.

Robbery or assault to commit robbery as affected by intent to collect or secure debt or claim. 88 ALR3d 1309.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such

property. 89 ALR3d 1202.

Admissibility of photographs of stolen property. 94 ALR3d 357.

Applicability of best evidence rule to proof of ownership of allegedly stolen property in prosecution for theft. 94 ALR3d 824.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime. 1 ALR4th 481.

Computer programs as property subject to theft. 51 ALR4th 971.

Cat as subject of larceny. 55 ALR4th 1080.

State regulation of motor vehicle rental ("you-drive" ) business. 60 ALR4th 784.

Employer's liability for assault, theft, or similar intentional wrong committed by employee at home or business of customer. 13 ALR5th 217.

Consideration of sales tax in determining value of stolen property or amount of theft. 63 ALR5th 417.

Joyriding or similar charge as lesser-included offense of larceny or similar charge. 78 ALR5th 567.

What constitutes offense under provisions of *18 USCS § 659* penalizing theft from interstate or foreign shipments. 8 ALR Fed 938.

What constitutes "causing" mail to be delivered for purpose of executing scheme prohibited by mail fraud statute (*18 USCS § 1341*). 9 ALR Fed 893.

Interstate or foreign commerce nature of "shipment" within meaning of *18 USCS § 659* penalizing thefts or similar offenses as to goods moving in interstate or foreign commerce. 10 ALR Fed 476.

Validity, construction and application of *18 USCS § 1014* and similar predecessor statutes making it federal offense to make false statements or report, or to overvalue property, for purpose of influencing action of federal or federal-affiliated lending agencies. 16 ALR Fed 825.

Who is "officer, director, agent or employee" of bank, or is "connected in any capacity" with bank and therefore subject to prosecution and punishment for misapplication of bank funds under *18 USCS § 656*. 57 ALR Fed 537.

### **Hierarchy Notes:**

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Representation or Other Pretense 24. Victim's Reliance and Resultant Injury 25. Transfer of Title 26. Related and Included Offenses 27. Defenses 28. Particular Persons and Transactions C. PROCEDURE, GENERALLY 29. In General 29.5. Self-representation 30. Venue 31. Statute of Limitations 32. Pleading, Generally 33. Charging Theft 34. Charging Larceny 35. Charging Embezzlement 36. Charging False Pretenses D. EVIDENCE (1) GENERALLY 37. In General 38. Criminal Intent 39. Effect of Possession of Stolen Property 40. Miscellaneous Particular Cases (2) ADMISSIBILITY 41. In General 42. Other Acts and Offenses 43. Specific Kinds of Cases (3) WEIGHT AND SUFFICIENCY 44. In General 45. Corpus Delicti 46. Corroboration of Testimony 47. Possession of Stolen or Other Property 48. Theft and Larceny Cases Generally 49. Theft by Trick or Device Cases 50. Embezzlement Cases 51. False Pretenses Cases E. TRIAL, VERDICT, AND JUDGMENT 52. In General 53. Instructions to Jury 54. Refusal or Failure to Instruct 55. Judgment, Sentence, and Punishment F. APPEAL AND ERROR 56. In General 57. Harmless and Prejudicial Error

## A. GENERAL CONSIDERATIONS

### 1. In General

This section, as amended, does not invalidate § 459, defining burglary, on the ground that it now becomes so vague that one charged therewith does not have sufficient information as to which brand of theft he is supposed to have intended by his felonious entry. *People v. Myers (1929) 206 Cal 480, 275 P 219, 1929 Cal LEXIS 624.*

This section, as amended, making three former, separate crimes one offense and allowing the People to plead pursuant thereto, does not violate *Amendment XIV of the United States Constitution* or *Art 1, § 13 of the California constitution*. *People v. Robinson (1930, Cal App) 107 Cal App 211, 290 P 470, 1930 Cal App LEXIS 404.*

Crime in which intent to defraud is essential element is crime involving moral turpitude. *In re Hallinan (1954) 43 Cal 2d 243, 272 P2d 768, 1954 Cal LEXIS 244.*

Defendant's demurrer to indictment on ground that this section is unconstitutional is properly overruled. *People v. Corenevsky (1954, Cal App) 124 Cal App 2d 19, 267 P2d 1048, 1954 Cal App LEXIS 1691.*

Where alien was convicted, among other crimes, of violation of this section, his deportation was not invalid. *Alesi v. Cornell (1957, 9th Cir Cal) 250 F2d 877, 1957 US App LEXIS 4214.*

Grand theft under § 487 subd (1) is included in theft as defined in § 484, which in turn includes crimes described in § 504, relating to fraudulent appropriation of property by officers or agents of public or private corporations, which are species of theft. *People v. Coe (1959, Cal App 2d Dist) 171 Cal App 2d 786, 342 P2d 43, 1959 Cal App LEXIS 1897.*

Prosecution of defendants for grand theft (*Pen C §§ 484, 487*), arising out of the procuring and cashing of fraudulent insurance claims drafts was not precluded a by a misdemeanor statute proscribing presentation of false insurance claims, former *Ins C § 556* (see now *Ins C § 1871.1*); the felony statute required, as an essential element, the taking of something of value, whereas a violation of the misdemeanor statute was complete when a false claim for payment of loss was presented or a false writing was prepared or presented with intent to use it in connection with such a claim, whether or not anything of value was taken or received. *People v. Cohen (1970, Cal App 2d Dist) 12 Cal App 3d 298, 90 Cal Rptr 612, 1970 Cal App LEXIS 1629.*

The specific provisions of *H & S C §§ 18020.5, 18060.5*, subd. (c), making fraud in the sale of a mobilehome a misdemeanor, prevail over the general provisions of *Pen C §§ 484, 487*, making it a felony to defraud a person of money in excess of \$400, since the terms "fraud" and "deceit," as used in the Health and Safety Code, are defined as including any act falling within the provisions of *Pen C § 484 (H & S C § 18004.6*, subd. (d)), and since there is no statutory language expressly saving the applicability of other criminal law provisions. Such language is not contained in general provisions of the mobilehome law providing that the law is to be construed as a restatement and continuation of

existing provisions relating to the same subject matter (*H & S C § 18000.5*). *Finn v. Superior Court* (1984, *Cal App 4th Dist*) 156 *Cal App 3d* 268, 202 *Cal Rptr* 732, 1984 *Cal App LEXIS* 2087.

Defendant's argument that a violation of *Pen C § 484* is not necessarily a "theft offense" and so the government may not rely on it to satisfy an "aggravated felony" element of federal law, failed because it did not take two factors into account: the term "theft offense" is not necessarily a common-law term; and even if it were, other, more relevant principles of statutory construction dictate that a violation of *Pen C § 484* can support a prosecution under 8 *USCS § 1326(b)(2)* (alien deported subsequent to conviction for aggravated felony, as subject to fine or imprisonment). *United States v. Esparza-Ponce* (1998, *SD Cal*) 7 *F Supp 2d* 1084, 1998 *US Dist LEXIS* 11341.

*Pen C § 484(a)* allows a conviction for theft when the defendant has neither taken, nor exercised control over, the property. A defendant can be convicted of the substantive offense of violation of § 484 for aiding and abetting a theft, even if that theory is not specifically charged. *United States v. Corona-Sanchez* (2002, *9th Cir Cal*) 291 *F3d* 1201, 2002 *US App LEXIS* 10778, superseded by statute as stated in *United States v. Gomez-Mendez* (2007, *9th Cir Cal*) 486 *F3d* 599, 2007 *US App LEXIS* 11268, superseded by statute as stated in *United States v. Vidal* (2005, *9th Cir Cal*) 426 *F3d* 1011, 2005 *US App LEXIS* 22949.

### 1.5. Constitutionality

Self-representing defendant's Fourteenth Amendment due process rights were violated when the trial court and prosecutor mistakenly stated during plea bargain discussions that defendant would not be eligible to receive 50 percent good conduct credits, causing defendant to refuse the plea offer. *People v. Goodwillie* (2007, *Cal App 4th Dist*) 147 *Cal App 4th* 695, 54 *Cal Rptr 3d* 601, 2007 *Cal App LEXIS* 173.

## B. FORMS, ELEMENTS, AND SUBJECTS OF OFFENSE

### (1) GENERALLY

#### 2. In General

Where one suspects that theft is about to be committed against him, he cannot actively participate therein to the extent of personally delivering his property to the defendant and then prosecute him successfully, an essential element that the property be taken without the owner's consent not existing. *People v. Werner* (1940) 16 *Cal 2d* 216, 105 *P2d* 927, 1940 *Cal LEXIS* 301, overruled *People v. Camodeca* (1959) 52 *Cal 2d* 142, 338 *P2d* 903, 1959 *Cal LEXIS* 192).

No elements of the former crimes of larceny, embezzlement, or obtaining property under false pretenses have been changed. *People v. Tullos* (1943, *Cal App*) 57 *Cal App 2d* 233, 134 *P2d* 280, 1943 *Cal App LEXIS* 170.

When both property and money are taken at the same time from the same owner as a part of a single transaction whereby he is defrauded, there is only one theft. *People v. Nor Woods* (1951) 37 *Cal 2d* 584, 233 *P2d* 897, 1951 *Cal LEXIS* 312, cert den (1952) 344 *US* 860, 73 *S Ct* 101, 97 *L Ed* 667, 1952 *US LEXIS* 1713.

Restoration of property feloniously taken or appropriated is no defense to charge of theft. *People v. Pond* (1955) 44 *Cal 2d* 665, 284 *P2d* 793, 1955 *Cal LEXIS* 267.

Taking of property is not theft, in absence of intent to steal. *People v. Matlock* (1959) 51 *Cal 2d* 682, 336 *P2d* 505, 1959 *Cal LEXIS* 292, 71 *ALR2d* 605.

Theft is characterized as felonious taking of property which is not one's own. *People v. Zucker* (1960, *Cal App 2d Dist*) 177 *Cal App 2d* 172, 2 *Cal Rptr* 112, 1960 *Cal App LEXIS* 2443.

Test applied in theft prosecutions as to whether there are separate offenses or one offense is whether evidence

discloses one general intent or separate and distinct intents. *People v. Bailey* (1961) 55 Cal 2d 514, 11 Cal Rptr 543, 360 P2d 39, 1961 Cal LEXIS 231.

Theft, as defined by section, includes theft by trick and device, theft by false pretenses and embezzlement. *People v. Miller* (1961, Cal App 2d Dist) 188 Cal App 2d 156, 10 Cal Rptr 326, 1961 Cal App LEXIS 2403.

"Criminal acquisitive techniques" described by this section include common-law offenses of embezzlement and obtaining money under false representation or false pretense. *People v. Darling* (1964, Cal App 4th Dist) 230 Cal App 2d 615, 41 Cal Rptr 219, 1964 Cal App LEXIS 914.

Under *Pen C* § 484, the intent to permanently deprive an owner of his property is a necessary requisite of the crime of theft. *People v. Jaso* (1970, Cal App 2d Dist) 4 Cal App 3d 767, 84 Cal Rptr 567, 1970 Cal App LEXIS 1576.

In a theft prosecution, there was no merit to defendant's claim that he was entitled to take the victim's property to offset a debt which the victim never allegedly intended to pay, where the "debt" involved was an unliquidated claim in contract. *People v. Holmes* (1970, Cal App 2d Dist) 5 Cal App 3d 21, 84 Cal Rptr 889, 1970 Cal App LEXIS 1408.

A good faith attempt to recapture money lost on an illegal wager is not theft. *People v. Littleton* (1972, Cal App 2d Dist) 25 Cal App 3d 96, 101 Cal Rptr 489, 1972 Cal App LEXIS 1014.

Felonious intent was a necessary element of theft pursuant to *Pen C* § 484; thus, while the sale of securities might be a crime under former *Corp C* § 26104 (see now *Corp C* § 25540), it did not amount to theft under California law absent a showing of criminal intent to deprive owners permanently of their property. *Bellis v. Commissioner* (1976, 9th Cir) 540 F2d 448, 1976 US App LEXIS 7854.

### 3. Statutory Merger of Offenses

This section, as amended, merged into the crime of grand theft the offenses which were formerly termed larceny, embezzlement, and obtaining money by false pretenses. *People v. Myers* (1929) 206 Cal 480, 275 P 219, 1929 Cal LEXIS 624.

While this section, as amended, has amalgamated the former crimes of larceny, embezzlement, and false pretenses, under the cognomen of theft, no elements of the former crimes have been changed. *People v. Myers* (1929) 206 Cal 480, 275 P 219, 1929 Cal LEXIS 624.

Though the crimes of larceny, embezzlement, obtaining money by false pretenses, and kindred offenses are now included under this section, the elements of the several offenses have not been changed. *People v. Jones* (1950) 36 Cal 2d 373, 224 P2d 353, 1950 Cal LEXIS 250.

Although offenses of larceny by trick and device and obtaining money under false pretenses, with other larcenous crimes, have been consolidated into single crime of theft, their elements have not been changed. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

Fine distinctions and technical niceties which once existed between various forms of larceny were done away with by 1927 amendment of section, and are all included under term "theft." *Dawson v. Superior Court of Alameda County* (1956, Cal App 1st Dist) 138 Cal App 2d 685, 292 P2d 574, 1956 Cal App LEXIS 2420.

Separate offenses of larceny, embezzlement and obtaining property by false pretenses have been merged into one classification by this section. *People v. Schmitt* (1957, Cal App 2d Dist) 155 Cal App 2d 87, 317 P2d 673, 1957 Cal App LEXIS 1251.

Purpose of consolidation of larcenous crimes into single crime of theft was to remove technicalities previously existing in pleading and proof of those crimes. *People v. Antoine* (1960, Cal App 1st Dist) 180 Cal App 2d 786, 4 Cal Rptr 589, 1960 Cal App LEXIS 2398.

Since 1927 amendment of section, accused may be convicted of grand theft on proof showing either embezzlement or obtaining money by false pretenses. *People v. Murdock* (1960, Cal App 2d Dist) 183 Cal App 2d 861, 7 Cal Rptr 293, 1960 Cal App LEXIS 1842.

Crimes of larceny, embezzlement, obtaining money by false pretenses and kindred offenses have been consolidated by provisions of this section into single crime of theft, but elements of several offenses have not been changed. *Callan v. Superior Court of San Mateo County* (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.

Consolidation in section of the offenses of nonforcible appropriation of another's property, larceny, embezzlement and false pretenses did not create new crimes or enlarge scope of any old ones. *People v. Kassab* (1963, Cal App 2d Dist) 219 Cal App 2d 687, 33 Cal Rptr 494, 1963 Cal App LEXIS 2424.

In California, the ancient common law distinctions between the theories of larceny by trick and theft by false pretenses no longer exist by statute. Under *Pen C § 484*, there is simply one consolidated crime of theft, which the jury may find upon either theory, if there is an unlawful taking. The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. Juries need no longer be concerned with the technical differences between the several types of theft and can return a general verdict of guilty if they find that an unlawful taking has been proved. *People v. Counts* (1995, Cal App 1st Dist) 31 Cal App 4th 785, 37 Cal Rptr 2d 425, 1995 Cal App LEXIS 36.

After defendant was convicted both under *Pen C § 484* of petty theft and under *Pen C § 496(a)* of receiving stolen property, it was appropriate to reverse the theft conviction and affirm the conviction for receiving stolen property, which was a felony and therefore the greater offense. *People v. Ceja* (2007, 4th Dist) 155 Cal App 4th 1246, 66 Cal Rptr 3d 697, 2007 Cal App LEXIS 1648.

#### **4. Property Subject to Theft**

Real property may be subject of theft. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

Telephone company's lists of new telephone subscribers are physical goods and come within definition of personal property in § 7, subd 12, which includes "goods," and such lists may be the subject of embezzlement, theft, or receiving stolen goods; such lists have value, as evidenced by defendants' payments of \$600 therefor, though they are not sold by company; value to company is in good will it gains or preserves by protecting its customers from annoyance by solicitors. *People v. Dolbeer* (1963, Cal App 1st Dist) 214 Cal App 2d 619, 29 Cal Rptr 573, 1963 Cal App LEXIS 2652.

Defendant was properly charged and convicted of theft arising out of his alleged defrauding of the telephone company under the general theft statute (*Pen C § 484*), rather than under the special statute covering telephone fraud (*Pen C § 502.7*), where the case involved obtaining both monthly service and classified advertising in the yellow pages of the telephone directory. The yellow pages directory is essentially an advertising service rather than a telephone service, and the general tenor of *Pen C § 502.7*, indicates that the Legislature did not intend to include directory advertising within the special provisions governing telephone fraud. *People v. Rousseau* (1982, Cal App 1st Dist) 129 Cal App 3d 526, 179 Cal Rptr 892, 1982 Cal App LEXIS 1346.

When the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated in 1927 into the single crime of "theft," defined by *Penal C § 484*, most procedural distinctions between those offenses were abolished. However, their substantive distinctions were not, and a judgment of conviction of theft,

based on a general verdict of guilty, can be sustained only if the evidence discloses elements of one of the consolidated offenses. Theft by larceny is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal that property, and (6) carries that property away. The act of taking personal property from the possession of another is always a trespass unless either the owner consents to the taking freely and unconditionally, or the taker has a legal right to take the property. Intent to steal, or animus furandi, is intent, without good-faith claim of right, to permanently deprive the owner of possession, and if a taking has begun, the slightest movement of the property constitutes a carrying away or asportation. *People v. Davis (1998) 19 Cal 4th 301, 79 Cal Rptr 2d 295, 965 P2d 1165, 1998 Cal LEXIS 6883.*

Conviction for petty theft in California is not an aggravated felony under 8 USCS § 1101(a)(43)(G). *United States v. Corona-Sanchez (2002, 9th Cir Cal) 291 F3d 1201, 2002 US App LEXIS 10778*, superseded by statute as stated in *United States v. Gomez-Mendez (2007, 9th Cir Cal) 486 F3d 599, 2007 US App LEXIS 11268*, superseded by statute as stated in *United States v. Vidal (2005, 9th Cir Cal) 426 F3d 1011, 2005 US App LEXIS 22949*.

#### **4.5. Relationship to Receiving Stolen Property**

Where defendant was convicted for both the theft of a bicycle under *Pen C §§ 484(a), 488* and of receiving the bicycle as stolen property under *Pen C § 496(a)*, the trial court's attempt to correct the dual convictions by striking the petty theft conviction was prejudicial error. Reversal of the conviction for receiving stolen property was required. *People v. Recio (2007, 4th Dist) 156 Cal App 4th 719, 2007 Cal App LEXIS 1795.*

### **(2) LARCENY**

#### **a. GENERALLY**

#### **5. In General**

One who does not participate in larceny or have any knowledge of it whatever prior to or at time of its commission, but afterwards receives stolen goods into his possession, does not thereby become guilty of larceny. *People v. Maxwell (1864) 24 Cal 14, 1864 Cal LEXIS 161.*

Asportation and intent to steal are necessary elements in larceny. *People v. Murphy (1873) 47 Cal 103, 1873 Cal LEXIS 266*, overruled *People v. Ditson (1962) 57 Cal 2d 415, 20 Cal Rptr 165, 369 P2d 714, 1962 Cal LEXIS 185.*

Robbery includes larceny. *People v. Nelson (1880) 56 Cal 77, 1880 Cal LEXIS 354.*

That type of theft formerly called larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. *People v. De Coursey (1882) 61 Cal 134, 1882 Cal LEXIS 559.*

The stealing of gold dust from a mining claim may constitute larceny. *People v. Salvador (1886) 71 Cal 15, 11 P 801, 1886 Cal LEXIS 512.*

The contention that money taken was in satisfaction of claims against the person from whom it was appropriated presents an issuable defense to charge of larceny. *People v. Eastman (1888) 77 Cal 171, 19 P 266, 1888 Cal LEXIS 653.*

The taking of another's property under a mistaken idea of a legal right thereto, honestly entertained, does not amount to theft. *People v. Eastman (1888) 77 Cal 171, 19 P 266, 1888 Cal LEXIS 653.*

The taking of gold ore is that element of theft formerly termed larceny, although it may not have been severed from the earth prior to the taking. *People v. Opie (1899) 123 Cal 294, 55 P 989, 1899 Cal LEXIS 1064.*

Receiving or disposing of stolen property is not larceny. *People v. Disperati (1909, Cal App) 11 Cal App 469, 105*

*P 617, 1909 Cal App LEXIS 126.*

Where one feloniously took money from another and used it in his business, a subsequent agreement to make the taking a loan was not a defense to the crime of theft. *People v. Hill (1934, Cal App) 2 Cal App 2d 141, 37 P2d 849, 1934 Cal App LEXIS 1392.*

Where the wrongful possession of the victim's property completes the offense, as in larceny, a series of transactions are often said to constitute one offense. *People v. Stanford (1940) 16 Cal 2d 247, 105 P2d 969, 1940 Cal LEXIS 305.*

In order that thing may be subject of larceny, it is only necessary that it possess some intrinsic value. *People v. Quiel (1945, Cal App) 68 Cal App 2d 674, 157 P2d 446, 1945 Cal App LEXIS 818.*

Defendant failed to establish that his conviction of violation of this section deprived him of property without due process under the theory that he had a contractual right to possess the automobile he was charged with stealing, where the agreement under which he was permitted to take the automobile, to secure his wife's consent to the purchase, did not constitute a contract of sale, he never made any payment and remained in possession of the automobile until it was found by the police about eight months later. *People v. Gerundo (1952, Cal App) 112 Cal App 2d 797, 247 P2d 374, 1952 Cal App LEXIS 1104, cert den (1953) 344 US 936, 73 S Ct 507, 97 L Ed 720, 1953 US LEXIS 2420.*

Severance of oil from another's land with felonious intent is prohibited. *Victory Oil Co. v. Hancock Oil Co. (1954, Cal App) 125 Cal App 2d 222, 270 P2d 604, 1954 Cal App LEXIS 1869.*

Essential elements of crime of grand theft are: (1) taking of thing which is subject matter of crime from owner into possession of defendant without consent of owner or claim of right; (2) asportation of subject matter; (3) subject matter taken and carried away must be property of another; and (4) taking and carrying away must be with intent to deprive owner of his property wholly and permanently. *People v. Torres (1962, Cal App 1st Dist) 201 Cal App 2d 290, 20 Cal Rptr 315, 1962 Cal App LEXIS 2594, cert den (1962) 371 US 850, 9 L Ed 2d 86, 83 S Ct 89, 1962 US LEXIS 808.*

Elements of theft by larceny are: taking of thing from owner into thief's possession without owner's consent; asportation; taking and carrying away of property of another with intent, without claim or right, to deprive him of it wholly and permanently. *Callan v. Superior Court of San Mateo County (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.*

Real property cannot be subject of larceny. *Callan v. Superior Court of San Mateo County (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.*

Essential elements of larceny are taking and asportation of property from possession of another without his consent and with intent, without claim or right, to wholly deprive owner or possessor of possession thereof. *People v. Earle (1963, Cal App 2d Dist) 222 Cal App 2d 476, 35 Cal Rptr 265, 1963 Cal App LEXIS 1692.*

Since one intentionally defrauding the provider of telephone services to avoid paying the service charge, by using an existing telephone number without the authority of the subscriber thereto, commits theft (*Pen C § 502.7, subd. (a)*), a defendant was properly charged with burglary where it was alleged he entered the victim's home to place a long distance call without the victim's consent. *Pen C § 490a*, not only changed *Pen C § 484*, so that the word "larceny" formerly used therein became superseded by the word "theft," but plainly means that the word "larceny" in *Pen C § 459* (burglary), shall now be read and interpreted as if the word "theft" were substituted. Because the word "theft" now encompasses acts in addition to those containing the elements of common law larceny, some of which do not require any intent to permanently deprive a person of property, one may commit theft requisite for burglary by committing an act not containing that element. The act of defrauding specified in § 502.7, subd. (a)(1), is a theft akin to false pretenses and is sufficient to set aside the theft element in an allegation of burglary. *People v. Dingle (1985, Cal App 4th Dist) 174 Cal App 3d 21, 219 Cal Rptr 707, 1985 Cal App LEXIS 2719.*

Prosecution's appeal from an order dismissing a charge of conspiracy to manufacture methamphetamine in violation of *Pen C* § 182(a)(1) did not become moot when defendant pleaded guilty to possession of pseudoephedrine with intent to manufacture methamphetamine in violation of *H & S C* § 11383(c)(1) and to petty theft with a prior conviction in violation of *Pen C* §§ 484, 666; because these crimes were not lesser included offenses of conspiracy under the elements test, *Pen C* § 1023 did not bar a subsequent prosecution for conspiracy. *People v. Herrera* (2006, *Cal App 4th Dist*) 136 *Cal App 4th* 1191, 39 *Cal Rptr 3d* 578, 2006 *Cal App LEXIS* 216, review denied (2006, *Cal*) 2006 *Cal LEXIS* 7187.

Prosecution's appeal from an order dismissing a charge of conspiracy to manufacture methamphetamine in violation of *Pen C* § 182(a)(1) did not become moot when defendant pleaded guilty to possession of pseudoephedrine with intent to manufacture methamphetamine in violation of *H & S C* § 11383(c)(1) and to petty theft with a prior conviction in violation of *Pen C* §§ 484, 666; because these crimes were not lesser included offenses of conspiracy under the elements test, *Pen C* § 1023 did not bar a subsequent prosecution for conspiracy. *People v. Herrera* (2006, *Cal App 4th Dist*) 136 *Cal App 4th* 1191, 39 *Cal Rptr 3d* 578, 2006 *Cal App LEXIS* 216, review denied (2006, *Cal*) 2006 *Cal LEXIS* 7187.

## 6. Taking and Asportation

In that element of theft formerly termed larceny, the gravamen of the offense, in stealing horses, is the taking and removing, it being immaterial whether the asportation be by leading or driving. *People v. Smith* (1860) 15 *Cal* 408, 1860 *Cal LEXIS* 137.

Where one accused of larceny was unable to remove the property because it was securely fastened to the prosecutor's premises, asportation was not proved. *People v. Meyer* (1888) 75 *Cal* 383, 17 *P* 431, 1888 *Cal LEXIS* 555.

If different asportations from the same owner are prompted by one design, one purpose, and one impulse, they are a single act and constitute one offense. *People v. Fleming* (1934) 220 *Cal* 601, 32 *P2d* 593, 1934 *Cal LEXIS* 577.

Carrying of merchandise through checkstand of store without paying for it constituted asportation of goods, since act effectively removed it from store's possession and control, even if only for moment. *People v. Thompson* (1958, *Cal App 2d Dist*) 158 *Cal App 2d* 320, 322 *P2d* 489, 1958 *Cal App LEXIS* 2371.

The theft of a coat from a store was complete, where the thief reduced the coat to his possession although he subsequently failed to remove the coat from the store. *People v. Tijerina* (1969) 1 *Cal 3d* 41, 81 *Cal Rptr* 264, 459 *P2d* 680, 1969 *Cal LEXIS* 190.

The completed crime of larceny-as distinguished from attempted larceny-requires asportation or carrying away of another's property, in addition to the taking thereof. With respect to the alleged offense of larceny of another's goods, the element of asportation is not satisfied unless it is shown that the goods were severed from the possession or custody of the owner, and in the possession of the thief, though it be but for a moment. *People v. Khoury* (1980, *Cal App Dep't Super Ct*) 108 *Cal App 3d Supp* 1, 166 *Cal Rptr* 705, 1980 *Cal App LEXIS* 2104.

## 7. Property of Another; Nonconsent to Taking

One cannot commit larceny by taking his own property. *People v. Mackinley* (1858) 9 *Cal* 250, 1858 *Cal LEXIS* 103.

A mortgagor commits larceny by feloniously taking the property from the lawful possession of the mortgagee. *People v. Stone* (1860) 16 *Cal* 369, 1860 *Cal LEXIS* 232.

One taking his own goods from the possession of a bailee, without the knowledge or consent of the latter and with the intent to charge the bailee, commits that element of theft formerly termed larceny. *People v. Thompson* (1868) 34

*Cal 671, 1868 Cal LEXIS 44.*

Where one hired a horse and agreed not to remove it from San Benito County and to return it after two months, but did not do so and removed it to other counties, larceny was not committed. *People v. Salorse (1882) 62 Cal 139, 1882 Cal LEXIS 709.*

The guardian of an incompetent, in possession of his ward's property, has such an interest therein as will support charge of larceny against the one feloniously depriving him thereof. *Jones v. Jones (1886) 71 Cal 89, 11 P 817, 1886 Cal LEXIS 530.*

Where a police officer, in an effort to learn the identity of suspected thieves, purported to be in a drunken stupor and allowed the defendant to remove from his person certain money, in a prosecution for larceny it was not shown that the prosecutor consented to the asportation. *People v. Hanselman (1888) 76 Cal 460, 18 P 425, 1888 Cal LEXIS 909.*

Where one charged with that element of theft formerly called larceny was given possession of community property by a wife after he had seduced her, the wife's consent to the asportation was not also a consent by the husband, since the wife's adulterous conduct notified the defendant that she was acting against her husband's will. *People v. Swalm (1889) 80 Cal 46, 22 P 67, 1889 Cal LEXIS 855.*

To steal cattle from an agister who takes them from the owner to pasture constitutes that element of theft formerly called larceny. *People v. Buelna (1889) 81 Cal 135, 22 P 396, 1889 Cal LEXIS 998.*

An assistant foreman of a warehouse may commit that element of theft formerly termed larceny by selling the stored property without authority. *People v. Perini (1892) 94 Cal 573, 29 P 1027, 1892 Cal LEXIS 731.*

The removal of money from the pocket of trousers placed under the head of the owner while he sleeps is that element of theft formerly termed larceny. *People v. McElroy (1897) 116 Cal 583, 48 P 718, 1897 Cal LEXIS 591.*

Possession alone, as against one charged with that element of theft formerly termed larceny, is a sufficient interest to justify an allegation and proof of ownership of the property taken. *People v. Kirsch (1928) 204 Cal 599, 269 P 447, 1928 Cal LEXIS 726.*

That an association is a partnership probably does not prevent a member thereof from being guilty of larceny by taking its funds. *People v. Murakami (1932, Cal App) 122 Cal App 221, 9 P2d 583, 1932 Cal App LEXIS 1115.*

That a trustee deposits trust funds to his personal account does not make him guilty of that element of theft formerly termed larceny. *People v. Grana (1934) 1 Cal 2d 565, 36 P2d 375, 1934 Cal LEXIS 413.*

A partner cannot steal from the partnership of which he is a member. *People v. Foss (1936) 7 Cal 2d 669, 62 P2d 372, 1936 Cal LEXIS 692.*

Where one lost over \$1,000 to a gambling house and later entered that house and took therefrom \$200, he was not guilty of theft, since legal title to the money had remained in the defendant. *People v. Rosen (1938) 11 Cal 2d 147, 78 P2d 727, 1938 Cal LEXIS 283, 116 ALR 991.*

Where one paid part of the purchase price on realty, and thereafter leased the premises to other parties, his failure to conclude the purchase or return the consideration for the leases constituted that element of theft formerly termed larceny. *People v. Bianco (1948, Cal App) 84 Cal App 2d 281, 190 P2d 230, 1948 Cal App LEXIS 1192.*

Argument that CC § 23.2 compels the conclusion that the California Civil Code definition of undue influence is applicable in criminal trials goes too far. Restricting larceny to its common law boundaries leaves intact the rules of contract formation in the *California Civil Code*. *People v. Brock (2006, Cal App 1st Dist) 143 Cal App 4th 1266, 49 Cal Rptr 3d 879, 2006 Cal App LEXIS 1575, modified, rehearing denied (2006) 2006 Cal. App. LEXIS 1766.*

Evidence was sufficient to find defendant guilty of theft by a caretaker from an elder under *Pen C § 368(e)*, despite the caretaker's claim that the victim gave permission to taking \$ 17,000 to buy a new sport utility vehicle because there was substantial evidence that the victim was not capable of consenting to the transfer of money. A doctor testified that the victim suffered from cognitive impairment due to Parkinson's disease and medication taken to treat the disease. Although the victim's signature was on the check, the victim could not remember signing the check or going to the bank to make the transfer of funds. *People v. Catley (2007, Cal App 4th Dist) 148 Cal App 4th 500, 55 Cal Rptr 3d 786, 2007 Cal App LEXIS 331*, review denied (2007, Cal) 2007 Cal LEXIS 5332.

## 8. Criminal Intent

Where one was employed by another at his livery stable, and during the employment took two horses and converted them to his own use, that element of theft formerly termed larceny was committed. *People v. Belden (1869) 37 Cal 51, 1869 Cal LEXIS 30*.

Where the defendant and the prosecutor occupied adjoining tracts of land, some of the prosecutor's hogs wandered into the defendant's enclosure, and the defendant took those hogs along with some of his own and sold them, the felonious intent necessary for that element of theft formerly termed larceny was not shown. *People v. Devine (1892) 95 Cal 227, 30 P 378, 1892 Cal LEXIS 805*.

While felonious intent of party taking property of another need not necessarily be intention to convert property to his own use, still it must in all cases be intent wholly and permanently to deprive owners thereof. *People v. Brown (1894) 105 Cal 66, 38 P 518, 1894 Cal LEXIS 1111*.

Where money was placed in certain trunks kept by the defendant, but the keys thereto were always subject to the call of the owner of the money, a conversion of the money to the defendant's own use constituted that element of theft formerly termed larceny. *People v. Montarial (1898) 120 Cal 691, 53 P 355, 1898 Cal LEXIS 836*.

Fraudulent intent is a necessary element of that type of theft formerly called larceny. *People v. Talbot (1934) 220 Cal 3, 28 P2d 1057, 1934 Cal LEXIS 492*.

Where one promised the prosecutor to make restitution for the property taken, and gave a note in settlement therefore but did not pay it, felonious intent sufficient to constitute that element of theft formerly termed larceny existed. *People v. Marble (1937) 8 Cal 2d 139, 64 P2d 135, 1937 Cal LEXIS 254*.

There is no larceny unless it is proven that a taking was with the specific intent to steal, i.e., to appropriate property of another and permanently deprive him of its possession. *People v. Turner (1968, Cal App 2d Dist) 267 Cal App 2d 440, 73 Cal Rptr 263, 1968 Cal App LEXIS 1407*.

The taking of property as mere self-help in the recompense of unliquidated damages amounts to theft, but such a taking with a bona fide intent to recover a liquidated claim might not be so considered. *People v. Holmes (1970, Cal App 2d Dist) 5 Cal App 3d 21, 84 Cal Rptr 889, 1970 Cal App LEXIS 1408*.

Theft by larceny requires a specific intent permanently to deprive the rightful owner of his property. Although the felonious intent of the taker need not necessarily be an intention to convert the property to his own use, still, it must, in all cases, be an intent wholly and permanently to deprive the owner. *People v. Kunkin (1973) 9 Cal 3d 245, 107 Cal Rptr 184, 507 P2d 1392, 1973 Cal LEXIS 187, 57 ALR3d 1199*.

Carjacking (*Penal C § 215*) requires two elements that are not required for theft: that a vehicle be taken from the possession or immediate presence of another, and that such taking be accomplished by means of force or fear. Theft (*Penal C § 484*) requires an element specific intent to permanently deprive a person of property that is not required for carjacking. Accordingly, neither carjacking nor theft is a necessarily included offense of the other, because it is possible to commit either offense without committing the other. Thus, there was no error where defendants were convicted of

both offenses. *People v. Ortega* (1998) 19 Cal 4th 686, 80 Cal Rptr 2d 489, 968 P2d 48, 1998 Cal LEXIS 7629.

The "felonious taking" required for robbery under *Penal C* § 211, as well as that for theft under *Penal C* § 484, is a taking accomplished with felonious intent, that is, the intent to steal, a state of mind that is inconsistent with a good-faith belief that the specific property taken is one's own. When the Legislature incorporated this mental state element into the definition of robbery upon codifying the offense in 1872, it effectively recognized claim of right as a defense to that crime. The question whether that doctrine continues to reflect sound public policy must be addressed to the Legislature and not to the California Supreme Court (*Cal Const Art III* § 3). Nonetheless, there is nothing in the language of § 211 to suggest that the Legislature intended to incorporate into the robbery statute the Butler (*People v. Butler* (1967) 65 Cal 2d 569, 55 Cal Rptr 511, 421 P2d 703, 1967 Cal LEXIS 366, overruled in part as stated *People v. Demetrulias* (2006) 39 Cal 4th 1, 45 Cal Rptr 3d 407, 137 P3d 229, 2006 Cal LEXIS 8352, overruled in part *People v. Tufunga* (1999) 21 Cal 4th 935, 90 Cal Rptr 2d 143, 987 P 2d 168, 1999 Cal LEXIS 7782, overruled in part as stated *Jones v. McGrath* (2007, ED Cal) 2007 US Dist LEXIS 65428) broad extension of the claim-of-right defense to forcible takings perpetrated to satisfy, settle, or otherwise collect on a debt, liquidated or unliquidated. Thus, in the present prosecution for robbery and other crimes, the trial court erred when it refused to give the claim-of-right instruction where the property in question was \$200 that defendant claimed to have taken to his ex-wife's residence to give her for paying debts, and which he had forcibly taken back when it appeared to him that she planned to use the money for other purposes. *People v. Tufunga* (1999) 21 Cal 4th 935, 90 Cal Rptr 2d 143, 987 P 2d 168, 1999 Cal LEXIS 7782.

The intent to take property temporarily, but for so extended a period of time as to deprive the owner of a major portion of its value or enjoyment, satisfied the intent requirement of theft under California law (*Pen C* §§ 459, 484). The rule of lenity did not compel a different result; although true ambiguities were resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it could fairly discern a contrary legislative intent. Here, the language in § 484(a), referring to an intent to "feloniously steal," reasonably construed, adopted the common law intent requirement. That requirement, although often summarized as the intent to deprive another of the property permanently, was satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment. *People v. Avery* (2002) 27 Cal 4th 49, 115 Cal Rptr 2d 403, 38 P3d 1, 2002 Cal LEXIS 250, rehearing denied (2002, Cal) 2002 Cal LEXIS 826.

## **b. BY TRICK OR DEVICE**

### **9. In General**

If one with the owner's consent, obtains possession of goods fraudulently and with the present intent to convert them to his own use, he may be guilty of that element of theft formerly termed larceny. *People v. Tomlinson* (1894) 102 Cal 19, 36 P 506, 1894 Cal LEXIS 595.

To constitute theft by trick or device there must be a taking, an asportation of the thing taken, the thing taken and carried away must be the property of another, and the taking and carrying away must be with an intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently. *People v. McManus* (1960, Cal App 4th Dist) 180 Cal App 2d 19, 4 Cal Rptr 642, 1960 Cal App LEXIS 2310.

In prosecution for theft by trick or device, either ownership or possession of thing taken is sufficient as against wrongdoer. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

To constitute theft by trick or device there must be a taking and transportation of property, property must belong to another, taking and carrying must be with intent, without claim or pretense of right, to deprive owner of his property wholly and permanently, and intent must exist at time of taking. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

Larceny by trick and device is form of theft committed when person by means of fraud, trick, device, artifice, or false promises that he has no intention of performing obtains possession of property owned by another with felonious intent to steal it from owner who does not intend to transfer his title to property to person so obtaining its possession. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.

Elements of theft by trick and device are as follows: obtaining of possession of property of another by some trick or device; intent by person so obtaining possession to convert it to his own use and to permanently deprive owner of it; and intent by owner, although parting with possession to such person, not to transfer his title to that person. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.

### **10. Fraud or Trick**

Inherent in crime of larceny by trick and device is employment of fraud and trickery in obtaining possession of property by one who has preconceived design to appropriate such property to his own use. *People v. Maggart* (1961, Cal App 2d Dist) 194 Cal App 2d 84, 14 Cal Rptr 745, 1961 Cal App LEXIS 1794.

Trick or device in prosecution for theft by trick or device may consist of misrepresentation of some existing or past fact or of promise made without intent to perform. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

Larceny by trick and device is appropriation of property, possession of which was fraudulently acquired. *People v. Allen* (1961, Cal App 2d Dist) 195 Cal App 2d 336, 15 Cal Rptr 713, 1961 Cal App LEXIS 1456.

Although the crimes of larceny by trick and device and obtaining property by false pretenses are much alike, they are aimed at different criminal acquisitive techniques. Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession. In California, the two offenses, with other larcenous crimes, have been consolidated into the single crime of theft (*Pen C § 484*), but their elements have not been changed thereby. While a general verdict of guilt may be sustained on evidence establishing any of the consolidated theft offenses, the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict. *People v. Curtin* (1994, Cal App 1st Dist) 22 Cal App 4th 528, 27 Cal Rptr 2d 369, 1994 Cal App LEXIS 111, review denied (1994, Cal) 1994 Cal LEXIS 1848.

Where defendant entered a store, picked up a shirt from a retail display, carried it to a sales counter, claimed to own it, and asked for a refund of cash or credit, defendant s intent to claim ownership of the shirt and to return it to the store only on condition that the store pay him a refund constituted intent to permanently deprive the store of the shirt within the meaning of the larceny law and, hence, intent to feloniously steal that property within the meaning of *Penal C § 484(a)*. And because the store could not be deemed to have consented to defendant s taking possession of the shirt with intent to steal it, defendant s conduct also constituted trespassory taking within the meaning of the law of larceny. *People v. Davis* (1998) 19 Cal 4th 301, 79 Cal Rptr 2d 295, 965 P2d 1165, 1998 Cal LEXIS 6883.

### **11. Change of Possession for Special Purpose**

Where there has been delivery of property by the owner but no change of legal possession, but custody was given for a special purpose, larceny may be committed. *People v. Raschke* (1887) 73 Cal 378, 15 P 13, 1887 Cal LEXIS 680.

If one puts his property into the hands of another for use or to do some act in relation thereto, a subsequent conversion is larceny. *People v. Johnson* (1891) 91 Cal 265, 27 P 663, 1891 Cal LEXIS 1079.

Where the accused acquires possession of property by fraud or trickery and intends to devote it to a purpose other than that agreed upon, his subsequent conversion of it to his own use, though for the smallest length of time, is a sufficient asportation to sustain a conviction for that element of theft formerly termed larceny. *People v. Edwards*

(1925, Cal App) 72 Cal App 102, 236 P 944, 1925 Cal App LEXIS 387, overruled *In re Estrada* (1965) 63 Cal 2d 740, 48 Cal Rptr 172, 408 P2d 948, 1965 Cal LEXIS 232.

Where the owners of property surrendered possession to the defendant with the understanding that it was to be used for a definite object, and it was not so used and title did not pass, the defendant committed that element of theft formerly termed larceny. *People v. Hennessey* (1927) 201 Cal 568, 258 P 49, 1927 Cal LEXIS 497.

Loan of money induced by fraudulent representation that it will be used for specific purpose, and accompanied by intent to steal, amounts to larceny by trick and device. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.

Larceny amounting to grand theft can be committed by trick or device, such as when the victim of a fraud intends not to pass complete title to his property but that it shall be applied to a special purpose, while the recipient intends to appropriate it to his own use, or when a loan of money, induced by fraudulent representation that it will be used for a specific purpose, is accompanied by an intent to steal, the intent to defraud being a question of fact to be determined from all of the facts and circumstances of the case. *People v. Felsman* (1967, Cal App 2d Dist) 257 Cal App 2d 437, 64 Cal Rptr 870, 1967 Cal App LEXIS 1801.

## 12. Title Not Acquired

When by means of fraud, conspiracy, or artifice, possession of property is obtained with felonious intent, and title so remains in owner, crime is larceny, but if title as well as possession is parted with, crime is that of obtaining property by false pretenses. *People v. Rae* (1885) 66 Cal 423, 6 P 1, 1885 Cal LEXIS 461.

Where one has fraudulently obtained possession of property under the guise of a purchase, and there has been a change of property and a change of possession, larceny cannot be committed. *People v. Raschke* (1887) 73 Cal 378, 15 P 13, 1887 Cal LEXIS 680.

Where one unconditionally paid money to the defendant to reimburse him for an expenditure which he falsely claimed to have made, that element of theft formerly termed larceny was not committed, as title passed. *People v. Beilfuss* (1943, Cal App) 59 Cal App 2d 83, 138 P2d 332, 1943 Cal App LEXIS 285, cert den (1944) 321 US 746, 64 S Ct 529, 88 L Ed 1048, 1944 US LEXIS 1059.

Larceny by trick and device is appropriation of property the possession of which was fraudulently acquired, whereas obtaining property by false pretenses is fraudulent or deceitful acquisition of both title and possession. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

One of distinctions between larceny by trick or device and theft by false pretenses is that in former situation victim intends to transfer possession only, while in theft by false pretenses he intends to transfer both possession and title. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

If possession has been obtained by fraud, trick, or device, and owner intends to part with his title when he gives up possession, offense, if any, is obtaining money by false pretenses; where possession has been obtained through trick or device, with intent, at time party receives property, to convert it to his own use, and owner parts merely with possession and not with title, offense is larceny. *Callan v. Superior Court of San Mateo County* (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.

There are two significant distinctions between theft by trick and device and theft by false pretenses: (1) in theft by trick and device owner intends to part with possession of property but not with title to it, whereas in theft by false pretenses owner intends to part with both; (2) corroboration is required to prove theft by false pretenses but not theft by trick and device. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS

1866.

### 13. Particular Transactions

Where one was induced to conditionally sell property to another through false statements by that other as to his financial condition, and the property was to be used in a business which later was found to be closed and the property removed by the purported purchaser, larceny was committed. *People v. Raschke* (1887) 73 Cal 378, 15 P 13, 1887 Cal LEXIS 680.

Upon obtaining money from another through a bunco game, if it appeared that the prosecutor did not intend to part with the property, the defendant committed that element of theft formerly termed larceny. *People v. Shaughnessy* (1895) 110 Cal 598, 43 P 2, 1895 Cal LEXIS 1104.

Where the defendant falsely represented himself as a member of a collection house, pretended to employ the prosecutor therein, and obtained from him a cash deposit as security for his collections, that element of theft formerly termed larceny was committed. *People v. Campbell* (1899) 127 Cal 278, 59 P 593, 1899 Cal LEXIS 639.

Where one secured a loan from a bank by presenting forged documents and making false statements regarding certain contracts for public improvements, and did not repay the loan but absconded with the money, he committed that element of theft formerly termed larceny. *Security Trust & Sav. Bank v. New York Indem. Co.* (1934) 220 Cal 372, 31 P2d 365, 1934 Cal LEXIS 543.

If an attorney fixes a reasonable fee for his services, and thereafter client is assured that the object of the services will be attained, an effort to obtain an additional amount as reasonable fees is such an unlawful and felonious taking of another's property as will constitute theft. *People v. Hickman* (1939, Cal App) 31 Cal App 2d 4, 87 P2d 80, 1939 Cal App LEXIS 588.

Where one falsely stated that he was organizing a mining company and would sell another five thousand shares of stock for the sum of \$465 and make the purchaser president of the firm, a "sale" induced thereby was a theft. *People v. Dunn* (1940, Cal App) 40 Cal App 2d 6, 104 P2d 119, 1940 Cal App LEXIS 54, cert den (1940) 311 US 701, 61 S Ct 139, 85 L Ed 454, 1940 US LEXIS 150.

Where a client paid an attorney money for a handwriting expert but it was neither paid to such expert nor refunded, the attorney committed the element of theft formerly termed larceny. *Cheleden v. State Bar of California* (1942) 20 Cal 2d 133, 124 P2d 1, 1942 Cal LEXIS 254.

Where the defendant and another tricked the prosecutor out of two hundred dollars through a matching of coins, they committed that element of theft formerly termed larceny by trick or device. *People v. Post* (1946, Cal App) 76 Cal App 2d 511, 173 P2d 48, 1946 Cal App LEXIS 741.

The elements of larceny by trick and device were present where one was induced to give money to another intending that the money be used to fix a horse race, and the other in taking the money intended to appropriate it to his own use and did so appropriate it. *People v. Chamberlain* (1950, Cal App) 96 Cal App 2d 178, 214 P2d 600, 1950 Cal App LEXIS 1342.

### 14. Defenses

Where defendant obtained money from victim by telling him it was for purpose of establishing credit for business venture in Mexico, place of deposit was not immaterial where money was not given to defendant for use by him in connection with his agreement with victim for sharing profits in gold buying and selling business but rather as manager of refining company in which victim had no interest and with understanding that most of money was to remain on deposit in named bank. *People v. Woolson* (1960, Cal App 2d Dist) 181 Cal App 2d 657, 5 Cal Rptr 766, 1960 Cal App

LEXIS 2042.

Even if partnership did exist, in prosecution for theft, defendant, having committed theft by trick or device through such partnership, could not escape criminal liability by reason thereof on theory that victim by becoming member of partnership to which he contributed his money pursuant to defendant's representations, retained such interest in that fund as to preclude dependent's conviction of crime of grand theft by trick or device. *People v. Woolson* (1960, Cal App 2d Dist) 181 Cal App 2d 657, 5 Cal Rptr 766, 1960 Cal App LEXIS 2042.

Even if property is worth consideration paid therefor, this is not defense to prosecution for obtaining property by trick and device, where there is substantial evidence that defendant knowingly made false representations with intent to defraud and with purpose and effect of inducing prosecuting witness to part with something of value. *People v. Maggart* (1961, Cal App 2d Dist) 194 Cal App 2d 84, 14 Cal Rptr 745, 1961 Cal App LEXIS 1794.

Where larceny has been committed by trick and device, neither the promise to repay, nor the intention to do so, will deprive of its criminality the false and fraudulent act in obtaining possession of the property taken. *People v. Felsman* (1967, Cal App 2d Dist) 257 Cal App 2d 437, 64 Cal Rptr 870, 1967 Cal App LEXIS 1801.

### **(3) EMBEZZLEMENT**

#### **15. In General**

Shares of stock constitute property and are subject to embezzlement. *People v. Williams* (1881) 60 Cal 1, 1881 Cal LEXIS 528.

That type of theft formerly called embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. *People v. De Coursey* (1882) 61 Cal 134, 1882 Cal LEXIS 559.

The embezzlement of a horse is a felony. *People v. Salorse* (1882) 62 Cal 139, 1882 Cal LEXIS 709.

Where property is entrusted to another with the power to sell it, and he converts it, or the proceeds thereof, to his own use, he is guilty of that element of theft formerly termed embezzlement. *People v. Doane* (1888) 77 Cal 560, 20 P 84, 1888 Cal LEXIS 745.

The type of theft formerly termed embezzlement is a concept created to remedy two defects in the common-law offense of larceny: (1) where the stolen goods did not get into the prosecutor's possession, or (2) where the goods were acquired by a bailee. *People v. Gallagher* (1893) 100 Cal 466, 35 P 80, 1893 Cal LEXIS 820.

That element of theft formerly termed embezzlement differs from the statutory offense of embezzlement by public officers, as defined in § 424, in that a conviction under that section can be sustained only where it is alleged and shown that the defendant was authorized by law to receive the money appropriated, and that it was his duty under the law to pay it over to the treasurer of the public funds but wilfully omitted to do so. *People v. Westlake* (1899) 124 Cal 452, 57 P 465, 1899 Cal LEXIS 1016.

The statutory definition of that element of theft formerly termed embezzlement does not conflict with § 424, defining the offense of embezzling public moneys by a public official. *People v. Dillon* (1926) 199 Cal 1, 248 P 230, 1926 Cal LEXIS 232.

Where property is entrusted to one with authority to transmute it into property of another kind, including cash, to the use of one who deposits with trusted person, property so entrusted cannot be subject of embezzlement, if transmutation is made, but only the property which results from the change. *People v. Borchers* (1926) 199 Cal 52, 247 P 1084, 1926 Cal LEXIS 237.

Where property is rightfully in one's possession, subsequent fraudulent appropriations thereof, constituting that element of theft formerly termed embezzlement, are usually held to constitute separate offenses. *People v. Stanford* (1940) 16 Cal 2d 247, 105 P2d 969, 1940 Cal LEXIS 305.

Insurer's right to have premiums collected by insurance agent for group insurance policy applied to satisfy its claims under policy is sufficient legal interest in them to support conclusion that agent's fraudulent appropriation of money constitutes embezzlement. *People v. Hedderly* (1954) 43 Cal 2d 476, 274 P2d 857, 1954 Cal LEXIS 266.

Where one honestly receives possession of goods on trust, and, after receiving them, fraudulently converts them to his own use, it is embezzlement under § 503; but where possession has been obtained through trickery or deceit, with intent at time defendant received goods to convert them to his own use, offense is larceny under this section. *People v. Swanson* (1959, Cal App 3d Dist) 174 Cal App 2d 453, 344 P2d 832, 1959 Cal App LEXIS 1720.

Gist of offense of embezzlement is appropriation to one's own use of property delivered to him for devotion to specified purpose other than his own enjoyment of it. *People v. Woolson* (1960, Cal App 2d Dist) 181 Cal App 2d 657, 5 Cal Rptr 766, 1960 Cal App LEXIS 2042.

In a prosecution of a tenant who sold property he took without permission from his apartment, the trial court erred in setting aside the information on the ground that his crime could not be charged under the general theft statute, *Pen C § 484*, because it factually fell within *Pen C § 507*, prohibiting tenant conversions. *Pen C § 507*, provides that a tenant who is entrusted with property and fraudulently converts it to his or her own use is guilty of embezzlement, and, under *Pen C § 490a*, when a statute mentions embezzlement, it must be read and interpreted as if the word "theft" were substituted therefor. Thus, since defendant's crime was embezzlement, it was theft, and as theft it was chargeable as a violation of *Pen C § 484*. Moreover, since there are no conflicts between the elements to prove, or the punishment for, embezzlement under *Pen C § 484*, and embezzlement as defined in *Pen C § 507*, defendant could be charged under *Pen C § 484*, and was also subject to the felony enhancing provisions of *Pen C § 666* (punishment for petty theft after prior conviction). *People v. Artis* (1993, Cal App 4th Dist) 20 Cal App 4th 1024, 25 Cal Rptr 2d 63, 1993 Cal App LEXIS 1216, review denied (1994, Cal) 1994 Cal LEXIS 624.

## 16. Elements

In embezzlement, fraudulent intent is essential. *People v. Treadwell* (1886) 69 Cal 226, 10 P 502, 1886 Cal LEXIS 659.

That one charged with the element of theft formerly termed embezzlement offered to return the property taken is not evidence negating criminal intent. *People v. De Lay* (1889) 80 Cal 52, 22 P 90, 1889 Cal LEXIS 856.

If defendant has embezzled and converted trust moneys to his own use he cannot affect his guilt in eye of the law if he afterwards repents and restores money. *People v. Royce* (1895) 106 Cal 173, 39 P 524, 1895 Cal LEXIS 589.

The essential elements of embezzlement are the fiduciary relation arising when one entrusts property to another, and the fraudulent appropriation thereof by that other. *People v. Gordon* (1901) 133 Cal 328, 65 P 746, 1901 Cal LEXIS 915.

That a bailee committing that element of theft formerly termed embezzlement desired to return the property was no defense, unless the restoration was made before the information was filed. *People v. McLean* (1902) 135 Cal 306, 67 P 770, 1902 Cal LEXIS 793.

One who has fraudulently converted entrusted property, or the proceeds thereof, to his own use is guilty of embezzlement, notwithstanding his intention to restore the embezzled property. *People v. Jackson* (1903) 138 Cal 462, 71 P 566, 1903 Cal LEXIS 702.

In that type of theft formerly termed embezzlement, it is essential that the property misappropriated be entrusted to the defendant and not obtained by him through artifice. *People v. Dougherty (1904) 143 Cal 593, 77 P 466, 1904 Cal LEXIS 863*.

That the accused kept the property under a claim of right is a defense to a prosecution for that element of theft formerly termed embezzlement. *Lee v. Levison (1916) 173 Cal 166, 159 P 438, 1916 Cal LEXIS 382*.

Criminal intent is essential in that element of theft formerly termed embezzlement. *People v. Dillon (1926) 199 Cal 1, 248 P 230, 1926 Cal LEXIS 232*.

An agreement between the person accused of embezzlement and the one from whom the property was taken to convert the taking into a loan constitutes no defense to a criminal action thereon. *People v. Payne (1931, Cal App) 117 Cal App 108, 3 P2d 328, 1931 Cal App LEXIS 394*.

It is no defense to charge of theft by embezzlement that defendant contractor intended to use trust funds, deposited with him for purchase of lots, in construction of houses to be built thereon, that he had no intention of permanently depriving customers of their property, for it is the immediate breach of trust which makes offense. *People v. Braiker (1943, Cal App) 61 Cal App 2d 406, 143 P2d 89, 1943 Cal App LEXIS 666*.

The ability of the defendant to replace the property taken is no defense to a prosecution for that element of theft formerly termed embezzlement. *People v. Jones (1943, Cal App) 61 Cal App 2d 608, 143 P2d 726, 1943 Cal App LEXIS 694, cert den (1944) 323 US 665, 65 S Ct 39, 89 L Ed 541, 1944 US LEXIS 299*.

Offers of restoration, in whole or in part, of money fraudulently appropriated are not a defense but only matters in mitigation of punishment. *People v. Costello (1951, Cal App) 107 Cal App 2d 514, 237 P2d 281, 1951 Cal App LEXIS 1937*.

Elements of embezzlement are: (1) agency, (2) property ownership in principal, (3) possession by agent, (4) conversion by agent, and (5) intent. *People v. Schwenkner (1961, Cal App 4th Dist) 191 Cal App 2d 46, 12 Cal Rptr 408, 1961 Cal App LEXIS 2024*.

In offense of theft by embezzlement, money or property that is subject of offense must have been entrusted to defendants. *Callan v. Superior Court of San Mateo County (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293*.

It is essential to crime of embezzlement that appropriation of embezzled property be with intent to defraud. *People v. Dolbeer (1963, Cal App 1st Dist) 214 Cal App 2d 619, 29 Cal Rptr 573, 1963 Cal App LEXIS 2652*.

One may be guilty of embezzlement where he has aided or abetted actual embezzlement though he does not occupy any fiduciary capacity to one whose property is embezzled. *People v. Dolbeer (1963, Cal App 1st Dist) 214 Cal App 2d 619, 29 Cal Rptr 573, 1963 Cal App LEXIS 2652*.

In prosecution of conspiracy to commit embezzlement there need be no fiduciary relationship between accused and owner of embezzled property; one may be guilty of conspiracy to commit embezzlement when he has allied himself with others to commit embezzlement and overt act has been performed. *People v. Dolbeer (1963, Cal App 1st Dist) 214 Cal App 2d 619, 29 Cal Rptr 573, 1963 Cal App LEXIS 2652*.

## **17. Agents, Brokers, and Attorneys**

An agent can commit that element of theft formerly termed embezzlement by drawing a draft on his principal, payable to a third person. *Ex parte Hedley (1866) 31 Cal 108, 1866 Cal LEXIS 171*.

An agent is not guilty of that element of theft formerly termed embezzlement because of his refusal to pay his principal's money to a person demanding it, unless that person had authority to receive it. *People v. Tomlinson* (1885) 66 Cal 344, 5 P 509, 1885 Cal LEXIS 431.

An attorney is guilty of that element of theft formerly termed embezzlement, if he collects money for his client and appropriates it to his own use. *People v. Treadwell* (1886) 69 Cal 226, 10 P 502, 1886 Cal LEXIS 659.

Where an agent had a large sum entrusted to him by his principal, and converted such sum to his own use, he committed that element of theft formerly termed embezzlement. *People v. January* (1888) 77 Cal 179, 19 P 258, 1888 Cal LEXIS 656.

Where the defendant had a written contract to sell a house, and he sold it for \$300 more than the purchase price and pocketed the difference as commission for his services, he was not guilty of that element of theft formerly termed embezzlement. *People v. Lapique* (1898) 120 Cal 25, 52 P 40, 1898 Cal LEXIS 703.

Where an attorney collected money for a client and appropriated it to his own use, he committed that element of theft formerly termed embezzlement. *People v. Gordon* (1928) 206 Cal 29, 273 P 568, 1928 Cal LEXIS 445.

Where an attorney collected money in settling a partnership and knowingly failed to keep the money in a separate account but subjected it to his personal use, he was guilty of that element of theft formerly termed embezzlement. *Seavey v. State Bar of California* (1935) 4 Cal 2d 73, 47 P2d 281, 1935 Cal LEXIS 499.

Where a real estate broker, acting as agent to exchange real property, obtained an assignment of a mortgage thereon and sold it and converted the money therefor to his own use, he committed that form of theft formerly termed embezzlement. *People v. Atwater* (1942, Cal App) 53 Cal App 2d 118, 127 P2d 609, 1942 Cal App LEXIS 452.

A conviction of grand theft by an attorney was sustained by evidence that an associate of the defendant's client gave a check to the defendant on behalf of such client with which the defendant was to pay a debt of the client, and that the defendant did not pay such debt, but retained the proceeds of the check in satisfaction of a fee which he claimed the client owed him. *People v. Glenn* (1950, Cal App) 96 Cal App 2d 859, 216 P2d 457, 1950 Cal App LEXIS 1458.

## 18. Corporate Officers

Where a secretary of a corporation was given signed, blank checks to fill in for the payment of specified debts, and he filled in sums larger than the indebtedness and converted the whole thereof to his own use, he committed that element of theft formerly termed embezzlement. *People v. Gallagher* (1893) 100 Cal 466, 35 P 80, 1893 Cal LEXIS 820.

A de facto officer of a de facto corporation or a de jure officer of a de jure corporation may commit that element of theft formerly termed embezzlement. *People v. Leonard* (1895) 106 Cal 302, 39 P 617, 1895 Cal LEXIS 604.

On the prosecution of one charged with that element of theft formerly termed embezzling funds from a corporation by an officer thereof, it is sufficient to show that the corporation had a de facto existence. *People v. Ward* (1901) 134 Cal 301, 66 P 372, 1901 Cal LEXIS 763.

A banker fraudulently appropriating the money in the savings accounts to the use of the bank to prevent a failure thereof may commit that element of theft formerly termed embezzlement. *Winchester v. Howard* (1902) 136 Cal 432, 69 P 77, 1902 Cal LEXIS 732.

Where the officers of a corporation take corporate funds for their personal uses, they are guilty of that element of theft formerly termed embezzlement. *People v. Talbot* (1934) 220 Cal 3, 28 P2d 1057, 1934 Cal LEXIS 492.

The failure to return money taken before the indictment was filed completed that element of theft formerly termed embezzlement by an officer of a private corporation, although the defendant intended to return the funds and was financially able to so do. *People v. Talbot* (1934) 220 Cal 3, 28 P2d 1057, 1934 Cal LEXIS 492.

### 19. Partners or Members of Other Associations

A member of an association may embezzle the funds thereof. *People v. Mahlman* (1890) 82 Cal 585, 23 P 145, 1890 Cal LEXIS 605.

A use of money by a member of a firm, with the full consent of all the other members and not for a personal benefit, failed to disclose a criminal intent making the act that element of theft formerly termed embezzlement. *Murphy v. Davids* (1919) 181 Cal 706, 186 P 143, 1919 Cal LEXIS 415.

Where the defendant and four others entered into an agreement to form a club and to use funds derived from the sale of certain tickets for the erection of a clubhouse, and the defendant appropriated such funds to his own use, he was guilty of that element of theft formerly termed embezzlement. *People v. Foss* (1936) 7 Cal 2d 669, 62 P2d 372, 1936 Cal LEXIS 692.

The rule that a partner cannot steal from his partnership applies to embezzlement and to joint ventures. *People v. Oehler* (1970, Cal App 4th Dist) 7 Cal App 3d 685, 86 Cal Rptr 703, 1970 Cal App LEXIS 2205, overruled in part (1978, Cal App 4th Dist) 86 Cal App 3d 987, 150 Cal Rptr 577, 1978 Cal App LEXIS 2146.

A partner can be guilty of fraudulently appropriating partnership property. *Pen C § 484*, defining theft, does not require that property entrusted to one who fraudulently appropriates it be that "of another." *People v. Sobiek* (1973, Cal App 1st Dist) 30 Cal App 3d 458, 106 Cal Rptr 519, 1973 Cal App LEXIS 1176, 82 ALR3d 804, cert den (1973) 414 U.S. 855, 94 S. Ct. 155, 38 L. Ed. 2d 104, 1973 U.S. LEXIS 689.

In a prosecution of a partner for embezzlement of partnership property, the partnership could properly be treated as a separate entity, where defendant was the only person who acted as agent for the partnership. The recent trend of case law is to recognize unincorporated associations as separate legal entities rather than following traditional legal concepts under which a partnership is regarded as an aggregate of individuals. *People v. Sobiek* (1973, Cal App 1st Dist) 30 Cal App 3d 458, 106 Cal Rptr 519, 1973 Cal App LEXIS 1176, 82 ALR3d 804, cert den (1973) 414 U.S. 855, 94 S. Ct. 155, 38 L. Ed. 2d 104, 1973 U.S. LEXIS 689.

### 20. Miscellaneous Particular Persons and Transactions

Where a bailee of property had an intent to steal it at the time he took possession, he was guilty of that element of theft formerly termed embezzlement. *People v. Smith* (1863) 23 Cal 280, 1863 Cal LEXIS 245.

In the prosecution of a public officer for that element of theft formerly termed embezzlement, mere proof of failure to turn over funds collected to the public treasury does not raise a presumption of felonious appropriation. *People v. Carrillo* (1879) 54 Cal 63, 1879 Cal LEXIS 123.

Where one rented a horse and agreed to return it after two months and not to remove it from the county but did not return it and removed it to other counties, he committed the offense of theft formerly called embezzlement. *People v. Salorse* (1882) 62 Cal 139, 1882 Cal LEXIS 709.

The secretary to the Board of State Harbor Commissioners committed that element of theft formerly termed embezzlement by a public officer, when he collected wharfage and tolls and converted the money to his own use. *People v. Gray* (1884) 66 Cal 271, 5 P 240, 1884 Cal LEXIS 755.

If one lawfully receives goods upon trust and afterward fraudulently converts them to his own use, he is guilty of

that element of theft formerly termed embezzlement. *People v. Tomlinson (1894) 102 Cal 19, 36 P 506, 1894 Cal LEXIS 595.*

Where a deputy tax collector received taxes on personalty and converted them to his own use, he committed that element of theft formerly termed embezzlement by a public officer. *People v. Cobler (1895) 108 Cal 538, 41 P 401, 1895 Cal LEXIS 888.*

Where one was the guardian of an insane person and converted such person's funds to his own use, he committed that element of theft formerly termed embezzlement. *People v. Page (1897) 116 Cal 386, 48 P 326, 1897 Cal LEXIS 559.*

On the trial of a tax collector accused of that element of theft formerly termed embezzlement, the People did not have to prove that a statute regulating the tax collector's office required the defendant to pay the money appropriated to another agency. *People v. Westlake (1899) 124 Cal 452, 57 P 465, 1899 Cal LEXIS 1016.*

Where the owner of money gave it to the defendant for safe keeping while he slept, and during the night the defendant converted the money to his own use, he committed that element of theft formerly termed embezzlement. *People v. McMahan (1901) 133 Cal 278, 65 P 571, 1901 Cal LEXIS 901.*

Where the defendant took a diamond ring from the prosecuting witness and stated that he would have rubies inserted and bring it back in nine days but he never came back, he committed that element of theft formerly termed embezzlement. *People v. Gordon (1901) 133 Cal 328, 65 P 746, 1901 Cal LEXIS 915.*

Where one, while in Russia, received money from his employer to be delivered to a particular company, and he appropriated the money to his own use and fled to California, he was guilty of that element of theft formerly called embezzlement. *Grin v. Shine (1902) 187 US 181, 23 S Ct 98, 47 L Ed 130, 1902 US LEXIS 807.*

Where securities were deposited with another and he thereafter, at various times, converted them to his own use, he committed separate acts of that element of theft formerly termed embezzlement. *People v. Barnett (1910, Cal App) 15 Cal App 89, 113 P 879, 1910 Cal App LEXIS 10.*

A contractor who appropriates money paid to him for any use or purpose other than that for which it was received is guilty of that element of theft formerly termed embezzlement. *Runo v. Williams (1912) 162 Cal 444, 122 P 1082, 1912 Cal LEXIS 558.*

A wife may commit that element of theft formerly termed embezzlement against the property of her husband. *People v. Graff (1922, Cal App) 59 Cal App 706, 211 P 829, 1922 Cal App LEXIS 165.*

In prosecution for embezzlement of bonds delivered to defendant in connection with promissory note, when promissory note for which bonds were pledged was paid and defendant failed to comply with demands made upon him for return of bonds, from that moment there existed wrongful conversion amounting to embezzlement. *People v. Tambara (1923) 192 Cal 236, 219 P 745, 1923 Cal LEXIS 342.*

Where property comes into the care of one by virtue of his employment, it is immaterial that the fraudulent appropriation occurs after the employment has ceased. *People v. Sprado (1925, Cal App) 72 Cal App 582, 237 P 1087, 1925 Cal App LEXIS 504.*

To determine whether a bailee disposing of property in accordance with the conditions of his trust, but accompanied by conversion and with a felonious intent, embezzled the property bailed or the proceeds thereof, the point in time when the criminal intent was first conceived usually controls. *People v. Hughes (1926, Cal App) 79 Cal App 697, 250 P 869, 1926 Cal App LEXIS 276.*

Pledgee's application of pledged bonds to his own separate use in excess of his rights as pledgee is illegal conversion of property, and where there has been such conversion, and pledgee has failed to comply with demand for return of bonds after payment of pledgor's debt, there exists wrongful conversion amounting to embezzlement. *People v. Fleming (1934) 220 Cal 601, 32 P2d 593, 1934 Cal LEXIS 577.*

Where money was delivered to defendant for specific purpose of being forwarded to Canada as part of down payment on newsprint, his diversion of money to his own pocket constituted embezzlement. *People v. Hodges (1957, Cal App 2d Dist) 153 Cal App 2d 788, 315 P2d 38, 1957 Cal App LEXIS 1557.*

#### **(4) OBTAINING PROPERTY UNDER FALSE PRETENSES**

##### **22. In General**

That type of theft formerly termed obtaining money or other property by false pretenses is committed against the public and not against the individual. *People v. Martin (1894) 102 Cal 558, 36 P 952, 1894 Cal LEXIS 686.*

It is not necessary to show that accused obtained property, it being sufficient if, induced by his false representations, it is delivered to another for benefit of that other or for benefit of accused. *People v. Woods (1922, Cal App) 59 Cal App 740, 212 P 41, 1922 Cal App LEXIS 160.*

A general intent to defraud does not prevent a series of acts, in obtaining property by that element of theft formerly termed false pretenses, from being separate crimes. *People v. Rabe (1927) 202 Cal 409, 261 P 303, 1927 Cal LEXIS 361.*

Real property may be the subject of property obtained by false pretenses. *People v. Rabe (1927) 202 Cal 409, 261 P 303, 1927 Cal LEXIS 361.*

This section repeals by implication § 532, establishing the offense of obtaining money, property, or labor by false pretenses. *People v. Carter (1933, Cal App) 131 Cal App 177, 21 P2d 129, 1933 Cal App LEXIS 780.*

To whatever extent that it conflicts with § 532a, this section, as amended, constitutes a repeal by implication. *People v. Breyer (1934, Cal App) 139 Cal App 547, 34 P2d 1065, 1934 Cal App LEXIS 683.*

Section 532a does not create an exception to this section, as amended, under the rule that where a general statute contains matter also found in a special statute, and conflicts therewith, the special statute is an exception to the general one. *People v. Breyer (1934, Cal App) 139 Cal App 547, 34 P2d 1065, 1934 Cal App LEXIS 683.*

Where proof in a given case is sufficient to show existence of fraudulent intent or purpose on part of accused to obtain property from another by false or fraudulent representations, the making of first false representations which moved or induced person to whom they were made to part with his property does not immunize defrauding person from punishment for subsequently obtaining from such person other property which was parted with under influence of fraudulent representations which were still operating on mind of defrauded person at time he passed his property into hands of such designing person. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

Ordinary commercial defaults cannot be subject of criminal prosecution, for essence of obtaining property by false pretenses is fraudulent intent of defendant. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

Deceptions deliberately practiced for purpose of obtaining unfair advantage of another is fraud. *People v. McNear (1961, Cal App 2d Dist) 190 Cal App 2d 541, 12 Cal Rptr 124, 1961 Cal App LEXIS 2337.*

To support conviction of theft for obtaining property by false pretenses, it must be shown that defendant made false pretense or representation with intent to defraud owner of his property, and that owner was in fact defrauded. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

Essential element of offense of obtaining money by false representations is that defendant had specific intent to defraud. *People v. Marsh* (1962) 58 Cal 2d 732, 26 Cal Rptr 300, 376 P2d 300, 1962 Cal LEXIS 304.

Elements of theft by false pretenses are that defendant made false pretense or representation, that he did so with intent to defraud owner of his property, and that owner was in fact defrauded in that he parted with his property, both possession and title, in reliance on false representation. *Callan v. Superior Court of San Mateo County* (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.

Real, as well as personal property, may be subject of theft by false pretenses. *Callan v. Superior Court of San Mateo County* (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.

Where defendant obtained money on basis of promises of what he could and would do, defendant acted with fraudulent intent only if he had no intention of keeping his promises. *People v. Roof* (1963, Cal App 2d Dist) 216 Cal App 2d 222, 30 Cal Rptr 619, 1963 Cal App LEXIS 2008.

To support conviction of theft by false pretenses, it must be established that defendant made false pretense or representation, that representation was made with intent to defraud owner of his property, and that owner was in fact defrauded in that he parted with his property in reliance on representation. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.

Only one false pretense is required to constitute offense of obtaining property by false pretenses. *People v. Kassab* (1963, Cal App 2d Dist) 219 Cal App 2d 687, 33 Cal Rptr 494, 1963 Cal App LEXIS 2424.

In prosecution for theft on theory money or property was obtained by false pretenses, it is unnecessary to prove that defendant benefited personally from his fraudulent acquisition. *People v. Causey* (1963, Cal App 2d Dist) 220 Cal App 2d 641, 34 Cal Rptr 43, 1963 Cal App LEXIS 2297, cert den (1964) 376 US 959, 11 L Ed 2d 976, 84 S Ct 981, 1964 US LEXIS 1649.

Contractor's representations on which property owner relied in making progress payments must have been not only false, but knowingly and designedly made, in order to constitute theft. *Norton v. Commissioner* (1964, 9th Cir) 333 F2d 1005, 1964 US App LEXIS 5056.

To support a conviction of theft for obtaining property by false pretenses, it must be shown: (1) that the defendant made a false pretense or representation, (2) that the representation was made with the intent to defraud the owner of his or her property, and (3) that the owner was in fact defrauded in that he or she parted with the property in reliance on the representation. The representation need not be in the form of an oral or written statement; it may also consist of conduct. The false pretense may consist of any act, word, symbol, or token calculated and intended to deceive. It may be either express or implied from words or conduct. Reliance on a false representation may be, and in some cases must be, inferred from the evidence. However, if the evidence establishes that the victim did not rely on the false pretense, a conviction cannot stand. *People v. Whight* (1995, Cal App 3d Dist) 36 Cal App 4th 1143, 43 Cal Rptr 2d 163, 1995 Cal App LEXIS 665.

### **23. Fraudulent Representation or Other Pretense**

False pretense is such fraudulent representation of existing or past fact, by one knowing it to be untrue, as is adapted to induce one to whom it is made to part with something of value. *People v. Wasservogle* (1888) 77 Cal 173, 19 P 270, 1888 Cal LEXIS 654.

"Tricks of trade," though immoral, are not intended to be included in statute against obtaining money under false pretenses, where there is no false representation as to character, quality or quantity of merchandise. *People v. Morphy* (1893) 100 Cal 84, 34 P 623, 1893 Cal LEXIS 752.

To constitute theft by means of false representations and pretenses, false representations must relate to present or past fact. *Peoples v. Ames* (1943, Cal App) 61 Cal App 2d 522, 143 P2d 92, 1943 Cal App LEXIS 682.

A theft by false pretense is committed by taking the property of another by force of an opinion asserted in bad faith and with a design to mislead. *People v. Staver* (1953, Cal App) 115 Cal App 2d 711, 252 P2d 700, 1953 Cal App LEXIS 1727.

In prosecution for grand theft on ground of obtaining money by false pretenses, it is sufficient to prove any single false representation on which victim relied, and the fact that false promises are likewise made is not important. *People v. Bennett* (1953, Cal App) 122 Cal App 2d 244, 264 P2d 664, 1953 Cal App LEXIS 1479.

Inclusion of false promises within this section will not materially encumber business affairs. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

A promise made with intent not to perform is a false or fraudulent representation or pretense within meaning of this section. *People v. Weitz* (1954) 42 Cal 2d 338, 267 P2d 295, 1954 Cal LEXIS 175, cert den (1954) 347 US 993, 74 S Ct 859, 98 L Ed 1126, 1954 US LEXIS 2040, cert den (1955) 350 US 889, 76 S Ct 145, 100 L Ed 783, 1955 US LEXIS 224.

It is not necessary that false representations be made to person defrauded in order to convict one of obtaining property by false pretenses; false representation to agent or clerk is false pretense to principal. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

Defendant's statements with respect to quality of job offered and duration of its roof ceiling ability did not amount to mere "puffing," where evidence of his activities was sufficient to show intent to defraud those to whom he offered his roofing service, in prosecution for conspiracy to obtain money by false pretenses and operation of roofing business. *People v. Docherty* (1960, Cal App 4th Dist) 178 Cal App 2d 33, 2 Cal Rptr 722, 1960 Cal App LEXIS 2556.

Conviction of grand theft by false pretenses can rest either on fraudulent statements of factual character, or on promise made without intent to perform. *People v. Wallace* (1960, Cal App 1st Dist) 182 Cal App 2d 624, 6 Cal Rptr 309, 1960 Cal App LEXIS 2155.

The "direct" acts necessary to constitute attempt to obtain money by false pretenses can be simply the making of misrepresentations calculated to induce victim to part with his property. *People v. Anderson* (1961) 55 Cal 2d 655, 12 Cal Rptr 500, 361 P2d 32, 1961 Cal LEXIS 246, cert den (1961) 368 US 931, 7 L Ed 2d 193, 82 S Ct 368, 1961 US LEXIS 104.

Promise made without intention to perform is misrepresentation of state of mind, and thus misrepresentation of existing fact, and is a false pretense within meaning of this section. *People v. De Casaus* (1961, Cal App 4th Dist) 194 Cal App 2d 666, 15 Cal Rptr 521, 1961 Cal App LEXIS 1863.

Unconditional promises, made without any intention of performing them, constitute actionable fraud. *People v. Allen* (1962, Cal App 2d Dist) 203 Cal App 2d 659, 21 Cal Rptr 789, 1962 Cal App LEXIS 2411.

Representation as to quantity of thing offered for sale may constitute false pretense where it involves statement of fact known to be false. *People v. Kassab* (1963, Cal App 2d Dist) 219 Cal App 2d 687, 33 Cal Rptr 494, 1963 Cal App LEXIS 2424.

The making of a promise to divulge information without an intent to perform the promise may serve as a predicate for theft by false pretenses when the victim, misled by a subsequent concealment, transfers value to the promisor. *People v. Samuel* (1966, Cal App 1st Dist) 245 Cal App 2d 210, 53 Cal Rptr 887, 1966 Cal App LEXIS 1457.

Where representations are promissory in character, such promises, if unconditional and made without intention of performance, may constitute actionable fraud. *People v. Hedrick* (1968, Cal App 2d Dist) 265 Cal App 2d 392, 71 Cal Rptr 352, 1968 Cal App LEXIS 1632.

While mere nonperformance of promise is not enough to constitute fraudulent pretense within law of grand theft, promise made with intent not to perform constitutes false pretense. *People v. Gibson* (1969, Cal App 2d Dist) 275 Cal App 2d 198, 79 Cal Rptr 693, 1969 Cal App LEXIS 1905.

On appeal from a conviction of violation of *Pen C § 484* (theft by false pretenses), based on defendant's ordering and accepting delivery of a large quantity of liquor from several wholesalers with the intent not to pay for it, his contention that a construction of the words in *Pen C § 484*, "representation or pretense" to include silence on his part violated *Pen C § 4*, which states that all provisions of the Penal Code "are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice," was without merit, since silence in the face of a legal duty to speak may be sufficient to constitute the false representation required by the statute, and where, in any event, defendant's false representation was manifested, not by silence, but by his conduct in ordering the liquor. *People v. Rondono* (1973, Cal App 4th Dist) 32 Cal App 3d 164, 108 Cal Rptr 326, 1973 Cal App LEXIS 974.

Former *Pen C § 1110* (see now *Pen C § 532*), providing that no one might be convicted of false pretenses "if the false pretense was expressed in language unaccompanied by a false token or writing," except when the pretense was evidenced by a writing or by two witnesses or by one witness and corroborating circumstances, neither described nor limited the offense of theft by false pretenses (*Pen C § 484*), and did not preclude conviction therefor when the pretense was expressed other than in language. *People v. Rondono* (1973, Cal App 4th Dist) 32 Cal App 3d 164, 108 Cal Rptr 326, 1973 Cal App LEXIS 974.

In the prosecution of a restaurant owner for theft of liquor by false pretenses, defendant's conduct in ordering and accepting large quantities of liquor from several wholesalers, ostensibly for use in his bar and restaurant and without anything to suggest to any of the wholesalers that the orders were out of the ordinary, implied a promise to pay for the liquor, in the absence of any evidence of donative intent, which combined with defendant's intention not to perform, constituted a false representation or pretense within the meaning of *Pen C § 484* (theft by false pretenses). *People v. Rondono* (1973, Cal App 4th Dist) 32 Cal App 3d 164, 108 Cal Rptr 326, 1973 Cal App LEXIS 974.

Even when no oath is involved, reckless disregard for the truth may be deemed the equivalent of intentional falsity. Thus, the crime of theft, as provided by *Pen C § 484*, is committed by one who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money. The statute permits conviction of a defendant who makes such representations knowing them to be false or recklessly and without the information justifying a belief that they were true. *People v. Cook* (1978) 22 Cal 3d 67, 148 Cal Rptr 605, 583 P2d 130, 1978 Cal LEXIS 277, superseded by statute as stated in *People v. Truer* (1984, Cal App 5th Dist) 157 Cal App 3d 345, 203 Cal Rptr 693, 1984 Cal App LEXIS 2209.

#### **24. Victim's Reliance and Resultant Injury**

Conceding that criminal charge of obtaining money under false pretenses may be predicated on representation as to one's title to real estate, yet where it appears that grantee has not relied upon such representations in purchasing land, party making representations is not guilty of crime charged. *People v. Gibbs* (1893) 98 Cal 661, 33 P 630, 1893 Cal LEXIS 974.

A complete loss of property need not be shown to support a charge of obtaining money under false pretenses.

*People v. Jones* (1950) 36 Cal 2d 373, 224 P2d 353, 1950 Cal LEXIS 250.

It is not necessary that false pretenses be sole inducing cause of owner's parting with his property. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

Fact that victim was actually out of pocket need not be shown. *People v. Schmidt* (1956, Cal App 2d Dist) 147 Cal App 2d 222, 305 P2d 215, 1956 Cal App LEXIS 1266.

In determining whether defrauded party really believed and acted on defendant's representation, it is proper to inquire whether they were of character properly to induce belief in his mind or in mind of person of ordinary intelligence. *People v. Phillips* (1960, Cal App 2d Dist) 186 Cal App 2d 231, 8 Cal Rptr 830, 1960 Cal App LEXIS 1623.

While false pretense or representation must have materially influenced owner to part with his property, it need not be sole inducing cause. *People v. Phillips* (1960, Cal App 2d Dist) 186 Cal App 2d 231, 8 Cal Rptr 830, 1960 Cal App LEXIS 1623.

It is not necessary that defrauded party rely entirely on defendant's misrepresentation in parting with his property; false pretense or representation must have materially influenced owner to part with his property, but false pretense need not be sole inducing cause. *People v. Conlon* (1962, Cal App 1st Dist) 207 Cal App 2d 86, 24 Cal Rptr 219, 1962 Cal App LEXIS 1885.

Where aluminum siding salesman, by active misrepresentation and fraud or concealment at time of procuring purchasers' signatures on \$6,000 sales contract, tricked purchasers into signing blank deed of trust form, later used as security contrary to purchasers' expressed intention not to encumber their property, there was something more than unauthorized taking of written instrument; purchasers changed their legal position as result of fraudulent acts of commission and omission which may be made basis of charge of grand theft by false pretenses. *Buck v. Superior Court of Orange County* (1965, Cal App 4th Dist) 232 Cal App 2d 153, 42 Cal Rptr 527, 1965 Cal App LEXIS 1447, 11 ALR3d 1064, cert den *Buck v Superior Court of California* (1965) 382 US 834, 86 S Ct 77, 15 L Ed 2d 77, 1965 US LEXIS 697.

In a grand theft prosecution of two defendants for obtaining a contract for repair of a residence by false representations in which it appeared that the contract obtained had never been accepted in the manner prescribed therein and as a consequence no property was taken from the victim, a provision of the writing for a fee upon cancellation of the contract did not impose an obligation on the victim so as to constitute the transaction a theft where the contract never came into existence, and if the provision referred to the cancellation of an "offer" it was without a consideration and not binding on the victim. *People v. Layman* (1968, Cal App 4th Dist) 259 Cal App 2d 404, 66 Cal Rptr 267, 1968 Cal App LEXIS 1983.

To support a conviction of the crime of theft by false representations, the representations need not be the exclusive inducement, but it is sufficient if they materially influence the victim to part with his money. *People v. Lynam* (1968, Cal App 4th Dist) 261 Cal App 2d 490, 68 Cal Rptr 202, 1968 Cal App LEXIS 1769.

The crime of theft by false pretenses is committed when, by means of such false pretenses, the fraud intended is consummated by obtaining possession of the property sought; the victim is merely a witness whose ultimate financial gain or loss, in the circumstances, is immaterial; financial loss is not a necessary element of the crime. *People v. Brady* (1969, Cal App 4th Dist) 275 Cal App 2d 984, 80 Cal Rptr 418, 1969 Cal App LEXIS 2008.

The degree of a theft by false pretenses is tested not by the ultimate loss to the victim but by the amount of money received by the accused. *People v. Ross* (1972, Cal App 2d Dist) 25 Cal App 3d 190, 100 Cal Rptr 703, 1972 Cal App LEXIS 1021.

In order for there to be a theft by false pretenses, the victim must pass title to his or her property in reliance on the swindler's misrepresentation. Even though a false representation is made and property obtained by the person making the representation, no prosecution will lie where the complainant parted with his or her property as the result of some cause other than such false representation. The reliance or causation element of the crime may be found lacking in three typical situations: where the complainant knew the representation was false, or did not believe it to be true; where, even if the complainant believed it, he or she did not rely on it, but personally investigated or sought and relied on other advice; and where, although some false representations are proved, the complainant parted with his or her money or property for other reasons or in reliance on other representations not shown to be false. However, although the false pretense must have materially influenced the owner to part with his or her property, it need not be the sole inducing cause. Further, the victim need not investigate, although, where he or she does investigate the representation and relies solely on that investigation rather than on the defendant's representation, there is no crime of theft by false pretenses. On the other hand, the causal chain of reliance is not broken merely because the victim undertakes some investigation. So long as the victim does not rely solely on his or her own investigation, sufficient reliance is shown if the victim relied in part on the defendant's representations. *People v. Whight (1995, Cal App 3d Dist) 36 Cal App 4th 1143, 43 Cal Rptr 2d 163, 1995 Cal App LEXIS 665.*

*Penal C § 484(a)* defines the crime of theft of real property by false pretense. Proof of this crime requires the prosecution to establish that (1) defendant made a false pretense or representation, (2) he did so with intent to defraud the owner of property, and (3) the owner was in fact defrauded. Further, the false pretense or representation must have materially influenced the owner to part with his property, even though it need not have been the sole inducing cause. Thus, defendant in a prosecution for theft of real property was improperly convicted where the facts adduced at trial did not include any evidence that any pretense or representation was made to any of the purported grantors. Even though there was substantial evidence that defendant caused the recordation of 10 forged deeds to 11 parcels of real property, there was no evidence that he made any false representation. Defendant had no contact with any of the grantors; indeed, six of them had died prior to the dates on which their forged signatures were affixed to deeds that were later recorded. *People v. Sanders (1998, Cal App 2d Dist) 67 Cal App 4th 1403, 79 Cal Rptr 2d 806, 1998 Cal App LEXIS 972.*

## **25. Transfer of Title**

If the title to property obtained by fraud or deceit has passed, that type of theft formerly termed obtaining goods under false pretenses is committed. *People v. Campbell (1899) 127 Cal 278, 59 P 593, 1899 Cal LEXIS 639.*

Where evidence in prosecution for grand theft shows that each prosecuting witness intended to pass both title and possession of money and property to person to whom she delivered possession, type of theft, if any, was that of obtaining property by false pretenses. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

Conviction of theft by false pretenses was not shown to be erroneous by fact that victims intended to part with title to their property, if they so intended on understanding that they would get clear title to certain other property in exchange, which they did not get. *People v. Zucker (1960, Cal App 2d Dist) 177 Cal App 2d 172, 2 Cal Rptr 112, 1960 Cal App LEXIS 2443.*

Theft by false pretenses is committed when person knowingly and with design uses some fraudulent representation or pretense as means of obtaining property of another who, in parting with it, intends to transfer title as well as possession to person obtaining possession. *People v. Riley (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.*

Crime of theft by false pretenses, as distinguished from crime of theft by trick and device, requires transfer of title of thing stolen. *People v. Aiken (1963, Cal App 2d Dist) 222 Cal App 2d 45, 34 Cal Rptr 828, 1963 Cal App LEXIS 1622.*

Defendant was properly convicted of theft by false pretenses, notwithstanding that the victim retained a security interest in the stolen property. Defendant, a construction contractor, ordered lumber on credit from lumber companies for a project that did not in fact exist, and defendant then purported to sell the lumber to a coperpetrator. A victim's retention in a security interest in the taken property does not prevent the passage of title so as to convert a theft by means of false pretenses to theft on a theory of larceny by trick. It would be against public policy to allow any item that is the subject of a security interest to be taken by a thief who uses false pretenses. Despite the security interest the victim retained, defendant intended to obtain, and did obtain, sufficient title to support a conviction for false pretenses. Moreover, even if there was error in the pleadings and jury instructions, any error was harmless since it added to the People's burden the additional requirement of proving corroboration. *People v. Counts* (1995, *Cal App 1st Dist*) 31 *Cal App 4th* 785, 37 *Cal Rptr 2d* 425, 1995 *Cal App LEXIS* 36.

## 26. Related and Included Offenses

That *Unempl. Ins C § 2101*, which classifies as a misdemeanor fraudulent representation to obtain unemployment benefits, applies to completed, as well as attempted, unemployment insurance fraud and therefore precludes prosecution of such fraud as theft by false pretenses under *Pen C § 484*, is established by reference to other sections of the Unemployment Insurance Code. *Unempl. Ins C § 1263*, subd (c) provides for suspension of payment of benefits to a person prosecuted under § 2101, while §§ 1375, 2113, contemplate that overpayments may actually be made as a result of violations of § 2101, and § 2113, further provides that no one who has been convicted on violating § 2101, within the preceding three years may be offered an opportunity to restore benefits in lieu of criminal prosecution. *People v. Ruster* (1976) 16 *Cal 3d* 690, 129 *Cal Rptr* 153, 548 *P2d* 353, 1976 *Cal LEXIS* 250, 80 *ALR3d* 1269, overruled *People v. Jenkins* (1980) 28 *Cal 3d* 494, 170 *Cal Rptr* 1, 620 *P2d* 587, 1980 *Cal LEXIS* 232).

Section 182, subd 4, relating to conspiracies to obtain money or property "by false pretenses or by false promises," does not indicate that legislature did not regard false promises as "false pretenses" within meaning of this section and § 532, but merely indicates that such words were probably used out of an abundance of caution to insure carrying out of legislative purpose to include all such acts within scope of § 182. *People v. Ashley* (1954) 42 *Cal 2d* 246, 267 *P2d* 271, 1954 *Cal LEXIS* 171, cert den (1954) 348 *US* 900, 75 *S Ct* 222, 99 *L Ed* 707, 1954 *US LEXIS* 1437.

Obtaining property by false pretenses, where victim intends to part with title to his property is distinguished from larceny by fraud, trick, or device, where victim intends to part with possession only, making of misrepresentations with requisite specific intent can constitute attempt to commit either type of theft. *People v. Anderson* (1961) 55 *Cal 2d* 655, 12 *Cal Rptr* 500, 361 *P2d* 32, 1961 *Cal LEXIS* 246, cert den (1961) 368 *US* 931, 7 *L Ed 2d* 193, 82 *S Ct* 368, 1961 *US LEXIS* 104.

In prosecution for obtaining funds by false pretenses under aid to needy children program, it was reversible error to grant defendants' motion for new trial on ground that since aid to needy children statutes (*W & I C §§ 1500 et seq.*) referred to prosecutions for other crimes, particularly perjury, but did not provide specifically for prosecutions in aid to needy children cases under theft statute, Legislature intended that none should lie, where evidence established each element of crime with which defendants were charged and provisions of Welfare and Institutions Code and this code were not antagonistic. *People v. Ryerson* (1962, *Cal App 3d Dist*) 199 *Cal App 2d* 646, 19 *Cal Rptr* 22, 1962 *Cal App LEXIS* 2878.

Theft statute (*Pen C § 484*) as applied to fraudulent misrepresentations as to cures for cancer had not been preempted by former *H & S C § 1714* (see now *H & S C § 109365*), condemning as misdemeanor false representation that device, substance or treatment was effective to arrest or cure cancer; it had to be inferred that Legislature intended misdemeanor statute to supplement, not supplant, Penal Code section, since latter required proof that victim relied on defendant's representations and that he actually parted with value, while former did not. *People v. Phillips* (1966) 64 *Cal 2d* 574, 51 *Cal Rptr* 225, 414 *P2d* 353, 1966 *Cal LEXIS* 288, overruled *People v. Flood* (1998) 18 *Cal 4th* 470, 76 *Cal Rptr 2d* 180, 957 *P2d* 869, 1998 *Cal LEXIS* 4033.

Misrepresentation of welfare eligibility constitutes a crime both under special legislation (*Welf & Inst Code*, §§ 11265, 11482-formerly §§ 1564, 1577) and under the general grand theft statute (*Pen C* §§ 484, 487). *Parrish v. Civil Service Com.* (1967) 66 Cal 2d 260, 57 Cal Rptr 623, 425 P2d 223, 1967 Cal LEXIS 301.

The special provision of *Welf & Inst Code*, § 11482, relating to fraud in obtaining aid to dependent children, precludes the prosecution of such fraud under the older general theft provision of *Pen C* § 484. *People v. Gilbert* (1969) 1 Cal 3d 475, 82 Cal Rptr 724, 462 P2d 580, 1969 Cal LEXIS 223, superseded by statute as stated in *People v. Crow* (1992, Cal App 1st Dist) 15 Cal App 4th 1459, 4 Cal App 4th 1473, 6 Cal Rptr 2d 574, 1992 Cal App LEXIS 444.

## 27. Defenses

Notwithstanding property may be restored by civil action, if one is induced to part with his property by false pretenses offense is committed. *People v. Bryant* (1898) 119 Cal 595, 51 P 960, 1898 Cal LEXIS 679.

Since theft by false pretenses is against public and not against one defrauded, carelessness of such person will not ordinarily be defense. *People v. Skidmore* (1899) 123 Cal 267, 55 P 984, 1899 Cal LEXIS 1056.

In prosecution for obtaining money under false pretenses, guilt of accused does not depend upon degree of folly or credulity of person defrauded. *People v. Cummings* (1899) 123 Cal 269, 55 P 898, 1899 Cal LEXIS 1057.

It is no valid defense to show that some law made it illegal for defendant to complete transaction. *People v. Raines* (1944, Cal App) 66 Cal App 2d 960, 153 P2d 424, 1944 Cal App LEXIS 801.

A defendant charged with obtaining money under false pretenses cannot escape liability on the ground that his victims entered into partnership with him and retained an interest in the funds which they contributed, where his conversion of a partnership fund to his own use occurred while they were still under the influence of the false pretenses. *People v. Jones* (1950) 36 Cal 2d 373, 224 P2d 353, 1950 Cal LEXIS 250.

Even if property is worth consideration paid therefor, this is not defense to prosecution for obtaining real property by false pretenses, where there is substantial evidence that defendant knowingly made false representations with intent to defraud and with purpose and effect of inducing prosecuting witness to part with something of value. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

In prosecution of chiropractor for conspiracy to commit theft by false pretenses as to effectiveness of certain machines used by him in treatment of cancer and certain other diseases, fact that treatments may have been worth consideration paid is no defense. *People v. Schmitt* (1957, Cal App 2d Dist) 155 Cal App 2d 87, 317 P2d 673, 1957 Cal App LEXIS 1251.

Conviction of theft based on false representations cannot be sustained if false representations were made in actual and reasonable belief that they were true; burden of proof on this issue is on prosecution. *People v. Marsh* (1962) 58 Cal 2d 732, 26 Cal Rptr 300, 376 P2d 300, 1962 Cal LEXIS 304.

When money is obtained by use of false pretenses, subsequent restitution or repayment is not defense. *People v. Braver* (1964, Cal App 2d Dist) 229 Cal App 2d 303, 40 Cal Rptr 142, 1964 Cal App LEXIS 987, 10 ALR3d 565.

The crime of obtaining property by false pretenses is committed if the victim is induced to part with money or property in exchange for other property fraudulently misrepresented; it is not a defense that no permanent loss occurred; the victim is defrauded if he did not get what he bargained for, even though he may not have suffered a net financial loss; he is defrauded even though he may eventually recover the money or property taken from him, and subsequent restoration, restitution or repayment is no defense. *People v. Brady* (1969, Cal App 4th Dist) 275 Cal App 2d 984, 80 Cal Rptr 418, 1969 Cal App LEXIS 2008.

One accused of criminal fraud by false pretenses cannot escape responsibility by merely using an innocent agent as his instrumentality in soliciting through misrepresentation; it is no defense that the criminal acts were actually performed by others or that the defendant is not shown to have directly benefited personally. *People v. Taylor* (1973, Cal App 2d Dist) 30 Cal App 3d 117, 106 Cal Rptr 216, 1973 Cal App LEXIS 1143.

## 28. Particular Persons and Transactions

Where one purchased horses on credit and gave a note therefor, and the seller relied on the resale of the horses by the defendant for his pay, that element of theft formerly termed obtaining property under false pretenses was not committed, although the defendant falsely represented that he had money in the bank equal to the purchase price. *People v. Mauritzen* (1890) 84 Cal 37, 24 P 112, 1890 Cal LEXIS 756.

Where one obtains goods from another upon the representation that he has a large cash capital and owes nothing, but in truth he is virtually insolvent, he is guilty of that element of theft formerly termed obtaining property under false pretenses, although at the time he obtained the goods he honestly intended to pay for them and believed that he would be able to so do. *People v. Wieger* (1893) 100 Cal 352, 34 P 826, 1893 Cal LEXIS 798.

Where the defendant falsely represented to the woman defrauded that a judgment for a large sum of money had been obtained against her in another state and she was induced thereby to transfer her property to the defendant in order to avoid having it subjected thereto, that element of theft formerly termed obtaining property under false pretenses was committed. *People v. Martin* (1894) 102 Cal 558, 36 P 952, 1894 Cal LEXIS 686.

Where one obtained the signature of another to a promissory note under the false pretense that he was obtaining his signature to an application for a policy of life insurance, that element of theft formerly termed obtaining property under false pretenses was committed. *People v. Skidmore* (1899) 123 Cal 267, 55 P 984, 1899 Cal LEXIS 1056.

Where one obtained money from a county under an ordinance offering a bounty for squirrels killed therein, and the squirrels were killed elsewhere but an affidavit was made stating the contrary, and the squirrel tails were submitted as evidence, that element of theft formerly termed obtaining money under false pretenses was committed, although the ordinance under which the bounty was paid was invalid. *People v. Howard* (1901) 135 Cal 266, 67 P 148, 1901 Cal LEXIS 690.

Where one obtained a loan by transferring notes belonging to his wife, and falsely represented that he had a power of attorney so to do, he was not guilty of that element of theft formerly termed obtaining money under false pretenses since the transfer of the note would be valid without a power of attorney, making the representation relied on false but not material. *People v. Tufts* (1914) 167 Cal 266, 139 P 78, 1914 Cal LEXIS 453.

Where, on three occasions, one removed property from the same person by the same false representation, he committed separate offenses. *People v. Rabe* (1927) 202 Cal 409, 261 P 303, 1927 Cal LEXIS 361.

The receipt of unemployment compensation upon a false application therefor may be a theft. *People v. Serna* (1941, Cal App) 43 Cal App 2d 106, 110 P2d 492, 1941 Cal App LEXIS 618, overruled *People v. Bailey* (1961) 55 Cal 2d 514, 11 Cal Rptr 543, 360 P2d 39, 1961 Cal LEXIS 231.

Loan transactions ordinarily create civil rights and obligations, and it is only where evidence is sufficient to show larceny by trick or device or the obtaining of money under false pretenses that borrower may be held criminally liable. *People v. Lautenschlager* (1943, Cal App) 56 Cal App 2d 615, 133 P2d 8, 1943 Cal App LEXIS 224.

In prosecution for theft for obtaining loan under fraudulent representations that property was unencumbered, fact that part of property was actually free and clear and of sufficient value to protect loan was no defense, as financial loss was not necessary element of crime. *People v. Talbott* (1944, Cal App) 65 Cal App 2d 654, 151 P2d 317, 1944 Cal App LEXIS 758, cert den (1945) 324 US 845, 65 S Ct 677, 89 L Ed 1406, 1945 US LEXIS 2453.

False representations by the defendant that he was the owner of race horses and that he would use the money obtained from the victim to fix a horse race were representations of existing facts and not merely predictions or opinions regarding a future event, where he intended at that time to use the money for other purposes. *People v. Chamberlain* (1950, Cal App) 96 Cal App 2d 178, 214 P2d 600, 1950 Cal App LEXIS 1342.

While loan transactions ordinarily create only civil rights and obligations, borrower may be held criminally liable where evidence is sufficient to show larceny by trick and device or obtaining of money under false pretenses. *People v. Reed* (1952, Cal App) 113 Cal App 2d 339, 248 P2d 510, 1952 Cal App LEXIS 1368.

If statements relative to volume of business are made by a person knowing them to be untrue with intent to defraud the one to whom made, and the person to whom the statements are made relies on them and is induced thereby to part with something of value, the offense of theft, obtaining property by false pretenses, is committed. *People v. Platt* (1954, Cal App) 124 Cal App 2d 123, 268 P2d 529, 1954 Cal App LEXIS 1707.

In prosecution for theft by false pretenses under theory that defendant falsely represented that he would provide victim with pasture land on ranch, fact that counsel advised that defendant could, under his lease of ranch, charge third persons for pasturing cattle thereon does not establish his good faith in agreeing to do so after receiving notice of termination of his lease, and while unable to pay delinquent rent and with no intent to cure default with money advanced for pasturage. *People v. Rocha* (1955, Cal App 2d Dist) 130 Cal App 2d 656, 279 P2d 836, 1955 Cal App LEXIS 1953.

Representations by means of advertisement directed to general public may constitute guilt of obtaining money under false pretenses. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

Person commits fraud by offering to sell interest in business that has not been established and painting rosy picture of its future based on false statements that prospective purchaser believes to be true. *People v. Carlin* (1960, Cal App 1st Dist) 178 Cal App 2d 705, 3 Cal Rptr 301, 1960 Cal App LEXIS 2646.

Theft was committed through false personation immediately when person, falsely representing himself as person sent by employee of retail jeweler, obtained diamond jewelry from diamond salesman for examination and approval. *Freedman v. Queen Ins. Co.* (1961) 56 Cal 2d 454, 15 Cal Rptr 69, 364 P2d 245, 1961 Cal LEXIS 308.

In complaint filed by city employees against city and their superintendent, alleging that defendants had required plaintiffs to work overtime with knowledge that such requirement violated city ordinances and had made knowingly false representations that such ordinances did not apply, further allegation that taking of plaintiffs' labor by fraud in this manner constituted theft under this section was mere conclusion of law. *Slocomb v. Los Angeles* (1961, Cal App 2d Dist) 197 Cal App 2d 794, 17 Cal Rptr 529, 1961 Cal App LEXIS 1411.

Fact that determination to grant assistance to applicants for aid to needy children is, in final analysis, predicated solely on recommendation of social worker in charge of case does not remove prosecution for theft by false pretenses from provisions of this section, since social worker's recommendation must necessarily be based on information received from applicant or otherwise, and if such information has been given knowingly with intent to defraud, and aid is given that would not have been given had true facts been known, crime has been committed. *People v. Ryerson* (1962, Cal App 3d Dist) 199 Cal App 2d 646, 19 Cal Rptr 22, 1962 Cal App LEXIS 2878.

Person obtaining goods through forged sales slip and use of stolen credit card commits several crimes including theft of goods in violation of this section, violation of § 484a, theft of credit card, and forgery in violation of § 470. *People v. Searcy* (1962, Cal App 1st Dist) 199 Cal App 2d 740, 18 Cal Rptr 779, 1962 Cal App LEXIS 2889, 90 ALR2d 814.

False characterization of himself by magazine subscription solicitor as veteran, orphan or epileptic in order to

secure order for subscription by appealing to sympathy of person solicited, is not akin to type of "puffing" of merchandise which is recognized in marts of trade; such misrepresentation is sufficient to form basis of charge of obtaining money or property under false pretenses. *People v. Conlon* (1962, Cal App 1st Dist) 207 Cal App 2d 86, 24 Cal Rptr 219, 1962 Cal App LEXIS 1885.

Obtaining of welfare funds through false affidavits constitutes theft by false representation or false pretense as defined by this section. *People v. Darling* (1964, Cal App 4th Dist) 230 Cal App 2d 615, 41 Cal Rptr 219, 1964 Cal App LEXIS 914.

Grand theft charges based on obtaining of welfare funds through false affidavits did not constitute embezzlement rather than false pretenses where welfare funds were obtained by false representations and receipt thereof did not create fiduciary relationship basic to offense of embezzlement. *People v. Darling* (1964, Cal App 4th Dist) 230 Cal App 2d 615, 41 Cal Rptr 219, 1964 Cal App LEXIS 914.

Charges of grand theft may be premised on obtaining welfare funds by false pretenses, which constitute theft by false representation or by false pretenses as defined in *Pen C § 484*. *People v. Ford* (1965, Cal App 4th Dist) 236 Cal App 2d 438, 46 Cal Rptr 144, 1965 Cal App LEXIS 838, appeal dismissed (1966) 384 US 100, 16 L Ed 2d 396, 86 S Ct 1365, 1966 US LEXIS 1761.

Evidence of guilt of charge of grand theft and requisite fraudulent intent were present where defendant had knowledge that her payments by welfare agency would be reduced according to income of man, not her husband, if agency knew that he was living in her home, and her promises, made without intent to keep them, to inform agency if man were to return to her home. *People v. Ford* (1965, Cal App 4th Dist) 236 Cal App 2d 438, 46 Cal Rptr 144, 1965 Cal App LEXIS 838, appeal dismissed (1966) 384 US 100, 16 L Ed 2d 396, 86 S Ct 1365, 1966 US LEXIS 1761.

There was no false pretense in receiving welfare funds (aid to needy children) without notifying county welfare department that unrelated female adult lived with family where female was not residing with family when eligibility was established and recipient was not asked to notify county welfare department of such change of circumstance. *People v. Martin* (1965, Cal App 4th Dist) 237 Cal App 2d 770, 47 Cal Rptr 337, 1965 Cal App LEXIS 1317.

The provisions of *Veh. Code, § 11713*, subd. (n), making it a misdemeanor to turn back or reset the odometer of any motor vehicle did not preclude prosecution of a licensed automobile dealer for theft by false pretenses on the basis of his sales of vehicles on which the mileage readings had been reduced. The Vehicle Code offense may be committed irrespective of whether the vehicle involved is sold to another person after such resetting, whereas a case does not fall within the *Pen C § 484*, proscription against theft by false pretenses without further action, such as the transfer of an automobile upon which the odometer has been reset to another person with the specific intent to fraudulently obtain money or property from that person, acting in reliance upon the false representation as to mileage. *People v. Ross* (1972, Cal App 2d Dist) 25 Cal App 3d 190, 100 Cal Rptr 703, 1972 Cal App LEXIS 1021.

*Pen C § 484(a)* defines the crime of theft of real property by false pretense. Proof of this crime requires the prosecution to establish that (1) defendant made a false pretense or representation, (2) he did so with intent to defraud the owner of property, and (3) the owner was in fact defrauded. Further, the false pretense or representation must have materially influenced the owner to part with his property, even though it need not have been the sole inducing cause. Thus, defendant in a prosecution for theft of real property was improperly convicted where the facts adduced at trial did not include any evidence that any pretense or representation was made to any of the purported grantors. Even though there was substantial evidence that defendant caused the recordation of 10 forged deeds to 11 parcels of real property, there was no evidence that he made any false representation. Defendant had no contact with any of the grantors; indeed, six of them had died prior to the dates on which their forged signatures were affixed to deeds that were later recorded. *People v. Sanders* (1998, Cal App 2d Dist) 67 Cal App 4th 1403, 79 Cal Rptr 2d 806, 1998 Cal App LEXIS 972.

### **C. PROCEDURE, GENERALLY**

## 29. In General

That element of theft formerly termed embezzlement is extraditable between the *United States and Mexico*. *People v. Gray* (1884) 66 Cal 271, 5 P 240, 1884 Cal LEXIS 755.

That type of theft formerly termed obtaining money by false pretenses is within the jurisdiction of the superior court and not the police court. *Ex parte Neustadt* (1889) 82 Cal 273, 23 P 124, 1889 Cal LEXIS 844.

It is unnecessary and improper to compel district attorney, in advance of proof, to elect on which theory he is to proceed, whether larceny, false pretense, or embezzlement. *People v. Fewkes* (1931) 214 Cal 142, 4 P2d 538, 1931 Cal LEXIS 407.

In a prosecution for theft, the People need not elect among embezzlement, larceny by trick or device, or obtaining money by false pretenses. *People v. Waxman* (1952, Cal App) 114 Cal App 2d 399, 250 P2d 339, 1952 Cal App LEXIS 1188.

Holding to answer for crime of theft under this section can be sustained only if evidence discloses elements of one of several types of theft consolidated within this section and is sufficient to constitute reasonable and probable cause that such offense has been committed. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.

There was sufficient evidence to satisfy the requirement of probable cause to hold defendant to answer for conspiracy to violate *Lab C* §§ 1777, 1814, former *Pub Util C* §§ 3801, 3802, and *Pen C* §§ 484, 487, subd. (1), relating to tariff regulations and illegal employment practices and failure to comply with recordkeeping requirements, where it was shown that, in an apparent effort to avoid the tariff regulations prescribing minimum hourly and tonnage rates for hauling, defendants agreed to engage on a course of conduct wherein, inter alia, records of the wages paid were not accurate and in some instances falsely showed payment of overtime, and all of the defendants pretended falsely that the employees of one defendant trucking company were owner-operator drivers to avoid the prevailing wage provisions prescribed by law. *People v. Miles & Sons Trucking Service, Inc.* (1968, Cal App 4th Dist) 257 Cal App 2d 697, 65 Cal Rptr 465, 1968 Cal App LEXIS 2496.

An intent to deprive the owner of property wholly and permanently is an element of the crime of theft (*Pen C* § 484), and in a prosecution for grand theft, the element of intent was in issue where defendant pleaded not guilty to the charge. *People v. Walther* (1968, Cal App 5th Dist) 263 Cal App 2d 310, 69 Cal Rptr 434, 1968 Cal App LEXIS 2209.

In a grand theft prosecution of a former deputy sheriff, the trial court erred in overruling the magistrate's finding of probable cause with respect to a charge based on a derringer found in defendant's house, and in finding no probable cause for charges based on three other weapons and filed by the district attorney after the magistrate failed to hold defendant on those charges, where all of the weapons were shown to have been in lawful custody of representatives of the sheriff's office during defendant's employment, one of them in defendant's own custody, after being seized in connection with arrests, where all of them were found together in defendant's house, marked with defendant's name and badge number, in what appeared to be a place of concealment, and where there was evidence that defendant had admitted an interest in acquiring illegally secured pistols. *People v. Eitzen* (1974, Cal App 1st Dist) 43 Cal App 3d 253, 117 Cal Rptr 772, 1974 Cal App LEXIS 1316.

### 29.5. Self-representation

Sixth Amendment did not give defendant the right to receive the assistance of advisory counsel during self-representation; therefore per se reversal was not required when a trial judge relieved the advisory counsel appointed by an arraignment judge. Although the trial judge did not have the authority to reverse the order of the arraignment judge, defendant did not establish prejudice, given, among other things, an admission to the acts underlying many of the

crimes charged, which included petty theft under *Pen C § 484*. *People v. Goodwillie* (2007, Cal App 4th Dist) 147 Cal App 4th 695, 54 Cal Rptr 3d 601, 2007 Cal App LEXIS 173.

Self-representing defendant's Fourteenth Amendment due process rights were violated when the trial court and prosecutor mistakenly stated during plea bargain discussions that defendant would not be eligible to receive 50 percent good conduct credits, causing defendant to refuse the plea offer. *People v. Goodwillie* (2007, Cal App 4th Dist) 147 Cal App 4th 695, 54 Cal Rptr 3d 601, 2007 Cal App LEXIS 173.

### 30. Venue

Where a hired servant's employer entrusts him with property, and he severs the relationship and goes to another county and decides to steal the property, venue is properly laid in the county to which he goes. *People v. Garcia* (1864) 25 Cal 531, 1864 Cal LEXIS 64.

Where one is entrusted with personalty to be returned to the owner, and he takes it to another county and embezzles it, the venue is in the county where the criminal intent was formed. *People v. Murphy* (1876) 51 Cal 376, 1876 Cal LEXIS 56.

Where a launch was entrusted to the defendant in one county and he took it out of that county in violation of the trust, the venue for that element of theft formerly termed embezzlement was properly laid in the county where the launch was given to the defendant. *People v. Goodrich* (1904) 142 Cal 216, 75 P 796, 1904 Cal LEXIS 921.

That element of theft formerly termed obtaining money by false pretenses may have venue either in the county where the representation was made or where the property was delivered. *People v. Robinson* (1930, Cal App) 107 Cal App 211, 290 P 470, 1930 Cal App LEXIS 404.

Where one received money from the prosecutors at his Sacramento office, went over his accounts with them at that office, and did other general business there, in a prosecution against him for the theft of the money received, venue in Sacramento county was sufficiently proved. *People v. Hill* (1934, Cal App) 2 Cal App 2d 141, 37 P2d 849, 1934 Cal App LEXIS 1392.

Where one being prosecuted for the theft of a steer was accused of having removed the animal from a slaughterhouse in one town to another town, and it was a reasonable inference that both towns were in the county in which the action was being tried, venue was sufficiently proved. *People v. Montgomery* (1939, Cal App) 32 Cal App 2d 43, 89 P2d 184, 1939 Cal App LEXIS 309.

In prosecution for grand theft based on false pretenses concerning vending machines sold by defendant to victims, sufficient showing is made to support venue in county in which prosecution was brought, notwithstanding all false representations were made in adjoining county, where negotiations were initiated by advertisement placed by defendant in newspaper published in county in which prosecution was brought. *People v. Simms* (1956, Cal App 1st Dist) 144 Cal App 2d 189, 300 P2d 898, 1956 Cal App LEXIS 1701.

### 31. Statute of Limitations

Acquisition of real property is complete only on possession and title being received, and prosecution for obtaining real property by false pretenses is not barred by three-year statute of limitations where defendant did not obtain title until date less than three years from date of filing of information. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

Counts of information charging grand theft based on obtaining of welfare funds through false affidavits, which counts were filed more than three years after acts alleged therein had occurred, were barred by three-year statute of

limitation in § 800, despite provision in such statute excepting therefrom embezzlement of public funds, where, under rule requiring penal law susceptible of two constructions to be construed most favorably to offender exception of embezzlement of public funds refers to theft defined in § 503, as fraudulent appropriation of property by person to whom it has been intrusted, and does not include obtaining of money by false representation or false pretense, under which classification obtaining of welfare funds through false affidavits falls. *People v. Darling* (1964, Cal App 4th Dist) 230 Cal App 2d 615, 41 Cal Rptr 219, 1964 Cal App LEXIS 914.

A prosecution under *Pen C* § 484, is governed by the statute of limitations in *Pen C* § 800. *People v. Poyet* (1972) 6 Cal 3d 530, 99 Cal Rptr 758, 492 P2d 1150, 1972 Cal LEXIS 147.

On a motion to dismiss grand theft charges, it was error to sustain a defense of the statute of limitations, where it was alleged that the offenses were discovered about six months before the filing of the information, where, though *Pen C* § 800, at the time of the alleged thefts, required that an information be filed within three years of commission of the offense, it had been amended, some seven weeks after the expiration of the period within which the thefts could have occurred, to run from the date of discovery. A prosecution may be commenced within a period extended by an amendment to an existing statute if the amendment was adopted prior to the expiration of the original period of limitations. *People v. Eitzen* (1974, Cal App 1st Dist) 43 Cal App 3d 253, 117 Cal Rptr 772, 1974 Cal App LEXIS 1316.

### 32. Pleading, Generally

Indictment alleging that defendant did "unlawfully and feloniously steal, take, and lead away" horse was defective, in view of proof that defendant hired horse and promised to return it by evening but did not do so, there being no allegation that defendant received horse as bailee. *People v. Jersey* (1861) 18 Cal 337, 1861 Cal LEXIS 191.

Where indictment charges defendant with stealing five certificates of shares of stock of certain number and proof shows that there was but one such certificate, and not series of five, there is fatal variance in indictment. *People v. Coon* (1873) 45 Cal 672, 1873 Cal LEXIS 103.

There is no fatal variance, where one is charged with theft of horse but he actually took mare. *People v. Pico* (1882) 62 Cal 50, 1882 Cal LEXIS 699.

Where defendant was committed upon charge of embezzlement of property entrusted to him as bailee, an information charging him with embezzlement of money entrusted to him as agent does not show material variance or charge different offense. *People v. Walker* (1904) 144 Cal 1, 77 P 705, 1904 Cal LEXIS 646.

Indictment did not contain fatal variance, where it alleged theft of cash and evidence disclosed reception of check which was immediately cashed. *People v. Arnold* (1912, Cal App) 20 Cal App 35, 127 P 1060, 1912 Cal App LEXIS 143.

In prosecution on charge of embezzlement, judgment will not be reversed because of fact that information charges receipt of lawful money of United States whereas proof shows that sum of money had been received by check. *People v. Lindsay* (1925, Cal App) 75 Cal App 115, 242 P 87, 1925 Cal App LEXIS 118, overruled *In re Estrada* (1965) 63 Cal 2d 740, 48 Cal Rptr 172, 408 P2d 948, 1965 Cal LEXIS 232.

A count in an information specifically charging the defendant with grand theft does not, by the insertion of the additional clause "in violation of §§ 484 and 487 of the *Pen Code*," charge him with two offenses. *People v. Tate* (1946, Cal App) 72 Cal App 2d 467, 164 P2d 556, 1946 Cal App LEXIS 1064.

Notwithstanding an information in a prosecution for theft by false pretenses names two husbands as the victims, whereas the proof shows that the wives relied on defendants' representations, the variance is immaterial, where it appears that both husbands and wives were present when the representations were made, and that defendants, being sufficiently informed to enable them to present any defense, were not prejudiced. *People v. Frankfort* (1952, Cal App)

114 Cal App 2d 680, 251 P2d 401, 1952 Cal App LEXIS 1227.

It is not necessary, in indictment or information, to allege particular kind of theft committed. *People v. Murdock* (1960, Cal App 2d Dist) 183 Cal App 2d 861, 7 Cal Rptr 293, 1960 Cal App LEXIS 1842.

Indictments and information charging theft under this section need only allege unlawful taking and need not be concerned with technical differences between several types of theft. *People v. Riley* (1963, Cal App 1st Dist) 217 Cal App 2d 11, 31 Cal Rptr 404, 1963 Cal App LEXIS 1866.

### 33. Charging Theft

An information charging theft in that the defendant, at a certain time and place, unlawfully took the property of a named person of a value in excess of \$200 of lawful money of the United States was not defective by reason of describing the property as four hundred shares of the stock of the People v. *Lalor* (1928, Cal App) 95 Cal App 242, 272 P 794, 1928 Cal App LEXIS 467.

The failure to allege that the property taken was the personal property of another does not invalidate an information charging theft, where it is alleged that the property was taken from the person of a named party. *People v. Price* (1941, Cal App) 46 Cal App 2d 59, 115 P2d 225, 1941 Cal App LEXIS 1359.

Indictment charging that defendant wilfully, unlawfully and feloniously took personal property of value in excess of \$200, personal property of certain estate and its administratrix, is sufficient. *People v. Massey* (1957, Cal App 2d Dist) 151 Cal App 2d 623, 312 P2d 365, 1957 Cal App LEXIS 1808.

Information charging theft need not allege that property was taken with intent to steal. *People v. Zucker* (1960, Cal App 2d Dist) 177 Cal App 2d 172, 2 Cal Rptr 112, 1960 Cal App LEXIS 2443.

Indictments and informations charging "theft" can simply allege "unlawful taking." *People v. Antoine* (1960, Cal App 1st Dist) 180 Cal App 2d 786, 4 Cal Rptr 589, 1960 Cal App LEXIS 2398.

Indictment or information need not specifically allege intent to steal. *People v. O'Hara* (1960, Cal App 2d Dist) 184 Cal App 2d 798, 8 Cal Rptr 114, 1960 Cal App LEXIS 1937.

Information charging that defendant, on or about specified date, unlawfully and feloniously took \$500, personal property of named person, was sufficient to notify defendant of crime with which he was charged. *People v. O'Hara* (1960, Cal App 2d Dist) 184 Cal App 2d 798, 8 Cal Rptr 114, 1960 Cal App LEXIS 1937.

Information charging theft was not defective on ground it charged defendants with theft from two individuals and corporation, whereas only one of named victims could have had possession of checks at time of taking, where defendants had notice of the offense with which they were charged and under this section prosecution did not have to plead form of theft. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

Transcript of evidence before committing magistrate in theft case augments formal allegations of pleading to give defendant ample notice of details of offense. *People v. Kaminsky* (1962, Cal App 2d Dist) 204 Cal App 2d 300, 22 Cal Rptr 191, 1962 Cal App LEXIS 2246.

Holders of trust deeds and improvement bonds on property purchased from construction corporation whose stock was held by defendants were properly named as victims in indictment charging theft of construction loan proceeds and could properly be referred to during trial where jury could reasonably conclude that holders of trust deeds and bonds had monetary stake in defendants' construction enterprises on property and that their stake was jeopardized on diversion by defendants of funds loaned for improvements. *People v. Steele* (1965, Cal App 2d Dist) 235 Cal App 2d 798, 45 Cal

*Rptr 601, 1965 Cal App LEXIS 977.*

References in *Pen C* § 666 to "petty theft" and "grand theft"--as qualifying prior convictions for the § 666 offense of petty theft with a prior--do not include a welfare fraud conviction under the special statute of *W & I C* § 11483. Thus, a welfare fraud conviction under *W & I C* § 11483 cannot be used as the prior (theft-related) conviction for a *Pen C* § 666, criminal charge of petty theft with a prior. *Bradwell v. Superior Court* (2007, 3d Dist) 67 *Cal Rptr 3d* 163, 156 *Cal App 4th* 265, 2007 *Cal App LEXIS* 1731.

Because defendant's prior conviction under the special statute of *W & I C* § 11483 could not be used as a "petty theft" or a "grand theft" prior conviction for purposes of prosecuting her under *Pen C* § 666, a trial court had to dismiss an information that charged her with petty theft with a prior under § 666. *Bradwell v. Superior Court* (2007, 3d Dist) 67 *Cal Rptr 3d* 163, 156 *Cal App 4th* 265, 2007 *Cal App LEXIS* 1731.

### 34. Charging Larceny

Indictment for larceny describing money as "\$3,000, lawful money of the United States" is insufficient; particular denomination or species of coin must be set forth. *People v. Ball* (1859) 14 *Cal* 101, 1859 *Cal LEXIS* 247.

Indictment for larceny describing stolen property as "fifteen \$20 pieces and twenty-five \$10 pieces, and ten \$5 pieces of gold coin of the United States of value of \$550" is not defective as not averring value of each particular piece of coin. *People v. Green* (1860) 15 *Cal* 512, 1860 *Cal LEXIS* 153.

Indictment for larceny which charges that defendant "did feloniously, wilfully, and unlawfully, and with force and arms, steal, take, and carry, lead and drive away," contained sufficient statement of intent with which taking was done without averment that property was taken with felonious intent. *People v. Brown* (1865) 27 *Cal* 500, 1865 *Cal LEXIS* 54.

In an indictment charging that kind of theft formerly called larceny, a description of the money taken as "gold and silver coin of the value of \$235.75" was sufficient. *People v. Jim Ti* (1867) 32 *Cal* 60, 1867 *Cal LEXIS* 25.

In indictment for larceny for stealing cow, it was sufficient to charge that defendant "did steal, take, and carry away," without adding words "lead, or drive away." *People v. Strong* (1873) 46 *Cal* 302, 1873 *Cal LEXIS* 176.

An indictment for larceny was not defective by stating a theft of the property of a named person, where the evidence disclosed that to be his business name and that his personal name was different. *People v. Leong Quong* (1882) 60 *Cal* 107, 1882 *Cal LEXIS* 409.

Where one was charged with taking a cow, an allegation in the indictment as to the ownership at the time the offense was committed was sufficient, it not being necessary to state the person in whom ownership was vested at the time the indictment was returned. *People v. Lewis* (1883) 64 *Cal* 401, 1 *P* 490, 1883 *Cal LEXIS* 660.

Where an information charging one with larceny stated that he feloniously stole a horse of a particular value, and in a later paragraph stated that the property was owned by a named person, a subsequent statement in the pleading that the property was carried away by the person named as the owner of the horse did not render the information invalid, the insertion of the name in the last instance being a clerical error. *People v. Monteith* (1887) 73 *Cal* 7, 14 *P* 373, 1887 *Cal LEXIS* 590.

An information purporting to charge larceny must state that the property taken was owned by someone other than the defendant. *People v. Hanselman* (1888) 76 *Cal* 460, 18 *P* 425, 1888 *Cal LEXIS* 909.

An indictment alleging larceny was not defective for describing the property taken as owned by "Townsend and Carey," without designating them as partners. *People v. Goggins* (1889) 80 *Cal* 229, 22 *P* 206, 1889 *Cal LEXIS* 894.

An information charging larceny sufficiently alleged the ownership of the check taken by stating that it was the property of "one Pennington," although it was drawn in favor of one A. G. Pennington or bearer. *People v. Arras* (1891) 89 Cal 223, 26 P 766, 1891 Cal LEXIS 801.

In an information purporting to charge larceny, the defendant was sufficiently put upon notice of the People's contentions by an averment that he is guilty of stealing another's horse. *People v. Lopez* (1891) 90 Cal 569, 27 P 427, 1891 Cal LEXIS 969.

Where defendant is charged with larceny in bringing into this state goods stolen out of its jurisdiction, laws of this state control as to what constitutes larceny and its degree, and fact that complaint and information alleged committing of crime in another state does not render it necessary to prove how laws of such state define offense. *People v. Staples* (1891) 91 Cal 23, 27 P 523, 1891 Cal LEXIS 1043.

An accusation purporting to charge larceny is sufficient in the absence of an averment that the property was taken against the will of the owner. *People v. Davis* (1893) 97 Cal 194, 31 P 1109, 1893 Cal LEXIS 509.

Indictment charging larceny of money stolen from person and immediate possession of another person named, "same being money and property" of said person, although it would be improved if words "then and there" were inserted before word "being," is not rendered void by their omission. *People v. Piggott* (1899) 126 Cal 509, 59 P 31, 1899 Cal LEXIS 750.

### **35. Charging Embezzlement**

An indictment purporting to charge embezzlement, which alleged that the defendant was the "bailee of 130 ounces of gold dust," was insufficient, there being no allegation of the facts establishing the bailment. *People v. Poggi* (1862) 19 Cal 600, 1862 Cal LEXIS 153.

An indictment purporting to charge embezzlement by an employee failed to state a cause of action, where it averred that the defendant was employed by a daily newspaper and in the course of his duties received money due his employers and converted it to his own use, there being no allegation that the money was entrusted by the employer to the employee. *People v. Bailey* (1863) 23 Cal 577, 1863 Cal LEXIS 323.

In charging that element of theft formerly termed embezzlement of public funds, the defendant's official character should be stated. *People v. Doss* (1870) 39 Cal 428, 1870 Cal LEXIS 70.

In an indictment charging embezzlement, a description of money taken as being "certain money," and that the defendant converted the sum of \$800 to his own use, was insufficient. *People v. Cox* (1870) 40 Cal 275, 1870 Cal LEXIS 188.

An indictment sufficiently charged obtaining money under false pretenses, where it alleged that at a certain time and place the defendant, with the intent to defraud another of his property, did unlawfully, knowingly, designedly, and falsely pretend and represent that certain bonds were of a particular value, that any bank in San Francisco would lend a particular amount thereon, and that the company issuing the bonds was in running order, and thereafter the defendant obtained \$1365 from that other on the representations, that the money was obtained unlawfully, knowingly, and designedly to defraud the other, and that the representations made were all untrue. *People v. Jordan* (1884) 66 Cal 10, 4 P 773, 1884 Cal LEXIS 665.

An information purporting to charge embezzlement by a bailee is not subject to a general demurrer on the ground that it does not name the defendant as such, if the terms of the contract between him and the person alleged to have been injured are specifically set forth and disclose a bailor and bailee relationship. *People v. Johnson* (1886) 71 Cal 384, 12 P 261, 1886 Cal LEXIS 596.

An indictment or information purporting to charge embezzlement is not necessarily void for failing to designate whether the defendant received the property as bailee, trustee, agent, or in one of the other capacities designated by the statute, where it alleges that the property was entrusted to the defendant. *People v. Johnson* (1886) 71 Cal 384, 12 P 261, 1886 Cal LEXIS 596.

An information purporting to charge embezzlement was sufficient, where it stated that the accused was treasurer of a named association and converted funds thereof to his own use, it not being necessary to allege the persons composing the association. *People v. Mahlman* (1890) 82 Cal 585, 23 P 145, 1890 Cal LEXIS 605.

An information purporting to charge embezzlement was sufficient, if drawn substantially in the language of the statute. *People v. Mahlman* (1890) 82 Cal 585, 23 P 145, 1890 Cal LEXIS 605.

In an indictment or information for embezzlement, it was sufficient to describe the money appropriated as lawful money of the United States, it not being necessary to show the coin, number, denomination, or kind. *People v. Cobler* (1895) 108 Cal 538, 41 P 401, 1895 Cal LEXIS 888.

An indictment or information purporting to charge embezzlement must allege a fiduciary relation arising by one entrusting property to another, and the fraudulent appropriation thereof by that other. *People v. Gordon* (1901) 133 Cal 328, 65 P 746, 1901 Cal LEXIS 915.

An information purporting to charge embezzlement stated a crime, where it alleged that the launch taken was the property of a third person who entrusted it to the defendant as bailee for the purpose of bringing it from one point to another and then purchasing it or delivering it to the owner if not purchased, and that he did neither, but "wilfully, unlawfully, and feloniously embezzled and fraudulently converted to his own use the said launch." *People v. Goodrich* (1904) 142 Cal 216, 75 P 796, 1904 Cal LEXIS 921.

An indictment purporting to charge one with that element of theft formerly termed embezzlement by a public officer is insufficient, where it designates the defendant and his official capacity as "county physician." *People v. Shearer* (1904) 143 Cal 66, 76 P 813, 1904 Cal LEXIS 779.

### **36. Charging False Pretenses**

Formerly, an information charging that type of theft termed obtaining money under false pretenses was sufficient, if it charged the offense substantially in the language of the statute. *People v. Donaldson* (1886) 70 Cal 116, 11 P 681, 1886 Cal LEXIS 736.

Where an information charging theft alleged that the defendant obtained \$3000 by false pretenses through the use of representations as to the ownership of certain stocks, it was subject to demurrer for failing to show a causal connection between the payment of the money and the representation made. *People v. Fyfe* (1929, Cal App) 102 Cal App 549, 283 P 378, 1929 Cal App LEXIS 171.

An information charging grand theft includes offense of obtaining property by false pretenses. *People v. Platt* (1954, Cal App) 124 Cal App 2d 123, 268 P2d 529, 1954 Cal App LEXIS 1707.

In order to convict a person of obtaining money by false pretenses on the ground that he made false representations to induce people to join a partnership and then took their money, a showing must be made that the partnership was formed as a part of a scheme to defraud and not as a going concern formed in good faith. Therefore, in a grand theft prosecution of a partner in an investment club, who misappropriated money paid in by club members for investment purposes, the prosecution could not successfully contend that the indictment could be upheld on the ground of false pretenses merely because defendant falsely stated to the club that he had made various loans and thereafter the members continued to pay their monthly dues. *People v. Sobiek* (1973, Cal App 1st Dist) 30 Cal App 3d 458, 106 Cal Rptr 519, 1973 Cal App LEXIS 1176, 82 ALR3d 804, cert den (1973) 414 U.S. 855, 94 S. Ct. 155, 38 L. Ed. 2d 104, 1973 U.S.

LEXIS 689.

Defendant was properly charged with the crime of attempted grand theft by false pretenses (*Pen C §§ 484 and 487*) where it was alleged he sold to undercover officers a quantity of a product represented to be an expensive trademarked French perfume which was in fact an imitation. *Pen C § 351a*, making it a misdemeanor for a person to attempt to sell, and falsely represent goods as the product of other than the true manufacturer, a special statute, did not supplant the general theft statute, since the special statute did not require reliance as an element of the offense. Moreover, *Pen C § 351a* was intended to relate to unfair competition and substitute only, and thus did not supplant the general criminal statutes in respect of a seller's relations with his customers or members of the public generally. *People v. Weltsch (1978, Cal App 1st Dist) 84 Cal App 3d 959, 149 Cal Rptr 112, 1978 Cal App LEXIS 1936.*

#### **D. EVIDENCE**

##### **(1) GENERALLY**

##### **37. In General**

If the subsequent conduct of the accused is such that an intent to convert another's money to his own use can be inferred therefrom, a conviction for that element of theft formerly termed larceny may be sustained, notwithstanding an undisputed avowal of the accused that at the time he took the money from his intoxicated friend, he did so to protect him from "rollers." *People v. Hansen (1890) 84 Cal 291, 24 P 117, 1890 Cal LEXIS 806.*

In that type of theft formerly termed obtaining property under false pretenses, the owner must intend to part with title and possession when transferring custody to the offender. *People v. Martin (1894) 102 Cal 558, 36 P 952, 1894 Cal LEXIS 686.*

The identity of the perpetrator of a crime is not a part of the corpus delicti. *People v. Mainhurst (1945, Cal App) 67 Cal App 2d 882, 155 P2d 843, 1945 Cal App LEXIS 1224.*

It is unnecessary to prove that defendant benefited personally from fraudulent acquisition. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

In prosecution for grand theft of county welfare funds, defendant's representations respecting lack of knowledge of her husband's whereabouts were material, since grant of aid to her was based on fact that she and her husband were living separate and apart, eligibility for such grant depending on whether or not there was clear "dissociation" of normal family relationship. *People v. De Casaus (1961, Cal App 4th Dist) 194 Cal App 2d 666, 15 Cal Rptr 521, 1961 Cal App LEXIS 1863.*

Reasonable conclusion to be drawn from evidence that magazine subscription solicitors represented to persons solicited that they were veterans, orphans or epileptics, was that there was reasonable cause to believe that solicitors were not as represented, though there was no direct evidence they were not as represented. *People v. Conlon (1962, Cal App 1st Dist) 207 Cal App 2d 86, 24 Cal Rptr 219, 1962 Cal App LEXIS 1885.*

##### **38. Criminal Intent**

When one person takes property of another unlawfully and surreptitiously, his actions speak for themselves and in absence of satisfactory explanation his intentions must be deemed to have been as evil as his conduct was wrongful. *People v. Glass (1960, Cal App 2d Dist) 181 Cal App 2d 549, 5 Cal Rptr 289, 1960 Cal App LEXIS 2026.*

Intent to defraud may be proved by surrounding circumstances. *People v. Reed (1961, Cal App 2d Dist) 190 Cal App 2d 344, 11 Cal Rptr 780, 1961 Cal App LEXIS 2304.*

Proof of intent to commit theft may consist of reasonable inferences drawn from affirmatively established facts. *People v. Ambrose* (1962, Cal App 2d Dist) 202 Cal App 2d 73, 20 Cal Rptr 584, 1962 Cal App LEXIS 2447.

Intent to defraud can be inferred from all facts and need not be proved by direct evidence. *People v. Hambleton* (1963, Cal App 2d Dist) 218 Cal App 2d 479, 32 Cal Rptr 471, 1963 Cal App LEXIS 1807.

Because the specific intent to commit theft is rarely shown by direct proof, circumstantial evidence may be used to provide this proof. *People v. Brown* (1967, Cal App 2d Dist) 253 Cal App 2d 820, 61 Cal Rptr 368, 1967 Cal App LEXIS 2409.

In a prosecution for theft, intent is rarely susceptible of direct proof and must be inferred from a consideration of all of the facts and circumstances shown by the evidence, and proof of intent may consist of reasonable inferences drawn from affirmatively established facts. *People v. Crain* (1967, Cal App 2d Dist) 255 Cal App 2d 726, 63 Cal Rptr 494, 1967 Cal App LEXIS 1334.

Proof of theft requires proof of a specific intent to convert the property to the thief's own use (*Pen C § 484*). *People v. Dabney* (1968, Cal App 5th Dist) 260 Cal App 2d 786, 67 Cal Rptr 455, 1968 Cal App LEXIS 1918.

The intent to defraud is a question of fact to be determined from all the facts and circumstances of the case, and may be, and usually must be, inferred circumstantially. *People v. Hedrick* (1968, Cal App 2d Dist) 265 Cal App 2d 392, 71 Cal Rptr 352, 1968 Cal App LEXIS 1632.

In a prosecution for grand theft of an automobile (*Pen Code § 487*, subd 3), tried to the court without a jury, the evidence fell short of the quantum necessary to overcome the presumption of innocence and to meet the burden resting on the prosecution to establish guilt beyond a reasonable doubt, where defendant had rented the automobile in question for a two-day period through the use of false identification, where, at the time of defendant's trial, *Pen C § 484*, created a presumption of fraud by the obtaining of a rental car through the use of false identification only if the car was not returned within 10 days after the expiration of the rental period, where defendant was arrested and possession of the car was obtained by the police within the two-day rental period, and where there was no other evidence bearing on defendant's intent. *People v. Turner* (1968, Cal App 2d Dist) 267 Cal App 2d 440, 73 Cal Rptr 263, 1968 Cal App LEXIS 1407.

The presumption of intent to commit theft by fraud provided by *Pen C § 484*, subd. (b), when a lessee fails to return leased property within 20 days after the owner makes written demand therefor after expiration of the lease by certified or registered mail, does not violate due process if it is construed to require proof both of sending a demand letter and its receipt by the lessee, as well as failure to return the leased property within the 20-day period, but if the provision is construed so as to require only the sending of the demand letter, it is irrational and arbitrary and thus violates the due process clause of the Fourteenth Amendment; to presume an intent to commit theft where a demand letter is sent but not received, and where the leased property is not returned, presumes a conclusion from an unrelated premise. *People v. Hemmer* (1971, Cal App 4th Dist) 19 Cal App 3d 1052, 97 Cal Rptr 516, 1971 Cal App LEXIS 1352.

A presumption of intent to commit theft by fraud is triggered by the failure of the lessee of a rental automobile to return the vehicle within 20 days of a written demand meeting the requirements of *Pen C § 484*, which requires, in pertinent part, the owner to make written demand for the return of the vehicle by certified or registered mail following the expiration of the lease or rental agreement. *People v. Hedrick* (1980, Cal App 3d Dist) 105 Cal App 3d 166, 164 Cal Rptr 169, 1980 Cal App LEXIS 1763.

### **39. Effect of Possession of Stolen Property**

One charged with that element of theft formerly termed larceny does not have the burden of showing that the property found in his possession came there honestly, except where the burden of going forward shifts after the People prove that he came by it dishonestly. *People v. Antonio* (1865) 27 Cal 404, 1865 Cal LEXIS 35.

If jury is satisfied that defendant stole so much of property stolen as was found in his possession, they may presume that all property stolen at same time and place was stolen by defendant unless there is some fact or circumstance tending to show contrary. *People v. Fagin* (1885) 66 Cal 534, 6 P 394, 1885 Cal LEXIS 494.

In prosecution for theft, where defendant was found in recent possession of stolen goods which he had taken from tailor shop and he did not testify as to his intention in taking them, nor explain possession of them, jury might infer criminal intent from all circumstances of case and their verdict of guilty will not be disturbed. *People v. Smith* (1904) 143 Cal 597, 77 P 449, 1904 Cal LEXIS 865.

Possession of goods recently stolen may be considered by the court in a theft case in connection with other incriminating evidence and, if not satisfactorily explained, it is a circumstance tending to show guilt. *People v. Rutland* (1953, Cal App) 120 Cal App 2d 798, 261 P2d 735, 1953 Cal App LEXIS 2016.

Defendant who was in possession of stolen property has duty to explain his possession in order to remove effect of possession as circumstance, taken with other suspicious facts of guilt. *People v. Ransome* (1960, Cal App 2d Dist) 180 Cal App 2d 140, 4 Cal Rptr 347, 1960 Cal App LEXIS 2322, cert den *Dean v. California* (1960) 364 US 887, 5 L Ed 2d 107, 81 S Ct 178, 1960 US LEXIS 301.

Accused's silence when questioned by police concerning his possession of recently stolen property should not be used against him if it appears that he is acting on basis of his right not to incriminate himself and, even where his failure to explain is not based on matter of right, he will be free later to introduce evidence of reasons for his silence other than consciousness of guilt; if he chooses not to be silent and makes statement by way of explanation which on its face raises reasonable doubt as to guilt, burden with respect to truth or falsity of his statement is not on him but on prosecution. *People v. McFarland* (1962) 58 Cal 2d 748, 26 Cal Rptr 473, 376 P2d 449, 1962 Cal LEXIS 305, superseded by statute as stated in *People v. Burns* (1984, Cal App 1st Dist) 157 Cal App 3d 185, 203 Cal Rptr 594, 1984 Cal App LEXIS 2190.

Rule that defendant's silence when questioned by police concerning his possession of recently stolen property gives rise to inference of guilt does not shift burden of proof or destroy presumption of innocence; prosecution must still satisfy jury of defendant's guilt beyond reasonable doubt; the rule does not require conviction but merely permits inference of guilt if jury determines one is warranted in light of all circumstances, and although defendant remains silent throughout and introduces no evidence whatever, he may nevertheless be acquitted. *People v. McFarland* (1962) 58 Cal 2d 748, 26 Cal Rptr 473, 376 P2d 449, 1962 Cal LEXIS 305, superseded by statute as stated in *People v. Burns* (1984, Cal App 1st Dist) 157 Cal App 3d 185, 203 Cal Rptr 594, 1984 Cal App LEXIS 2190.

No inference of consciousness of guilt on defendant's part can be drawn from mere fact that jury, in order to convict, must have disbelieved defendant's explanations as to how he came to be in possession of stolen goods. *People v. Ford* (1962, Cal App 1st Dist) 200 Cal App 2d 905, 19 Cal Rptr 758, 1962 Cal App LEXIS 2793.

Where it appears on prosecution for burglary and theft that recently stolen property was found in conscious possession of defendant who, on being questioned by police, gave false explanation regarding his possession or remained silent under circumstances indicating consciousness of guilt, inference of guilt is permissible and it is for jury to determine whether or not inference should be drawn in light of all evidence. *People v. Giffis* (1963, Cal App 2d Dist) 218 Cal App 2d 53, 32 Cal Rptr 215, 1963 Cal App LEXIS 1749.

#### **40. Miscellaneous Particular Cases**

In order to convict an employee of that element of theft formerly termed embezzlement, the prosecution must prove: (1) that the accused was an agent; (2) that he received property belonging to his principal; (3) that he received it in the course of his employment; (4) that he converted it to his own use with the intent to steal it. *Ex parte Hedley* (1866) 31 Cal 108, 1866 Cal LEXIS 171.

In order to warrant conviction of defendant charged with embezzlement it is necessary for people to prove that he had, before date of complaint for his arrest for offense, fraudulently converted to his own use money alleged to have been embezzled. *People v. Wyman (1894) 102 Cal 552, 36 P 932, 1894 Cal LEXIS 685.*

To support a conviction of theft for obtaining property by false pretenses, it must be shown that defendant made a false pretense or representation with intent to defraud owner of his property, and that owner was in fact defrauded. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

In cases of obtaining property by false pretenses, it must be proved that any misrepresentations of fact alleged by the prosecution were made knowingly and with intent to deceive. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

Express testimony of victim of false pretenses indicating that he was induced to part with his money by fraudulent statements of accused is not essential to successful prosecution of action for theft by false pretenses, but is sufficient, if inference of reliance could have been drawn from all the evidence. *People v. Adams (1955, Cal App 4th Dist) 137 Cal App 2d 660, 290 P2d 944, 1955 Cal App LEXIS 1241.*

In false pretenses prosecution, intent to defraud is question of fact to be determined from all circumstances of case, and it may be, and usually must be, inferred circumstantially. *People v. Caruso (1959, Cal App 2d Dist) 176 Cal App 2d 272, 1 Cal Rptr 428, 1959 Cal App LEXIS 1480, cert den (1960) 363 US 819, 4 L Ed 2d 1517, 80 S Ct 1259, 1960 US LEXIS 977.*

In prosecution for theft by false pretenses, it is not essential that victim expressly testify that he was induced to part with his money or property by accused's fraudulent statements. *People v. Mason (1960, Cal App 2d Dist) 184 Cal App 2d 317, 7 Cal Rptr 627, 1960 Cal App LEXIS 1882, cert den (1961) 366 US 904, 6 L Ed 2, 81 S Ct 1046, 1961 US LEXIS 1285.*

In prosecution for theft by false pretenses, inference of reliance on victim's part may be drawn from all the evidence. *People v. Mason (1960, Cal App 2d Dist) 184 Cal App 2d 317, 7 Cal Rptr 627, 1960 Cal App LEXIS 1882, cert den (1961) 366 US 904, 6 L Ed 2, 81 S Ct 1046, 1961 US LEXIS 1285.*

Direct proof that defendant had knowledge of falsity of representations made or of his intention to defraud is not necessary in false pretenses prosecution, since in many such cases those elements can be proved only through circumstantial evidence, which is sufficient. *People v. Phillips (1960, Cal App 2d Dist) 186 Cal App 2d 231, 8 Cal Rptr 830, 1960 Cal App LEXIS 1623.*

Requisite intent in prosecution for larceny by trick or device is rarely susceptible of direct proof and ordinarily must be inferred from facts and circumstances shown by evidence. *People v. Maggart (1961, Cal App 2d Dist) 194 Cal App 2d 84, 14 Cal Rptr 745, 1961 Cal App LEXIS 1794.*

In prosecution for theft by trick or device, accused's misrepresentations must have induced action in reliance thereon, but it is not essential that there be express testimony by victim that he was induced to part with his money by accused's false representations as long as inference of such reliance can be drawn by trier of fact from evidence. *People v. Maggart (1961, Cal App 2d Dist) 194 Cal App 2d 84, 14 Cal Rptr 745, 1961 Cal App LEXIS 1794.*

To support conviction of theft for obtaining property by false pretenses, it must be shown that defendant made false pretense or representation, that representation was made with intent to defraud owner of his property, and that owner was in fact defrauded in that he parted with his property in reliance on representation. *Perry v. Superior Court of Los Angeles County (1962) 57 Cal 2d 276, 19 Cal Rptr 1, 368 P2d 529, 1962 Cal LEXIS 172.*

In prosecution for grand theft by false pretenses, intent to defraud is question of fact to be determined from all

circumstances of case, and it may be, and usually must be, inferred circumstantially. *Perry v. Superior Court of Los Angeles County* (1962) 57 Cal 2d 276, 19 Cal Rptr 1, 368 P2d 529, 1962 Cal LEXIS 172.

Intent to defraud necessary in prosecution for obtaining money or property under false pretenses may be inferred from all facts and need not be proved by direct evidence; to prove intent, it is necessary to show that misrepresentations were made knowingly. *People v. Conlon* (1962, Cal App 1st Dist) 207 Cal App 2d 86, 24 Cal Rptr 219, 1962 Cal App LEXIS 1885.

In prosecution for theft by false pretenses proof of defendant's intention must of necessity come from his acts and conduct. *People v. Kassab* (1963, Cal App 2d Dist) 219 Cal App 2d 687, 33 Cal Rptr 494, 1963 Cal App LEXIS 2424.

Intent to defraud is an essential element of grand theft by false pretenses, but such intention is inferable from the facts. *People v. Brady* (1969, Cal App 4th Dist) 275 Cal App 2d 984, 80 Cal Rptr 418, 1969 Cal App LEXIS 2008.

To support a conviction of theft for obtaining property by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. *People v. Taylor* (1973, Cal App 2d Dist) 30 Cal App 3d 117, 106 Cal Rptr 216, 1973 Cal App LEXIS 1143.

## **(2) ADMISSIBILITY**

### **41. In General**

On trial for larceny it is not competent for defendant to prove that he was under twenty-one years of age for purpose of showing that in committing offense he was acting under control of another. *People v. Richmond* (1866) 29 Cal 414, 1866 Cal LEXIS 6.

Though evidence of wealth or poverty of defendant accused of larceny is not permissible, evidence is admissible to show that previous to date of crime defendant was without money and that immediately after that date he had large amount of money. *People v. Kelly* (1901) 132 Cal 430, 64 P 563, 1901 Cal LEXIS 1080.

In prosecution for obtaining real property by false pretenses, it is proper to permit one who had been owner of property for a number of years to testify as to what he thought it was worth on certain date. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

In prosecution for obtaining real property under false pretenses, it is proper to admit testimony of witnesses as experts as to value of property where they testify they have bought and sold property in area and are familiar with property values over long period of time. *People v. Pugh* (1955, Cal App 2d Dist) 137 Cal App 2d 226, 289 P2d 826, 1955 Cal App LEXIS 1180, appeal dismissed (1956) 352 US 885, 77 S Ct 141, 1 L Ed 2d 83, 1956 US LEXIS 239.

In grand theft prosecution arising out of operation of mortgage and loan company which accepted funds from investors for use by builders in constructing structures on specific lots, it was not improper to refuse to admit evidence of water service contract with city showing that city gave temporary water service during construction on certain lots and promised to put in permanent water pipes, but later declined to do so, where such evidence could not have affected defendant's intent in misusing funds invested with mortgage and loan company, and where general substance of whole situation respecting water problem went into evidence by defendant's own testimony and was not contradicted. *People v. McManus* (1960, Cal App 4th Dist) 180 Cal App 2d 19, 4 Cal Rptr 642, 1960 Cal App LEXIS 2310.

In prosecution for theft of promissory note allegedly by falsely representing to makers that they owed defendant money for advances, letter written by one of makers to defendant's attorney in other litigation difficulties guaranteeing defendant's note to attorney for legal services and stating that makers were indebted to defendant for his help to them in past and would be glad to guarantee his note should have been admitted in rebuttal of writer's testimony that note

allegedly stolen was based on money advanced and not on services rendered. *People v. Kennedy* (1960, Cal App 3d Dist) 180 Cal App 2d 862, 4 Cal Rptr 862, 1960 Cal App LEXIS 2412.

It was proper, during theft prosecution, to allow playing of recording of telephone conversation between defendant and complaining witness where recording was made with complaining witness' consent and it could be inferred therefrom that defendant was attempting to cause complaining witness to pay loss allegedly shown by fraudulent betting slips. *People v. O'Hara* (1960, Cal App 2d Dist) 184 Cal App 2d 798, 8 Cal Rptr 114, 1960 Cal App LEXIS 1937.

Admissibility of evidence regarding person's silence when questioned by police concerning his possession of recently stolen property requires showing that circumstances under which defendant is confronted by police with fact of possession were such as to reasonably call for denial or explanation; accused must understand he is being charged with commission of crime as result of his possession of stolen property, and he must have reasonable opportunity to give explanation; his silence cannot be used against him if it is based on claim of right to which he is legally entitled. *People v. McFarland* (1962) 58 Cal 2d 748, 26 Cal Rptr 473, 376 P2d 449, 1962 Cal LEXIS 305, superseded by statute as stated in *People v. Burns* (1984, Cal App 1st Dist) 157 Cal App 3d 185, 203 Cal Rptr 594, 1984 Cal App LEXIS 2190.

Statements giving false explanations of possession of stolen goods are admissible as implied admissions tending to show guilt. *People v. Ford* (1962, Cal App 1st Dist) 200 Cal App 2d 905, 19 Cal Rptr 758, 1962 Cal App LEXIS 2793.

Even though offense is theft whether fraudulent intent was formed before or after offender obtained possession of property, where jury finds that initial intent was not fraudulent, it has to decide whether offender later conceived intent to permanently deprive owner of his property; in such case evidence that is material to further issue may not be excluded if otherwise admissible. *People v. Rosson* (1962, Cal App 2d Dist) 202 Cal App 2d 480, 20 Cal Rptr 833, 1962 Cal App LEXIS 2505.

In prosecution for grand theft and for conspiracy to commit grand theft through fraudulent receipt of child welfare payments, no prejudicial error resulted from court's refusal to admit in evidence certain expenses claimed as offset to unreported income, introduced in order to show lack of intent to defraud, where defendant did not give offsetting expenses as reason for failing to report her income to Welfare Department but only her fear that report might have effect on custody of her child, and where certain of these expenses were already before jury. *People v. Wood* (1963, Cal App 4th Dist) 214 Cal App 2d 298, 29 Cal Rptr 444, 1963 Cal App LEXIS 2607.

In a prosecution for grand theft arising from the theft of telephone wire, testimony of the victim's supply foreman was admissible to establish the replacement cost of the stolen cable to the victim on the date of the theft where the packing slips that he described were similar to price tags or business labels furnished by the seller and kept by the buyer in the regular course of their business, and hence were competent to establish the purchase price of the telephone wire accompanying the packing slips. *People v. Renfro* (1967, Cal App 5th Dist) 250 Cal App 2d 921, 58 Cal Rptr 832, 1967 Cal App LEXIS 2184.

The crime of theft requires a specific intent to deprive the owner of his property; and testimony by a defendant charged with theft that he lacked such intent is substantial and competent evidence. *Kincaid v. Sears, Roebuck & Co.* (1968, Cal App 1st Dist) 259 Cal App 2d 733, 66 Cal Rptr 915, 1968 Cal App LEXIS 2017.

In a prosecution of three defendants for conspiracy to commit grand theft, and for grand theft, based on misrepresentations in the sale of trust indentures, in which knowledge of the falsity of the representations and intent to defraud were essential elements of the offenses charged, evidence of orders in a civil injunction suit applicable to defendants, of which they had notice prior to the time of the charged offenses, enjoining defendants from making similar misrepresentations as to the effect of the trust indentures was properly received for the limited purpose of showing knowledge, intent and state of mind of defendants and not to prove the truth or falsity of the matters recited in the orders, where the jury was cautioned on receipt of the evidence and later instructed as to the limited purpose for which the evidence was received, and the relevance of the civil orders on the question of defendants' knowledge of the

falsity of their representations and their intent to defraud was self-evident. *People v. Lynam* (1968, Cal App 4th Dist) 261 Cal App 2d 490, 68 Cal Rptr 202, 1968 Cal App LEXIS 1769.

In a prosecution for larceny, arising from the sale by defendants of a horse fraudulently represented by them to be an Arabian horse, the requirements of a foundation were met as to the admission into evidence of a phone conversation between one of the defendants and the owner of the genuine horse, even though such owner admitted he had never met such defendant and had only the one conversation with her and could not identify her voice, where the contents of the telephone conversation, in which such defendant inquired about the horse, and the evidence, which showed that such defendant had given a detailed description of the horse and had presented the horse club registry with a bill of sale containing the forged signature of the owner, gave rise to a strong inference that such defendant placed the telephone call to the owner. *People v. Hess* (1970, Cal App 4th Dist) 10 Cal App 3d 1071, 90 Cal Rptr 268, 1970 Cal App LEXIS 1918, 43 ALR3d 643.

#### 42. Other Acts and Offenses

Evidence not going to direct guilt of defendant upon charge of larceny may be introduced for purpose of showing knowledge on his part in other and similar transactions, with view of determining his motives in transaction in issue. *People v. Fehrenbach* (1894) 102 Cal 394, 36 P 678, 1894 Cal LEXIS 657.

In prosecution for obtaining money under false pretenses, evidence that defendant, prior to questioned transaction, had made substantially same representations to other persons in endeavor to sell them stock in company owning mines, is admissible to show that representations were not inadvertent, but were deliberately made with knowledge of facts and with intent to deceive. *People v. Whalen* (1908) 154 Cal 472, 98 P 194, 1908 Cal LEXIS 354.

In prosecution for theft, evidence tending to show that theft for which defendant is on trial was committed by him as part of common scheme or plan is admissible, whether it be regarded as theft by false pretenses or by trick and device. *People v. Thorne* (1938) 10 Cal 2d 705, 76 P2d 491, 1938 Cal LEXIS 249.

In prosecution for theft by false pretenses, evidence of other transactions similar in material elements to those forming basis of indictment is admissible to show defendant's criminal intent and to corroborate evidence of false pretenses. *People v. Weitz* (1954) 42 Cal 2d 338, 267 P2d 295, 1954 Cal LEXIS 175, cert den (1954) 347 US 993, 74 S Ct 859, 98 L Ed 1126, 1954 US LEXIS 2040, cert den (1955) 350 US 889, 76 S Ct 145, 100 L Ed 783, 1955 US LEXIS 224.

In grand theft prosecution based on defendant's inducing complaining witness to give him money for partnership interest in business, court properly refused to allow defendant to cross-examine complaining witness to show that on prior occasion such witness had entered into partnership with another person and was in habit of bringing criminal actions to extricate himself, since evidence of details of other business transactions was irrelevant. *People v. Mitman* (1960, Cal App 1st Dist) 184 Cal App 2d 685, 7 Cal Rptr 712, 1960 Cal App LEXIS 1923, cert den (1961) 365 US 804, 5 L Ed 2, 81 S Ct 470, 1961 US LEXIS 1823.

Proof of false representations and pretenses made to other persons similar to those made to complaining witness are admissible in prosecution for theft by false pretenses to furnish corroboration required by law. *People v. Phillips* (1960, Cal App 2d Dist) 186 Cal App 2d 231, 8 Cal Rptr 830, 1960 Cal App LEXIS 1623.

In prosecution for theft by false pretenses, it was not error to admit testimony of certain witnesses concerning false representations made to them by defendant similar to those imposed on victim by defendant, since such evidence was not proof of collateral crimes, but merely proof of false representations made to those witnesses. *People v. Phillips* (1960, Cal App 2d Dist) 186 Cal App 2d 231, 8 Cal Rptr 830, 1960 Cal App LEXIS 1623.

In theft prosecution, it was not error to allow evidence of similar crime committed by defendant's codefendant to be admitted against such codefendant where court admonished jury at time evidence was received and instructed them later

that such evidence was admissible against codefendant only for limited purpose of showing plan, scheme or mode and was not to be considered for any purpose against defendant. *People v. Skipper* (1961, Cal App 2d Dist) 190 Cal App 2d 206, 11 Cal Rptr 681, 1961 Cal App LEXIS 2284.

In prosecution for theft by false pretenses, evidence of defendants' conduct both before and after period charged in information, relating to activities similar in material elements to those forming basis of criminal act charged, was properly admissible for limited purpose of showing defendants' knowledge and understanding of circumstances, their criminal intent, plan and scheme, and of corroborating evidence of false pretenses. *People v. Ryerson* (1962, Cal App 3d Dist) 199 Cal App 2d 646, 19 Cal Rptr 22, 1962 Cal App LEXIS 2878.

Admission of evidence of prior theft was justified by similarity of the modus operandi in two cases where in both cases men's suits were removed from racks in a Sears store and dropped in cardboard box lying on floor, though accomplice was used to remove box from store in instant case only. *People v. Zurica* (1963, Cal App 2d Dist) 219 Cal App 2d 418, 33 Cal Rptr 145, 1963 Cal App LEXIS 2390.

In grand theft prosecution of bookkeeper for alleged misappropriation of her employer's funds, no prejudicial error was committed in permitting evidence of prior offense on theory of similarity of modi operandi, supported by sufficient evidence, where the trial court instructed jury that evidence as to commission of other offenses was admitted for limited purposes, and set forth those purposes, including plan, scheme or design, into which fitted, to some degree, the commission of offense for which defendant was then on trial. *People v. Coke* (1964, Cal App 4th Dist) 230 Cal App 2d 22, 40 Cal Rptr 649, 1964 Cal App LEXIS 839.

In a prosecution for grand theft involving a complex scheme between defendant and others, including the victims, for the purchase of placer gold by the victims, evidence of a witness, who testified with respect to a similar happening a year earlier by which defendant had attempted to cheat the witness, as to hearsay statements of a third person was admissible, where the third person's statements were made within 10 minutes after he had been hit over the head with an iron bar by defendant after discovering wet sand instead of expected gold in boxes furnished by defendant, and thus made under extreme tension while excited, and where the witness' testimony was admitted for the limited purpose of tending to prove the identity of the person who committed the crime in the instant case, and a plan, scheme, system or design of the defendant for committing a theft of the kind charged in the present indictment, and the jury was so instructed. *People v. Walther* (1968, Cal App 5th Dist) 263 Cal App 2d 310, 69 Cal Rptr 434, 1968 Cal App LEXIS 2209.

### **43. Specific Kinds of Cases**

To establish fraudulent intent in prosecution of grand theft by embezzlement, evidence is admissible of acts of similar nature committed by defendant before and after date of act on which conviction is predicated. *People v. McAffery* (1960, Cal App 2d Dist) 182 Cal App 2d 486, 6 Cal Rptr 333, 1960 Cal App LEXIS 2135.

In prosecution of union officers for grand theft by embezzlement, based on paying union less than they received from automobile dealer for sales of used cars of union, where union bookkeeper testified that in each case he made entry as to amount paid, and by whom, at direction of paying defendant, dealer's books showed amounts paid by dealer, and to whom, union's books showed amount paid to it, and by whom, and there was no issue as to accuracy of these entries, there was no error in admission of these business records, adequate foundation having been laid. *People v. Clancy* (1960, Cal App 1st Dist) 184 Cal App 2d 403, 7 Cal Rptr 532, 1960 Cal App LEXIS 1887.

In prosecution for theft based on false representations, defendant is entitled to introduce proper evidence that tends to establish that he did not, in fact, possess intent required by this section; such evidence may be introduced either to controvert evidence produced by prosecution, or to establish affirmatively lack of required criminal intent. *People v. Marsh* (1962) 58 Cal 2d 732, 26 Cal Rptr 300, 376 P2d 300, 1962 Cal LEXIS 304.

In prosecution for conspiracy to commit theft by false pretenses where one of representations made by defendant was that his "organization" was largest California association of law enforcement officers and citizen members with members in every branch of law enforcement, testimony of law enforcement agency officers that their agencies had no connection with defendant's group was properly admitted as tending to disprove representation. *People v. Seter* (1963, Cal App 3d Dist) 216 Cal App 2d 238, 30 Cal Rptr 759, 1963 Cal App LEXIS 2011.

In embezzlement prosecution arising out of real estate transaction in which defendant, by mistake, received from escrow money to which he knew he was not entitled, it was not error to refuse to admit testimony of attorney engaged by defendant to represent him in escrow holder's suit against him to prove lack of fraudulent intent on defendant's part by showing offer of restoration, where defendant refused to waive attorney-client privilege, thus making proffered evidence irrelevant, since, under conditions under which it was offered, it would not have tended to prove that at time of appropriating money in question defendant did not do so with fraudulent intent. *People v. Dubrin* (1965, Cal App 2d Dist) 232 Cal App 2d 674, 43 Cal Rptr 60, 1965 Cal App LEXIS 1513.

Taking of money with felonious intent, that is, with false pretenses, is necessary element of theft committed by obtaining money by false pretenses, and where defendant's intent in taking money from widow was vital issue, newspaper clippings, carried by him in his wallet, concerning large sums of money being left to two widows, had relevancy as circumstantial evidence to prove his intent. *People v. Curtis* (1965, Cal App 3d Dist) 232 Cal App 2d 859, 43 Cal Rptr 286, 1965 Cal App LEXIS 1539.

Testimony by defendant's wife in prosecution for obtaining money by false pretenses, to corroborate his testimony that he lost most of what he owned as result of his part in business in which he had induced his victims to invest, was not relevant to his intent to defraud. *People v. Sharlow* (1965, Cal App 2d Dist) 233 Cal App 2d 596, 43 Cal Rptr 778, 1965 Cal App LEXIS 1393.

In prosecution for obtaining money by false pretenses, testimony of defense witness that he and defendant agreed to transaction similar to ones for which defendant was prosecuted and that their transaction was satisfactory to both parties was neither relevant nor probative to establish good faith or lack of criminal intent absent foundation showing that circumstances of their transaction were identical to situations of victims. *People v. Sharlow* (1965, Cal App 2d Dist) 233 Cal App 2d 596, 43 Cal Rptr 778, 1965 Cal App LEXIS 1393.

In a prosecution for grand theft based on obtaining welfare funds through false representations or concealment, the regulations and rules of the county welfare department were properly considered insofar as they related to proof of the materiality of representations made by defendant and reliance on such representations by the county. *People v. Samuel* (1966, Cal App 1st Dist) 245 Cal App 2d 210, 53 Cal Rptr 887, 1966 Cal App LEXIS 1457.

In a prosecution for theft by false pretenses, forgery of stock certificates, and uttering said certificates, wherein defendant obtained loans from various lending institutions by passing fraudulent stocks off as genuine, defendant was entitled to present evidence of his attempts at repayment of the various loans in an endeavor to convince the jury that he did not know the certificates were false and therefore lacked the requisite specific intent to defraud, where such crimes were specific intent crimes. *People v. Katzman* (1968, Cal App 1st Dist) 258 Cal App 2d 777, 66 Cal Rptr 319, 1968 Cal App LEXIS 2474, overruled *Rhinehart v. Municipal Court* (1984) 35 Cal 3d 772, 200 Cal Rptr 916, 677 P2d 1206, 1984 Cal LEXIS 164, overruled in part as stated *Perryman v. Superior Court* (2006, Cal App 2d Dist) 141 Cal App 4th 767, 46 Cal Rptr 3d 306, 2006 Cal App LEXIS 1135.

In a prosecution for grand theft involving a complex scheme between defendant and others, including the victims, for the purchase of placer gold by the victims, the trial court did not err in admitting evidence relating to a clearance obtained from the Treasury Department and advice from the Secret Service concerning one of the participants in the scheme, where the evidence obviously was admitted to attempt to show the good faith of the victim and his business partners in making ample inquiry as to the nature of the people who were suggesting a deal be made for the sale of gold. *People v. Walther* (1968, Cal App 5th Dist) 263 Cal App 2d 310, 69 Cal Rptr 434, 1968 Cal App LEXIS 2209.

### (3) WEIGHT AND SUFFICIENCY

#### 44. In General

Any evidence which shows that representation induced prosecutor to part with his property is sufficient, it not being necessary that prosecutor testify expressly thereon. *People v. Hong Quin Moon* (1891) 92 Cal 41, 27 P 1096, 1891 Cal LEXIS 1161.

That the property the defendant was charged with taking was in the possession of the prosecutrix at the time thereof was sufficient evidence of ownership on the trial of the defendant for that element of theft formerly termed larceny. *People v. Davis* (1893) 97 Cal 194, 31 P 1109, 1893 Cal LEXIS 509.

Proof of demand is not required when evidence otherwise shows facts of such fraudulent appropriation; it is only in absence of such other sufficient proof of fraudulent appropriation that demand may be necessary to fix fact of fraudulent appropriation. *People v. Kirk* (1928, Cal App) 94 Cal App 378, 271 P 347, 1928 Cal App LEXIS 644.

Judgment of conviction of theft based on general verdict of guilty can be sustained only if evidence discloses elements of one of consolidated offenses. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

Testimony of two victims as to their ownership of property warrants implied finding that property is theirs. *People v. Wade* (1957, Cal App 2d Dist) 150 Cal App 2d 281, 309 P2d 841, 1957 Cal App LEXIS 2161.

To identify property as that of complaining witness, law merely requires production of property and substantial evidence in proof of charge. *People v. Wade* (1957, Cal App 2d Dist) 150 Cal App 2d 281, 309 P2d 841, 1957 Cal App LEXIS 2161.

Where criminal acts may constitute several forms of theft, depending on how evidence is viewed by court, judgment of conviction can be sustained on evidence of any form of the offense. *People v. Murdock* (1960, Cal App 2d Dist) 183 Cal App 2d 861, 7 Cal Rptr 293, 1960 Cal App LEXIS 1842.

In prosecution for theft of money from market, amount taken was sufficiently determined to be over \$200 by checker's testimony that he did not know exactly how much was taken but that he was told that amount was \$300, by police officer's testimony that amount missing was determined by checking cash register tapes and that amount stated in his reports varied from \$249 to \$309 because of \$60 that was returned, and by manager's testimony that, after checking with bookkeeper, it was determined that \$303 was taken, including \$60 that was returned. *People v. Goss* (1961, Cal App 1st Dist) 193 Cal App 2d 720, 14 Cal Rptr 569, 1961 Cal App LEXIS 1762.

In prosecution for burglary and for theft of contents of safe, evidence that defendant had opportunity for intimate knowledge of entire premises and of habits of owners and defendant's fellow employees and opportunity to have duplicate keys made for himself, that defendant discussed safe, and its possible entry, with other employees, and that, immediately after wrongful taking of contents, defendant came into sudden possession of large sum of money, which he attempted to conceal, was sufficient to connect defendant with burglary and theft. *People v. Kellert* (1963, Cal App 1st Dist) 219 Cal App 2d 57, 32 Cal Rptr 672, 1963 Cal App LEXIS 2340.

Though section redefines theft by consolidating within such definition various "criminal acquisitive techniques" which were subject of different common-law defined larcenous offenses, this redefinition did not change elements of several types of theft included therein, and conviction of offense of theft can be sustained only if evidence establishes elements of one of consolidated offenses included therein. *People v. Darling* (1964, Cal App 4th Dist) 230 Cal App 2d 615, 41 Cal Rptr 219, 1964 Cal App LEXIS 914.

In the absence of proof that the price charged by a retail store from which merchandise is stolen does not accurately reflect the value of the merchandise in the retail market, that price is sufficient to establish the value of the merchandise within the meaning of *Pen C* §§ 484 and 487, relating to larceny and grand theft. *People v. Tijerina* (1969) 1 Cal 3d 41, 81 Cal Rptr 264, 459 P2d 680, 1969 Cal LEXIS 190.

There was sufficient evidence to establish an attempted theft under the provisions of *Pen C* § 484, subd. (a) ("theft defined" ) and *Pen C* § 664 ("punishment for attempt" ) and therefore to justify the finding of the trial court in a juvenile proceeding that the minor was a person described by *Welf. & Inst. Code*, § 602, where the minor had climbed a locked fence at a school at which he had no legitimate business with a hacksaw in his possession, with the confessed purpose of stealing a bicycle. Though he was interrupted while observed crouching between two bicycles in a bike rack area, the crime had progressed beyond mere preparation to a point where it was reasonable to infer that it would have been completed except for the interruption, a circumstance independent of the minor's will. *In re Victor F.* (1980, Cal App 2d Dist) 112 Cal App 3d 673, 169 Cal Rptr 455, 1980 Cal App LEXIS 2493.

The trial court erred in failing to dismiss an amended information in which defendant was charged with 10 counts of forgery, *Pen C* § 470, and 10 counts of presenting a false or forged document for recording, *Pen C* § 115. The counts contained in the amended information and the counts contained in the original information for which a guilty verdict had been reversed for insufficient evidence were based on the identical conduct. Since defendant's conviction was reversed for insufficiency of evidence, *Pen C* §§ 1262 and 1009 had no application to the case. While it is true that a defendant may be retried when a conviction is reversed for trial error, retrial on the same charge is impermissible if the reversal is based on insufficiency of the evidence. The prosecution here made a deliberate choice of prosecuting defendant originally on grand theft charges, while all along knowing that the identical evidence could support forgery and filing false document charges. Defendant's prosecution on the new information was barred by *Pen C* § 654(a). *Sanders v. Superior Court* (1999, Cal App 2d Dist) 76 Cal App 4th 609, 90 Cal Rptr 2d 481, 1999 Cal App LEXIS 1018.

#### 45. Corpus Delicti

Corpus delicti of that kind of theft formerly termed obtaining property under false pretenses is established by proof of false statements adapted to fraudulent purpose and money parted with on faith thereof. *People v. Ward* (1905) 145 Cal 736, 79 P 448, 1905 Cal LEXIS 616.

In proving that element of theft formerly termed embezzlement, proof of the defendant's connection with the crime may be evidence of the corpus delicti, where the circumstances of the case are such that proof of the crime of necessity involves proof of the defendant's guilt. *People v. Rowland* (1909, Cal App) 12 Cal App 6, 106 P 428, 1909 Cal App LEXIS 58.

The corpus delicti of that element of theft formerly termed embezzlement may be proved by the testimony of the defendant himself, if he voluntarily becomes a witness and testifies to facts tending to aid the proof. *People v. Hill* (1934, Cal App) 2 Cal App 2d 141, 37 P2d 849, 1934 Cal App LEXIS 1392.

In the prosecution of a public officer for the embezzling of funds, the People sufficiently proved the corpus delicti by showing collection of fines for dog licenses and failure to turn the money into the city treasury. *People v. Kay* (1939, Cal App) 34 Cal App 2d 691, 94 P2d 361, 1939 Cal App LEXIS 166.

Corpus delicti of theft is established when there is proof of person from whom property may be taken, intent to take such property against will of owner, and an act performed tending to accomplish foregoing. *People v. Fountain* (1949, Cal App) 91 Cal App 2d 158, 204 P2d 639, 1949 Cal App LEXIS 1198.

Evidence that two cases of whisky were missing from store, that they had not been sold, and that no one had been given permission to take them from store sufficiently established corpus delicti of crime of theft, and defendant's confession was admissible. *People v. Brooks* (1957, Cal App 2d Dist) 154 Cal App 2d 631, 316 P2d 435, 1957 Cal App

LEXIS 1676.

Corpus delicti of theft of fur was established by evidence that missing fur was in stock just before defendant's arrival, that it was discovered to be missing shortly after defendant's departure, and that it had not been sold nor had permission been granted for its removal. *People v. Moore* (1965, Cal App 4th Dist) 234 Cal App 2d 29, 44 Cal Rptr 184, 1965 Cal App LEXIS 990.

In a prosecution for grand theft arising out of defendant's picking up of supermarket shopping carts in areas adjacent to the markets and refusing to return them without payment of a "finder's fee," there was substantial evidence supporting the trial court's findings that defendant intended to permanently deprive the owners of the carts if they did not pay his expenses, plus a reward, where defendant systematically took the carts from areas where they had been left by patrons before the markets could retrieve them, held them for a few days while accumulating expenses incurred by him in the business he specifically set up to retrieve the carts, and made demands on the owners to pay a ransom or reward of ten times the going rate for retrieving carts in order to release them, and where, upon refusal of the markets, he removed all indicia of ownership, sold the carts to other markets, and kept the proceeds. *People v. Stay* (1971, Cal App 2d Dist) 19 Cal App 3d 166, 96 Cal Rptr 651, 1971 Cal App LEXIS 1267.

#### 46. Corroboration of Testimony

In prosecution for theft, possession of stolen property may be sufficient corroboration to warrant conviction upon testimony of accomplice, and to be in possession of stolen property one need not have it in his manual possession or actually on his person, and such possession may be joint or individual, and two or more persons may be in possession where they have power to control and intent to control jointly. *People v. Rice* (1938, Cal App) 29 Cal App 2d 614, 85 P2d 215, 1938 Cal App LEXIS 391.

In prosecution for theft by false pretenses arising out of sales promotion program to stimulate sales of autos, testimony of two other witnesses who had dealings with defendant similar to those had by victim supplied sufficient corroborating evidence. *People v. Winning* (1961, Cal App 1st Dist) 191 Cal App 2d 763, 12 Cal Rptr 885, 1961 Cal App LEXIS 2121.

If conviction rests primarily on testimony of single witness that false pretense was made, making of such pretense must be corroborated. *People v. Dimitrovich* (1961, Cal App 2d Dist) 194 Cal App 2d 710, 15 Cal Rptr 407, 1961 Cal App LEXIS 1868.

In prosecution for theft by false pretenses arising out of misapplication of construction loan proceeds, testimony of loan company's president, defendant's accomplice, was corroborated by writing required by former Pen C § 1110 (see now Pen C § 532), where, on five occasions, false pretenses were expressed in writing either by defendant personally or from persons under his orders representing that construction had reached stage for advancement of loan proceeds and these writings were designed to be accepted as representations on strength of which defendant would receive money. *People v. Parker* (1965, Cal App 3d Dist) 235 Cal App 2d 86, 44 Cal Rptr 900, 1965 Cal App LEXIS 908.

Corroboration of the victim's testimony was essential to support a conviction of larceny on the theory of false pretenses, former Pen C § 1110 (see now Pen C § 532), but corroboration was not necessary to sustain a conviction of grand theft by trick and device. *People v. Felsman* (1967, Cal App 2d Dist) 257 Cal App 2d 437, 64 Cal Rptr 870, 1967 Cal App LEXIS 1801.

In a prosecution for the theft of liquor by false pretenses (Pen C § 484), in which the proof that the false pretense was made rests primarily on the testimony of a single witness, the making of the pretense had to be corroborated, former Pen C § 1110 (see now Pen C § 532), and where the witness was also an accomplice, Pen C § 1111, required that his testimony be corroborated by independent evidence which, without the aid or assistance from the accomplice's testimony, tended to connect defendant with the crime charged. *People v. Rondono* (1973, Cal App 4th Dist) 32 Cal App

3d 164, 108 Cal Rptr 326, 1973 Cal App LEXIS 974.

In a prosecution of defendant for theft by false pretenses (*Pen C § 484*), the rule that the testimony of one accomplice to a crime is not competent to corroborate that of another accomplice was not applicable to the testimony of a witness who was not subject to prosecution for the offense with which defendant was charged, even though he might have been guilty of concealing assets to defraud creditors (*Pen C § 154*), or as an accessory to the crime of theft (*Pen C § 32*). *People v. Rondono* (1973, Cal App 4th Dist) 32 Cal App 3d 164, 108 Cal Rptr 326, 1973 Cal App LEXIS 974.

#### **47. Possession of Stolen or Other Property**

Possession of stolen property is not alone sufficient to convict of larceny, though such possession is circumstance to be considered in determining guilt of possessor, in order to convict him, prosecutor must add other circumstances indicative of guilt. *People v. Chambers* (1861) 18 Cal 382, 1861 Cal LEXIS 202, overruled *People v. McFarland* (1962) 58 Cal 2d 748, 26 Cal Rptr 473, 376 P2d 449, 1962 Cal LEXIS 305.

Proof of possession of property recently stolen is not of itself sufficient evidence upon which to convict possessor of theft. *People v. Ah Ki* (1862) 20 Cal 177, 1862 Cal LEXIS 38, overruled *People v. McFarland* (1962) 58 Cal 2d 748, 26 Cal Rptr 473, 376 P2d 449, 1962 Cal LEXIS 305, overruled *People v. Ditson* (1962) 57 Cal 2d 415, 20 Cal Rptr 165, 369 P2d 714, 1962 Cal LEXIS 185.

In trial for larceny where testimony for people consists of many suspicious circumstances, one of which is possession of stolen property by defendant soon after larceny was committed, if defendant fails to account for this possession it is circumstance to be taken into consideration with other circumstances tending to show guilt. *People v. Kelly* (1865) 28 Cal 423, 1865 Cal LEXIS 151.

If defendant was seen in possession of stolen property shortly after it was stolen and does not explain his possession by showing that it was honestly acquired, it is circumstance tending to show guilt. *People v. Gill* (1873) 45 Cal 285, 1873 Cal LEXIS 37.

Possession of stolen property by the defendant a few days after the taking is insufficient to prove that element of theft formerly termed larceny. *People v. Swinford* (1880) 57 Cal 86, 1880 Cal LEXIS 500.

Where defendant was found in possession of recently stolen mare, slight corroborative evidence of other inculpatory circumstances tending to show his guilt, in absence of evidence on his part sufficient to authorize submission of case to jury. *People v. Vidal* (1898) 121 Cal 221, 53 P 558, 1898 Cal LEXIS 879.

In proving one guilty of that element of theft formerly termed larceny, proof of possession of the property stolen may be sufficient. *People v. Nunley* (1904) 142 Cal 105, 75 P 676, 1904 Cal LEXIS 904.

It is not necessary to convict defendant of larceny to show that money or property or any part of it has been in defendant's possession. *Dimmick v. United States* (1905, 9th Cir Cal) 135 F 257, 1905 US App LEXIS 4317.

Mere possession of stolen property is not sufficient to sustain conviction of theft, but such possession plus slight corroborative evidence of other inculpatory circumstances will suffice. *People v. Wissenfeld* (1951) 36 Cal 2d 758, 227 P2d 833, 1951 Cal LEXIS 225.

When property is found in defendant's possession shortly after it was stolen, corroborating evidence required to sustain conviction of theft may be slight, and failure to show that possession was honestly obtained is in itself strong circumstance tending to show possessor's guilt. *People v. Ransome* (1960, Cal App 2d Dist) 180 Cal App 2d 140, 4 Cal Rptr 347, 1960 Cal App LEXIS 2322, cert den *Dean v. California* (1960) 364 US 887, 5 L Ed 2d 107, 81 S Ct 178, 1960 US LEXIS 301.

Though mere possession of stolen property will not sustain possessor's conviction of its theft, such possession plus slight corroborative evidence of other inculpatory circumstances, such as acts, conduct or declarations of accused tending to show guilt, false and misleading accounts of possession, failure to show honest possession, and attempted disposition of property for less than its value, will suffice. *People v. Phelps* (1961, Cal App 2d Dist) 192 Cal App 2d 12, 13 Cal Rptr 383, 1961 Cal App LEXIS 1897.

In prosecution for burglary and theft, possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in form of statements or conduct of defendant tending to show his guilt. *People v. Giffis* (1963, Cal App 2d Dist) 218 Cal App 2d 53, 32 Cal Rptr 215, 1963 Cal App LEXIS 1749.

There is no specific time interval between burglary and theft and subsequent discovery of stolen property in defendant's possession when court will say that mere possession of stolen property with other corroborative evidence is sufficient to convict defendant; weight of evidence of possession, in light of time elapsing, is for jury. *People v. Giffis* (1963, Cal App 2d Dist) 218 Cal App 2d 53, 32 Cal Rptr 215, 1963 Cal App LEXIS 1749.

In prosecution for burglary and theft, failure to show that possession of recently stolen property was honestly obtained is itself strong circumstance tending to show possessor's guilt. *People v. Giffis* (1963, Cal App 2d Dist) 218 Cal App 2d 53, 32 Cal Rptr 215, 1963 Cal App LEXIS 1749.

In prosecution for burglary and theft, possession of recently stolen property together with false explanation will support conviction. *People v. Giffis* (1963, Cal App 2d Dist) 218 Cal App 2d 53, 32 Cal Rptr 215, 1963 Cal App LEXIS 1749.

Sudden and unexplained possession of money by one previously impecunious may serve to connect that person with recent theft. *People v. Kellert* (1963, Cal App 1st Dist) 219 Cal App 2d 57, 32 Cal Rptr 672, 1963 Cal App LEXIS 2340.

Evidence of possession of recently stolen property, with slight corroboration through statement or conduct tending to show guilt, warrants conviction for unlawful taking. *People v. Ford* (1965, Cal App 2d Dist) 234 Cal App 2d 480, 44 Cal Rptr 556, 1965 Cal App LEXIS 1036.

Where recently stolen property is found in conscious possession of defendant who, on being questioned by police, gives false explanation regarding his possession or remains silent under circumstances indicating consciousness of guilt, inference of guilt is permissible, and it is for jury to determine whether inference should be drawn in light of all evidence. *People v. Ford* (1965, Cal App 2d Dist) 234 Cal App 2d 480, 44 Cal Rptr 556, 1965 Cal App LEXIS 1036.

Possession of recently stolen property is so incriminating that to warrant a conviction of theft there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show guilt; flight, in addition to other corroborating evidence, is sufficient. *People v. Pater* (1968, Cal App 3d Dist) 267 Cal App 2d 921, 73 Cal Rptr 823, 1968 Cal App LEXIS 1471.

Though mere opportunity to commit theft, like the mere possession of stolen goods, is not enough to sustain a conviction of theft, when both opportunity and possession are present and corroborate each other tending to show guilt, they suffice to sustain a conviction. *People v. Mosqueira* (1970, Cal App 2d Dist) 12 Cal App 3d 1173, 91 Cal Rptr 370, 1970 Cal App LEXIS 1704.

While mere possession of stolen property is insufficient in itself to sustain a conviction for its theft, such possession is so incriminating that only slight corroboration tending to show guilt is necessary. *People v. Mosqueira* (1970, Cal App 2d Dist) 12 Cal App 3d 1173, 91 Cal Rptr 370, 1970 Cal App LEXIS 1704.

#### **48. Theft and Larceny Cases Generally**

Proof of a felonious and fraudulent taking of another's property, with intent to deprive him thereof, is sufficient to show larceny, without proof that the taker intended to convert the property to his own use. *People v. Juarez* (1865) 28 Cal 380, 1865 Cal LEXIS 140.

That a stolen horse was found in the possession of the accused a few hours after it was taken was insufficient to prove that element of theft formerly termed larceny. *People v. Noregea* (1874) 48 Cal 123, 1874 Cal LEXIS 106.

Where one had a \$5 gold piece and \$2 in four silver half-dollars, and the defendants took money from him at gun point, and they admitted that the amounts taken totaled \$7, that element of theft formerly termed larceny was proved. *People v. Nelson* (1880) 56 Cal 77, 1880 Cal LEXIS 354.

The finding of the hides of stolen cattle in the defendant's barn, which was open to anyone who chose to enter it, was not sufficient proof of possession in a prosecution for that element of theft formerly termed larceny. *People v. Hurley* (1882) 60 Cal 74, 1882 Cal LEXIS 400.

When evidence is otherwise insufficient to justify verdict, conviction for larceny cannot be sustained by mere fact that defendant when witness in his own behalf made false statement as to matter in no way connected with crime of which he was accused. *People v. Wong Ah You* (1885) 67 Cal 31, 7 P 8, 1885 Cal LEXIS 534.

Proof of the crime of receiving stolen goods is insufficient to convict one of larceny. *People v. Ward* (1895) 105 Cal 652, 39 P 33, 1895 Cal LEXIS 697.

Where the defendant, charged with that element of theft formerly termed larceny, exercised control and ownership over the property alleged to have been taken, sold it for almost nothing, and made declarations showing his obtaining and disposition thereof, the evidence was sufficient to sustain a conviction. *People v. Melandrez* (1906, Cal App) 4 Cal App 396, 88 P 372, 1906 Cal App LEXIS 11.

In proving that element of theft formerly termed larceny, it is sufficient proof of asportation that the owner of property, induced by the fraudulent promises of the accused, delivered possession without parting with title and that the accused obtained possession with the preconceived intention of appropriating the property without performing the stated inducements, and did subsequently convert it to his own use. *People v. Robinson* (1930, Cal App) 107 Cal App 211, 290 P 470, 1930 Cal App LEXIS 404.

It is persuasive of a criminal intent when it is shown that a stolen truck was, when discovered, 25 miles distant from its usual place of storage and in possession of the accused. *People v. Bowman* (1953, Cal App) 117 Cal App 2d 78, 254 P2d 134, 1953 Cal App LEXIS 1775.

Conviction of theft of office supplies and stationery from defendant's employer was supported by evidence that defendant had job maintaining inventory of such items and also conducted bindery and printing business of his own which did printing for defendant's employer, that many items of stationery and office supplies were found on premises of defendant's own business, that his employer did not authorize storage of such items on defendant's premises and was not informed by defendant that it was done, that item of property reported to police as stolen was later found on defendant's premises, that defendant entered into transaction with another person for sale of paper and delivered his employer's stock in fulfillment of undertaking, and that defendant was deceitful when questioned by officers on day of arrest, and defendant's exculpatory explanation of his actions merely created conflict in evidence. *People v. Morton* (1961, Cal App 2d Dist) 191 Cal App 2d 744, 12 Cal Rptr 817, 1961 Cal App LEXIS 2118.

Conviction of theft of six diamond grinding wheels was supported by evidence showing that defendant had possession of wheels within short time after their theft, that he attempted to sell them at far less than their value, that he lacked technical knowledge concerning them, and that he gave false, inconsistent and misleading statements relating to his possession of wheels, and by his failure to testify, deny or explain under oath how he came to have possession. *People v. Phelps* (1961, Cal App 2d Dist) 192 Cal App 2d 12, 13 Cal Rptr 383, 1961 Cal App LEXIS 1897.

Conviction of both defendants for theft of two bicycles was supported by evidence that when they were stopped by police they had two stolen bicycles in car and were at time only block from house where one of bicycles had been stolen, that they told police they were taking bicycles downtown for some boys, but downtown area was only block and half distant, that later contradicting story of how bicycles came to be in car was related, that defendants' conduct after their apprehension was such that it cast doubt on explanations they gave, and that one defendant at first admitted he knew bicycles were stolen, but denied at trial that he had made such statement. *People v. Ford* (1962, Cal App 1st Dist) 200 Cal App 2d 905, 19 Cal Rptr 758, 1962 Cal App LEXIS 2793.

In prosecution for theft where it was shown defendants fitted physical description of men whom eyewitnesses saw removing certain equipment from parked television repair truck into motor car, defendants wore same type of clothing as that worn by such thieves, drove car similar in year, model and color to that used in perpetrating theft in question, and bearing similar license plate number, defendants were in vicinity of theft at time of its occurrence and articles similar to those stolen were found in one defendant's car, such facts and circumstances, together with fact that one defendant failed to testify, were sufficient to sustain defendants' convictions of theft. *People v. Shannon* (1963, Cal App 4th Dist) 211 Cal App 2d 525, 27 Cal Rptr 264, 1963 Cal App LEXIS 2940.

In prosecution for burglary and for theft of contents of golf club safe, there was sufficient evidence that burglary and theft in fact took place where it was shown that club owners' receipts, found to have been wrongfully taken, had been placed in safe, that both safe and building had been carefully locked, and that no permission had been given anyone to enter building or safe. *People v. Kellert* (1963, Cal App 1st Dist) 219 Cal App 2d 57, 32 Cal Rptr 672, 1963 Cal App LEXIS 2340.

In a prosecution for grand theft resulting in a conviction of petty theft, there was sufficient circumstantial evidence from which the trial judge reasonably could conclude that it was the defendants who took the missing items and to establish a prima facie case against the defendants, where, while no one testified that he saw defendants take property from an apartment, the items in question were in the apartment when rented to defendants; defendants had access to the apartment; the items were discovered to be missing shortly after they left, on the same day they moved; the door to the apartment was closed and the key inside the apartment; and the owner of the property gave no permission for its removal. *People v. Crain* (1967, Cal App 2d Dist) 255 Cal App 2d 726, 63 Cal Rptr 494, 1967 Cal App LEXIS 1334.

Overwhelming evidence supported defendant's participation in thefts and second-degree burglary where it was shown that officers saw a car driven by defendant pull from the curb without lights about 4 a.m., that on reaching the intersection an officer heard a burglar alarm ringing in a service station across from where defendant's car was first seen, that the station had been broken into, that a screwdriver in defendant's car bore the same black paint as the station windows and exactly fit the pry mark on a station window, that hydraulic motors removed from trucks in an uncovered area and a battery charger taken without the owner's permission from a trucking business, which had been broken into, were in defendant's car, and that washers and a green nut were found in defendant's pocket and the color of the nut matched the paint on one hydraulic unit. *People v. Mack* (1969, Cal App 2d Dist) 2 Cal App 3d 724, 82 Cal Rptr 771, 1969 Cal App LEXIS 1460.

#### **49. Theft by Trick or Device Cases**

In prosecution arising out of operation of mortgage and loan company which accepted funds from investors for use by builders in constructing structures on specific lots, defendants' conviction of larceny by trick or device was supported by evidence that prospective investors, building materialmen and builders were informed that money invested would be kept in trust fund for payment of construction cost of building on land covered by deeds of trust given to investors, that investors intended that money should be kept in such trust fund until paid out for construction purposes, that such money was used by defendants knowingly and intentionally for improper purposes, that defendants' course of action was in accordance with general agreed plan, and that they intended to deprive investors of their property permanently without any claim or pretense of right or justification. *People v. McManus* (1960, Cal App 4th Dist) 180 Cal App 2d 19, 4 Cal Rptr 642, 1960 Cal App LEXIS 2310.

Though loan transaction generally creates only civil rights and obligations, borrower may be held criminally liable under evidence sufficiently showing larceny by trick or device; thus fact that receipt for \$20,000 recited that it was "loan" did not free defendant from criminal liability where he obtained money from victim by trick or device, and where, in addition, document on its face indicated that it was receipt from company in which victim had no interest and specifically declared that spending limit was \$5,000 in absence of further authorization. *People v. Woolson* (1960, Cal App 2d Dist) 181 Cal App 2d 657, 5 Cal Rptr 766, 1960 Cal App LEXIS 2042.

Theft by trick or device was shown by evidence that defendant and victim had become associated in venture to buy and sell gold to Mexican government at profit, that defendant told victim he needed sum of money to be deposited in named bank in Mexico in order to establish credit, that victim furnished money subject to condition that only part of it could be used by defendant, remainder to remain on deposit in bank untouched except with victim's permission, that defendant, contrary to such instructions, used all money for his own purposes, and that when he obtained delivery of money he did not intend to devote it to use for which it was given to him but intended to convert it to his own use. *People v. Woolson* (1960, Cal App 2d Dist) 181 Cal App 2d 657, 5 Cal Rptr 766, 1960 Cal App LEXIS 2042.

Theft by trick and device was shown by evidence that defendant, president of company engaged in buying and selling machinery, sold machinery to victim and accepted his checks in payment with preconceived design to appropriate proceeds to his own use, that defendant did not intend to devote checks to use for which they were given him but appropriated money of one check to augment salaries of company's employees and kept proceeds of second check for himself, that money belonged to victim and was acquired by defendant by fraud, and that four days before transaction with victim, defendant learned that company for which he was president was to be disbanded and he was asked to liquidate machinery, which he ostensibly did, but to his own personal gain. *People v. Rath* (1961, Cal App 2d Dist) 196 Cal App 2d 638, 16 Cal Rptr 641, 1961 Cal App LEXIS 1622.

In a prosecution for grand theft based on the theory of larceny by trick or device, the jury's implied finding that a loan of money to defendant was obtained by means of his false representation that the money was to be used to pay the remainder of the purchase price of a house and that the victim would not have made the loan for defendant to buy the car which he purchased with the money was supported by the evidence where the victim stated positively that he would not have loaned defendant the money to buy a car, and where it was for the jury to determine the effect of the victim's contrasting statements that he loaned the money to defendant because he was a friend, that the reason he loaned defendant the money was on his promise to pay it back, and that he did not have any reason, but let defendant have the money because he said he would pay a good dividend. *People v. Dedrick* (1967, Cal App 1st Dist) 249 Cal App 2d 750, 57 Cal Rptr 740, 1967 Cal App LEXIS 2285.

## 50. Embezzlement Cases

In a prosecution for that element of theft formerly termed embezzlement, proof of the removal of only a part of the property charged is sufficient. *People v. Gray* (1884) 66 Cal 271, 5 P 240, 1884 Cal LEXIS 755.

On the trial of one accused of that element of theft formerly termed embezzlement, it is sufficient to prove the property as lawful money of the United States, it not being necessary to show the coin, number, denomination, or kind thereof. *People v. Cobler* (1895) 108 Cal 538, 41 P 401, 1895 Cal LEXIS 888.

No mere neglect of duty of defendant as secretary of corporation to examine books can sustain charge of embezzlement, and presumption of innocence will overcome all presumptions of knowledge or control of secretary over books. *People v. Blackman* (1899) 127 Cal 248, 59 P 573, 1899 Cal LEXIS 634.

Conviction of embezzlement of steam launch as being property of another person entrusted to defendant and feloniously converted by him to his own use is not sustained by evidence where it appears that steam launch was purchased by defendant from such other person, and there is no proof that purchase price was not paid. *People v. Goodrich* (1903) 138 Cal 472, 71 P 509, 1903 Cal LEXIS 704.

To warrant conviction of crime of embezzlement it is not necessary, as matter of law, that demand should have been made upon defendant for money involved; it is sufficient if evidence shows fraudulent appropriation by defendant of such money. *People v. Hatch (1912) 163 Cal 368, 125 P 907, 1912 Cal LEXIS 418.*

An implied finding of an unlawful intent was supported by evidence that the defendant attorney converted to his own use moneys originally belonging to his client; that he obtained possession of parts of the money by means of a gift instrument which he had his client sign, although the client was incompetent at the time; that he gained possession of the remainder of the money by falsely representing himself to the attorney of the custodian of the money as the administrator of the estates of his client's relatives, for which the client was in fact the administrator and sole heir; that defendant deliberately evaded service of process in an action brought by the client to recover the money; that the gift, if valid, would render the client almost completely destitute; and that defendant never claimed the money as a gift until after the client died. *People v. Hewlett (1951, Cal App) 108 Cal App 2d 358, 239 P2d 150, 1951 Cal App LEXIS 2056, cert den (2004) 343 U.S. 981, 72 S. Ct. 1084, 96 L. Ed. 1372, 1952 U.S. LEXIS 2004*, superseded by statute as stated in *People v. Brock (2006, Cal App 1st Dist) 143 Cal App 4th 1266, 49 Cal Rptr 3d 879, 2006 Cal App LEXIS 1575.*

In prosecution for theft of sum of money given to defendant by his associate in venture to buy gold and sell it to Mexican government at profit, issue as to whether defendant and victim were partners or joint venturers was properly decided adversely to defendant under evidence showing that there was no joint participation in management and control of business, and proposed profit-sharing was contemplated only as compensation for use of money advance. *People v. Woolson (1960, Cal App 2d Dist) 181 Cal App 2d 657, 5 Cal Rptr 766, 1960 Cal App LEXIS 2042.*

Conviction of labor union business manager of embezzlement was supported by evidence that he conducted negotiations for purchase for union of seven automobiles at \$2,637 each, that he directed bookkeeper to make out check for \$21,000, \$2,541 more than required for union purchase, that check was made to cash contrary to usual practice of union, that he told union treasurer to secure two cashier's checks, one for union's cars and one for treasurer's personal car, that he signed letter to automobile dealer describing vehicle that was to be treasurer's own personal car, thus assuring that documents of title would be issued to treasurer rather than to union, that bookkeeper was told to enter price of union cars at \$3,000 each, and that union was never reimbursed for price of treasurer's car. *People v. Swanson (1960, Cal App 1st Dist) 183 Cal App 2d 424, 6 Cal Rptr 599, 1960 Cal LEXIS 1770.*

In prosecution of union officers for grand theft by embezzlement, based on paying union less than they received from automobile dealer for sales of used cars of union, conclusion that defendants were converting union property, of which they were trustees, was sustained by evidence that all sales took place only after defendant treasurer had negotiated altered method of trading in used cars, that in each instance "purchasing" defendant directed entry to be made when he paid union, that all but three of these entries showed dealer, rather than defendant, as purchaser, that in no case was document of title transferred to name of defendant, but that each ran to dealer and that in each case payment to union by defendant was made after dealer had paid defendant larger amount. Moreover, as to defendant president, where circumstances supported finding of his knowing participation in sales, his conviction was supported by evidence whether he be deemed principal as aider and abettor or conspirator. *People v. Clancy (1960, Cal App 1st Dist) 184 Cal App 2d 403, 7 Cal Rptr 532, 1960 Cal App LEXIS 1887.*

Conviction of embezzlement was supported by evidence that defendant, when he sold certain real property encumbered by deed of trust for benefit of bank, received check from escrow from which money due to bank had not been deducted, that he knew that mistake had been made and that mistake was due to fact, known to him but not to escrow holder or other parties to escrow, that through mistake bank's prior lien on property, so far as public records were concerned, had been extinguished, and that knowing of mistake defendant appropriated monies to his own use that rightfully belonged to bank. *People v. Dubrin (1965, Cal App 2d Dist) 232 Cal App 2d 674, 43 Cal Rptr 60, 1965 Cal App LEXIS 1513.*

Defendant's conviction of embezzlement of vehicle was supported by evidence that he rented truck, agreeing to keep it for not more than five hours, failed to return it, and was seen driving it five days later. *People v. Starkey (1965,*

*Cal App 2d Dist) 234 Cal App 2d 822, 44 Cal Rptr 738, 1965 Cal App LEXIS 1070.*

Failure of prosecution to identify several thousand trust deed holders and bondholders with respect to property from which defendants allegedly diverted construction funds did not prevent defendants from showing consent to diversion by trust deed holders and bondholders, where once prosecution showed that diversions were prima facie felonious, identity of persons who consented to diversion must have been known to defendants, but no effort was made to prove consent by anyone. *People v. Steele (1965, Cal App 2d Dist) 235 Cal App 2d 798, 45 Cal Rptr 601, 1965 Cal App LEXIS 977.*

Overwhelming evidence established defendant's intent to commit theft by false pretenses or theft by embezzlement where it was shown that he intended to solicit funds for trust deed association by making representations so flagrantly false that he could not possibly have believed them to be true and that moneys paid into trust account were withdrawn under his direction for alien purpose. *People v. Collins (1966, Cal App 2d Dist) 242 Cal App 2d 626, 51 Cal Rptr 604, 1966 Cal App LEXIS 1166.*

Sufficient evidence supported defendant's conviction of theft where it was shown that investor gave trust company of which defendant was president funds for purchase of trust deed, that investor's check was deposited in trust company's account, that defendant prepared check payable on that account to himself bringing account balance far below amount required to cover investor's funds, that withdrawn funds were used to pay debts of trust company and its affiliate, and that investor never received trust deed. *People v. Witt (1966, Cal App 2d Dist) 242 Cal App 2d 641, 51 Cal Rptr 559, 1966 Cal App LEXIS 1167.*

## **51. False Pretenses Cases**

Conviction of grand theft by false pretenses sustained by evidence that, among other things, victims gave money to defendants in reliance on defendants' false representations, made in pursuance of a scheme to secure the victims' money, that a certain allegedly wealthy man would contribute to a proposed business a sum of money equal to that contributed by the victims. *People v. Staver (1953, Cal App) 115 Cal App 2d 711, 252 P2d 700, 1953 Cal App LEXIS 1727.*

An implied finding that money had been acquired with felonious intent is sustained by evidence that defendant, as head of an organization, deliberately set out to acquire life savings of his victims, one a woman nearing 70 and the other a woman of little education and rural background, that women were won over by flattering offers of positions in organization and false promises of security for their loans, and thereafter held in line by importunate and then menacing supplications. *People v. Ashley (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.*

A conviction of grand theft by false pretenses is sustained by evidence that corporation which defendant controlled promised prospective retailers to find suitable locations for ice cream stores and to refund deposits if locations were not found within specified time, that it also promised to deliver necessary equipment at such locations, that 8 of 10 transactions were handled by defendant personally and the remaining two by persons who acted under his direction, that in each of ten instances the promises to find locations and furnish stores and equipment were performed only partly or not at all, that none of complainants received an ice cream machine, that no refunds were made in most transactions and in the others there were only partial refunds, and that defendant engaged in various methods of diverting substantial funds of corporation into cash which was not accounted for and was apparently used for purposes other than benefit of corporation, all of which justifies implied finding that defendant's promises to complainants were made without intent to perform them. *People v. Weitz (1954) 42 Cal 2d 338, 267 P2d 295, 1954 Cal LEXIS 175, cert den (1954) 347 US 993, 74 S Ct 859, 98 L Ed 1126, 1954 US LEXIS 2040, cert den (1955) 350 US 889, 76 S Ct 145, 100 L Ed 783, 1955 US LEXIS 224.*

In prosecution of automobile salesman for theft by false pretenses in sale of new car, conviction was sustained by evidence that defendant offered victims trade-in allowance of \$700 for their old car and sale price of new one would be

\$2,600, but that defendant wrote up contract and purchase order calling for thirty-six monthly payments of about \$95, that victims told defendant they could not pay that much a month and defendant told them to disregard it, that papers were to obtain basic facts and higher figures were not binding and that as soon as victims brought in \$450 in cash contract would be rewritten calling for reduced payments, that victims then signed documents and subsequently brought in cash but contract was not rewritten, that they returned new car and were given older car of same make and year as one they turned in, but in much worse condition, and that \$450 in cash they had paid was never returned. *People v. Caruso* (1959, *Cal App 2d Dist*) 176 *Cal App 2d* 272, 1 *Cal Rptr* 428, 1959 *Cal App LEXIS* 1480, cert den (1960) 363 *US* 819, 4 *L Ed 2d* 1517, 80 *S Ct* 1259, 1960 *US LEXIS* 977.

Where defendant represented that \$25 an acre was all that he could get for property, failing to disclose that he had been offered \$45 an acre, and his wife opened, under name of another woman, escrows for purpose of buying property from owner at \$25 an acre and at the same time selling it to purported purchaser at \$45 an acre, with knowledge that purported purchaser had previously offered to purchase at higher price from owner, evidence supported conviction for theft. *People v. Barker* (1960) 53 *Cal 2d* 539, 2 *Cal Rptr* 467, 349 *P2d* 73, 1960 *Cal LEXIS* 233.

Employment of false pretenses in procurement of deed was sufficiently proved by testimony of man and wife that they signed certain documents in reliance on defendant's representation that they were identical copies of previously signed escrow instructions, together with documents so signed. *People v. Zucker* (1960, *Cal App 2d Dist*) 177 *Cal App 2d* 172, 2 *Cal Rptr* 112, 1960 *Cal App LEXIS* 2443.

Conviction of obtaining money by false pretenses was sustained by evidence that, among other things, one defendant had developed powder to add to fruit juice to make drink and other defendants were employed to find distributors for such powder, that in obtaining distributors defendant salesmen made many false representations of fact and advertising matter used was not model of veracity. *People v. Carlin* (1960, *Cal App 1st Dist*) 178 *Cal App 2d* 705, 3 *Cal Rptr* 301, 1960 *Cal App LEXIS* 2646.

Despite his conflicting evidence, defendant's participation in crime was shown by evidence that defendant introduced complaining witness to codefendant and made false statements regarding codefendant's connection with factory in which he was supposed to be employed, that codefendant and complaining witness were to engage in bookmaking in factory, that after first day's activity complaining witness found that losses were heavy and suspected that codefendant had "past-posted" them, that defendant stated codefendant was square guy and would not do such thing, that complaining witness furnished \$500 to pay off losses and thereafter defendant demanded more money from him stating that he had killed man who failed to pay debt, that defendant introduced codefendant under fictitious name and aided him in avoiding disclosure of his surname, and that defendant tried to protect codefendant by telling complaining witness that only defendant could get through to codefendant on telephone while he was at work. *People v. O'Hara* (1960, *Cal App 2d Dist*) 184 *Cal App 2d* 798, 8 *Cal Rptr* 114, 1960 *Cal App LEXIS* 1937.

Conviction of theft by false pretenses was supported by evidence that complaining witness was induced to part with his equitable interest in motel valued at \$95,000 in return for second deeds of trust which turned out to be almost worthless by representations made by defendant with knowledge of their falsity or in reckless ignorance of what he stated to be facts, and relied on, at least in part, by complaining witness. *People v. Phillips* (1960, *Cal App 2d Dist*) 186 *Cal App 2d* 231, 8 *Cal Rptr* 830, 1960 *Cal App LEXIS* 1623.

Conviction of theft by false pretenses arising out of sale of automobile by defendant to victims was supported by evidence that defendant told the victims he had authority from dealer from whom he took car to sell it when in fact he had no such authority, that victims relied on his representations and parted with their money in reliance on them. *People v. McNear* (1961, *Cal App 2d Dist*) 190 *Cal App 2d* 541, 12 *Cal Rptr* 124, 1961 *Cal App LEXIS* 2337.

Jury could reasonably infer that defendant fraudulently obtained check and cashed it with intent to permanently deprive complaining witness of money by testimony that he lied when he represented himself as owner of corporation, nonexistent entity; that he lied when he represented he had "deal" pending with firm in distant city; that he needed

money to go to that city to contact firm but never went; that he did not deposit money in bank to cover his checks; that he could not be reached at addresses he had given; and that he never made his check good to complaining witness. *People v. Rosson* (1962, Cal App 2d Dist) 202 Cal App 2d 480, 20 Cal Rptr 833, 1962 Cal App LEXIS 2505.

Conviction of theft by false pretenses was supported by evidence that defendant, who operated restaurant in hospital as concessionaire, borrowed money from victim by falsely stating that he was going to expand his operations and that he owned all restaurant equipment free and clear on which he gave victim chattel mortgage to secure loan, whereas, in fact, hospital company owned most of equipment, defendant was largely in debt and chattel mortgage was not executed in proper form so as to be valid as against defendant's creditors and purchasers or encumbrancers of property in good faith and for value, and by evidence of similar false representations made to other persons by defendant. *People v. Allen* (1962, Cal App 2d Dist) 203 Cal App 2d 659, 21 Cal Rptr 789, 1962 Cal App LEXIS 2411.

Conviction of obtaining money by false pretenses was supported by evidence that defendant, who operated restaurant in hospital as concessionaire, borrowed money from victims by falsely stating to them that he was expanding his restaurant operation and was building new restaurant close to certain hospital, by evidence that he gave victims chattel mortgage on certain corporate stock which had already been mortgaged to third person and by evidence that defendant had made similar false representations to other persons. *People v. Allen* (1962, Cal App 2d Dist) 203 Cal App 2d 659, 21 Cal Rptr 789, 1962 Cal App LEXIS 2411.

Fact that persons charged with conspiracy to obtain money by false pretenses represented magazine subscription solicitors, acting under their direction and supervision, to be veterans, orphans and epileptics, either with knowledge that they were not such or without knowledge that they were such, was sufficient to lead man of ordinary caution or prudence to believe and conscientiously entertain strong suspicion that representations were made with intent to deceive subscribers. *People v. Conlon* (1962, Cal App 1st Dist) 207 Cal App 2d 86, 24 Cal Rptr 219, 1962 Cal App LEXIS 1885.

Though there was no direct evidence indicating defendant's wife, in falsely representing that she and her husband owned no property other than 1941 Chevrolet, acted with intent to defraud, such intent could be inferred from testimony indicating that defendant had been owner of several horses of value in excess of \$600 at time his wife applied for and received financial aid from county. *People v. Allen* (1962, Cal App 1st Dist) 208 Cal App 2d 537, 25 Cal Rptr 351, 1962 Cal App LEXIS 1824.

Where defendant charged with obtaining money by false pretenses took no part in discussions immediately preceding filing of application for county financial aid by his wife and did not sign application, and where, though he later falsely denied owning any horses at time his wife applied for and received such aid, such false statement, made when welfare payments to him and his wife had been discontinued by county, could have induced no reliance on part of county. *People v. Allen* (1962, Cal App 1st Dist) 208 Cal App 2d 537, 25 Cal Rptr 351, 1962 Cal App LEXIS 1824.

Where record showed that membership fees for organization were solicited and collected by representing that most of money would be used to aid in combating juvenile delinquency and that none of money collected was used for promised purpose but only for personal use of defendant and his salesmen, elements of crime of theft by false pretenses were established. *People v. Seter* (1963, Cal App 3d Dist) 216 Cal App 2d 238, 30 Cal Rptr 759, 1963 Cal App LEXIS 2011.

Jury could infer defendant's intent to defraud from evidence that defendant falsely represented to his victim that defendant was doctor who had done well in his practice at certain hospital but had sold it, that defendant showed victim escrow papers for sale indicating \$25,000 deposit and assured victim money was on deposit though no money was on deposit, that defendant falsely represented he owed another hospital and was in process of furnishing it, that he showed victim a check book with defendant's name as doctor on cover and on checks, that he exhibited false statement of his net worth as being over \$2,000,000, that as result of false representations victim was induced to give defendant check for \$5,000 for which victim's company received assignment of \$5,600 from escrow, and that neither victim nor his company received any funds from transaction. *People v. Causey* (1963, Cal App 2d Dist) 220 Cal App 2d 641, 34 Cal

*Rptr 43, 1963 Cal App LEXIS 2297, cert den (1964) 376 US 959, 11 L Ed 2d 976, 84 S Ct 981, 1964 US LEXIS 1649.*

Theft by false pretenses, conviction of which requires showing that title to stolen property was transferred, was shown by evidence that in exchange for some cash and one car delivered by defendant and in reliance on defendant's promise to deliver two more cars in "front-line" condition next day, automobile dealer delivered car to defendant's friend and that defendant had no intention of delivering other two cars, where, though dealer testified that cars to be delivered were subject to reappraisal and that car he delivered could have been returned if defendant and his friend didn't like it, jury could have concluded from other testimony that dealer turned over possession of car he delivered to defendant's friend, intending to sell it and intending that defendant's friend become owner; that dealer reserved security interest in car he transferred did not compel finding that no present sale was intended, if sale was "on approval," transfer of title occurred when purchaser retained car beyond time limit for returning it. (§§ 1738, 1739.) *People v. Aiken (1963, Cal App 2d Dist) 222 Cal App 2d 45, 34 Cal Rptr 828, 1963 Cal App LEXIS 1622.*

Defendant's transfer to each of his victims of interest in trucks that he did not own, coupled with his refusal, in violation of contracts with each of victims, to return money advanced by them supported finding of intent to defraud without reference to his representation to victims that each would earn profit of \$800 monthly, which defendant asserted was expression of opinion. *People v. Sharlow (1965, Cal App 2d Dist) 233 Cal App 2d 596, 43 Cal Rptr 778, 1965 Cal App LEXIS 1393.*

Even if loan company officer's knowledge that defendant was not using loan proceeds to construct houses that would secure loan was imputed to loan company, there was substantial evidence to support defendant's conviction so far as it rested on his theft of initial construction disbursement where loan officer testified he thought initial disbursement was used as intended and as defendant represented until he inspected property and defendant testified that he and loan officer intended construction on property when loan was arranged. *People v. Parker (1965, Cal App 3d Dist) 235 Cal App 2d 86, 44 Cal Rptr 900, 1965 Cal App LEXIS 908.*

Where there was evidence that investor deposited funds in escrow account on promise that he would receive trust deed, that money was released to trust company, that defendant, president of trust company, caused check to be deposited in his personal account and used funds to pay his bank note, court was not required to believe that he thought trust deed had been transferred to investor. It was immaterial whether note was trust company's obligation, as defendant claimed, or had been incurred for some other reason. *People v. Witt (1966, Cal App 2d Dist) 242 Cal App 2d 641, 51 Cal Rptr 559, 1966 Cal App LEXIS 1167.*

The grand jury could reasonably believe a scheme to be a fraud, and that defendants had agreed upon a course of conduct designed to violate the statutes against theft where circumstantial evidence warranted the inference that respondents associated themselves together in a common scheme and design, for the purpose of extracting money from a known segment of the public by a false pretense, to offer for sale material described by them in such a manner as to create the belief it was obscene, and thereafter to deliver material that did not meet the implied promises of their brochure. *People v. Tierney (1967, Cal App 1st Dist) 253 Cal App 2d 1, 61 Cal Rptr 164, 1967 Cal App LEXIS 2313.*

There was sufficient evidence to establish probable cause to believe that trucking companies, by false pretenses and representations, defrauded their truck drivers of labor, where they represented to the drivers that, in compensation for labor, each of them would receive the total gross income of the truck he was driving, less expenses for fuel and upkeep, that a part of this income would be paid to him in cash and the remainder applied to the purchase of the truck from his employer, and that the cash payment would equal 30 percent of the gross income, when in fact the drivers were paid 27 percent of the gross income, were not credited with any truck purchase payments, and were not given any indicia of ownership; and where there was evidence showing the false pretense, although not the sole inducing cause, in fact materially influenced the drivers to accept employment under the terms designated. *People v. Miles & Sons Trucking Service, Inc. (1968, Cal App 4th Dist) 257 Cal App 2d 697, 65 Cal Rptr 465, 1968 Cal App LEXIS 2496.*

In a prosecution of three defendants for grand theft based on misrepresentations in the sale of trust indentures, there

was substantial evidence to support the grand theft conviction as to one defendant, where he admitted preparing and distributing pamphlets containing representations relied upon by the purchasers, where he gave pamphlets to a third person for distribution to provide leads in furtherance of which the third person distributed the pamphlets to purchasers mentioned in the indictment, all of whom became interested by reason of the representations contained in them, where he met with the purchasers and orally made representations contained in the written material, where two codefendants corroborated the testimony of the victims that defendant did make the representations charged, and where there was substantial evidence that defendant knew the representations he made were false. *People v. Lynam* (1968, Cal App 4th Dist) 261 Cal App 2d 490, 68 Cal Rptr 202, 1968 Cal App LEXIS 1769.

The owner of a bar and restaurant who ordered and accepted delivery of liquor from wholesalers with the intent not to pay for it, and who thereafter concealed the liquor, was properly convicted of theft by false pretenses (*Pen C § 484*), even though the evidence would also have supported to a conviction under *Pen C § 154*, for fraudulently concealing assets from creditors. *People v. Rondono* (1973, Cal App 4th Dist) 32 Cal App 3d 164, 108 Cal Rptr 326, 1973 Cal App LEXIS 974.

In a prosecution for grand theft by false pretenses (*Pen C §§ 484*, subd. (a), 487, 532), based on defendant's use of his automated teller machine (ATM) card to obtain cash from grocery stores even though he knew that the checking account to which the card was connected was overdrawn and was to be closed, the evidence was sufficient to establish that the stores relied on defendant's presentation of his ATM card in approving his request for money, and not merely on the computer system they used to verify customers' credit. There was a glitch in the computer system concerning defendant's account, such that, rather than transmitting a code declining the transaction because defendant's account had been closed, it kept returning a code to the stores indicating that there was no response. This, in turn, caused them to treat each transaction as a "stand-in" without a verification or approval from the computer system, under which circumstance they had a policy of accepting a customer's card and giving the customer money. Thus, it could hardly be said that the stores relied on the computer system instead of defendant's representation that his card was valid. Even assuming that the use of a computer verification system could be described as an investigation, the computer system in fact never approved defendant's transactions. As a result, the stores had nothing to rely on except defendant's implicit representation that his ATM card was valid. It elected to take the risk and rely solely on defendant's representation. *People v. Whight* (1995, Cal App 3d Dist) 36 Cal App 4th 1143, 43 Cal Rptr 2d 163, 1995 Cal App LEXIS 665.

## **E. TRIAL, VERDICT, AND JUDGMENT**

### **52. In General**

Whether possession of stolen property is strong evidence or only slight evidence tending to show guilt is matter for jury to pass upon and not for court to determine. *People v. Titherington* (1881) 59 Cal 598, 1881 Cal LEXIS 457.

Where witness who had apparently been party to larceny testifies that he did not intend to commit any offense but had feigned complicity for purpose of detecting thieves, question whether or not he was particeps criminis is for jury. *People v. Bolanger* (1886) 71 Cal 17, 11 P 799, 1886 Cal LEXIS 513.

In prosecution for larceny, weight to be given to evidence that defendant was in possession of property recently stolen is one of fact for jury. *People v. Cline* (1888) 74 Cal 575, 16 P 391, 1888 Cal LEXIS 797.

Ordinarily question whether vehicle was used with permission of owner is one of fact to be determined by trial court. *Hayes v. Financial Indem. Co.* (1953, Cal App Dep't Super Ct) 118 Cal App 2d Supp 883, 257 P2d 765, 1953 Cal App LEXIS 1640.

Purpose of consolidation of the several larcenous crimes into single crime of theft was to remove technicalities that existed in pleading and proof of these crimes at common law; indictments and informations charging "theft" can now simply allege an "unlawful taking," and juries need no longer be concerned with technical differences between several

types of theft but can return a general verdict of guilty if they find that an "unlawful taking" has been proved. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

Where money paid to defendant by prosecuting witnesses and characterized by them as "guarantee" was transferred without any agreement that he would use it in chicken-raising venture or in any one particular way, it is for jury to determine whether money was paid as cash bond which was misused by defendant in violation of *Lab C § 405* or whether defendant obtained payments by making false pretenses within this section or whether transaction took some other form, criminal or noncriminal. *People v. Pond* (1955) 44 Cal 2d 665, 284 P2d 793, 1955 Cal LEXIS 267.

On issue of false pretenses, it is factual question whether promise was dishonestly made. *People v. Rocha* (1955, Cal App 2d Dist) 130 Cal App 2d 656, 279 P2d 836, 1955 Cal App LEXIS 1953.

In prosecution for theft and burglary, it is not error to sustain objection to cross-examination question asked prosecuting witness concerning location of burglarized apartment, in view of court's power to regulate order of proof, and fact that jury had as yet heard no testimony on burglary count. *People v. Saltz* (1955, Cal App 2d Dist) 131 Cal App 2d 459, 280 P2d 900, 1955 Cal App LEXIS 2073.

Juries need not be concerned with technical differences between several types of theft, but can return general verdict of guilty if they find that unlawful taking has been proved. *People v. Reinschreiber* (1956, Cal App 2d Dist) 141 Cal App 2d 688, 297 P2d 658, 1956 Cal App LEXIS 1906.

In prosecution for theft by false pretenses concerning vending machines sold by defendant, it was proper to refuse to motion for dismissal or advised verdict on any of five counts before close of entire case, where, apart from any other consideration, the making of similar false representations in the other four counts could be considered by jury as cooperation of making of false representation in each particular count. *People v. Simms* (1956, Cal App 1st Dist) 144 Cal App 2d 189, 300 P2d 898, 1956 Cal App LEXIS 1701.

Whether defendants, in carrying merchandise inside their coats through checkstand of store without paying for it, intended to steal was question of fact to be resolved by trial court in nonjury case from all circumstances. *People v. Thompson* (1958, Cal App 2d Dist) 158 Cal App 2d 320, 322 P2d 489, 1958 Cal App LEXIS 2371.

Partial investigation by victim of false pretenses does not, as matter of law, preclude reliance on them, but merely raises question of fact for jury. *People v. Phillips* (1960, Cal App 2d Dist) 186 Cal App 2d 231, 8 Cal Rptr 830, 1960 Cal App LEXIS 1623.

In a prosecution for grand theft based on obtaining welfare funds through false representations or concealment, where there is any evidence to sustain either a verdict of grand theft or of petty theft, the verdict must be upheld. *People v. Samuel* (1966, Cal App 1st Dist) 245 Cal App 2d 210, 53 Cal Rptr 887, 1966 Cal App LEXIS 1457.

On the issue of false pretense, intent to defraud is a question of fact; the nonperformance of a promise is a circumstance to be considered with all others in deciding whether the intent to perform was absent at the time of making the promise. *People v. Gibson* (1969, Cal App 2d Dist) 275 Cal App 2d 198, 79 Cal Rptr 693, 1969 Cal App LEXIS 1905.

### **53. Instructions to Jury**

There is no error in charging jury that mere possession of stolen property will not justify verdict of guilty, but there must be proof of other facts tending to establish guilt of accused, provided, all facts and evidence prove defendant's guilt beyond reasonable doubt. *People v. Brown* (1874) 48 Cal 253, 1874 Cal LEXIS 140.

Demeanor of accused when found in possession of stolen property or when he attempted to explain it, is proper to

be considered by jury so far as disclosed by evidence, and instruction referring thereto as circumstance proper to be considered cannot be construed as intended to include demeanor of defendant as witness at trial. *People v. Farrington* (1903) 140 Cal 656, 74 P 288, 1903 Cal LEXIS 650.

In prosecution for larceny, where defendant claimed that offense was that of obtaining money by false pretenses, court properly instructed jury that, "distinction which law makes between larceny and obtaining money by false pretenses turns on question of title. If, when taking is consummated by use of trick, artifice or device, complaining witness, being deceived by acts or representations of defendant, parts not only with possession but also with title to property, offense is that of obtaining money by false pretenses, but if complaining witness only parted with possession of property and not with title, offense is larceny." *People v. Schenone* (1912, Cal App) 19 Cal App 280, 125 P 758, 1912 Cal App LEXIS 41.

In prosecution for embezzlement where defendant testified that he had formed intent to steal property before it came into his possession as bailee, it is duty of court to instruct jury upon distinction between larceny and embezzlement as applicable to evidence, and particularly testimony of defendant. *People v. Bojorquez* (1917, Cal App) 35 Cal App 350, 169 P 922, 1917 Cal App LEXIS 504.

Instruction in prosecution for larceny drawing distinction between such crime and crime of obtaining property under false pretenses, in absence of any contention as to commission of latter crime, is not prejudicially erroneous. *People v. Carnes* (1920, Cal App) 49 Cal App 225, 192 P 1088, 1920 Cal App LEXIS 811.

It is improper for the trial court, instructing the jury on the law of embezzlement, to state that a restoration of the property is in mitigation of punishment. *People v. Smith* (1929) 206 Cal 235, 273 P 789, 1929 Cal LEXIS 586.

In prosecution for theft in which indictment and evidence related solely to false pretenses, jury could not have been misled by instruction that grand theft includes larceny and embezzlement as well. *People v. Gordon* (1945, Cal App) 71 Cal App 2d 606, 163 P2d 110, 1945 Cal App LEXIS 936.

Where question of intent is not in issue, instruction is not prejudicial which states that no act committed by person while in state of voluntary intoxication is less criminal by reason of his having been in such condition. *People v. Wright* (1949, Cal App) 94 Cal App 2d 70, 210 P2d 263, 1949 Cal App LEXIS 1492.

In a prosecution for theft it was not error to give instructions as to the meaning of "aid and abetting" in addition to those given, in referring to §§ 31 and 32, that if the jury was convinced that the defendant either actively committed the offense charged or aided and abetted any other person to commit the offense he should be found guilty, where the jury was informed that before it could convict the defendant as an aider or abetter of another in the commission of the offense it was necessary to prove that he not only aided in the offense but did so with the guilty knowledge of the wrongful purpose of the perpetrator. *People v. Johnson* (1950, Cal App) 99 Cal App 2d 717, 222 P2d 335, 1950 Cal App LEXIS 1768.

In a prosecution against an attorney for embezzling an incompetent client's moneys, instructions that a presumption of undue influence arises where a trustee obtains an advantage over his beneficiary were proper, where other instructions informed the jury that the effect of the presumption was not to relieve the prosecution of its burden of proof. *People v. Hewlett* (1951, Cal App) 108 Cal App 2d 358, 239 P2d 150, 1951 Cal App LEXIS 2056, cert den (2004) 343 U.S. 981, 72 S. Ct. 1084, 96 L. Ed. 1372, 1952 U.S. LEXIS 2004, superseded by statute as stated in *People v. Brock* (2006, Cal App 1st Dist) 143 Cal App 4th 1266, 49 Cal Rptr 3d 879, 2006 Cal App LEXIS 1575.

It is not necessary for the court to give an instruction defining the words "fraud," "artifice," "trick" and "device" in a theft case, since these are words in common usage and common knowledge. *People v. Taylor* (1953, Cal App) 116 Cal App 2d 802, 254 P2d 179, 1953 Cal App LEXIS 1141.

It is proper to instruct the jury that if the owner parts with the possession of property intending that it shall be used

for or applied to a specific purpose, and the person receiving the property, at the time it is received, feloniously intends to convert it to his own use and steal it and not to apply it to the use or purpose for which it was received, knowing that the owner parted with it only for such specific use or purpose, then the owner does not part with his title to the property and the crime is that of larceny by trick and device. *People v. Taylor* (1953, Cal App) 116 Cal App 2d 802, 254 P2d 179, 1953 Cal App LEXIS 1141.

It is not incumbent on court to give on its own motion a cautionary instruction on a specific contention by defendant that the charged theft was in fact a loan, where the jury is fully instructed on the general principles of the law involved. *People v. Andary* (1953, Cal App) 120 Cal App 2d 675, 261 P2d 791, 1953 Cal App LEXIS 2000.

Whether pretense is a false promise or a misrepresentation of fact, defendant's intent must be proved by something more than mere proof of nonperformance or actual falsity, and defendant is entitled to have jury instructed to that effect. *People v. Ashley* (1954) 42 Cal 2d 246, 267 P2d 271, 1954 Cal LEXIS 171, cert den (1954) 348 US 900, 75 S Ct 222, 99 L Ed 707, 1954 US LEXIS 1437.

It is proper to instruct in prosecution for grand theft that as to any evidence against defendant which he can reasonably be expected to deny, his failure to testify thereto may be considered by jury as tending to indicate truth of evidence. *People v. Reinschreiber* (1956, Cal App 2d Dist) 141 Cal App 2d 688, 297 P2d 658, 1956 Cal App LEXIS 1906.

In prosecution for theft of county welfare funds, it was proper to instruct jury that, under regulations adopted by State Department of Social Welfare, where man and mother of child receiving aid are deporting themselves as man and wife, there is presumption they are married and that man is child's stepfather, that this presumption and evidence of conduct are sufficient to establish existence of marriage and stepfather relationship for purposes of aid to needy children though parties in applying for aid deny they are married, that man and woman deport themselves as man and wife if they live together in established family relationship over reasonable period of time, have represented themselves to community as husband and wife, or have made statements to friends and neighbors that they are man and wife, and that prior to time they have refuted presumption of marriage by sufficient evidence Department of Social Welfare has right to treat man as if he were stepfather of aided child and to compute eligibility for aid by considering his income as that of one who has assumed role of spouse to mother of child. *People v. Bailey* (1961) 55 Cal 2d 514, 11 Cal Rptr 543, 360 P2d 39, 1961 Cal LEXIS 231.

In prosecution for theft arising out of transaction in which victim, attempting to purchase new auto, traded his old car at supposed valuation of \$800 but later learned that he had been allowed \$500 and did not receive vehicle back when new auto was repossessed, instructions on larceny and larceny by trick and device did not become inapplicable because victim intended to part with title to his old car, since he intended that it be used for specific purpose, that is, \$800 trade-in on newer model, but in fact it was not used for that purpose. *People v. Winning* (1961, Cal App 1st Dist) 191 Cal App 2d 763, 12 Cal Rptr 885, 1961 Cal App LEXIS 2121.

In prosecution for grand theft (this section and § 487) and for conspiracy to commit grand theft (§ 182), though neither defendant testified for state, giving of instruction requested by defendant's codefendant concerning corroboration of accomplice's testimony did not constitute prejudicial error, where before giving instruction court stated that neither defendant had testified for state, and that rule or corroboration applied to defendants only insofar as one's testimony might tend to incriminate other. *People v. Wood* (1963, Cal App 4th Dist) 214 Cal App 2d 298, 29 Cal Rptr 444, 1963 Cal App LEXIS 2607.

In a prosecution for attempted theft by false pretenses the trial court's instruction on the specific intent required for theft was sufficient where, although the trial court's instruction was merely a reading of the definition of the crime of theft by false pretenses, it clearly distinguished the two elements of the crime, and it was clear from the instruction that intent to defraud was an essential element of the crime which had to be proved apart from proof of the falsity of the alleged pretense. *People v. Fujita* (1974, Cal App 4th Dist) 43 Cal App 3d 454, 117 Cal Rptr 757, 1974 Cal App LEXIS

1330, cert den (1975) 421 US 964, 95 S Ct 1952, 44 L Ed 2d 451, 1975 US LEXIS 1569.

In a prosecution of defendant for grand theft (*Pen C* §§ 484 and 487, subd. (1)), arising out of the theft of two leather jackets, the trial court did not commit error in instructing the jury that the fair market value of the stolen property is the highest price in terms of money for which the property would have sold in the open market at the time and place of the theft, since the phrase "highest price" was defined in terms of what the articles would be sold for in the open market if neither buyer nor seller was under an urgent necessity to either buy or sell them, and where the instruction did not require that the jury accept whatever value was placed on the article either by its owner or by an expert, but left the question of valuation to the jury's determination. *People v. Pena* (1977, *Cal App 1st Dist*) 68 *Cal App 3d* 100, 135 *Cal Rptr* 602, 1977 *Cal App LEXIS* 1302.

In a trial for murder and robbery, the jury should have been instructed on theft as a lesser included offense of robbery because there was substantial evidence that defendant's intent to steal from the victim was not formed until after the murder; although the State alleged that defendant stole the victim's boots and money shortly before or after the killing, the evidence overwhelmingly supported the conclusion that the primary motive for the killing was to prevent the victim from testifying that defendant committed a prior robbery. The trial court's error in failing to give the lesser-included-offense instruction required reversal of the robbery conviction and a robbery special circumstance finding. *People v. Ledesma* (2006) 39 *Cal 4th* 641, 47 *Cal Rptr 3d* 326, 140 *P3d* 657, 2006 *Cal LEXIS* 9521, rehearing denied (2006) 2006 *Cal. LEXIS* 13100, 2006 D.A.R. 14245, cert den (2007) 2007 *U.S. LEXIS* 3834.

In a trial for attempted carjacking under *Pen C* §§ 21a, 215(a), 664, defendant was not entitled to an instruction on attempted grand theft auto under *Pen C* §§ 21a, 664, 484, 487 because attempted grand theft auto is not a lesser included offense of attempted carjacking. *People v. Marquez* (2007, *Cal App 2d Dist*) 152 *Cal App 4th* 1064, 62 *Cal Rptr 3d* 31, 2007 *Cal App LEXIS* 1090.

#### **54. Refusal or Failure to Instruct**

Instruction that if defendant was not present when alleged crime was committed he was not guilty was properly refused, since aiding and abetting crime would have rendered defendant guilty as principal. *People v. Feliz* (1902) 69 *P* 220.

It is proper to refuse an instruction in a fur theft case that if the jury believed defendant possessed hairs of fur on his clothing by accident or in some other innocent manner a verdict of not guilty is required, where there is no evidence to justify such an instruction. *People v. Kross* (1952, *Cal App*) 112 *Cal App 2d* 602, 247 *P2d* 44, 1952 *Cal App LEXIS* 1071, cert den (1952) 344 *US* 908, 73 *S Ct* 328, 97 *L Ed* 701, 1952 *US LEXIS* 1417, rehearing denied (1953) 344 *US* 923, 73 *S Ct* 385, 97 *L Ed* 711, 1953 *US LEXIS* 2487.

In prosecution for grand theft in which jury is properly instructed with reference to knowledge, design and intent of person in obtaining, converting and depriving owner of title to or possession of property, defendant is not entitled to complain of court's failure to give unrequested instruction that it is necessary for prosecution to prove specific intent to steal. *People v. Reinschreiber* (1956, *Cal App 2d Dist*) 141 *Cal App 2d* 688, 297 *P2d* 658, 1956 *Cal App LEXIS* 1906.

In prosecution of chiropractor for conspiracy to commit theft by false pretenses, rejection of certain of his proposed instructions did not prevent jury from considering his defense that he made his representations in good faith, where instructions given required, for conviction, implied finding that he intended to defraud his patients and thus made it necessary for jurors to consider question of good faith. *People v. Schmitt* (1957, *Cal App 2d Dist*) 155 *Cal App 2d* 87, 317 *P2d* 673, 1957 *Cal App LEXIS* 1251.

It was not error to refuse instruction that before jury could return guilty verdict all jurors must agree that theft proven was either by embezzlement, by larceny or by obtaining money by false pretenses, where court clearly defined various methods possibly included. *People v. McManus* (1960, *Cal App 4th Dist*) 180 *Cal App 2d* 19, 4 *Cal Rptr* 642,

1960 Cal App LEXIS 2310.

Instruction in embezzlement case that evidence of defendant's offer to return monies appropriated by him might be considered by jury in determining whether he had felonious intent was properly refused where there was no substantial evidence of any offer of restitution. *People v. Dubrin* (1965, Cal App 2d Dist) 232 Cal App 2d 674, 43 Cal Rptr 60, 1965 Cal App LEXIS 1513.

In a prosecution for theft by false pretenses, forgery of stock certificates and uttering said certificates, it was not error for the court to fail to instruct sua sponte that attempts at repayment were evidence of defendant's lack of intent to defraud, where the attempts at repayment were specific points developed by the evidence at the trial and instructions thereon should have been requested, and where the court properly defined the crimes of which defendant was charged and fully instructed that specific intent was required to convict defendant of these crimes, and also instructed that an act made under ignorance or mistake of fact which disproves any criminal intent is not a crime. *People v. Katzman* (1968, Cal App 1st Dist) 258 Cal App 2d 777, 66 Cal Rptr 319, 1968 Cal App LEXIS 2474, overruled *Rhinehart v. Municipal Court* (1984) 35 Cal 3d 772, 200 Cal Rptr 916, 677 P2d 1206, 1984 Cal LEXIS 164, overruled in part as stated *Perryman v. Superior Court* (2006, Cal App 2d Dist) 141 Cal App 4th 767, 46 Cal Rptr 3d 306, 2006 Cal App LEXIS 1135.

There is no error in failing to instruct the jury that they must agree on the method by which theft was committed, and it is sufficient if the instructions inform the jury that they must agree that the property was fraudulently appropriated by defendant. *People v. Kagan* (1968, Cal App 1st Dist) 264 Cal App 2d 648, 70 Cal Rptr 732, 1968 Cal App LEXIS 2129, cert den (1969) 394 US 911, 89 S Ct 1027, 22 L Ed 2d 224, 1969 US LEXIS 2364.

## 55. Judgment, Sentence, and Punishment

That type of theft formerly termed embezzlement was punishable in the same manner as that element formerly termed grand larceny. *People v. De Coursey* (1882) 61 Cal 134, 1882 Cal LEXIS 559.

That type of theft formerly termed obtaining money under false pretenses was punishable in the same manner as that type of theft formerly termed larceny. *People v. Wynn* (1903) 140 Cal 661, 74 P 144, 1903 Cal LEXIS 651.

A judgment which recited the jury verdict finding the defendant guilty of the offense of obtaining property under false pretenses of the value of more than \$100 was sufficient upon which to impose imprisonment for a felony. *In re Application of Wignall* (1924) 193 Cal 387, 224 P 452, 1924 Cal LEXIS 317.

Offers of restoration, in whole or in part, of money fraudulently appropriated are matters in mitigation of punishment. *People v. Costello* (1951, Cal App) 107 Cal App 2d 514, 237 P2d 281, 1951 Cal App LEXIS 1937.

Elements of several types of theft included within section have not been changed, and judgment of conviction of theft, based on general verdict of guilty, can be sustained only if evidence discloses elements of one of consolidated offenses. *Callan v. Superior Court of San Mateo County* (1962, Cal App 1st Dist) 204 Cal App 2d 652, 22 Cal Rptr 508, 1962 Cal App LEXIS 2293.

Mere fact that information charged defendants under this section does not vitiate judgment of conviction where it set out facts of crime of which defendants were ultimately convicted, theft of motor vehicle, which can only be grand theft. *People v. O'Neal* (1962, Cal App 1st Dist) 204 Cal App 2d 707, 22 Cal Rptr 641, 1962 Cal App LEXIS 2300.

It is immaterial which of several forms of theft may constitute basis of judgment of conviction if judgment can be sustained on evidence of any form of offense. *People v. Dolbeer* (1963, Cal App 1st Dist) 214 Cal App 2d 619, 29 Cal Rptr 573, 1963 Cal App LEXIS 2652.

In a prosecution which resulted in sentences for robbery and auto theft, the proscription against double punishment

precluded punishment for the offense of auto theft, not a crime of violence but a violation of property interests, where the evidence indicated that the robbers, who while ransacking a house, were carrying stolen property belonging to three victims to the garage, formed the intent to steal the car of one of the victims during the robbery if not before it. *People v. Bauer* (1969) 1 Cal 3d 368, 82 Cal Rptr 357, 461 P2d 637, 1969 Cal LEXIS 214, 37 ALR3d 1398, cert den (1970) 400 US 927, 91 S Ct 190, 27 L Ed 2d 187, 1970 US LEXIS 399.

Imposition, pursuant to *Pen C* §§ 487, subd 2, 489, of a state prison term for the taking of property of a value of less than \$200 from the person did not violate constitutional proscriptions against cruel and unusual punishment, where it could not be said that the maximum prison term provided in *Pen C* § 489, is so disproportionate to the crime as to shock the conscience and offend notions of human dignity, and where the nature of defendant's offense and his prior history justified a severe penalty. *People v. Smith* (1974, Cal App 2d Dist) 42 Cal App 3d 706, 117 Cal Rptr 88, 1974 Cal App LEXIS 1259.

Following conviction of felony petty theft, defendant was sentenced to a suspended state prison term and granted probation. The trial court was proper in not imposing a fine pursuant to *Pen C* § 1202.45, in addition to a restitution fine pursuant to *Pen C* § 1202.4. Defendant was not presently subject to a sentence which carried a period of parole, and therefore it would be inappropriate to impose a § 1202.45 fine, which requires the imposition of a sentence that includes a period of parole when, as matters stood, such a state of affairs did not exist. *People v. Hannah* (1999, Cal App 2d Dist) 73 Cal App 4th 270, 86 Cal Rptr 2d 395, 1999 Cal App LEXIS 636.

Because the full range of conduct proscribed by *Cal. Pen Code* § 484(a) falls within the definition of "theft offense," a conviction for petit theft with a prior under *Cal. Pen Code* §§ 487, 666, which arose from *Cal. Pen Code* § 484(a), qualified as an aggravated felony under 8 USCS § 1101(a)(43) and required a 16-level increase under the federal sentencing guidelines. *United States v. Corona-Sanchez* (2000, 9th Cir Cal) 234 F3d 449, 2000 US App LEXIS 31297, rev'd (2002, 9th Cir Cal) 291 F3d 1201, 2002 US App LEXIS 10778.

United States Court of Appeals for the Ninth Circuit holds that a felony conviction for petty theft with a qualifying prior offense under *Pen C* §§ 484, 488, and 666 is not a crime for which a sentence of one year or longer may be imposed under 8 USCS § 1227(a)(2)(A)(i)(II). *Rusz v. Ashcroft* (2004, 9th Cir) 376 F3d 1182, 2004 US App LEXIS 15837.

## F. APPEAL AND ERROR

### 56. In General

Where an information did not state all the particulars of the offense of theft but did state a public offense, and no demurrer was filed, a conviction based thereon would not be set aside. *People v. Myrick* (1931, Cal App) 112 Cal App 117, 296 P 320, 1931 Cal App LEXIS 1005.

Where the defendant was charged with and convicted of two separate charges of grand theft, the evidence would have warranted instructions on larceny, but only instructions on embezzlement were given, the attorney general may not on appeal sustain the conviction on charges of larceny which were not submitted to the jury. *People v. Hewlett* (1951, Cal App) 108 Cal App 2d 358, 239 P2d 150, 1951 Cal App LEXIS 2056, cert den (2004) 343 U.S. 981, 72 S. Ct. 1084, 96 L. Ed. 1372, 1952 U.S. LEXIS 2004, superseded by statute as stated in *People v. Brock* (2006, Cal App 1st Dist) 143 Cal App 4th 1266, 49 Cal Rptr 3d 879, 2006 Cal App LEXIS 1575.

On appeal from conviction of theft, judgment must be affirmed where the only asserted basis of appeal is insufficiency of evidence and there is sufficient evidence to support judgment on theory of theft by trick and device, by false pretenses or by embezzlement. *People v. Reinschreiber* (1956, Cal App 2d Dist) 141 Cal App 2d 688, 297 P2d 658, 1956 Cal App LEXIS 1906.

In prosecution for theft by false pretenses, reviewing court examines evidence to determine whether corroboration required by *Pen C § 1111*, of accomplice's testimony was proved; weight to be given such evidence is for jury. *People v. Parker (1965, Cal App 3d Dist) 235 Cal App 2d 86, 44 Cal Rptr 900, 1965 Cal App LEXIS 908.*

Deciding the existence of a larcenous intent on the part of him who takes property from its owner is the function of the trier of fact, and if the evidence is sufficient to justify a reasonable inference that such intent existed, an appellate court will not disturb the finding of the trial judge. *People v. Crain (1967, Cal App 2d Dist) 255 Cal App 2d 726, 63 Cal Rptr 494, 1967 Cal App LEXIS 1334.*

In a prosecution for theft, by false pretenses, forgery of stock certificates and uttering the certificates, defendant may not argue on appeal that certain exchanges between the court and counsel tended to mislead the jury into believing that attempts at repayment of the loans were irrelevant, and that failure to instruct on the relevance of repayments became prejudicial error, where the comments complained of occurred during colloquy between court and counsel at various points throughout the trial when defendant's counsel objected to evidence of events subsequent to the loan transaction, and where any error in this regard was invited by counsel in view of counsel's repeated emphasis on the irrelevance of events subsequent to the loan transactions and his agreement with some of the court's comments. *People v. Katzman (1968, Cal App 1st Dist) 258 Cal App 2d 777, 66 Cal Rptr 319, 1968 Cal App LEXIS 2474, overruled Rhinehart v. Municipal Court (1984) 35 Cal 3d 772, 200 Cal Rptr 916, 677 P2d 1206, 1984 Cal LEXIS 164, overruled in part as stated Perryman v. Superior Court (2006, Cal App 2d Dist) 141 Cal App 4th 767, 46 Cal Rptr 3d 306, 2006 Cal App LEXIS 1135.*

In a prosecution for grand theft, defendant cannot later complain as to the appointment of the person showing parts of the premises where the alleged theft was accomplished to the jury on a properly court-authorized visit to such premises where no objection was made to the appointment of the person showing parts of the premises. *People v. Walther (1968, Cal App 5th Dist) 263 Cal App 2d 310, 69 Cal Rptr 434, 1968 Cal App LEXIS 2209.*

A judgment of conviction of theft (*Pen C § 484*) must be affirmed by the appellate court if there is sufficient evidence to support a theft conviction on any theory. *People v. Kagan (1968, Cal App 1st Dist) 264 Cal App 2d 648, 70 Cal Rptr 732, 1968 Cal App LEXIS 2129, cert den (1969) 394 US 911, 89 S Ct 1027, 22 L Ed 2d 224, 1969 US LEXIS 2364.*

It was not error to deny defendant's motion for a mistrial sought on the theory that the only reasonable inference available to the jury when they were told that certain tape recordings had disappeared during a noon recess was that he was responsible for the tapes and that, therefore, it became impossible for him to have a fair trial, where any prejudice in this connection was averted by the court's prompt admonition telling the jury that the tapes had been in the court's custody, and directing the jurors not to attribute the disappearance to either the prosecution or the defense. *People v. Kirk (1974, Cal App 1st Dist) 43 Cal App 3d 921, 117 Cal Rptr 345, 1974 Cal App LEXIS 1366.*

On appeal from a grand theft conviction under *Pen C § 487, subd. (1)* for the offense of theft by larceny, where the sufficiency of the asportation element of the offense of larceny was disputed by defendant, the function of the reviewing court was, first, to determine the applicable law of theft by larceny, and then to examine the record to ascertain whether there was substantial evidence of asportation, a required element of the offense of larceny. *People v. Khoury (1980, Cal App Dep't Super Ct) 108 Cal App 3d Supp 1, 166 Cal Rptr 705, 1980 Cal App LEXIS 2104.*

### **57. Harmless and Prejudicial Error**

Where one was charged with larceny and the court's instructions defined larceny as the stealing, taking, or carrying away of the personal property of another, thus omitting the word "felonious," the charge was prejudicial error. *People v. Cheong Foon Ark (1882) 61 Cal 527, 1882 Cal LEXIS 658.*

In prosecution of insurance agent for grand theft by appropriation of money collected by him for payment of

premiums under group insurance policies, any error in exclusion of evidence concerning arrangements for commissions and payment of administration fees for policies other than those administered solely by defendant is not prejudicial in view of evidence showing manner in which money was appropriated and of defendant's admissions that his taking of it was improper. *People v. Hedderly* (1954) 43 Cal 2d 476, 274 P2d 857, 1954 Cal LEXIS 266.

In prosecution for theft of county welfare funds, instructions pursuant to former W & I C § 1508, where needy child lived with his mother and stepfather the amount of grant should be computed after consideration of stepfather's income, that he was bound to support, if able, his wife's children if without support from him they would be needy children eligible for aid, that under regulations of State Board of Social Welfare a stepfather living in home was responsible for support of mother of needy child unless incapacitated and unable to support, that man living in home assuming role of spouse had same responsibility as that of stepfather for mother and needy children, and that income of stepfather or other man assuming role of spouse to be considered in determining ability to contribute was his take-home pay, plus his income from all other sources except his wife's earnings, went beyond issues and were erroneous to extent that they might have indicated that man assuming role of spouse, though not married, had obligation to support mother and her children, but jurors could not have been misled where question of such man's liability for support had no bearing on whether defendant was guilty of theft by false pretenses, on elements of which jurors were fully informed. *People v. Shirley* (1961) 55 Cal 2d 521, 11 Cal Rptr 537, 360 P2d 33, 1961 Cal LEXIS 232, 92 ALR2d 413.

In prosecution for theft based on allegedly false representations that certain electric machines defendants were accused of selling had curative powers, it was reversible error to refuse to allow defendants to introduce into evidence contents of reports of named scientists and doctors and conversations had with such scientists and doctors concerning curative powers of machines where defendant's defense was that even if representations made were false they were believed by defendants to be true, where reports and conversations were offered not to prove truth of statements, but to show defendants' mental state, that is, that they believed machines did cure, where trial court's instructions told jury that defendants' defense was good faith belief in curative powers of machines, and where, by reason of court's ruling, jury was excluded from considering evidence that defendants relied on to show their defense. *People v. Marsh* (1962) 58 Cal 2d 732, 26 Cal Rptr 300, 376 P2d 300, 1962 Cal LEXIS 304.

Instructions objectionable as misleading because jury in effect were told thereby that they would have to find certain electronics machines effective in cure of human ailments before they could acquit defendant of charge of obtaining money under false pretenses through their use, are rendered harmless in view of court's further instruction that if jury found that machines were not effective, they would still have to decide whether defendant, in good faith, believed that machines were effective. *People v. Chapman* (1962, Cal App 4th Dist) 207 Cal App 2d 557, 24 Cal Rptr 568, 1962 Cal App LEXIS 1942.

In a prosecution for obtaining loan from finance company by false pretenses, it was error to exclude evidence that manager of finance company, who was chief witness for prosecution and with whom defendant dealt, had motive for inducing defendant to make representations by which defendant obtained money, manager having himself subsequently been convicted of same crime for different, unrelated transactions, and that, accordingly, defendant's version of transaction was more credible than that of manager. *People v. Braver* (1964, Cal App 2d Dist) 229 Cal App 2d 303, 40 Cal Rptr 142, 1964 Cal App LEXIS 987, 10 ALR3d 565.

In prosecution for obtaining loan from finance company by false pretenses, defendant's subsequent conduct with respect to obligation was of some evidentiary value as to whether he had intent to defraud at time loan was sought and obtained, and it was prejudicial error for court to refuse to permit defendant to present documentary evidence of payments he made on loan and to comment that repayment or reimbursement was not defense. *People v. Braver* (1964, Cal App 2d Dist) 229 Cal App 2d 303, 40 Cal Rptr 142, 1964 Cal App LEXIS 987, 10 ALR3d 565.

Failure to instruct jury that witness was accomplice as matter of law in theft by false pretenses was not prejudicial error where corroborating evidence of his complicity was ample in quality and quantity; there being no reasonable probability that instruction would have resulted in defense verdict, absence of instruction is not cause for reversal.

*People v. Parker* (1965, Cal App 3d Dist) 235 Cal App 2d 86, 44 Cal Rptr 900, 1965 Cal App LEXIS 908.

In prosecution of parents for theft of welfare moneys paid to wife to aid their children, instruction that jury might find father was as responsible for concealing from Department of Public Welfare his relation to children as his wife was, regardless of whether any public assistance money was given to him by wife, was tantamount to, and equally as prejudicial as, formula instruction failing to mention element of intent required. *People v. Gibson* (1965, Cal App 4th Dist) 235 Cal App 2d 667, 45 Cal Rptr 382, 1965 Cal App LEXIS 967.

In prosecution for thefts based on misappropriation of construction loan proceeds, defendants were not prejudiced by refusal to instruct that they did not steal from corporation if they were its alter ego and that loan company was not victim if its president was alter ego of his companies and they were joint venturers with defendants, where court instructed on necessary elements, that consent is defense to theft, and that defendants were not guilty of larceny or embezzlement if they took money they honestly believed to be their own under claim of title. *People v. Steele* (1965, Cal App 2d Dist) 235 Cal App 2d 798, 45 Cal Rptr 601, 1965 Cal App LEXIS 977.

In theft prosecution, no prejudice resulted from failure to instruct on effect of circumstantial evidence, only reasonable conclusion being that defendant was shoplifting, where it was shown that defendant told salesman he wanted to see suits for his father, that he gave false name to security officer, that he said customer asked him to take clothes downstairs, and that he crouched behind suit rack, lifted five suits, and headed for stairs with suits concealed by wrapping his coat around them. *People v. Johnson* (1965, Cal App 2d Dist) 236 Cal App 2d 62, 45 Cal Rptr 619, 1965 Cal App LEXIS 802, cert den (1966) 385 US 873, 87 S Ct 147, 17 L Ed 2d 101, 1966 US LEXIS 960.

In a theft prosecution, defendant was deprived of his constitutional right to have the jury determine every material issue presented by the evidence, and reversal of his conviction was required, where defendant was stopped by a security officer when he walked from an outside sale area at a department store carrying merchandise which he had not paid for, where the evidence that defendant intended to keep and not pay for the article was purely circumstantial and was contradicted by defendant's direct testimony concerning his intent, and where the court gave no instruction that to be guilty of theft defendant had to intend to keep the article, nor any instruction that defendant would be guilty of theft only if he did not intend to pay for it. *People v. Jaso* (1970, Cal App 2d Dist) 4 Cal App 3d 767, 84 Cal Rptr 567, 1970 Cal App LEXIS 1576.

In a prosecution for grand theft by defendant of funds advanced to him by co-adventurers to pay the expenses of additional drilling of an oil well venture, the court erred in not instructing on its own motion the joint venture defense to theft, which was closely and openly connected with the facts before the court; and the error was prejudicial in depriving defendant of his right to have the jury determine every material issue presented by the evidence. *People v. Oehler* (1970, Cal App 4th Dist) 7 Cal App 3d 685, 86 Cal Rptr 703, 1970 Cal App LEXIS 2205, overruled in part (1978, Cal App 4th Dist) 86 Cal App 3d 987, 150 Cal Rptr 577, 1978 Cal App LEXIS 2146.

Even assuming error, in a prosecution for larceny arising from the fraudulent sale by defendants of a horse boarded with them, in the admission of post litem motam handwriting exemplars, obtained from the horse's owner after the controversy and litigation had begun and introduced for the purpose of rebutting the testimony of one of the defendants that such owner was responsible for forged bills of sale and a statement of loss used to effect the sale, the judgment of conviction could not be reversed, where evidence of defendants' guilt was overwhelming and their explanation of what transpired was completely unconvincing. *People v. Hess* (1970, Cal App 4th Dist) 10 Cal App 3d 1071, 90 Cal Rptr 268, 1970 Cal App LEXIS 1918, 43 ALR3d 643.

In a prosecution for grand theft and unlawfully driving or taking an automobile, the trial court erred in instructing the jury on the presumption of intent to commit theft by fraud provided by *Pen C § 484*, subd. (b), when a lessee fails to return leased property within 20 days after the owner makes written demand therefor after expiration of the lease by certified or registered mail, or if the lessee presents false identification to the owner, where, though such written demand was made, the owner's certified letter was returned to him marked "Moved, left no address," and where defendant

introduced evidence that, if believed, would have been sufficient to support a finding of lack of intent to commit theft by fraud. *People v. Hemmer* (1971, Cal App 4th Dist) 19 Cal App 3d 1052, 97 Cal Rptr 516, 1971 Cal App LEXIS 1352.

It was reversible error for a trial court to allow defendant, who was representing himself in a prosecution for grand theft auto (*Pen C § 484*), to testify on his own behalf without first advising him of his Fifth Amendment privilege not to testify and obtaining a knowledgeable and voluntary waiver from him, where his appearance allowed the prosecution to shore up its proof of specific intent, that, coupled with an improbable alibi story told by defendant, may well have played a key role in convincing the jury that defendant was guilty of the offense charged rather than a lesser included offense. *People v. Solomos* (1978, Cal App 1st Dist) 83 Cal App 3d 945, 148 Cal Rptr 248, 1978 Cal App LEXIS 1825.

### **SUGGESTED FORMS**

Allegation Charging Feloniously Stealing, Taking, Carrying, or the Like of Personal Property of Another

Allegation Charging Fraudulently Appropriating Property Entrusted to Person

Allegation Charging Knowingly Defrauding Person of Money, Labor or Property

Allegation Charging Causing or Procuring Others to Report Falsely of Wealth or Mercantile Character and Obtaining Credit