

8 F. 232
Circuit Court, W.D. Tennessee.

UNITED STATES

v.

STONE.

June 28, 1881

Opinion

HAMMOND, D.J.

The court is satisfied that the construction put upon the Revised Statutes (section 5358) is the correct one. I cannot consent to emasculate this statute by whittling it down by construction to the paltry proportions of larceny of lost goods on land, as understood at common law; and certainly not to the once still narrower doctrine of our state that there can be no larceny of lost property, which has everywhere been repudiated as unsound, and now changed by statute. T. & S. (Tenn.) Code, 4685; 2 King Dig. (2d Ed.) tit. 'Larceny,' Secs. 1986, 1992; 2 Ben. & Heard, Lead. Crim. Cas. (3d Ed.) 409, 426; [1 Crim.Law Mag. 209, 214](#); [2 Whart.Crim.Law, \(7th Ed.\) 1791 et seq.](#); Id. Sec. 1867; 2 Bish.Crim.Law,(6th Ed.) 758, note; par, 17, 838; 880 et seq. I am of opinion, therefore, that the instructions asked by the defendant, defining larceny and the specific intent necessary to constitute that crime, and applying it to goods 'floating in the water, at the time when they had escaped from the custody and control of the crew of the steamer,' were properly refused.

In the first place, goods so situated are neither lost nor abandoned, in the circumstances of this case, while floating near a recent wreck to which they belong, with full knowledge on the part of those who take them that they do so belong. Even in the eyes of the common law they are not lost, but certainly not in those of the maritime law. *244 2 Pars.Ship. & Adm. 288, 292; 1 Abb.Dict. word 'Derelict.' And if they can ever belong to the first finder, it is only when they are both derelict and abandoned. [Weyman v. Hurlbut, 12 Ohio, 81](#). Wreck is not properly so called if the real owner is known, and is not forfeited till a year and a day. Id.; Reg. v. Thurborn, 1 Den. 387; 2 Ben.& Heard, Lead.Crim.Cas. 409, 411. The floating goods are still in the constructive possession of the owner or the vessel more like those in a house on fire, and are not abandoned because in peril. If one remove them for preservation, intending to keep them for the owner, but afterwards secrete and appropriate them, there is no larceny at common law, but only a breach of trust. Rex v. Leigh, 2 East, P.C. 694; 2 Bish.Crim.Law, 837; 2 Ben.& Heard, Lead.Crim.Cas. 426. If, however, the intent at the time of taking had been to appropriate the goods to her own use, the judgment in that case would have been different, nor would the defendant have been excused upon any theory that she entertained a bona fide belief that when a house was on fire the goods in it or taken from it belong to any one who secured possession of them, or that she did not think it stealing and did not intend to steal, but only take what she supposed she might rightfully take. That would have been trying the act of the

accused by her own mental characterization of that act. On that theory, if one takes money from under a pillow at night, and by stealth, he might have his crime excused by showing by his own testimony or otherwise his state of mind on the subject, and that he entertained an honest belief that he could do that thing without any wrong to the owner. This seems to me the result of the argument made for the defendant here, when we are asked to hold that, if he believed that he had a right to take these goods for his own use, he is not guilty.

That there is a prevalent belief along this river that goods floating from a wreck may be appropriated by those who 'capture' them from the water is, perhaps true; and it may be that goods so situated are supposed to belong to the first taker by those who know better than to apply the same rule of conduct to goods lost or in peril by fire or other disaster on land. But it seems to me plain that this preposterous claim of right cannot serve to excuse the taking either at common law or under the statute. I do not see how any man whose moral sensibilities are not blunted by the temptation always afforded by such disasters, whether on land or sea, and who is not wholly demoralized in the presence of the temptation, can fail to recognize the wrong in it. The duty of restoring the ^{*245} goods is enjoined by the oldest rules of the moral law. Deut. xxii; 1-3. Every instinct of right and fair dealing suggests their return, and this statute was enacted to enforce that duty. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law; nor will any belief, not even a religious belief, in the right act excuse the crime. *Reynolds v. U.S.* 145, 167. There is a principle, undoubtedly often misapplied, I think, in the law of larceny that excuses the taking or avoids the criminal intent where there is a fair color of claim or right to the property. For example, in the case already put, if one takes money from under a pillow at night by stealth, with the intention by that means to recover that which had been before in his belief wrongfully taken from him, there would be no larceny, although the money was not in fact the same, nor was there in truth any wrong done to him. *Merry v. Green*, 7 Mees.&W. 627; *State v. Homes*, 17 Mo. 379; *State v. Conway*, 18 Mo. 321; *State v. Deal*, 64 N.C. 272; *Herber v. State*, 7 Tex. 69; *Rex v. Hall*, 3 C.& P. 409; 1 Whart.Crim.Law. 1770, 1785; 2 Bish.Crim.Law, 851. This color or right, however, must come from some claim to the property itself, de hors this act of taking, and not, as I apprehend, be solely predicated upon an erroneous belief that what is known to belong to another may be appropriated to one's own use without his consent, or without compensation, because of the situation in which it is found. Nor will any usage or custom justify the taking. 2 Bish.Crim.Law, 852; 1 Whart.Crim.Law, 83e. Mr. Russell mentions the taking of corn by gleaning, under an erroneous notion which universally prevails among the lower classes that they have a right to glean, and differs with Woodfall on his statement that it was larceny. 2 Russ.Crimes, (8th Am.Ed.) 10. In *Com. v. Doane*, 1 Cush. 5, however, it was held that a custom by officers to appropriate small parts of the cargo would not establish a claim of right.

But while I am inclined to the opinion that on the facts of this case a common-law indictment for larceny, pure and simple, might be sustained, if the statute had intended only to declare that offence as applicable to wrecks, as the statute was not so interpreted and the jury was not instructed on that theory, the conviction cannot be sustained on that ground, because it was their province to determine whether the facts constituted larceny. It is, then, still necessary to inquire whether the charge has correctly interpreted the statute as one declaring an offence distinct from larceny, or

rather one *246 broad enough to cover not only a taking by larceny, but any other wrongful taking. If we admit that the facts in this case do not constitute larceny, or that those do not which are mentioned in *State v. Conway*, supra, where an iron safe belonging to a wrecked vessel was taken from the river and its contents appropriated after notice of their ownership, under circumstances, said by the supreme court of Missouri, to show that the perpetrators were 'unmindful of the duties of good and honest men,' I am still of opinion that either case falls within this statute, because, if not stealing in the sense of the common law, it was plundering, as known to this statute; if not in the *Conway Case*, certainly in this, where the distressed vessel was almost in sight and the goods were confessedly known to belong her.

Mr. Stephen says of this word 'plunder' that he does not know that it has any special legal signification. Steph. Dig. Crim. Law, (St. Louis Ed. 1878,) 261, 266, and notes. The lexicographers define it as that which is taken from an enemy by force: 'spoil,' 'rapine,' 'booty,' 'pillage,' etc. Worcester Dict.; Webster Dict. In Roget's Thesaurus it will be found grouped with 'mutilation,' 'spoilation,' 'destruction,' and 'sack,' at section 619; with 'harm,' 'wrong,' 'molest,' 'spoil,' 'despoil,' 'lay waste,' 'dismantle,' 'demolish,' 'consume,' 'overrun,' and 'destroy,' at section 649; with 'booty,' 'spoil,' and 'prey,' at section 793; and with 'taking,' 'catching,' 'seizing,' 'carrying away,' 'stealing,' 'thieving,' 'depredation,' 'pilfering,' 'larceny,' 'robbery,' 'marauding,' 'embezzlement,' 'filch,' 'pilfer,' and 'purloin,' at sections 791, 792, (Sears' Ed. 1866.) In Abbot's Law Dictionary 'plunder' is said to be often used to express the idea of taking property without right to do so; but as expressing the nature of the wrong involved, or necessarily imputing a felonious intent. 2 Abb.Dict. 284, word, 'Plunder.' In Bouvier's Law Dictionary it is limited to the idea of capturing property from a public enemy on land; but 'plunderage' is defined as a maritime term for the embezzlement 'of goods on board a ship. The word is used in Rev. St. Sec. 5361, in describing an intent as a synonym of 'despoil,' this being also a section of the act of 1825, from which the one we are considering was taken. The first English statute of 7 and 8 Geo. IV, C.29, 18, used the words 'plunder' or steal, ' but contained a proviso that where things of small value were cast on shore and were stolen, without circumstances of violence, the offender might be prosecuted for simple larceny; which shows that the statute was not regarded as declaring the crime of larceny simply, but something more. Indeed, anciently, the common law would *247 take no jurisdiction of theft upon the high seas, but committed the offender to answer in the admiralty. The second English statute of 1 Vict.c. 87, 8, uses the words 'plunder or steal,' as does the latest, 24 and 25 Vict.c. 96, 64, without the proviso, and with the exception of the word 'destroy,' the act is the same as our act of 1825, which was enacted before any of the English statutes. 2 Russ.Crimes, 150; 3 Fish.Dig. (Jacob's Ed.) 3322; 1 Bish.Crim.Law, 141. In [Carter v. Andrews](#), 16 Pick. 1, in a slander case, it was said that though the word 'plunder,' in its ordinary meaning, imports a wrongful acquisition of property, yet it does not express the precise nature of the wrong done.

'The most common meaning,' says Mr. Chief Justice Shaw, 'of this term 'plunder' is to take property from persons or places by open force, as in the case of pirates or banditti. But in another and very common meaning, though perhaps in some degree figurative, according to the general tendency of men to exaggerate and apply stronger language than the case will warrant, it is used to express the idea of taking property from a person or place without just right, but not expressing the nature or

quality of the wrong done. Like many such terms, as pillaging, rifling, pilfering, embezzling, swindling, peculation, and many other like ambiguous terms which have not acquired, either in law or philology, a precise or definite meaning, they express the idea of wrongful acquisition, but not the nature of the wrong done.' Page 9.

The same thing may be said of the word 'steal,' though it is not as indefinite as 'plunder.' It is generally used to express the crime of larceny,— which is the purely technical word, about the meaning of which there can be no doubt,—and in a slander case it would need no innuendo or colloquium to give it force. Yet we often use it in a sense not synonymous with larceny, as when we speak of stealing a child, stealing a wife, stealing a thought, stealing land, stealing a literary composition, or the like. One of the definitions is 'to take notice without right or leave.' The primary idea of the word is stealth, or a secret, concealed, or clandestine taking; but it is quite as often applied to open taking, and is used interchangeably with 'rob,' which is defined 'to take away' without right— to steal; 'to take anything away from by unlawful force or secret theft— to plunder; to strip.' Worcester. Dict., words, 'Steal,' 'rob; Webst. Dict., same words and 'Purloin; 2 Bouv. Dict., word, 'Stealing; 2 Abb. Law Dict., word, 'Steal.' I do not find the word 'steal' used in defining larceny in any of the common-law authorities cited by Mr. Bishop, or elsewhere, from Lord Coke down. 2 Bish.Crim.Law, 758, and notes; 1 Bish.Crim.Law, 566; 2 Whart.Crim.Law, 1750. And the truth is, I think, it is not a technical word, in the strict sense of that term, but a common *248 word applied to almost any unlawful taking, without regard to exactness of use or accurate technical terminology.

In [Dunnell v. Fiske](#), 11 Metc. 551, Mr. Chief Justice Shaw says:

'The natural and most obvious import of the word 'steal' is that of felonious taking of property, or larceny; but it may be qualified by the context.' Page 554.

In [Alexander v. State](#), 12 Tex. 540, where the words of the statute were 'steal or entice away a slave,' it was held the word 'steal' imported a simple larceny, and 'entice away' defined a separate offence, distinctly differing from the other. A similar statute was not so construed in South Carolina, but as creating a statutory offence differing from larceny; and this Texas case is, I believe, exceptional. [State v. Gossett](#), 9 Rich.(S.C.) Law, 428. In [Spencer v. State](#), 20 Ala. 24, it appears that in the Penal Code of Alabama there were two sections, one of which, the twenty-fifth, enacted that if one should 'fraudulently or feloniously steal' property in any other state or country, and bring it into that state, he might be convicted and punished 'as if such larceny' had been committed in Alabama. Another, the eighteenth section, enacted that any one who should 'inveigle, steal, carry, or entice away' any slave, etc., should, on conviction, be punished, etc. The words 'steal' and 'larceny' were held to be technically used in the twenty-fifth section, and required that the ingredients of larceny should exist; while in the eighteenth section the word 'steal,' with others used, embraced not only larceny, but other offences different from that offence in some essential particulars. Perhaps it would have been more accurate to say that the eighteenth section constituted a statutory offence embracing not only larceny, but other acts, essentially differing from those entering into that offence; because it is apparent from the case, and the others cited in the opinion, that is what the court meant, and not a plurality of offences, including larceny. In [Williams v. State](#), 15 Ala. 259, the word 'steal' is said to import a larceny, when technically used, but in this eighteenth section to be used as a synonym of 'carry away;' for the act declares that the offence shall be complete without an

intention to convert to use of the taker or some other person, which was the essential ingredient in larceny. So, in [Murray v. State, 18 Ala. 727](#), it was held that although the acts must, under the twenty-fifth section, constitute larceny in Alabama, it was the bringing of the slave into the state that constituted the statutory offence. And see [Ham v. State, 15 Ala. 188](#). Furthermore, it appears from these cases that under these two sections a common-law *249 indictment for larceny was insufficient because it did not describe the statutory offence; and this, although both 'steal' and 'larceny' appear in a technical sense in one of the sections; for the state could not punish the crime of larceny committed in another state, nor was there any such crime as larceny of a slave at common law. The offences were statutory, and must be so charged; and it will be found they were, when properly indicted, charged under a pleading using the words of the statute in one count, as to which I shall have occasion to speak further hereafter. I cite the cases now to demonstrate that the word 'steal' does not always nor necessarily import the crime of larceny. If congress had said that every person who shall steal goods belonging to a wreck, using no other words, I should probably hold it to denounce only acts constituting larceny at common law, in obedience to our familiar rule of construction that when congress defines a crime by only using its common-law name, we interpret it by the common law; although, considering the character of the property and the nature of the jurisdiction, as arising out of the maritime and commercial control of the United States over the subject-matter, it might well be doubted if, strictly speaking, there could be a common-law larceny under the circumstances mentioned in this statute, and whether the word 'steal,' when used in that connection, should not of itself mean more than it does at common law. Associated, as in this statute, with 'plunder' and 'destroy,' I have no doubt it does mean a great deal more, and just what I charged the jury in this case. The Revised Statutes, in sections 5356 and 5357, taken partly from this same act of 1825, and partly from others, were dealing with larceny on the high seas, and the language used shows that if congress intended to punish only that offence in this section it would have employed the technical language for the purpose.

The word 'destroy' is also somewhat a maritime word, and is used, as will be seen by other sections of this chapter of the Revised Statutes, to denote any kind of deprivation of the owner by demolishing, making way with, or other subversion of his property. Taken altogether, these three words comprehend any kind of taking with evil intent, and we have implied by them the animo furandi and lucri causa of larceny, the love of greed accompanying embezzlement, breach of trust, and such self-appropriation as escapes the punishment for larceny for want of a trespass, and the wicked intent that belongs to such acts as we call malicious mischief, criminal trespass, and the like. Any of these intents are sufficient under the statute; and, although there must necessarily be a general evil *250 or fraudulent intent, it is not to be confined to that specific intent which characterizes larceny. 1 Bish.Crim.Law, 345, 344, 343, 207, 206, 205; 1 Whart.Crim.Law, 297; 2 Whart.Crim.Law, 1794, 1800.

It is said by a learned annotator that the finder of a lost article of goods may have three motives— (1) To keep it and use it as his own; (2) to keep it for the owner when ascertained; (3) to keep it for a reward. 2 Ben.& Heard, Lead.Crim.Cas.(2d Ed.) 431. To which may be added, in cases like this, that of depriving the owner of his property by destruction, if that can be an intent independent of that to use it as property belonging to the finder, or supposed by him to belong to himself, as in this case. I

am unable to see any other motive, and the ingenuity of counsel has not satisfactorily suggested any; and I charged the jury in this case that if the second and third of these motives existed, this statute was not violated, but if any other were found it was, and, it seems to me, clearly so. It was said in argument one might drag goods from the river to see if worth saving, and, on examination, supposing them worthless, immediately cast them back. I understand the authorities to hold that if kept but for a moment with the unlawful intent the crime is complete. 2 Whart.Crim.Law, 1789. So, if in the case put the intent were to appropriate the goods to his own use, the statute would be violated; but if it were to save them for the owner it would not. However, if excused in the case suggested it would not be for want of unlawful intent, but because the act of taking had not been completed.

I consider the case of the [U.S. v. Pitman](#), 1 [Sprague](#), 196,— and see [The Missouri's Cargo](#), Id. 260, for a fuller statement of facts,— as a direct authority, in support of the charge given to the jury. The learned counsel for the defendant, who have defended this case with a pertinacity and zeal that characterizes all they do, and a professional ability that could not be surpassed,— and I say this sincerely, and not to assuage defeat,— have gone into an elaborate argument and citation of authorities to show that the learned judge in that case uses the word 'embezzlement' as the synonym of 'larceny,' which, it is said, was the crime committed, and also that Chancellor Kent and other judges have so used the word. I shall not stop to inquire whether Pitman could have been convicted of larceny at common law, but I doubt it. I think, however, that the court in that case did not so use the word, but rather in the sense used in the maritime law, as any fraudulent taking by the crew of parts of the cargo. 1 Bouv.Dic., word, 'Embezzlement;' 1 Abb.Dict., same *251 word; [The Boston](#), 1 Summ. 329; [Spurr v. Pearson](#), 1 [Mason](#) 104; [Edwards v. Sherman](#), [Gilp.](#) 461; [The rising Sun](#), 1 [Ware](#), 279; [Harley v. Gawley](#), 2 [Sawy.](#) 7; [Cromwell v. Island City](#), 1 [Cliff.](#) 221, where the word is used in the sense of 'plunder.' Also, that it is there used in the larger sense that we find it in our ordinary statutes against the wrongful appropriation of another's property. It is to be observed, too, that Pitman was a salvor, and the original taking was with that lawful intent, and yet he was convicted under this statute, which manifestly applies to all the cases of embezzlement and plunder by persons claiming salvage. At all events, the principle of construction adopted there applies as well to this case, and I am content to extend it, if need be, to the facts we have here, rather than adopt the narrow construction insisted on by counsel for the defendant. Even a penal statute should not be so strictly construed as to defeat the obvious intention of the legislature. [Am. Fur. Co. v. U.S.](#), 2 [Pet.](#) 358. The charge finds support, also, in the case of [U.S. v. Coombs](#), 12 [Pet.](#) 72; [U.S. v. Patmer](#), 3 [Wh.](#) 610; and [U.S. v. Pirates](#), 5 [Wh.](#) 184. See, also, [The Kensington](#), 1 [Pet.Adm.](#) 239; [U.S. v. Davis](#), 5 [Mason](#), 356, at p. 361.

The next objection taken to the charge is that the court unwarrantably amalgamated the counts in the indictment, by which the defendant was surprised and misled. It is said the court made a new indictment and departed from the pleading of the government in order to avoid trying the defendant upon an indictment for larceny. This only amounts to saying that the court refused to adopt the defendant's view of the statute restricting it to a larceny of lost goods on land, for it is almost too plain for argument that under our practice the form of the pleading is immaterial if the substance of the averments is sufficient; and it requires some injury to the defendant to enable him to take any

advantage of a defect in form. Rev. St. Sec. 1025. The indictment is misleading, no doubt, in chopping this offence, as it does, into pieces, by predicating one offence on 'plunder,' another on 'steal,' and yet another on 'destroy,' and subdividing these again into separate offences in relation to goods taken from the wreck and those belonging to it. The process may as well have been continued by a like separation of the words 'money, goods, merchandise, or other effects;' or, still further, of the words 'in distress, wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank,' etc., etc. The court admits that it did not detect this defect, if it be one, until it came to consider the charge to be given, and the request of the defendant to charge the jury *252 to find a verdict on each separate count. The case in Sprague's Reports was passed by the court to counsel early in the proceedings, and attention called to its construction of the words 'plunder' and 'steal;' but the questions on the form of the indictment were not raised at the bar, nor suggested to the court, otherwise than by the requests for instructions, handed up after the argument. This will account for any surprise so far as the court may be concerned; and if the fact were that any testimony had been excluded, or ruling made to the prejudice of the defendant, because of the failure of the court to detect this peculiarity of the indictment, and because of the supposition that we were trying separate offences under it, or any injury could have resulted, I should now grant a new trial. But it is plain to me that no harm has been done him by this mode of pleading and trial. Even if they had been separate offences— or separate indictments, for that matter— they could have been consolidated under our statutes and tried together. Rev. St. Sec. 1024. Again, when so consolidated into one indictment, with separate counts, a general verdict is proper, and will be sustained if any of the counts be good and charge an offence. T. & S. Code, (Tenn.) Sec. 5217; 2 King's Dig.(2d Ed.) 2185, 2003, and cases cited; 1 Arch.Crim.Pl.(8th Ed.) 292, and notes; U.S. v. Pirates, supra; 5 Wh. 184; U.S. v. Patterson, 6 M.L. 466, 469; U.S. v. Peterson, 1 Wood & M. 305; U.S. v. Seagrist, 4 Blatchf. 420. This last case is a direct authority for disregarding the unnecessary separation of a statutory offence into several counts where it is made out by proof of acts of differing character, but all included in the statutory definition of the offence. It was a case where the defendants were indicted very much as in this case, under the second section of the act of March 3, 1835, (4 St. 776,—now Rev. St. 5359,) for endeavoring to make a revolt or mutiny, etc., etc. The court says: 'It is practically unimportant whether the provisions of the second section are expounded as so many instances or methods in which the offence of an endeavor to make a revolt or mutiny may be manifested, or whether they are taken distributively, and understood to be so many separate and distinct offences, each being sufficient of itself to sustain an indictment. The three counts of this indictment are so framed as to secure to the United States the advantage of either construction. It appears to me, therefore, that the court did not err in instructing the jury that, if the acts charged in the indictment were satisfactorily sustained by the evidence, and if the defendant committed those acts with intent to resist the master in the free and lawful exercise of his authority on board of the vessel, they would amount, in law, to an endeavor to make a revolt.' At pages 423, 424.

*253 Reverting to the Alabama cases, before cited, it will be found that it was held that a common-law indictment for larceny could not sustain a conviction for the statutory offences described in the sections of the Penal Code already cited. So, here, a common-law indictment for larceny— if we had any such thing in our practice, as we have not, all our indictments being contrary to the form of the

statute— would not do, showing plainly that, as in the Alabama cases, the indictment should charge the offence in the language of the statute; and it was done in those cases without the separation we have here into counts charging distinct offences, which I have endeavored to show was immaterial. It is the same in Tennessee. *State v. Callicutt*, 1 Lea.(Tenn.) 714. The form of indictment given under the English statute for plundering or stealing is a single count, charging that the defendant 'did plunder, steal, take, and carry away, against the form,' etc., etc. It is stated, however, that you may add separate counts distinguishing between 'in distress' and 'wrecked,' etc. Arch. Crim. Pl. (4th Am. Ed.) 214; 2 Arch.Crim.Pl. (8th Am.Ed.) 1332. But there is no objection to stating the same offence in different ways in as many different counts as you may think necessary. 1 Arch.Crim.Pl.(6th Ed.) 93, and notes; Id. (8th Ed.) 292, and notes. And where the statute says the doing of this or that shall constitute the offence, the indictment may charge them all in one count, or in separate counts, at the election of the pleader. 1 Bish.Crim.Proc.(2d Ed.) 436, 435, 434. But whatever form is adopted the verdict should be in a case like this, general on the whole indictment, rather than separate on each count, and it is not error to so direct the jury as to relieve them of the confusion of finding a separate verdict for the different acts of the same offence, for all of which there was the same punishment. There may be cases of different grades, or punishment, or different offences, where the court should direct separate findings on the separate counts, but surely this is not one of them. 1 Bish.Crim.Proc. (2d Ed.) 1005, 1009, 1010, 1011. And, where the offence may be charged in one count, reciting all the statutory acts or elements, it seems to me more fitting to find a general verdict, and not to confuse with asking the jury to point out the particular act by following the separation of the pleader. The evidence will indicate on which act the verdict is predicated, if it be at all material to know it, in the subsequent proceedings. I fail, therefore, to see any injury to the defendant in the directions on that point of which so much complaint has been made in the argument. The jury were properly told to find a general verdict, and it *254 is a mistake to treat the charge as altering the form of the pleadings or amalgamating the counts, though the language used might possibly be so construed. The object of the court was to rule that there were not, as had been argued, separate and distinct offences, but one offence, which might be compassed by the doing of several acts, and that the doing of any one of them required a verdict of guilty. This being so, the defendant could not rightfully claim to be tried as if each act constituted a separate offence; and the real ground of complaint, on the motion for a new trial, is that the court did not so treat the case because the attorney for the government had so treated it in his pleading. I have endeavored to show that, conceding that there were charged separate offences, and not several acts of the same offence, a general verdict was still proper and lawful, though it would have been, in that case, correct to find a separate verdict on each count. Hence, in any view, no error has been committed for which a new trial should be granted.

We come, now, to the objection that the evidence of the confession was improperly admitted. I cannot see any reason why it should have been excluded. The witness Bennett was not in any proper view a person in authority; neither was Tarrant, the deputy marshal. In *Com. v. Tuckerman*, 10 Gray, 173, 190, the court states the rule to be that all confessions—
'Which are obtained by threats of harm or promises of favor and worldly advantage, held out by a person in authority, or standing in any relation from which the law will presume that his

communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals.' Again: 'Whether the court improperly admits them cannot be determined by reference to judicial authorities, which can only supply the principle of law which is to constitute a standard of decision; but in every case the admissibility in evidence of confessions must depend upon the peculiar state of facts and circumstances existing in that case.' [Id. at p. 192](#); [Com. v. Morey, 1 Gray, 461, 463](#); [U.S. v. Nott, 1 McLean, 499](#).

The circumstances in Tuckerman's Case, *supra*, are instructive, but I shall not take space to relate them here. The confessions were made to a stockholder and director of the corporation injured by the embezzlement, and yet were admitted, although the promises were stronger than we have here. The court says:

'Thus, if an accused party has been made a prisoner, anything which may be said to him by the officer by whom he is held in custody will always be scrutinized with greatest care, and slight promises of favor coming from him will be considered a sufficient reason for rejecting all proof of subsequent confessions. *255 But the defendant was not under arrest, and no charge had been brought or complaint made against him at the time of his interview with Reed.' At page 193.

The court then compares the men in their relations and respective intelligence, and refers to the capacity of the accused to know what he was doing, and declares that what was said must always be considered in the light of the accompanying circumstances, which are never to be lost sight of in determining whether the promises in threats were limited, explained, or qualified in their meaning by whatever else was said and done. See, also, [Com. v. Curtis, 97 Mass. 474, 578](#); [Com. v. Whittemore, 11 Gray, 202](#); [Com. v. Cuffie, 108 Mass. 287](#); [Com. v. Smith, 119 Mass. 311](#); [Com. v. Sego, 125 Mass. 210](#). The cases in the federal courts substantially agree with these Massachusetts cases. [U.S. v. Nott, supra](#); [U.S. v. Pocklington, 2 Cranch, 293](#); [U.S. v. Kurtz, 4 Cranch, 682](#); [U.S. v. Williams, 1 Cliff. 5](#); [U.S. v. Graff, 14 Blatchf. 381](#); [Montana v. McClintock, 1 Mont. 394](#); [Beery v. U.S., 2 Col. Ter. 186, 203](#), in which there is an able dissenting opinion attacking the rule of exclusion and recommending its abandonment. Indeed, it is generally lamented that there is any exclusion of the evidence of confessions under any circumstances, although it is conceded that the rule has become too firmly established to be ignored. The Tennessee cases are likewise in accord with the best cases on the subject. [Beggary v. State, 8 Bax. 520](#); [Self v. State, 6 Bax. 244](#); [Frazier v. State, Id. 539](#); [2 King, Idg. \(2d Ed.\) 184](#). And I have found no more exact statement of the law of the subject than that made by that learned and accurate writer, now Mr. Justice Stephen. He says:

'No confession is deemed to be voluntary if it appears to the judge to have been caused by an inducement, threat, or promise proceeding from a person in authority and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if (in opinion of the judge) such inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not involuntary only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. The prosecutor, officers of justice having the

prisoner in custody, magistrates, and other persons in similar positions, are persons in authority.' Steph. Dig. 'Evidence,' (May's Ed. 1877,) 72.

See, also, 1 Greenl. Ev. (12th Ed.) 219 et seq.; 2 Ben.& *256 Heard, Lead.Crim.Cas.(2d Ed.) 484, 630; 2 Russ.Crimes, (8th Ed.) 824; 1 Whart.Crim.Law, (17th Ed.) 683.

The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise. Steph. Dig. 'Evidence,' p. 70, and note; [Reg. v. Reason, 12 Cox, 228](#). And Chief Baron Kelly said: 'The cases excluding confession, on the ground of unlawful inducement have gone too far for the protection of crime.' Id. p. 73, and note; [Reg. v. Reeve, 12 Cox, 179](#). The same thing was said by Baron Parke, and he further said that—

'he could not look at the decisions without some shame when he considered what objections had prevailed to prevent the reception of confessions in evidence, and that justice and common sense had been too frequently sacrificed at the shrine of mercy.' [Reg. v. Baldry, 5 Cox, 623](#); S.C. 2 Benn.& Heard, Lead.Crim.Cas.(2d Ed.) 484, 495.

Mr. Justice Earle said that the sacrifice was made, 'not at the shrine of mercy, but at the shrine of guilt.' Id. I am aware that the cases on this subject are conflicting to that extent, that if we look so only for precedents any given case can be ruled on way or the other, so often are the established distinctions overlooked. But I think the principle to be extracted from them amounts to this: The court will submit the confession to the jury for what it may be worth, in all cases where the threat or promise has been made by one having no authority over the prosecution for the offence, and will exclude it in all cases where there has been a threat or promise, of the nature above described, to one having such authority, or in his presence or by his sanction. There may be possible qualifications to this statement, as applicable to other circumstances, but it is sufficiently comprehensive to include the facts we have in hand. As I understand the law established by the cases that show the adjudication to have been made with careful consideration, the determination of the question of authority depends upon the relation of the person to a criminal prosecution for the act done by the accused. If some officious person, not at all so related to the prosecution for the crime, should, by threats or promises, extort a confession, it would be a question, not of the competency of the evidence for the judges to decide, but of its weight with the jury. The elements entering into the preliminary inquiry by the judge, where he is called on to determine the competency of the evidence, are these:

(1) Has the person to whom, or in whose presence, or by whose sanction, the alleged confession was made, any authority? (2) Were the threats or promises of that character that should exclude the confessions as one made involuntarily?

*257 Both these questions being answered in the affirmative, the evidence is excluded as a matter of law, the judge trying the facts as in other cases of mixed questions of law and fact; but either being answered in the negative, the evidence goes to the jury, and thereupon they try this as they do all the other facts of the case, giving such weight to the confession as they see fit. All evidence of confessions does not pass through this ordeal of trial by the judge, except to determine whether it belongs to the one class or the other; for if they have been made to persons not in authority, whether voluntarily or involuntarily, they go to the jury, to be by them discarded if they find that they have

been extorted by threats or induced by promises of that kind that ‘the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise.’

It would be going too far, perhaps, to say that the term ‘confession’ implies, somewhat in the nature of the word, an acknowledgment of guilt to one in authority, not competent as evidence, if the judge sees that the person in authority has taken advantage of his position to extort or induce it; while such acknowledgment to one not in authority is merely an admission or declaration of the party, receivable in evidence precisely as in civil cases, to be valued by the jury according to circumstances. But the inexactness is more philological than technical, and this, because the two terms are ordinarily used to distinguish between civil and criminal cases, more as a matter of convenience than anything else. 1 Greenl.Ev. 213. But when we come to classify confessions, when so broadly used, we find a need of some further division than that of judicial and extrajudicial. Id. Sec. 316. Because, whether the given case falls within the one or the other of the classes as defined by Mr. Greenleaf, we find that it is subject to the distinctions above adverted to, unless we treat all confessions made to one in authority as judicial— which in a broad sense they are— and do not limit that class, as he does, to those ‘made before a magistrate, or in court, in the due course of legal proceedings.’ Otherwise, extrajudicial confessions, as defined by that learned author, must be again distinguished into those made to persons in authority over the prosecution and those made to such as are not. Authoritative and unauthoritative, official and extraofficial, may be suggested as sufficiently comprehensive to designate the distinctions between the two, though I should prefer— following a not unnatural signification of the terms—to limit confessions to that acknowledgment of guilt made to any person in authority over the prosecution, *258 and call all others admissions. Speaking of extrajudicial confessions, Mr. Greenleaf says:

‘All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the jury.’ 1 Greenl.Ev. 216.

Again:

‘Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary.’ Id. Sec. 219.

Now, manifestly, these two statements of the texts are not only inaccurate, but conflicting, unless attention is given to the limitation to which I have just alluded; and with such attention they are both accurate and harmonious, and abundantly supported by the best-considered cases. Some such classification will greatly aid in understanding the cases, and serves to somewhat clear up the confusion attending the subject throughout any investigation of it.

The case of *Beggarly v. State*, supra, contains, in the opinion of a very able judge, intimations of an adherence to the rule suggested by Mr. Greenleaf as the wiser one, though, confessedly, not the one established by the later cases, that all confessions, whether made to persons in authority or not, must be entirely excluded by the judge, if it appear to him that the threats or promises used were sufficient to overcome the mind of the accused. 1 Greenl.Ev. 223. (12th Ed. by Redfield,) and note. In *Beggarly's Case*, supra, it is said:

‘In regard to the person by whom the inducements were offered there has been conflict in the authorities— some holding that the inducements held out by private persons, not being prosecutor, officer, or having any authority over the prisoner, are not sufficient to exclude confessions thus

obtained; but the sounder rule manifestly is that this is a mixed question of law and fact for the judge, and while it is proper to note the difference between confessions obtained by the prosecutor, officer, or person in authority, and those obtained by private persons, yet, if in fact the confessions were forced from the prisoner through hope or fear presented to his mind by a third person, it should be rejected.' Page 526.

This was said in regard to an occurrence that did not result in any confession, but a denial of guilt, the adjudication turning upon the admissibility of subsequent confessions received in evidence in the court below, and sustained because the prisoner had been warned and all the influence of that occurrence removed, as the court determined. But, as to the occurrence itself, if confession had resulted, as suggested by the court, it would have been as well rejected because the inducements were sanctioned by one in authority, the magistrate, namely. It is true the magistrate did not talk to the prisoner, on account of a *259 delicacy he felt about his official position, but the accused was in custody before him, and while the examination was in progress, by his consent, and, as I infer, by his instigation, the prisoner was taken out by the witness for the very purpose of inducing a confession, the magistrate instructing the witness 'to tell him about turning state's evidence.' This was really making the person talking to the prisoner an agent of the magistrate to do what he felt a delicacy in doing, and under the circumstances of the case, it fell clearly within the rule of inducements held out by the sanction of one in authority, which are as fateful to the evidence as if held out by himself. 2 Ben.& Heard, Lead.Crim.Cas. 576, 516, and cases cited; [Reg. v. Taylor, 8 C.& P. 733](#); S.C. 34 E.C.L. 608; [Reg. v. Sleeman, 6 Cox, 245](#), and other cases cited; 3 Jac.Fish.Dig. 3712. It does not appear whether the case of [Reg. v. Moore, 2 Den. 522](#); S.C. 12 Eng.Law & Eq. 583; S.C. 2 Ben.& Heard, Lead.Cas. 499, was called to the attention of the court, but it certainly resolves the conflict mentioned in the above extract, and by Mr. Greenleaf in favor of the admissibility of all confessions made to a third person not in authority, to be weighed by the jury according to the circumstances of each case. It was so understood by the learned annotator of Greenleaf's Evidence, in the edition already cited, and by the text writers since that case was reported, and by the learned judge in [Com. v. Smith, 10 Gratt. 734](#),— one of the ablest expositions of the law of the subject I have found, and which has come under my observation since the foregoing portion of this opinion was written. See, also, [Wolf v. Com. 30 Gratt. 833](#), where the case was affirmed. I cannot, therefore, consider these expressions in [Beggary v. State](#) as establishing the doctrine contended for as the rule of evidence in Tennessee, even if, as such, it were binding on this court, which it probably is not. [U.S. v. Reid, 12 How. 36](#).

When we come to determine who are persons in authority, in the sense of the rule above indicated, I do not know how better to express my judgment on the question than to adopt that of the learned judge in [Com. v. Smith, supra](#). It was contended by the learned counsel in this case that the fact that a master or mistress could be such person in authority, would show that any kind of domination would answer the rule, and that official authority was not essential as an element in determining the question. It might be a sufficient answer to this to say that the facts here do not show that Bennett had that domination over the mind of Stone to bring the case within the rule as thus indicated. The authorities already cited demonstrate that *260 the person must have some authority over the prosecution of that particular offence, whether he be an officer of the law or not. The mere fact the is

an officer does not answer the purpose; he must be connected with the prosecution, and have authority through that connection over the prisoner. *Reg. v. Moore*, supra; *Com. v. Smith*, supra. I do not think it is necessary that the legal proceedings shall have actually commenced, but they must be impending or contemplated, and perhaps, under the strict rule, the accused must, in some way, be in the actual custody of the person in authority, or suppose himself so to be. The cases of master or mistress occupying that relations will be found to be where the offence concerned them in their persons or property, and it does not arise alone out of their attitude of master or mistress. *Reg. v. Moore*, supra; *Com. v. Smith*, supra. Not even does the relation of a parent to a child of tender years bring the case within the rule where the parent is unaffected by the crime. *The Queen v. Reeve*, L.R. 1 C.C. 362.

It was said that Bennett was a detective and also the agent of the owners of the goods, and stood for them in the relation of prosecutor. It is to be first observed that he was not a police officer, although he calls himself a detective, but only a private agent employed, not to prosecute the crime, or to procure evidence for that purpose, but to gather up the goods or their value. He undoubtedly, during the progress of that employment, sought to influence the parties by suggestions of prosecution under the federal statutes, which he printed and circulated; but, as I understand the evidence, not till after the alleged confession of the defendant in this case. And at that time he had been advised by counsel, if I remember the testimony, and by the assistant United States district attorney, that no prosecution would lie in this court. But take all he said at the strongest, and it may well be doubted, if he had been in authority over the prosecution, whether the confession would be excluded under the latest cases. [The Queen v. Jarvis](#), L.R. 1 C.C. 96; *The Queen v. Reeve*, Id. 362. But I did not place my judgment on this ground, but on the more substantial one that he occupied no such relation to the prosecution as would exclude the evidence of the confession; conceding that it would have been excluded if he had been in authority. We have in our courts no such quasi officer as a prosecutor, as known to the common law and our state practice. At common law some person, generally the party injured, though it might be another person, must be named as prosecutor, except in special cases. And without this there could be no prosecution. 1 Arch.Crim.Pr.,(8th Ed.) 245, and *261 notes; Id. (6th Ed.) 47, 52, 79, and notes; 1 Bish.Crim.Pr.(3d Ed.) 690. And the Code of Tennessee has the same requirement. T. & S. Code, (Tenn.) Sec. 5096. It is through this semi-official relation to the prosecution that a private prosecutor becomes a person in authority in this matter of the evidence of confessions. But under our federal practice from the earliest times, and by force of the statute, the district attorney is the only prosecutor known to our law; and as a matter of fact, in this court, at least, no private prosecutor has ever been recognized. Act of 1879, c. 20, Sec. 35, (1 St. 92;) Rev.. St. Sec. 771; [U.S. v. Mundel](#), 6 Call, (Va.) 245 247; [U.S. v. McAvoy](#), 4 Blatchf. 418; [U.S. v. Blaisdell](#), 3 Ben. 132, 143, where the court refused to recognize an agreement of the executive department not to prosecute the offender, and said that 'when there is no district attorney in commission, the government cannot prosecute in this court.' 1 Bish.Crim.Pr. 278 et seq. It is impossible therefore, for any one to occupy the place of a private prosecutor in this court, or to make any promises of immunity that will avail the accused in that capacity. It was otherwise at common law; for, generally, if the party injured refused to prosecute, there could be no prosecution. With us the district attorney alone can give such assurances. Neither Bennett or his principals could, therefore, have such

authority over the prosecution as to bring them within the rule we are considering. Being owners of the goods, without this capacity to control the prosecution, through the necessity of becoming prosecutor, does not answer to make them persons in authority. 1 Whart.Crim.Law, (7th Ed.) 693; Id. Sec. 686; Ward v. People, 3 Hill, (N.Y.) 395. The case of [Frain v. State](#), 40 Ga. 529, stating a contrary doctrine, is predicated upon a statute regulating the subject which abolishes all distinctions between persons in and not in authority. The statute is quoted in [Earp v. State](#), 55 Ga. 136; S.C. 1 Am.Crim.Rep. 171. The [State v. Brockman](#), 46 Mo. 566, is within the rule, because the owner of the goods was a prosecutor. In the [State v. Hogan](#), 54 Mo. 192, the witnesses were the officers of the law concerned in the prosecution. It does not appear in [State v. Lawhorne](#), 66 N.C. 638, how or by whom the confessions were obtained, and the case involved the admissibility of subsequent confession; while in [State v. Whitfield](#), 70 N.C. 356, the owner was the prosecutor. In [Flagg v. People](#), 40 Mich. 706, the prisoner was in arrest and under the control of the officers having him in custody. These are the particular cases so much pressed by counsel, but I do not see that they militate against the views I have here expressed.

***262** In regard to Tarrant, the deputy marshal, his mere presence, without more, would not invalidate the confession. He must be in authority over the prosecution and prisoner, and sanction the threat or promise held out by others. See the cases mentioned in the comments on Beggarly's Case, supra; 1 Whart.Crim.Law, (7th Ed.) 692, at p. 609; [State v. Gossett](#), 9 Rich. (S.C.) Law, 428; [State v. Cook](#), 15 Rich.(S.C.)Law, 29; [Wiley v. State](#), 3 Cold.(Tenn.) 362. He was present only in his character as the assistant of Bennett. I have no doubt they both relied upon his official position as an aid in procuring settlements for the goods taken from this wreck; but Tarrant was not using his official powers, if he had any, to extort or elicit this confession. He had no warrant of arrest, and was neither attempting nor threatening to make an arrest, and there was no cause for the defendant to reasonably suppose that he had any authority to hold out inducements or to sanction those held out by Bennett.

Finally, I may say that, while the courts are constantly lamenting that there is any rule that excludes the evidence of confessions or admissions of guilt in any case from the consideration of the jury, who have just as much capacity to weigh the facts of duress or inducement, whenever the judge does admit the proof, I see no reason why the rule should be extended in the least beyond the established law of the cases. In this case I fully submitted to the jury the determination of the weight they would give to the evidence, and I have no doubt, if there was any threat or inducement to impair the testimony, the defendant received the full benefit of it. He could have been properly convicted upon his own testimony before the jury without the confessions; still, if they were improperly admitted, he would be entitled to a new trial. [U.S. v. De Quilfeldt](#), 5 Fed.Rep. 276. Hence I have given the subject a careful examination, and am satisfied the evidence was properly admitted. The other requests refused need not be especially noticed. They are on the face of them not in accordance with the views I have taken of the statute and the law of the case as here expressed, and after thorough reconsideration I am of opinion a new trial should be refused.

Motion overruled.

NOTE: Of the 51 indictments found by the grand jury for plundering the wreck of the City of Vicksburgh, 10 were disposed of by conviction subsequently *263 to the ruling in this case, 7 by acquittal, and 11 were dismissed by the district attorney.

The ruling made at the trial of this case, on the authority of the New York cases, permitting the defendant to testify as to his own intention in taking the goods, receives confirmation in the case of Greer v. Whitfield, 4 Lea. (Tenn.) 85, appearing since the trial.

W. W. Murray, Dist. Att'y, and John B. Clough, Asst. Dist. Att'y, for the United States.
Metcalf & Walker and Luke E. Wright, for defendant.