

LARCENY BY STEALING IN A BUILDING

The defendant is charged with stealing in a building. Section 20 of chapter 266 of our General Laws provides as follows:

“Whoever steals in a building
shall be punished”

Stealing is the wrongful taking of personal property which belongs to someone else with the intent to deprive that person of the property permanently.

In order to prove the defendant guilty of stealing in a building, the Commonwealth must prove four things beyond a reasonable doubt:

First: That the defendant took and carried away property;

Second: That at the time the property was being kept safe by virtue of being in a building;

Third: That the property belonged to someone other than the defendant; *and*

Fourth: That the defendant took the property with the intent to deprive the owner of it permanently.

“Taking and carrying away” was accomplished if the property was physically transferred from the place where it was being kept. It does not matter if the transfer involved only slight movement, or if it lasted for only a short time.

Commonwealth v. Fielding, 371 Mass. 97, 117, 353 N.E.2d 719, 731-732 (1976) (any separation of property from victim’s dominion, even if brief in space and time, sufficient); *Commonwealth v. Salerno*, 356 Mass. 642, 648, 255 N.E.2d 318, 321 (1970) (taking can be proved by circumstantial evidence); *Commonwealth v. Luckis*, 99 Mass. 431, 433 (1868) (wallet need not be removed from victim’s pocket, but defendant “must for an instant at least have had perfect control of the property”); *Commonwealth v. Stephens*, 14 Mass. App. Ct. 994, 994-995, 440 N.E.2d 777, 777 (1982) (sufficient that victim put property in bag at defendant’s orders, though defendant never touched it); *Commonwealth v. Bradley*, 2 Mass. App. Ct. 804, 805, 308 N.E.2d 772, 772 (1974) (momentary transfer sufficient); *Commonwealth v. Flowers*, 1 Mass. App. Ct. 415, 418-419, 298 N.E.2d 898, 900-901 (1973) (transfer of property from victim’s control to thief’s sufficient, since literal “carrying away” not required; transfer may be through agent or victim).

The Commonwealth must prove that the property was being protected and kept safe by virtue of being in the building rather than being under the watchful eye or personal care of someone in the building.

The Commonwealth must prove that the property was owned or possessed by a person other than the defendant. This can be proved by direct evidence that someone else owned or possessed the property. Or, in some cases, it may be reasonable for you to infer this from the surrounding circumstances. The Commonwealth is not required to prove who owned or held the property, as long as it proves that the defendant did not.

G.L. c. 277, § 25 (identity of owner need not be alleged if property described with sufficient certainty); G.L. c. 278, § 9 (“owner” includes anyone in actual or constructive possession). *Commonwealth v. Souza*, 397 Mass. 236, 238-239, 490 N.E.2d 1173, 1175 (1986) (identity of owner need not be proved, only that it was not defendant; because of G.L. c. 277, § 35, misnomer of owner is immaterial if defendant not misled); *Commonwealth v. Kiernan*, 348 Mass. 29, 50-51, 201 N.E.2d 504, 516 (1964), cert. denied sub nom. *Gordon v. Mass.*, 380 U.S. 913 (1965) (“owner” includes anyone with a possessory or property interest); *Commonwealth v. Binkiewicz*, 342 Mass. 740, 748, 175 N.E.2d 473, 479-480 (1961) (because of G.L. c. 278, § 9, complaint about “the property of x” in effect reads “the property of x, or of another but in x’s actual or constructive possession”; driver with shared dominion over auto registered in spouse’s name is “owner”); *Commonwealth v. Finn*, 108 Mass. 466, 467 (1871) (one may steal from thief); *Commonwealth v. Sullivan*, 104 Mass. 552, 554-555 (1870) (person who orders goods is in constructive possession of them once delivered to a common carrier, absent a shipping agreement to the contrary); *Commonwealth v. Arrance*, 5 Allen 517, 517-518 (1862) (because of G.L. c. 278, § 9, permissible to allege and prove only one co-owner).

SUPPLEMENTAL INSTRUCTIONS

1. “Property.”

The term “property” includes (money) (movable items of personal property) (bank notes) (public records) (anything that is part of or attached to real estate) (apartment security deposits) (electronically processed or stored data, either tangible or intangible) (domesticated animals, including dogs, birds and other animals ordinarily kept in confinement).

This is only a partial list. See G.L. c. 266, § 30(2) for the complete list of items, in addition to those at common law, that may be the subject of larceny. See also *Commonwealth v. Youraski*, 384 Mass. 386, 388, 425 N.E.2d 298, 299 (1981) (intellectual property, such as taped performance, not subject to larceny statute); *Commonwealth v. Beckett*, 373 Mass. 329, 341-343, 366 N.E.2d 1252, 1259-1261 (1977) (intent to commit larceny from welfare department inferable from circumstances).

2. *Intent to deprive permanently.*

The Commonwealth must prove

that the defendant intended to deprive the owner of the property permanently. This may be proved by direct evidence or by inference from the surrounding circumstances. For example, if a person takes the property of another and disposes of it with utter indifference to whether the owner recovers its possession, you might infer from that an intent to deprive the owner of it permanently.

See Instruction 3.120 (Intent) and the supplemental instructions and note to Instruction 8.520 (Larceny by Stealing).

Salerno, supra; Commonwealth v. Cabot, 241 Mass. 131, 141-143, 135 N.E.2d 465, 469 (1922); *Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 456-457, 632 N.E.2d 1234, 1236 (1994); *Commonwealth v. Coyle*, 17 Mass. App. Ct. 982, 984, 459 N.E.2d 119, 121 (1984); *Commonwealth v. Ellison*, 5 Mass. App. Ct. 862, 862-863, 365 N.E.2d 1253, 1254 (1977) (intent to make restitution later is not a defense). It is not enough that the theft be committed within a building. The building – rather than a particular person – must be protecting the property. See *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 761 N.E.2d 961 (2002).

General Laws c. 266, § 20 also applies to stealing in a ship, vessel or railroad car. The model instruction may be adapted as necessary.

NOTE:

1. **Value of property stolen immaterial** . Larceny in a building is a felony regardless of the value of the property stolen. *Commonwealth v. Graham*, 62 Mass. App. Ct. 642, 647, 818 N.E.2d 1069, 1074 (2004).