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[G.R. No. 19786. March 31, 1923]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. CLEMENTE AVILA, DEFENDANT AND APPELLANT.

D E C I S I O N

STREET, J.:

This appeal has been brought to reverse a judgment of the Court of First Instance of the Province of Bulacan, finding the appellant, Clemente Avila, guilty of the offense of theft, and sentencing him to undergo imprisonment for one year, eight months and twenty-one days, *presidio correccional*, with the accessory penalties prescribed by law, to pay to the injured party, Lucio Pilares, the sum of P4,300 (the value of the unrecovered money and jewels), with subsidiary imprisonment in case of insolvency, and to pay the costs of prosecution.

It appears in evidence that on August 16, 1921, in the municipality of Meycauayan, in the Province of Bulacan, Lucio Pilares and his family, composed of his wife, two children and a niece of his wife, took a *carretela* to go from the house of his father-in-law to his own home in said municipality. Upon said occasion the wife of Lucio Pilares carried, among other things, a large pocketbook, or purse, containing paper money, gold coin, and jewels of a total value of P4,500. Upon arriving at the house of Lucio Pilares, the family alighted from the vehicle, but the wife of Lucio Pilares inadvertently failed to carry with her the purse containing the valuables, and she left the same in the *carretela*.

The driver of the *carretela* was one Tiburcio de los Santos, of the age of 50 years; and after his passengers had alighted, Tiburcio turned to go back, when his attention was attracted by two girls, namely, Dolores Orito and Rosario

Buning, who were standing on the street in front of their house and who indicated that they wanted to embark in the *carretela*. Tiburcio accordingly stopped to pick them up, but before they had gotten aboard Tiburcio thought well to clean out or arrange the interior of the *carretela*. In doing this he saw the purse which had been left in the *carretela* by the wife of Lucio Pilares, and he accordingly picked it up. As the two girls mentioned climbed aboard the *carretela*, the accused in this case, Clemente Avila, who was at the time a policeman of the municipality, also got in; and as the three passengers were adjusting themselves in their seats, Tiburcio handed the purse to Clemente Avila, and asked him, as a policeman, to deliver it to Lucio Pilares. The accused received the purse and, wrapping it in his raincoat, placed the bundle under his arm.

The said purse, it is now to be stated, has never come to the hands of Pilares through the person to whom it was thus confided, nor through any other channel; but within a very few hours after the incident above narrated the Joss of the purse came to the attention of the owner and efforts to locate its whereabouts were begun. To this end complaint was made to the police authorities; and the *cochero*, Tiburcio de los Santos, was arrested. At first he denied any knowledge of the purse, doubtless through fear of becoming implicated himself, but later he admitted that he had picked it up in the *carretela* after the Pilares got out and that he had turned it over to Clemente Avila, with the request that it should be delivered to its owner. A search warrant was then procured; and armed with this, two officials, one of whom was a lieutenant of the barrio, proceeded to a search of the house of Clemente Avila, on August 23, 1921, or about a week after the incident above narrated occurred.

The result of this search was the finding of a solitaire stone (diamond) and a locket containing the pictures of Lucio Pilares and his wife. These objects were subsequently identified by Lucio Pilares as belonging to himself and wife and constituting part of the contents of the lost purse.

Other objects contained in the purse which have never been recovered were: bank bills in the amount of P1,700; a diamond pin, of the value of P800; two gold rings, with a brilliant, of the value of P450; and other valuables specified in the testimony of Lucio Pilares, of the value of P1,350—all together

worth, approximately, P4,300.

In meeting the case thus sketched the efforts of the defense appear to have been chiefly directed towards the creation of a doubt upon the point whether or not the valuables might not have been appropriated by Tiburcio de los Santos, but a perusal of the testimony of the two girls who got into the *carretela* at the same time as the accused is convincing that the purse was delivered intact to him by Tiburcio, and without knowledge on the part of the latter of the valuable contents contained therein. Nor do we think there is any force in the suggestion that the officers searching the house of the accused may have surreptitiously introduced the objects which were found in or under the dresser.

In the light of the facts appearing of record we think the conclusion is irresistible that the accused appropriated the purse and its contents to his own use, with full knowledge that it was the property of Lucio Pilares.

The principal question presented for consideration is one of law, and it is this; namely, whether the accused, upon the facts stated, was properly convicted of the crime of theft, it being contended that the offense committed, if any, should be declared to be criminal appropriation (*estafa*) under subsection 5 of article 535 of the Penal Code. The determination of this point depends primarily and principally upon the interpretation to be given to the second paragraph of article 517 of the Penal Code; arid the concrete question is whether the form of theft there contemplated, *i. e*., criminal appropriation of found property, can be committed by a person other than the one by whom the property is first found. In other words, is this form of theft limited to the actual finder, using .the word in its literal and most limited sense, or does it include misappropriation by any one into whose hands the property may be placed by the actual finder for delivery to the true and known owner? To exhibit this problem in its proper light some discussion is necessary concerning the nature of the particular form of theft now under consideration and its relation to other cognate offenses.

Having regard to much that is found in the writings of modern commentators on penal law, it might seem that the offense of misappropriation of property which has been found after being lost by its true and known owner does not fall within

the conception of theft in its proper juridical sense at all; and it might therefore at first blush appear that the authors of the Penal Code, in incorporating subsection 2 of article 517 into the definition of theft, had arbitrarily and erroneously introduced into the law of theft a conception entirely foreign to that offense. This impression is a mistaken one; and we now propose to show that misappropriation by the finder of lost property under the conditions stated in the said subsection is, on historical and jurisprudential grounds, clearly and undeniably an act of theft.

In the early Roman law we find theft defined by Gaius in terms broad enough to include any kind of physical handling of property belonging to another against the will of the owner; and in this connection we note that the term is there made to include misappropriation and misuse by the bailee, a species of offense which in our Penal Code is transferred to subsection 5 of article 535, dealing with *estafa*. *"Furtum autem fit non solum cum quis intercipiendi causa rem alienam amovet, sed generaliter cum quia alienam rem invito domino contrectat. Itaque, sive creditor pignore, sive is apud quem res deposita est, ea re utatur, sive is qui rem utendam accepit, in alium usum eam transferat quam cujus gratia ei data est, furtum committit."* (Gai. iii, 195, 196.)

Substantially the same definition is given by Paulus: "A thief is he who with evil intention handles (touches, moves) the property of another." *Fur est qui dolo malo rem alienam contrectat*. In the Institutes of Justinian a more elaborate definition is given as follows: "Theft is the fraudulent handling of a thing with the object of acquiring gain either from the thing itself or from its use, or from possession of it." *Furtum est contrectatio rei fraudulosa, lucri faciendi causa vel ipsius rei, vel etiam usus ejus possessionisve*. (Inst. 4, 1, 1.)

The corresponding provision of the *Partidas* follows in the main the definition given in the Institutes but contains the additional qualification that the taking must be without the consent of the owner. "Furto es malfetria que fazen los omes que toman alguna cosa mueble agena encubiertamente sin plazer de su señor, con intencion de ganar el señorio o la posesion o el uso della." (Ley 1.ª, Tit. XIV, Part. VII.)

Article 437 of the Spanish Penal Code of 1850 consists of three subsections.

Of these the first is identical with the first subsection of the corresponding article of the Penal Code now in force in Spain and the Philippine Islands; the second is noteworthy as placing under theft a form of offense which according to current conceptions is not theft at all but *estafa*, that is to say, the denial of having received a thing which has been committed to one's keeping under circumstances creating an obligation to deliver or return the same.

> "CODIGO DE 1850.—ART. 437. Son reos de hurto:
>
> "1.° Los que, con animo de lucrarse y sin violencia o intimidacion en las personas ni fuerza en las cosas, toman las cosas muebles ajenas sin voluntad de su dueño.
>
> "2.° Los que con animo de lucrarse negaren haber recibido dinero u otra cosa mueble, que se les hubiere entregado en prestamo, deposito o por otro titulo que obligue a devolucion o restitucion.
>
> "3.° * * * * * * *."

The insertion of the second subsection in the foregoing article apparently marks a reversion to primitive ideas, its antecedent being found in the excerpt already quoted from Gaius. In the Code now in force this provision has been incorporated in subsection 5, of article 535 of the Penal Code, dealing with misappropriation by depositaries and others who have received property under circumstances giving rise to an obligation to deliver or return the same. At the same time the second subsection of the older Code has been substituted by the provision in the existing Code to the effect that appropriation by the finder of anything that has been lost, with intention of gain and knowledge of the ownership, constitutes theft.

From a comparison of the definitions given above it is obvious that the most fundamental notion in the crime of theft is the taking of the thing to be appropriated into the physical power of the thief, which idea is qualified by other conditions, such as that the taking must be effected *animo lucrandi* and without the consent of the owner; and it will be here noted that the

definition does not require that the taking should be effected against the will of the owner but merely that it should be without his consent,—a distinction of no slight importance.

Upon these considerations it is evident that the taking and appropriation of a thing by one who finds it, knowing the same to have been misplaced or lost by the true owner, and with knowledge of his identity, is legitimately within the classical definition of theft; and in giving expression to the second subsection of article 517 of the Penal Code, the authors of the Code have merely extended the general definition to a special case about which otherwise some doubt might have existed; and we cannot impute to them the clumsy mistake of having imported into the law of theft a form of offense foreign to that conception and which should properly have been incorporated in the chapter dealing with *estafa*.

What has been said is of the greatest practical importance in dealing the problem now in hand, for it determines the proper point of view for the correct interpretation of the provision relating to the theft of found property; namely, that the provision should be interpreted according to its true spirit and conformably with the doctrines that inform it. If we had discovered that this form of theft is really a species of *estafa* wrenched from its proper associations and artificially placed under a heading where it does not belong, much could be said in favor of a strict and literal interpretation; but when it is made to appear that the criminal misappropriation of found property is theft upon general principles of jurisprudence and not some other crime, it becomes obvious that the provision in question should be applied in accordance with its true spirit.

What then is the meaning of the second subsection of article 517, in so far as it affects the case before us? The words used in the law are literally these: “Those are guilty of theft: * * *. 2. Who, finding a lost thing, and knowing who the owner is, appropriate it with intent to gain.” The gist of this offence is the furtive taking and misappropriation of the property found, with knowledge of its true ownership; and the word “finding” (in Spanish, *encontrandose*) must not be treated as a cabalistic or sacramental term limiting the application of the provision to the literal first finder. The furtive appropriation of the found property, under the conditions stated, is the principal thing. In the case

before us, the accused, if not the actual finder, occupied towards the purse, from the time he took it into his hands, precisely the same relation as if he had picked it up himself. The purpose of the law is to protect the owner of the lost thing from appropriation by the person into whose hands it may come, with knowledge of its ownership. The accused was a finder in law, if not in fact; and his act in appropriating the property was of precisely the same character as if it had been originally found by him.

The copious learning of the common law on the subject of larceny, or theft, as exhibited in the decisions of English and American courts, as well as in the writings of a tribe of learned authors, corroborates in a remarkable manner the conclusion set forth above; and inasmuch as the common-law jurisprudence sheds light upon matters little discussed by the Spanish commentators, it will be found instructive to direct attention for a moment to the results reached by the common-law courts in dealing with the matter of theft by appropriation of found property.

We may begin with the observation that in the development of the law in this subject, as on most others, the common-law courts have never been entangled in any measurable degree with statutory provisions; and their decisions reflect the light of general jurisprudence. Moreover, it should be premised that under common-law doctrine three distinct categories of crime are recognized where the Spanish Penal Code takes account of only two. That is to Say, in the common-law system, we have theft, embezzlement, and the obtaining of property under false pretenses (deceit), while under the Spanish Penal Code we have only theft and *estafa*, the law of embezzlement being consigned, with certain extension, to a mere subdivision of the law of *estafa* (art. 535 [5], Penal Code).

The existence of this threefold division has enabled the common-law jurists extensively to enter into a logical analysis of the idea of possession in relation to these three crimes against property; and the results of their speculations on this topic, if collected, would alone constitute an extensive jurisprudence. Briefly stated, the doctrine is that theft (larceny) is distinctively a crime involving the idea of violation of possession, intending that there must always be a taking of the thing from the possession (real or constructive) of the owner; embezzlement, on the other hand, implies

misappropriation by a person who has been entrusted with possession; and false pretense refers to any deceitful practice or device by which an owner is led to part with the property in the thing taken.

Now, in dealing with theft, the common-law courts at an early day adopted the definition given in the Institutes; and Sir James Fitzjames Stephen, the leading historian of the criminal law of England, quotes the following from an ancient handbook, intrinsically of minor importance, called the Mirror (*circa*, A. D. 1285-1290), and he observes that, so far as it goes, this is a perfect definition of the offense of theft as it is still understood in England. That old definition, in the part here material to be quoted, is this: "Larceny is the treacherously taking away from another movable corporeal goods against the will of him to whom they do belong by evil getting of the possession or the use of them." In other words, one could transcribe subsection 1 of article 517 of our Penal Code as a definition of larceny into any English or American treatise on the subject and nobody would ever suppose that it had been formulated by Spanish jurists.

We now approach the noteworthy fact, which is, that although the common law has exactly the same general definition of theft as that found in the Spanish Code, and notwithstanding the further fact that the crime has never been specially defined so as to include the offense of misappropriation by the finder, nevertheless the common-law courts in modern times are unanimous upon the proposition that the misappropriation of lost property, under the conditions defined in subsection 2 of article 517 of the Penal Code, constitutes theft and no other crime. We shall not incumber this opinion with any detailed statements of the development of American and English law on this subject; but we insert references that will enable any person whose curiosity has been aroused to examine the matter for himself. (Stephen, History of Criminal Law of England, vol. III, pp. 121-176; Pollock, Possession in Common Law, pp. 171-187; State *vs*. Hayes, 37 L. R. A., 116, 121, *et seq.;* People *vs*. Miller, 88 Am. St. Rep., 546, 559; 25 Cyc., 35.) Says the author of the title "Larceny" in Ruling Case Law: "* * * The place where the property is found does not affect the question whether it is a subject of larceny. The accepted definition of the offense extends to the taking and carrying away of goods from any place. Property which has been thrown away and abandoned becomes no man's property. The former owner loses his title and all claim to it, and one who

finds it can claim it as his own. Hence, property which has been abandoned is not the subject of larceny. It is a crime against the United States to steal property from a wrecked vessel. Property must have been voluntarily abandoned or the taking may constitute larceny. Thus it has been held to be larceny to take clothes from a dead body cast up by the sea, on the ground that they were not voluntarily abandoned." (17 R. C. L., 36.)

The same writer then passes on to a proposition more directly connected with the case now before us, since it relates to the act of misappropriation by one who receives the property by voluntary substitution from the actual finder. Upon this the rule there formulated is this: "One who receives property from the finder thereof assumes, in legal contemplation, by voluntary substitution, as to the property and the owner, the relation occupied by the finder, placing himself in the finder's stead. In such a case, whether the person taking the property is guilty must be determined on the same principles that govern in the case of the actual finder." (17 R. C. L., 36.)

In Allen *vs*. State (91 Ala., 19), some children found a pocketbook containing money and certain papers sufficient to identify the owner. Upon arriving home, the children delivered the purse to their father, who converted it to his own use. It was held that the accused was properly convicted and that his guilt was to be determined by the same principles that would have governed if he had been the actual finder. In the course of the opinion the following language was used:

> "* * * Finding it, and its delivery to the defendant by the finder, did not deprive the money, as to the owner, of the character or *status* of lost property; the ownership remained in him, drawing to it, constructively, the right of possession. When defendant took the money from his children, he knew it had been lost, and took it as such. It is manifest the children had no felonious intent, and properly delivered the money to their father for his disposition. By receiving it from his children, knowing it was lost, defendant assumed, in legal contemplation, by voluntary substitution, as to the money and the owner, the relation occupied by the finders, placing himself in their stead. Otherwise a person knowingly receiving lost property from the finder, who had no intent to steal, with the felonious intent to appropriate it to his own use, escapes

> punishment. In such case, whether or not the person taking the money is guilty of larceny must be determined on the same principles which govern in the case of the actual finder."

It should be further observed that in dealing with misappropriation of found property the common-law courts have noted a distinction between property that has been truly lost, in the sense that the owner can have no clue to its whereabouts, and property that has merely been inadvertently and temporarily misplaced. For instance, a purse containing money dropped in a crowded thoroughfare or even on a public highway must be considered lost; while a package inadvertently left on a seat by a passenger on a street car (State *vs*. Courtsol, 89 Conn., 564; L. R. A. [1916A], 465), or in a carriage returned to a livery stable by a hirer (Moxie and Brackens *vs*. State, 54 Tex. Crim. Rep., 529), or carelessly left behind by its owner in a shop (25 Cyc., 35), is not lost but merely mislaid. In case of mere misplacement, it will be noted that the owner, upon releasing the property from his hands, intends, though unconsciously, to resume control, and possibly he may afterwards remember where he left it. In all such cases, the common-law courts hold that the property is never out of the owner's possession at all, and misappropriation by the finder constitutes theft, supposing other necessary ingredients of the crime to be present. This distinction between lost and mislaid property supplies an additional consideration in support of the conclusion that misappropriation by the finder of a purse inadvertently left by a passenger in a street vehicle constitutes theft on general principles of jurisprudence.

In the light of the foregoing discussion the conclusion seems inevitable that the accused in this case committed the offense of theft when he appropriated the purse belonging to Lucio Pilares under the conditions already stated; and the circumstance that he received the purse by delivery from Tiburcio de los Santos, who was the actual finder, is immaterial.

Moreover, it is not necessary for us to formulate any conclusion as to the exact point of time when the felonious design to appropriate the purse was formed. Upon this point the situation resembles that involved in larceny by a servant. The property converted was at most only in the physical custody of the accused, and he at no time was vested with legal possession. The violation of

possession, essential in larceny, was therefore simultaneous with the actual appropriation or conversion.

The only decision which has been called to our attention supporting a conclusion in anywise contrary to that announced above is one noted by Viada in *Question XXIV* of his comment on the second paragraph of article 530 of the Spanish Penal Code, corresponding to the second paragraph of article 517 of the Code in force in these Islands. It there appeared that a certain person had found a portfolio containing papers exclusively of interest to the owner. Not knowing how to read, the finder delivered the portfolio to the two accused in order that they might ascertain to whom it belonged. These individuals, however, kept the article in their possession and on that account were afterwards prosecuted for theft. The trial court held them guilty of that offence, but the decision was quashed upon appeal to the Supreme Court. The decision was based upon three grounds; namely, first, that the two accused were not the actual finders; secondly, that it did not appear which of the two had in fact received it from the finder; and, thirdly, that in view of the trivial value of the portfolio there was no appropriation by the accused with intent to gain.

The decision contains the bare resolution of the court only, and it is evident that the point now under discussion; namely, whether one who receives lost or mislaid property from the hands of a finder can be guilty of theft in misappropriating the same, was there involved with other considerations decisive of the case. Under these circumstances the decision is entitled to little or no weight upon the point we have been considering; and as the resolution on the point referred to is, in our opinion, contrary to the principles of sound jurisprudence, we are unable to accept it.

From what has been said it is evident that the trial judge committed no error in finding the appellant guilty of the offence of theft; but we note that, probably through mere inadvertence, his Honor placed the offence under No. 2 of article 518 of the Penal Code, instead of under No. 1 of the same article. The value of the articles stolen clearly exceeded 6,250 *pesetas*, and No. 1 must be applied, with the result that the accused is amenable to imprisonment for the period of three years, six months and twenty-one days, *presidio correccional*, instead of the period of one year, eight months and twenty-one days, as fixed by the trial judge. It being understood therefore that the

judgment is modified by applying the penalty of imprisonment in the extension of three years, six months and twenty-one days, *presidio correccional*, the judgment will be affirmed, with costs against the appellant. So ordered.

Araullo, C.J., and *Ostrand, J.,* concur.
Villamor, and *Johns, JJ.,* concur in the result.

DISSENTING

ROMUALDEZ, J., with whom concur **MALCOLM,** and **AVANCEÑA, JJ.:**

I believe that the crime established by the evidence is that of *estafa* and not that of theft.

These are the plain facts: Mrs. Pilares inadvertently left in a vehicle her purse containing money, gold coins, and jewels, the value of which is P4,300. The driver of the vehicle found the purse, and knowing the owner thereof, turned it over to the accused in order that the latter might return it to Pilares. The accused, instead of doing so, appropriated the purse with all its contents.

In the decision of the majority the accused is convicted of theft under the second paragraph of article 517 of the Penal Code which says:

> "The following are guilty of theft:
>
> "Any person who, having found anything which has been lost, shall with knowledge of its ownership appropriate the same with intent of gain."

The accused not having been the person who found the purse, nor acted in

connivance With the driver who had found it, cannot be convicted of theft. An accused is not responsible for any other acts than those performed by, or chargeable to, him. *Nemo ex alterius facto praegravari debet. Nemo punitur pro alieno delicto*.

Having in mind the terms of the provision above quoted, this kind of theft has three elements: (*a*) Finding of another's property which has been lost; (*b*) knowledge of its ownership; and (*c*) appropriation of said property with intent of gain.

In order that the accused may be convicted of this crime, it is necessary that each and every one of these three elements be present. If, as in the instant case, the element of the finding was not an act of the accused, nor imputable to him, then one of the essential elements of such theft is lacking.

That the finding is not an act of the accused is a proven fact as to which there is no question. Such a finding cannot be imputed to the accused, nor considered against him.

Between said finding and the accused there is no connection, nor any juridical, moral, or even logical relation whatsoever. The driver might, in many ways, have acquired possession of the purse before he turned it over to the accused. Instead of finding it, he might have received it from a relative or friend of the owner, or stolen or robbed from the latter, and later, having repented for his criminal act, he might have turned it over to the accused for its restitution.

In none of these, nor any other possible, cases, can the manner in which the driver had acquired possession of the purse be taken into consideration against him. The criminal responsibility of the accused in this case must be judged in connection with the facts that occurred after the driver acquired possession of the purse in question.

The act of the driver in delivering the purse to the accused is entirely independent from the manner in which said purse came into the possesion of the driver. The finding of the purse can in no way have any connection with the accused. Such connection can be established only through connivance, conspiracy

or collusion between the driver and the accused, which was not proven, nor claimed in this cause.

Had such intelligence existed between the person who found the purse and that who appropriated it, both of them having confederated together to deprive the owner thereof, it might be said that in a way the accused made the finding his, for in that case both conspirators took advantage of the finding made by one of them in order for the other to convert the thing thus found to his own use; that is to say, the finding, as well as the appropriation, would be common with each other. By virtue of such a conspiracy, the accused would participate in the finding, would in a sense make it his by taking advantage thereof, and the driver would participate in the appropriation by cooperating to that end through its delivery.

But where such mutual intelligence, connivance, conspiracy or collusion between them is lacking or they did not act jointly, nor entertain a common intention, but, on the contrary, the purpose of the driver was honest and plausible, namely, to return the lost purse to its owner, while that of the accused was criminal and wrongful, which it was to take advantage of its delivery for the purpose of appropriating it, I can see no reason why the finding of the purse should be considered against the accused, which finding, in the instant case, was with respect to him purely accidental and absolutely foreign and remote.

It was upon the attitude of the driver at the time of turning the purse over to the accused that it depended whether the crime subsequently committed by the accused was that of theft or of *estafa*. If the driver had become identified, so to speak, with the accused by facilitating the latter in the appropriation of the purse, then the accused, as well as the driver, would have been guilty of theft. But if, as in the instant case, the driver became identified, not with the accused, but with the owner of the purse, fulfilling the presumed will of the latter by instructing the accused to return it to the owner, then there exists no connection between the finding and the appropriation, said acts having been performed independently of each other by different persons, and none of these persons committed the theft in question in its entirety.

It is not difficult to understand why these acts performed by the driver are easily held to constitute the crime of theft, if it is taken into account that some of the cases of *estafa* defined in number 5 of article 535 of our Penal Code now in force were included under theft in the Spanish Penal Code of 1850.

But the Code Committee who prepared the Spanish Penal Code of 1870, from which the definition of the kind of theft in question given in ours was literally taken, wanted to draft said code on a scientific basis, and classified under theft all those cases involving furtive *taking* without violence against persons or force upon things and with intent of gain, and under *estafa* all cases involving *reception* of a thing, whether the reception be legally real or with color of reality, through deceit, machination or fraud, or be followed by infidelity or abuse of confidence; and so it included under theft the taking through finding, which became furtive when it was followed by appropriation with intent of gain and with knowledge of the owner of the thing found. It was desired to include in the chapter of theft those cases where the thing was *taken*, without the owner thereof having delivered it, and in the section on *estafa*, generally those cases involving *reception*, that is to say, cases in which the offender acquired possession of the thing, not by taking it, that is, taking without delivery by the owner, but by receiving it from him or from the person who was authorized to deliver it. I, therefore, understand that, according to our Penal Code now in force, in theft, the offender *takes* the thing; in *estafa*, he *receives* it.

And this kind of theft now in question, denned for the first time in the Spanish Penal Code of 1870, was interpreted by the supreme court of Spain in the same sense as is maintained in this dissenting opinion, in a decision rendered June 9, 1884, and presented by Viada in one of his “questions” on pages 428, 429, volume 3, 4th edition, as follows:

> “If from the evidence it appears that a person, having found a purse of little value, containing some papers and documents of interest only to the owner, not knowing how to read, turned it over to the two accused in order that they might inquire as to its ownership, said accused appropriated it; and as

> some months thereafter the owner of the purse learned that they had it, he demanded the return thereof from each of them, but failed to recover it; are the said accused guilty of the crime of theft, defined in article 530, number 2, of the Code? The district court of Colemar Viejo gave judgment in the affirmative. But the case having been taken to the Supreme Court by writ of error on the ground of violation of law, that court reversed the judgment of the lower court: Considering that, according to article 530 of the Penal Code, case No. 2, theft is committed by a person who, having found a thing lost, and knowing its ownership, appropriates the same with intent of gain, and, therefore, in order to commit this crime, the finding of the thing lost, the knowledge of its ownership, and the appropriation by the finder with intent of gain are necessary: Considering that neither the plaintiff in error, Antonio Hernandez Key, nor his coaccused, found the purse lost by Jose Martin Ruiz; that it came into their possession because Agustin who had found it turned the same over to them, it not appearing who of the two took it, and it not appearing, therefore, that an object of so little a value was appropriated, and much less with intent of gain: Considering that the lower court committed an error of law and violated articles 530, case No. 2, and 531, case No. 5, of the Penal Code in failing so to find."

It cannot be argued that that part of this decision of the supreme court of Spain dealing with the finding of the thing is merely an *obiter dictum*, for the question as to the finding was one of the issues in that case, and in fact the reversal of the judgment appealed from was grounded on that point.

Therefore, as the accused in the case before us did not furtively take the purse, either by taking it from the possession of the owner, or by finding it after the latter had lost the same, nor is the finding by the driver chargeable to the accused, the conclusion is inevitable that the accused did not commit any theft.

And as the accused obtained possession of the purse from the driver who delivered the same to him, acting in the place of the owner, as he did by fulfilling the clearly presumed will of the latter that the purse be returned to him, it necessary follows that as the accused received the purse with the obligation to turn it over to the owner, his failure to do so and his action in

appropriating it, rendered him guilty of *estafa*, as defined in article 535, number 5, of the Penal Code, which says:

> "Any person who, to the prejudice of another, shall *convert* or misappropriate any money, goods, or other personal property *received* by such person for safe-keeping, or on commission, or for administration, or *under any other circumstances giving rise to the obligation to make delivery of* or to *return the same*, or shall deny having received such money, goods, or other property." (Italics mine.)

For the foregoing, I am of the opinion that the crime committed by the accused is not that of theft but that of *estafa*, of which he cannot be convicted under the information filed herein, which charges a different crime.

For this reason, I believe that the case must be dismissed without releasing the accused, and the prosecution ordered to file another information against him for the crime of *estafa*, as provided in section 37 of General Order No, 58.

Date created: September 27, 2018