The State *vs.* Barckley and Others.

Theft—Intention.

An indictment for theft must set out that the act was committed with the intention of stealing.

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This case came before Kotzé, C.J., in the Circuit Court at Leydenburg. The accused were charged with theft in that they had *wrongfully and unlawfully taken* certain goods, the property of certain persons named. They pleaded not guilty. The presiding judge thereupon called the attention of the prosecuting counsel to the fact that the indictment did not allege that there was any intention to steal, and reserved the point whether such an allegation ought not to be made, for the decision of the full Court. The accused were found guilty, and execution of the sentence was postponed pending the decision of the point reserved.

Leyds, A.-G., with him *Morice*, for the State: Granted that the intention ought to be alleged in the indictment, in the present indictment it is alleged because it is said that the act was done *wrongfully* and *unlawfully*, and these words, together with the allegation that the goods were *taken away*, sufficiently set out the *intention to steal*. Vide *Van der Linden*, p. 251; *Van Leeuwen, Roman-Dutch law*, 4, 38, 1. The *Institutes* speak of *contrectatio fraudulosa*. *Archbold, Pleading and Evidence in Criminal Cases*, 18th ed., p. 346, says the carrying away must be *felonious*. *Feuerbach*, p. 279, § 312.

Nieuwe Hollandsche Consultatien (*Poenaal*), p. 310, definition of *theft*.

Smit's Geschiedenis van Wetboek van Strafrecht. *Bayne's Crim. Manual*, p. 406; *Queen* vs. *Johannes*, 2 Laurence, p. 369; *Thirty-three Articles*, art. 21; *Shaw, Crim. Law*, p. 188.

Cur. adv. vult.

Postea (November 30th, 1886).

Kotzé, C.J.: This case came before me in September last, on the occasion of the sitting of the Circuit Court at Leyden-

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burg. The prisoners were indicted for the crime of theft, in that in the month of June they "*wrongfully and unlawfully took and carried away*" from different native kraals, situated on this side of the Lebombo Mountains, certain sheep, goats, guns, powder, pots, baskets, skins, linen, etc., the property of various natives, as mentioned in the indictment. The accused pleaded not guilty, and I drew the attention of the learned counsel who appeared on behalf of the State, to the fact that the indictment merely set forth that the goods had been wrongfully and unlawfully taken away, without alleging any intent to steal. I directed the trial to proceed, and intimated that, in the event of the jury returning a verdict of guilty, I should reserve the point for the consideration of the full Court. It was proved in evidence that the accused, under the pretext that they had been authorised by Mr. Abel Erasmus, Native Commissioner for the district of Leydenburg, proceeded armed to several Kafir kraals, and there perpetrated various acts of theft with violence. In one instance they also carried off two girls, and their unlawful acts resulted in a commando of natives being formed, apparently with the view of avenging and protecting themselves against the violence committed upon them. Fortunately Mr. Abel Erasmus received timely warning of what had happened, and immediately took the necessary steps for the apprehension of the accused. Barckley and his associates were arrested by the native police under the Commissioner, and removed to Leydenburg. Advocate Morice, who prosecuted on behalf of the State, laid the evidence in a very able manner before the jury, who returned a verdict of guilty against the accused. Sentence was thereupon passed, and execution stayed under the provisions of Law No. 3 of 1883, pending the decision of the full Court upon the following point reserved, viz.: "Whether a conviction for theft can take place by law upon an indictment, which merely alleges that the accused have *wrongfully and unlawfully removed and taken away* goods, without setting forth the attention to steal." The argument was heard on the 22nd instant. The Attorney-General submitted that in principle it was not necessary to state the intention in an indictment. He, however, admitted, for the purpose of this case, that the intention ought to be set forth, and maintained that the intention to

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steal was properly laid in the indictment in the present instance, inasmuch as the prisoners were indicted not only for the *wrongful* (*onwettig*), but also the *unlawful* (*wederrechtelijk*) removal of property. In other words, that the unlawful removal of goods is equivalent to the stealing of such goods. Several authorities were cited by the Attorney-General in support, as he submitted, of this contention. Not a single authority, however, supports this view. Reference was, in the first place, made to the definition of theft, given by Van der Linden and Van Leeuwen. According to Van der Linden, theft is the appropriation of movable property against the will of the owner, with the intent of deriving some gain therefrom. Here, then, there is no question of a mere unlawful removal, but of the appropriation of another's property, with the intention of benefiting one's self thereby. Van Leeuwen says (4, 38, 1): "Theft is a secret and fraudulent dealing with, and retention of, another's property." Consequently, according to this writer, the simple unlawful carrying away of another's property is not theft. Van Leeuwen refers to the *Institutes of Justinian* (4, 1, 1), where theft is defined as *contrectatio rei fraudulosa*, and these words he has simply embodied in his definition. It must also be borne in mind that without the intent to steal there can be no theft, *sine affectu furandi furtum non committitur* (*Just. d. l.* § 7). So likewise with regard to § 21 of the *Thirty-three Articles*. There we read: "Whoever shall fraudulently take any property that does not belong to him shall be guilty of theft, and in all cases of theft the law of Holland shall be referred to as a basis." Here we have not an *unlawful* taking, but a *fraudulent* taking, which can mean nothing else than *contrectatio fraudulosa*, or, as Van Leeuwen has translated it, "the secret and fraudulent dealing with and retention of another's property." That this is the meaning of § 21 further appears from the provision that the law of Holland, *i.e.*, the Roman-Dutch law, according to the custom of South Africa, shall be taken as a basis (*cf.* § 31 of the *Thirty-three Articles*). Feuerbach, a German writer on criminal law, has also been referred to, viz., § 312 of his *Lehrbuch des Peinlichen Rechts*. There he gives the notion of theft, considered as a private tort or *delictum*, according to Roman law, and in this sense theft denotes "an unlawful

taking into possession of movable property, with the intent of deriving an unlawful benefit therefrom." Hence a mere unlawful taking of anything is not sufficient, according to this definition, to constitute theft. In § 314 Feuerbach gives us, according to German law, the real notion of theft, " which consists in the *intentional* and *unlawful* appropriating to one's own use of another's property, with the object of deriving a benefit therefrom." The jurist is here treating of an appropriation to one's own use of another's property, so that a simple unlawful taking does not yet amount to theft. And this brings me to the new Penal Code of the Netherlands, § 310, where I find the following: "He who takes away anything which belongs wholly or in part to another, with the intention of unlawfully appropriating it to himself, is guilty of theft." It is quite impossible to appeal to this article of the Code in order to prove that the wrongful and unlawful removal of property amounts to theft, for the intention of unlawfully appropriating another's property is, according to the Code, the true essential of the crime of theft. (Cf. *Ontwerp van een Wetboek van Strafrecht*, tit. 22, p. 296.) According to the authorities, therefore, upon which counsel for the State relies, it is clear that his contention, that the mere unlawful removing of property is equivalent to theft, is altogether untenable. I will further point out, by means of a few examples, the unsoundness of the contention. A, out of mere wantonness, takes the cart of B, and places it on the stoep or roof of C. D takes the horse of E and purposely drives it into a swollen river, so that the horse is drowned. According to the assertion of the Attorney-General, A and D are guilty of theft, for they have each unlawfully removed another's property, although there is no intention to steal. The law, however, tells us something quite different. (Cf. *Matthaeus de Crim.* 47, 1, 7, and *Voet*, 47, 2, 8.) The adverb *unlawfully* (*wederrechtelijk*) merely denotes *contrary to law*. Hence an assertion that an accused person has unlawfully taken away something is nothing but a statement that he has taken away something contrary to law; but that is no definition of theft. If unlawfully taking away property includes the intent to steal, then we can with equal justice maintain that unlawfully killing contains the *malice prepense* or intent to kill; in

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other words, that unlawfully killing is equivalent to murder, which can never be successfully maintained. In § 24 of the *Criminal Procedure* it is clearly laid down what must be observed in the framing of an indictment. There the Legislature prescribes, *inter alia*, "Always bearing in mind that a faithful adherence to truth in the statement of facts, and a strict accuracy in the legal description of the crime, constitute the chief requisites of an indictment." It is clear that the description of the offence in the indictment in the present instance in no way constitutes the crime of theft. I have examined all the indictments for theft to be found among the records of the Court, and in not a single instance is there an indictment in which it is merely set forth that the accused "wrongfully and unlawfully took away, &c." It is invariably that the prisoners "unlawfully and maliciously" or "wrongfully and unlawfully" *did steal*, &c. I have considered the question at issue somewhat fully, not because I entertained any doubt as to the decision of the Court upon the point reserved, but in the interest of the due and proper administration of criminal justice. This is not the first time that the indictment has insufficiently described the offence. I need merely refer to the case against the Koranna prisoners, who were indicted in May last for the rebellion at Mamusa. In the present instance the conviction will have to be set aside, although it has been fully proved that the prisoners have committed theft and deeds of violence upon peaceful natives, living under the protection of the Republic. If the indictment had been properly drawn, we should, in consequence of the conviction, not merely have seen the violators of the law undergoing their just punishment, but should also thereby have secured and strengthened the obedience and loyalty of the natives living on our distant borders at the Lebombo Mountains. This is, however, not all. Of what use is it for the State, at great expense, to have sittings of the Circuit Court, for the trial and punishment of crime, if proper care is not taken in drawing out indictments, and thereby the greatest malefactors escape their righteous punishment? For the reasons already mentioned by me the conviction must be set aside.

ESSELEN and S. JORISSEN, JJ., concurred.