1915. *November* 15, 17. WESSELS, MASON and BRISTOWE, JJ.

Criminal law.—Theft.—Conversion.—Illegality of purpose.

An accused received a sum of money to be applied to an illegal purpose, and converted it to his own use, *Held*, that he was rightly convicted of theft.

Appeal from a conviction by the magistrate of Jahannesburg.

The accused, a native, was charged with the crime of theft, on three counts, the third being that on the 27th August at Johannesburg he stole the sum of £15 0s. 6d., the property or in the lawful possession of another native named Solomon. The evidence showed that on that date Solomon handed the accused the sum in question to purchase liquor for him; the accused failed to purchase the liquor but retained the money. A few days later the accused left for Natal, where he was arrested and brought back to Johannesburg. On hearing of the arrest the complainant laid the present charge. The accused was acquitted on the first two counts, convicted on the third, and sentenced to 4 months' imprisonment with hard labour.

A. Alexander, for the accused: The conviction is against the weight of evidence, which showed an actual sale of liquor, not a handing over of money for purpose of buying liquor. Even if there were no sale, the purpose was illegal by virtue of Ord. 32 of 1902: the complainant could not legally recover the money from the accused, who cannot be said to have deprived him of his property. Breach of a moral duty is no crime. He referred to *R.* v. *Seebloem* (1912, T.P.D. 30); *Affhauser* v. *McLeod* (1909, T.S. 827).

I. P. van Heerden, for the Crown: Illegality of the original agreement may render a civil claim thereon unenforceable, but is no bar to a prosecution by the Crown. The accused cannot set up his own turpitude as a defence. Whether the complainant can legally recover or not there has been a *fraudulosa contrectatio.* Though complainant cannot sue for the enforcement of an illegal agreement, he has a *locus poenitentiae* until the completion of the illegality, and can recover what he has paid over. See Broom's *Legal Maxims* (8th ed., p. 563); *Taylor* v. *Bowers* (1 Q.B.B. 291); *Hermann* v. *Charlesworth* (1905, 2 K.B., at p. 131); *Kearley* v. *Thomson* (24 Q.B.D. 742). The evidence is clear that no sale took place.

Alexander, replied.

Cur. adv. vult.

Postea (November 17).

WESSELS, J. (after holding that no reason existed to set aside the magistrate's finding on the facts): Assuming that the magistrate's finding of fact is correct—viz., that the complainant handed over the £15 odd to the accused for the purpose of buying liquor, and that the accused neither bought the liquor nor returned the money—the question is whether under these circumstances he can be convicted of theft. The argument advanced by Mr. *Alexander* was that the complainant and the accused are *in pari delicto;* that the complainant cannot say that the accused has refused to hand him over money which the accused was lawfully obliged to hand over, and, therefore, the State cannot say that theft has been committed. Now I think in this case there is a confusion of thought. We have nothing to do with whether the complainant and the accused were *in pari delicto*. That is a question which might arise if the complainant were to sue the accused; in an action by the complainant against the accused, the latter might be able to set up that they were both *in pari delicto*, and, therefore, the Court should not lend its assistance to the plaintiff to recover the money from the defendant. But this is a different case. The State intervenes here, and asks the Court to say that the accused has been guilty of theft, inasmuch as he has received £15 on a certain condition, has not fulfilled the condition, and has retained the money. Now our definition of theft is that it is a fraudulent dealing with property of another person—*furtum est fraudulosa contrectatio rei alienae*. The question, therefore, to decide is whether the £15 belonged to the accused after he had received it from the complainant; was it his property to deal with as he thought fit; was it legal for him to put it into his pocket and to use it for his own purposes? Now if the money was handed over by the complainant to the accused subject to a condition, it did not become the property of the accused unless the condition was fulfilled. If, therefore, the complainant handed over £15 to the accused subject to the condition that the latter was to use the money for the purpose of buying liquor for the complainant and was to give the complainant the liquor, the accused was bound either to buy the liquor for the complainant or to return him his money.

Until he buys him the liquor he has not performed the condition, and until the condition has been fulfilled the property in the money does not pass to the accused. Under these circumstances, therefore, there is the fraudulent dealing with the property of another, and according to our law it appears to me that the accused has been guilty of theft.

I do not see that there is much difference between our law in this respect and the law of England. The same principle which I have enunciated was applied in the case of *The Queen* v. *Buckmaster* (57 L.J., Q.B. (M.C.), p. 25). In that case "The prisoner occupied a betting-stand at the Ascot race-meeting. Just before one of the races was run the prosecutor made two bets with the prisoner, at the same time depositing two sums of five shillings with him, the prisoner stating to the prosecutor that if the horse which he backed won, he would receive back the moneys which he had deposited and some more besides. The horse did win; but meanwhile the prisoner decamped. Later on the same day the prosecutor saw the prisoner, but he declined to pay any of the money which was owing. The prisoner was subsequently tried and convicted upon an indictment for larceny: *Held*, that the prosecutor never intended to part with the property in the money, except in a certain event which did not happen, and that there was evidence of a preconcerted design on the part of the prisoner to get the prosecutor's money by a fraud and a trick, and that the conviction was right." Lord COLERIDGE, in his judgment, says the following: "The first is, that supposing there was an intention on the part of the prosecutor to part with the property in the money, in order to pass such property to the prisoner there must have been a contract of some kind; but the term 'contract,' as the name implies, must be the bringing together of two minds, and here there seems to have been nothing in the shape of a contract. For supposing the prosecutor parted with the property, he only intended to do so on the assumption that the prisoner intended to do or give something in certain events to the prosecutor in return. Now the evidence clearly negatives any such intention on prisoner's part, and it appears to me that there is high authority for saying that the property did not pass to the prisoner." Then he refers to the facts in *Oliver's* case (4 Taunt. 274), and continues: "Then, again, *R.* v. *Robson* (Russ. and R. 413) is in strict accordance with *Oliver's* case, where it was held that if there is a plan to cheat a man of his property under a colour of a bet, and he parts with

the possession only to deposit as a stake with one of the confederates, the taking by such confederate is felonious." He goes on to point out that it does not matter whether it is a specific article or money in coin; he says: "The fact that he would have been satisfied with getting back coins of a like value without insisting on having the identical coins returned does not seem to me to affect the question. In my judgment, upon the facts as stated, the jury were quite right in finding the verdict which they did." In these circumstances, I am of opinion that the appeal ought to be dismissed.

MASON, J.: I concur in thinking that this appeal should be dismissed, though I have a little difficulty as to stating the exact grounds, in one respect, upon which I arrive at that conclusion. The English law seems to be quite clear that in a case of property being bailed, even upon an illegal consideration, it is theft in the bailee to convert the property to his own use contrary to the terms of the bailment. That appears quite clearly from the case which has been cited by the presiding Judge. It is also stated, though not quite so definitely, in Stephen's *Digest of the Criminal Law*, art. 326; he says that theft may be committed by a bailee, and that this applies to bailments to infants incapable of entering into a contract of bailment by reason of infancy, and, it is submitted, to bailments upon a void, and perhaps upon an illegal, consideration. My difficulty as to stating the exact ground in the way in which it has been stated is this. This is really a case of theft by conversion, because the money was voluntarily handed to the accused by the complainant. The breach of duty—whatever the nature of the duty may be, whether moral or otherwise—on the part of the accused was failure to return the money. That was his moral duty; it was not his moral duty to carry out the illegal contract by purchasing the liquor. If there were no legal obligation to return the money, there was no legal duty to return it, and he would therefore, upon that aspect of the case, be punished for a breach not of a legal duty but of a moral duty; and, speaking generally, it is not a criminal offence to violate only moral duties. But I am not satisfied that there is not a legal obligation to return the money—that is an obligation which can be enforced. Speaking generally, no immoral contract can be enforced. That is laid down quite clearly in all the authorities, and was considered very fully by Sir Henry CONNOR in *Grant* v. *Collett* (4 N.L.R. 32). But the real question is this. Where money is given to a man, not as a

gift, but for a particular purpose, if he retains the money he can only do so, it seems to me, by setting up a legal contract. To illustrate the case—I lend a man a horse to go and commit a theft; I do not give him the horse. Would that man be entitled to retain the horse? I could say: "That is my horse, I want it back." He could only retain it by setting up the illegal contract, and, as the authorities show, he is not entitled to do that. This particular aspect of the case was considered in *Levy* v. *Katz* (1914, W.L.D. 88), where the authorities were gone into, and where it is stated generally that a person is not entitled to get any benefit out of an illegal contract. But if he can, in respect of the transaction in question, set up a right independent of the illegal contract, he is entitled to do so. Story, in his book on *Bailments*, sec. 379, referring to the general principle, says that certain bailments are prohibited by law, and he gives the example of a bailment of furniture used in a brothel—these passages being based on Pothier's *Contract of Letting*. Now in none of these cases do I find it stated that, though the contract is void, the person to whom the property is bailed is entitled to retain it. That seems to me not necessarily to follow from the contract being null and void and unenforceable. There are two cases given by *Voet*, which seems to me parallel with this. In one he says that though gaming is illegal and punished by many laws with considerable severity in the various cities of Holland, yet if when two persons are playing a game of chance one cheats the other, the person who is cheated may recover the money out of which he is cheated. Now it seems difficult, speaking generally, to say that they have not quite as much committed a breach of the law in gaming, whether there is cheating or not. But *Voet* lays stress on the fact, and cites as authority the *Digest*, that in the case of the swindler it is not a case of *par turpitudo;* in addition to the offence of gaming, he has been guilty of the offence of cheating. Here, it seems to me, it is a somewhat parallel case. In addition to entering into an engagement to commit a breach of the law, the accused has also been guilty of taking the complainant's money—practically of stealing it. Then there is also the well-known case given by *Voet*, and followed in other authorities, of a stake-holder in connection with some illegal game. It seems to me that such a stake-holder is as much a *socius criminis* as any other person who takes part in an illegal transaction. He holds the money for the purpose of enabling the illegal game to be carried out. Yet it is held that either party,

whether the game is played or the race won, or not, may recover from the stake-holder. That principle was followed in *Clarke* v. *Bruning* (1905, T.S. 295), and those authorities are in line with the authorities quoted by Mr. *van Heerden*, under the English law. It seems to me, therefore, that we have here, apart from the considerations which my brother WESSELS has pointed out, this fact—that there was a breach of a legal duty also on the part of the accused. The complainant was entitled to get his money back; the accused stole it. Therefore I think the conviction was right.

BRISTOWE, J.: I am of the same opinion. I do not think it is necessary in this case to go so far as to decide whether this money is civilly recoverable—not that I wish to dissent from the opinion expressed by my brother MASON on that point, but I would rather reserve my opinion. But, whether that is so or not, I am clearly of opinion that in the circumstances of the present case the conversion of the money by the accused to his own use amounted to theft. It is not a question of enforcing or not enforcing an invalid contract. This was money which was handed to the accused on a condition, and subject to the performance of that condition the money belonged to the person who handed it over. It may be that the condition was invalid, and that the Courts will not assist in the recovery of the money. But all the same, the money remained the property, not of the accused, but of the complainant, and the conversion of it by the accused to his own purposes seems to me to have amounted to theft. Therefore, without expressing any opinion upon the question of civil right, I agree with the view expressed by my brother WESSELS, and think that the appeal should be dismissed.

Accused's Attorney: *C. van D. Mathey.*

[J. M. M.]

REX v. OPPERMAN.

1915. *November* 22. WESSELS, MASON *and* GREGOROWSKI, JJ.

Liquor laws.—Liquor concealed at a certain spot.—Preconcerted arrangement.—Supply.—Ord. 32 *of* 1902, *sec.* 46.

An accused was observed to deposit and conceal liquor at a spot on the veld and was thereupon arrested. Shortly thereafter a native came to the spot and removed the liquor. *Held*, that this was evidence of a preconcerted arrange-