who has come to seek work, and if he does not wish to go to the location and remain there during the six days, accommodation is provided by the Government until such date. Once he has obtained employment, then he must either live on the premises of his employer, if employed on a mine in the compound set aside for that purpose or in a location. In this case the native who was found in the premises of the appellant was not in his employ, but in that of the Ferreira Gold Mine. He should therefore in the ordinary course of events live in the compound or in the location. The appellant owns certain property. He lives on the property, and in the yard are certain rooms which, apparently, he is in the habit of renting to natives. It appears to me, therefore, that he is encouraging or assisting those natives to do what the law does not allow them to do, namely, to live in a town except on their master's premises. The fact that he has made a lease with them does not alter the matter. In my opinion the appellant was rightly convicted of harbouring these natives on his premises, and the appeal must be dismissed. I have nothing to add to what has been said by the JUDGE-PRESIDENT as to the jurisdiction of the lower Court.

DE VILLIERS, J.P.: The appeal is dismissed.

REX v. BRETT AND LEVY.

1915. *March* 1, 22. WESSELS, CURLEWIS and GREGOROWSKI, JJ.

Criminal law. — Theft. — Accessory after fact. — Selling stolen property knowing it to have been stolen. — Possession of accused.

Where an accused person, on an indictment charging him with theft, was found guilty by the jury of assisting to sell the stolen property knowing it to have been stolen, *Held*, that the jury's finding amounted to a verdict of guilty of theft, and that it was not necessary to prove that the accused ever had the stolen property in his personal possession.

R. v. *Turpin and Blake* (1 Ros. 103) not followed.

Question reserved for the decision of the full Court under sec. 270 of Ord. 1 of 1903.

Six persons, amongst whom were the two appellants, were charged with the theft of nine wagons belonging to the Imperial Government. Two were discharged, two were found guilty of theft and the two appellants were found guilty of "assisting to sell the stolen wagons knowing they were stolen property." The presiding Judge (MASON, J.), held that this finding was equivalent to a verdict of guilty of theft and sentenced each of the appellants to a fine of £75 or 9 months' imprisonment with hard labour. The following is the judgment of MASON, J., at the trial:—

The question for decision in this particular matter is one which, so far as I know, has not come before courts of law in this country before. The six accused were all charged with stealing certain nine wagons belonging to the Imperial Government. The jury have found two not guilty, with them I have nothing to do. The jury have found Walter Levy and Clee guilty of the theft of the wagons, and the two accessories, Brett and Bernard Levy, guilty of assisting to sell the wagons knowing they were stolen property. I think the meaning of that verdict is perfectly clear: The jury found that Brett and Bernard Levy were not actually proved to have taken part in the theft, but that they helped those who did take part in the theft, namely, Walter Levy and Clee, to sell the wagons knowing that they were stolen. The question is whether, with reference to the verdict against Brett and Bernard Levy, those facts constitute any offence upon which the prisoners can be found guilty upon the indictment with which they were charged, namely, an indictment for theft. Speaking for myself, it appears to me that those facts would, at any rate, constitute the two accused accessories after the fact. But then the question would arise as to whether they could be convicted of being accessories after the fact upon the indictment. The general practice here has certainly been to charge the offence of being accessory after the fact specially or in the alternative. There is no question that such a course is the fairest course to take for the prisoners. But I have come to the conclusion that the facts found by the jury constitute a participation in the crime of theft. For these reasons, as theft is a fraudulent dealing with the property of another person so as to deprive the owner of that property, that fraudulent dealing in the present case, to my mind, is constituted not only by removing the wagons from the "Heights," but also by the sale of those wagons. It is quite true that the crime of theft would have been completed even if there had been no attempt to sell, but the attempt to sell was an element in this *fraudulosa contractatio*—that is, fraudulent dealing with the property. And those who knowing that property had been stolen under the circumstances alleged and admittedly occurring in this case take part in the transaction by trying to assist the thieves to sell that property are certainly morally guilty of an offence, and I believe in law also guilty of an offence. I shall therefore adjudge that this verdict, as regards Brett and Bernard Levy, is a verdict of guilty of theft.

At the request of counsel for the defence the question was reserved for the decision of the full Court whether this finding amounts to a verdict of guilty of theft or any other crime.

T. J. Roos, for the accused: I submit that the verdict is equivalent to one of not guilty on the indictment, which charges all the

accused with theft. The accused might have been found guilty of being accessories after the fact but could not be found guilty of the principal crime. The effect of the jury's find is that the accused only entered upon the transaction after the theft had been consummated and did not take part in the actual theft. See *R.* v. *Turpin and Blake* (1 Roscoe 103); sec. 141, Ord. 1 of 1903; *The State* v. *Binden and Others* (1 S.A.R. 149).

Under the common law on an indictment for theft a man cannot be found guilty of receiving stolen property and assistance after the crime has been committed cannot be the same as the original offence. A person who merely helps to hide the body of a murdered man cannot be found guilty of murder. See *R.* v. *Abrahams* (1 S.C. 393, at p. 397).

Furtum is defined in Donellus (vol. 4, col. 243) as a *fraudulosa contractatio* and *contrectare* in col. 246 as a physical taking. Here the stolen property was not handled by the accused. The accused might be charged with some other offence but not with theft. *Contractatio* means a dealing with the property of another by depriving another of it. See also Bishop's *New Criminal Law* (Vol. I, sec. 642, page 393); Halsbury's *Laws of England* (vol. 9, sec. 1356, p. 676).

In section 141 of the Criminal Procedure Code (Ord. 1 of 1903) principals and accessories are distinguished. We have departed from the old Roman-Dutch law because we recognise the distinction in the case of a receiver.

[GREGOROWSKI, J.: All our offences are misdemeanours and not felonies. You have quoted no case to show that there can be an accessory to a misdemeanour.]

[WESSELS, J., referred to *R.* v. *Lalloo* (1906, T.S. 798).]

But see *R.* v. *Retief and Another* (1904, T.S. 63) where it was held that being in possession of stolen property well knowing it to have been stolen, is no offence under our law. See also *R.* v. *Kleinbooi* (2 H.C.G. 429); *Chellan* v. *R.* (1901, 22 N.L.R. 23); *R.* v. *Sing Si* (1911, E.D.C. 296), which are to the same effect. See also Halsbury's *Laws of England* (vol. 9, pp. 248 and 255).

I. P. van Heerden, for the Crown: Theft under Roman-Dutch law is any fraudulent dealing with another's property with the intention of depriving the owner of the property and anyone assisting in the disposal of it is guilty of theft as a principal. See Matthaeus, *de Criminibus* (1, 1, 2, 10); Colquhoun's *Roman Civil Law*, par. 1896. See also judgment of WESSELS, J., in *R.* v. *Berman*,

heard in the Witwatersrand Local Division on 31st Oct., 1914, where a thief who gave evidence against a receiver was regarded by the learned Judge as an accomplice of the receiver. See also Stephen's *Digest of the Criminal Law* (p. 246, sec. 308). Here the intention of the accused was clear and it was accompanied by an overt act.

Roos, in reply: The jury did not intend to return a verdict of guilty of theft. It is quite possible that this verdict is consistent with innocence.

Cur. adv. vult.

Postea (March 1).

WESSELS, J.: In this matter six persons, amongst whom were the two appellants, Michael Brett and Bernard Levy, were charged with the theft of nine wagons, belonging to the Imperial Government. Two of the six were acquitted, two were found guilty of theft, but with regard to Michael Brett and Bernard Levy the jury brought in the following special verdict: "Guilty of assisting to sell the stolen wagons knowing that it was stolen property." Upon a question from the presiding Judge the jury added that Bernard Levy was not in the possession of the stolen property but that knowing it to be stolen he endeavoured to dispose of it.

The presiding Judge held that the verdict of the jury amounted to a finding that both the accused in question were *socii criminis* and, therefore, in law guilty of theft. They were punished by a fine of £75 each, payable in instalments or in default of payment with imprisonment with hard labour for nine months. At the request of counsel for the defence the presiding Judge reserved the question whether upon the facts found by the jury the appellants could be found guilty of any crime or whether they were entitled to their discharge as being not guilty.

It is unnecessary to go into the details of this case, for the only question to decide is whether in law a person charged with theft and found guilty by the jury of assisting to sell the stolen property knowing that it was stolen is in law rightly convicted of theft (1) if he had physical possession of such property; and (2) if he did not have such possession.

It has been contended on behalf of the accused that they could not upon the finding of the jury have been convicted of any crime on an indictment for theft of the wagons. The indictment for

theft of wagons does not cover the finding of the jury. They might perhaps have been found guilty of being accessories after the crime of theft, but then they should have been charged as accessories and not as principals. The jury's finding shows that the crime of theft had already been consummated before the two accused now before the Court came to have any connection with the crime. The two accused were, therefore, not principals and should not have been charged as such. Having been charged as principals they must either be found guilty or acquitted. If an accessory after the crime of theft is guilty of a crime it is not of the crime of theft but of a crime falling under a different category. Mr. *Roos* has also urged that a person who receives stolen property knowing it to have been stolen may be guilty of a crime but he is not guilty of theft and if charged with theft could not under the common law have been convicted of a different crime, viz., receipt of stolen goods knowing them to have been stolen.

In support of the above contention, Mr. *Roos* has relied upon the case of *R.* v. *Turpin and Blake* (1 Roscoe, p. 103). It was held in this case, decided in 1863, that a prisoner who is indicted for theft cannot be convicted as an accessory after the fact.

There can be no doubt that this decision of Mr. Justice CLOETE deserves great weight more especially as it has been subsequently followed in the Cape Province.

It is difficult from the report to judge whether it was based entirely upon English law or whether the Roman-Dutch law was consulted. The only case cited as reported is *R.* v. *Felton*. This is probably a misprint for the English case: *R.* v. *Fallon* (9 Cox C.C. 242, 32 L.J.M.C. 66) in which it was decided that an accessory after the fact to a felony cannot be convicted upon an indictment charging the commission of the felony only: he should be indicted as an accessory after the fact.

A different view of our law was taken by Sir Henry CONNOR in *R.* v. *Ashga and Others* and this case was followed by the Natal Supreme Court in 1900 in *Bulai and Others* v. *R.* (21 N.L.R. 20). The Natal Supreme Court held that a person charged with murder could be rightly convicted of being an accessory after the fact. This decision is, therefore, opposed to *R.* v. *Fallon*, and also to *R.* v. *Turpin and Blake*, for the latter decision is based on the general proposition that a person cannot be convicted as an accessory after the fact upon an indictment charging him as principal felon (page 104). Which of these decisions is more in conformity with the Roman-Dutch law?

It must be pointed out at the outset that the English law with regard to accessories is very artificial and is largely due to its historical development. Thus Fitz James Stephen in his *History of Criminal Law* (vol. 2, p. 231) says: "The history of the law upon this subject is intricate and characteristic. . . . Stated in the broadest and most unqualified way it came to this. There was no distinction between principals and accessories in treason and misdemeanours, and the distinction in felony made little difference, because all alike principals and accessories were felons and were as such punishable with death."

The technical rules as regards accessories were apparently introduced to mitigate the extraordinary severity of the old criminal law and the judges were anxious to give the accessory a loophole for escape wherever the principal could claim some privilege. "The essential part of the doctrine of the law of principal and accessory is, that from the earliest times a doctrine prevailed that —'no accessory can be convicted or suffer any punishment where the principal is not attained or hath the benefit of his clergy.' The result was that if the principal died, stood mute, challenged peremptorily more than the proper number of jurors, was pardoned or had his clergy the accessory altogether escaped" (page 232).

From the above it will be seen how very unsafe it is for us to follow English precedents as regards principals and accessories in criminal cases. It was pointed out in *R.* v. *Peerkhan and Lalloo* (1906, T.S. 798)) that according to our law everybody who, in the opinion of the judge does something to further the purpose of a criminal is a person who assists or helps at the crime. The CHIEF JUSTICE said (at page 802) that, "in our Criminal Courts men are convicted for being *socii criminis* without being specially charged in the indictment as such. They are so convicted under ordinary indictments charging them with having actually committed the crime." The Dutch criminalists considered the principals and accessories, both before and after the fact, as guilty of the same crime and only distinguished in the punishment meted out to them. See Damhouder, *Crim. Praktijk Nispen's Tr.*, c. 106, c. 121 and c. 122; Original Latin Ed., c. 135, 136.

These principles were applied by the Dutch jurists to all kinds of crimes and specially to the crime of theft. In reality there must always be a distinction between the principal who actually commits the crime and the accessory who only takes an active part in the preparation of the crime, in enabling the principal to

obtain the full fruits of the crime or in sheltering him from the pursuit of justice. There must in the nature of things be a difference between the act of the thief who actually does the stealing and the act of the accessory who helps him to dispose of it after the thing has been stolen. In as much, however, as everyone of the persons concerned in the preparation of the theft, its execution and the disposal of the stolen property contributes a share towards depriving the owner of his property, the Roman-Dutch law considered the thief and his associates as guilty of varying degrees of theft. The nature of the crime committed by the principal determined the nature of the crime of the accessory. This was expressed by the doctors in the maxim: *Accessorius sequitur naturam principalis sui.* Thus Joost van Damhouder in dealing with those who buy stolen goods calls their crime a kind of theft—*aliud praeterea furti crimen est, quo multi fures subsidiarii, suos fures in furto fortiter coadjuvant et, alunt, et quo furibus fovendis commodiatem sane praebent non inefficavem, Praxis, Crim.*, c. 119. "There is *another species of theft* in which there are many subsidiary thieves who afford one another considerable aid in the actual stealing and in which no small part of the assistance consists in harbouring the thieves." He then goes on to say that the purchasers of the stolen goods assist the actual thieves in the stealing and are themselves to be punished as thieves. Matthaeus (*de Criminibus*, p. 99) also points out that those who take part in a theft are guilty of a similar crime. He refers to a Frisian Statute where occur the following words:—*Soo wie gestolen goet wetens herberght of wetens koopt of mede deijlt is punierlijk gelyck den principalen.* There is no doubt that by the Roman-Dutch law, even towards the end of the 18th century, the purchaser of stolen goods was punished as if he were a principal. (Kersteman, *Sleutel der Crim. Praktijk*, Vol. I, p. 65).

Carpzovius speaking of the German criminal practice draws a distinction between actual theft and helping thieves. This he does in order to show that the aiders and abetters of thieves ought not to be punished with death like the thieves themselves. He points out, however, that the Dutch jurist Damhouder was of a different opinion (Q. 87, n. 47).

I have been unable to find a single authority for the proposition that the Dutch Courts drew a distinction between the principal thief and the accessory or that they were indicted for different crimes.

Mr. *Roos* has also relied on section 141 of the Criminal Procedure Code for the argument that the accessory must be specially indicted as such and cannot be indicted as a principal or if so indicted cannot be found guilty of being an accessory. The article does not support this argument. It merely provides that the Crown has the right to try principal and accessory together or separately as it pleases.

It appears to me, therefore, that the presiding judge was right in coming to the conclusion that the finding of the jury amounted to a verdict that the accused were *socii criminis* and, therefore, guilty of theft. I am also of opinion that it was as such a fraudulent dealing with the wagons to sell them on behalf of the principal knowing them to have been stolen as to remove them from Roberts' Heights.

In the case of *His Majesty's Advocate* v. *Browne, Burns and Williams* (*Scot. Law Reporter*, vol. 41, p. 136), the Lord Justice Clerk held that according to Scotch law where a person was privy to the retention of property known to have been dishonestly appropriated it is not necessary to prove that the person charged has ever had the property in question actually in his personal possession. I think that the principle underlying this practice is in conformity with the principles and practice of our law.

Both accused were, therefore, rightly convicted and punished.

CURLEWIS and GREGOROWSKI, JJ., concurred.

Attorneys for Accused: *Ludorf & Strange.*

[A.D.]

STERN & CO. v. DE WAAL.

1915. *March*, 4, 22. WESSELS, CURLEWIS and GREGOROWSKI, JJ.

Alien enemy.—Right to sue.—Carrying on business in partnership.—Suing in name of firm.—King's Proclamation 22/9/14.
Partnership.—Partner alien enemy.—Declaration of war.—Effect on partnership.—Dissolution.

A British subject resident in and trading in enemy territory is regarded, when he seeks redress in the King's Court as an enemy subject. On the other hand a person of enemy nationality who is neither resident in nor carrying on business in enemy territory, but is living in British territory under the King's protection has the same right to sue as a British subject.