

1910 difference in substance between what was supposed to be and
 _____ what was taken, so as to constitute a failure of consideration.”
 ANGEL v. No one could say that there is such a complete difference
 JAY. between a sanitary and an insanitary house as to constitute a
 Bucknill J. failure of consideration after the lessee had gone into and
 remained in possession for half a year. For these reasons I
 agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Sherwood, Baker & Hart.*

Solicitors for respondent: *Grammer, Hamlin & Co.*

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 Nov. 29.

[COURT OF CRIMINAL APPEAL.]

THE KING v. TAYLOR.

Criminal Law—Larceny—Evidence of Asportavit.

The prisoner put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its meeting an obstruction. The prosecutor grasped the purse and replaced it.—

Held, that there was sufficient evidence of asportavit to support a charge of larceny.

APPEAL against conviction.

At the Wiltshire quarter sessions holden at Warminster on June 28, 1910, the appellant was charged that he feloniously did steal from the person of Alexander Barnes a purse containing the sum of 8s. 9d. in money, the goods, chattels, and moneys of the said Alexander Barnes, at Warminster on June 2, 1910.

The following evidence was given at the trial:—

The prosecutor, Alexander Barnes, was a cattle dealer. He had been attending an agricultural show at Warminster on June 2, 1910, and, being minded to return to Frome by a train leaving Warminster at 8.38 P.M., he was waiting in the waiting-room with his daughter, aged eight years, when the train came

into the station. Then, to quote the words of the prosecutor, "I went to look for a carriage and as I was walking up the prisoner came up and put his hand in my trouser pocket He pulled my purse out to the edge of my pocket and I think the corner lodged under the edge of my belt. I grasped it out of his hand and put the purse back and made a grasp to try and catch him."

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In cross-examination the prosecutor said that the purse was caught in his belt and in the corner of his pocket. Then the following questions were put and answers given :—

"Q. It never left your possession at all ?

"A. It came out to the end and I grasped it like that.

"Q. He never got it away from you ?

"A. Nothing more than that."

In re-examination the following questions were put and answers given :—

"Q. When you seized his hand was the purse in his hand the moment you seized it ?

"A. It was at that very moment.

"Q. Where was his hand ?

"A. It was just outside there."

The chairman directed the jury as follows :—

"The prisoner is charged that he did on June 2 steal from the person of the prosecutor a purse in which there was a certain amount of money. The facts are before you. If you are satisfied that the purse was actually in the man's hand you would be justified in returning a verdict for the full charge, With regard to the facts of the case you have Mr. Barnes's evidence before you that on June 2, which you will remember was the day of the show, he was at the station shortly after half-past 8, and that when the train came in—the platform as you may imagine was crowded—he was looking for a carriage with a little girl of eight when the defendant came behind him, put his hand in his trouser pocket and pulled the purse out of the pocket, when it caught in his belt. Then, as Mr. Barnes puts it in his own phraseology, 'I grasped it out of his hand, put the purse back in my pocket, and tried to catch him. I followed him down the avenue.' He was only pushed, he says

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in cross-examination, once. 'I was close to the carriage door, but the defendant was not pushing in front of me; he was pushing behind me.' The prosecutor's story is that he turned round to catch him, and that the defendant then bolted. . . . After dealing with other evidence for the prosecution, the chairman continued: "Against that you have the defendant's evidence which he has given on oath, and upon which he has been cross-examined in the box. . . . His account of what occurred is that the platform was full; that everybody was rushing for carriages; that he was pushed up against the prosecutor; that the prosecutor then turned round and went for him, and that he backed away from the prosecutor. Mr. Barnes seems to have gone for him again, and then he took to his heels. He ran down the avenue, and, he says, 'When I saw him stop I got across the path to get to the railway to catch my train, and I was pulled back by a man. I asked him what he was stopping me for, and told him that if I did not catch the train I should not get back to Bath that night.' He was handed over to the police and so on.

"Well, gentlemen, what you have to decide is the credibility of the two stories. You have the prosecutor's story of what occurred in the station, and against that you have the defendant's. It is for you to consider whether the defendant has given an explanation of the circumstances of what occurred after Mr. Barnes turned on him, and it is for you to say which of the two stories you believe. Will you please consider your verdict?"

The jury on this direction found the prisoner guilty of stealing the purse from the person of the prosecutor.

The prisoner was then charged with being a habitual criminal and found guilty. He was sentenced to penal servitude for three years and afterwards to a period of detention for another five years.

The prisoner appealed against the conviction.

Acton Pile, for the appellant. The chairman misdirected the jury in telling them that the evidence for the prosecution was that the prisoner pulled the purse out of the prosecutor's pocket. The evidence in truth was that the purse had not wholly left the

prosecutor's pocket when he seized the appellant's hand and retook it. Therefore, assuming there was a taking of the purse, there was no carrying away, because there was no severance of the purse from the person of the prosecutor. It never left his possession : *Wilkinson's Case* (1) ; *Rex v. Thompson*. (2) In this respect the present case is distinguishable from *Rex v. Lapier* (3) and *Reg. v. Simpson* (4), in which cases there was a complete severance already effected before the hand of the defendant encountered the obstacle. In the present case an obstacle, namely, the prosecutor's belt, prevented complete severance.

Then, the evidence not supporting a charge of larceny, the chairman ought to have told the jury that, assuming that they believed the prosecutor's story, they could only find the appellant guilty of an attempt to steal. But if he had been convicted of that offence he could not have been sentenced to penal servitude, because that offence is only a misdemeanour at common law and not punishable by penal servitude. Consequently he could not have been convicted of being a habitual criminal, and the sentence of preventive detention could not have been passed upon him, because s. 10 of the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), which provides for such a conviction and sentence, only applies where the Court passes sentence of penal servitude. Therefore both convictions were wrong and ought, with the sentences based upon them, to be quashed.

A. J. Lawrie, for the Crown. The cases cited on behalf of the appellant are all cases of stealing from the person. In the case of simple larceny very slight evidence of asportation is sufficient : *Rex v. Thompson*. (2) The mere raising of a chattel from its position of rest has been held to be a complete asportation : *Rex v. Walsh* (5) ; *Rex v. Coslet*. (6) In the present case there was evidence on which the appellant could have been convicted of simple larceny. That is an offence of which the jury could on this indictment have found the appellant guilty : 2 Hale, Pleas of the Crown, 302 ; the verdict shews that the jury must have been satisfied of facts which proved the appellant guilty of

(1) (1598) Hale, P. C. 508.

(2) (1825) 1 Moo. C. C. 78.

(3) (1784) 1 Leach, 320.

(4) (1854) 24 L. J. (M.C.) 7.

(5) (1824) 1 Moo. C. C. 14.

(6) (1782) 1 Leach, 236.

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larceny, and therefore the Court may under s. 5, sub-s. 2, of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), instead of allowing the appeal, substitute for the verdict of the jury a verdict of guilty of larceny and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for simple larceny. Larceny is punishable by penal servitude; a sentence of preventive detention may legally follow such a sentence; and in the circumstances of this case the Court may well pass the same sentence as that pronounced by the Court below.

The judgment of the COURT (Darling, Pickford, and Bankes JJ.) was delivered by

PICKFORD J. This is an appeal against a conviction before the Wiltshire' quarter sessions. The appellant, having been convicted of larceny from the person and of being a habitual criminal, was sentenced to a term of three years' penal servitude and five years' preventive detention. Objection is taken on his behalf that there was no evidence on which he could be convicted of larceny from the person, that the chairman of quarter sessions misdirected the jury as to the effect of the evidence, and that the only offence proved was an attempt to commit larceny, for which he could not have been sentenced to penal servitude and consequently not to a term of preventive detention.

It may be that the evidence was not stated with absolute accuracy by the chairman when he said to the jury that the appellant pulled the purse out of the prosecutor's trouser pocket; the evidence was not that the purse was taken out of the pocket, but that it was removed to the edge of the pocket where it caught the belt. Earlier in the summing up the chairman had said "If you are satisfied that the purse was actually in the man's hand you would be justified in returning a verdict for the full charge," that is to say, the charge of larceny from the person. That is not an accurate direction. The fact that the purse was in the appellant's hand was not sufficient evidence of asportation to support a conviction of larceny from the person. But then the chairman went on to state the effect of the evidence and the story told by the appellant, and concluded in these words: "It is for you

to consider whether the defendant has given an explanation of the circumstances which occurred after Mr. Barnes turned on him, and it is for you to say which of the two stories you believe." He therefore in the clearest terms left to the jury the choice between the two stories, and the jury accepted the story of the prosecutor; that is to say they found that the appellant took the purse in his hand and lifted it to the edge of the prosecutor's pocket, and that there it caught the belt. They have therefore believed facts which in our view constitute a simple larceny, because the authorities point to this, that if a man puts his hand into another man's pocket, seizes his purse, removes it from the position in which it was at the bottom of the pocket to the edge of the pocket, and is only prevented from taking it entirely out of the pocket by the accident that it meets an obstruction in the shape of the man's belt, that is a sufficient asportation to constitute a simple larceny. The jury then have accepted a state of facts which justify a conviction of simple larceny. Then by s. 5, sub-s. 2, of the Criminal Appeal Act, 1907, the Court instead of allowing the appeal may substitute for the verdict of the jury a verdict of guilty of the offence of a simple larceny, and pass such a sentence in substitution for the sentence passed at the trial as may be warranted in law for the offence of simple larceny, not being a sentence of greater severity. Acting on the powers conferred upon the Court by that enactment we find the prisoner guilty of simple larceny, and we pass upon him the same sentence as that which was passed by the quarter sessions. The sentence of three years' penal servitude will therefore stand. Upon that the conviction of being a habitual criminal may properly be superimposed, the facts in this case amply justifying that conviction, and as the sentence of five years' preventive detention is not, as a sentence, complained of, that sentence will also stand, and this appeal will be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

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