MAIN THEORIES ON ASPORTATION

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THERE is no definition of Theft in our Criminal Code ; it simply makes a distinction between aggravated and simple theft. The aggravating circumstances of theft are mentioned in Sec. 274, while Sec. 279 lays down that theft is simple when it is not accompanied by any of the aggravating circumstances specified in Sec. 274. In the absence of such a definition our Criminal Code leaves us in the dark as to which are the constituent elements of theft, and we will have to depend upon the definitions furnished by text writers and other codes. Generally speaking, all the definitions given agree as to what are the elements of this offence, but there may be various opinions as to what in fact constitutes this or that element.

We may define theft as the taking or carrying away (asportation) *animo furando* of the goods or chattels without the consent of the owner *(invito domino)* (1).

The physical and the mental elements of theft can be readily recognised from this definition. What concerns us here is the physical element, which according to English Common Law principles was made up of two ingredients, (i) the simple physical act of seizing the thing (*cepit*) and taking it away (*asportavit*) and (ii) a negative ingredient, the condition that this taking and carrying away must be done without the consent of the owner *(invito domino)* (2). It is the first of these two ingredients which here falls under discussion, i.e. what constitutes asportation.

This question has been much debated on the Continent, and different solutions have been suggested which may be classified in the following four theories (3).

Theft is completed,

(1) As soon as a person lays his hand on the article which he intends to take away;

(2) only when the thief actually succeeds in carrying away the thing to a safe place (*eo loco quo destinaverat).*

(3) as soon as the thing is removed from the place where it is ;

(4) by the removal of the thing from the sphere of possession of the owner.

All these theories, except the first, require the taking away of the thing, which means that there must be asportation ; but there is disagreement as to what is sufficient, consequent upon the *apprehensio rei,* to amount to such asportation.

No long explanation is necessary to show that the first theory is untenable, it cannot be said that a person violates the possession of another person just because he lays his hand on the property of such person. It is true that, in the majority of cases, a thing cannot be taken away unless it is grasped but from the moment the thief lays his hand on the thing to the carrying -

(1) Rex v. Pisani (2. 12. 1941), reported in "Recent Criminal Cases Annotate" (Para. 20), by Hon. Mr. Justice Harding, B.Litt., LL.D.

(2) English Studies in Criminal Science, Ed. by L. Radzinowiez and J.W.C. Turner. Vol. IV, Modern Approach to Criminal Law, p. 357.

(3) Maino, Commento al Codice Penale, pp. 6-7. De Mauro, Il-momento consumativo del furto (Riv. Pen., Suppl. IV, 5 et seq.).

away and the taking possession of the thing there is some lapse of time. In Rex v. Spiteri (14. 1. 1943) our Courts held that the element of asportation was negatived in a case in which the accused was surprised in the act of putting his hand in a tin box to take a bar of chocolate (4). Moreover, theft can be committed without the thing having been at all touched as the act by which the owner is deprived of his possession need not be direct (5). This principle finds special application in theft of animals by means of traps and in the unlawful use or consumption of water, gas or electric current (6).

The inadequacy of this theory made Carrara and other authors express a doubt as to whether theft is a formal or a material offence: "Per dirlo tale (formale) bisognerebbe poterlo definire il toccamento della casa altrui, come la ingiuria si definisce il proferimento di una parola" (7), and another writer states that "Il furto e reato, per eccellenza materiale e non formale : tale sarebbe se consistesse nel toccamento della cosa" (8).

The second theory finds practical application in the Code Penal of France, and is supported by a number of French writers, and by some Italian writers. The Code Penal defines theft as follows: "Quiconque a soustrait frauduleusement une chose qui ne lui appartient pas..." (Sec. 379). The element to be noted here is the 'soustraction'. It is required that the thing is taken away to a safe place. According to this school of thought, there is sufficient asportatian when the thing is taken to a place where the thief may make use of it, but not the owner ; otherwise, theft is only attempted (9). In other words the thing must be taken away to a safe place, where the thief had the intention of taking it; up to such time, the thief may as well have desisted from the offence. "E necessario che l'agente abbia posto la mano sulla cosa che desidera, che l'abbia sequestrata, che l'abbia rapita, fino a quest'ultimo atto il delitto non e ancora che un progetto da cui l'agente potrebbe desistere" (10). This opinion is also held by Jousse whom Cheveau et Helie quote in their support. It is held by this school that when the thing is not carried away in such a manner it cannot be said that the owner has lost his property : "Il padrone non soffre neppure per pochi istanti la perdita della sua cosa" (11).

Without going into details, it may be safely said that once the thief gains possession of the thing, then the owner is deprived of his possession. But to say that the thief has gained possession of the thing does not, it is submitted, imply that he is sure that the object stolen is made his own. "Non e poi esatto cercare come condizione dello impossessamento che il ladro abbia acquistata nel animo la sicurezza di aver fatto suo l'oggetto involato" (12).

That this theory is not very sound can be argued from the fact that the French Criminal Code establishes that an attempt to steal is punished in the same manner as if it were a complete

(4) Harding J., op. cit. Para. 106. Note 61.

(5) Carrara, Programma, Vol. IV. Para. 2028. Tuozzi, Corso di Diritto Penale, Vol. II. p. 301. Manzini, Trattato del Furto, Vol. II, p. 260.

(6) Vide Section 277 (2) of our Criminal Code.

(7) Carrara, op. cit. p. 22

(8) Alfredo, Enciclopedia Giuridica, Furto, p. 787.

(9) Arabia, I Principii del Diritto Penale, p. 412.

(10) Cheveau et Helie, Trattato, Vol. III, pp. 15-16.

(11) Guliani, Istituzioni, Vol. II, p. 495.

(12) Carrara, op. cit., Note on p. 24.

theft : "Nel caso di tentativo... per una specie di presunzione della legge, il crimine e reputato compiuto" (13). So that as Carrara puts it "per riparar alle conseguenze di un errore ontalogico si dette sanzione ad un errore giuridico" (14). Moreover the carrying away to a safe place of the stolen property may be accomplished by persons other than the thief, who in the proper circumstances may be liable for the offence of receiving stolen property (15).

The two theories which are about to be discussed, i.e., the third and fourth theories, require that the thing must have entered in the possession of the offender. This is necessary to constitute the offence of theft. Indeed in Rex v. Demicoli, (20. 11. 1922) (16) , it was held that in theft proper there is a violation of property (ownership) together with a violation of possession by way of contrectatio. The point on which these theories disagree is what constitutes that sufficient asportation, which makes the thief the possessor of the thing.

The third theory to be considered is that which holds that theft is complete as soon as the thing is removed from the place which it occupied. "Col pigliare in mano ed incominciare l'asportazione della cosa il ladro ha gia invaso la sfera dell'attivita patrimoniale del possessore" (17). Carrara is the chief exponent of this theory. Theft, as we have seen above, consists in the violation of possession of the owner. From the instant therefore, that a person takes the thing which belongs to another, possession is violated, without it being necessary for the thief to retain such possession for some time. If theft is not completed at this moment, it is difficult to find a correct criterion to say when the offence of theft is completed. It would be difficult to decide whether there is sufficient carrying away, in the taking of a thing out of a room or out of a house. "In primo luogo il furto consiste in una violazione del possesso altrui ; laonde e chiaro che al primo momento in cui io mi sono impossessato della cosa che era in possesso di altri, la violazione del possesso e avvenuta senza aspettare che lo impossessamento da me usurpato si prolunghi di un tratto... se si prescinde da questo primo momento dell'amozione, *che gia in se presenta completa la violazlone del possesso,* non si sa piu dove trovare un criterio esatto per definire il momento consumativo del furto... quando il ladro entrato in mia casa prende la roba mia si rende egli possessore della medesima, quantunque io rimanga possessore dell'abitazione" (l8). So, a person is guilty of theft when he removes the article, even if he is surprised and is unable to carry it elsewhere (19). Of the same opinion is Carmignani : "Per dirsi perfetta e consumata l'ablazione basta che il ladro abbia rimosso la cosa dal luogo nel quale il padrone l'aveva posta" (20). And Crevellari holds that the thing enters in the possession of the thief "tosto che (il ladro) l'ha rimossa dal luogo ove il proprietario l'aveva collocata" (21).

This theory is adopted by Art. 347 of the Codice Penale Toscana which lays down that theft is completed "*subito che* il colpevole ha tolto la cosa dal luogo ove si trova." Emphasis should be made on the word *subito.* The theft is committed *as soon* as the thing is removed from the place where it is.

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(13) Cheveau et Helie, loc. cit.

(14) Carrara, op. cit., Note on p. 26.

(15) Alfredo, op. cit., p. 785.

(16) Local Law Reports, Vol. XXV, pp. 821, 825 (cited by Harding J. op. cit. Para. 20. Note 27).

(17) Carrara Lineamenti, p. 246.

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Although according to this theory the slightest removal is sufficient to constitute asportation, not every removal suffices far this purpose. Carrara distinguishes between "amozione preparatoria" and "amozione definitive". The removal is final and definite, when the thing *itself*, which the thief intends to steal is removed; and it is preparatory, when the thief removes the thing for the purpose of reaching the thing which he intends to take. For instance, when a thief moves a ladder to reach an object on a shelf (22).

It is held against this theory that it cannot be said that the thief has necessarily acquired the possession of the thing, because it is removed from the place in which it was. "L'impossessamento del ladro presuppone lo spossessamento del proprietario, ma o spassessamento del padrone non e ancora di per se solo l'impossessamento del ladro ; perche questo si compia, e necessario che la cosa, uscita dal possesso del derubato entri nel possesso del colpevole" (23). If it is still possible for the owner to make use of his property, then he still retains possession : "Mancherebbe il termine a quo quando la cosa non fosse che per poco spazio rimossa dal luogo in cui per volere del padrone si trovava, per modo che, potendole usare a suo arbitrio, si presume che non ne abbia mai perduto il possesso" (24).

The fourth and last theory, which is to be examined falls between the theory propound by the French school and the theory propounded by Carrara. Asportation is complete when the thing is completely removed from the sphere of possession of the owner. Pessina is the chief exponent of this school. In theft there must subsist not only the *rei alienae apprehensio* but also the *amotio de loco ad locum*, which may be said to consist of two elements : the *terminus a quo* and the *terminus ad quem*. The *terminus a quo* is the place where the thing was, before the theft was committed, and the *terminus ad quem* is the place where the thing is taken. So that what is essential in this offence is that the place of the thing should be changed. "Il primo momento del furto e *l'apprehensio rei: e* l'ultima momento costitutivo consiste nel muntamento di luogo che integra l'ablatio" (25). The word "place" (luogo) should not be understood in its physical and material sense, i.e., as the place where the thing was actually put : one must see whether that place falls or not within the sphere of possession of the owner. Pessina gives the following examples. A thief enters a house to commit a theft, the offence is completed when the thief goes out of the house. Two persons live in the same house but in different rooms, one of them steals something from the other room, there is asportation when the thing stolen is taken out of the owner's room. Two boys in a college sleep in the same dormitory, there is asportation when the stolen article is removed from the particular area where the owner holds all his property (26).

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(18) Carrara, Programma, pp. 23-24.

(19) Puccioni, Codice Penale Tascano Illustrato. Art. 374.

(20) Elementi, Vol. II. p. 61 (Trans. by Prof.. Caruana Dingli).

(21) Il Codice Penale per il Regno d'Italia, Vol. VIII, p. 14.

(22) Carrara, op. cit. pp. 28-29. see also Puccioni, Codice Penale Toscana Illustrato, Vol. V. pp. 8-9. Manzini, op. cit, pp 234-235. For a contrary opinion see Marciano, Il Titolo X del Codice Penale Italiano, p. 27).

(23) Vico, Digesto Italiano, Vol. XI. Part. ii, p. 1006.

(24) Arabia, loc. cit.

(25) Pessina, Elementi, Vol. IT; p. 212.

According to this school of thought, when a person has only removed the thing from the place where it was, it cannot be said that there is a change of possession, "ma questa mutazione non puo dirsi awverata mentre la cosa si trova ancora nel luogo che costituisce la sfera di possesso del proprietario. Fino a questo punto, e percio nell'afferrare la cosa, si avra bensi un tentativo di furto ma non un furto consumato" (27). So that the removal to complete the asportation must be such as to take the thing out of the sphere of possession of the owner (28).

Pessina has been quoted at some length, but this fact will be pardoned when one is aware of the part that author played in the discussions and *Progetti* preliminary to the Italian Penal Code of 1890, Art. 402 of which defines theft as follows :— "Chiunque s'impossessa della cosa mobile altrui per trarne profitto, togliendola dal luogo dove si trova, senza il consenso di colui al quale appartiene" (29). When one goes through the various *Progetti* in connection with this definition, one must construe the word 'luogo' in the sense in which Pessina contrues it, i.e., the sphere of possession of the owner. "Alla parola luogo bisogna dare un significato non materiale e volgare ma ideologico e tecnico, cosi da intendersi per essa la sfera della custodia efficacemente possibile del possessore, sia codesta materiale, sia anche puramente morale" (30). The *Relazione Ministeriale sul Progetto 1887*, says that there is asportation, when the thing is removed from the place it occupied, provided it is transferred in the power of some one else: "Il momento essenziale del furto sta nella violazione del possesso ; ma, perche cio avvenga, basta che la cosa, con atto di dominio sia sottratta dalla sfera di attivita patrimoniale del possessore... si richiede... che il diritto altrui sia stato pregiudicato con un fatto reale... che per opera del delinquente il possessore non si trovi piu in grado di disperne" (31). The same argument is followed by the *Relazione della Commissione del Senato,* "Per avere il diritto di furto... si richiedera che (la cosa) sia uscita dalla sfera di possesso del praprietario, per entrare nella sfera di possesso del ladro" (32).

This leads us to the conclusion that two conditions are required by this definition : the carrying away of the thing from the place where it was and also the possession of the thing by the thief (33). Of this same opinion are Mittermajer and Costa (34). The former states that there is theft when the thief "ha rimossa la cosa dal luogo, ove il derubato la custodiva, e l'ha presa in modo che resta sottoposta alla sua disposizione" (35). A concise and clear explanation is formulated by Maino who says that as long as the owner can materially dispose of the thing we cannot say that the thief has taken such thing : "Si potrebbe dire che il furto non e

(26) Pessina, loc. cit.

(27) Pessina, Relazione sul Progetto 1885 (cited by Maino, op. Cit. P. 4)

(28) Pessina, Manuale, p. 56.

(23) A translation is given by Stephen (History of Criminal Law) : To possess oneself of a movable thing belonging to another person, for the purpose of deriving advantage from it, *and take it away from the place where it is,* without that person's consent.

(30) Manzini, op. cit. p. 260.

(31) Rel. sul Pro$_g$. 1887 (cited by Maino op. cit. p. 6).

(32) Cited by Maino loc. cit.

(33) Maino, loc. cit.

(34) Prog. Zandarelli, Rel. al Senato.

(35) Vide also Lucchini. Riv. Pen. XLII, p. 165; Impallomeni, Codice Penale Italiano Illustrato, Vol. III, p. 234.

consumato fino a che il proprietario conserva la materiale disponibilita della cosa" (36).

But notwithstanding the wording of the definition of the Italian Code and the comments and elucidations thereon in the *Progetti* no *a priori* rule can be laid down as to when the thing has passed from the sphere of possession of the owner to that of the thief. "La nozione della sfera di attivita patrimoniale del derubato e del ladro e puramente ideologica, ne puo quindi a priori indicarsi nella casa, appartamento, stanza, armadio o che altro del detentore dannegiato" (37). It was held in Italy that there may be sufficient asportation when the thief is surprised with the stolen article upon him, while still in the place belonging to the owner. There may be certain cases when the two spheres of possession, that of the owner and of the thief, are mixed up with one another ; here again the question of asportation is one of fact. It was held that there was sufficient asportation in case a man took money out of a drawer when in a hotel, and such money was found on his person when he was leaving the hotel. The thief may have hidden the thing in a place which is still within the sphere of possession of the owner, but it is impossible or very difficult for the owner to find the thing. There is also sufficient asportation, it was held, when a man puts the goods stolen in a sack and, on being surprised, runs away, leaving the sack with the goods behind him. What is very important, in regard to this theory, is that once the thing is taken out of the sphere of possession of the owner, it is indifferent whether the thief is surprised and so has to abandon the *res furtiva.* "Ne segue che l'impossessamento da parte del ladro non occore che sia ne definito ne prolungato, ma pub anche essere precario e momentaneo, perche violi il possesso altrui cioe sottragga la cosa alla sfera dell'attivita patrimoniale del detentore senza che sia necessario il passaggio permanente a duratorio di essa cosa nella sfera dell'attivita patrimoniale del ladro (38).

In defence of this theory it is said that this is a solution which satisfies public opinion, because, when a thief is surprised with the article in the place in which he entered to steal, it is generally said that the thief has *attempted to* steal: "la coscienza popolare dice sempre che esso (il ladro) aveva tentato di rubare e non gia che aveva rubato" (39). On the other hand, it is objected that this is too artificial a solution, in that, whether the thief has taken possession or not depends on a number of circumstances, and not on the taking of the thing from the sphere of possession of the owner to that of the thief. "La disponibilita della cosa depende a mio avviso da un complesso di circostanze, e non e poi subordinato alla circostanza del mutamento di luogo" (40). Arabia also states that "dal luogo ove si trova non e ancora una formola precisa, e percio tanto vorrebbe ometterla" (41).

One or two observations on the position in English law will not be irrelevant. In English law we find a definition of theft (Larceny) in Section 1 (1) of the Larceny Act 1916, which establishes that "a person steals who without the consent of the owner fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with the intent at the time of such taking, permanently to deprive the owner thereof".

(36) Op. cit. pp. 7-8.
(37) Manzini, op. cit. p. 229.
(38) Ibid. p. 227, for other observations in this paragraph see pp. 230, 232, 233..
(39) Prog. Pessina, 1889, (quoted by Maio op. cit. p. 4).
(40) Vico, op. cit. p. 1007.
(41) Cited by Maino op. cit. p.6.

And in Sec. 1 (2) (ii) it is laid down that "the expression 'carries away' includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached." The expression which denotes the element of asportation is "carries away".

English text-writers and English case law are in agreement in interpreting the element of asportation. Blackstone writes that a bare removal from the place in which the thief found the goods, though he does not quite make off with them is a sufficient asportation (42). Russel says to the same effect that Larceny lies in the very first act of removing the property : and therefore the least removal of the thing taken from the place where it was before with an intent to steal is a sufficient asportation, though the thing may not be quite carried away (43). And Harris and Wilshire remark "The slightest removal of the article is sufficient, provided that every part of it is moved from the specific portion of space which it occupied, and that it is actually severed from any person or thing to which it is attached" (44). The slightest removal will suffice even though the thief at once abandons the thing (45). Therefore as Kenny puts it: "The test seems to be, has every atom left the place in which that particular atom was before? So there may be sufficient carrying away even though part of the thing still occupies the place which some other part of it previously did, e.g., by half drawing a sword from the scabbard, or lifting a bag part-away out of the boot of a coach, or pulling a book out of a man's pocket. (Rex v. Walsh and Rex v. Taylor)".There is sufficient asportation in taking plate out of a chest and laying it on the floor (Rex v. Simson) or of pulling a lady's ear ring from her ear, even though the ear ring is caught in her hair and remains there (Rex v. Lapier) ; or in shifting a bale from the back of a cart to the front. As to the severance of the thing, as we have seen, it is provided by the Act that in case the thing is attached, there cannot be a sufficient removal unless it has been completely detached, e.g., unless the string which ties the scissors to the counter has been cut through (46). It would not be larceny therefore if a thief draws a book partly out of my pocket, but it was fastened with the pocket by a chain or guard which prevented its removal (47).

Finally, what is the position in Maltese Law? It has already been stated that in our law there is no definition of theft and therefore, if one wants to know what constitutes asportation in our law, reference will have to be made to the sources of our law and to our system of jurisprudence. The late Professor Randon stated in his notes on Criminal Law that our legislator had the intention to follow the Codice Toscano. We have already made reference to the definition of theft in this Code, and we have seen that it answers completely to the theory propounded by Carrara. Application of this theory is found in Police v. Pace (10. 1. 42). The prisoner was caught taking out a bottle of whisky from a box and trying to break the neck of the bottle. As soon as he realised that he was being watched, the prisoner at once replaced the bottle. It was held by Camilleri J., that the offence of theft is completed when the thing is taken away, even momentarily, from the control of the owner or possessor, even though the thief

(42) Comm. Vol. IV, p. 231 (21st Edition).
(43) Crimes and Misdemeanors, Vol. II, p. 122.
(44) Harris's Principles and Practice of Criminal Law, by A. M. Wilshire, p. 256.
(45) Larency Act 1916. Sec. 1 (2) ii.
(46) Kenny, Outlines of Criminal Law, pp. 214-215.
(47) A.M. Wilshire, Elements of Criminal Law pp. 39-40.

may have been surprised in the act and compelled to replace it. As soon as the thief takes possession of the thing belonging to others, removing it from the place in which it is, the offence is completed. The moment the thief puts the thing in his control, that is as soon as he removes it from the place where it is, he completes the offence (48). As Harding J., observes, the rules laid down in Maltese judgments appear to agree with the position in English law (49).

(48) Harding J., op. cit. Para. 106.
(49) Ibid. Note 61 to Para. 106.