JOSEPH TORKOR and TEETEE, Appellants, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM CONVICTION OF LARCENY.

Argued December 6, 7, 8, 9, 1937. Decided December 31, 1937.

1. Only if goods be found under such circumstances that there is absolutely no clue to the ownership and no reasonable expectation that the owner will find them, may the finder appropriate them.
2. Should there be a clue to the ownership of lost property, the finder who appropriates them is guilty of larceny.
3. A clue to the ownership is any circumstance which will lead the finder to believe that the owner can find his goods again.
4. In some jurisdictions, an appropriation of found property by the finder is not larceny unless the *animus furandi* exists at the time of the taking, but by statute in Liberia, a person may be guilty of larceny even though his intent to deprive the owner of his property permanently was not formed until after the taking.
5. Exceptions taken and noted during a trial, but not included in the bill of exceptions, are considered as having been waived.

On appeal from conviction of larceny, *judgment affirmed.*

P. Wolo and *A. B. Ricks* for appellants. *M. Dukuly,* Revenue Solicitor, for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

Joseph Torkor and Teetee, appellants, are two of three defendants jointly indicted for larceny; but inasmuch as Martha, the third co-indictee, was acquitted, she was not one of those who appealed to this Court, and hence not one of the appellants before us.

The essential facts appear to us to be undisputed; and, paraphrased principally from the testimony of Madam Bartee, the private prosecutrix, Boymah, her husband, one Fernando Attie, a fellow tribesman, and from Torkor, one of the defendants himself, may be summarized as follows:

Madam Bartee, the private prosecutrix, had leased from one T. V. Cole a piece of ground upon which she built a house. At some time thereafter Joseph Torkor, one of the appellants, and husband of Teetee, the other appellant, succeeded in overcoming the reluctance of Madam Bartee to rent him a portion thereof, her reluctance having been due to the fact, as testified by Boymah, that "according to the laws of the house no one was to be permitted to go into the house because something was in it," and hence, to quote from Madam Bartee, "for fear trouble might come at the end." (See minutes of the trial, record pp. 2, 6–8.) The fact that Torkor, one of the defendants aforesaid, and the said Madam Bartee were "fellow countrymen" from the Cameroons who had emigrated therefrom to Liberia seems to have played a considerable part in overcoming said reluctance, especially as another "fellow countryman" of hers, a Fernando Attie, who had already been given permission to live in the house, "could not see good," i.e., his sight was somewhat impaired, and the new tenant was to assist the old in looking after the things, and after himself. (See testimony of Madam Bartee, record p. 2, and of Torkor, record p. 34.) Another salient point is that during the three years that Torkor, one of the appellants, was a tenant of those premises, "he had no job earning money"; but on the contrary had had a long spell of illness, and had had to spend six months "in the sick bush" (the native equivalent for a hospital) and while there, and after his return, had been the recipient of pecuniary aid from Madam Bartee his said landlady. (See testimony of Madam Bartee, pp. 2–3; of Boymah, p. 11; of Fernando Attie, pp. 12–13; and of Torkor himself, p. 34.)

Sometime after Torkor's return from the hospital, he and his wife Teetee, the other appellant, were sitting down in the house when they heard some little dogs (puppies) crying under the house. One of the said pups had fallen into a "crab hole," and digging to relieve the

pup and to cover up the hole so as to prevent a recurrence of such an unfortunate incident, he "came across some money" sixty-four pounds sterling, according to his own sworn statement, sixty pounds of this money being silver and four pounds gold. (See testimony of Torkor, record pp. 35, 37.)

The money had been in the ground so long as to have become discolored; but he obtained from witness Attie a recipe for cleaning such money, and having done so forthwith, on the very same day, began spending it. (See testimony of Torkor, record p. 37, and of Attie, record pp. 12–15.) One half crown piece which he himself handed private prosecutrix in payment for lemonade and cigarettes he was purchasing for friends caused her to remember that he was unemployed, and getting on the alert, she heard him at one Martha's, the defendant who had been acquitted, one of his wives, counting money, and subsequently saw money falling from his pockets. She thereupon went to the house she had leased him to search for the money she had buried, and found the ground "sunk down" and the money gone. (See testimony of Madam Bartee, record p. 3; of Boymah, record p. 8; and of Attie, record p. 21.)

After several fruitless efforts to induce him to give up the balance of her money she had buried there claimed to have been in all one hundred sixty-one pounds and ten shillings, to which efforts we shall recur later in this opinion, she made a complaint to the police which caused the institution of this prosecution.

Appellants, not seriously contesting any of the salient facts hereinbefore summarized, as indeed they couldn't, since in all the salient points the testimony of the witnesses for the defense dovetailed into that of the witnesses for the prosecution, fought for a verdict of acquittal principally upon questions of law, raised in the second count of a "Motion to the Jurisdiction of the Court" as soon as the evidence for the prosecution had been rested. (See min-

utes, p. 32, and the motion filed.) The relevant portion of said motion reads:

". . . Because all the evidence already submitted to this Honourable Court and Jury in said cause, including the evidence of the private prosecutrix, shows conclusively that if indeed any of the money in question has ever been in the possession of the defendants, said money was *found buried under ground.* Defendants further submit that under the law, to find money buried underground, not known by the finder that said money has been placed there previously to the finding of same, is not the subject of larceny. Wherefore defendants most respectfully pray that your Honour refuse further jurisdiction and hearing of this matter, discharging them without day and order their bonds delivered.

"Respectfully submitted,
[Sgd.] JOSEPH TORKOR, TEETEE and MARTHA, *defendants.*
"[Sgd.] A. J. PADMORE,
" C. A. CASSELL,
" SAM'L C. M. WATKINS,
" A. B. RICKS,
" P. GBE WOLO,
Attorneys and Counsellors-at-law."

The ruling of His Honor the trial judge, denying said motion, the subject of complaint in the thirty-first count of the bill of exceptions, is the one major issue upon which this appeal has been presented to this Court.

If at all appellants were entitled to make any motion at that stage of the trial, they blundering along surely stumbled upon the wrong one, for the record shows that the trial court had jurisdiction of the cause and of the parties, and that the offense charged was committed within its territorial jurisdiction. We could with propriety, therefore, have sustained the court's decision on said point without further comment. But, inasmuch as

the issue thus raised is apparently first raised within this Republic, and was presented and argued as though it had been a motion to direct the verdict, we are hereby enabled to consider same as the court below did, and expound the law upon the principles actually argued before the trial judge.

The principle of law laid down in 25 *Cyc.* 36, 37 on this subject is:

> "If goods are found under such cimcumstances that there is absolutely no clue to the ownership, that is, no reasonable expectation that the owner will find the goods, the finder has a legal right to take the goods for his own use. If therefore a finder of goods who has no clue to the ownership takes the goods for himself and converts them to his own use he is not guilty of larceny.
>
> ". . . If there is any clue to the ownership of lost property the finder who takes for himself is guilty of larceny."

On what amounts to a clue, discussed in the next paragraph of said authority, numbered II, we have *inter alia:*

> "A clue to the ownership is any circumstance which will lead the finder to believe that the owner can find his goods again. If the property is found in such a place that it might be inferred that the owner, discovering his loss, would return to look for it, this circumstance of itself constitutes a clue to the ownership. . . . So where money is found hidden in the ground within a farm building. Where one accidentally left his purse on an old saddle in a barn, there was held to be a clue to the ownership. . . ."

In 17 *Ruling Case Law,* pages 36–37, section 40, we have three rules for determining whether or not a taking and conversion of goods found is or is not larceny. They are:

> "A taking by finding . . . may be classed under three heads. In one class may be included those cases

where on the finding the finder has no intention to appropriate the thing found to his own use, but on the contrary intends to restore it to the owner when found, though he afterward disposes of it to his own use, either before or after he knows who the owner is. This is not considered to be larceny, because there was no animus furandi at the time of taking. In the second class are those cases where one finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and he appropriates them with intent to take the entire dominion over them, really believing then that the owner cannot be found, and he afterward disposes of them to his own use, either before or even after he knows who the owner is. This also is not larceny, because the taking, though not exactly innocent, was not punishable, and could not be made the subject of an action of trespass. The third class comprehends those cases where goods have been actually lost, or are reasonably supposed by the finder to have been, and he appropriates them with intent to take the entire dominion over them, knowing or really believing the owner can be found. Under such circumstances the finder is guilty of larceny, whether he afterward converts them to his own use or not."

Several adjudicated cases have been referred to in the notes to the citations from *Cyc.* and *R.C.L.* above given, most of which our meagre library facilities have prevented our examining. But in 2 L.R.A. (N.S.) pp. 248 *et seq.* we have the case of *Williams* v. *State,* 75 N.E. 875 (Ind. 1905), the facts in which are therein recorded as follow:

"It appears from evidence that on Sunday, November 8, 1903, as one Alice Schisler was going from church to her home, she found a lead-colored purse on the public highway about 1 foot outside the wagon track. The place where she found the purse was between the bridge on the highway and a corn field be-

longing to William and Jacob Raibley. The purse contained five $20 bills, one $10 bill and one $5 bill. Nothing else was in the purse. The bills were folded together in a small wad, about as small as it could be. The purse had two sides, and the money was all on one side. After she found the money, and she and three other girls had examined and counted it, she walked over the bridge toward her home and met appellant, who lived about 100 steps from the bridge. He was driving a horse attached to a buggy going from his home toward the bridge. Appellant did not speak to her. After she passed appellant's house, appellant's wife came out and she said to appellant's wife: 'I found a pocketbook with $125 in it, if anybody inquires for one.' Appellant's wife asked to see the pocketbook, and when she saw it said, 'That looks like his,' meaning appellant, and she said that '$125.00 as about the amount.' At this time appellant had crossed the bridge, and his wife called to him that she (the girl, Alice Schisler) had found a pocketbook, and said, 'Did you lose yours?' or 'Have you got yours?' Appellant turned around and started back. Before he came to where his wife and the Schisler girl were, his wife said to the girl that if the money was not theirs it would be given back to her, and because of this statement the girl left the purse containing the money with appellant's wife and went on home. When the money was so left by the Schisler girl, neither appellant nor his wife had claimed the money to be theirs. When appellant came back his wife gave him the purse and money, and they went into the house and counted it. Immediately after the Schisler girl got home appellant came and told her that it was his money, and that he was very thankful that she gave it back to him, and offered her a new dress or a dollar. The next Thursday he gave her a dollar. Appellant refused to return or surrender said

money, but converted it to his own use. Appellant claimed that he lost said purse and money on Sunday, November 8, 1903; that the same were his property; that there were two $20 bills, one $10 bill, and fifteen $5 bills,—in all, $125 in the purse. At the trial he produced a purse which he testified contained the money found by said Alice Schisler. Alice Schisler and other witnesses testified that it was not the same purse found by her and left with appellant's wife. There was evidence which authorized the jury to find, as they did, that the purse and money, five $20 bills, one $10 and one $5 bill, $115, found by Alice Schisler and converted by appellant to his own use, were the property of William Raibley, and that the same had been lost the day before they were found by her, and that appellant knew that the same did not belong to him, but were owned by someone else, and that, so far as he was concerned, the finder, Alice Schisler, was the owner of said purse and money, and he fraudulently converted the same to his own use. . . .

"When, however, one has the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party having such bare charge or custody may be guilty of larceny by fraudulently converting the same to his own use, although he had no fraudulent intent when he received them in custody. . . . In People v. McDonald, 43 N.Y. 61, it was said: 'If money or property is delivered by the owner to a person for mere custody, or charge, or for some specific purpose, the legal possession remains in the owner, and a criminal conversion of it by the custodian is larceny.' . . . 'when the delivery of goods is made for a certain special and particular purpose the possession is still supposed to reside, not parted with, in the first proprietor,' . . . 'where any person, whether servant or not, has the bare charge or care of another's effects, "the legal possession," observes

East, "remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use." ' "

Appellants strenuously argued here that according to the common law the intent to steal must synchronize with the finding, or the conversion is not larceny. Said thesis of theirs does not appeal to us to be in harmony with the above citations, nor with our own statute, since section 73, sub-section 3 of our Criminal Code provides *inter alia* that one is guilty of larceny,

"Who against the consent and will of the owner of any dwelling house shall, during the day time, enter therein and steal, take and carry away the personal goods of the owner of the said dwelling house, or of any inmate living or residing temporarily therein, with intent in so doing (*whether such intent was formed before or after such wrongful entry*), to deprive the owner of such goods permanently of his property therein. . . ."

Let us now revert to the evidence, and see if we can deduce therefrom whether or not appellants had any reasonable cause to believe that the money was Madam Bartee's, or any clue by which they could have discovered who was the real owner of the money thus dug up in the premises which they were occupying under lease.

According to the testimony of Madam Bartee (minutes page 3), upon discovering the loss she went to Madam Martha, a "wife" of appellant Torkor, to complain about said appellant's having taken her money and said *inter alia:*

"You should call and tell him about it because it is a shame matter he being my countryman. . . . And tell him I know that he had bought a lot of things but whatever amount is left he must give it back to me as I did not want to make a palava. . . . After this conversation with Martha I saw defendant Torkor myself and I called him and told him that I wanted to see

him. He came to my house. I told him what had happened and he said that Martha, defendant, had told him about it and that I should wait on him; he was going to his house to carry some eggs. I waited on him and did not see him. I went back to Kroo-town but I did not see anybody there and I returned. I went back to defendant Martha and told her that defendant Torkor had not given me any answer about the matter of the money being stolen that I put before him."

That part of the testimony of witness Boymah bearing on this point is as follows:

"My wife . . . went to the house where defendant Torkor was living, and discovered that the money had been stolen and the place where she put it was broken. I saw her come crying. When she came, she passed by and went to defendant Martha and told her about the loss of the money which was taken by defendant Torkor, and asked her to entreat defendant Torkor to return whatever of the amount he had not used that he had on hand, and if he had used some he should bring the balance because they were all one country people. Martha told defendant Torkor, and Torkor went to us that evening, and my wife asked him if he had the money to give it up, and that she did not want to go to court; in this I also joined. Defendant Torkor after sitting a long while thinking said that he 'hold word' and told my wife not to cry; and said he was going home and on the next day morning would give her answer. Mr. Debobey at that time had come from Bar Mount (presumably Bar Mouth); he was called and the question of the loss of the money was referred to him and the circumstances; we told him that the defendant Torkor had been there. He promised to come back at 8 o'clock to give answer whether or not he knew anything about the money being lost and that he had not turned up.

Mr. Debobey approached defendant Torkor and after a good talk defendant said that he did not have the money. Defendant Torkor then asked, 'When a man gives you a house and you are living in it, whatever is found in it, does it not belong to you?' Mr. Debobey said, 'All right, if that is so, then since the woman gave you her house and you are paying no rent is that the reason why you took her money?' . . . We came to the Police Station and reported the matter to the Superintendent of Police."

On page fourteen the testimony of Fernando Attie on this subject is as follows:

"Bartee, the private prosecutrix, then called Martha, one of the defendants. Defendant Martha came into the shop and Mammy Bartee said to her, 'Tell brother Torkor,' meaning defendant Torkor, 'to give me my money back that he took and that I have told him that the day of the happening; and that is what I told him the very day he was to go into the house that there was something in said house belonging to me, meaning my money. Whatever he has used of it I will make no fuss, but let him give me the balance not yet spent.' Defendant Martha did not say anything but she left and after which defendant Torkor came into the house and the store of Mammy Bartee with the chicken eggs in his left hand; Mammy Bartee then fell to his feet and said, 'Brother Torkor, I beg you give me the balance of my money. That is what I told you that I had in the house and I did not want anyone else to go in said house but you my family.' Defendant Torkor looked at her a long time and said, 'Mammy, I beg your pardon but let me go and put these eggs down and I will come back.' Defendant Torkor and I went back to our house. After 6 p.m. that evening defendant Torkor called me to go with him to Mammy Bartee's place so that he could answer her. We went and when we got to the store Mammy

Bartee came out and begged him the second time for her money. Defendant Torkor said to her again, 'Mammy, I ask your pardon for whatever I have done. Take it for granted I will answer you tomorrow morning.' We went back to our house that evening. Defendant Torkor was so worried that he was not able to even take his dinner. I called him and asked him, 'What are you worrying about?' He said to me, 'Brother, I regret for what I have done; I did not want for such a thing to happen between the old lady and me because she had been too good to me.' I said to him, 'Don't be worried. The only thing that you can do is to take her money back to her and whatever you spent these two days she will not make any palava about it because she has promised not to make any palava about it.' Defendant Torkor said to me, 'Yes brother, but now it is too late. I will call you to go with me tomorrow morning to carry the old lady, Mammy Bartee, her money.' "

On pages 35–36 we have appellant's own account of how he came into possession of Mammy Bartee's money, and it is as follows:

". . . I went down underneath the house. When I went, I met one of the little dogs had gone half way in the crack or hole and I took it out. So I dug some of the earth to cover the crab hole in which the dog had fallen to prevent it from getting back in said hole. While I was digging the ground I came across some money. When I came across that money I knelt down and prayed and said, 'God bless me!' I thought that it was my luck. I called my wife Teetee and asked her to give me a bag. She asked me, 'What are you going to do with a bag? The people's dog are down there. They don't care to mind their dog. You who are not the owner of the dog will mind them.' And I said to her, 'That is all right, Teetee, you give me a bag,' and she handed over the bag to

me. I took the money and put it in that bag and I came up. I came and went inside my room and I said my prayer again. I said, 'Thank God I have luck.' I called my wife Teetee and said to her, 'When I went down under the house there I found some money.' She asked me how much money it was and I said to her, 'I never counted it as yet,' and she said to me, 'Go and count it.' And I went inside my room. I checked the money and it was £56:0:0—silver, and four pieces of gold; total amount came to £60:0:0. From that time I had been using the money. When I was using the money I did not hide it. I thought it was luck which God had given to me.

". . . On my way coming one of my wives by the name of Martha called me in the kitchen and said that Mammy Bartee said, 'You know she is the one who put you in the house, and if you got any good luck in the house you must know that the good luck belongs to her,' and I said to her, 'Go ask Mammy Bartee what she mean about good luck. I don't understand the name of good luck,' and I left her and went. Say about half past five in the evening time I went down the waterside again. I met Mammy Bartee and she stood in front of her store and called me, saying that she wanted to ask me something and I went. She said, 'I heard that you have been spending money, but that money which you have been spending belongs to me.' And I said to her, 'Where did you put the money that you say belongs to you?' She said, 'I buried the money in the kitchen where the people cook.' I said to her, 'I don't know anything about your money. If you said you buried the money in the kitchen, go and look there but I don't know anything about your money.' She said to me, 'But I hear that you have been spending money,' and I said to her, 'It matters not if I have been spending money.

If I spend money, that is my own money which God gave me, not your money.' And I left and went home. Saturday morning, say about 9 o'clock, I saw Mr. Debobey coming and Boymah and Attie came to me and said, 'Mr. Torkor, I come to see you.' I said to him, 'You are welcome.' When he got inside the house, I offered them seats and I asked him, 'What is the trouble?' He said nothing was the trouble but Mammy Bartee sent him to me. 'She said that you stole her money she had in the house here. You must give it to me and let me carry it to her.' Then I answered Debobey, 'What you mean by telling me that Mammy Bartee said that I stole her money?' Then I asked Debobey again, 'Where Mammy Bartee told you she kept her money that I stole?' Debobey said to me, 'I don't know where she kept her money, but she simply said that I must come and get her money.' And I said to Debobey, 'I did not steal Mammy Bartee's money and that I don't know anything about stealing her money.' Debobey said, 'All right, I will go to Mammy Bartee and tell her what you have said.' Debobey went. While I was still in the house a little while Debobey came and said to me, 'We have been to the Secretary of the Interior to ask him to give us authority to come and play sassywood to find out who stole the money.' I said, 'Since you say already that I stole the money, go and please yourself.' From that Debobey went. That Saturday evening about eleven o'clock in the night I left my house and was going to one of my wives by the name of Martha. On my way going I met Mr. Debobey and Mammy Bartee and passed them. Debobey called and asked me, saying, 'Where are you going?' I said to him, 'I don't know. Where you are going? Why is it that you want to know where I am going for?' Debobey did not say anything again. At the same time I met

up with the Superintendent of Police and there I was arrested. They carried me to the Police Station. That was about half past twelve in the night."

Continuing his testimony, the following was brought out on cross-examination:

Question: "Did I understand you to say that Madam Bartee was the owner of the house you were living in?"

Answer: "Yes."

Question: "And you were living there by her permission?"

Answer: "Yes, she let me stay in the house."

Question: "How much money you found buried in the house?"

Answer: "I said I found money underneath the house amounting to £60:0:0 made up in £56:0:0— silver and £4:0:0 in gold."

Question: "When was this, that is, the money and date?"

Answer: "June month the 14th day, 1936."

Question: "When did you begin spending the money, that very day or the next day?"

Answer: "The very day which I found the money I started spending it."

Question: "The money you said you found did you consider it being lost?"

Answer: "I don't know."

Question: "Was it yours?"

Answer: "Yes, because I found it."

Question: "Did you inform Madam Bartee of what you had found in her house since you were living there by her permission to ascertain whether it was hers before spending it?"

Answer: "I did not inform her because I was living in the house and that was my premises."

Question: "Since you considered the money that

you obtained from the ground was found by you, did you ascertain the owner before attempting to spend it?"

Answer: "I did not tell anybody because don't know who was the owner."

Question: "Did Madam Bartee go to you and tell you that the money you had found in her house was hers?"

Answer: "Mammy Bartee when she called me asked me that, 'I heard that you have been spending money but that money belongs to me.' And I said her, 'How the money belongs to you?' and she said, 'I know it belongs to me,' and I said to her, 'I don't know anything about your money.' That is the time Mammy Bartee asked me about the money. The next morning she sent Debobey to ask me for the same money."

Question: "When you were arrested and carried to the Police Station did you then and there make a clean breast of everything and tell the Superintendent of Police that you found the money and under what circumstances in order that the true owner might be ascertained?"

Answer: "I answered to the Superintendent of Police that I found the money but that he did not allow me to explain."

Question: "Then did you direct the Superintendent of Police where the remainder was or did you produce it without an independent search?"

Answer: "No, he didn't ask me anything again."

Question: "Did you give your wife Teetee an amount of the same money to be carried to Madam Bleh for safe keeping and if so, what amount?"

Answer: "Yes, I gave her £14: 18: 0—silver and two gold sovereigns, making a total of £16: 18: 0."

It now becomes necessary for us to ascertain from the

record what evidence, if any, there exists against Madam Teetee, one of the wives of Torkor, who is the other appellant in the case at bar.

Madam Bartee on the stand testifying as recorded on page 7 of the minutes was asked:

> Question: "Mrs. Witness, at the time when the money was lost had anybody told you that Teetee and Martha gave them money for safe keeping?"
>
> Answer: "Yes, defendant Teetee carried the money to one Mammy Bleh for safe keeping. One policeman by the name of Momo Gbandi told me this."
>
> Question: "When you went to Mammy Bleh did she acknowledge that the defendant Teetee gave her money to keep?"
>
> Answer: "Yes, she admitted and gave the money up."

Fernando Attie's version of this matter, as recorded on pages 13–14, is as follows:

> "I called defendant Teetee, the two of us being left in the house, and I said to her, 'Sister, you have done well.' She said to me, 'What have I done?' I said to her, 'For taking my brother in the country and have thus cured him, and when you brought him home you have offered him a good capital of money to buy just what he wants.' She said to me, 'Money. I find money, where did I get money from and here me here trying to pawn my lappa for money, just to buy market; because all that I had in market was taken out and sold just for his sickness.' I then said to her again, 'Sister, when he was going to the country did you leave any good savings here?' She looked at me a long time and said: 'Yes.' I asked her how much was the capital? She said, '£8: 0: 0.' I said, 'But where did you put the money?' She said to me that she put it in the cigarette cup. I asked her what kind of money was it there. She replied, '1/– pieces.' I then said, 'Well, sister, do you think that £8: 0: 0, 1/–

pieces can get into a cigarette cup?' She got angry and said to me, 'Brother, don't ask me any more questions about this money. As for myself I am afraid of it. I don't know how it will go but let us talk on something else and leave the money question alone.' "

The same witness, continuing his statement as recorded on page 15, testified:

"Defendant Torkor was so worried that he was not able to even take his dinner. I called him and asked him, 'What are you worrying about?' He said to me, 'Brother, I regret for what I have done; I did not want for such a thing to happen between the old lady (Madam Bartee) and me because she has been too good to me.' I said to him, 'Don't be worried. The only thing that you can do is to take her money back to her and whatever you spent these two days she will not make any palava about it because she has promised not to make any palava.' Defendant Torkor said, 'Yes, brother, but now it is too late. I will call you to go with me tomorrow morning to carry the old lady Mammy Bartee her money.' As soon as defendant Torkor said this word to me, his wife, defendant Teetee, was sitting down by her husband. She grumbled and sucked her teeth and said, 'Are you afraid to go in jail, who else in Monrovia never stole; do you think if you go in jail I will not be able to cook and carry the food for you? I will give money back tomorrow morning?' And she sucked her teeth again."

The same witness continuing, as found on page 16 of the record, said:

"The next morning we went back for the proper search; when we got there policeman Johnnie Gbandi No. 0016 said to us that we should not trouble ourselves looking for this money again because he said he thought that some of the money was up town to an old lady called Mammy Bleh because while I was in the

window I saw defendant Teetee coming to her place, that is, Mammy Bleh's. She brought a pan covered with a white cloth. Since she got into the house she and Mammy Bleh went into the kitchen, and dug the fireside to put something in there and I think it must be some of this money that was put there. We left them and went up to Mammy Bleh's place, that is, Mr. Debobey, the police officer who carried the search warrant and myself, and when we got there, seeing the police officer, she called Mr. Debobey and said, 'I want to see you.' Mr. Debobey went to her and I followed them. She said to Mr. Debobey, 'I do not want to get into trouble for anybody. Defendant Teetee brought a lot of money to me for safe keeping on yesterday morning which I know that she has not got such money. Come and take it. It may be that this is some of Mammy Bartee's money that was stolen from the house.' Mr. Debobey then called the police officer's attention, and the latter person took the money. Mammy Bleh then went to the fireside, dug this money out, and gave it to the police officer. We then left and went back to the station where, at the police station, the money was checked and found to be £16:18:0; £14:18:0 being in silver and £2:0:0 in gold."

The next morning the case was transferred to the City Court where it was examined and sent forward. Witness W. S. Boyle, Superintendent of Police, testifying as recorded on page 30 of the record, said:

"The next person arrested was Teetee. She also surrendered a trunk containing clothing. It was observed in Teetee's trunk some specie amounting to £5:9:7, which she said was the property of Joseph Torkor. On June 14, 1936, on or about mid-day the police succeeded in obtaining from Mrs. Elizabeth Ballah the sum of £16:18:0. Elizabeth Ballah stated that this amount was handed her by Teetee for

safe keeping. Now this Teetee is a paramour of Joseph Torkor, Martha also. Later another woman handed over to police certain pieces of cloth stating this cloth was given to her by Teetee, British gold, two sovereigns, £2, British silver rusty, £3:5:0, one half crown 2/6d and one Liberian fifty cents piece equivalent to 2/6d amounting to £5:9:7 from Teetee. From Elizabeth Ballah two sovereigns, £2:0:0, British silver florins including 2/6d pieces to the amount of £14:18:0, totalling £16:18:0, making a grand total of £22:7:7 from those two women. These people were forwarded to the Police Court and now they are here."

Teetee, appellant, testifying on her own behalf, as found on page 41, said *inter alia:*

". . . My husband and I went up in the country. Upon our return Madam Bartee said that she had lost some money. She, Madam Bartee, charged defendant Torkor with having taken it. Madam Bartee called me in her bed room and said to me, 'The money that your husband is using belongs to me. You being a woman living in the house, I told you that I had money in the house.' I told her that, 'How is it that you buried money in the house and you did not inform anybody?' She then said, 'All I know is that the money which your husband is using is mine.' I told her again that that was not so. Saturday at 1 o'clock while sleeping at night, I saw Mr. Debobey with some policemen and they came there to arrest me. I said that I would not go; I asked him, 'Is this the time of night for you to come and arrest me?' He said, 'Well, as I have arrested your man (husband).' We then went to the Police Station and after a while returned to search my house; they were searching when day broke, and they went back. I was at the Police Station. Mr. Debobey and Boymah went to Mammy Bleh and told her, Mammy Bleh, that I sent them for

money that I was supposed to have given her. Mammy Bleh then said that if they went there for money she should see me. Debobey refused to come and tell me and insisted that she should give the money. After a while I saw Mammy Bleh and a lot of police officers with Mr. Debobey coming to the Station. Then Mammy Bleh said, 'That Teetee,' meaning myself, 'gave me her market money to keep and that fact I cannot hide.' Mr. Debobey then said, 'That is not Teetee's market money, but it is Mammy Bartee's money that she and her husband have stolen.' Debobey then said, 'Why did you not ask Teetee as to where she got the money from?' Mammy Bleh then said, 'I could not ask Teetee where she got the money from because she generally makes market.' That is all."

Continuing her statement, farther on she said:

"He told me, 'If you go don't stay, you must come back quick.' I said, 'All right.' I went and came back. He told me, 'Teetee, God has given us luck.' I asked him what did God give us? He said, 'Money.' And I was glad myself. This is all I know about it."

Question: "Please tell the court and jury whether during the three years and some months you and your husband lived in the house Madam Bartee ever told you and your husband about money hidden in the house or anything else?"

Answer: "No, she did not."

Question: "Please tell the court and jury whether or not your husband counted the money which as you said he found under the house, and if so, how much did he tell you it was?"

Answer: "He told me the amount, but I have forgotten it."

Question: "Did you say that Madam Bartee told you that the money that defendant Joseph Torkor,

your husband, found and was spending belonged to her?"

Answer: "Yes, so she said."

Question: "Did you tell defendant Joseph Torkor, your husband, what she said?"

Answer: "No, I did not tell him because Madam Bartee said that she would have told him about it."

Question: "Did you give Mammy Bleh £14: 18: 0 silver and £2: 0: 0 gold for safekeeping out of the money found by defendant Torkor, your husband?"

Answer: "Yes."

Question: "Did you tell Mammy Bleh that Torkor had found this money under the house of Madam Bartee's premises or that it was your market money?"

Answer: "I asked her to keep this money—that it belongs to Joseph Torkor."

Question: "Is that all you told her?"

Answer: "Yes."

From the foregoing résumé it will be seen that not only did appellant have a clue to the ownership of the money, the subject of this prosecution, but also that they were categorically apprised of the ownership, and that nevertheless they forthwith, "on the very same day" as the finding, began spending same, and then and there converted it to their own use as though it were their own property. In view of the principles of law hereinbefore cited, we are of the opinion that appellants were correctly convicted of larceny, and hence that the judge of the court below did not err in sentencing appellants, as they complain in the 45th count of their bill of exceptions that he did.

Mr. Justice Tubman, one of our learned colleagues who is dissenting from us, has done so upon the ground that the judge in charging the jury exceeded his powers by definitely, albeit impliedly, instructing them to convict. Obviously that question is beyond our powers to consider. It has been settled by several decisions of this

Court that exceptions taken during the trial and not included in the bill of exceptions are considered waived. See the leading case *Clarke* v. *Republic,* 2 L.L.R. 498, decided by this Court on January 6, 1925, when Mr. Justice Witherspoon, speaking for this Court after having quoted *in extenso* the several exceptions laid in the bill of exceptions, said:

> "Within the bounds of these exceptions we are confined; exceptions taken and noted during the trial below, and not set out in the bill of exceptions, are considered waived and cannot claim our consideration not being properly before us." p. 502.

This opinion, so expressed, has been several times reiterated by this Court, and we see no reason why we should not again reiterate same in accordance with the maxim of *"stare decisis et non quieta movere,"* quoted in the case *Brownell* v. *Brownell,* decided by this Court on January 3, 1936, 5 L.L.R. 76, 3 New Annual Series, that,

> " 'Decisions construing the constitution or acts of the legislature should be followed, in the absence of cogent reasons to the contrary, inasmuch as it is of the utmost importance that the organic and statute law be of certain meaning and fixed interpretation. And it has been said that the court of last resort of a state will not overrule one of its prior decisions construing a statute where the legislature has held several sessions since such decision without modifying or amending the statute, as it may be claimed justly that the legislature has acquiesced in the decision, and therefore a fair case is presented for the application of the doctrine of stare decisis. . . . A well-settled rule of practice, which has been silently acquiesced in, will not be set aside where it would probably cause great inconvenience and confusion in the practice, and where it can easily be changed by the legislature, if there is any necessity therefor. Even though the conclusiveness of its utterances may perhaps be open to debate,

yet when a court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when, in the presence of conflicting decisions in other jurisdictions, such declarations amount to the adoption of the views of those courts approving the rule.' "

Our opinion therefore is that the judgment of the court below should be affirmed; and it is hereby so ordered.

Affirmed.

MR. JUSTICE TUBMAN, dissenting.

I am in agreement with the majority opinion of my colleagues just read, so far as it maintains that the evidence in this cause shows a clear case of larceny and not of treasure trove; but I find myself compelled to dissent from them on one point, as follows:

In the records of the trial of this cause it appears that on the 16th day of November, 1936, the defendants through their counsel requested His Honor the Judge to reduce his charge to writing, which he did. See charge in record.

In concluding the charge to the jury, His Honor made the following remarks, which I consider highly improper as invading the province of the jury and unduly influencing them. Said he:

"New Annual Series No. 1 page 27 William McBurrough, appellant, versus Republic of Liberia, False Imprisonment syllabus 4 says, If the court after considering all the evidence has not an abiding conviction of the truth of the charge the defendant should be discharged. I have no such abiding conviction with the exception of defendant Martha, she should be discharged."

The seventh section of Article First of the Constitution declares that:

"No person shall be held to answer for a capital or infamous crime, except in cases of impeachment, cases

arising in the army or navy, and petty offences, unless upon presentment by a grand jury; and every person criminally charged shall have a right to be seasonably furnished with a copy of the charge, to be confronted with the witnesses against him,—to have compulsory process for obtaining witnesses in his favor; and to have a speedy, public and impartial trial by a jury of the vicinity."

In a criminal case, in my opinion, the jury are the sole judges of the facts involved and should be left untrammelled to adjudge the guilt or innocence of the accused.

The abiding conviction of a judge of the guilt or innocence of a defendant is his, but he should never impose his feelings in this respect upon the jury nor intimate it to them by way of instructing them. They should be left free to deliberate and decide upon the credibility and effect of the evidence submitted in a cause before them, just as the judge exercises to the fullest extent his right to decide upon the admissibility of the evidence.

The judge, having left a jury free to deliberate and decide the facts, has the privilege, after verdict, to set aside a verdict and award a new trial if in his opinion the verdict be contrary to the evidence; it is at this stage that his abiding conviction can be brought into play, but it does not enter into the purview of his judicial functions to assist them in finding the facts in any case.

See Liberian Statute (Old Blue Book) chapter 7, section 16:

"The court may set aside the verdict or decision of the jury and order a new trial, whenever it shall be proved that the jury or any of them have received a bribe, or have conversed otherwise than openly in the presence of the court, with any party to the suit, or agent of such party, on the subject of the trial, after being affirmed; or if any juryman was related to either of the parties, or to the wife of either of the parties, as father, son or brother, or had himself any pecuniary interest in the

cause, or if the verdict shall be manifestly against the evidence, the law, or the legal instructions of the court, or if the debt or damages found by the jury, be greatly too much or too little, when compared with the evidence in the cause."

It may be that the jury in this case were not influenced by the remarks of the judge, or it is possible that after hearing all the evidence in the case, they were of the same opinion as that expressed to them by the judge and that their opinion was only confirmed and strengthened by the judge's remarks; but it is also possible that the whole or some of them might have been otherwise minded, and that they were influenced by the judge's remarks. In any case there is a doubt as to how the remarks of the judge affected the jury's mind; and all doubts should operate in favor of defendants.

It is certain, however, that the judge's remarks had a bearing on the merits of the case, which was solely the business and function of the jury.

It is error, I contend, for a judge to express an opinion in charging the jury; and my contention is upheld by 16 Corpus Juris, page 943, section 2312 (d):

"A charge may be objectionable as being on the weight of the evidence, although it is couched in the form of the question put to the jury, where the question is asked in such a form, tone and manner as to manifest the clear conviction of the court as to how it ought to be answered."

Again the same authority in section 2313 (e) of the same book goes further and says:

"It has been held that, where the trial judge, in charging, intimates an opinion as to the weight of the evidence, or as to the credibility of the witnesses, the error is not cured by subsequently instructing that the jury are the sole judges of such matters, or that no expression of opinion is intended, or that the court has no right to trench upon their province in that regard."

In section 2310 (b) of the same book we find the following:

> "Within the meaning of the rule stated in the preceding section an instruction is erroneous, where the jury might understand therefrom that the court expects a verdict of guilty or where it intimates that the jury should render such a verdict. It has been held erroneous for the court, in charging, to state that certain evidence is entitled to great weight, that it does not leave much room for doubt, or that upon a given state of facts the jury can have no reasonable doubt; or to state that certain evidence is of little value, or is inadequate; or to characterize one class of evidence as the best evidence; or to state that it should not be regarded as better than or equal to another class of evidence; or to state that facts have greater weight than opinions. Repeating a principle of law involved so as to create an impression on the jurors' minds as to the court's opinion of the facts to which the principle is applicable is error."

In view of the law controlling the point under discussion, I hold and contend that the charge of the judge was erroneous and that the case should be remanded for a new trial.

I therefore dissent from the majority opinion affirming the judgment of the court below which affirms a judgment of conviction against the two defendants upon a verdict brought in after such a charge as we have on record, and especially so when the actions of the jury responded exactly to the opinion of the judge expressing his charge; convict Torkor and Teetee and acquit Martha.

My colleagues from whom I am dissenting hold that because the exception taken to the judge's charge by the defendants, now appellants, was not couched in their bill of exceptions, it is regarded as waived, and hence cannot be considered by this Court of appeal; and cite several opinions of the Court in support thereof.

I maintain that while there are opinions of this Court upholding this view of the majority opinion, they are contrary to the statute of appeals which provides that:

> "The court to which the appeal may be taken shall examine the matter in dispute, upon the record only; they shall receive no additional evidence, and they shall reverse no judgment for any default of form or for any matter to which the attention of the court below shall not appear to have been called, either by some bill of exceptions, or other part of the record."

Under the chapter of the statute on appeals I am of opinion that the opinions of this Court cited in the opinion of the majority of my colleagues are contrary to the provisions of the statute on appeals, as the relevant portion thereof expressly provides that appeals shall be heard upon the records and only those questions to which the attention of the lower court was called by some bill of exceptions or some other part of the record shall be ground for reversal. These opinions on this point should in my opinion be set aside.

Now the bill of exceptions omits that exception taken to the judge's charge; but it appears in the records, both the judge's charge and the exception taken to it by the appellants, and appellants argued the question before us during the hearing of the cause and urged its consideration. I fail to see whereby it could be considered as waived, when although it was not made to form a part of the bill of exceptions, yet it does appear in other parts of the records and defendants took exception thereto. The statute impliedly provides that not only such matters as appear in the bill of exceptions shall be considered by the appellate court but anything to which the attention of the lower court may have been called which appear in any other part of the record, and to which exceptions were taken.

Again, therefore, I say, I dissent from the majority opinion of my colleagues on this one point.

MR. JUSTICE RUSSELL, dissenting.

The reasons why I have been unable to bring myself to agree with the majority opinion of colleagues in this case are succinctly set out in this dissenting opinion.

The facts arising out of the case may be briefly summarized as follows:

Defendant Torkor and his wife Teetee were occupants of a certain house belonging to the private prosecutrix, Madam Bartee. Defendant and his wife had lived in this house for a period of three and a half years as tenants of Madam Bartee without any incident worth recording. During the said three and a half years of tenure of these premises of Madam Bartee by the defendants, now appellants in this case, private prosecutrix Madam Bartee was not absent from Monrovia, but continued to reside in the City. The said private prosecutrix contends that after the Bank of British West Africa, Ltd., left the country, certain funds of hers aggregating one hundred sixty-one pounds ten shillings were turned over to her by the said institution, and that she in turn concealed said amount in the ground beneath the house she rented out to defendant Torkor and his wife. It must be observed here, in passing, that while it might be a fact the private prosecutrix did express that she had something hidden in the house, there is no record of her having ever informed anyone definitely what was "that thing" she had in the house, particularly during the occupancy of defendant and his wife prior to the discovery of the money by said defendants. Defendant Torkor stated in his evidence that when he was taking over the house Madam Bartee stated that she had some furniture in the house such as a bed, etc., but that having his own bed and utensils, he would not take over said belongings of Madam Bartee, the private prosecutrix, but turned same over to her, before the defendant and his wife took over the

house, and that Madam Bartee, the private prosecutrix, was thereupon satisfied.

As before stated, defendants lived in this house for over three years and nothing happened of which private prosecutrix could complain; nor did Madam Bartee make it a point of duty to visit the house occasionally and inspect the condition of the place where she claims she had buried the money in question. At a particular time defendant Torkor left the house in question and went into the country in search of health, returning to Monrovia on the 9th day of June, 1936. On the 12th day of said month, during the day time, while resting upstairs in his room, Torkor heard some puppies crying downstairs. The noise annoyed him so much that he repaired under the house to ascertain what was the trouble with the puppies. He discovered that one of them had fallen into a crab hole from which it could not extricate itself. In a humanitarian act, Mr. Torkor took the little puppy out of the hole and having done so commenced to scrape up some dirt to fill the hole so that the puppies might not fall back into it. Mr. Torkor said on the stand, "While I was digging the ground I came across some money. When I came across that money I knelt down and prayed and said, 'God bless me.' I thought that it was my luck. I called my wife Teetee and asked her to give me a bag. . . . I took the money and put it in that bag and I came up. I came up and went inside my room and I said my prayer again. I said, 'Thank God, I have luck.' "

Defendant Torkor having found the money buried in the earth under the house which he had occupied for three and a half years, and taking it for granted that it was his "luck," began to clean it with benzine and lime and to spend it. During these acts of believed-ownership and subsequent appropriation by defendant Torkor, the news reached private prosecutrix and she laid claim to the money that Mr. Torkor had found buried in the earth.

The central question, then, the crux of the case is simply this: Could Torkor and his wife Teetee be held for larceny of the money thus found by them buried in the earth under the house in which they had lived for three and a half years; or, is the case one of trover and conversion? My colleagues hold that notwithstanding the circumstance of finding, which is not an element of larceny, defendants can yet be held guilty of stealing the money in question. To this view I am unable to agree, and I proceed now to state the reasons why.

In the thirty-first count of the bill of exceptions, defendants allege:

> "And also because on the 14th day of November A.D. 1936, appellants filed a Motion to the jurisdiction of the court in the case which said Motion the court over-ruled, to which appellants excepted." Vide sheets 4 and 5, 6th day's session, 14/11/'36.

The motion submitted after the conclusion of evidence on part of the prosecution is as follows:

> "1.—Because the indictment now before this Honourable Court and upon which the said defendants are now being tried shows on the face thereof that defendants are charged with having Found one hundred and sixty-one pounds and ten shillings (£161 : 10 : 0) or seven hundred and sixty-five dollars and twenty cents, said to be the property of one Madam Bartee; defendants submit that under the law, this Honourable Court has no legal jurisdiction to hear and preside over a charge for Grand Larceny based upon the alleged Finding of Money. And this the defendants are ready to prove.
>
> "2.—And also because all the evidence already submitted to this Honourable Court and Jury in said cause, including the evidence of the private prosecutrix, shows conclusively that if indeed any of the money in question has ever been in the

possession of the defendants, said money was found buried under ground. Defendants further submit that under the law, To Find Money Buried Under Ground, not knowing by the finder that said money has been placed there previously to the finding of same Is Not The Subject of Larceny.

"Wherefore defendants most respectfully pray that Your Honour will refuse further jurisdiction and hearing of this matter, discharge them without day and order their bonds delivered.

"As has already been noted, the court below overruled this motion of defendants on the grounds primarily that the court takes judicial notice of the indictment preferred against the defendants which is confirmation with the statute laws of this Republic."

Thus the pertinent question arises: Is the case now before court one of trover and conversion, or that of larceny? Be it observed, that in the Criminal Code of Liberia, there is no mention whatever of stealing by finding property either lost, abandoned or mislaid. The idea of "felonious" stealing, taking and carrying away to constitute larceny is clearly delineated throughout the 73rd section of our Criminal Code.

"3. Who against the consent and will of the owner of any dwelling house shall, during the day time, enter therein and steal, take and carry away the personal goods of the owner of the said dwelling house, or of any inmate living or residing temporarily therein, with intent in so doing (whether such intent was formed before or after such wrongful entry) to deprive the owner of such goods permanently or his property therein; . . ."

The records are too clear on the point of entry so far as the defendants in this case are concerned. Because they rented the house of the private prosecutrix and lived therein for three and half years, therefore one of "owners

consent" cannot be claimed as against them. It naturally follows, that "wrongful entry" cannot be asserted against them. The fact is, defendants found the money in question and there is no provision in the Criminal Code of Liberia making the finding of property larceny.

On the 9th day of January, 1914, in the case *Coleman* v. *Republic,* this Court, through Mr. Justice McCants-Stewart, handed down an opinion, the relevant portion of which I now quote word for word:

> "This is an appeal from a final judgment of the Circuit Court of the first judicial circuit imposing upon each of the appellants a fine of one hundred dollars and imprisonment in chains with hard labor in the county jail for three months and requiring them to make restitution to the full value of the actual damage sustained by said forgery, which said judgment was based upon the verdict of a jury finding the appellants guilty of uttering a forged instrument.
>
> . . . . .
>
> "The final count of the indictment further charged that the above named appellants did alter and utter the aforesaid instrument for probate well knowing the same to be forged, and concluded with the words 'contrary to the statute law, in such cases made and provided.'
>
> . . . . .
>
> "Counsel for appellants gave notice of motion for a new trial, but no such motion was made, appellants confining themselves to a motion in arrest of judgment, which motion was overruled. Whereupon appellants after the rendition of final judgment, presented and were allowed a bill of exceptions in which issues of law alone are raised, and they now come here asking for a reversal of said final judgment, basing their appeal upon certain issues of law, the only one necessary to be considered being the following: That there is no statute making uttering a criminal offense.

"In order to punish for a crime, the crime must be distinctly defined. Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. (*U.S.* v. *Brewer,* 139 U. S. 278.)

"The doctrine is fundamental in English and American law that before a man can be punished his case must be plainly and unmistakably within the law. It follows, therefore, *a priori,* that where there is no statute making uttering a forged instrument a criminal offense, a judgment punishing therefor is a nullity, if the indictment alleges that the offense is against the statute law in such cases made and provided.

. . . . .

"The responsibility is upon this court to see that justice is done to all whether the Republic comes here with its mighty power or whether it be the humblest and poorest individual in the land; and while we shall not reverse any judgment on the ground of any technicality, yet, where the liberty of the citizen is involved, it is the duty of this court to see that it is not taken away unless by the law of the land. Even if a crime should be committed, the proceedings to punish it should strictly conform to constitutional and statutory requirements; and in a case like the one at bar, this court cannot uphold a judgment punishing a party for an act which is not made a criminal offense by statutory enactment, where the indictment charged the violation of 'statutes made and provided.'" 2 L.L.R. 139, 3 Semi-Ann. Ser. 7–9, 11, 12.

Under the word "Finder," Bouvier has said that "money or property found on the premises of another has been held, in the case of a servant in a hotel, as against the proprietor, to belong to the finder." Under "Treasure Trove" the same authority defines same to be the name given "to such money or coin, gold, silver, plate, or bullion, which, having been hidden or concealed in the

earth, or other private place, so long that its owner is unknown, has been discovered by accident. Should the owner be found, it must be restored to him. . . ."

Blackstone's *Commentaries,* Book 1, *295 confirms what has been set out above by Judge Bouvier. He adds: "Formerly all the treasure trove belonged to the finder, as was also the rule of the civil law." But this rule was abrogated for expedient purposes of the State.

Hammond's note under this subject in Jones's Blackstone states:

> "Lost property was such as was found on the surface of the earth, and with which the owner had involuntarily parted. The presumption arising from the place of finding was that the owner had intended to abandon his property, and that it had gone back to the original stock, and therefore belonged to the finder or first taker until the owner appeared and showed that losing it was accidental, or without an intention to abandon the property. Treasure Trove, on the other hand, was money or coin found hidden or secreted in the earth or other private place, the owner being unknown. It originally belonged to the finder if the owner was not discovered; but Blackstone says it was afterwards adjudged expedient, for the purpose of state, and particularly for the coinage, that it should go to the King; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to the King. In this country [meaning America], the law relating to treasure trove has generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English Law of treasure trove obtains in any state has never been decided in America."

I have endeavored to show by the preceding quotations, that according to the modern law of thought and

interpretation in the United States, the system on which ours is based, treasure trove in the English sense has been converted to that of finder of lost property, whether that property was actually lost, mislaid or abandoned. Hence property so acquired, as by finding under the circumstances of this case, cannot be larceny but mere finding of lost property.

"In order to make the finder of lost property guilty of larceny, a felonious intent on his part to appropriate it is essential, and the general rule is that such intent must exist at the time he first takes the goods into his possession and that it is not larceny if there was no such intent when the goods were found, though there was a subsequent felonious asportation. The existence of the criminal intent, like the intent with which any other act is done, may be ascertained by a careful examination of the facts and circumstances preceding, attending, and following the finding. In order to ascertain the original intent, inquiries may be made as to the manner in which the finder conducted himself with the goods and his present means of knowing or ascertaining the owner. But proof of ignorance of the law, or that the finder believed that he acquired the title by finding the property, does not tend to disprove the intent to convert it to his own use. If he did the act with the requisite intent, it is no defense that in his ignorance of the general law he supposed that by finding he became the owner of the property. A taking by finding, it is said, may be classed under three heads. In one class may be included those cases where on the finding the finder has no intention to appropriate the thing found to his own use, but on the contrary intends to restore it to the owner when found, though he afterward disposes of it to his own use, either before or after he knows who the owner is. This is not considered to be larceny, because there was no animus furandi at the time of

taking. In the second class are those cases where one finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and he appropriates them with intent to take the entire dominion over them, really believing then that the owner cannot be found, and he afterwards disposes of them to his own use, either before or even after he knows who the owner is. This also is not larceny, because the taking, though not exactly innocent, was not punishable, and could not be made the subject of an action of trespass. The third class comprehends those cases where goods have been actually lost, or are reasonably supposed by the finder to have been, and he appropriates them with intent to take the entire dominion over them, knowing or really believing the owner can be found. Under such circumstances the finder is guilty of larceny, whether he after converts them to his own use or not." 17 R.C.L. 36, 37, § 40.

To my mind we should experience very little difficulty if at all, in finding out in which of the three classes of cases above set forth, the case under review falls. The evidence shows clearly that Torkor was an occupant of the house for three and a half years; that it was by accident that he found the money in question buried in the earth, that there is no shred of evidence to show that Torkor knew to whom the money belonged or that at the time of finding it, he had previously or at the moment of finding formed any felonious intent of stealing. The case clearly and unequivocally falls within the second class of cases of the nature laid down by the eminent authority—Ruling Case Law—which I have cited above. Torkor found the money that was lost or hidden (both incidents of losing or hiding being analogous in cases of this nature) ; Torkor appropriated the money to his own use, taking entire dominion over it, really believing then that the owner could not be found. This is not larceny.

For these reasons, I am convinced that the conviction

of Torkor and his wife Teetee for the crime of larceny is fundamentally and unequivocally erroneous, and the affirmance of such a judgment and sentence by the appellate court by the majority of my colleagues is in my opinion equally, if not more so, unwarranted by the law of the land. Hence this dissent.

The legal thing to do is to dismiss this appeal in keeping with the motion filed in the court below, leaving the private prosecutrix to a civil process of law whereby she may recover the money found by Torkor, the appellant.