Theft and Fraud Law: Cases and Commentary

Alex Steel 2011
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PROPERTY AND CRIME - SOME FUNDAMENTAL CONCEPTS

In order to study the area of property offences it is first necessary to review a number of fundamental concepts of property law and criminal law. Larceny, which is the foundation form of corporate fraud in NSW, is based on the concept of possession of property, rather than ownership of property. It is therefore necessary to briefly review the common law understanding of possession.

But property offences are only one means by which legal rights to property unlawfully taken may be asserted. It is therefore necessary to also outline the civil remedies by which property may be recovered or damages gained. The main forms of civil action in relation to property are: trespass, detinue, conversion and the residual action on the case. Finally, in order to analyse the criminal aspects of property offences it is also necessary to briefly review the dual requirements of guilt.

Possession and Custody

Property is a concept that has a myriad of meanings, and shades of meaning, in various areas of law. Larceny, and other forms of fraud are based on a broad understanding of the concept of possession, one that is very similar to the common law understanding of possession in personal property law. By contrast, drugs offences have a much more restricted understanding of the meaning of possession. Where drugs offences generally restrict the concept of possession to forms of physical possession, larceny and other forms of fraud expand the notion of possession to include not only physical possession but also constructive possession and rights to possession. In essence the distinction is that if the concept of possession relates merely to the liability of the accused the concept is restricted, but if the concept is used in relation to the rights of the victim the concept has its general civil law meaning.

The central idea of possession requires two elements. Firstly the possessor must intend to possess the property and, secondly, the possessor must have some degree of physical control over the property - or a right to such physical control.

For there to be possession there must be an intent to possess by the possessor, the animus possidendi, and it must be effectively realised, the corpus possessionis. There must be physical control on his own behalf or there must have been such control and the intention and means of control retained, no other person having intervened in some way and acquired possession, or a right to reduce the article into possession.

Button v Cooper [1947] SASR 286

Consequently, possession must be distinguished from mere custody. Custody is a situation in which the person has physical control of the property, but not any intention to possess the goods on that person’s own behalf. The classic example of this concerns the servant or employee. The differences between custody and possession are explained in the following extract from Horsley v Phillips Fine Art Auctioneers Pty Ltd (1995) 7 BPR 14,360:

71. In Pollock and Wright, Possession in the Common Law, Clarendon Press, 1898, at 2 it is recognised that "possession, again, whether in the popular or in the legal sense, does not necessarily concur with title". Then it is said (at 16) that possession at law need not be possession as against "all men without exception, though it be against the world at large". It is recognised that "a perfectly exclusive right to the control of anything can belong only to the owner, or to someone invested with such right by the will of the owner or some authority
ultimately derived therefrom, or, exceptionally, by an act of the law superseding the owner's will and his normal rights". Thus at 19 they conclude:

"possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title."

72. I turn now to the meaning of custody in comparison to possession.

73. Pollock and Wright (supra) at 26, differentiate between possession and custody, with the following example:

"A tailor sends to J.S.’s house a coat which J.S. has ordered J.S. puts on the coat, and then has both physical control and rightful possession in law.

J.S. takes off the coat and gives it to a servant to take back to the tailor for some alterations. Now the servant has physical control (in this connexion generally called 'custody' by our authorities) and J.S. still has the possession in law."

"[Another] useful summary is to be found in Crossley Vaines (supra) at 49.

"(2) Legal possession. - Here we have a definite legal relation (Pollock and Wright, Possession in the Common Law, 27) but one which may exist without physical control or without lawful origin. The person who has both title to and physical control of a chattel has, of course, legal possession, but so also has he who has physical control of and a manifest intention to exercise dominion over a chattel. Thus a thief may have legal possession of that which he steals. Again, legal possession may exist in the absence of physical control, as where a man's goods are in the hands of his servant. Unless, in special circumstances, the servant has been constituted a bailee of his master's property (See R. v. Cooke (1871) LR 1 CCR 295, The instances are generally to be found in criminal law.), he has not possession but a mere physical control; a de facto possession, called, conveniently, custody. Similarly the guest has custody only and not possession of the glass he drinks out of at his host's table ...

' Custody' in this sense must not be confused with the contract of custody for reward, e.g., with respect to the warehousing of goods, which, of course, is a proper bailment under which legal and actual possession passes to the custodian; and even in the case of a gratuitous deposit for safe custody the 'depository' is a bailee (See Chapter 6, p. 85) and has possession."

The question of whether an employee has possession or custody of goods was discussed by the High Court in Willey v Synan (1936) 57 CLR 200, a case which concerned a sailor on a ship finding some hidden bags of money.

But it is not to be supposed that the plaintiff asserted any independent possession of his own. The concealment of goods on a ship for the purpose of clandestine carriage is a matter that concerns the master and owners. It would be inconsistent with the duties of a member of the ship’s company to deal with goods so concealed on his own account. Although it may be taken that he found the coins, it does not appear that he took even manual custody of the bags of money. But if he did, it could amount to custody only and not to possession. The possession taken was that of the owners, unless it be still true that a ship is in the possession of the master.

A boatswain looking for stowaways and finding articles in the ship could not, in my opinion, appropriate them to himself, and, if he did so without honestly believing that he had a claim of right, he would be guilty of larceny (see R v Pierce (1853) 6 Cox CC 117)

Actual or Physical Possession

In a situation where there not only exists some form of control, but also an intention to exert that control the courts will generally find possession to exist. In such cases, the intention to possess is normally not a major issue. The issue which is of more importance is the question of the degree of physical control required in order to constitute possession.
These issues are summarised in relation to the common law of personal property in *Knapp v Knapp* [1944] SASR 257:

Now possession connotes power over the article possessed. This is referred to as the corporeal element in possession, and means ... such control as would enable the possessor, unless overpowered by force, to exclude others from enjoying the use of the chattel. The degree and occasion of physical contact (if any) will vary with the nature and size of the article as well as the necessity for its enjoyment. Control may involve merely access to a building, room or receptacle, in which the article is kept. On the other hand, as with a watch, physical contact may be practically co-terminous. ... [T]he mental element may be expected to be an attitude of mind denying the right of anyone to access to, or user of, the article, save of course by the leave of the possessor, leave that may be conceded or withheld at will ...

The degree of physical control is discussed by the High Court in *Moors v Burke* (1919) 26 CLR 265, a case which related to the meaning of the phrase “actual possession” in a criminal statute. Moors, a Customs officer, had been charged with having in his “actual possession” wool that was suspected of being stolen. Moors had put the wool into a locker in a shed on the Melbourne wharves, a locker other Customs officers also had access to.

[in] the part of [*Pollock and Wright on Possession in the Common Law*] which was written by the late Mr Justice Wright, dealing with crime - which is cognate to our present inquiry - we find some expressions that help us to ascertain the essentials of possession. At pp. 118 and 119 the learned author says:- "The word 'possession' is used in relation to movable things in three different senses. Firstly, it is used to signify mere physical possession . . . which is rather a state of facts than a legal notion. The law does not define modes or events in which it may commence or cease. It may perhaps be generally described by stating that when a person is in such a relation to a thing that, (1) so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and (2) so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him, or in some receptacle belonging to him and under his control, he is in physical possession of the thing." The division of the parts and the italics are ours. The receptacle belonging to him and under his control implies that it belongs to no one else and is subject to no other person’s independent control. This is, if necessary, made still more clear by the passage at p. 129 : "No phrase is more usual for describing the ordinary test of possession than the question-' had he the separate undivided and exclusive control of the thing?'"

The requisite of exclusiveness is insisted on by other writers of authority. The article in the *Encyclopedia of the Laws of England*, 2nd ed., vol. xi., quoted in the judgment of the learned Chief Justice (1), is, at p. 320, most insistent as to exclusiveness. Among other observations is this: "The determining factors in legal possession are, then, the exercise of exclusive physical control, and the character in which this control is exercised." *Sir James Stephen in his Digest of the Criminal Law*, 5th ed., p. 243, observes:-"A movable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word 'servant' here includes any person acting as a servant for any particular purpose or occasion. The word 'custody' means such a relation towards the thing as would constitute possession if the person having custody had it on his own account." Judicial opinion of the highest rank supports this...

Possession is proved by various acts varying with the nature of the subject matter. But exclusiveness is essential. That, of course, does not mean that several persons may not in concert have and exercise that exclusive possession as against the rest of the world...

Having “actual possession” means, in this enactment, simply having at the time, in actual fact and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody, or by having it where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes. ... But it does not include the case of a person who has
put the property out of his present manual custody and deposited it in a place where any other
person independently of him has an equal right and power of getting it, and so may prevent the
first from ever getting manual custody in the future. In that event the property is not in his
actual possession: it is where he may possibly reduce it again into actual possession, or, on the
other hand, where the other person may himself reduce it into his own actual exclusive
possession.

That is the present case. The wool, placed in the locker by Moors, had ceased to be in his
actual possession, because, though it was in the locker, the locker itself was not, in the words of
Mr Justice Wright, a “receptacle belonging to him” or “under his control,” nor had he the
exclusive means or right of opening it and obtaining the contents. Another Customs clerk had
equal right and power with Moors, and independently of him, to open the locker and take out
its contents.

Note the difference between arguments over possession in civil and criminal cases. In
this case, Moors was trying to deny possession and the circumstances were not enough to
prove he did in fact have control over the wool. In a civil case possession is often argued
for by the parties and thus if actual possession cannot be proved constructive possession
would be argued for.

In *R v Amanatidis* [2001] NSWCCA 400 (5 October 2001), heroin had been found in the
appellant’s car and he had denied knowledge of it. His daughter was a heroin addict. Giles J
reviewed the law on possession in criminal law in the following terms:

9 Possession of a thing in the criminal law involves physical control or custody of the thing
plus knowledge that you have it in your control or custody (He Kaw Teh v The Queen (1985) 157
CLR 523 at 537-9, 546, 585-7, 599-600). The physical control or custody may be shared, but
must be control or custody to the exclusion of other persons or persons other than those with
whom it is shared (R v Dib (1991) 52 A Crim R 64 at 66-7). It is not enough, however that you
are one of a number of persons with access to the thing to the exclusion of other persons - that
does not constitute your physical control or custody of the thing or physical control or custody
shared with the others of the number of persons. So in *R v Filipetti* (1984) 13 A Crim R 335
finding drugs in the lounge room of a house occupied by six persons, to which all six had access,
did not establish physical control or custody of the drugs by one of the occupants, because any
physical control or custody of the one occupant was not to the exclusion of the other occupants
and shared physical control or custody could not be inferred; see also *R v Bazeley* (CCA, 23

10 The appellant had physical control or custody of the heroin in that he had driven the car
to where it was parked and held the keys to the car. Even if another person had accompanied
him, the appellant held the keys; the appellant’s daughter might have driven the car the
previous night, and had available to her the other keys, but the appellant drove it on this
circumstance and had the keys then in use. It was not an *R v Filipetti* situation.

11 But the apparent involvement of the appellant’s daughter in drug abuse and her clear
use of the car made the question of the appellant’s knowledge that he had the heroin in his
control or custody particularly important. He did not admit knowledge, and in the
circumstances knowledge could not be established beyond reasonable doubt simply by proof
that the heroin was found in the car (see for example *R v Clarke* (1995) 78 A Crim R 226 at 232).

Again, in this case the appellant is denying possession and therefore the state of
knowledge is crucial. This is because possession is an element of the offence and the mens
rea requires knowledge. In property offences however the possession issues often relate to
the status of the property (ie that it belongs to someone other than the defendant) and not
the mens rea. Thus the element of knowledge is less important and the courts are
consequently more willing to imply knowledge – even though at times this is a patent fiction.
Constructive Possession

In civil law the concept of legal possession also includes prior possessors who, though out of physical possession, still claim some form of control over the property. This can also arise if the person in physical control holds the property on behalf of another. The criminal approach is not as broad – one cannot be normally convicted of possession of property that has been taken by another person from one’s own possession.

However the concept of physical possession is expanded, for the purposes of property offences, to include the constructive possession of an employer or master. In such circumstances possession that is held by the employee or servant within the terms of their employment or servitude, is considered to be constructively in the possession of the employer or master. The concept is discussed in Williams v Phillips (1957) 41 Cr App R 5, a case which related to the collection of garbage by council employees.

Once the servants of the local authority have come and taken it and put in the corporation’s carts, it seems to me beyond any question that it is in the constructive possession of the corporation......In the case of Reed and Another (1854) 6 Cox 284..... the headnote to that case is: “A servant being sent by his master to fetch coals from a wharf, where the master dealt, went with his master’s sacks and cart for that purpose, and received the coals in the sacks, which, when filled were deposited in the cart. On his way home he fraudulently extracted from the cart some of the coals. Held that as soon as the coals, which were the property of the master, had been deposited in the master’s cart the exclusive possession of the servant was determined, and that a constructive possession of the master began, the servant, hence forward, having only the mere charge or custody of the coals as a servant; consequently the servant committed a trespass in taking them from the cart, and was properly convicted of larceny.” I observe that Lord Campbell said at page 288; “the constructive possession of the master need not be distinct from the actual possession of the servant.

Right to Possession

As will be seen, larceny concerns itself with offences against the possessor of goods, not of the owner. However, under general property law, the owner of property has a right to that property even though the owner may be out of possession. This is sometimes known as special property. It also extends beyond the right of a true owner of property to also include any other person who had legal possession of the property at the time when the property was taken out of their possession. Thus in Russell v Wilson (1923) 33 CLR 538 the proprietor of an illegal gaming house was able to force the police to return the monies seized in a raid on the gaming house in the absence of an application by the police to the Court for the forfeiture of the money.

Immediately before the seizure on 6 May 1921, Wilson was in the actual possession of all the property seized, which comprised the proceeds of the forbidden transactions. But he was possessed of that property as for himself by the actual consent of the original, and, we shall for this purpose assume, the continuing, absolute owners of the property. That is to say, he had possession of the property, not as servant or agent of another, but as in his own right subject to any right of the absolute owners to recover it whenever they so desired.... possession, in the relevant sense, is not merely evidence of absolute title; it confers a title of its own, which is sometime called a “possessory title”. This possessory title is as good as the absolute title as against, it is usually said, every person except the absolute owner.... it is therefore clear that Wilson had by that possession a real “title” to the property, just as lawful and just as powerful as if it were the absolute title, except as against the absolute owner, or any person claiming to hold by virtue of the absolute owner’s authority.... If the person taking the goods has a superior right, then to the extent of that superior right, and to that extent only, must the possessory title yield. The absolute owner, his rights being unqualified by any circumstance, would of course be justified in taking and keeping or demanding the goods, because his title is superior... The police
statutory right [to seize the property having been exhausted], their superior right no longer
existed, and the refusal was that of a person who was depriving the respondent of the property
and having, in Lord Campbell words, “no title in himself” that is, a wrong doer. The
respondent’s position reverted to that immediately before the seizure as to both classes of the
property seized, and he had an instant right as against the appellant to possession.

To distinguish between the right to possession of a lawful possessory title holder and the
right to possession of the absolute owner or prior lawful possessor, the courts often refer to
the rights of the lawful possessory title holder (such as a bailee) as a “special property” and
the right of the prior possessor or absolute owner (such as a bailor) as a “general property”.

**The Statutory Form of Possession**

In the *Crimes Act* 1900, possession is defined to be:

7. “Possession” when criminal

Where by this or any other Act the unlawful receiving of any property, or its possession
without lawful cause or excuse, is expressed to be an offence, every person shall be deemed to
have such property in his or her possession within the meaning of such Act who:

(a) has any such property in his or her custody, or

(b) knowingly has any such property in the custody of another person, or

(c) knowingly has any such property in a house, building, lodging, apartment,
field, or other place, whether belonging to or occupied by himself or herself or not, and
whether such property is there had or placed for his or her own use, or the use of another.

This definition does not apply to larceny, which remains at common law, but does have
relevance for the offences of receiving and goods in custody.

**Bailment**

In circumstances where the possessor of goods wishes to transfer the possession of the
property to another person but to retain the right to regain possession a bailment occurs.
There are a multitude of different forms of bailment. But in all forms of bailment the
fundamental concepts remain the same. These are summarised in the judgment of Clarke JA
in *Brambles Securities Services Ltd v BiLo Pty Ltd* (1992) Aust Torts Reports 81-161. Brambles
had been retained to collect and bank money from Shoeys’ stores. Through a complicated
system, that was in some aspects in breach of the contract, the money was actually
deposited into Brambles’ own account and accounted for in a daily running account. One
issue was whether, in accepting the cash and then placing into their own bank account (not
Shoeys’), Brambles accepted the money as a debt owed; or as a bailee - with a duty to return
the exact notes and coins.

If a retail store does not retain security carriers, as Brambles described themselves, its
banking requirements would be carried out by its staff members who would be obliged to
collect the cash, prepare deposit slips and take the cash to the nearest bank where the deposit
would be effected. In short the employees would bank the actual cash collected.

When a security carrier is retained to carry out those tasks there is no reason to suppose
that, in the absence of special contractual conditions, the general nature of the obligations
undertaken would be different. That is, the security carrier would, special contractual terms
apart, be required to collect the cash, carry it safely to, and deposit it in, a bank to the credit of
the customer’s account.

Upon this analysis Brambles became a bailee of the cash collected from Shoeys whose
fundamental obligation was, in the absence of contrary instructions from Shoeys, to deliver that
cash to the bank for deposit to the credit of Shoeys’ account.
The obligations thus undertaken by Brambles to Shoeys did not arise by virtue of any contract but as incidents of the law of bailment. Those obligations arose on each occasion that a servant of Brambles collected cash from a Shoeys' branch and continued, in respect of the cash then collected, until the money had been deposited in the bank to the credit of Shoeys or otherwise dealt with in accordance with Shoeys' instructions.

In this context it is helpful to recall the way in which Pollock and Wright defined "bailment":

"It is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person.'(Pollock & Wright, "Possession", p163.)

To similar effect were the following statements of Windeyer J in Hobbs & Anor v Petersham Transport Co Pty Lid & Anor, 124 CLR 220. At 238, his Honour said:

"A bailment comes into existence upon a delivery of goods of one person, the bailor, into the possession of another person, the bailee, upon a promise, express or implied, that they will be re-delivered to the bailor or dealt with in a stipulated way. A carrier to whom goods are delivered for carriage is a bailee. But a person who undertakes that he will carry goods is not a bailee of them unless they be actually delivered to and received by him."

And, at p 239:

"The Hobbs Brothers were sub-contractors of the defendant to perform its contract with the plaintiff. They were strangers to that contract. They had no contract with the plaintiff. But the common law, deriving its concept of bailment largely from the civil law, has never subsumed bailment under the general law of contract. It is now beyond dispute that the relationship of bailor and bailee of a chattel can arise and exist independently of contract. By taking the plaintiff's goods into their physical possession when they were loaded on to their lorry the Hobbs Brothers undertook the duties and obligations of a bailee for reward. ... The Hobbs Brothers unquestionably became directly liable to the plaintiff if they, by their servants and agents, failed to take due care of the goods."

It is the acceptance of possession of the goods which creates the obligations of a bailee which may, of course, be different depending upon whether the person accepting possession is a gratuitous bailee or a bailee for reward. Further it is not essential that there be a contract between the bailor and bailee. For instance where A enters into a contract with B to carry B's goods and to deposit them at a particular place and, with B's permission, enters into a sub-contract with C to perform the actual carriage, upon C accepting possession of the goods from A it becomes A's bailee of those goods.

Although the bailee's duty to re-deliver the goods or to deal with them in accordance with the instructions of the bailor is a fundamental one it is not absolute. To use the language of the majority in John F Golding Pty Ltd v The Victorian Railways Commissioners, 48 CLR 157, at 166:

"It would not be broken if the defendants were disabled from delivery through destruction or loss of the goods which reasonable care or skill on their part could not avoid."

(See also Menzies J in Hobbs, p 231)

In this case the trial judge observed that a bailment of money will not arise unless the money is delivered on the basis that the particular notes and coins will be returned to the bailor or dealt with for the stipulated purposes and that unless that be so, the recipient of the money will be a debtor rather than a bailee. Those statements are undoubtedly correct but here, as I have sought to point out, Brambles received the cheques and cash in order safely to carry them to a bank wherein they could be deposited to the credit of Shoeys. That being so Brambles in my opinion undoubtedly became a bailee of the cash it collected from Shoeys.
Mr Hely sought to resist this conclusion by submitting that a bailment of money will only arise where coins and/or notes are delivered upon the basis that they are to be retained and returned to the deliveror or in accordance with its instructions. What was emphasised in this submission was that the deliveror must, at or before delivery, require that the actual coins or notes delivered to the other party be kept in specie by that other party and either re-delivered to the deliveror or dealt with in accordance with its instructions before there can be a bailment of those moneys.

He then argued that in this case Shoeys was not concerned to receive the actual notes and coins picked up by Brambles from the various stores. It sought that the money be paid into a bank so that it would be credited with the monetary value of the notes and coins collected and it followed that there was no bailment.

....

In my opinion the principle on which Mr Hely seeks to rely does not extend so far as to constitute Brambles a debtor of Shoeys in respect of the cash picked up from Shoeys’ stores. The cash was received by Brambles upon the express mandate that it deliver that cash to a bank for credit to Shoeys’ account or disburse it in accordance with Shoeys’ directions. It was never intended that property in that cash be transferred to Brambles and, in my view, the case is one of bailment.

Civil Actions in Relation to Misuse of Property

Trespass

A trespass is an intentional or negligent interference with goods in the possession of the plaintiff. This interference maybe anything from the removal of the goods from the possession of the owner to a mere use of the goods. However in Everett v Martin [1952] NZLR 298, where the basis of the action was merely the snagging of a coat on a car door handle, it was held that a trespass does not extend to a merely accidental contact with the goods when no damage is done.

A further restriction is that the interference with the goods must be a direct interference. An indirect interference is not a trespass, but may still be compensated under the residual “action on the case”. Thus in Hutchins v Maughan [1947] VLR 131 the court held that it was not a trespass for a person to leave poison baits on land which were then later eaten by the plaintiff’s dogs, killing them. The action of the defendant had been to leave the baits on the land, not to kill the dogs. The dogs’ death had been an indirect result of the defendant’s actions.

On the other hand, as long as the action is direct the dealing with the goods may be very slight. In Kirk v Gregory (1876) 1 Ex D 55 a women who moved the jewellery of a deceased person from one room to another, allegedly for their safe keeping, was still found to be liable for trespass to those goods when they subsequently went missing because, although the defendant had acted in good faith, it was not proved that the interference was reasonably necessary. As Cleasby B said:

I think that it is most important to guard the goods of a deceased person from interference, except in the case of necessity. Beyond that, I think that no intermeddling ought to be allowed. Voluntary and capricious interference should be altogether forbidden.

In Penfolds Wine Pty Ltd v Elliott (1946) 74 CLR 204 Latham C J stated:

A mere taking or asportation of a chattel may be a trespass without the infliction of any material damage. The handling of a chattel without authority is a trespass.... unauthorised user of goods is a trespass; unauthorised acts of riding a horse, driving a motor car, using a bottle,
are all equally trespasses, even thought the horse may be returned unharmed or the motor car un-wrecked or the bottle unbroken.

Although a trespass may be committed even in a situation where the defendant commits the action of trespass purely by mistake, the modern law of negligence and its greater ease of proof, means that in modern times trespass generally really only relates to intentional interference with goods; though a possibility for negligent interference always remains.

Conversion

One of the important limitations of trespass is that as it is an action for interference with possession, it is only an action that can be taken by the person in possession of the property. Thus the action of conversion (or trover) developed to deal with the interference of the rights of the owner. While there must still be an interference with possession that would amount to a trespass, the action can be brought by a person with rights of ownership who is not in actual possession.

Conversion has been defined by Lord Porter in *Caxton Publishing Co v Sullivan Publishing Co* [1939] AC 178 as follows:

"Conversion was defined by Atkin J as he then was, in *Lancashire and North Yorkshire Railway Co v McNicoll*. "Dealing" he said, “with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner’s right or to assert a right which is inconsistent with the owner’s right.”

This was approved by Scrutton L J in *Oakley v Lister*.

Atkin J goes on to point that, “where the act done is necessarily a denial of the owner’s right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner’s right though the doer may not know of or intend to challenge the property or possession of the true owner.”

Thus the action must be intentional, but there is no requirement that there be any notion of fraud or dishonesty. This is an important distinction between the civil idea of conversion and the crimes of larceny and other forms of fraud. In *Rendell v Associated Finance Pty Ltd* [1957] VR 604, a case where a truck was repossessed that had had the original engine replaced with an engine not owned by the re-possessor, it was stated:

The [civil] wrong of conversion does not involve any element of dishonesty in the tortfeasor...[H]ere the evidence disclosed an intentional taking of the engine with the truck. If that is so, Connelly’s interference with the engine was done at his peril...... Connelly’s mistaken belief that the engine in the truck belonged to the Company on whose behalf he repossessed it, avails him nothing.... nor does it avail him that in repossessing the truck he was acting not on his own behalf, but on behalf of the finance company.... As the engine in February 1956, when the truck was repossessed by Connelly, still belonged to Rendell, Connelly was therefore guilty of a conversion of the engine, and as he was then acting with the authority and on behalf of the finance company, the company is also liable for his acts as their agent.

It is however important to emphasise that the act, though intentional, must also be an act which is inconsistent with the continued possession of the goods by the original possessor. This distinction was emphasised in *Fouldes v Willoughby* (1841) 8 M&W 540. In that case the appellant had paid for two of his horses to be placed on a ferry. Due to the plaintiff’s behaviour the defendant asked the plaintiff to leave the ferry and when he did not do so, removed the plaintiff’s horses, drove them to the top of the landing slip, and turned
them loose on the road. They then galloped away. The plaintiff sued for conversion of his horses, but the court found that although there could possibly have been an action for trespass there was no cause of action for conversion. Alderson B held:

Why did this defendant turn the horses out of his boat? Because he recognised them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It is clearly not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle.

In *Flowfill Packaging Machines Pty Ltd v Fytore Pty Ltd* (1993) Aust Torts Reports 81-244 Young J summarised the position thus:

The cases show that the mere detention by A of B’s goods will not necessarily amount to conversion nor will the mere handling of them. But once the degree of user amounts to employing the goods as if they were one’s own then a conversion is established. That point may be reached without any subjective intention and may be demonstrated by, for instance, wearing the plaintiff’s jewellery or locking up the plaintiff’s tools or her stock so that the plaintiff cannot use them without lawful excuse.

**Detinue**

Detinue occurs in situations where the defendant has possession of the goods and the plaintiff has an immediate right to possession of those goods. It is one of the oldest remedies in common law and to a very large extent overlaps conversion. The essence of the action is that a proper demand must be made on the defendant for the goods’ return and such a demand must identify where the goods are to be delivered and the agent to whom they are to be delivered. Following such a demand, failure to deliver the goods as specified constitutes detinue. Two important differences between detinue and conversion are that the defendant will be liable in detinue where the goods have been lost through no fault of the defendant’s, and also that detinue permits the plaintiff to require the return of the actual goods and does not give the defendant an election to keep the goods and pay damages for them.

The distinction between conversion and detinue is explained by Dowd J in the following passage from *Banks v Ferrari & Ors* [2000] NSWSC 874:

[57] In order to maintain an action for conversion, the plaintiff must have the right to the immediate possession of the goods. The Winkfield, note 1 at 349, per Collins MR. Conversion essentially consists of a positive wrongful act of dealing with goods in a manner which is inconsistent with the rights of the owner. This must be coupled with the intention of denying the owner’s rights or asserting a right that is inconsistent with them. Among such rights is the right of possession to the immediate claim to it Coleman v Harvey [1989] 1 NZLR 723 at 730, per Somers J.

[58] In an action for conversion, the aggrieved owner must connect the wrongful conduct with the infringement of a specific right or rights to the goods concerned.

[59] The gist of the action of detinue is the wrongful detention of goods. In other words, as Herring CJ states in Bellinger v Autoland Pty Ltd Bellinger v Autoland Pty Ltd [1962] VR 514, at 520, an action in detinue involves the unlawful failure on the part of the alleged tortfeasor to deliver the goods up when so demanded.

[60] To establish an action in detinue, the plaintiff must prove that the following three elements exist. Firstly, the plaintiff must specifically make a demand for the return of the goods on the person who has legal possession of them. The plaintiff’s immediate right to possession must simultaneously subsist at the time the demand is made Timewell v Virgoe (1868) 5 WW & A'B L 147 at 151, per Stawell CJ. Secondly, the plaintiff’s demand must have been refused by the alleged tortfeasor Nelson and Another v Nelson [1923] St R Qd 37 at 40, per McCawley CJ.
And thirdly, where the goods are in the actual possession of the alleged tortfeasor, the refusal to return the goods to the plaintiff must be unreasonable EE McCurdy Ltd (in liq) v Postmaster-General [1959] NZLR 553 at 556-557, per McGregor J (hereinafter ‘McCurdy’). In the event that the goods are not in the actual possession of the tortfeasor, the tortfeasor must have wrongfully parted with possession McCurdy, note 8 at 556-557, per McGregor J.

[61] An action in detinue where the claimant seeks an order for the return of the goods which have been wrongfully detained, coupled with damages for their wrongful detention, or, as an alternative to the return of the goods, the recovery of the value of those chattels Bellinger, note 5 at 520, per Herring CJ.

[62] The distinction between conversion and detinue is that in the former action, the injurious act is the original taking or interference with the dominion of the true owner, whereas the latter injurious act involves the wrongful detention of goods.

Action on the case

Action on the case is an ancient and residual tort that still is of use today in rare situations where the plaintiff cannot place their case within trespass, conversion or detinue. It must be used by the owner of goods who is not in position of either possession or an immediate right to possession and therefore has no right to recover the goods under trespass or conversion, as both actions are based on the concept of possession rather than ownership. It is also available in situations where there has been an indirect damage to the goods, with the result that an action for trespass would not be available.

The nature of the action is explained by Dixon J in Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204:

“There remains the remedy for special damage sustained by the owner of a chattel who is out of possession. This was a special action on the case and does not depend on the plaintiff having the immediate right to possession. More usually the action is brought by an owner whose right to possession was suspended. If the chattel was held upon a bailment for a term until the fulfilment of a condition, it was the only action available to the bailor, if the chattel was damaged. The foundation of the action is the damage and the “permanent” damage to the chattel must have occurred, that is damage which would enure to the “reversioner”.

Bailors are now considered to be entitled to sue for conversion.

Deceit

Deceit is the tort of fraud, and is most commonly encountered in relation to false representations inducing the entering into of contracts. However it is not restricted to purely contractual situations. Consequently it is a useful and important action in relation to corporate fraud, particularly as its compensatory damages remedy is often an effective means of alleviating the consequences of fraud.

The classic definition of deceit is that of Lord Herschell in Derry v Peek (1889) 14 App Cas 337:

I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the
motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

The High Court reviewed the operation of the tort of deceit in relation to corporate bodies in _Krakowski v Eurolynx Properties Ltd_ (1995) 130 ALR 1. In this case Eurolynx had sold shop premises to Krakowski. Krakowski had only agreed to purchase the property on the basis that the premises had a current tenant of some financial strength and stability. The tenant Swaeder had however only signed a six year lease with Eurolynx in return for a three month rent-free period and a lump sum payment from Eurolynx equivalent to the first years rent. This had been agreed under a separate agreement, and was not apparent on the terms of the lease itself. Neither Eurolynx nor their solicitors informed Krakowski of this side agreement. Krakowski sued for deceit and breaches of ss52 and 53 of the Trade Practices Act 1974. The High Court held:

21. This was not a case in which a defendant had simply not disclosed a fact; it was a case in which negotiations for sale of unit 12 had taken place on the footing that a lessee for the property on offer had been found who was willing to pay a rent of $156,000 for a lease of that property. By its s.32 statement and by the proffered contract of sale, Eurolynx had disclosed that the lease affected unit 12 and the question was whether that statement carried the representation that the terms of the instrument of lease contained the contractual arrangement between lessor and lessee or, putting the representation in another but identical way, whether the terms of the instrument of lease were unaffected by any other agreement between the lessor and lessee. In _Tapp v. Lee_ ((1803) 3 Bos and Pul 367 at 371 (127 ER 200 at 203), cited by Park J in _Foster v. Charles_ (1830) 6 Bing 396 at 403 (130 ER 1333 at 1336)), Chambre J said:

"Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood."

...The conclusion of the Full Court as to the effect of the evidence adduced at the trial within the scope of the pleadings was that -

"the plaintiffs were induced to enter into the contract of sale by a material representation of fact that was false. The representation was that the lease contained the whole of the agreement between the defendant and the tenant. In all the particular circumstances, that amounted to a representation to the effect that the rent reserved by the lease annexed to the contract of sale was a market rent." (Emphasis added.)....

23. When fraud is alleged against a defendant, it is not enough to prove that the representation as pleaded was false. The words or conduct by which a representation is made may be understood in different senses. The words or conduct may be understood by a reasonable person in the position of the representee in one sense, by the representee in a second sense and by the representor in a third sense. Or the representee may understand the words or conduct in a sense which the representor knew the representee might understand them, albeit not in the sense in which a reasonable bystander would understand them. The differing senses in which words or conduct are understood must be borne in mind in determining whether the several elements of deceit are proved.

24. The sense in which a representation would be understood by a reasonable person in the position of the representee is prima facie the sense relevant to the question whether the representation is false (Simons v. Zartom Investments Pty. Ltd. (1975) 2 NSWLR 30 at 35). The sense in which a representation is understood by the representee is relevant to the question whether the representation induced the representee to act upon it (Smith v. Chadwick (1884) 9 App Cas 187; Bisset v. Wilkinson (1927) AC 177 at 183). And the sense in which the representor intended the representation to be understood is relevant to the question whether the representation was made fraudulently (John McGrath Motors (Canberra) Pty. Ltd. v. Applebee
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(1964) 110 CLR 656 at 659-660; Akerhielm v. De Mare (1959) AC 789 at 805-806; Sargent v. Campbell (1972-1973) ALR 708 at 710).

Falsity of the representation

25. There is no doubt but that the instrument of lease did not contain the whole of the agreement between Eurolynx and Swaeder. Although a distinction can be drawn between the lessee's covenants in the lease that run with the reversion and obligations contained in a contract that does not affect the term demised, the separate agreement varied the covenant for payment of rent contained in the instrument of lease. It is not necessary to decide whether this amounted to a surrender and new demise. The separate agreement affected the lessee's covenant to pay rent in a period that ran until 10 December 1989. Moreover, the execution of the instrument of lease by Swaeder was the trigger for Eurolynx' contractual obligation under the separate agreement to pay out the $156,000 to which Swaeder would become entitled at the latest when it commenced business. Once the representation is understood in the sense of a statement of the whole contractual arrangement between Eurolynx and Swaeder, its falsity is clearly established....

Inducement

27. As O'Bryan J did not find that a representation had been made, he had no occasion to determine whether the element of inducement was established. In the Full Court, however, their Honours found that a representation had been made in the sense in which Mr Krakowski understood it, namely, that there was no other agreement made by Eurolynx to confer on Swaeder some benefit not disclosed in the instrument of lease. Their Honours cited the evidence of Mr Krakowski that a prospective tenant who might not otherwise be financially capable of paying the rent reserved would be tempted by the separate agreement to go into occupation. They referred to valuation evidence that showed the rent reserved to be 25% above market rate and the inducements contained in the separate agreement affected the assessment of the risk of non-payment of the inflated rental. The financial inducements for Swaeder to take the lease were, as we have seen, a credit for three months' rent ($39,000) and payment of a further sum of $156,000. If those benefits be apportioned over the six-year term of the lease and be regarded as part of the consideration for the covenant to pay the rent reserved, the net rent attributable solely to the value of the premises is reduced by more than $30,000 per annum. Given that the price for the purchase of the premises was fixed at 10 times the annual rental, the financial inducements given to Swaeder by the separate agreement inflated the price by a sum well in excess of $300,000.

28. In the Full Court, their Honours concluded that the representation was material and that it induced the purchasers to enter into the contract of sale. This conclusion is amply supported by the evidence and accords with the approach taken by this Court in Sibley v. Grosvenor ((1916) 21 CLR 469 at 473, 478, 481-482).

Fraud by Eurolynx

29. In order to succeed in fraud, a representee must prove, inter alia, that the representer had no honest belief in the truth of the representation in the sense in which the representer intended it to be understood. In Akerhielm v. De Mare ((1959) AC 789 at 805-806) the Privy Council said:

"The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true. ... (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see
Derry v. Peek ((1889) 14 App Cas 337; 5 TLR 625); Angus v. Clifford ((1891) 2 Ch 449; 7 TLR 447); Lees v. Tod ((1882) 9 Rettie 807 at 854), which authorities must, in their Lordships’ view, be preferred to Arnison v. Smith ((1889) 41 Ch D 348; 5 TLR 413) so far as inconsistent with them.)”

31. It would have been erroneous for their Honours to have declined to find fraud merely because Eurolynx or its solicitor had not first formed a plan (“set out”) to trick the purchasers into buying unit 12. A representation may be made fraudulently without prior planning. Equally, a representation may be made fraudulently without evil motive. Lord Herschell in Derry v. Peek ((1889) 14 App Cas 337 at 374. See also Smith v. Chadwick (1884) 9 App Cas at 201; The Crown v. McNeil (1922) 31 CLR 76 at 104) said:

"if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

32. The Full Court found that a representation had been made and the terms of the representation appear in unequivocal terms in cl.9.8 of the instrument of lease:

"The terms ... contained in this Lease ... cover and comprise the entire understanding and the whole agreement ... and all previous ... arrangements ... are ... excluded".

A representation that the instrument of lease covered the whole of the agreement between Eurolynx and Swaeder bears only one meaning. If that representation was made consciously by Eurolynx or its solicitor, it must have been made fraudulently. There is no sense in which a representation in those terms could have been honestly made by Eurolynx or by its solicitor. But was Eurolynx or its solicitor conscious of the making of a representation in those terms?

34. The [trial judge’s] finding that Eurolynx and its solicitor thought that the separate agreement was irrelevant to the purchase of unit 12 and the finding of the Full Court that neither Eurolynx nor Mallesons “set out to induce” the purchasers to believe that there was no separate agreement, found an argument that neither Eurolynx nor the solicitor intended to make or was conscious of making such a representation.

35. If this were the correct inference to be drawn from the evidence, the courts below would have been right to acquit Eurolynx of fraud. In Smith v. Chadwick ((1884) 9 App Cas 187 at 201; and see Angus v. Clifford (1891) 2 Ch 449 at 467; Australasian Brokerage Ltd. v. Australian and New Zealand Banking Corporation Ltd. (1934) 52 CLR 430 at 438), Lord Blackburn postulated the case where

"a man may make a statement which he intended to mean one thing only, but which negligently and stupidly he sends out in such a shape as to bear another meaning, and the plaintiff acts upon that meaning."

He commented:

"On that I need only say that the defendant, in such a case, would have great difficulty in establishing that it was only honest blundering; but if he did, as for instance, by shewing that his manuscript sent to the printer, contained the word ‘not,’ which by some printer’s error was omitted in the published prospectus, or that 10,000 was by a printer’s error printed 100,000, which escaped notice in revising the proofs, I should say it was not a fraud, though perhaps gross negligence."

36. His Lordship thought that such a case "is not likely ever to arise"; but it would arise if a representor, honestly believing a topic to be irrelevant to the particular transaction, does not advert to the representation conveyed to the representee by the words or conduct of the representor. Eurolynx’ argument, building on the findings made by O’Bryan J and by the Full Court, would state the facts in this way: Eurolynx and its solicitor believed, rightly or wrongly, that the contents of the separate agreement were immaterial to the transaction of purchase of unit 12. The instrument of lease was furnished in order to show a prospective purchaser the terms of the covenants binding on the lessee of the property, not to create any belief as to the non-existence of the separate agreement. Clauses such as cl.9.8 are commonplace in leases.
and a failure to appreciate the significance of such a clause to a purchaser to whom a copy of the lease is produced is explicable by sheer incompetence on the part of the solicitor concerned. Gilbert, the Eurolynx officer responsible for the giving of instructions to Mallesons for the drawing of the lease, the separate agreement and the contract of sale, gave evidence that he relied on the advice of the solicitor dealing with these transactions and that, as he did not believe that the separate agreement "was anything to do with the purchase", he did not advert to it. He was quite familiar with the terms of the separate agreement, though he did not realize "until we came to settlement" that the rent-free period had not then expired. Clearly enough, his evidence shows a belief that inducements given to prospective tenants to secure their entry into a lease of property to be sold by Eurolynx were immaterial to a subsequent sale of the property leased, though the sale price would reflect the rent reserved by the lease.

37. This view, although productive of sharp practice, could possibly account for his claimed failure to advert to the separate agreement in connection with the sale of unit 12. He might have regarded the separate agreement as no more than an item in the cost of development of unit 12 as a going concern, leaving it to Mallesons to advise of any legal duty arising from dealings with the tenant. Though Gilbert’s explanation as to why he did not advert to the separate agreement when he was supervising the sale of unit 12 be accepted, the question is not whether Gilbert’s mind adverted to the making of the representation but whether Eurolynx’ mind should be held to have adverted to the making of that representation.

38. The mind of Eurolynx does not depend upon the acceptance of the evidence of Gilbert alone as to his appreciation of the significance of the separate agreement. Account must be taken of the evidence that Eurolynx' agent (Cini) and Eurolynx' officer (Ryan) who had first procured the agreement of Mermelstein (as agent for the purchasers) to buy unit 12 knew that the purchasers were willing to buy on the footing that the rent reserved by the lease was what the tenant had been and was willing to pay for a lease of the property offered to them. In other words, they were willing to buy at a price ten times the amount of the rent which the property itself would yield. Their knowledge was the knowledge of Eurolynx, for they were the persons who were responsible for the initial negotiations and who had set the scene in which the representation had been made by the s.32 statement and the proffered contract of sale. As Bright J said in Brambles Holdings Ltd. v. Carey ((1976) 15 SASR 270 at 279; and see per Bray CJ at 275-276, Mitchell J at 281-282):

"Always, when beliefs or opinions or states of mind are attributed to a company it is necessary to specify some person or persons so closely and relevantly connected with the company that the state of mind of that person or those persons can be treated as being identified with the company so that their state of mind can be treated as being the state of mind of the company. This process is often necessary in cases in which companies are charged with offences such as conspiracy to defraud."

A division of function among officers of a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by each of them (See Dunlop v. Woollahra Municipal Council (1975) 2 NSWLR 446 at 485; Tesco Ltd. v. Nattrass (1972) AC 153 at 170). Neither Cini nor Ryan was called to give evidence. It is erroneous to make a finding as to the company's intention or willingness to misrepresent the contractual arrangements with Swaeder without reference to the knowledge of Cini and Ryan.

39. So to approach the question of Eurolynx' liability is not to regard the negotiations with Cini and Ryan as containing the actionable misrepresentation. If Eurolynx be treated as knowing that the purchasers were buying on the faith of the rent which the property itself would yield, it must have known that the purchasers would believe that the rent reserved according to the copy of the instrument of lease produced represented the commercial rent that the premises the subject of the proposed purchase would yield and that there was no other agreement conferring on the lessee a financial benefit which was reflected in the rent reserved. When the separate agreement secured Swaeder's agreement to execute a lease reserving a rent of $156,000 per annum from 11 September 1989, Eurolynx' production of a copy of the instrument of lease without reference to the separate agreement cannot be
explained as a failure to advert to the possibility that the rent was what the property would yield without supplement from financial assistance contractually conferred on the lessee. Even if Gilbert, not knowing of the prior conversations between Mermelstein and Cini and Ryan, did not perceive that the s.32 statement would be taken to represent that the lease contained the whole agreement, an inference that Eurolynx intended or was willing that that representation be conveyed should be drawn against Eurolynx. In the absence of evidence from Cini or Ryan deposing to their knowledge of the basis on which the purchasers were buying unit 12, this Court is as able to draw inferences from the primary facts as are the Courts below. Although Lord Blackburn's dictum about a representor's difficulty in establishing mere honest blundering must be taken to refer only to an evidential burden, not an ultimate burden, of proof, the purchasers' burden of proving fraud in the present circumstances is more easily discharged when Eurolynx called neither those who represented it in the early negotiations with the purchasers nor their solicitor....

42. Counsel for Eurolynx submitted that fraud could not be sheeted home to Eurolynx unless that company, knowing of the falsity of the representation which induced the purchasers to enter into the contract, intended the representation to be made. It may be that a principal who does not authorize an agent to make a particular representation in performing the duties of the agency will not be held personally liable in fraud if the representation is in fact made by an agent who is innocent of fraud, even though the principal knows the facts which make the representation false (Cornfoot v. Fowke (1840) 6 M and W 358 (151 ER 450); Anglo-Scottish Beet Sugar Corporation v. Spalding Urban District Council (1937) 2 KB 607 at 619-621 (discussing the speeches in S. Pearson and Son, Limited v. Dublin Corporation (1907) AC 351); Armstrong v. Strain (1952) 1 KB 232; and per Devlin J (1951) 1 TLR 856 at 872; Awaroa v. Commercial Securities (1976) 1 NZLR 19 at 29). But it can hardly be open to argument that Eurolynx, by its officer Gilbert, did not authorize Mallesons to furnish the s.32 statement and to proffer the contract of sale in the terms in which Mallesons drew those instruments. (some footnotes have been omitted)

Elements of Crime

At common law all crimes must contain two elements: the actus reus and the mens rea. This come from the old Latin phrase: “actus non facit reum, nisi mens sit rea”. Roughly translated this means: an act does not make a person guilty, unless their mind is guilty.

Actus Reus

The actus reus is the act which constitutes the external or physical aspect of the crime. It must be a voluntary and conscious act, or as Barwick CJ put it in Ryan v R (1967) 121 CLR 205:

In my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act.

In Jiminez v The Queen (1992) 1723 CLR 572, the accused was driving a car in circumstances where he claimed he had no symptoms or feelings of tiredness, but fell asleep at the wheel only regaining consciousness after the car he was driving had crashed. He was charged with negligent driving. On appeal the High Court was asked to determine what actions of Jiminez could constitute the negligent driving and whether those actions were conscious or voluntary. The High Court held:

“.... where the question is whether a driver who falls asleep at the wheel is guilty of driving in a manner dangerous to the public, the relevant period of driving is that which immediately precedes his falling asleep. Not only must the period be sufficiently contemporaneous with the time of impact to satisfy the requirement of s.52A but the driving during that period must be, in a practical sense, the cause of the impact and the death. The relevant period cannot be that during which the driver was asleep because during that time his actions were not conscious or
voluntary. And, for the reasons which we have given, if the driver's actions upon waking up amount to no more than an attempt to avoid an accident, it cannot be that period of driving.”

Depending on the elements of each crime the relevant act which constitutes the actus reus can be either a positive act (e.g., forgery) or an omission (e.g., failure to properly account for corporate funds). While the actus reus will usually be a distinct and separate act it can sometimes be characterised as an act which forms part of a continuous sequence of events (one transaction).

Often the actus reus will only occur if the actions take place in certain circumstances. Thus sexual assault can only occur in circumstances where there is a lack of consensual sex. Some crimes also require not only surrounding circumstances but also that the action lead to a certain result. Thus murder is only committed if an action, without legal justification, leads to a person’s death.

**Mens Rea**

Traditionally crime requires a certain state of mind - the guilty mind; but in each crime the state of mind required is different. Consequently the mens rea of any crime can only be ascertained by an examination of the elements of the crime. Common forms of mens rea include: intent (not motive), knowledge and recklessness. For example the Corporations Act 2001 states:

**184 Good faith, use of position and use of information—criminal offences**

*Good faith—directors and other officers*

(1) A director or other officer of a corporation commits an offence if they:

(a) are reckless; or

(b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

(c) in good faith in the best interests of the corporation; or

(d) for a proper purpose.

**Finding the Mens Rea**

There is a presumption that every crime requires a mens rea— but like the actus reus, the mens rea of each crime is different.

The mens rea of common law crimes, or those crimes merely described in statutory codifications of the common law are contained within the precedent judgments of appropriate courts. However in relation to statutory offences there is a need for judges to use statutory interpretation principles to elucidate the requisite mens rea. Often the required state of mind is not explicit in the statutory provision. In such circumstances the judges have developed a number of principles of interpretation.

The most fundamental of these is a presumption that every crime must have a mens rea unless there is a compelling reason against this.
The presumption is stated by RS Wright in *Sherras v De Rutzen* [1895] 1 QB 918 at 921: “There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered” ... It is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject matter, it is excluded expressly or by necessary implication ...

Brennan J. in *He Kaw Teh v R* (1985) 60 ALR 449

**The method by which the courts decide if mens rea is present in an statutory offence.**

The courts must themselves construct a mens rea for a crime if the statute merely refers to the external elements of the offence. The methods used by courts are summarised by Gibbs J in *He Kaw Teh v R* (1985) 60 ALR 449:

In deciding whether the presumption has been displaced by s.233B(1)(b), and whether the Parliament intended that the offence created by that provision should have no mental ingredient, there are a number of matters to be considered. First, of course, one must have regard to the words of the statute creating the offence...

The second matter to be considered is the subject matter with which the statute deals...

A third consideration is that which was mentioned in *Lim Chin Aik v. The Queen*, at p 174:

"It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly ... which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

**Categorizing types of statutory crimes:**

Other than statutory crimes requiring a full mens rea the courts have recognised two types of statutory offences which derogate from a mens rea. The most commonly accepted forms are crimes of strict liability. In such crimes the requisite mens rea is assumed by the court to have been present at the time of the actus reus. However this is a rebuttable presumption. As the High Court said in *Jiminez v The Queen*:

In a well-known passage in *Proudman v. Dayman* (1941) 67 CLR 536, at p 540. Dixon J. drew a distinction between mens rea as an ingredient of an offence and an honest and reasonable belief in a state of facts which, if they existed, would make a defendant’s act innocent. If honest and reasonable mistake is not excluded in the case of a statutory offence, it will afford an excuse for what would otherwise be an offence.

Very rarely the courts admit the Parliament might intend to completely remove all requirement of mens rea and create an offence of mens rea:

Where an offence is one of absolute liability, the prosecution does not need to establish that the defendant knew that his act was wrongful, and it will succeed even where the defendant had no knowledge ...Where the legislature chooses to remain silent as to its intention, it must do so in the knowledge that the courts will ordinarily apply the presumption that the defendant’s state of mind is relevant ... The trend of modern authority is clearly to limit offences of absolute liability ...

*Hawthorne v Morcam Pty Ltd* (1992) 29 NSWLR 120
An example of such an offence is contained in the *Road Obstructions (Special Provisions) Act* 1979

### 4 Penalty for not moving a motor vehicle obstructing a public road

(1) Where the Commissioner or any authorised officer is of the opinion that any motor vehicle is on a public road and ought to be moved in order to prevent it obstructing or continuing to obstruct a public road, the Commissioner or authorised officer may cause to be affixed to a conspicuous part of the motor vehicle a notice...

(2) Where a notice is affixed to a motor vehicle in accordance with subsection (1):

(a) the person who last drove the motor vehicle before the notice was affixed to it shall forthwith move the vehicle...

(3) A person who contravenes subsection (2) is guilty of an offence and liable to a fine not exceeding 10 penalty units....

(7) An offence referred to in subsection (3) is an offence of absolute liability

**Mens Rea is a subjective issue - and one for the jury**

In *Pemble v The Queen (1971) 124 CLR 107*, an appeal against a murder conviction, Barwick CJ held:

25. The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accuser’s actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man’s reaction would be in the circumstances as decisive of the accused’s state of mind. They need also to be reminded that the accused’s circumstances are relevant to the decision as to his state of mind; for example his age and background, educational and social, his current emotional state and his state of sobriety. They should be expressly told that they need to be satisfied beyond any reasonable doubt that he must have foreseen, and in that sense did foresee, the consequences of the act he contemplated.
Larceny, the common law name for theft, is one of the older forms of law still in force in the common law world. The word larceny comes from the Latin word *latrocinium*, which means robbery. Traditionally, larceny was seen to be of two types: simple larceny and compound or mixed larceny. Simple larceny is what we generally know today as theft. Compound larceny was theft combined with some form of violence or break in and is today generally known as the various forms of robbery, either against the person or from a dwelling.

The main elements of simple larceny were developed by the English courts as early as the 1700s. The body of law which relates to the elements of larceny is a very complicated and technical body of law. There were attempts to simplify and to codify the elements of larceny in the late 1800s and to remedy many of the deficiencies by passing legislation to cover the gaps in the law. The current law of larceny, as it applies through the *Crimes Act 1900* in New South Wales reflects the development of the common law of larceny up until the turn of this century. However, New South Wales is now one of the few common law jurisdictions to still rely on the common law of larceny to underpin its laws against theft.

In 1968 the English Parliament passed the *Theft Act 1968* which simplified the law of larceny into a modern format creating general crimes of theft and stealing. This approach has been followed in Victoria, and a variant of it is contained in the Model Criminal Code, which is now in force in the Commonwealth, Australian Capital Territory and Northern Territory jurisdictions. South Australia has a further elaboration of the Model Code approach. Queensland, Western Australia and Tasmania have criminal codes which are largely a codification of the common law.

There are a number of reasons why larceny and related offences is such a complex area of law. Some are due to the inherent complexity of property rights in modern society. Others are a result of the history of the offence. One of the major reasons why the common law of larceny is so complicated is that it was seen to be a felony, and therefore anyone convicted of larceny could be executed if found guilty. Such an extreme punishment for what at times was trifling theft concerned commentators even in the 1700s. Writing in 1765 Sir William Blackstone said:

> Many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. And certainly the natural punishment for injuries to property seems to be the loss of the offender’s own property which ought to be universally the case, were all men’s fortunes equal. But as those, who have no property themselves, are generally the most ready to attack the property of others it has been found necessary instead of a pecuniary to substitute a corporal punishment: yet how far this corporal punishment ought to extend is what has occasion for doubt.


The fact that a person convicted of theft could lose their life was a disincentive to the judges to extend the law of larceny to cover new and novel situations. Two other considerations added to the complexity of the common law of larceny. The first was that there existed an extensive body of law relating to land, or real property. As a result the law of larceny only extended to the theft of those things which did not constitute real property. This resulted in the need to create boundaries around the type of property which could be the subject of larceny. As we will see, this creates problems to this day.
The third problem was the rule of escheat. This was an old, and now abolished rule that any person who was convicted of a felony forfeited all their property to their feudal lord (or in later times, the state). Larceny was a felony, though trespass was merely a misdemeanour. Given the dire consequences of finding somebody guilty of a felony this led the courts to emphasise crimes of trespass over crimes of larceny. From a perspective of the 19th century, Stephen in his *History of the Criminal Law* noted:

When the movable property of one man, got into the hands of another, the owner’s chance of recovering it was lost by a prosecution on indictment ... Hence it was in the interest of everyone concerned to extend the scope of the law of trespass and to restrain the scope of the law of larceny, and this may, I think, have been one reason why it was said to be essential to larceny that the taking...should be fraudulent and why so many things have been held not to be subject of larceny.... these considerations may have had more to do with the narrow limitations put upon it then scruples as to the infliction of capital punishment.

Stephen *History of the Criminal Law* Vol III p122

Finally, an influential thesis by George Fletcher links much of the complexity in larceny to what he calls a metamorphosis of larceny from an offence of manifest criminality to one of subjective criminality. This thesis is discussed in the Course Readings in the article by Michael Tigar, "The right of property and the law of theft" (1984) 62 Texas Law Review 1443 and extract from Fletcher’s *Rethinking Criminal Law*.

**The Elements of Larceny**

Larceny is not defined in the *Crimes Act 1900*.

116. Every larceny, whatever the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects, as grand larceny was before the passing of the Act seventh and eighth George the Fourth, chapter twenty-nine.

117. Whosoever commits larceny, or any felony by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to penal servitude for five years.

Consequently the elements of larceny can only be determined by an examination of common law precedents. In *Croton v The Queen (1967)* 117 CLR 326 Barwick CJ offered the following definition of larceny:

At common law, larceny is taking and carrying away the personal goods of another from any place with the felonious intent to convert them to the taker’s own use, and to make them permanently his own property without the consent of the true owner....

As I have indicated, larceny consists in the taking and carrying away of the property of another without his consent, and without colour of right, intending at the time of the taking permanently to deprive the owner of that property. It follows that there must be what is called an asportation. Therefore, apart from any special statutory provision, larceny can only be committed of property which is capable of physical possession and removal. It also follows that to constitute larceny, the property must be removed ....from the possession of some other person against the will of that person.

More recently the High Court of Australia in *Ilich v The Queen (1987)* 162 CLR 110 has defined larceny in the following terms. Wilson and Dawson JJ held:

At common law, larceny is committed by a person 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 intent, at the time of such taking, permanently to deprive the owner thereof. …. What we wish to draw attention to is the fact that at common law larceny involves the taking of something without the consent of the owner who may, for this purpose include the person in possession of the thing. For this reason it is said that there is no
larceny if the circumstances would not sustain an action in trespass. ... Because larceny at common law requires a trespass - it is sometimes described as an offence against possession - a person lawfully in possession of something cannot be guilty of larceny of it.

Summarising these definitions, the elements of larceny are as follows:

**Actus Reus**

- Subject matter: property capable of being stolen
- Belonging to another
- Taking and carrying away
- Without consent of owner

**Mens Rea:**

- With intent to permanently deprive the owner of possession.
- Without claim of right
- Fraudulently or dishonestly
- And with all elements of the mens rea existing at the time of taking of the property.

**Actus Reus**

**Subject Matter: Property Capable of being stolen**

Because of the distinction between the law relating to real property and the law relating to personal property larceny can only be committed in relation to things that are capable of being defined as property. Further, they must be things capable of being defined as personal property. As larceny is a crime related to possession, the property must also be property which is capable of possession.

**Animals**

One of the most valuable forms of property that could be possessed prior to the invention of the motor car were the various forms of livestock. Horses in particular, being the primary means of transportation, were highly valuable and the cases are replete with horse stealing.

Domesticated animals have therefore always been seen as forms of property capable of being stolen (see eg 1 Hale 511; 1 Hawk c33, s43). The produce of such animals is also larcenable, so it can amount to larceny to take eggs (1 Hale 511; 1 Hawk c33, s43), milk (Anon (1769) 2 East PC 617) or wool (*R v Martin* (1777) 1 Leach 171). In fact in NSW cattle were considered so valuable that the penalty for stealing them is almost 3 times the maximum for larceny simpliciter.

For an amusing case debating whether emus could be stolen see *R v Lee* (NSWSC 1830 [http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_lea_1830.htm]).

**4 Definitions**

Cattle includes any horse, mare, gelding, colt, foal, filly, ass, mule, bull, cow, ox, steer, heifer, calf, ram, ewe, sheep, lamb, pig, goat, deer, alpaca, llama, vicuna, camel, or dromedary, and every hybrid or cross thereof.

**126 Stealing cattle or killing with intent to steal**

Whosoever:
steals any cattle, or
wilfully kills any cattle with intent to steal the carcass, or skin, or other part, of the cattle
so killed,
shall be liable to imprisonment for fourteen years.

131   Unlawfully using etc another person's cattle

Whosoever:
takes and works, or otherwise uses, or takes for the purpose of working, or using, any
cattle the property of another person without the consent of the owner, or person in lawful
possession thereof, or
takes any such cattle for the purpose of secreting the same, or obtaining a reward for
the restoration or pretended finding thereof, or for any other fraudulent purpose, or
fraudulently brands, or ear-marks, or defaces, or alters, the brands or ear-marks of any
cattle the property of another person,
shall be liable to imprisonment for three years.

The situation is more complicated with wild animals – animals described as “ferae
naturae”. Russell summarises the law on this as:

“Larceny may be committed of animals ferae naturae if they are fit for the food of man,
and dead, reclaimed (and known to be so), or confined.” (Turner, Russell on Crime, 12th Ed,
1964, p903)

The law in this area is overly complex. This is largely because wild animals do not belong
to any person, a requirement of larceny. Wild animals killed to eat become the property of
the killer unless they are confined on private property in which case they belong to
possessor of the land. This is discussed in more detail below.

The other complicating factor is a position in the old cases that some forms of animal life
were not worthy of the protection of the criminal law. Thus the requirement that in most
cases the animal be suitable to be eaten. One major exclusion were dogs, cats, birds and
other pets. Due to this the Crimes Act 1900 continues to contain specific offences of stealing
dogs and animals kept in confinement.

132   Stealing dogs

Whosoever, having been summarily convicted under this or any former Act, of any such
offence as is hereinafter in this section mentioned, afterwards,
steals any dog, or
has unlawfully in his or her possession any stolen dog, or the skin of any stolen dog,
knowing such dog to have been stolen,
shall be liable to imprisonment for one year.

133   Taking money to restore dogs

Whosoever corruptly takes any money or reward, directly or indirectly, under pretence, or
upon account, of aiding any person to recover any dog which has been stolen, or which is in the
possession of any person other than its owner, shall be liable to imprisonment for one year.

502   Possession of skin etc of stolen cattle

Whosoever, in whose possession there has been found the skin or carcass of any stolen
cattle, or of any cattle reasonably suspected to have been stolen, or any part of any such skin or
carcass, may be brought before or may be summoned to appear before a Local Court to show in
what manner he or she became possessed of the same, and if there is reasonable cause to
believe that he or she has dishonestly come by the same, and if he or she fails to satisfy the
Court before whom the case is heard that he or she obtained the same without any knowledge or reasonable ground to suspect that the same was the skin or carcass, or part of the skin or carcass, of any stolen cattle, he or she shall be liable to imprisonment for six months, or to pay a fine of 5 penalty units, or both.

503 Stealing dogs
Whosoever steals any dog shall, on conviction by a Local Court, be liable to imprisonment for six months, or to pay a fine of 5 penalty units, or both.

504 Possessing stolen dog or skin
Whosoever has unlawfully in his or her possession any stolen dog, or the skin of any such dog, knowing the dog to have been stolen, shall, on conviction by a Local Court, be liable to pay a fine of 5 penalty units.

505 Stealing animals etc ordinarily kept in confinement
Whosoever:

- steals any animal or bird ordinarily kept in a state of confinement, or for any domestic purpose, but not being the subject of larceny at Common Law, or
- kills any such animal or bird with intent to steal the same, or any part thereof,

shall, on conviction by a Local Court, be liable to imprisonment for six months, or to pay a fine of 5 penalty units, or both.

506 Stealing animals etc ordinarily kept in confinement—second offence
Whosoever, having been convicted under this or any former Act of any such offence as is mentioned in section 505, afterwards commits any offence in the said section mentioned shall, on conviction by a Local Court, be liable to imprisonment for one year.

507 Possession of stolen animals etc
Whosoever in whose possession there has been found any such animal or bird as in section 505 mentioned, or the skin thereof, respectively, which to his or her knowledge has been stolen, or is the skin of a stolen animal or bird, shall, on conviction by a Local Court, be liable to imprisonment for six months, or to pay a fine of 5 penalty units, or both.

508 Possession of stolen animals etc—second offence
Whosoever, having been convicted, under this or any former Act, of any such offence as is mentioned in section 507, afterwards commits any offence in the said section mentioned, shall, on conviction by a Local Court, be liable to imprisonment for one year.

509 Restoration of such stolen animals etc
Any such animal or bird as is mentioned in section 505, or the skin thereof, which has been found in the possession of any person may be restored to the owner thereof by the order of a Local Court.

510 Setting engine for deer etc
Whosoever:

- unlawfully and wilfully sets, or uses, any snare, or engine, for the purpose of taking or killing deer upon any inclosed land in the occupation of the owner of such deer, or
- unlawfully and wilfully destroys any part of the fence of any land where deer are then kept

shall, on conviction by a Local Court, be liable to pay a fine of 5 penalty units.

512 Taking fish in waters on private property
Whosoever unlawfully and wilfully takes, or destroys, any fish in any water being private property, shall, on conviction by a Local Court, be liable to pay the value of the fish taken or destroyed, in addition to a fine of 0.1 penalty unit.

It is unclear whether such common law exclusions still remain good law.

The human body

The nature of the human body and body parts and organs is however highly contentious. To date the issue has only arisen in rare cases. In Doodeward v Spence (1908) 6 CLR 406, a civil action for the conversion and detinue of the corpse of a still-born two headed child which had been kept in a specimen jar for medical purposes, the following comment was made by Griffith CJ:

In my opinion there is no law forbidding the mere possession of a human body, whether born alive or dead, for purposes other than immediate burial. A fortiori such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction . . . a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.

More relevantly for our purposes, Higgins J (who was in dissent on the main issue) stated:

The foundation of the action is property..... the question then is, can there be property in a dead human body? First, such a body cannot be stolen - it cannot be the subject of larceny (Stephen's Digest Criminal Law 5th ed....p.252). True, it does not necessary follow that, because larceny will not lie, there can be no property in the thing.

(Compare R v Haynes (1614) 12 Co. Rep. 113 where a dead body is referred to a being “but a lump of earth”).

In R v Kelly [1999] QB 621, the defendant was an artist who arranged with a person who had access to the Royal College of Surgeons to take body parts were being used for teaching purposes. Some of these were up to 20 years old. Kelly intended to make casts of the body parts as part of a display in an art gallery.

The Court of Appeal held:

We return to the first question, that is to say whether or not a corpse or part of a corpse is property. We accept that, however questionable the historical origins of the principle, it has now been the common law for 150 years at least that neither a corpse, nor parts of a corpse, are in themselves and without more capable of being property protected by rights (see eg Erle J, delivering the judgment of a powerful Court of Crown Cases Reserved in (1857) Dears & B 160 at 163, 169 ER 959 at 960, where he said:

‘Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment . . .’

He was there referring to an indictment which charged not theft of a corpse but removal of a corpse from a grave.
If that principle is now to be changed, in our view, it must be by Parliament, because it has been express or implicit in all the subsequent authorities and writings to which we have been referred that a corpse or part of it cannot be stolen.

To address the point as it was addressed before the trial judge and to which his certificate relates, in our judgment, parts of a corpse are capable of being property within s 4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes: see Doodeward v Spence, in the judgment of Griffith CJ to which we have already referred and Dobson v North Tyneside Health Authority [1996] 4 All ER 474 at 479, [1997] 1 WLR 596 at 601, where this proposition is not dissented from and appears, in the judgment of this court, to have been accepted by Peter Gibson LJ; otherwise, his analysis of the facts of Dobson's case, which appears at that page in the judgment, would have been, as it seems to us, otiose. Accordingly the trial judge was correct to rule as he did.

Furthermore, the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of s 4, even without the acquisition of different attributes, if they have a use or significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial. It is to be noted that in Dobson's case, there was no legal or other requirement for the brain, which was then the subject of litigation, to be preserved (see the judgment of Peter Gibson LJ [1996] 4 All ER 474 at 479, [1997] 1 WLR 596 at 601).

In Dobson v North Tyneside Health Authority [1996] 4 All ER 474 a hospital had disposed of a brain removed from the deceased as part of an autopsy. The next of kin plaintiffs sought damages in tort. The court dismissed the action on the basis that even if the plaintiffs could prove that the brain had been preserved in such a way as to turn it into property (which the court doubted) there was no basis on which the plaintiffs could claim that they had a right to possession of it.

Tangible, though not visible

As larceny is an offence based on the concept of trespass, the property must be able to be touched to be larcenable.

Nothing is larcenable at common law unless it can be perceived by the sense of touch. Once cannot be guilty of larceny of an idea, or of value, or of a balance of accounts, or of a debt, or of a copyright, or of any other notional, incorporeal thing.


However, the courts have held that even ephemeral and inconstant physical things can be larcenable. For example in Ferens v O’Brien (1883) 11QBD 21, it was held that a woman taking two buckets of water from a water tap without authority was capable of constituting larceny. The abstraction of gas from a gas pipe has also been seen to be larcenous.

1 In R v White (1853) Dears CC 203 White had had gas connected to his house. The gas company had installed a gas meter onto White’s own house piping, but White had secretly inserted pipes that bypassed the meter. White argued both that gas could not be stolen and, even if it could, that the gas was already in his own pipes. As such, he argued, it had passed into his possession and couldn’t then be stolen. The gas company argued that their contract with White was such that the gas remained theirs until it passed through the meter. The court agreed with the company:

“There may be larceny of gas as well as of wine or oil. The gas was not put into the possession of the prisoner, but was in the possession of the company, and the prisoner took it away, having an animus furandi, and converted it to his own use. It was the gas of the company, and it being in the prisoner’s
On the other hand the courts have declined to see electricity as larcenable. In *Akbulut v Grimshaw* [1998] 3 VR 756, Akbulut had entered unoccupied business premises and made 35 unauthorised phone-calls. He was charged with theft under the Victorian Crimes Act (which has an expanded definition of property that includes intangible property). The court held:

In the present case, there is no “property” vested in the owner which is capable of being appropriated before the acts which were the telephone calls. By making unauthorised telephone calls, the appellant created an obligation in the owner of the service to pay for the phone calls made but he did not deprive the owner of anything that could be said to be “property”, even intangible property. He did not deprive the owner of use of the service or any rights the owner may have to make phone calls pursuant to the agreement with the telephone service.

What the appellant undoubtedly did was to engage in dishonest conduct to the detriment of the subscriber because the subscriber was obliged to pay for the telephone calls made without his authority. Such conduct gave the appellant an advantage because he was able to make the phone calls for which he would not have to pay. Such conduct may well have constituted fraudulent acts such as obtaining a financial advantage by deception in breach of s. 82 of the *Crimes Act*. However, in my opinion, those acts could not, in law, amount to thefts which must involve a dishonest appropriation of “property”, intangible or otherwise, belonging to its owner.

Note however that the judge’s concentration is on the rights of the telephone subscriber, not the loss of power suffered by the power company. See also *Lowe v Blease* [1975] Crim LR 513. Perhaps in light of these difficulties, the *Electricity Supply Act* 1995 (NSW) enacts offences covering the area.

64 Theft of electricity

A person must not abstract, cause to be wasted or diverted, consume or use any electricity from a generating, transmission or distribution system unless authorised to do so under a wholesale supply arrangement or customer supply contract. Maximum penalty: 200 penalty units (in the case of a corporation and 50 penalty units (in any other case). ...

75 Local Court may order payment for stolen electricity

A Local Court that finds a person guilty of an offence under section 64 of unlawfully causing electricity to be abstracted, wasted, diverted, consumed or used may make an order directing the person to pay to the wholesale or retail supplier concerned such amount as the Court considers appropriate for the electricity so wasted, diverted, consumed or used.

The penalty involved is significantly less than that of larceny.

The common law has also always considered that information *per se* is not property. This was reinforced in the English case of *Oxford v Moss* (1978) 68 Crim App R 183. Moss was an engineering student at the University of Liverpool who got temporary possession of a draft of a civil engineering exam paper to be sat that semester. He had no intention of stealing the exam paper – in fact he hoped no one would notice it had been seen. All he “took” was the intangible confidential information contained in the paper. The court held:

[In this case we] have to consider whether there is property in the information which is capable of being the subject of a charge of theft [under the extended English definition that includes intangible property]. In my judgement, it is clear that the answer to that question must be no.

pipes makes no difference. There is nothing in the nature of gas to make it not the subject of larceny, and by means of the stop-cock it was abstracted.”

See also *R v Russell* (1878) 1 SCR NSW (NS) 73.
Thus both electricity and data are not forms of property. Therefore, even if larcenable property was expanded to include intangible forms of property neither could be stolen. As a result the application of property offences to digital data is problematic, an issue discussed in greater detail later.

Moveable

Neither land nor any fixture\(^3\) can be the subject of larceny. In *Billing v Pill* [1954] 1QB 70, the court was asked to determine whether or not a person who had removed army huts which had been temporarily placed on land and secured to concrete foundations by bolts could be found guilty of larceny. In delivering their judgment the court stated:

> By the old common law of larceny there were many difficulties in the way of preferring a charge of theft in respect of anything which, if I can use a convenient expression, savoured of the land. ....In my opinion the [current legislation] is intended to preserve the old common law position that one cannot be charged with stealing real property. What is real property? Land is real property, and if there are things that are so attached to the land that they become part of it then, in the language which conveyancers and others have generally applied, those things become, as between a landlord and tenant, landlord’s fixtures as they are sometimes called ... The question is: is the thing a fixture? What is a fixture? The commonest fixture is a house which is built into the land, so that in law it is regarded as part of the land. The house and the land are one thing. If, therefore, one has something, such as lead pipes, which are an integral part of the house, it follows that as the house is an integral part of the land, the pipes are also, and therefore the pipes will be fixtures and they will be attached to or will form part of the land. If there is a thing which by its nature is a chattel which is affixed in some way, it seems to me that the true test is: was it really meant to be a temporary fixture, not intended to be part of the house or the land. In a house it may be for the purposes of decoration. Many questions have arisen with regard to tapestries, fireplaces, ornamental chimney-pieces and other things of that kind.

The matter is summed up admirably by du Parcq L.J. in the Laws of England, Hailsham ed., vol. 20, para. 107: "Whether a chattel has been so affixed to the land or buildings as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the

\(^2\) The *R v Munday* puzzle: One anomaly in the law relates to the stealing of fixtures to houses. In *R v Munday* (1799) 2 Leach 850; 2 East PC 594 the accused had induced the owner of a house to let it to him. Having taken possession of the house he then proceeded to strip the fixtures and was convicted of their larceny. In 1911 similar circumstances arose in *R v Richards* [1911] 1 KB 260. The court found:

- This case raises the question of whether or not we should follow the decision in *Rex v Munday*. If that case is to be followed, then a person who procures possession of a house under an agreement for a lease with the fraudulent intention of stealing the fixtures thereto belonging is, by stealing the fixtures, guilty of larceny. ... It is somewhat difficult to follow the train of reasoning in that case, because the report does not state what the arguments were, nor does there seem to have been any considered judgment or opinion delivered. The judges, however, confirmed the conviction. That case was decided more than a century ago on reference to all the judges, and it has been considered as an authority from that date to the present time. We think that we ought to follow it, and therefore there was no misdirection, and the conviction must stand.

This case therefore appears to create an unprincipled exception to the doctrine that fixtures are not property capable of larceny. The case does not appear to have been recently followed, presumably because the statutory developments have made any reliance on the common law unnecessary.

\(^3\) That is, anything affixed to land with the intention that it remain there permanently. See *Holland v Hodgson* (1872) LR 7 CP 328
degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty.” That is a useful exposition of the law, and if one requires authority to support it, there is a very good instance in Holland v. Hodgson (1872) L.R. 7 C.P. 328. Blackburn J., than whom there was no higher authority on these matters, giving his judgment in that case, emphasized that one must look at the circumstances...

Can anybody doubt that the hut in question was erected for a temporary purpose? It can be removed without doing any damage to the freehold at all. It rests upon a concrete bed which is let into the land. I should say that there is no question but that the concrete bed has become part of the land, but the hut which stands upon it has not become part of the land merely because some bolts have been put through the floor of the hut to stabilise or steady it. It was erected merely for a temporary purpose so that the Army personnel who were going to the site for a presumed temporary purpose, to man a gun emplacement during the war, would have somewhere to sleep.

In my opinion, it would be quite wrong to hold that this hut was attached to or formed part of the realty. It was not so attached any more than if one takes a garden seat out into one’s garden and, because the seat may be in an exposed position and liable to be blown over, one drives a spike through it to hold it to the ground. In one sense that is an attachment, but it is not an attachment sufficient to make it part of the realty. It is simply a spike put in to hold the chattel firm. In my opinion, this hut was a chattel, remained a chattel and is capable of larceny. Therefore, the justices came to a right decision in law in convicting.

Of value

The common law also requires that the property stolen be of some value, the emphasis of the law being that larceny protects economic interests not merely sentimental attachments. However this is a quite flexible requirement, and value has been found to exist in the physical paper of a cancelled banknote (R v Clark (1890) 168 ER 749) and a cancelled cheque (R v Perry (1845) 1 C & K 725; 174 ER 1008). The exact amount of value required was historically uncertain and consequently the history of larceny is littered with arcane arguments over the question of whether paper documents have any value (see also R v Watts (1854) Dears 327)

Documents

At common law the requirement that the property be of some value caused problems for documents evidencing property rights or contracts. The courts considered the physical nature of these documents to be insignificant and the real value to be in the chose in action it evidenced. Thus there could not be larceny in the theft of the documents. See for example R v Greenhalgh (1854) Dears 267(order for payment); R v Williams (1852) 6 Cox 49 (conveyance and mortgage deeds); R v Powell (1852) 2 Den 403 (mortgage deeds). In order to overcome the common law’s limitations the NSW Crimes Act contains a number of sections creating distinct offences for the theft or destruction of written instruments.

134 Stealing, destroying etc. valuable security

Whosoever steals, embezzles, or for any fraudulent purpose destroys, cancels, obliterates, or conceals, the whole or any part of any valuable security, shall be liable, as if he or she had stolen a chattel, to be punished as for larceny.
135 Stealing, destroying etc. wills or codicils

Whosoever steals, or, for any fraudulent purpose destroys, cancels, obliterates, or conceals, the whole or any part of any will, codicil, or other testamentary instrument, either during the life of the testator, or after the testator’s death, or whether the same relates to real, or personal estate, or to both, shall be liable to penal servitude for seven years.

4 Definitions

“Valuable security” includes every order or other security whatsoever entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of any part of the British dominions or of any Foreign State, or in any fund of any body corporate, company, or society, whether within or without the British dominions, or to any deposit in any bank; and every debenture, deed, bond, bill, note, cheque, warrant, order, or security whatsoever for money, or for payment of money, whether current in any part of the British dominions or in any Foreign State, and every document of title to land or goods, as herein defined.

Chose in Possession, not Chose in Action: the problem with cheques and money

One of the most abiding problems with the common law of larceny and its focus on the unlawful taking of possession of property is that it has never been able to be applied to any form of legal right which does not have a physical existence. This is particular troublesome in relation to cheques and money. These are choses in action, and have no physical existence other than the pieces of paper which represent them.

Money

While it is of course possible to steal physical paper money, as in a bank robbery, it is not possible to be guilty of the common law offence of larceny for illegally removing money from a bank account. This is because the money in that bank account does not exist as a physical possession but as merely a chose in action - ie a debt owed by the bank to the rightful owner of the account. As Barwick CJ stated in Croton v The Queen (1967) 117 CLR 326:

The subject matter of the instant charges was money, in each case expressed as a number of dollars, that is, paper money, or coin to the stated face value. That can be asported and be the subject of larceny. But, though in a popular sense it may be said that a depositor with a bank has "money in the bank", in law he has but a chose in action, a right to recover from the bank the balance standing to his credit in account with the bank at the date of his demand, or the commencement of action. That recovery will be effected by an action for debt. But the money deposited becomes an asset of the bank which may use it as it pleases: see generally Nussbaum, Money in the Law: s. 8, p. 103. Neither the balance standing to the credit of the joint account in this case, nor any part of it, as it constituted no more than a chose in action in contradistinction to a chose in possession, was susceptible of larceny...

Cheques

Such a distinction creates a major problem where the theft is of money from another’s bank account by use of a cheque. A classic larceny case is one of the misuse of a cheque signed in blank. The problems which this has raised are usefully summarised in the judgment of Rowland J in Trumbrich & Leask v Weston [1986] WAR 169, a case where the accused unsuccessfully tried to pass a cheque they had misappropriated. The cheque was refused as it had only one signature, not the two required.

I was not referred to any authorities in relation to this matter by counsel but my researches seem to indicate that at common law only physical objects were capable of being stolen. Thus, if an accused were to take a cheque or other bill of exchange he might be guilty of larceny of
the document itself but not guilty of larceny of the chose in action represented by the
document. R v Perry (1844) 1 Car & K 726; 174 ER 1008 related to a charge of stealing a cheque
for 13 pounds 9 shillings 7 pence which was stolen and cashed. The counts in the indictment
were variously worded but in the end the court of fifteen judges held that the mere stealing of
the piece of paper or the cheque form was sufficient to sustain a count of larceny.

Glanville Williams, Textbook of the Criminal Law, p 73, indicates that the common practice
in these matters now seems to be that when a man steals a cheque the simple course for the
prosecution is to charge him with stealing the cheque as a piece of paper from the drawer. On
conviction the thief can be punished according to the circumstances and if he has cashed the
cheque that will be an important circumstance. The learned author indicated that alternatively
if he had cashed the cheque he could be convicted of stealing the cash as being the proceeds of
the cheque and that particular theft would occur not when he stole the cheque but when he
dishonestly appropriated the cash [under the English Theft Act].

A rather ingenious argument was raised in R v Duru [1973] 3 All ER 715. In that case the
defendants were charged with stealing the cheque and they suggested by way of defence that
it was the cheque form which was the subject of the charge because one could not steal a
chose in action and that they had no intention of permanently depriving the drawer of that
form because they and everybody else knew that once it had been cashed it would in the
normal course of banking procedures, well known to all, get back to the drawer.

The Court disposed of that argument by stating that the charge in that matter referred to
the cheque being a thing in action, namely, the piece of paper in the sense that the piece of
paper carried with it the right to receive payment of the amount. Megaw LJ said at 720:

"So far as the cheque itself is concerned, true it is a piece of paper. But it is a piece of
paper which changes its character completely once it is paid, because then it receives a
rubber stamp on it saying it has been paid and it ceases to be a thing in action or at any rate
it ceases to be, in its substance, the same thing as it was before."

but he went on to hold that it was the intention of the appellants to present the cheque
and be paid the proceeds thereby permanently depriving the owner of the proceeds.

The facts of course differ in the instant case. If in fact the cheque can be described as a bill
of exchange it was certainly an imperfect bill of exchange. There can be little doubt from the
magistrate’s findings that he found that there was an intent by the appellants to permanently
deprive the owner of the property in the cheque or perhaps had he considered the matter an
intent to deal with it in such a manner that it could not be returned in the condition in which it
was at the time of the taking or conversion. It seems to me to be irrelevant that that intent was
frustrated because the thing stolen was not capable of fulfilling the appellants' intentions.

The analysis in Duru was that the thing taken from the victim was a combined paper and
chose in action and that the payment of the cheque changed the essence of the thing by
removing the inherent chose in action in action. The idea that the victim had a chose in action
attached to the paper has since been overruled in England by R v Preddy [1996] AC 815. In
Preddy, Lord Goff explained:

The point in question has been much discussed in the literature on the subject, and there
now appears to be a broad consensus on the point, with which I find myself to be in agreement.
I can therefore consider the point relatively shortly.

I start with the time when the cheque form is simply a piece of paper in the possession of
the drawer. He makes out a cheque in favour of the payee, and delivers it to him. The cheque
then constitutes a chose in action of the payee4, which he can enforce against the drawer. ...

4 That is, the chose in action does not exist until the point of delivery to the payee, and thus is never property that belongs
to the payer. This is different in Australia – see Parsons v R
But if the payee himself obtained the cheque from the drawer by deception, different considerations apply. That is because, when the payee so obtained the cheque, there was no chose in action belonging to the drawer which could be the subject of a charge of obtaining property by deception. This was decided long ago in *R v Danger* (1857) Dears & B 307, 169 ER 1018. There, the defendant was charged with obtaining a valuable security by false pretences, on the basis that he had presented a bill to the prosecutor who accepted it and returned it to the defendant, his acceptance having been induced by false pretences on the part of the defendant. The court held that in these circumstances the defendant was not guilty of the offence with which he was charged because, before the document came into his possession, the prosecutor had no property in the document as a security, nor even in the paper on which the acceptance was written. Lord Campbell CJ, delivering the brief judgment of the court, said [(1857) Dears & B 307 at 324, 169 ER 1018 at 1025):

'... we apprehend that, to support the indictment, the document must have been a valuable security while in the hands of the prosecutor. While it was in the hands of the prosecutor it was of no value to him, nor to any one else unless to the prisoner. In obtaining it the prisoner was guilty of a gross fraud; but we think not of a fraud contemplated by this Act of Parliament [7 & 8 Geo 4 c 29, s 53].'

Unfortunately, this authority does not appear to have been cited in *R v Duru* [1973] 3 All ER 715, [1974] 1 WLR 2. That decision was followed and applied by the Court of Appeal in *R v Mitchell* [1993] Crim LR 788.

In summary, in England a cheque does not come into existence as a chose in action until the point of delivery, and is thus never property in the control of the payer. Similar considerations apply to other securities which require delivery to become complete. On the Preddy analysis it is therefore unclear whether larceny could be charged on the paper itself and whether eventual return of the paper could defeat the charge.

For Australian purposes however, the issue has been resolved through a different route. Firstly, in *Parsons v R* (1999) 195 CLR 619 the High Court held that the Duru argument of the eventual return of a cheque form was not applicable to Australia.

However, in Australia, banks have asserted the right to retain possession of paid cheques, apparently on the footing that this is an ordinary incident in this country of the relationship between banker and customer. In any event, it is not the practice that cheques be returned, after they have been honoured, to the drawer by the drawer's bank.

Further, they held that cheques in Australia have certain characteristics that make them more than mere pieces of paper and therefore can be found to have been stolen without the need to use any chose in action based analysis:

[The law of negotiable instruments now represented in the Cheques Act imparted to the cheques various legal characteristics giving them then a value beyond what otherwise was their quality as mere pieces of paper. The cheques, being complete in form, contained a mandate by the respective drawer to its bank to reduce the credit of its account by payment in favour of a person answering the statutory description of a holder. Further, arising out of the drawing of the cheques, there was, albeit incomplete and revocable until delivery, the contract by the drawer referred to in ss 25 and 71 of the Cheques Act.]

Although not mentioned in the judgment, this reasoning may apply to other forms of statutorily defined negotiable instruments. Cheques may therefore be stolen from drawers once the cheque is signed. Until that time, they remain pieces of paper.

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5 A cheque is defined in s10 Cheques Act 1986 as:

10 Cheque defined

(1) A cheque is an unconditional order in writing that:
Belonging to Another

In order for a taking of property to be larcenous the goods must have been in the possession of another person. Thus, it is a defence to larceny to argue that the goods were either abandoned or that despite the eventual ownership of the goods belonging to another person the accused had a “special property” in the goods (essentially a right to possession against the owner).

In *R v Kidd* (1907) 72 JP 104 the accused had unlawfully printed extra copies of sheet music the copyright of which was owned by Messrs Chappell and Co. They were charged with larceny of the music sheets. The court held:

I do not think that the charge of larceny can be supported in this case, for the chattels were never taken away from the owner, and he was never deprived of them. It is true he was deprived of the intangible right of copyright. The actual pieces of music which the prisoners are charged with stealing were never in the actual or constructive possession of the owner; nor was there that deprivation from the owner which is essential to sustain a charge of larceny.

In *R v Smith* (1852) 2 Den.499 Smith was asked to settle outstanding wages owed to an employee of his employer. He got the victim to fill in the amount of the money owed on a stamped receipt which Smith handed him. Smith then took that receipt off the victim and left the room without giving him the money. The court held that this did not constitute larceny of the receipt.

The stamped paper never was in the prosecutor’s possession, and the prisoner cannot be convicted of stealing it unless the prosecutor had such a possession of it as would enable him to maintain trespass. It was merely handed over for him to write upon.

See also *R v Burke* (1997) 96 A Crim R 334 where the former Premier of WA’s convictions were quashed on the basis that the prosecution had failed to established that money he had used was in fact a donation to the Labor Party and not to himself personally.

However, the fact that the goods belong to another may be sometimes proved by circumstantial evidence. In *R v Burton* (1854) 6 Cox CC 293, the accused was found coming out of a warehouse in which pepper was stored, and in which he had no right to be. He said, “I hope you will not be hard with me” and threw a quantity of pepper out of his pockets and onto the ground. The pepper was of the same sort to the pepper in the warehouse, but it was impossible to ascertain whether any pepper had been stolen from the warehouse. The court held the jury could find on the circumstantial evidence that the pepper in the accused’s pockets had belonged to the owner of the pepper in the warehouse.

Abandoned Goods

As already discussed, larceny is based on the removal of property out of the possession of the rightful owner. Can a person be guilty of larceny if the goods that they have taken are in fact abandoned property? The answer to this is quite simple, though necessarily hard to prove. If nobody owns the goods then there can be no theft. However, the courts are very reluctant to find that any property does not have an owner and a very clear intention of

(a) is addressed by a person to another person, being a financial institution; and

(b) is signed by the person giving it; and

(c) requires the financial institution to pay on demand a sum certain in money.
abandonment must be shown before this would act as an effective defence to a charge of larceny.

Two old cases explain the extreme reluctance of the courts to admit that a person has abandoned goods. In Haynes Case (1613) 12 Co. Rep 113 Haynes was convicted of the larceny of three winding sheets (sheets used to bury dead bodies in). He had dug up the bodies and removed the sheets. The report of the case states: “A man cannot relinquish the property he hath to his goods, unless they be vested in another”. As the bodies were not property, but merely a “lump of earth” there had been no abandonment. Whether the proposition is as wide as the report asserts is however questionable.

In R v Edwards and Stacey (1877) 13 Cox CC 384, three pigs had been bitten by a mad dog, shot and buried. The accused had dug the pigs up and sold them. They were found guilty of larceny because the court considered there had not been abandonment of the pigs, as their owner’s intention had been to “prevent the pigs being made use of”.

In more modern times, in Hibbert v McKiernan [1948] 2KB 142 the accused was caught removing golf balls found on the private links of a golf club. His defence was that the golf balls had been lost by the members of the club and therefore were abandoned goods. At first instance the judges accepted that the individual players who had hit the balls had lost them, and given up looking for them, and therefore abandoned the balls. This decision was queried by the Court of Appeal and by many commentators ever since. However, the Court of Appeal still found the accused to be guilty of larceny on the grounds that although the balls might have been abandoned by the individual players, there was no evidence that the club had itself abandoned the balls. Lord Goddard CJ held:

The fact is that the theft alleged was of golf balls from a golf course: on every course balls must be lost from time to time, to be retrieved when the grass is cut or when someone has the time to look for them. Clearly there is no licence from the club to all and sundry to go on to the course and take what they can find and the facts show that the club did mean to exclude these pilferers, though the officials of the club did not know at any given moment the position or number of balls that might be lying on their property.

This was a case where there was clear evidence that the accused was deliberately trying to dishonestly take the balls from the club. In situations where the accused claims they acted innocently and merely found the goods further questions arise. These are discussed below in relation to the situation of finders and the notion of “continuing trespass.

Even rubbish is not abandoned. In Williams v Phillips (1957) 41 C App R 5, dustmen employed by the local council appropriated wool rags out of rubbish which had been left for collection. One of the issues in the case was whether the garbage which had been placed out for collection had in fact been abandoned by its previous owners. The court held:

If I put refuse in my dustbin outside my house, I am not abandoning it in a sense that I am leaving for anybody to take it away. I am putting it out so that it maybe collected and taken away by the local authority, and until it has been taken away by the local authority it is my property. It is my property and I can take it back and prevent anyone else from taking it away.

This case is significant in that it suggests that employees could be guilty of larceny if materials which appear to have been disposed of by the employer are appropriated. The case suggests that employees have no realistic opportunity to appropriate any goods, no matter how apparently abandoned, unless they specifically obtain permission to do so from the employer.

See also Moorhouse v Angus and Robertson (No 1) Pty Ltd [1981] 1 NSWLR 700. In that case a manuscript was left by an author with a publisher for six years with no
communication between the parties concerning it. The court held this was not evidence of abandonment.

In *R v Woodman* [1974] 2 All ER 955 scrap metal on a derelict but fenced factory site, had been sold to purchasers who had removed all but a small amount. The factory owners were unaware of the scrap metal’s continued presence on their land and Woodman had trespassed onto the land and removed the metal. The English Court of Appeal were asked to decide if the metal, though no longer owned by the factory owners, remained under their control within the meaning of the English *Theft Act*. While this is a more expansive definition than common law possession they made the following comment:

The point was well put in an article written by no less a person than Oliver Wendell Holmes Jnr in his book *The Common Law* (1881), pp 222–224, dealing with possession.

Considering the very point we have to consider here, he said:

‘There can be no *animus domini* unless the thing is known of; but an intent to exclude others from it may be contained in the larger intent to exclude others from the place where it is, without any knowledge of the object’s existence ... In a criminal case *R v Rowe* (1859) 8 Cox CC 139, the property in iron taken from the bottom of a canal by a stranger was held well laid in the canal company, although it does not appear that the company knew of it, or had any lien upon it. The only intent concerning the thing discoverable in such instances is the general intent which the occupant of land has to exclude the public from the land, and thus, as a consequence, to exclude them from what is upon it.’

This dicta suggests that courts are likely to find that property can belong to persons even if they are unaware of it, so long as they exert some form of control over the place in which it was found. Similar considerations would apply to property in containers.

### Illegal Possession of Property

In *Anic, Stylianou & Suleyman v R* ((1993) 61 SASR 223), defendants were convicted of housebreaking with intent to steal and assault with intent to rob when they broke into Mrs Hollis’ house in the mistaken belief that it contained cannabis. They appealed on the basis that it was not possible to steal property from a person who had them unlawfully in their possession. Bollen J held:

The submissions springs from some remarks made obiter by White J in *Lenard v R* (1992) 57 SASR 164 at 172. ... White J said:-

"It would have been incongruous to my mind if the prosecution had included the cannabis in the particulars of the goods taken as described in the information. Cannabis is a prohibited substance. It is unlawful for any person, including Marlene Williams, to possess it. A thief could hardly be charged with unlawfully taking out of her possession something which she unlawfully possessed. It is somewhat like a thief being charged with taking stolen goods out of the possession of a receiver of stolen goods."

In my respectful opinion, the incongruity does not exist. Despite the fact that she had no right in law to have these supposed drugs, Mrs Hollis did have possession of them. The drugs were tangible personal property having some value. The *Controlled Substances Act* does not make such drugs incapable of being the subject of property rights. That Act makes it an offence for anyone to have prohibited drugs or drugs of dependence in their possession. But that does not, in my opinion, mean that the drugs cannot in law be subject to some proprietary rights by the holder of them. I think that so much was decided by the Full Court of New South Wales and by the High Court in *R v Waterhouse* (1911) XI SR (NSW) 217 and (1911) 13 CLR 228 at 230...The decision in *R v Waterhouse* recognises that there was some right of property invested in the opium despite the fact that it was prohibited. So, I think, by parity of reasoning we can, and should, here say that Mrs Hollis had some proprietary rights in the drugs of which she had
possession. For my part, too, I think that possession was sufficient to found the charges, (see again by parity of reasoning Russell v Wilson (1923) 33 CLR 538).

I do not think that the law sees no offence in the taking of drugs, illegally held by one person, by another who intends permanently to deprive the one of those drugs. I do not think that the cry "He has no right to have had them" amounts to an exculpatory answer for the culprit. R v Waterhouse seems to me to justify what I have written.

In "The Australian Law of Theft (1977)" by Weinberg and Williams the authors say at p18:-

"A person may be in possession of property even though, he has himself stolen it. If a thief steals property, and it is taken from him by a second thief, the second thief is guilty of larceny from the first thief. The second thief is also guilty of larceny from the owner, since the offence of larceny now protects ownership as well as possession."

In "Criminal Law - South Australia" in his commentary to s131 (Simple Larceny) Judge Lunn says (page 4419 paragraph 5630.6): "Larceny is an offence against possession..." He cites Ilich v R (1987) 162 CLR 110 at 123. That case dealt with matters not relevant here. But Wilson and Dawson JJ did say this:- "Because larceny at common law requires a trespass - it is sometimes described as an offence against possession - a person lawfully in possession of something cannot be guilty of larceny of it."

I emphasise the remark that larceny is an "offence against possession". Mrs Hollis was in possession of the drugs. It matters not that she had no absolute ownership nor indeed any title to the drugs. Judge Lunn says in the same note as mentioned above: "Control of property not amounting to possession may be sufficient to make the controller an owner for the purpose of the law of larceny." I would prefer to say that such control may afford sufficient possession for the purpose of the law of larceny.

In the nineteenth edition (1966) of "Kennys Outlines of Criminal Law" the author Mr J.W.C. Turner wrote (p267, paragraph 227) -

"Larceny was always conceived as an offence against possession, and naturally so, since English law has never recognised in a subject of the realm any absolute right of ownership of chattels, our "owner" being merely the person who has the best right to possess the thing. It follows therefore that a man can be guilty of larceny by stealing a thing from another who had himself stolen that thing from someone else, for a thief holds possession (albeit mala fide) of what he has stolen."

In the Canadian case of R v Beboning (1908) 13 CCC 405 the Court of Appeal for Ontario considered a conviction for theft where a caretaker of land removed hay cut from that land with the intention of depriving the person for whom he was caretaker of that hay. The person for whom he was caretaker had not good title to the hay. The point directly at issue was not the question of "stealing from a thief". However, two of the Judges (a court of five) made remarks useful here. Osler JA said (p409):-

"As to these it appears, and is so found by the magistrate, that the accused was in charge of the place in which the hay was grown, as caretaker for Essibon, who was in possession by him. As against him, the hay was her property or that of anyone claiming under her, and the offence of theft might be committed by him in respect of it. 'For the purposes of larceny, that man is the owner of goods who, as against the taker, is entitled to the possession of the goods taken. The taker cannot set up jus tertii against such an owner, unless the taking was effect with or in the belief that he had the authority of the third person:' Ency. of English Law, 2nd ed., vol 8, p51. 'It is quite immaterial for purposes of theft whether the possessor of goods seized larcenously has or has not any real right to them. One thief can steal stolen goods from another:' ibid; Roscoe, Criminal Evidence, 13th ed, 1908."

Meredith JA said at pp412-413:- "And it has long been said that one may be convicted of larceny in stealing goods from one who had obtained them by theft. As put by Lord Hale, if A steals the horse of B, and, after, C steals the same horse from A, C is a felon both as to A and B: 1 Hale, P.C. 507; see also 2 East PC 654...."
These remarks were applied by a magistrate in Ontario in 1959 to convict a man who stole guns from a man who had stolen them (*R v Jessop* (Can) 1959 Crim LQ 487.)

For these reasons I think that the appeals based on the suggestion that a person cannot be convicted for stealing prohibited drugs from another person must fail.

**Creating Property: Wild Animals and Severed Fixtures**

The issue of the difference between real property, fixtures and property capable of theft created another historical problem. If a fixture was owned by the owner of the land and a trespasser came and physically broke the fixture from the land, such that it became a chattel (and a chattel that was first in the physical possession of the trespasser), was that chattel then capable of being the subject of larceny? Similar issues applied to the poaching of ferae naturae on private lands and the cases are discussed together.

In *R v Townley* (1871) LR 1 CCR 315 poachers had killed rabbits on land owned by the Crown. They had then placed some of these rabbits into their own bags and tied the others by the legs, leaving the rabbits together with netting (presumably used to catch the rabbits) in a ditch on the Crown lands. They had returned that morning to retrieve the rabbits and had been apprehended. The issue before the court was whether this could constitute larceny.

Bovrill C.J. Now, the first question is as to the nature of the property in these rabbits. In animals ferae naturae there is no absolute property. There is only a special or qualified right of property – a right ratione soli to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil. ... But before there can be a conviction for larceny for taking anything not capable in its original state of being the subject of larceny, as for instance, things fixed to the soil, it is necessary that that act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel, and so is brought within the law of larceny. This doctrine has been applied to stripping lead from the roof of a church, and in other cases of things affixed to the soil. And the present case must be governed by the same principle. ... Under all the circumstances of the case I think a jury ought to have found that the whole transaction was a continuous one; and the conviction must be quashed.

Martin B. ... Now if a man kills a rabbit and carries it away at once it is not larceny. But it is said that if he leaves it for a little while before carrying it away it is. And in support of this view a passage in *Hale’s Pleas of the Crown*, p510, is relied on, where he says “If a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour’s time or so come and fetch it away, this hath held to be felony, because the act is not continued, but interpolated, and so it was agreed by the Court of King’s Bench, 9 Car.2, upon an indictment for stealing the lead of Westminster Abbey.” A dictum of Gibbs, C.J. in *Lee v Risdon* 7 Taunt. 188 at 191 to the same effect is also cited. Those statements may be perfectly correct, and ought perhaps to be followed in cases exactly similar in their facts, where there has been an abandonment of possession of the things taken. But here there was no abandonment. And when the act is merely interrupted I think it is more reasonable to hold that there is no larceny.

All of the judges emphasised in this case the fact that although the poachers had left the rabbits on the Crown land, they had never abandoned their possession of the property and hence the act could be seen as continuous. A break in physical possession alone was not sufficient to enable a charge of larceny to be laid.

Such a break in possession was found in *R v Foley* (1889) 17 Cox CC 142. Foley had been a tenant on some land from which he had been evicted. He was found to have re-entered that land and cut grass. Rather than removing the grass immediately he left the grass lying on the land for a number of days and then returned and removed the grass. The case raised two issues: firstly, was the grass now a chattel, and therefore capable of larceny; and
secondly, as larceny is primarily a crime against possession, was the grass ever in the
possession of the owner of the land? Holmes J held:

When the grass was growing it belonged to the owner of the land: But, although he
was in possession of it as part of the land, he was not in possession of it as a personal chattel. It
first became capable of being the subject of larceny when it was severed. It is, I think, clear that
where it is severed by a wrong-doer, and as part of one continuous transaction it is carried
away by him, there is no larceny. In such a case it has never, as a personal chattel, been in the
possession actual or constructive of the true owner. It has been continuously in the actual,
though perhaps not always in the physical, possession of the wrong-doer. In the case before us
the defendant, having cut the grass, left it on the lands. Beyond this severance he did no act of
any kind evidencing actual possession on his part, and for two days the owner of the land had,
its seems to me, precisely the same kind of possession of it has he would have had if it had been
cut and left there by his own servant. There cannot, I conceive, be constructive as distinguished
from actual possession by a wrong-doer, and when he returned at the end of the period I have
mentioned he would be guilty of larceny, unless he was in actual possession in the interval.

The practical importance of these cases is that it means that at common law nobody can
be convicted of physically removing any piece of equipment or part of a building which was
permanently attached to the premises. Clearly, this constitutes a very large deficiency in the
common law of larceny. It is precisely because of this major deficiency, that sections 139 -
144 of the Crimes Act were enacted. It should be remembered however that irrespective of
these provisions perpetrators could also be charged with malicious damage.\(^6\)

139 Stealing etc. metal, glass, wood etc. fixed to house or land

Whosoever steals, or rips, cuts, severs, or breaks with intent to steal, any glass, or
woodwork, belonging to any building, or any metal, or any utensil, or fixture, whether made of
metal or other material, or of both respectively, fixed in, or to, any building, or anything made
of metal, fixed in any land being private property, or used as a fence to any dwelling-house,
garden, or area, or being in any square, or street, or in, or on, any place dedicated to public use
or ornament, or in any burial-ground, shall be liable to be punished as for larceny.

140 Stealing etc. trees etc. in pleasure-grounds etc.

Whosoever:

steals, or destroys or damages with intent to steal, the whole, or any part, of any tree,
sapling, shrub, or plant, or any underwood, growing in any park, pleasure-ground, garden,
orchard, or avenue, or in any ground belonging to any dwelling-house, where the value of
the article stolen, or the amount of injury done, exceeds two dollars, or

steals, or destroys or damages with intent to steal, the whole, or any part, of any tree,
sapling, shrub, or plant, or any underwood respectively growing elsewhere than in any
situation beforementioned, where the value of the article stolen, or the amount of injury
done, exceeds ten dollars,

shall be liable to be punished as for larceny.

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6 Maliciously destroying or damaging property

Any person who maliciously destroys or damages property belonging to another or to that person and another is liable:

(a) to imprisonment for 5 years, or

(b) if the destruction or damage is caused by means of fire or explosives, to imprisonment for 10 years.
Constructive possession of employees

This requirement that the goods belong to another has led to some complexity in the application of common law larceny to business situations. If the goods are received by an employee or an agent, and never at any time does that employee or agent place the goods constructively into the possession of the employer, then the employee or agent could not be guilty of larceny.

This principle was established in the case of *R v Bazeley* (1799) 2 Leach 835. Bazeley was a teller with Esdaile & Hammett, a London bank. He was charged with larceny when he, in the course of his employment, received money from the bank’s customers and placed the money into his own pocket rather than into the bank’s money drawer. It was held that as the customer had given the money to Bazeley and that Bazeley had never accepted that money on behalf of the bank, but rather fraudulently on his own behalf, the money had never been reduced into the possession of the bank and therefore Bazeley could not be convicted of larceny. Almost immediately following this decision the offence of embezzlement was enacted, designed specifically to cover this situation. Embezzlement will be discussed in more detail below.

Of course, in most cases, an employee who accepts goods or other forms of property will do so within the scope of their employment and on behalf of their employer. As a result in most cases possession will be reduced to the employer through the doctrine of constructive possession. An example of this is the case of *Williams v Phillips* discussed above. In that case the dustmen were found to have been collecting the refuse on behalf of their employers and it having been reduced into their employers ‘constructive possession’ to then dispose of the refuse was larceny by a servant. This case will be discussed below in the relation to the special doctrines of larceny by a servant.

Special Property

The fact that larceny is primarily a crime against possession also means that in some circumstances the owner of the property may themselves be guilty of larceny if possession in the goods has been lawfully given to another person. In such cases the person to whom possession has been granted has what is known as a *special property* in the goods. The two most common occasions in which this will occur are situations of bailment and where a lien has arisen.

In *Rose v Matt* [1951] 1KB 810 the defendant purchased a model aircraft engine and parts on one month’s credit by giving the shop keeper a clock which the defendant owned, on condition that if the aircraft engine was not paid for the shop keeper could sell the clock. The defendant later returned to the store and removed his clock. The court held:

> It is quite clear that [the shop keeper] had a special property in the clock: he had the right to hold it as security. .... It is clear that an owner of goods who entrusts them to another person, in such circumstances that the latter as a special property in them, is guilty of larceny if he fraudulently takes them away again.

In *R v Hough* (1894) 15 LR NSW 204 Hough and Drew had stayed for a few days at a Gilgandra hotel. On arrival by horse, their saddles had been placed in the stables by hotel’s groom. One morning the accused attempted to leave without paying, taking the saddles with them. It was found that they were guilty of larceny of the saddles, as the innkeeper had a lien over them for unpaid board and lodging. Such a lien existed even in the absence of any overt action by the innkeeper to assert her right of lien.

Such an issue can even arise in circumstances where there is a partially performed contract to sell the goods to the accused. In *R v Cameron* (1924) 24 SR (NSW) 302 a quantity
of brass scrap on the vendor’s property had been sold to the accused. The vendor refused to allow the brass to be taken away because, although a price per pound had been agreed on, the exact weight of the brass was still undecided. Despite this the accused removed the brass. The court held:

“Now, it is clear enough .... that the special property recognised by law in certain cases would be sufficient evidence of title, either in criminal or civil cases, against a wrong-doer.... Here the special property relied on by the Crown was the vendor's lien for unpaid purchase money, and that was a right expressly brought to the mind of the appellant... we think, therefore that [the vendor’s] title was sufficiently established to warrant the acceptance of it by the jury.”

**Asportation: Taking and Carrying Away**

On a strict separation between actus reus and mens rea, the element of asportation is a purely physical movement of the larcenable property. However with the antiquity of the offence of larceny there are many cases that describe the element in ways that import a mental aspect to the element. Thus the older cases emphasise that asportation must be an act that is done with intent to steal. See Russell on Crime for a detailed critique of some of these cases.

At the most basic level, larceny requires that there be some physical dealing with the larcenable property. This can be illustrated in the English case of *R v Bloxham (1943) 29 CrAppR37*. In this case the accused, who was the employee of the local council, fraudulently sold a refrigerator owned by the council to his victim. She paid him a cheque for £30 and he told her that he would arrange delivery of the refrigerator to her. She never got her money back and the fridge was never delivered. Bloxham was charged with larceny. In quashing Bloxham’s conviction the Court of Criminal Appeal held:

[The very essence of the offence of larceny is the asportation, and if the appellant had done anything which could amount to an attempt to take and carry away the refrigerator, he would of course been guilty of the offence with which he was charged. But the fact is that he took no step whatever connected either immediately or remotely with taking and carrying away this refrigerator.

On the other hand in *Wallis v Lane [1964] VR 293* the Victorian Supreme Court explained that even the slightest movement of the property could be sufficient to amount to asportation. In this case the defendant was employed as a delivery man and was making deliveries to one of his employers clients. One of the boxes, which contained bicycle toe clips, was damaged and opened. The defendant moved two pairs of toe clips from this box and left them hidden on the tray of the truck while he delivered the rest of the boxes to the customer. The defendant was apprehended while still completing the delivery. The argument before the Court was whether there had been any asportation on the basis that he had not removed the toe clips from his employer’s possession, he had in fact kept them in his employer’s possession by keeping them on the truck.

The question turns really upon what amounts to an asportation for the purposes of the crime of larceny. I have heard from Mr. Kendall, the defendant not being represented here, what the books say about asportation. He has referred me to Halsbury’s Laws of England, 3rd ed. vol. 10, p. 767, para. 1484 and to Halsbury’s Laws of England, 3rd ed. vol. 10, p. 767, para. 1484 and to *Hale on Pleas of the Crown*, vol. 1, p. 508, and to the cases relied upon in those works, and it would appear that any movement of goods with an intent to steal them is sufficient to constitute an asportation. In *B. v. Coslet* (1782), 1 Leach 236; 168 E.R. 220, the facts were that the prosecutor was the proprietor of the Ux-Bridge Waggon, in the forepart of which the goods laid in the indictment were packed. Those goods were a quantity of currants, the property of John Parker. The prisoner got into the waggon and after groping about on his hands and knees laid hold of this parcel of currants and had got near the tail of the...
waggon with them, when he was apprehended. The parcel was afterwards found near the middle part of the waggon. The jury found the prisoner guilty; but as he had not carried the goods out of the waggon, the court doubted whether this was a sufficient asportation to constitute the crime of larceny. The judgment was, accordingly, respited and the case reserved for the consideration of the twelve judges; and on 17 April 1782 they were unanimously of an opinion that as the prisoner had removed the property from the spot where it was originally placed, and the jury had found that he had so removed it with intent to steal, it was a sufficient taking and carrying away to constitute the offence.

That case, of course, is on all fours with the present case and establishes that it is sufficient asportation if there is a removal of the property from the spot where it was originally placed with intent to steal. ... The only other [case] I think I need refer to is R. v. Thompson, 1 Mood. C.C. 78; 168 E.R. 1192. It is a decision of a much later period, 1825, whereas Coslet was decided in 1782, some 40 years earlier. In this case the prisoner was charged on an indictment of stealing from the person of John Hillman a pocket book and four promissory notes of £1 each. The evidence of the prosecutor was this: "I was at a fair at East Grinstead; I felt a pressure of two persons, one on each side of me; I had secured my book in an inside front pocket of my coat; I felt a hand between my coat and waistcoat; I could feel the motion of the knuckles; I was satisfied the prisoner was attempting to get my book out. The other person had hold of my right arm and I forced it from him and thrust it down to my book, in doing which I just brushed the prisoner's hand and arm; the book was just lifted out of my pocket; it returned into my pocket; it was out; how far I cannot tell" ....

The judges by a majority, six judges to four, (Best, L.C.J., and Alexander, L.C.B., being absent), decided that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor, but the judges were unanimous that the simple larceny was complete. In other words they were satisfied that the removal of the book out of the pocket, however slight the distance might be, was a sufficient asportation to constitute larceny, provided that removal of the book was effected with intent to steal.

One of the more minimal examples of this occurred in R v Walsh (1824) 1 Mood 14. The defendant had been caught attempting to remove a bag from the bottom of a boot of a coach. He was stopped before he had managed to entirely remove the bag from the space that it had occupied in the boot. However as raising it had moved each specific part of the bag from the specific space that part had occupied this was considered a sufficient asportation.

Note that despite the minimal physical interference with the property in all instances it is described in the cases as being done with an intent to steal. By this the courts mean that the act must also coincide with two other elements of larceny – the lack of consent of the possessor and the defendant’s intention to permanently deprive.

The need for the property to be originally in the possession of the victim, and to have been interfered with without consent has been emphasised by the Full Victorian Supreme Court in R v Davies:

The taking must also amount to an act of trespass against the person from whom possession is taken; it is not sufficient that it is taken without the consent of some other person who is the true owner or that it involves a conversion of his property. Larceny is an offence against possession, not ownership.

See also R v Ashwell (1885) 16 QBD 190 at 195; R v Hill [1909] VLR 491 and R v Turvey 31 CrAppR 154.

A trespass however involves no more than an unlawful interference with another person’s property. If the defendant were to merely move another’s property to another location with the intention of inconveniencing the victim the next time they went to use the
property, larceny would not be made out as there would be no intent to permanently deprive. At a minimum such an intent requires that there be an assumption of possession. Thus larceny requires that the interference by thief must not only be a trespass but also amount to a taking up of the goods and carriage of them out of the possession of the lawful possessor.

Possession by the thief while a necessary aspect of the element of an intention to permanently deprive, is not sufficient on its own to prove the element. For example a person who takes possession of another’s property without consent may only have an intention to borrow the property for a short time. As discussed below this does not amount to an intention to permanently deprive.

It is suggested that because of this, the courts developed the idea of taking and carrying away as including a notion of possession. This left the intent to steal element to concentrate on the degree of permanence of possession intended. On a more modern approach to the offence, asportation would only require an act of movement, and an intention to permanently deprive would require proof of the taking of indefinite or at least more than temporary possession.

Viewed holistically, the element of asportation thus requires both trespass to the rightful possessors’ possession, and also an assumption of possession by the thief. However viewed from the point of view of separating out the various elements into discrete actions or intents, asportation amounts only to some physical movement of the larcenable property. Depending on the facts in issue in a trial for larceny, the element may be discussed by the courts in either way.

A taking can also be accomplished constructively, if the thief instructs an innocent party to take the property. In R v Ryan (1868) 8 SCR (NSW) 22 Ryan was convicted of larceny when he falsely represented to a buyer that he owned a cow for sale. The court held that the taking away of the cow by the purchaser following the sale was to be seen as a taking by the accused.

Without Consent of the Owner or Possessor

It is of course fundamental to the concept of larceny that the goods were taken without the permission or consent of the lawful possessor of the property. This is emphasised in the following extract from R v Davies [1970] VR 27 where the Full Court of the Supreme Court of Victoria held:

For a case of larceny there must always be a taking of property from another who has it in his actual possession and a taking in circumstances which amount to an act of trespass. A mere change of possession is not sufficient. The voluntary passing of possession will not found a larceny, no matter what the taker may do thereafter or what intention he may form thereafter. There must be a taking of possession against the will of the person from whom possession is taken: R. v. Hill and Marshall, [1909] V.L.R. 491; 15 A.L.R. 523. The taking, must also amount to an act of trespass against the person from whom possession is taken; it is not sufficient that it is without the consent of some other person who is the true owner or that it involves a conversion of his property. Larceny is an offence against possession, not ownership. Otherwise a receiver from a thief would himself be guilty of larceny. In Clerk & Lindsell on Torts, 12th Ed., para. 892, it is said: " It is apprehended, however, that for a taking to constitute a trespass it must not merely be an unlawful act, but unlawful as against the party from whom possession is taken. Thus, if goods belong to A, and B being unlawfully possessed of them, transfers them to C the taking of them by C though it may give a good cause of action in trover, is not a trespass. And it makes no difference, it would seem, if C is aware of the infirmity of B’s title. The receiver of stolen goods does not commit a trespass when he takes the goods from the thief with the thief’s consent. If it were otherwise every receiver might be indicted for larceny.
Note the importance placed on notions of possession in defining larceny. As will be discussed below, this contributes significantly to the complexity of the law in this area.

An important question is whether the lack of consent requires evidence of a state of mind of the owner or possessor to deny the passing of possession or whether a merely a lack of a positive intention to pass the possession is all that is required.

In *R v Middleton* (1873) LR 2 CCR 38 at 54-5, Bramwell B. held:

I say then on principles of general jurisprudence, on the general principles of our law, and on the particular definition of larceny, the taking must be invito domino. That does not mean contrary to or against the will, but without it. All he need be is invitus. This accounts for how it is that a finder of a chattel may be guilty of larceny. The dominus is invitus. So in the case of a servant who steals his master’s property. 7

This approach to consent has apparently been recently reaffirmed by the High Court in *Kennison v Daire* (1986) 160 ALR 129. In that case the High Court held that the fact that money could be withdrawn from an Automatic Teller Machine did not mean that the bank had in fact consented to the withdrawal. They upheld a larceny conviction on the basis that the computer could not give consent, and there was no basis on which to imply that the bank had given its consent to the transaction. 8

**Consent through duress**

The lack of consent can also be found in a situation where what would otherwise appear to be consent has been tainted by intimidation or duress. In *R v McGrath* (1869) LR 1 CCR 205 McGrath was an auctioneer conducting an auction of cloth. He pretended that a member of the audience, Powell, had made a bid and knocked down the cloth to her. He then told her that she could not leave the auction rooms without paying for the cloth, despite her protests that she had not bid for it. She paid the money. Kelly C.B. held:

In consequence of being thus frightened by the prisoner, and of his threat that she should not leave the room, she paid the money. ...Jane Powell did not part with it voluntarily, but the possession was obtained by fraud and force. Both these causes operated on her mind. The crime of obtaining money by false pretences differs from larceny. It is constituted by the pretence that something has taken place which, in fact, has not taken place. The present is a different case. Jane Powell was not deceived. She was intimidated, and by the operation of both the intimidation and the surprise at the trick she was induced to give up her money against her will.

A lack of consent will ordinarily not be a major evidentiary issue. However there are a number of situations in which this may become an important issue at trial.

**The Issue of Implied Licence**

One argument that the accused may run is that the goods were handed to them or taken by them under an implied licence from the lawful possessor. This issue is of particular

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7 The Latin words are:

*invitus* - a -um [unwilling, against one’s will]; abl. absol., ‘me invito’, [against my will]. Adv. invite, [unwillingly, against one’s will].

*dominus* - i m. [master of a house, lord, master]. Transf., [husband or lover; a master, owner, possessor; employer; ruler, lord, controller]

8 The implications of this decision will be discussed in more detail below.
importance in shop-lifting cases. An example of the issue occurred in *Humes v Townsend* (1989) 4 WAR 196. In that case the accused was seen, in a bottle shop, attempting to place a bottle of rum down behind the front of her dress. A shop assistant saw her doing this, stopped her and had her remove the bottle of rum, placing it back on the shelf. Later the shop assistant noticed that a bottle of rum was again missing from the shelf, and this time when the accused approached the cash register her bag was searched and a bottle of rum found in the bag. The issue for the court was whether there was an implied licence that all customers in the store were entitled to place goods into their bags while considering purchasing them, and that the act of stealing would only be complete once those goods had been taken past the cashier. In his decision Pidgeon J held that the existence of such a licence is largely determined by the intention of the accused.

The basis of the ground is submitted that up to this time there is a licence for the customer to take the goods from the shelves and to take them to the cashier. It is also submitted that the act of stealing would not be complete until the goods had been taken past the cashier. Mr Owens on behalf of the appellant has referred to the appropriate authorities to show what the legal position is in respect of an ordinary and honest transaction within a supermarket. The first proposition is that the contract is not completed until the money is accepted at the cashier. The property in the goods would then pass. This proposition is established in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401. There the Court of Appeal agreed with the reasons of Goddard LCJ that there is no sale effected merely by the purchaser taking up the article and that there is no sale until the buyer’s offer to buy is accepted by the acceptance of money. The position that arises between the time the customer takes the goods from the shelf until he takes them to the cashier was referred to in *Martin v Puttick* [1968] 2 QB 82 at 89 where Winn LJ said:

"It is clearly, in my view, a licence, possibly custody subject to an overriding course of control and continuing right of termination remaining in the proprietor. At any rate no property has passed and no right has been conceded or granted by the proprietor to retain possession, exclusive possession, beyond the moment when the customer presents himself or herself to the cashier: and it is subject to a condition subsequent that any such possession shall terminate unless the amount which is found to be due is paid by the customer to the cashier."

I would consider such licence would not arise in the event of a person removing the goods from the shelf with an intention to take them out of the store without paying for them. Winn LJ before defining the legal position in the way I have set out referred to the fact that the customer would be holding the goods and carrying them to the cashier by permission of the proprietor. The proprietor would not by implication be giving any permission to a person who wishes to remove goods and not pay for them and there would be no consensus to establish any licence. To go to a greater extreme a person may enter the store with the intention of removing goods and not paying for them and in fact does that. Such person could not claim he was acting under any licence from the proprietor.

If a customer takes the goods from the shelf and at that time has no intention to pay for them and has an intention to remove them from the store other than past the cashier or if he has an intention to secret them in some way and take them past the cashier without paying for them, then it would be my view that he would have no licence. The owner of the goods would have no intention to be giving any person a licence to remove them from the store without paying for them and there would be no licence from the very start. If they were taken with a view initially to paying for them and then the intention was formed not to pay for them, then I would consider that any licence to further carry them has come to an end.

It is for these reasons that I consider that it is possible for a stealing to occur prior to the goods being taken past the cashier. It is necessary for there to be a taking and for there to be the fraudulent intent at the time of the taking. The proof of this fraudulent intent would negate the licence.

In *Kolosque v Miyazaki* (unreported NSWSC, Dowd J, 17 February 1995), Dowd J applied *Humes v Townsend* and held:

The nature of the consent implied by the system of display, with the customer having the right to pick up the goods and take them to a point of purchase, is not a consent to take the goods irrespective of the intention of the customer. Any evidence of any conduct which is inconsistent with the implied consent of the owner is therefore admissible as to the intention of the customer, thus breaking the terms of the licence which exists between the owner and that customer in respect of the particular item. If the customer’s intention at the time the goods were taken is dishonest, either because there was no intention to pay for the goods or there was an intention to damage the goods, any licence agreement is terminated. ...

It follows, therefore, that the licence granted by an owner to remove goods is broken if there is any action inconsistent with the licence allowing clothing to be removed for a fitting or to take goods to a cash register for purchase or lay-by. Any action which damages the goods, or removes them from a place to another part of the store, or where goods such as food may be consumed or damaged, are all inconsistent with the terms of the licence. A person who conceals goods by placing them in a pocket or concealing them in a bag, as against just placing them in a bag or trolley, can be adduced as evidence of an action inconsistent with the terms of the licence.

**Mistake**

The issue of whether an accused can be acquitted of a charge of larceny on the grounds that the goods were in fact given to them by the possessor with full consent or the alternative argument that such consent is vitiated by a fundamental mistake on the part of the person handing over the property has been an issue which has a long and controversial history in the common law. The most recent examination of the issue by the High Court was in *Ilich v The Queen* (1987) 162 CLR 110. Ilich was acting as a locum vet for Brighton. On Brighton’s return an argument ensured about the way in which Ilich had run the practice. On Ilich’s evidence, Brighton threw three bundles of money onto a table and told him to take them, which Ilich did. Ilich claimed that it was only later that he realised that he had been given too much money.

A majority of the High Court analysed the leading English and Australian cases on mistake in larceny and held that these cases demonstrated three different categories of fundamental mistake sufficient to vitiate consent to the passing of property for the purposes of larceny. These were:

- mistake as to the identity of the person to whom the money was delivered;
- mistake as to the identity of the thing delivered; and
- mistake as to the quantity of the thing delivered.

The Court held that the only mistake possible was that as to the quantity of money handed over. Wilson and Dawson JJ held:

13. The cases fall into two categories. First there are those, of which *Reg. v. Middleton* (1873) LR 2 CCR 38 is the principal decision, in which the person handing over the thing said to be stolen did so under a mistake which was known at the time by the person to whom the thing was handed. Cases in the second category, of which *Reg. v. Ashwell* (1885) 16 QBD 190 is the leading authority, occur where the thing said to be stolen was handed over under a mistake which was unknown at the time by the person to whom the thing was handed and was learnt by him only subsequently.
14. In *Middleton* the accused was handed by a post office clerk by way of withdrawal from a savings account an amount which was more than standing to the accused's credit in that account. At the time the clerk made the payment, he mistakenly referred to a letter which authorized the payment, but to another depositor. The accused was convicted upon trial, the case being reserved for the Court of Crown Cases Reserved where it was eventually heard by a Full Court of fifteen judges. By a majority of eleven to four the conviction was upheld.

15. In *Ashwell* the accused asked for a loan of a shilling and was handed by mistake, in the dark, a sovereign. The accused did not at first realize the mistake, but when he did some time later, he appropriated the sovereign. He was convicted upon trial but again a case was stated for the Court of Crown Cases Reserved. The fourteen judges (who included the trial judge) were equally divided and accordingly the conviction stood.

16. Many analyses of the judgments in these cases have been made, but it is sufficient for present purposes to observe that the decision in *Middleton* can only be explained upon the basis (somewhat of a fiction upon any view) that there was a taking against the consent of the owner at the time the accused received the money and that he acquired neither the right to possession nor ownership of it. The apparent consent of the clerk who paid the money was vitiated by his mistake. It may also be observed that it was the whole of the money which was held to be stolen, not just the amount by which the payment exceeded the money which was in the accused's account.

17. The decision in *Ashwell* must, we think, rest upon the proposition (difficult to accept as it is) that the mistake on the part of the person handing over the coin and on the part of the accused, meant that the accused, although he obtained physical possession of the coin, did not obtain possession of the sovereign until he realized that the coin was a sovereign. At that point he formed an intention to keep it and was held to have taken it without consent.

18. The cases of *Middleton* and *Ashwell* have received a measure of acceptance in England, although they have been the subject of considerable criticism. See M.R.E. Kerr, "The Time of Criminal Intent in Larceny" (1950) 66 Law Quarterly Review, p.174; R. Cross, "Larceny De Lege Lata" (1950) 66 Law Quarterly Review, p 497; R. v. Hudson (1943) KB 458; Russell v. Smith (1958) 1 QBD 643; *Moynes v. Cooper* (1956) 1 QBD 439. In Australia they have never been confirmed or adopted and the decision in *R. v. Goodrick* (1922) 18 Tas.LR 36 is clearly contrary to *Middleton*. See also *Reg. v. Wauchope* (1957) 2 FLR 191.

19. In *Reg. v. Potisk* (1973) 6 SASR 389 the accused changed some travellers' cheques into Australian currency at a bank. The teller applied the wrong exchange rate and gave the accused too much. The accused did not realize this until he got home and counted the money. He then decided to keep it. In the Full Court of the Supreme Court of South Australia, Bray C.J., with whom Mitchell J. agreed, found both *Middleton* and *Ashwell* distinguishable but would have declined to follow them in any event. The reasons which the Chief Justice gave for regarding both of those decisions as unsatisfactory are cogent and we should be inclined to agree with his view that they should not be followed. However, in this case, as in *Potišk*, there are important differences which make the English decisions clearly distinguishable and which render unnecessary any detailed discussion of the reasons in those cases.

20. Both *Middleton* and *Ashwell* have been treated, and in our view must be treated, as cases in which the mistake which was made was of a sufficiently fundamental kind to negate the apparent consent and to prevent ownership from passing. A mistake will be of that kind if it is in the identity of the transferee or as to the identity of the thing delivered or as to the quantity of the thing delivered. See Glanville Williams, *Textbook of Criminal Law*, (1978), p.779; Williams and Weinberg, *Property Offences*, 2nd ed. (1986), p.44; *Russell on Crime*, vol.2, 12th ed. (1964), p.1553; J.C. Smith, (1972) *Criminal Law Review*, pp.586-588. In those circumstances, and perhaps only in those circumstances, can it be said that the mistake is such that the transferor never really intended to deliver the thing transferred and so never gave consent to the transfer. *Middleton* may be regarded as a case of mistake as to the identity of the transferee: the clerk thought that the accused was the person referred to in the letter.
authorizing the payment. Less plausibly, Middleton may be regarded as a case of mistake as to the identity of the deposit: see (1972) Criminal Law Review, p.587. Ashwell may be regarded as a case of mistake as to the identity of the thing delivered: both the lender and the accused thought it was a shilling whereas it was in fact a sovereign. The third category - mistake as to the quantity of the thing delivered - requires in our view some qualification where the thing is money but may be illustrated by Russell v. Smith where eight sacks too many of pig meal were mistakenly delivered to the accused who appropriated them. He was convicted of theft.

21. Where there is a mistake which is not of a fundamental character it will not vitiate consent so that possession and ownership will pass in accordance with the apparent intention of the owner. Thus in Reg. v. Prince (1868) LR 1 CCR 150, where the cashier of a bank handed over money, intending to do so although deceived by a forged order, there was held to be no larceny. And in Lacis v. Cashmarts (1969) 2 QB 400 where the accused took goods from a self-service store and paid the amount which the manager read from the cash register, which was less than the price, there was held to be no larceny. Upon this view the decision in Reg. v. Gilks, which was made in reliance upon Middleton, was wrong and it has been criticized accordingly: (1972) Criminal Law Review, p 585 et seq.; G.F. Orchard, "The Borderland of Theft Revisited" (1973) New Zealand Law Journal, p.110.

22. In the present case there was no mistake as to the identity of the person to whom the money was delivered. There was no mistake as to the identity of the thing delivered, which was money. If there was any mistake it was as to the quantity of money delivered and it is therefore necessary to turn to the qualification of that category of fundamental mistake which we think must be made in the case of money.

23. In Potisk there was no mistake as to the quantity of money handed to the accused. The teller made a mistake in applying the wrong exchange rate but he intended to hand over the amount which he did. The case might have been decided simply upon the basis that there was no fundamental mistake to prevent possession and ownership passing, but Bray C.J. at p.401 adverts to the qualification which we have suggested saying that "... cases where ownership has been held not to pass, despite delivery, because of a mistake are cases relating to the title to specific chattels, and I doubt whether they can apply to delivery of money in circumstances like these". And at p.404 he refers to the "curious question" which would have arisen in Potisk if the accused had been guilty of larceny, namely, whether he stole the whole of the money delivered to him or only the amount which was in excess of the sum to which he was entitled in exchange for his travellers' cheques.

24. It is an error, as Lord Mansfield pointed out as long ago as 1758 in Miller v. Race (1758) 1 Burr 452, at p 457 (97 ER 398, at p 401), to treat money in the form of cash in the same way as other goods. Money in most circumstances cannot be followed, which is to say that property, or ownership, generally passes with possession. "It has been quaintly said, 'that the reason why money can not be followed is, because it has no ear-mark:' but this is not true. The true reason is, upon account of the currency of it: it can not be recovered after it has passed in currency": ibid. Money is, of course, capable of being stolen and if it is stolen, property in the notes or coins does not pass to the thief. But if the thief possesses the money into currency, which he may do by making payment with it, ownership will pass with possession notwithstanding the thief's lack of title providing the transaction was bona fide and for valuable consideration: Moss v. Hancock (1899) 2 QB 111; Banque Belge v. Hambruck (1921) 1 KB 321; Clarke v. Shee and Johnson (1774) 1 Cowp 197 (98 ER 1041). That is because of the doctrine of negotiability - and negotiability was first attributed to chattels in the form of money - which constitutes an exception to the common law rule that a man who has no title himself cannot pass title to another; nemo potest dare quod non habet: Banque Belge v. Hambruck, at p 329.

25. In the circumstances of this case this aspect of negotiability is of less importance - since Brighton had title in the money - than the rule that when money passes into currency property goes with possession. Whether money only passes in currency when it is negotiated, that is, when it is used for payment bona fide and for value, or whether money may pass in currency in other circumstances when it is not delivered in specie, is something which it is unnecessary to examine here. Definitions of currency tend to speak in terms of it being a medium of exchange,
but this nevertheless imports the notion of payment. See Moss v. Hancock at p 116; Mann, The Legal Aspect of Money, 4th ed. (1982), p 8. Upon any view money passes into currency when it is negotiated and in this case, upon the applicant’s version of the facts, the transaction in which the money changed hands was both bona fide and for value. He was unaware of the overpayment when it was made and consequently there was no reason to doubt the bona fide character of the transaction. Thus the notes or coins ceased to be the subject of specific title as chattels and passed as currency, that is to say, passed “from hand to hand in point, not merely of possession, but of property”: Sinclair v. Brougham (1914) AC 398, at p 418 per Viscount Haldane L.C. We do not think that it is possible to say that only the correct amount was paid for valuable consideration and that the amount of the overpayment passed hands for no consideration and hence as mere chattels rather than currency. Apart from the insuperable difficulty of identifying the notes or coins which constituted the overpayment, it is the transaction itself which characterizes the payment. The transaction between the applicant and Brighton was bona fide and for value. The payment, which was part of that transaction, was also of that character. It is not possible, in our view, to apportion the consideration to some of the chattels comprising the notes or coins transferred and not to others.

26. With goods other than currency, property does not pass with possession unless it is the owner’s intention that it should and it has been held (not without some difficulty) that it is possible to conclude in cases of overdelivery that appropriation of the whole of the goods involves the theft of the excess goods without any need to identify them. See R. v. Tideswell (1905) 2 KB 273; Pilgram v. Rice-Smith (1977) 1 WLR 671; (1977) 2 All ER 658. Cf. Lacis v. Cashmarts, at p 411. However where property passes with possession, as with currency, no such conclusion is possible in relation to an amount overpaid. There is, we should add, a civil action to recover money paid under a mistake of fact and equitable rights may arise. See Chase Manhattan v. Israel-British (1981) Ch 105.

27. The result is that in this case, even without rejecting Middleton and Ashwell, there was no mistake of a fundamental kind which would have operated to prevent ownership in the money passing at the time at which, upon the applicant’s evidence, it was handed by Brighton to the applicant. There was no mistake as to the identity of the transferee, there was no mistake as to the identity of the money and any overpayment, being in currency, did not prevent property in the whole amount being transferred to the applicant.

Note that while the extract begins with a categorisation of the cases based on the time at which the defendant was found to have discovered the mistake, this categorisation does not play a part in their Honours subsequent analysis.9

Deane J agreed with the analysis of Wilson and Dawson JJ and Brennan’s analysis was to similar effect. Brennan J did however appear to come to a different conclusion on the issue of the passing of property with currency.

14. When a person in possession of money in the form of currency hands it to another intending him to be the owner of it and the other receives it with the same intention, prima facie the other acquires ownership of the money. That is because currency, when it passes from hand to hand, transfers not merely possession of the notes or coins, but property in them: per Viscount Haldane L.C. in Sinclair v. Brougham (1914) AC 398, at p 418. But there are some exceptions to this general proposition. They inhere in the rule that a person who receives money in the form of currency in good faith and for valuable consideration acquires a good title to the money even though the person who gave him possession of the notes or coins had no title to them: Wookey v. Pole (1820) 4 B & Ald 1, at p 7 (106 ER 839, at p 841). The first exception is that a person who receives money in the form of currency without consideration acquires no better title than the person from whom the money was received so that even if the notes or coins are given to him with the intention that he should own them, the notes and coins

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9 The issue of the time at which the mistake is discovered does however play an important part in academic discussion of the issue, on the basis that those who know of the mistake at the time might be more culpable.
can be recovered from him in specie by the true owner so long as they are identifiable. Before money received without consideration has passed in currency an action may be brought for the money itself: per Scrutton L.J. in Banque Belge v. Hambrouck (1921) 1 KB 321, at p 329; and see Miller v. Race (1758) 1 Burr 452, at pp 457-458 (97 ER 398, at p 401). The second exception is that the owner of notes and coins may recover them from a person who has obtained possession of them in bad faith so long as the actual notes or coins can be identified: Clarke v. Shee (1774) 1 Cowp 197, at p 200 (98 ER 1041, at p 1043). On the applicant’s version of what happened, he received the money from the then owner, Brighton, in good faith - Brighton alone was responsible for the mistake in the amount he paid the applicant.

15. The prima facie conclusion that ownership of money in the form of currency passes when the person in possession hands it to another intending him to be the owner may be displaced in some cases where the intention is formed by mistake. In such cases the payer is entitled to recover it in specie before it is disbursed: Porter v. Latec Finance (Qld.) Pty.Ltd. (1964) 111 CLR 177, at p 183. But it is not every mistake which precludes the formation of the intention essential to the transfer of ownership of notes or coins. The mistake must be fundamental to the transaction. In Norwich Union Fire Insurance Society v. Wm. H. Price, Lt. (1934) AC 455, Lord Wright said (at p 463):

"It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic."

To determine whether a mistake is fundamental, one must properly identify the transaction and the relationship of the mistake to it: Porter v. Latec Finance (Qld.) Pty.Ltd., at p 187. When the relevant transaction is the transfer of possession or ownership of property, a fundamental mistake must relate to the knowledge of the owner of the property as to what he is doing, what the property is, and to whom he is transferring possession or ownership (to adapt the test applied by Nicholls C.J. in Goodrick). Of course, minds may differ on the character to be attributed to a particular mistake. Take Ashwell, for example. There the prosecutor, intending to lend Ashwell a shilling, gave him a sovereign by mistake. Ashwell thought it was a shilling but when he later discovered it to be a sovereign, he kept it for himself. The present relevance of the case is in the opinion of the judges that Ashwell fraudulently converted the coin, presumably on the ground stated by Cave J., at p.201, "as there was a mistake as to the identity of the coin no property passed". But it is at least arguable that the relevant transaction was not the loan of a shilling but the delivery of the coin the value but not the identity of which was mistaken. In Potisk, Bray C.J. observed (at p.395):

"... though there was no mistake as to the identity of the particular metal disc handed over, there was a mistake about its value and perhaps about its kind. A sovereign may be different in kind from a shilling. I think that some of the Judges thought it was."

16. On the applicant’s version of what happened, there was no fundamental mistake in this case. Brighton simply handed notes to the applicant in payment of what he owed. There was no evidence of Brighton being mistaken as to what he was doing, or what he was handing to the applicant or who the applicant was. The only mistake was as to the number or value of the notes needed to discharge the debt owed to the applicant. That was not a fundamental mistake: it did not vitiate Brighton’s intention that the applicant should have as his own the notes which Brighton put on the table in payment. When a debtor pays out money to discharge his debt, he has but one intention with respect to the money paid, namely, to transfer ownership in discharge of the debt. It is artificial to ascribe to a debtor an intention to transfer ownership of some only of the notes and coins he pays. In any event, when there is a commingling of the notes and coins in an overpayment, none is identifiable as a note or coin delivered in overpayment, and assuming all else in favour of the prosecution none could be identified as a thing which has been stolen: cf. Lacis v. Cashmarts (1969) 2 QB 400, at p 411.
In *Marshall v Szommer [1990] Tas SR 210* the defendant had been credited 10 times more money into his bank account than he had been entitled to for his weekly wages. Having drawn out his supposed wages he realised that the balance in his account was far in excess of what it should have been. He subsequently then withdrew the rest of the money in his account and spent it all paying urgent debts. The issue before the Full Court was whether or not this amounted to larceny on the defendant’s part. In order to so find, the court would have had to have decided that the bank’s teller had paid the money to the defendant under a fundamental mistake as to the defendant’s right to have that money, and that therefore that fundamental mistake would vitiate the apparent consent of the bank.

*Ilich v. The Queen (supra)* confirms that an apparent consent to the handing over of property may be vitiated if the handing over is done under a fundamental mistake. [The Court quoted Wilson and Dawson JJ. in *Ilich v. The Queen*]. See also the reasons for judgment of Brennan J. at pp.139,140.

In this case there was no fundamental mistake of the kind referred to in *Ilich v. The Queen* (supra). The bank’s agent intended to pass the property in the money to the respondent, he understood the nature of the transaction in which he was engaging, he was under no misapprehension as to the identity of the respondent, he knew that the property he was transferring was money and he was aware of the amount of money which he was handing over. Even assuming that the property the subject of the charge was taken by the respondent within the meaning of the Criminal Code, s.226(2), there was no evidence capable of sustaining a finding that the property was taken without the consent of the bank and there was thus no case to answer.

I reject the appellant’s submission made in the alternative that the respondent had a case to answer on the alternative charges of obtaining goods by a false pretence or dishonestly obtaining.

**Entrapment**

The requirement that the property be taken without the consent of the lawful possessor has important practical implications for anti-theft measures. If an employee is permitted to take property then clearly this is done with the consent of the employer, and the employee cannot be found guilty of larceny. On the other hand, there is no problem with the employer making it easy for the employee to steal the goods. The distinction is a fine one, but a crucial one.

In *R v Turvey [1946] 2 All ER 60*, one employee approached another employee with a plan to steal cutlery from a Ministry of Works depot. The second employee informed his superiors of the plan and his superiors told him to go along with the plan in order to catch the first employee. However as this involved the employer telling the second employee to give the goods to the first employee the Court of Criminal Appeal held that there had been no asportation without consent.

An old English case *R v Lawrance (1850) 4 Cox CC 438* sums the distinction up nicely. The facts in that case were that the accused was a tenant who wished to fraudulently alter the term of the lease. In order to so he approached the clerk of his landlord and asked his clerk to procure the deed for him so that he could make the alterations. The clerk, having informed the landlord, was instructed to go along with the scheme in order to catch Lawrance in the act of stealing the deed. They met and the clerk gave the deed to the accused. The court held:

I think it would be carrying the doctrine, as to larceny, to far to say, that in this case there is a sufficient taking proved. The deed is got out of the owner’s possession by his servant, and he, by the master’s consent, gives it to the prisoner. There is something more than rendering facility to the commission of the defence, for it appears probable that the deed was delivered in
to the prisoner’s hands. ....I shall, therefore, direct the jury that unless they are satisfied that the clerk did not deliver the deed in to the hands of the prisoner, it will be their duty to acquit him. If the deed was laid by the clerk on the table and taken up by the prisoner, then I think he might be found guilty.

The crucial distinction is whether the clerk actually gives the deed to the accused - in which case the property would pass with consent; or whether the clerk merely placed the deed on the table and thereby made it easy for the accused to himself pick up the deed - in which there would not have been any consensual passing of the property.

The Problems with Corporations and Directors in Relation to Consent

One peculiar situation that arises in corporate fraud in relation to larceny is the issue of one or two person family companies. In such situations it is often the case that the entire corporate entity is controlled by one person who is both the major shareholder and the Managing Director. In such cases, according to the organic theory of company law that person is the directing mind and will of the company. The problem that arises is that if they are such a directing mind and will of the company, how is it possible for them to steal from the company?

In *R v Roffel* [1985] VR 511 the Full Court of the Supreme Court of Victoria held that in such situations there could be no theft from the company. The decision is controversial and has been doubted in subsequent cases.

Roffel and his wife were the only shareholders and directors of Cresida Fashions Pty Ltd. Roffel was also the company secretary and had the authority to sign company cheques on his own. Following the destruction of the company’s assets by fire, Roffel promised to pay creditors from the insurance money. Instead he withdrew all this money by way of cheques payable to cash and a travel agency. He and his wife then travelled overseas and whilst travelling “lost” all the company’s records.

He was charged under the section 72 of the Victorian *Crimes Act* 1958 with stealing. That offence adopted the English *Theft Act* 1968 definition of stealing as dishonest appropriation. The decision of the majority followed the decision in *R v Morris* [1984] AC 320 that appropriation did not occur if the actions were done with the consent of the owner. *Morris* has since been overruled in England (see *R v Hinks* [2001] AC 201) but still appears to be good law in Victoria.

In *Roffel* Young CJ held:

That a company is a legal entity separate from its corporators has been trite law at least since *Salomon v Salomon and Co Ltd* [1897] AC 22. Thus there is no doubt that a natural person can steal from a company. Nor is there any reason in logic or in legal theory why a person should not be guilty of stealing from a company of which he was the dominant shareholder and director, although it will not often be possible to prove that he has done so. It is also true that a company which gives property to one of its shareholders or to one of its directors does not by that act alone, without more, commit any offence against the criminal law. Nor is a person who receives a gift from a company by that act alone, without more, guilty of theft from the company even if he owns almost all of the shares and is the governing director with plenary powers.

In the present case it is necessary to ask upon what act of appropriation the Crown relies to prove the theft. Since it is, in the four counts presently under consideration, the theft of money that is alleged, the Crown doubtless relies upon the receipt of the money from the company’s bankers as the act of appropriation. But where is the element of usurpation of the company’s rights in the act of receiving the money? The cheque was the company’s cheque, made payable...
to cash and in the possession of the applicant who was the de facto controller of the company. There was no evidence to suggest that the company did not intend the applicant to have the money and to use it for his own purposes. If the company decided to give the money to the applicant in order to defeat its creditors, that would be quite irrelevant. The motive of the company in making the gift could not convert the applicant's act in receiving the money into a usurpation of the company's rights. If it be assumed that the act of the company in giving the cheque to the applicant to enable him to obtain the money was beyond the powers of the company, that consideration would not turn the applicant's act of receiving the money into an act of usurpation of the rights of the company. The fact that the applicant was "the directing mind and will of the company" (see H L Bolton (Engineering) Co Ltd v T J Graham and Sons Ltd [1957] 1 QB 159, at p. 172, per Lord Denning MR) seems to me to be irrelevant. Though the applicant's purpose may have been the purpose of the company, to treat that purpose as attributable to him as the recipient of the cash which he is alleged to have appropriated seems to me to ignore the fact that the company is a separate legal person. Similarly I would regard the fact that it was ultra vires of the company to give the money to the applicant (if it be a fact) as equally irrelevant. If the act of the company were void and the company were able to recover the money from the applicant, it would be able to do so not because the applicant had stolen the money from the company but because he had as the directing mind and will of the company caused the company to apply its money in a manner or towards objects which the company had no power to entertain: cf Spackman v Evans (1868) LR 3 HL 171, at pp. 244-5. Thus even if the act of the company were void, the directing mind and will of the company still concurred in the applicant's receiving the money for his own benefit and thereby precluded his receipt of it from being an appropriation within the meaning of the Crimes Act. If this conclusion means that a person whom common sense would regard as a thief is not a thief in law, that result follows from the fact that the law has at least since 1897 treated a company as a legal person entirely separate from and, in law, independent of those who own it or who control or manage its affairs.

Brooking J dissented from this approach and disputed both the construction of the theft offence – arguing that a lack of consent was not necessary – and that the doctrines of corporate responsibility did not require consent to have been granted.

It was not until 2003 however that the issue was considered by the High Court in Macleod v R (2003) 214 CLR 230. Macleod was the only shareholder and only effective director of Trainex Pty Ltd, a company ostensibly formed to raise finance for films. The film financing scheme Macleod promoted through Trainex operated by way of deeds entered into between investors and Trainex. Under the terms of the deed, Trainex was to place investor's funds into a trust account from where it could be invested in securities authorised under the Trustee Act 1925 (NSW). Money was invested for the purposes of financing specific film projects. When sufficient money was invested to reach the specified minimum, the money was to be used to produce the film. Investing in the Trainex scheme appeared to have significant tax advantages. For an investment of $3000 investors were informed that they had incurred a tax-deductible expense of $10,000. From time to time investors also received false “income statements” that purported that films had been made and were profitable. However, as in a classic Ponzi scheme, no such profits were being realised and any “income” paid to investors was taken from the pool of investor funds.

The scheme attracted several thousand investors, and an amount of $6,000,000 was invested. Of this $718,249.27 was shown to have been invested in film making expenses.

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10 Named after Charles Ponzi, who ran gigantic frauds of this nature in the 1920's. The money from later investors is used to fund payouts to earlier investors. The schemes collapse when there is a drop in the amount of money flowing in from new investors.
More than $2,000,000 was applied for Macleod’s own interests, including property investment and loan repayment.

Macleod was convicted of a number of counts under s173 Crimes Act 1900 (NSW). That section is as follows:

**173 Directors etc fraudulently appropriating etc property**

Whosoever, being a director, officer, or member, of any body corporate, or public company,

fraudulently takes, or applies, for his or her own use or benefit, or any use or purpose other than the use or purpose of such body corporate, or company, or fraudulently destroys any of the property of such body corporate, or company,

shall be liable to imprisonment for 10 years.

Macleod argued that the finding of dishonesty against him could not be supported because the “victim” corporation had consented to his application of the property.

Gleeson CJ, Gummow and Hayne JJ pointed out that the relevant offence in Macleod was s173 and this was expressed in much broader terms than larceny or theft. They then held in relation to s173:

These reforms predated the emergence from the era of the joint stock company of a more fully developed understanding of the distinct legal identity of the corporation, as reflected in Salomon v Salomon & Co11. The scope and operation of the provisions necessarily move with those developments; their construction is informed by the proposition that a company has rights, interests and duties which differ from those of its directors, officers and members. The conduct or state of mind of the latter is not always to be attributed to the former; this is particularly evident upon an insolvent winding up. Indeed, the text of s 173 itself distinguishes between the director, officer or member’s "own use or benefit" and the "use or purpose" of the "body corporate, or company". The Full Court of the Supreme Court of South Australia referred to like considerations in holding that a person in dominant control of a company is capable of contravening the South Australian analogue of s 173 by fraudulently applying company property for purposes other than the purposes of the company (Attorney-General’s Reference No 1 of 1985 (1985) 41 SASR 147 at 152-154.)

"Where a company is accused of a crime the acts and intentions of those who are the directing minds and will of the company are to be attributed to the company. That is not the law where the charge is that those who are the directing minds and will have themselves committed a crime against the company."

His Lordship referred to Attorney-General’s Reference (No 2 of 1982). The Court of Appeal there answered in the affirmative a point of law, referred to it by the Attorney-General, whether a person in total control of a limited liability company (by reason of shareholding and directorship) is capable of stealing the property of the company within the terms of the statutory offence of theft.

The submission that the "consent" of a single shareholder company cures what otherwise would be a breach of s 173 should not be accepted. The self-interested "consent" of the shareholder, given in furtherance of a crime committed against the company, cannot be said to represent the consent of the company.

McHugh J held:

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11 [1897] AC 22.
Section 173 does not require an absence of the "victim's" consent.

However, Macleod claims that \textit{R v Roffel} is authority for the proposition that the consent of all the shareholders is a defence to a charge of fraudulent taking or application of a company's property. ...

The decision in \textit{Roffel} was met with "disbelief" from some commentators. To some extent, the Victorian courts have sought to distance themselves from the decision (see \textit{Feil v Commissioner of Corporate Affairs} (1991) 9 ACLC 811). In my opinion, the case was wrongly decided for the reasons given by Brooking J who dissented. His Honour held that an appropriation of property takes place where a person takes possession of another's property. His Honour thought that the consent of the owner was immaterial to whether an appropriation had taken place. He said:

"I see no sufficient warrant for holding that there is no assumption of the rights of an owner within the meaning of s 73(4) \cite{CrimesAct1958} if the act in question is authorized by the person to whom the property belongs. The clear words of s 73(4) are not to be cut down by reference to some notion said to be contained in the ordinary meaning of 'appropriates'. The suggestion that the word 'assumption' in s 73(4) connotes something like want of authority I find unpersuasive."

This Court rejected the Crown's application for special leave to appeal against the judgment of the Full Court. But that was because the prosecution had failed to establish the appropriate lack of company consent at trial.

Unsurprisingly, the House of Lords disapproved \textit{Roffel} in \textit{R v Gomez} where the issue was whether a charge of theft could be sustained against the respondent in circumstances where the owner of the relevant goods could be deemed to have consented to the goods being transferred. The House also disapproved the reasoning in its earlier decision of \textit{Morris}.

Lord Browne-Wilkinson said of that and similar cases:

"If the accused, by reason of being the controlling shareholder or otherwise, is 'the directing mind and will of the company' he is to be treated as having validly consented on behalf of the company to his own appropriation of the company's property. This is apparently so whether or not there has been compliance with the formal requirements of company law applicable to dealings with the property of a company ..."

\textit{In my judgment this approach was wrong in law ...} Where a company is accused of a crime the acts and intentions of those who are the directing minds and will of the company are to be attributed to the company. That is not the law where the charge is that those who are the directing minds and will have themselves committed a crime against the company ...

In my judgment the decision in \textit{R v Roffel} [and statements in other cases] are not correct in law and should not be followed." (emphasis added)

While Lord Keith of Kinkel said that the actual decision in \textit{Morris} was correct, he considered that it was "erroneous, in addition to being unnecessary for the decision, to indicate that an act, expressly or impliedly authorised by the owner could never amount to an appropriation". His Lordship said:

"[A] person who ... procures the company's consent dishonestly and with the intention of permanently depriving the company of the money is guilty of theft contrary to [the Theft Act]."

... I reject the submission that an officer of a company cannot be guilty of the fraudulent taking of a company's property if, as its sole shareholder, that person consents to the taking.

While such comments are strictly dicta, it seems clear that the High Court would overrule \textit{Roffel}. Similar comments were made by the NSW Court of Criminal Appeal.
Mens Rea

As larceny is a crime it requires more than just the mere act. A certain state of mind of the offender is also required. As with most criminal offences this is a subjective state of mind. In other words it must be proved that the accused themselves in fact had the requisite state of mind. Such a state of mind is determined, in some cases by confession, but in most cases by surrounding circumstances and evidence. In the following sections which deal with the elements of mens rea for larceny, it should always be remembered that the decision as to whether the accused has such a state of mind is a decision which is for the jury alone. As such it is a question of fact and not a question of law. The law merely posits the question which the jury must then decide on a factual basis.

Intention to permanently deprive the owner of possession

In every larceny the accused must have taken the property, not only without the consent of the owner, but also with an intention to permanently deprive the owner of possession of the property. The taking of the property is of course a deprivation of possession. The important issue is not that the property was taken, but that the deprivation is intended to be permanent. As a result, many accused will argue in their defence that they were “merely borrowing the property”, and had no intent to permanently deprive the owner.

*R v Holloway* (1948) 1 Den 370 is the classic statement of the need for an intention that is more than a mere trespass. In that case Holloway was a tanner paid on the basis of the number of skins he tanned and presented to his foreman. Skins tanned were stored in employee specific places to enable periodic accounting by the supervisor. Holloway broke into the tannery’s warehouse and moved skins tanned by another employee to his storage area so that he could then present these to the foreman for payment. Parke B held:

All the cases shew that if the intention were not to take the entire dominion over the property, that is no larceny. *R v Phillips and Strong*, 2 East, Pl. Cr. Ch16, s.98, is the earliest case on the subject, and there are others to the same effect. Then there is the case of *R v Webb*, 1 Moo. CC 431, which is precisely the same as the present case. Therefore the essential element of larceny is here wanting, viz., the intention to deprive the owner wholly of his property.

Borrowing and other mere trespasses

Sometimes the facts might suggest a mere temporary interference, amounting to a trespass but not the conversion needed for larceny. In a very early case, *R v Phillips & Strong* (1801) 2 East PC 662, the defendants took two horses from a stable in the middle of the night and rode them 30 miles to another where they took them to different inns. They left them there with the ostlers, saying they would return later. The defendants were caught 14 miles further on from the town, on foot. The judges are reported as saying that this was not larceny, but only trespass, as the jury had found that the defendants had no intention to change the property or make it their own but merely to save themselves labour in travel. In *R v Crump* (1825) 1 C&P 658, the thief used a horse to effect his escape and then turned it loose. This was considered not to be theft.

In *R v Addis* (1848) 1 Den 381, a similar horse borrowing case Atcherley Serjt was reported as holding:

If a person, without leave or authority, takes a horse for frolic or any purpose without intent to steal, he is not guilty of felony. This intent must be gathered from the circumstances, especially from the disposition to sell the animal. In this case the prisoner does not appear to have ever offered the horse for sale, but when he arrived at the inn at Bewdley, he had the horse fed, and then went to sleep elsewhere, and moreover, he returned to the neighbourhood whence he took the horse, and he was well known.
These cases could be described as horse joyriding. The modern equivalent involving cars is the subject of a separate statutory offence:

154A Taking a conveyance without consent of owner

(1) Any person who:

(a) without having the consent of the owner or person in lawful possession of a conveyance, takes and drives it, or takes it for the purpose of driving it, or secreting it, or obtaining a reward for its restoration or pretended restoration, or for any other fraudulent purpose, or

(b) knowing that any conveyance has been taken without such consent, drives it or allows himself or herself to be carried in or on it,

shall be deemed to be guilty of larceny and liable to be indicted for that offence.

(2) For the purposes of this section conveyance means any cart, wagon, cab, carriage, motor car, caravan, trailer, motor lorry, tractor, earth moving equipment, omnibus, motor or other bicycle, or any ship, or vessel, whether decked or undecked, used or intended for navigation, and drive shall be construed accordingly.

Borrowing fungibles

An intention to merely borrow fungibles such as money is not available as evidence that there is no intention to permanently deprive. This is because the actual coins or notes are not returned, merely their equivalent. This was emphasised in R v Williams [1953] 1 QB 660. In that case a husband and wife borrowed money from the till of a sub-post office of which the wife was postmistress. The jury found that they intended to return the money but only had an honest belief that they could return some of the money. They were nonetheless convicted of larceny. Lord Goddard held:

A great part of the discussion in the court below took place because the defence was submitting that, if the appellants intended to repay and had reasonable grounds for repayment, that would be an answer. We have to point out, as has been pointed out more than once in the course of the argument, that we are here dealing with the case of coins, and there is no question that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. Does it make any difference that they intended to replace them, which can only mean in this case that they hoped they would be able to replace them? It is one thing if a person with good credit and plenty of money uses somebody else's money which is in his possession -- it having been entrusted to him or he having the opportunity of taking it -- he merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to get. No jury would then say that there was any intent to defraud or any fraudulent taking, but it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future ...

The appellants intended to use the money for purposes different from those for which they were holding it and for which the persons who paid the money intended it to be used, namely, for paying the Postmaster-General for stamps or postal orders, and for purposes different from those which their employer (the Post-master-General) to their knowledge intended they should use it. Therefore, it seems to the court that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Post-master-General of the property in those notes and coins, and in so doing they acted without a claim of right and fraudulently because they knew they had no right to take the money which they knew was not theirs. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which at most can go to mitigation. It does not amount to a defence.
Therefore, the appellants' own evidence shows that they were guilty of the larcenies with which they were charged.

**Intent to return the property at a later stage**

An intention to eventually return the property has been removed as a defence under NSW law by s118 of the *Crimes Act 1900*.

**Intent to return property no defence**

118. Where, on the trial of a person for larceny, it appears that the accused appropriated the property in question to his own use, or for his own benefit, or that of another, but intended eventually to restore the same, or in the case of money to return an equivalent amount, such person shall not by reason only thereof be entitled to acquittal.

Its operation is explained by Barwick CJ in *Foster v The Queen (1967) 118 CLR 117*, a case where Foster had taken his friend's gun, allegedly to show his father.

Larceny under the Crimes Ordinance 1951 (A.C.T.), as under the Crimes Act, 1900 (N.S.W.) being undefined, is as under the common law. It involved an intention on the part of the applicant to assume ownership of the gun, to deprive Baker permanently of it, to deprive him of the property in it. I use these three expressions, which are several ways of establishing the same essential element of larceny, namely, the intention to appropriate the goods to himself.

To intend to deprive the true owner permanently of the possession of the goods is one form of the requisite intention. An intention to deprive him of his property in the goods is another, that is, an intention to appropriate the goods as distinct from merely to assume possession of them. Section 118 of the Ordinance does not deny the necessity for an intention in one of these forms to accompany the taking. It deals with the case of an accused who has appropriated the property and not of an accused who has only assumed possession of it. It merely ensures that the consequence of forming or having that intention is not defeated by an intention eventually to restore the property to the true owner. Thus, if the intention is to deprive the true owner of possession for a limited time, larceny is not made out. But if the intention of the taker is to exercise ownership of the goods, to deal with them as his own, an intention later to restore the property to the true owner. Thus, if the intention is to deprive the true owner of possession for a limited time, larceny is not made out. But if the intention of the taker is to exercise ownership of the goods, to deal with them as his own, an intention later to restore the property to the true owner.

The cases that Barwick CJ refers to as being overturned by s118 are cases in which the property was pawned by the defendant with the expectation that the goods could be redeemed and returned to the owner.12

Common law also recognises three exemptions to the strictures imposed by the decision in Holloway that the accused intend to “deprive the owner wholly of his property”. These are when the accused intends to exhaust the virtue or value of the property, change the

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12 In NSW it remains unclear to what extent the notion of “dealing with property as if it were his/her own” forms part of the law. On the one hand there is the statement of Barwick in *Foster* that an “intention to deal with them as his own” amounts to larceny despite an intention to return the goods later. On the other hand it is clear in NSW that a mere borrowing does not amount to larceny. Borrowing without permission is an action done regardless of the rights of the owner amount to an intention to permanently deprive.
nature of the property or ‘ransom’ the property back to the owner – often as part of a refund fraud.

**Exhausting the virtue of the property**

While some forms of borrowing may be for short periods of time and not harm or diminish the value of the property (such as borrowing a film to make an illegal copy of it, cf, *R v Lloyd* [1985] 1 QB 829) other “borrowings” may have a more substantially detrimental effect. A good example of this is the “borrowing” of a ticket. While the paper is returned after use, all the value has gone out of it. In *Beecham* (1815) 5 Cox CC 181 the accused worked as a porter for a railway station. One evening after work he took a number of first class tickets. In his defence he argued that he took them only as a joke, but that if he had intended to use them he intended that they be returned to the railway.

[Paterson J.] told the jury that if the prisoner took the tickets with intent to use them for his own purposes, whether to give them to friends, or to sell them, or to travel by means of them, it would not be the less larceny though they were to be ultimately returned to the company at the end of the journey.

**Changing the nature of the property**

Permanent deprivation of possession of the owner of goods can also include dealing with the property in such a way as to change the nature of the property. In *R v Smails* (1957) *WN (NSW)* 150, the accused was an employee of the NSW Railways. As part of his job he was required to live in a tent next to the railway lines he was working on. To make his life a little more comfortable he took a number of sleepers, split them down the middle, and used them as supports for a structure which he built next to his tent. As he had not removed the sleepers from the premises of the Commissioner for Railways, the court was asked to decide whether there had been any intention to permanently deprive the Commissioner of his property. The court held:

Here when the appellant took these sleepers they were railway sleepers, capable of use as such. After he had split them and otherwise cut the timber they were no longer railway sleepers. They were incapable, in that state of affairs, of being used as railway sleepers and they could never again be put together and used as the original sleepers could have been used. To all intents and purposes while he was living in this tent on the Commissioner's property, he had burnt these sleepers and destroyed them completely that would have been evidence from which an intent to deprive the Commissioner permanently of his property in the sleepers could be inferred. At the other end of hypothetical sets of circumstances might be the case where he had taken the sleepers, laid them on the ground for some purpose of his own and they had suffered no injury beyond a few minor superficial scratches. In such circumstances it might be arged that, although the appellant had taken the sleepers, there could not from that dealing with them be inferred an intention to deprive the Commissioner permanently of the property. They were still in existence as usable sound railway sleepers, the minor superficial scratches having no real effect on their use as such. In between those two extremes there may be an infinite variety of circumstances, and it is to the facts of user that attention must be paid to determine whether there can be found evidence of an intent to deprive the owner permanently of his property.

**Refund Fraud**

Larceny is also committed in circumstances of refund fraud. In *Lowe v Hooker* (1987) *Tas R* 153 the accused stole goods from certain stores and then attempted to return the goods and gain a refund for them. The court held:
In the present case, the intention at the time of taking was to use the property as the accused's own. The particular use in mind was to present the property as if it had been lawfully purchased and obtain a refund. When no refund was forthcoming, the property was retained. To put that another way, the property which the store keeper had in the goods, whether as true owner or possessor of goods on consignment, was destroyed and could not be regained, although a new property in them could be obtained by a payment of money.

In Glanville Williams' *Textbook of Criminal Law*, 2nd edn., p. 714, he describes this sort of case as one which comes under the "ransom" principle and he says that in the case of a person who, having taken another’s property, advises that other that he can have it back if he pays for it, the taking can be described as coming within the words "with the intention of permanently depriving the other of "without the assistance of any statutory guide to interpretation. The same opinion is apparent in Weinberg and Williams, *Australian Law of Theft*, p. 45.

An older version of this sort of larcenous behaviour is in what is known as “ringing the changes”. In *R v Greenaway* 1 CrAppR 31, Greenaway bought two pennyworth of tobacco using a half sovereign. This necessitated a large amount of change from the shopkeeper (9s 10d) and she left the half sovereign on the counter while she organised the change. Greenaway then asked her if he could convert the change that to a full sovereign by giving her another half sovereign and 10s. While the shopkeeper was occupied getting out a full sovereign he picked up the half sovereign on the counter that he had originally given the shopkeeper and tried to pass this off as another half sovereign from his pocket. He was found guilty of the larceny of the half sovereign; that is, in the act of picking it up and trying to give it to the shopkeeper again.

**Fraudulently**

Not only must the taking be with an intention to permanently deprive the owner of possession but there also must be some fraudulent intent. This is because the basic idea of a larceny is that it is a fraud against the true owner. The meaning of dishonesty at common law in Australia has now been defined by the High Court in *Peters v The Queen* (discussed in detail in the chapter on dishonesty). In *Macleod* a later decision of the High Court applying Peters to s173 a fraud offence aimed at corporate officers, it was held that fraudulence and dishonesty are to be seen as synonymous. Consequently the decision of the High Court in *Peters* is direct authority.

Thus the test for fraudulence is now whether “ordinary, decent people” would regard the taking of the property without consent as dishonest.

The leading NSW case on the role of fraudulently in larceny prior to *Peters* was *R v Weatherstone* (1987) 8 Petty Sessions Review 3729. It would appear to be a complementary authority to *Peters*. While *Peters* deals with the appropriate test for determining dishonesty, *Weatherstone* deals with the requirement that there be findings of fact to which such a test can be applied.

In *Weatherstone* the accused had taken welding rods owned by Kempsey Shire Council with the intent of using them to repair local tennis court fencing. The tennis courts were owned by the Council. He had taken the rods without permission, and as he intended to melt them in welding the fence would have permanently deprived the Council of them (following the analysis in *R v Smails* discussed above). However his defence was that he had not acted fraudulently:

Fraudulent intent, or moral obloquy as it has been described in a more recent English case, plainly was present in *Regina v Smails*. In the present case, however, there is no finding of fact of the presence of moral obloquy or dishonesty. The question accordingly arises whether, without such a finding, the appellant can be held guilty of stealing.
In Regina v Feely [1973] QB 530 the Court of Appeal was considering the application of the Theft Act 1968 to a particular set of facts that threw into focus the statutory requirement of proving, that the act had been done dishonestly. Insofar as Regina v Feely is a decision on the significance of the word “dishonestly” it is, of course, to be recognised that it is a decision based on the recent English legislation. In the course of that judgment however their Lordships in that case stated at p 539:

“In our judgment a taking to which no moral obloquy can reasonably attach is not within the concept of stealing either at common law or under the Theft Act 1968.”

It will be noted that in the passage cited from the judgment of the Chief Justice in Regina v Smails it was recognised that an element of the offence of larceny was that the taking was wrongful. That this concept underlies the offence of larceny has long been recognised at common law. The element of dishonesty might be met by proving in a particular case that the intention was one to advantage the taker in a personal sense.

At the same time it must be recognised that the element of personal advancement is not in itself an essential ingredient in larceny. It may, I repeat, be a factor or indeed that only factor which in a given case established the wrongfulness, the moral obloquy, the dishonesty or the relevant guilty intent, however it be expressed, which is the ingredient of larceny.

In Rex v Cabbage reported in Russell & Ryan’s Reports. (1815) 294: 168 ER 809, the headnote reads:

“To make a taking felonious it is not necessary that it should be done lucri causa; taking with an intent to destroy will be sufficient to constitute this offence, if done to serve the prisoner or another person, though not in a pecuniary way.”

The judges by majority held at (page 293);

“It is not essential to constitute the offence of larceny, that the taking should be lucri causa; they thought a taking fraudulently, with an intent wholly to deprive the owner of the property sufficient.”

A case which is more directly in point is Regina v Richards (1844) 1 Car & K 532; 174 ER 925. It will be sufficient for present purposes to read the headnote:

“A. was supplied with a quantity of pig-iron by B & Co, his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace and became puddle bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B & Co, which was not pig-iron; the value of the axle to B & Co was 7s., but the gain to the prisoner by melting it and thus increasing the quantity of metal which ran from the furnace was 1d: Held, that if the prisoner put the axle into the furnace, with a felonious intent to convert it to a purpose for his own profit, it was a larceny.”

It is to be observed in that case that the element of personal profit was recognised as a necessary ingredient in the offence of larceny. But this is not to be understood as establishing that personal profit is always an essential ingredient. Rather it establishes that the element of personal profit meets the dishonesty which is the true prerequisite amongst the elements going to make up larceny. Personal profit is but a species of the genus dishonesty.

The earlier decision of Cabbage, to which reference has been made, is another instance of the proper relevance of personal profit within the basic ingredients going to make up the offence of larceny.

In the present case there was no finding whatever of any fact which would entitle the conclusion to be reached that an element of moral obloquy or dishonesty had entered into the appellant’s taking of these welding rods. It may have been an unauthorised use of them on his part, they being intended by the Council for other, perhaps more specialised, use. As an employee of the Council a mere unauthorised use by the appellant would not necessarily import a dishonest act on his part.
It should be acknowledged that there is material in the depositions which is not reflected in the findings of fact and which was not litigated in the District Court which could point fairly strongly towards the presence of the requisite element of moral obloquy but the fact is that no such finding of fact has been made or presented to us in the stated case.

In the absence of a finding meeting this particular requirement of the offence of stealing, I am of the view that the mere fact that question (a) is to be answered in the Crown’s favour, that is to say that was an intent to deprive the Council permanently of its property, is not sufficient to establish that the crime of stealing was in fact committed.

Claim as of Right

In addition to the requirement that the taking be dishonest it must also be a taking that is an action done without any belief in a claim of right to the property. Claim of right is a “defence” that is available to all property offences and is discussed in the chapter on Dishonesty and Claim of Right.

For present purposes though two points should be made. Although in most cases a dishonest act is one done without claim of right, the two are separate elements of larceny and both must be proved by the prosecution (but cf the approach taken by the High Court in Macleod on the role of claim of right in fraud). Secondly, acting without a claim of right is an element of the offence and must be proved by the prosecution. There is no requirement that the defence satisfy any evidentiary burden as is the case with defences such as self defence. However, if the claim of right is not raised by the defence, then the prosecution are in practice not required to prove anything as the point is not in issue.

Mens rea existing at the time of taking.

A final requirement for a finding of larceny is that the mens rea of a fraudulent intention to permanently deprive must have been present at the same time that the actus reus occurred. This rule means that if a person innocently takes the goods, and then only later decides to keep them dishonestly that cannot constitute a larceny. These issues arise most often in finders cases.

Larceny by finding

In R v Thurborn (1849) 1 Den 387; 169 ER 239, Thurborn found a bank note on the highway and picked it up. The next day he became aware of the true owner of the note but still decided to keep it. He was held to be not liable for larceny because at the time that he picked up the note he did not have any fraudulent intention.

To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost; that is that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them ... It appears, however, that goods which do fall within the category of lost goods, and which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or if there is any mark upon them, presumably known by him, by which the owner may be ascertained ... Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost; because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict ...

The result of these authorities is, that the rule of law on this subject seems to be, that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them, that the owner cannot be found, it is not larceny. But if he takes them
with a like intent, though lost, or reasonably supposed to be lost, but reasonably believing that
the owner can be found, it is larceny.

In applying this rule, as indeed in the application of all fixed rules, questions of some nicety
may arise. But it will generally be ascertained whether the person accused had reasonable
belief that the owner could be found, by evidence of his previous acquaintance with the
ownership of the particular chattel, the place where it is found, or by the nature of the marks
upon it. In some cases it would be apparent, in others would appear only after examination.

It would probably be presumed that the taker would examine the chattel as an honest man
ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might
conclude that he took it, when he took complete possession of it, *animo furandi*. The mere
taking it up to look at it, would not be a taking possession of the chattel.

To apply these rules to the present case; the first taking did not amount to larceny, because
the note was really lost, and there was no mark on it or other circumstance to indicate then
who was the owner, or that he might be found, nor any evidence to rebut the presumption that
would arise from the finding of the note as proved, that he believed the owner could not be
found, and therefore the original taking was not felonious; and if the prisoner had changed the
note or otherwise disposed of it, before notice of the title of the real owner, he clearly would
not have been punishable; but after the prisoner was in possession of the note, the owner
became known to him, and he then appropriated it, *animo furandi*, and the point to be decided
is whether that was a felony.

Upon this question we have felt considerable doubt.

If he had taken the chattel innocently, and afterwards appropriated it without knowledge
of the ownership, it would not have been larceny, nor would it, we think, if he had done so,
knowing who was the owner; for he had the lawful possession in both cases, and the
conversion would not have been a trespass in either. But here the original taking was not
innocent in one sense; and the question is, does that make a difference? We think not,
it was punishable as we have already decided, and though the possession was accompanied by a
dishonest intent, it was still a lawful possession and good against all but the real owner, and the
subsequent conversion was not therefore a trespass in this case more than the others, and
consequently no larceny.

We therefore think that the conviction was wrong. 13

Parke B’s judgment demonstrates the expanding approach to larceny the common law
was developing in this period. Immunity from larceny is limited to finders of lost property,
defined as goods that are deliberately or practically abandoned (in the sense that the owner
will never find them). But the state of mind of the taker is also employed by Parke B to limit
the scope of the exception for finders. Parke B holds that, even if the property is lost, a
person who takes the property commits larceny if they believe there is any way by which the
taker could have returned the property to the owner. Whether such a belief was in fact held
may be determined by the jury by assessing what a reasonable person would believe in such
circumstances.

More recently in *Thompson v Nixon* [1966] 1 QB 103 the defendant, a police officer, had
found a bag of feeding pellets. He initially intended to attempt to find the owner, but later
decided to keep them for himself. Because of the problems of *Thurborn’s* case, one
question on appeal was whether his initial possession constituted a bailment and whether
he could therefore be convicted of the offence of larceny by bailee. The court held:

13 Similarly in *R v Glyde* (1868) LR 1 CCR 139, Glyde found a sovereign on a road and when later asked by its owner if he had
found it, denied finding it. He was acquitted of larceny as his original taking had been innocent. This was due to the fact
that he could have had no way of knowing at that time whose sovereign it was.
Turning now to authority, the present case falls four square within the decision in 1873 of *R. v. Matthews* (1873), 28 L.T. 645; 12 Cox, C.C. 489. That case came before the Court of Crown Cases Reserved in which there were such eminent exponents of the common law as Bramwell, B., and Blackburn, J. It related to certain heifers, and on a special verdict of the jury it was found first that, at the time when the prisoner took the heifers, he had reasonable expectation that the owner could be found, and that he did not believe that the heifers had been abandoned by the owner; secondly, that, at the time of finding the heifers, the prisoner did not intend to steal them, because the intention to steal came on him later, and, thirdly, that the prisoner, when he sent the heifers away, did so for the purpose and with the intention of depriving the owner of them, and did intend to appropriate them to his own use. In relation to those facts, the judgment of Bovril, C.J., giving the reasons for holding the prisoner not guilty contained the following passage:

"The jury have found that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. But at the same time they have found that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequently to the first interview with Stiles. That being so, the case is indistinguishable from *R. v. Thurborn* (1849), 1 Den. 387 and the cases that have followed that decision. Not having any intention to steal when he first found them, the presumption is that he took them for safe custody and unless there was some equivalent to a bailment afterwards, he could not be convicted of larceny."

That case having been quoted in the text books ever since, no writer has ever suggested that it was bad law. Moreover, the view taken in it corresponds with that of many learned authorities as to what in law constitutes a true bailment as opposed to a quasi bailment. Dealing as we are today with a statute that affects the liberty of the subject, it does not seem to me that it is permissible to adopt a different construction of the relevant words to that which has so long stood as law, and now for the first time in effect to construe them adversely to the appellant.

**Proving a dishonest intent in larceny by finding**

A good example of the tensions in the individual vs community understanding of dishonesty that are clearly at the core of the compromise test in *Ghosh* (discussed in the Dishonesty and Fraudulence chapter) can be seen in the case law on “larceny by finding”. Is a person who finds “lost” property and keeps it only dishonest if they deliberately intend to ensure that the owner can never recover the property? Or is it dishonest if a person fails to be a “good citizen” and make inquiries about the owner?

In *McDonald* [1983] 1 NSWLR 729 the NSW Court of Criminal Appeal appears to have elevated the reasonable person test for dishonesty that Parke B says a jury might use into a de facto rule of law. McDonald had appropriated a camera he had found hanging on a fence.

The finder’s belief, in our view, is to be inferred from the facts and circumstances surrounding the finding and the taking of the goods, and in this respect regard may be had not only to what the finder does in relation to the goods but also what he does not do that might reasonably be regarded as consistent with the actions of an honest man finding goods. Did the finder G examine it closely to see if it gave any clue to its owner by name tag or otherwise? What avenues were reasonably open to the finder to locate the owner? A person finding goods may be taken to know that the person who has lost those goods may well retrace his steps with a view to recovering them, and so the leaving of the finder’s name and address with someone at the place of discovery may be one means of locating the owner. It is common knowledge in our community, and the finder would know, that the police will receive lost property handed in and take care of it and accordingly the finder would think that the loser might make an inquiry of the police in the area where he believes he may have lost his property. It is common knowledge that newspapers publish “lost and found” columns. These and perhaps other
considerations would ordinarily be present to the mind of an honest person finding property in a suburb of Sydney. Each case must be looked at according to its own facts, and the place where the property is found and the nature of the property will, in most instances, readily indicate the avenues that are reasonably open to find the owner. In R v Weston [1927] SASR 439, Angas Parsons J delivering the judgment of the court said (at 441, 442):

“The jury could infer that an honest man picking up these things would understand that they were not abandoned and were of value, and that inquiries would probably be made through the ‘Lost and Found’ advertisement columns of the daily newspapers, and he would search for such an advertisement, and he would unequivocally admit that he found the articles. On the other hand, a man’s felonious intention might be inferred through his not searching for advertisements, his keeping the goods for so long a time that notice of their loss would probably have been forgotten - that is temporarily secreting them - and then telling contradictory stories how he came by the goods.”

To the same effect were the observations of Mayo J in Feist v Bonython [1944] SASR 176, at 182, when his Honour drew attention to the likely mental processes of the finder of goods:

"In the first place I do not think it necessary to prove a dishonest intention. nor a belief in the finder that the owner can be located, at the time of finding, unless, of course, as may usually be the case, the taking quickly follows upon finding. Comprehended in the ‘finding’ are the circumstances, including the condition of the article, when it comes to the notice of the finder. The inferences, that he will be presumed to have drawn therefrom as to the mode whereby the article came to be in that spot, may to some extent be fairly obvious. If the chattel be of a kind that may be readily identified, and of value, and if the circumstances suggest accidental loss or escape from custody or control, the presumption may be, that these features did not escape the finder."

Applying the considerations above mentioned to the facts of the present case the position is as follows: the camera was a chattel of a kind that could, in all probability, readily be identified by its owner and was of such a value that it was not likely that it would have been abandoned by its owner. It was open to the appellant to have gone into the house on whose fence it was hanging and to have informed the occupant there of the discovery he had made, and to have left his name and address; he may have reported its discovery to the nearest police station; he may have watched the "lost and found" columns in a daily newspaper circulating in the area. He did none of these things. He did not even examine the camera or the case for the name of the owner before making up his mind to keep it. He contented himself with an inquiry from a man standing in a yard next door and having been told by that man that it did not belong to him, he there and then formed the intention to keep it. It might be thought that such a state of affairs is so far out of accord with the actions of an honest man that an inference can readily be drawn that the appellant believed both that it had not been abandoned and that if inquiries were made the owner could be found. It is our view that a tribunal of fact could conclude beyond reasonable doubt that the appellant was guilty of larceny ...

Although his failure to examine the camera case for identification was certainly persuasive evidence of the defendant’s actual state of mind, many of the other considerations to which the court draws attention suggest that, in practice, the jury should be more concerned with whether the defendant took reasonable steps to find the owner than whether they believed that the owner could be found – which is the formal legal test. In essence, the court in MacDonald saw the criminal offence of larceny as a blanket guarantee against dishonest interference with assets, to the neglect of other forms of regulation, such as civil law remedies.

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**The innocent finder who later decides to keep the property**

As Parke B noted in Thurborn, the fact that larceny is a crime based on the unlawful taking of possession from another meant that:

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If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. (at 397)

However, in the subsequent case of Riley (1853) Dears 149; 169 ER 674, an exception was created to this rule. Riley had left some black-faced lambs in a neighbour’s field where they had mixed with the neighbour’s white-faced lambs. The next morning Riley had driven away his own lambs and due to the mist had also unknowingly included one of his neighbour’s lambs. He later discovered this and sold the neighbour’s lamb. Parke B (with whom the other judges concurred, Pollock CB delivering a judgment to similar effect) held:

The original trespassing was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along … and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent that becomes a felonious trespass. (at 157)

The driving away of his neighbour’s lambs, though unintentional, was seen to be an unlawful interference with the property and thus a trespass. This finding was despite the court’s acceptance that Riley did not know that he had custody of the lambs. From a more modern perspective, without this knowledge the court should not have made a finding of trespass. To explain the finding the fiction of a deemed knowledge developed, described as a “continuing trespass”.

Early Australian cases took a slightly different approach to the particular problem of straying cattle and sheep, holding that where they joined a flock or a herd being driven by the defendant, without his knowledge, they were not in his possession. As a result, he could take possession with mens rea upon realising their presence, and consequently be guilty of larceny (Finlayson (1864)3 SCR (NSW) 301; Venables (1908) 8 SR (NSW) 612, followed most recently in Buttle (1960) 77 WN (NSW) 154).

Reconciling the decisions in Thurborn and Riley is difficult if not impossible. One less than successful attempt to explain the differences between Thurborn and Riley was made in R v O’Brien (1921) 21 SR (NSW) 136:

Where the accused person has found the article his original taking of the article away from where he finds it may be quite free from any trespass against the rights of the real owner, because he may have taken it for the purpose of discovering who the real owner is and restoring it, or it may have been an act of criminal appropriation in the first instance, because there and then he might have dishonestly appropriated it to his use.

In Minigal v McCammon (1970) SASR 82 Bray CJ also attempted to reconcile Thurborn and Riley. The defendant had picked up a wallet on the floor of the TAB while very drunk and had claimed to have only remembered he had it a few days later.

The learned Special Magistrate was of opinion that there was no larceny on 25th April because no animus furandi: no larceny on 27th April because though the animus furandi was then present, it was not contemporaneous with the taking (the learned Special Magistrate says “finding” but it is clearly the “taking” which is relevant).

This case confronts us with many difficult and contested questions of law relating to the finding of lost goods, the definition of lost goods, the meaning of “taking” in the law of larceny, the necessity for the taking and the animus furandi to be contemporaneous, and the circumstances when possession of a receptacle involves possession of its contents. I think, however that I can decide it on a comparatively narrow ground.

There are two principles which seem to me to be indisputable, and the difficulty in this case arises from their inter-relationship. One is that he who finds and takes possession of lost goods is not guilty of larceny if at the time of taking he either intends to keep them for the true owner.
or believes that they have been abandoned or that the owner cannot be found, and it does not matter that he subsequently changes his mind and decides to appropriate them, even after discovering that they have not been abandoned and that the owner can be found (R. v. Thurborn; Kenny, Outlines of the Criminal Law, 19th ed., (1966) pp. 288-289; Russell on Crimes, 12th ed., (1964) pp. 1009-1010). The other is that if the original taking is a trespass, or it might be better to say, is tortious, the subsequent dishonest appropriation will be a larceny despite the general rule that the animus furandi must exist at the time of taking (R. v. Riley; R. v. O’Brien; Ruse v. Read; R. v. Kindon). This has been said to be an anomalous rule and the invention of the judges in Riley’s Case. See e.g. Kenny, op. cit., pp. 310-311. But I think it is now firmly established.

How then are the two rules to be reconciled? Is it to be said that the honest finder who subsequently becomes dishonest does not commit a trespass when he takes the goods? Or is the case of the finder an exception to the rule in Riley’s Case? The finder who is honest at the time of taking, as I have just remarked, falls into two classes, the finder who takes intending to keep for the true owner and the finder who takes believing that the thing has been abandoned or the owner cannot be found. With regard to the first class, I think it is clear that there is no trespass because the owner is deemed to consent to the finder saving the thing for him (Russell on Crimes op. cit. at p. 1010; Kenny, op. cit. at p. 288). The authorities cited for that purpose in footnote 73 in Russell are three cases from the Year Books which I have examined to the best of my ability (the date of the third case is wrongly given in footnote 73. it should be 1505, not 1535). They seem to bear out the proposition. In the second case, for example. (1484) Y.B. 2 Ric. 3 Mich. pl. 39, it is said at the end that the taking of goods in jeopardy to save them is a justification to an action for trespass or detinue. This accords with the general principle enunciated in later cases that to take possession of another’s goods without his consent, when this is reasonably necessary to save them from loss or peril, is justifiable and no trespass (Kirk v. Gregory; Proudman v. Allen. So in Isaack v. Clark it is said by Sir Edward Coke that the finder commits no conversion by keeping the goods for the true owner and even by refusing to deliver them to the true owner until the latter proves his title. He says:

"It is the law of charity, to lay up the goods which do thus come to his hands by trover, and no trespass shall lie for this; but where one takes goods, where there is no such danger of being lost, or finds them before they are lost, otherwise it shall be;"

Sir Edward Coke is thinking throughout, in my view, of the honest finder in the first sense, namely the man who intends to keep the goods for the true owner.

What, however, of the original honest finder in the second sense, the man who thinks the goods have been abandoned or that the owner cannot be found? Does he commit a trespass when he takes the goods? The text writers place his immunity on the ground that he takes under a claim of right. (Kenny, op. cit., p. 288; Russell, op. cit., p. 1010; R. v. Reed). This, however, hardly seems enough to prevent the original taking from being a trespass when the owner has not abandoned the thing at all; there is surely no implied consent by the owner except to the taking of the thing into safe custody for him. Yet even if the finder subsequently appropriates the thing after he has found out that the true owner can be discovered and that there has been no abandonment, when it would hardly seem that any claim of right could continue to exist, he is clearly enough saved by his original intention at the time of taking (Thurborn’s Case, R. v. Preston; R. v. Christopher; R. v. Glyde ). In many, perhaps most, cases the intention to appropriate will be simultaneous with the original taking and the point will not arise but this is not always so. Cf. Thurborn’s Case, Preston’s Case and Christopher’s Case.

Nevertheless, as I have said, the rule laid down in Riley’s Case is too firmly established now for us to overturn it. Thurborn’s Case was referred to in that case. Pollock C.B. quotes the words of Parke B. in Thurborn’s Case which include the case of the finder in the second sense who thinks the owner cannot be found: yet when he comes to lay down the principle himself, he seems to have in mind only the honest finder in the first sense who intends at the time of taking to keep the thing for the owner. He says:
“It may reasonably be said not to be a violation of any social duty for the man who finds a lost article to take it home for the purpose finding out the true owner; and if he does this honestly in the first instance, and afterwards, though he may have discovered the true owner, is seduced into appropriating it to his own use, he is not guilty of larceny, though he does wrong.”

The immunity of the finder who thinks at the time of taking that the owner cannot be found, and subsequently appropriates the thing after discovering that he can be, must either overturn the rule in Riley’s Case altogether or be regarded as an exception to it. It cannot, as I have just said, overturn it. It must therefore be an exception to it.

For a more creative attempt to overcome this problem see the judgment of Wells J in Minigal. His approach was not accepted by the other judges.

**Fraudulent appropriation**

As a result of the apparent contradiction between Thurborn and Riley the NSW Crimes Act contains s 93J, s124 and s527 which overcome the contradictions to some extent.

**93J Property previously stolen**

Where on the trial of a person for any offence which includes the stealing of any property it appears that the property was, at the time when it was taken by the accused, already out of the possession of the owner by reason of its having been previously stolen, the accused may be convicted of the offence charged notwithstanding that it is not proved that the taking by him or her amounted to an interference with the right to possession of, or a trespass against, the owner.

**124 Fraudulent appropriation**

Where, upon the trial of a person for larceny, it appears:

(a) that the person had fraudulently appropriated to his or her own use or that of another, the property in respect of which the person is indicted, although the person had not originally taken the property with any fraudulent intent, or

(b) that the person had fraudulently retained the property in order to secure a reward for its restoration,

the jury may return a verdict accordingly, and thereupon the person shall be liable to imprisonment for two years, or to a fine of 20 penalty units, or both.

**527 Fraudulently appropriating or retaining property**

Whosoever:

fraudulently appropriates, to his or her own use, or that of another, any property belonging to another person, although not originally taken with any fraudulent intent, or fraudulently retains any such property in order to procure a reward for its restoration, shall, on conviction before two Justices, be liable to imprisonment for six months, or to pay a fine of 5 penalty units, or both.

Sections 124 and 527 cover the same area and so give prosecutors flexibility in charging either an indictable or summary offence.

**Procedural Aspects: Persons unknown**

It is possible to charge a person with larceny of goods from persons unknown, but there must be evidence that the goods did in fact belong to someone.
In *Anglim and Cooke v Thomas* [1974] VR 363 at 374 Harris J noted:

Proof of larceny was one element of this charge and there are well-established principles of law relating to the charge of larceny which control the significance of the proof that the property stolen was the property of a person. The information may lay the property in a specific person, or it may lay the property in persons unknown. If the property is laid as being the property of a person named, then there must be, at all events, some evidence to show that that named person was the owner of the goods which are alleged to have been stolen. If the property is alleged to be the property of persons unknown, then the evidence must show that the Crown is unable to ascertain who was the owner of the goods. These principles are to be found set out, so far as Australia is concerned, in an early decision of the Full Court of the Supreme Court of New South Wales. The case is *R v Isaacs* (1884) 5 LR (NSW) 369. The relevant passage is in the judgment of Martin CJ (at p. 372) where he said:

"It has always been the law, and is one of the things essential in cases of larceny, that the ownership of the property stolen should be proved. If, at the trial, it were shown that the goods stolen were the goods of A., instead of being the goods of B. as charged, an amendment of the information could be made. But here no such amendment was applied for. The prisoner was found guilty of receiving the goods, knowing them to be stolen, and that being so, the question is whether there ought to have been a conviction, there being no proof whatever as to whom the goods belonged. An information charging the prisoner with receiving goods the property of some person to the Attorney-General unknown, would have sufficed; but it would not have sufficed if it turned out that the owner was known. It is an essential thing to show that they were either the property of a person unknown, or of some person named."

This case has the authority of the High Court, for it was specifically approved in *Trainer v R* (1906) 4 CLR 126 especially at 132-4.

In *Trainer v R* Griffiths CJ also issued the following caution:

The foundation of the charge of stealing is that the property in question is stolen property. ... The foundation is not that it is not the property of the accused, but that it is the property of someone from whom it has been feloniously taken. A person is not called on to give an account of how he became possessed of his own property. If it does not appear whether the property belongs to the prisoner or not, then you cannot draw any inference from his refusal to give an account of it. If the man gives a false account of it, and the account is proved to be false, how does the case stand then? You know nothing. The only account given is untrue, and you know nothing about it. That reasoning cannot be evaded merely by alleging that the property is that of some person unknown. As was pointed out by Sir Matthew Hale, the stealing must be first proved.

See also *R v White* (1783) 1 Leach 252; *R v Flood* (1869) 8 SCR (NSW) (L) 299; *R v Fitzsimmons* (1899) 20 LR (NSW) 42; *R v Joiner* (1910) 4 CrAppR 64; *R v Hempenstall* [1937] St R Qd 343; *R v McCoy* [1938] St R Qd 249; *R v Thompson* (1947) 47 SR (NSW) 466; *Noon v Smith* [1964] 3 All ER 895

This traditional common law attitude stands in stark contrast to the approach taken in the goods in custody offences discussed in the Receiving and Goods in Custody chapter.
One of the recurring aspects of property offences is that the mens rea of particular offences requires that the accused have acted either fraudulently or dishonestly. The meaning of these phrases has become controversial in recent years and there is currently a degree of uncertainty as to the exact meaning of the terms. It is therefore important to outline the various points of view. “Dishonesty” and “intent to defraud” have often been held to have the same meaning as “fraudulently” \((R v \text{ Glenister } [1980] 2 \text{ NSWLR} 597)\), though there may be some differences as yet unexplored by the case law.

At common law the term “fraudulently” was subject to conflicting authority, some cases suggesting that it requires a degree of moral blameworthiness, some arguing it means no more that a lack of any belief in a right to the property. In 1968 the English Theft Act replaced the concept of fraudulence with the concept of dishonesty, on the basis that although the words meant the same thing, jurors could understand dishonesty more easily. A series of English cases then examined the meaning of dishonesty and came to the conclusion that it had an ordinary everyday meaning that did not need to be explained to the jury. For a full history of these meanings in theft see Alex Steel, *The Meanings of Dishonesty in Theft* (2009) 38 Common Law World Review 103–136.

The situation in NSW is currently highly complex. The offence of larceny, and offences that are based on larceny remains a common law offence, and consequently involves a fault element of “fraudulently”. How that element is to be interpreted is unclear. As the commentary below makes clear, there is High Court authority in *Peters* that suggests a largely objective test for dishonesty and there is an implication that this may apply to larceny.

However, for all offences in the NSW Crimes Act which use the word “dishonestly” there is now a statutory test in s 4B:

**Dishonesty**

(1) In this Act:

dishonest means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence, dishonesty is a matter for the trier of fact.

This test essentially replicates the approach taken in England in *Ghosh*.

Further complicating matters, there remain a number of statutory offences in other Acts that use the words “fraudulently” and “dishonestly” without definition. It is unclear how such offences should be interpreted.

Because of this uncertainty, this chapter provides a chronological analysis of the case law.

**The English Approach: Feely/Ghosh**

In *R v Feely* [1973] QB 530, Feely had “borrowed” money from the work till and claimed that he had an intention to return it. The question on appeal concerned whether the judge should have instructed the jury that they had to find that Feely’s intentions were dishonest. Lawton LJ held:

We do not agree that judges should define what ‘dishonestly’ means. This word is in common use... Jurors, when deciding whether an appropriation was dishonest can be
reasonably expected to, and should, apply the current standards of ordinary decent people. In their own lives they have to decide what is and what is not dishonest. We can see no reason why, when in a jury box, they should require the help of a judge to tell them what amounts to dishonesty.

However, as a result of this case a further question arose of whether this test was an objective or subjective test. The issue was resolved in *R v Ghosh* [1982] 1 QB 1053. Ghosh was a surgeon who had incorrectly claimed fees from the hospital he was working at for surgical procedures he had not performed. His defence was that this was not dishonest because he was due these fees for other consultations. Again the issue of how a jury were to determine dishonesty arose.

Reg. v. *Feely* [1973] Q.B. 530 ... is often treated as having laid down an objective test of dishonesty for the purpose of section 1 of the *Theft Act* 1968. But what it actually decided was (i) that it is for the jury to determine whether the defendant acted dishonestly and not for the judge, (ii) that the word "dishonestly" can only relate to the defendant's own state of mind, and (iii) that it is unnecessary and undesirable for judges to define what is meant by "dishonestly."

The sentence requiring the jury to apply current standards leads up to the prohibition on judges from applying their standards. That is the context in which the sentence appears. It seems to be reading too much into that sentence to treat it as authority for the view that "dishonesty can be established independently of the knowledge or belief of the defendant." If it could, then any reference to the state of mind of the defendant would be beside the point.

This brings us to the heart of the problem. Is "dishonestly" in section 1 of the *Theft Act* 1968 intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem.

Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word "dishonestly" in the *Theft Act* 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach. ... A man's belief and his willingness to pay are things which can only be established subjectively. It is difficult to see how a partially subjective definition can be made to work in harness with the test which in all other respects is wholly objective.

If we are right that dishonesty is something in the mind of the accused (what Professor Glanville Williams calls "a special mental state"), then if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would have regarded it as dishonest to embark on that course of conduct.

So we would reject the simple uncomplicated approach that the test is purely objective, however attractive from the practical point of view that solution may be.

There remains the objection that to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which "Robin Hood would be no robber": Reg. v. Greenstein. This objection misunderstands the nature of the subjective test. It is no defence for a man to say "I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty." What he is however entitled to say is "I did not know that anybody would regard what I was doing as dishonest." He may not be believed; just as he may not be believed if he sets up "a claim of right" under section 2 (1) of the *Theft Act* 1968, or asserts that he believed in the truth of a misrepresentation under section 15 of the Act of 1968. But if he is believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest.
In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.

Thus in situations where the accused claimed that he or she had acted honestly, not knowing what they were doing was wrong, the jury were to be told:

1. Was what was done dishonest according to the ordinary standards of reasonable and honest people?
2. Must the defendant have realised that what he or she was doing was dishonest according to those standards?

The Australian Approach: Salvo to Peters

In Victoria, which adopted laws identical to the English theft laws, the courts decided to see dishonesty as having a special meaning. This was explained by Fullagar J in *R v Salvo* [1980] VR 401:

The proposition, that every juror knows what dishonesty is, is in my opinion too imprecise to be true or false, and it obscures two truths, first that what matters is a point of statutory construction and secondly that jurors, like judges and magistrates and other people, differ very markedly in their views as to whether particular conduct in particular circumstances is dishonest of is conduct to which moral obloquy attaches....

In my opinion “dishonesty” in this statute, is used in that sense of “with disposition to defraud” which means “with disposition to withhold from a person what is his right” and in the special context thus imports into the offence the element that the actor must obtain “the property” without any belief that he himself has any legal right to deprive the other of it.

The approach taken by Fullagar J was not accepted without criticism but it became approach taken in Victoria. Note that the formulation is narrower and simpler than the *Ghosh* approach.

In New South Wales there is authority both ways. In *R v Glenister* [1980] 2 NSWLR 597 the English approach had been applied without discussion, but in *R v Love* (1989) 17 NSWLR 608 the Court of Criminal Appeal had instead chosen to reject the Feely/Ghosh approach and instead follow *Salvo*.

The mental element required for a breach of 178BA (now repealed) was that the financial advantage be obtained dishonestly. The leading case on the meaning of dishonestly in this section is *R v Love* (1989) 17 NSWLR 608. The facts of the case were that a family dispute had arisen as to the ownership of a parcel of land in Dapto. Love, who believed he had a right to the land, deceptively induced his relatives to effect the transfer of the land into the name of a fictitious person whose identity Love assumed.

The court held:
It is important to note that, in the context of s 178BA, the question which arises is not, or not only, the wider question as to the meaning of the term "dishonesty", but the more particular question of the meaning of the words "dishonestly obtains". Such a context is especially apt to give rise to problems of the kind that arose in the present case, involving the obtaining by a person, by deception, of something to which he claims to have been entitled. What is the standard by reference to which such conduct is categorised as dishonest?

This problem arose in the Court of Criminal Appeal in Victoria in R v Salvo [1980] VR 401. The majority decision was followed in R v Bonallo [1981] VR 633; (1980) 2 A Crim R 431, R v Brow [1981] VR 783 and R v Walsh and Harney [1984] 9 A Crim R 307. The facts were that the appellant in that case had dealt with another man concerning a motor car, and believed for reasons that are not presently material, that he had a legal right to get the motor car back. Apparently because the other man would not willingly have returned it, the appellant tricked him into handing it over by pretending to be willing to buy it and by writing out a cheque which he never intended to honour. The majority (Murphy and Fullagar JJ), for reasons with which we respectfully agree, emphatically rejected the notion that it would have been sufficient for the trial judge to direct the jury that, in order to determine whether the appellant had "dishonestly obtained" the vehicle, they should simply apply the standards of ordinary decent people, without giving them any further instruction and without relating the matter to the facts of the instant case, and in particular to the appellant's claim of right. They further held that the question to be considered was whether the appellant believed he had a legal right to obtain the motor car, not whether the appellant believed he had a legal right to practise the particular deception, that is to say, to pass a worthless cheque. Their Honours pointed out that, as a matter of construction of the statutory provision (which was similar to s 178BA), it is contemplated that there may be a deceptive obtaining of property which is not dishonest. Of course in many cases the deception will be powerful evidence of dishonesty. However, when a claim of legal right of the kind now in question is raised, the issue is whether there was a belief in a legal right to obtain the property, not whether there was a belief in a legal right to practise the deception. Fullagar J said (at 440):

"a claim of right' ... does not require a belief in the accused in a right to obtain the property by deception, or by the particular deception employed. It is the obtaining that the Crown must prove was done dishonestly, not the practising of the deception."

... To relate that to the second of the charges on which the appellant was convicted in this case ..., the appellant believed that the property referred to in the charge, the Dapto property, belonged to him beneficially and that he could deal with and dispose of it as he pleased. Prior to the events the subject of the charge the registered proprietor of the land, who never claimed any beneficial interest in it, was a lady who was unaware that her (maiden) name had been used in connection with the land. The appellant (according to the Crown case) tricked her into signing a transfer which would have had the result that the name of the registered proprietor was an alias for the appellant. If the Crown could not negative the belief referred to above, then whatever breaches of the law the appellant may have committed by his conduct, he was not, in our view, attempting to "dishonestly obtain" the property referred to in the charge.

Peters

In 1998, in Peters v The Queen (1998) 192 CLR 493 the High Court attempted to explain what it understood the concept of dishonesty to mean. The decision is an unsatisfactory one, in that the members of the High Court were divided in their understanding of the term dishonesty, but a majority was formed by Kirby J agreeing with the joint judgment of Toohey and Gaudron JJ, even though his reasoning was in dissent. McHugh J, with whom Gummow J agreed, did not discuss the issue of dishonesty. This was a case in which the accused was alleged to have been involved in a conspiracy to defraud the Commissioner of Taxation by concealing income in sham transactions.
In rejecting some English and Australian approaches to the meaning of dishonesty, Toohey & Gaudron JJ said:

There is a degree of incongruity in the notion that dishonesty is to be determined by reference to the current standards of ordinary, honest persons and the requirement that it be determined by asking whether the act in question was dishonest by those standards and, if so, whether the accused must have known that that was so. That incongruity comes about because ordinary, honest persons determine whether a person’s act is dishonest by reference to that person’s knowledge or belief as to some fact relevant to the act in question or the intention with which the act was done. They do not ask whether he or she must be taken to have realised that the act was dishonest by the standards of ordinary, honest persons. Thus, for example, the ordinary person considers it dishonest to assert as true something that is known to be false. And the ordinary person does so simply because the person making the statement knows it to be false, not because he or she must be taken to have realised that it was dishonest by the current standards of ordinary, honest persons.

There are also practical difficulties involved in the Ghosh test. Those difficulties arise because, in most cases where honesty is in issue, the real question is whether an act was done with knowledge or belief of some specific thing or with some specific intent, not whether it is properly characterised as dishonest. To take a simple example: there is ordinarily no question whether the making of a false statement with intent to deprive another of his property is dishonest. Rather, the question is usually whether the statement was made with knowledge of its falsity and with intent to deprive. Of course, there may be unusual cases in which there is a question whether an act done with knowledge of some matter or with some particular intention is dishonest. Thus, for example, there may be a real question whether it is dishonest, in the ordinary sense, for a person to make a false statement with intent to obtain stolen property from a thief and return it to its true owner.

The practical difficulties with the Ghosh test arise both in the ordinary case where the question is whether an act was done with knowledge or belief of some specific matter or with some specific intent and in the unusual case where the question is whether an act done with some particular knowledge, belief or intent is to be characterised as dishonest. In the ordinary case, the Ghosh test distracts from the true factual issue to be determined; in the unusual case, it conflates what really are two separate questions, namely, whether they are satisfied beyond reasonable doubt that the accused had the knowledge, belief or intention which the prosecution alleges and, if so, whether, on that account, the act is to be characterised as dishonest. In either case, the test is likely to confuse rather than assist in deciding whether an act was or was not done dishonestly.

In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest. Necessarily, the test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether the question is whether it was dishonest according to ordinary notions or dishonest in some special sense. If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if “dishonest” is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or, perhaps, more usually, what is not meant by that word. Certainly, it will be necessary for the jury to be instructed as to that special meaning if there is an issue whether the act in question is properly characterised as dishonest (as in Salvo)....

We have earlier dealt with dishonesty in a general way. It is now necessary to indicate what is involved in dishonest means for the purposes of conspiracy to defraud.

As in other contexts, the question whether the agreed means are dishonest is, at least in the first instance, a question of knowledge, belief or intent and, clearly, that is a question of fact for the jury. On the other hand, the question whether, given some particular knowledge,
belief or intent, those means are dishonest is simply a question of characterisation. And as in
other contexts, the question whether an act done with some particular knowledge, belief or
intent is properly characterised as dishonest is usually not in issue. Thus, putting to one side
the exceptional case where it is in issue, it is sufficient for a trial judge simply to instruct the jury
that they must be satisfied beyond reasonable doubt as to the knowledge, belief or intent
alleged by the prosecution before they can convict. Alternatively, the trial judge may instruct
the jury that, if satisfied as to the knowledge, belief or intent alleged, the means in question are
properly characterised as dishonest and they should so find.

Because of the view expressed by McHugh J and Gummow J in this case, we should indicate
that we incline to the view that should an issue arise whether the agreed means are properly
characterised as dishonest, that issue should be left to the jury. At least, that is so if the means
are capable of being so characterised. And the jury should be instructed that the question
whether they are to be characterised as dishonest is to be determined by application of the
standards of ordinary, decent people. However, these issues need not be pursued in this case.

It need hardly be said again that a statute establishing an offence may use the term
"dishonestly" in its ordinary meaning or use it in a special sense. In either case it will
ordinarily be necessary for the trial judge to explain precisely what the legislation requires. In
the case of conspiracy to defraud, it will ordinarily be sufficient to instruct the jury as to the
facts they must find if the agreed means are to be characterised as dishonest. Alternatively, it
will be sufficient to instruct them that, if satisfied as to those facts, they will be satisfied that
the agreed means were dishonest. Only in the borderline case will it be necessary for the
question whether the means are to be so characterised to be left to the jury. In this area, but
only in this area, we differ from the approach taken by McHugh J and Gummow J.

What emerges from this judgment is an indication that dishonesty can be used either in
a general sense or in a specific way defined by the offence. This will necessarily mean that
each offence will need to be examined by the courts to determine the relevant form of
dishonesty that is required. The issue remains confused at a theoretical level, but in practice
the issue of dishonesty often is not pleaded by accused, and when it is the offence is often
not sufficiently serious for it to be a jury trial (ie the decision on dishonesty is made by a
magistrate).

In Peters, Kirby J strongly dissented from the objective nature of the test.

**Defining dishonesty**

The difficulty which the law faces in giving precise content to the notion of "dishonesty" is
well described by King CJ in *R v Kastratovic*:

“Human ingenuity in devising dishonest schemes designed to produce an advantage to
one person at the expense of another or of the community at large is notoriously fecund.
The courts have been understandably reluctant to place themselves in the position of being
unable to punish conduct which should by commonly accepted standards be stigmatised as
fraudulent by reason of the constraints of an a priori definition framed without thought of
conduct of that particular kind.”

It did not take long after the passage of the English Theft Act in 1968, with its express use
of the adverb "dishonestly", for the problem to arise which has troubled this area of the law
ever since. Prior to that time, there does not appear to have been any comprehensive attempt
by judges to define "dishonest" or its adverbial variant "dishonestly". It was enough to state
the word. But the use of "dishonestly" in the Theft Act resulted in a succession of valiant

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14 As in Ghosh.
15 As in Salvo.
attempts at definition and the equal number of suggestions that the effort to find a comprehensive definition was futile. The basic problem was, and still is:

"how instrumental the defendant’s own views and beliefs are in selecting the particular standard by which his conduct is to be judged. At one extreme it is thought that it is only fair to find the defendant culpable when he has failed to live up to standards that he himself subscribes to - commonly referred to as a subjective approach. At the other extreme it is thought necessary for society to impose standards upon its members irrespective of their own individual views and beliefs - the objective approach."

The initial responses to the Theft Act in England quickly demonstrated the ambivalence which has persisted to the present time. In June 1972, in R v Gilks, the English Court of Appeal upheld a direction to a jury instructing them to consider whether the defendant "thought he was acting honestly or dishonestly". This endorsed a subjective approach. However, soon afterwards, in R v Feely, that Court suggested objective criteria, proposing that the jurors consider "the current standards of ordinary decent people".

Each of these approaches to what the concept of dishonesty involved in this connection had disadvantages. To require the jury (or any tribunal of fact) to take into account the standards of ordinary, decent people involves a departure from the fundamental principle of our criminal law that the criminal quality of the accused's conduct is generally to be judged by reference to his or her subjective intention and not to an imputed intention, objectively derived. This Court has steadfastly adhered to that principle. Yet to evaluate dishonesty solely by reference to the subjective intention of the accused might surrender notions of dishonesty to the absurd, but genuine, beliefs of the particular accused. It would afford a defence in law to Robin Hood, because of his subjective beliefs about the moral, social or political justifications of his otherwise unlawful conduct.

The resolution of this quandary was extremely important, not simply for the elaboration of the word "dishonestly" appearing in the English Theft Act. The use of that word merely provided the occasion for the debate. As the concept of dishonesty was so pervasive, the approach of the law in resolving the debate between the proponents of the so-called objective and subjective schools was both important and urgent.

R v Ghosh represented the attempt by the English Court of Appeal to achieve a compromise which would at once prevent "conduct to which no moral obloquy could possibly attach" from being regarded as dishonest whilst at the same time avoiding the other extreme by which an exclusively subjective approach might permit sincere, but unacceptable, extremists imposing their own conceptions of honesty on others and escaping criminal liability for conduct wholly unacceptable to society.

The result of this compromise was the formulation of the two stage test. To find that the accused had acted dishonestly (save possibly for cases of obvious dishonesty) required affirmative answers to two questions:

Was what was done dishonest according to the ordinary standards of reasonable and honest people?

Must the defendant have realised that what he or she was doing was dishonest according to those standards?

In Feely, which preceded Ghosh, Lawton LJ said:

"We do not agree that judges should define what 'dishonestly' means. This word is in common use ... Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people."

It is in this passage, in Feely, that the seeds may be found of the controversies that have continued ever since. Should an attempt be made to define what honestly and its variants connote? Or should its meaning in the particular context be left to the tribunal of fact, having regard to all of the evidence of the particular case? Should the "current standards of ordinary decent people" or "reasonable and honest people" be introduced as an instruction to the
tribunal of fact so that such considerations are taken into account as a check against unbridled subjectivism? Or is it enough to assume that jurors and other tribunals of fact, because of their nature and functions, will invariably bring the "current standards of ordinary decent people" or "reasonable and honest people" to bear upon the evidence and arguments on behalf of the accused concerning his or her subjective intentions?

In its context, it seems fairly clear to me that Lawton LJ, in the passage cited from *Feely*, was not proposing the imposition of a legal gloss on the meaning of dishonesty so that the concept was to be judged by reference to objective standards. That suggestion would have been completely inconsistent with the opening passage of his remarks where it was proposed that no judicial definition of "dishonestly" should be proffered at all. All that his Lordship was saying was that, as a matter of commonsense, the community could trust juries to apply "current standards of ordinary decent people". It could do so because juries, by hypothesis, were generally made up of just such people - ordinary and decent; reasonable and honest. Adopting the approach in *Feely* had the advantage of avoiding judicial attempts to define comprehensively the notion of dishonesty, a task which has eluded legislatures, law reform bodies, official committees and judges.

Although there were obvious advantages in the approach favoured by Lawton J in *Feely*, that approach was significantly altered by the ruling in *Ghosh*. In the place of judicial silence, a two-stage test was adopted. In the place of an acceptance that the jury would, in general terms, reflect community standards concerning honesty and dishonesty, there was substituted the requirement for an express instruction to juries (and other tribunals of fact) that they must conceive what "the ordinary standards of reasonable and honest people" were. They must measure what they found to have been done against those standards. Moreover, if what was done was dishonest by those standards, the jury were then instructed to consider not the subjective beliefs of the accused as to the honesty or dishonesty of the conduct said to constitute the offence, but "whether the defendant himself must have realised that what he was doing was by those standards dishonest".

The *Ghosh* approach has been severely criticised as an inept attempt to "reintroduce order into a subject that had become inconsistent and confused". Its "fundamental flaw" has been argued to be a confusion between subjective and objective elements of the offences to which it applied. Instead of leaving the evaluation, as Lawton LJ proposed in *Feely*, to the good sense of the jurors themselves because they presumably reflected ordinary decent standards, it introduced "a partially idealised test with a necessary component of moral evaluation which will vary from jury to jury". Either, in practice, juries would ignore the direction to conceive the fictitious "ordinary standards of reasonable and honest people" separate from their own standards or they would subsume those standards to their own, cutting through the fiction and drawing on their own experience and opinions despite the judicial direction. If this were what happened in practice, it would make each of the two stages of the *Ghosh* test for dishonesty futile at best and misleading at worst.

**Application and rejection of the English tests**

Australian authorities since *Feely* and *Ghosh* have reflected the foregoing debates. In *R v Salvo* a majority of the Victorian Court of Criminal Appeal declined to follow *Feely*. *Salvo* was followed in Victoria in *R v Bonollo* and *R v Brow*. Dealing with the problem in *Salvo*, it was proposed that "dishonestly" imported "the notion that the actor is conscious that he has no right to deprive the other of that of which the latter is in fact being deprived ... he must do so without any genuine claim to any right to do the depriving". Some of the arguments advanced in this appeal appear to rest on the proposition that this description of what was required for dishonesty in *Salvo* was being propounded as a universal definition of dishonesty. I do not take that to have been the purpose of the judges. Nonetheless, that is where authority rested in Victoria at the time when the decision in *Ghosh* was delivered.

After *Ghosh*, it became necessary for the Victorian courts to decide, in cases involving crimes of dishonesty, whether to persist with the approach adopted in *Salvo*, and to extrapolate it to a universal test, whether to follow *Ghosh* or whether to strike out on a new
course. In the result, the approach in Salvo has been maintained; but it has been restricted to offences based on the Theft Act provisions of the Victorian Crimes Act. In other cases involving dishonesty, including offences against the Act such as conspiracy to defraud, the Ghosh test has been expressly or impliedly endorsed. Not only has this occurred in Victoria. It has also happened in other States of Australia. On the other hand, decisions of courts in New South Wales and in the Australian Capital Territory have declined to follow Ghosh in cases involving both non-federal and federal offences. Through all of these cases it has been assumed that a judge in Australia, presiding over a jury trial, is duty-bound to endeavour to assist the jury on the meaning of the element of dishonesty where this is an ingredient of the offence. The New South Wales courts, with fair consistency, have regarded the Ghosh test as "an unreliable guide as to what constitutes 'dishonesty'". Other Australian courts have tended to follow Ghosh in most cases.

The Officers' Committee developing a model criminal code for Australia have acknowledged the "strong philosophical disagreements" reflected in the foregoing debates. In apparent resignation, rather than with enthusiasm, the officers have concluded that what they described as the "Feely/Ghosh test" was "the best that the law can do":

"In view of the conflict in the authorities and the diversity in the various Australian jurisdictions, some common test has to be laid down in the Model Criminal Code. A very clear majority of submissions favoured the Feely/Ghosh test ... although this was not without some strong contrary submissions."

Some of the same debates which have emerged about this subject in Australia are also reflected in judicial decisions in New Zealand and Canada. In New Zealand, the Court of Appeal has refused to follow Ghosh, holding that, in order to prove that a person had acted "fraudulently" contrary to the provisions of the Crimes Act creating the offence of fraudulent misapplication of moneys, "it must be shown that he acted deliberately and with knowledge that he was acting in breach of his legal obligation". As in the case of the offence of conspiracy to defraud, the New Zealand Act did not expressly incorporate the notion of dishonesty into the offence of fraudulent misapplication. It was imported simply because it was part and parcel of the fraud which is inherent as an element of the offence.

Resolving the differences in judicial authority

As the foregoing review of authority and analysis demonstrate, the resolution of the problem presented by this appeal is by no means easy. No holding of this Court determines the matter. Such authority as exists in the several jurisdictions of Australia and overseas, demonstrates a sharp division between those who are persuaded to the correctness and utility of the Ghosh approach to dishonesty and those who are not. The current state of diversity of Australian judicial opinion is obviously unsatisfactory. Particularly is this so in the case of the approach that is to be taken to dishonesty where it is an ingredient in a federal offence. That approach should not differ, depending upon the jurisdiction in which the trial is had. The quandary presented has not been resolved by the Parliament. On the contrary, the Act still leaves the question to be determined in accordance with the common law.

Whilst it would be preferable for a legislative solution to be offered, and whilst work to that eventual end has been performed on the Model Criminal Code, it would be unrealistic to postpone the resolution of the question in this appeal in the hope that legislation will shortly ensue. In expressing the best solution which the common law provides, it is not inappropriate to take into account the work that has been performed on the Model Criminal Code. As I have said, the drafters favour the adoption of the "Feely/Ghosh test", not apparently regarding as important the differences between what was recommended in Feely and what was done in Ghosh. However, there are important differences between the exercise by the Officers' Committee on a model criminal code and the function of this Court in declaring the common law in Australia. Necessarily, the officers working on the Model Code have been obliged to pay close regard to the consensus of official opinion in the several Australian jurisdictions, that being a matter pertinent to the prospects of adoption of the legislative code which they will eventually recommend. This Court, unless constrained by authority, is obliged to derive any
new principle in a different way. It must take into account past decisions on analogous matters and evaluate any applicable considerations of legal principle or legal policy.

Most serious crimes of dishonesty are still tried in Australia before a jury. This feature of the mode of trial makes it specially important, as this Court has repeatedly recognised, to avoid wherever possible, over-subtle distinctions and differentiations and to adopt legal standards which are readily comprehensible, easily applied, capable of simple explanation to juries by judges and, in matters of fundamental principle which are unaffected by statutory disparities, as uniform as possible throughout the nation. One special reason for adhering to the simple concept of acts and intentions is that this can be readily explained to, and understood by, a jury. Excessive subtlety may not be understood. Differentiation between the essential notion of dishonesty as an ingredient of criminal offences, whether express or implied, does not appear to be justified simply because, in some contexts, the word is used in an adverbial or adjectival form and in others as a noun. Furthermore, differentiation, such as now arises in the State of Victoria, in the judicial explanation of dishonesty, where that concept is relevant to both federal and State offences, is a sure formula for mistakes in judicial directions, confusion on the part of the jury or both. To resolve these differences, this Court should return to basic principle.

**The fundamental principle of subjective intention**

Save for a limited number of exceptional cases, the concern of the criminal law in Australia is ordinarily addressed in each offence not just to the conduct of an accused but also to his or her subjective intention or belief. This is a fundamental feature of our criminal law. Stephen J in *R v O'Connor* observed:

"For criminal liability to be incurred (cases of strict liability and culpable negligence always apart) civilised penal systems have, in modern times, insisted that the accused should be shown to possess a blameworthy state of mind. As Stephen J pointed out in *R v Tolson*, 'The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed ...'. (The reference to proof of absence must now, of course, be read in the light of *Woolmington v Director of Public Prosecutions*. The mental element that must be present is a state of mind such as Lord Simon described, in *Majewski*, as 'stigmatised as wrongful by the criminal law': it is that state of mind which, when compounded with prohibited conduct, constitutes the particular offence. As Dickson J said in *Leary v The Queen*, 'Society and the law have moved away from the primitive response of punishment for the actus reus alone'. Thus in *Bratty v Attorney-General (Northern Ireland)* the Lord Chancellor, in describing 'the overriding principle, laid down by this House in *Woolmington's Case* ' said, 'that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of mind; ... if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary means rea - if indeed the actus reus - has not been proved beyond reasonable doubt'."

The foregoing basic principle requires juries (or where relevant another tribunal of fact) to determine the intention or belief of the accused at the time of the criminal act in order to judge whether the offence has been established. Obviously, this requirement presents certain difficulties. Absent a comprehensive and reliable confession, it is usually impossible for the prosecution actually to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act. Necessarily, therefore, intention must ordinarily be inferred from all of the evidence admitted at the trial. In practice this is not usually such a problem. But the search is not for an intention which the law objectively imputes to the accused. It is a search, by the process of inference from the evidence, to discover the intention which, subjectively, the accused actually had. Thus in *He Kaw Teh v The Queen*, Gibbs CJ remarked that:
"[If guilty knowledge is an element of an offence, an honest belief, even if unreasonably based, may negative the existence of the guilty knowledge, and thus lead to an acquittal."

Dishonesty may be an element of an offence, either expressly (as in the Theft Act offences in Victoria) or inherently (as here, because the conspiracy alleged is of a particular character, viz one to defraud). The absence of the ingredient of dishonesty, even if that absence is, objectively speaking, unreasonably based, will negative the existence of dishonesty and justify a verdict of acquittal. Because the tribunal deciding such matters, whether jury or not, can be counted on to avoid the extremes of gullibility and naivety, that tribunal can safely be expected to apply what, for want of a better expression, amounts to "the current standards of ordinary decent people". But this is an expectation based upon the nature, composition and functions of the decision-maker. It is not based upon a legal requirement that the decision-maker, jury or otherwise, must apply to the facts an objective standard, invented as a fiction and resting on a presumption that it is possible to discover the "current standards of ordinary decent people" or the "ordinary standards of reasonable and honest people" separately from the standards of the decision maker.

To the extent that an accused puts forward idiosyncratic, bizarre, eccentric or peculiar beliefs to support an assertion of a want of dishonesty, such considerations go, in my opinion, only to the plausibility of the accused's evidence. If the tribunal of fact accepts the evidence and it sustains an absence of dishonesty at the relevant time, it will sustain an acquittal where dishonesty is an essential ingredient of the offence. Fear of hordes of modern Robin Hoods, galloping into the court rooms of the nation, in company with anti-vivisectionists, environmentalists and other people affirming minority beliefs (so often raised as a spectre in these cases) should neither be exaggerated nor overstated.

The injection of an objective criterion as contemplated by the ruling in Ghosh cuts across one of the basic principles of our criminal law. Without the specific authority of Parliament, the courts should not invent such an exception. To do so is to countenance the punishment of an accused on the basis of a criminal intention derived from a fiction based on objective standards rather than on the foundation of the accused's actual intention, subjectively held at the time of the criminal act charged. Such a departure from principle could certainly be achieved by statute. No doubt it would be applauded by some. But it is out of harmony with one of the most fundamental concepts – perhaps the most fundamental idea - of the criminal law of this country. If such a principle were to be adopted it would have to be done by a Parliament and not by a court declaring the common law in Australia.

The appellant urged this Court, in relation to the offence of which he stood charged, to return to the approach accepted by the Victorian Full Court in Salvo. In that case, the judges in the majority addressed attention to two considerations in giving meaning to the word "dishonestly" where expressly appearing in the Theft Act provisions of the Victorian Crimes Act. The first was the need to focus the inquiry upon what "the accused himself in fact believed". The second was to address whether the accused believed that "he had a legal right in all the circumstances". In my opinion, in giving attention to what the accused in fact believed, the majority in Salvo correctly expressed the test for the ascertainment of the presence or absence of the ingredient of dishonesty. And this is so whether that ingredient is expressly stated by statute or is inherent in the definition of the offence created by the common law. However, the reference to the existence of a claim of right, whilst doubtless apt to the facts of that case did not (nor did it purport to) exhaust the circumstances where dishonesty might be negatived. The broader statement expressed by King CJ in Kastratovic would, in my view, have application to a wider range of cases:

"In all cases, the element of intent to defraud connotes the intention to produce a consequence which is in some sense detrimental to a lawful right, interest, opportunity or advantage of the person to be defrauded, and is an intention distinct from and additional to the intention to use the forbidden means."

Whilst the notion of defrauding will commonly address attention to the use of forbidden means, it is not confined to a consideration of the means. In certain cases some, at least, of the
means used may have been perfectly legal. The stain of fraud may arise from the object which
the perpetrator dishonestly set out to achieve.

I have no more temerity to attempt an exhaustive definition of the meaning of "defraud",
or of dishonesty, than Viscount Dilhorne could evince in \textit{R v Scott}. Nor is it necessary to do so.
In the present case, the proper instructions to the jury would have involved a review of the
essential ingredients of the charge of conspiracy to defraud. It would have obliged the judge to
inform the jury that one ingredient which the prosecution had to prove was that the appellant,
in concert with the other persons named, had set about to deprive the Commissioner of
Taxation dishonestly of the taxation owing to him by the client. This direction would have been
followed by a reminder of the evidence pertinent to the respective cases of the prosecution
and the accused, much as the primary judge gave in this case. But instead of telling the jury, as
\textit{Ghosh} and its Australian acolytes required, that they had to ascertain whether the appellant
had acted dishonestly by reference to "the ordinary standards of reasonable and honest
people", it would have been the judge's duty to focus the minds of the jury on what the
appellant himself in fact believed as to the means chosen to achieve the agreement found. If
he believed that he had a legal right to act as he did, if he believed that that he was not acting
in breach of any legal obligations or if he had no dishonest intention to act in a way to impede
the Commissioner of Taxation in the lawful collection of tax from the client, the means chosen
to achieve the purposes of the agreement would lack the element of dishonesty necessary to
establish its character as one of defrauding the Commissioner. The search is for the accused's
intention as well as for his actions. It was not just the intention to enter an agreement with the
alleged co-conspirators but the intention to enter an agreement intended to be achieved by
dishonest means which alone would warrant criminal punishment. Conclusions on the
foregoing questions unfavourable to the accused, reached to the requisite standard, would
justify conviction of the appellant.

\textit{The proviso is inapplicable}

It follows from these conclusions that the charge given to the jury in the trial of the
appellant in this case was erroneous. It introduced misdirections as to the way in which they
were to approach an ingredient of the offence of conspiracy to defraud, viz an agreement on
the part of the appellant with others to cause loss to the Commissioner of Taxation by
dishonest means. The appellant was entitled to have the jury pass upon the evidence, correctly
instructed on the important ingredients of that offence. The objective considerations, as
required by \textit{Ghosh} and contained in the primary judge's instruction, may have affected the
jury's approach to the consideration of the subjective beliefs, intentions and objectives of the
appellant.

It is impossible to know how, properly instructed, the jury might have responded to the
appellant's evidence. Whilst it is true that his principal defence was that he did not enter into a
conspiracy at all, he was entitled, if that defence were rejected, to have the jury consider the
issue of the alleged dishonesty with the proper legal test in mind. As the judge's charge did not
ensure that that happened, the appellant suffered a miscarriage of justice. He lost a real
chance of acquittal. The case is therefore not one for the application of the proviso. It is true
that, on the facts, the prosecution case against the appellant was extremely strong. Objective
evidence would clearly have supported inferences of dishonesty which the prosecution invited
the jury to draw. But the accused was entitled to have the jury accurately instructed on such an
important, even central, ingredient of the offence. This did not occur.

The Crown argued that the introduction of objective considerations was not unknown in
particular contexts of the criminal law. Thus, on the issue of provocation the question is not
resolved by reference only to the subjective beliefs of the accused. Consideration is given to
the response of an ordinary person or "an ordinary person in the position of the accused". It
was argued that juries are accustomed to receiving and acting upon judicial instructions
addressed to such considerations. All of this is true. However, the position in such cases is
distinguishable on a number of grounds. First, the introduction of an objective element in
provocation can be traced to very old principles of the common law, elaborated, historically,
before the universal importance of the subjective intention of the accused was accepted as a
general rule. As well, in Australia, the objective criterion is now commonly so stated in the applicable Crimes Act or Code. Furthermore, in a case such as provocation, what is in issue is an amelioration of the charge of criminal conduct. Here, the issue is the definition of one of the elements of the offence itself. Now confronted by the problem, the Court is obliged to solve it by resort to fundamental principle. Dishonesty of its essential nature connotes conscious wrongdoing. It is not dishonesty by the standards of other persons but by the appreciation and understanding of the accused personally.

Conclusion and orders

I have already indicated my disagreement with the conclusions of McHugh J (with whom Gummow J concurs). From the foregoing it will be plain that I also cannot agree with the opinion of Toohey and Gaudron JJ that the question whether the means used to effect the conspiracy are to be characterised as dishonest is to be answered by the application of the standards of ordinary, decent people. However, clearly, the opinions of Toohey and Gaudron JJ are much closer to my own, in that their Honours accept that the offence of conspiracy to defraud the Commonwealth, properly analysed, involves dishonesty at two levels and a jury must be so satisfied. As this Court is evenly divided on the applicable legal test, as there is a clear majority for dismissing the appeal which my opinion cannot affect and as it is essential that the Court should provide clear instruction to those who have the responsibility of conducting criminal trials, whilst preferring my own opinions I withdraw them. For the purposes of procuring a holding on the issues argued in this appeal, I concur in the opinions expressed by Toohey and Gaudron JJ on the point of difference between them and McHugh J and Gummow J.

The Model Code approach

The Feely/Ghosh test has been both applied and rejected by Australian courts in recent years. The approach taken in the Model Code was to adopt the Feely/Ghosh test by defining dishonesty in those terms. This was followed in the Commonwealth enactment of the MCC, despite criticisms of the test by the High Court in Peters v The Queen.

Thus under the Commonwealth Code dishonesty is defined as follows:

130.3 Dishonesty.
For the purposes of this Chapter, "dishonest" means:
(a) dishonest according to the standards of ordinary people; and
(b) known by the defendant to be dishonest according to the standards of ordinary people.

130.4 Determination of dishonesty to be a matter for the trier of fact
In a prosecution for an offence against this Chapter, the determination of dishonesty is a matter for the trier of fact.

Enactment of such a definition appears to have the result that in every prosecution of an offence involving dishonesty the prosecution will be required to prove dishonesty according to the Ghosh test. This is despite judicial and academic criticism of the test and the insistence by the English courts that the test is only applicable in the specific situation where the defence alleges that the defendant was acting on a mistaken belief as to community standards.

An example of how dishonesty works in practice is contained in Anderson v Bigmore [2006] ACTSC 85 (7 September 2006). Anderson was employed by the Commonwealth Department of Immigration. While the Department was moving offices, Anderson removed two original paintings from the wall of the old offices and took them home. The issue was
whether the removal of the two original paintings was dishonest according to the test in the Commonwealth Criminal Code (which is identical to the Model Criminal Code):

Crispin J: ...

The appellant was a Commonwealth officer employed in the Department of Immigration and the appropriations occurred whilst the Department was in the process of moving some of its staff from their existing offices into the South Building in Canberra. She claimed, in essence, that she had believed that the paintings were to be discarded and that she had been given permission to take them.

A similar move had been undertaken in April 2003 when the section of the Department in which the appellant had been employed was moved into the North Building and the appellant had been involved as a “move manager” with other officers of her section. At some stage prior to the arrival of the removalists she had walked through the area of the building about to be vacated by her section and had had a discussion with a Ms Robinson-Obst, who was an Assistant Director of the Department, concerning various items that had been marked with stickers to designate that they were not to be taken to the new premises. The Department had apparently been concerned to create a new image and many assets thought to be incompatible with that image had been marked for disposal irrespective of their condition. The appellant gave evidence that she had noticed a particular print named “View of Sofala” which had apparently been marked for disposal and asked Ms Robinson-Obst if she could take it for herself. She said that Ms Robinson-Obst had told her that if she liked it she could take it. The appellant also said that she had taken the painting off the wall in the presence of Ms Robinson-Obst and two other officers and had then placed it in her car. [This evidence was accepted by the court].

...

The appellant gave evidence that shortly prior to the second move in November 2004, she had had a further conversation with Ms Robinson-Obst during which she had asked her whether there was a similar arrangement, in that she could help herself to pictures marked for disposal. She said that Ms Robinson-Obst had replied “If there is something there that has been marked and you were interested in that you could help yourself. I don’t want to know about it”.

The appellant said that she had gone to a party on the evening of 26 November 2004 but left some time before 11.00 pm with her sister and gone to the Benjamin Offices. She and her sister had then gone from floor to floor looking for items that had been labelled with what she described as “the dot sticker”, which she had understood designated items that had been marked for disposal and were “available for removal”. She also explained that she had understood that the art works marked for disposal were “going to be trashed”. During the course of her evidence in chief she said that when she and her sister found the paintings in question they had been puzzled as to why they had been labelled with a dot sticker because they had appeared to be originals and had wondered whether they may not have been correctly labelled. However they eventually decided to remove them. She said that there had been a lot of other people in the building at that time. At least some had been removalists but she was unable to say whether other people from the Department had also been present.

She maintained that she had not acted dishonestly in taking the paintings, though she conceded that, in hindsight, she no longer thought that she had been allowed to do so.

In cross-examination the appellant agreed that she had known that there had been a procedure for the disposal of assets and that she could have sought advice from a “property section for the new building team”. She said that she had known that some art works had been owned by “Artbank”, and “leased” to the Department of Immigration, though it was suggested in argument that Artbank was merely another government agency and Mr Livingstone, who appeared for the appellant, did not raise any issue about whether the paintings in question had belonged to the Commonwealth as alleged. In any event, the appellant said that she had not been aware that Artbank stickers had been on the back of the pictures she had taken. She also
said that it had not occurred to her to look at the back of the pictures to see if there had been any other identifying marks, though she agreed, in hindsight, that it would have been a prudent thing to have done. She also said that it had not occurred to her to “double check” whether the dot stickers had been correctly placed on them. It was put to her that it would have been appropriate to have told someone that she had taken these particular paintings and she agreed, again in hindsight, with this proposition. However, she rejected a suggestion that Ms Robinson-Obst had not actually told her that she could help herself to anything that had a sticker on it.

The basis for this last suggestion did not emerge with any clarity from the evidence. Ms Robinson-Obst had given evidence that in the weeks before the move coloured stickers had been placed on items to be taken to the South Building, with different colours designating the intended floors, and “ex-government” stickers had been placed on items intended for disposal. She did recall a conversation with the appellant about artworks that she thought had occurred several weeks before the move but said that, even when first interviewed about the matter, the lapse of time had made it difficult for her to provide anything but a rather vague account of the conversation. She responded to a question about whether she had said that the appellant could have paintings with no labels on them, by saying: “Not so much she could have it. It was that I wasn’t concerned what happened to it”. However, when it was put to her that she might have used the words, “I don’t want to know”, she said that she thought she had. She also agreed that she might have told the appellant that items with stickers on them were to be disposed of. She initially said that neither of the paintings in question had been so labelled but agreed in cross-examination that dot stickers may have been left on them from a previous move.

The appellant’s evidence that she had not acted dishonestly was not directly traversed in cross-examination and she was not asked any questions about her understanding about what Ms Robinson-Obst may have meant when she said “I don’t want to know about it”. Nor was she asked any questions about whether she had subsequently resolved her doubts about whether the stickers had been correctly placed on the paintings she had taken or, if not, how such doubts could have been reconciled with her claim that she had not acted dishonestly.

[The magistrate held that on this evidence there had to be a conviction. He held:

In assessing the evidence, I accept that a print was taken with Ms Robinson-Obst’s permission in 2003. I make no comment as to whether she was entitled to give such permission and whether the defendant knew of that. Accepting that the defendant went to the premises late at night and wrapped the two original paintings in bubble wrap and took them to her residence after being concerned that they were going to be dumped, I’m of the view that her actions were not in accord with the standards of ordinary people.

There were significant differences between her taking the print in 2003 and the removal of these two paintings. The print was obviously of much less value. She showed it to the person who had given her permission to remove it and she removed it openly from the Department during working hours. In the present case, even allowing that permission had been given, she removed two original paintings that were obviously of value, given that she wrapped them in bubble wrap to remove them, she was concerned that they were to be dumped and made no enquiry as to whether her suspicion was correct or not.

I don’t accept that she didn’t see the sticker on the reverse of one of them. On her own evidence in the circumstances put forward by her, I find that her conduct was dishonest according to the standards of normal people. She was aware that she was removing property that belonged to the Commonwealth, from the Commonwealth, not in accordance with acceptable standards of disposal of that property and was surprised that such items were said to be for disposal, yet made no enquiry as to whether she was entitled to so remove it.

This removal took place before the move was complete and in circumstances where the defendant knew that the disposal did not, of necessity, mean the property was, in her words, to be dumped. I do not accept that this was a case of mistake. I accept the defendant had, at least, reservations about the propriety of her removing the items and did nothing about it.
In the circumstances, I find the offence proved.

Mr Livingstone then commenced to make a further submission based upon the good character of the appellant but was almost immediately interrupted by his Honour who added the following comments:

Well I take this to be – to short-circuit you Mr Livingston, I take this to be a matter of very poor judgment. That it’s not a matter of, in my view, straight out dishonesty. That is, straight out intention to totally deprive. I take it, as I said, the dishonest conduct in not being conduct of an ordinary member of society. I know the – I know the act speaks of dishonesty.

... Whilst it is true that his Honour’s explicit findings to the effect that the appellant’s conduct had been attributable to an error of judgment rather than “straight dishonesty” were made after his Honour had already found the offences proven, they were clearly intended to provide further clarification of the basis for that finding. In any event, it is clear, even from the earlier remarks, that his Honour accepted the appellant’s evidence that she had previously been given permission to take the print “View of Sofala” and that he found “dishonesty” in the subsequent removal of the paintings that were the subject of the charges only by reason of her having had reservations as to the propriety of that conduct. It was this proposition that his Honour apparently sought to clarify or explain by his further finding that the appellant’s conduct had been attributable to an error of judgment rather than “straight” dishonesty. His Honour seems, in substance, to have concluded that the appellant had made an error of judgment in proceeding to take the paintings without making further enquiries with a view to resolving whatever doubt had been in her mind about the propriety of relying upon the permission she had been given by Ms Robinson-Obst.

In my opinion, this approach should not be too readily dismissed. The appropriation of another person’s property by someone who has reservations as to the propriety of that conduct may well be dishonest according to the standards of ordinary people, even if falling short of actual theft. Furthermore, a finding that a person has made an error of judgment is not necessarily inconsistent with a finding that he or she has acted dishonestly, though much will depend upon the circumstances revealed by the evidence and the nature of the judgment. The mere fact that an offender misjudged the prospects of eluding detection would obviously not inhibit a finding of dishonesty. On the other hand, such a finding would be quite inappropriate if the relevant act had been made in good faith due to an honest mistake, even one attributable to carelessness or neglect. Furthermore, there may be circumstances in which even well motivated people may conscientiously disagree as to the extent to which the demands of honesty may require someone to pursue enquiries in order to dispel vestiges of doubt.

The concept of dishonesty in s 130.3 involves not only the objective test in subparagraph (a) but also the subjective test in paragraph (b). The latter test does not relate to any idiosyncratic views of dishonesty held by the alleged offender but depends rather upon whether he or she knew that the act in question was dishonest according to the standards of ordinary people. It is incumbent upon the prosecution to prove beyond reasonable doubt that the defendant acted with such knowledge and, in the absence of any relevant admissions, proof of that element will be dependent upon circumstantial evidence. In some cases it may seem obvious that the defendant must have known that the conduct was dishonest according to such standards, but in others the possibility of a mistake of fact or even, perhaps, misapprehension as to the manner in which conventional standards of honesty would apply to the situation he or she confronted may require careful consideration. Perceptions may vary and the mere fact that a prosecutor is able to point to facts and circumstances which can be seen, in hindsight, to support a conclusion that a defendant should have realised certain things may not exclude the possibility that he or she had actually formed a quite different impression at the time. ...

As previously mentioned, the case put to the appellant in the present case was simply that Ms Robinson-Obst had not told her that she could take any of the artworks. The proposition that Ms Robinson-Obst had spoken words ostensibly conveying permission but, in reality, implying that she had been willing to turn a blind eye to what amounted to theft was never suggested to either woman and, even on appeal, the respondent did not challenge Ms
Robinson-Obst’s integrity. Mr White did submit that it was not Ms Robinson-Obst’s intention but rather the impression created in the appellant’s mind that was important. That may be so but, as already mentioned, it had not been put to the appellant in cross-examination that she must have formed the impression that Ms Robinson-Obst had been making such a dishonest overtone and the suggested basis for her to have read such an implication into her words had not been canvassed with her. Indeed, whilst written submissions apparently relied upon in the Magistrates Court were not reproduced in the appeal book, there was nothing in the material before me to suggest that such a contention had formed part of the respondent’s case. In any event, the plaintiff was entitled to have the credibility of her sworn evidence that she had not acted dishonestly judged by reference to matters fairly put to her by the prosecutor in cross-examination.

The crucial findings were clearly made in breach of the rule in *Browne v Dunn* [which requires that the prosecution’s case be clearly put to the defendant in cross-examination] and cannot stand.

I did give some consideration as to whether there should be a retrial of the charges but, given the manner in which the matter was conducted, I have concluded that this would be inappropriate. Having found that this was not a case of “straight dishonesty”, which seemed to have been the only case put forward by the respondent, his Honour should have acquitted the appellant rather than making a finding of guilt on a different basis that she had been given no opportunity to rebut in cross-examination. It would not be fair to now order her to be retried and permit the respondent to re-litigate a case rejected by his Honour and/or advance a case that could have been put to her in the earlier hearing.

The appeal will be upheld, the findings set aside and, in lieu thereof, the appellant acquitted.

**Application of the Peters test**

The High Court decision in *Peters* affirmed previous NSW decisions adopting the Feely test (*R v Glenister* (1980) 2 NSWLR 59; *R v Weatherstone* (unrep, 20/8/87, NSWCCA)). It also had the effect of confirming the more subjective approach to dishonesty taken in *R v Love* in relation to s178BA. The High Court has applied *Peters* to now repealed NSW fraud offences that used “fraudulently” in *Macleod*.


**Claim of right**

While ignorance of the law has never of itself been seen as an exculpating factor, special considerations apply to property and dishonesty offences. This is because the regime of property offences are based on pre-existing civil law property rights. Criminality arises in the disregard of those rights. Given the complexity of the ways in which property can be owned the law has always accepted that a person should not be criminally liable for actions which are based on a genuine but mistaken belief as to the defendant’s property rights. Largely this is because of the law’s recognition of the property owner’s right to self-help in recaption of their property without the need for prior legal approval. In essence a claim of right is not based on ignorance of the law but on a positive mistaken belief in one’s rights under the law.

In *Walden v Hensler* (1987) 163 CLR 561 at 570 Brennan J noted:

There is no injustice in punishing a murderer who is unfamiliar with the law of homicide provided, of course, he is of sound mind when he commits the crime. But when a law proscribes conduct which an ordinary person without special knowledge of the law might engage in the honest belief that he is lawfully entitled to do so, the secondary deterrent
purpose - that is, the purpose of educating both the offender and the community in the law’s proscriptions so that the law will come to be known and obeyed - must be invoked to justify the imposition of a penalty for breach. In such a case, care must be taken in imposing a penalty lest the offender be made to shoulder an unfair burden of community education.

The recognition of a claim of right originated with the common law development of larceny but extends across all property offences including fraud offences and damage to property.

The belief is not one based on reasonableness or on any objective assessment of the situation by the finders of fact. The claim of right is based entirely on the subjective belief of the defendant. This is because the claim acts to negate dishonesty. The leading NSW authority is *R v Nundah (1916) 16 SR (NSW) 482*. In that case the Court of Appeal held::

The question for the jury is whether the man was honest or not, that is to say, whether he was honest in the act of taking, or not. ... [I]n the case of larceny where the question is between honesty and dishonesty, the guilt or innocence of a man cannot, as I understand the principles applicable to that branch of the criminal law, be made to depend upon a consideration by the jury of whether he had reasonable grounds for his belief. The question whether he honestly believed the property to be his is that which is material. Possibly some of the strongest beliefs held by human beings might be found by other minds to be completely destitute of reasonable grounds. They may depend on nothing more than the associations of early childhood or the gossip of his neighbourhood after a man has grown up, or the customs of the community in which he lives. But the question of thief or no thief is a question of honesty or dishonesty in the act charged as theft. A man may be ever so much mistaken in his reasoning processes and yet be honest, though you would not accept his mere statement of opinion unless there was some colour in the circumstances for his entertaining the opinion he claims to have had.

However, the belief must be honestly held and it must be the basis for the defendant’s actions, not merely a colourable pretence to justify the action. (*R v Wade* (1869) 11 Cox CC 549, *R v Dillon* (1878) 1 SCR NS (NSW) 159).

The belief must relate to a legal right, not merely a perceived moral right. That is, it is a belief in a legal right that the person actually has, not merely a belief that one ought to have such a right. However, the right believed in need not be a right that is actually recognised by the law. In *The Queen v Lopatta* (1983) 35 SA SR 101 a former manager of a company was dismissed in circumstances in which he believed that he was owed outstanding wages and other entitlements. He broke into his former employer’s premises and removed a number of items of property. When apprehended he argued that he believed he had a right to enter the premises and take property to the value of the amount of money that he was owed. Despite the fact that there is no such legal right that a dismissed employee could claim, the majority of the South Australian full Court held that this was an argument that the accused was entitled to put to the jury.

The scope of the defence was exhaustively outlined by Wood CJ at CL in *R v Fuge* [2001] NSWCCA 208. Fuge had been convicted of being an accessory to an attempted armed robbery of a Hungry Jacks restaurant. One of the principals, Baker-Vollmer had previously worked at the restaurant but had been dismissed for lateness. In the trial there was evidence that one of that in planning the actions Baker-Vollmer had mentioned that this was the only way in which she would get money she was owed, but the evidence was not adverted to in the summing up or directions. The indication was that the statement had been made as a joke. The judges on appeal dismissed the appeal heavily criticising counsel for running an “armchair appeal”. In relation to the substantive law Wood CJ at CL held:

22 In an appropriate case, the existence of a claim of right is relevant to the commission of the foundational offence. In the present case, had Pohl and Baker-Vollmer held a bona fide belief that Hungry Jack’s owed her a sum of money, then the taking of that sum of money from
the restaurant, in circumstances which otherwise would have involved robbery would not have constituted an offence on their part. The reason for that lies in the absence of the mens rea which is an essential element of the offence: *Walden v Hensler* (1987) 163 CLR 561 at 569, 603 and 608.

23 The same principle applies to any crime of which larceny is an element, and it extends to any person who takes the property on behalf of another, or in collaboration with another, whom he believes to have a bona fide claim of right to the money or property in question: *Sanders* 57 SASR 102 at 105, per King CJ.

24 A review of the authorities shows that:

a) the claim of right must be one that involves a belief as to the right to property or money in the hands of another: *Langham* (1984) 36 SASR 48;

b) the claim must be genuinely, ie honestly held, it not being to the point whether it was well founded in fact or law or not: *Nundah* (1916) 16 SR (NSW) 482, *Bernhard* (1938) 2 QB 264; *Lopatta* (1983) 35 SASR 101 at 107; *Walden v Hensler*; and *Langham* at 52-53.

c) while the belief does not have to be reasonable: *Nundah* at 485-490; *Langham* at 49; and *Kastratovic* (1985) 19 A Crim R 28, a colourable pretence is insufficient: *Dillon* (1878) 1 SCR NS (NSW) 159 and *Wade* (1869) 11 Cox CC 549.

d) the belief must be one of a legal entitlement to the property and not simply a moral entitlement: *Bernhard* and *Harris v Harrison* (1963) Crim LR 497;

e) the existence of such a claim when genuinely held, may constitute an answer to a crime in which the means used to take the property involved an assault, or the use of arms; the relevant issue being whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it: *Love* (1989) 17 NSWLR 608 at 615-616; *Salvo* (1980) VR 401; *Langham* at 58; *Kastratovic* at 66; *Barker* (1983) 153 CLR 338; *Williams* (1986) 21 A Crim R 460; and see also *Boden* (1844) 1 C & K 395.

f) the claim of right is not confined to the specific property or banknotes which were once held by the claimant, but can also extend to cases where what is taken is their equivalent in value, of which *Langham* and *Lopatta* provide examples; although that may be qualified when, for example, the property is taken ostensibly under a claim of right to hold them by way of safekeeping, or as security for a loan, yet the actual intention was to sell them: *Lenard* (1992) 58 A Crim R 123.

g) the claim of right must, however, extend to the entirety of the property or money taken. Such a claim does not provide any answer where the property or money taken intentionally goes beyond that to which the bona fide claim attaches: *Astor v Hayes* (1988) 38 A Crim R 219 at 222.

h) In the case of an offender charged as an accessory, what is relevant is the existence of a bona fide claim in the principal offender or offenders, since there can be no accessory liability unless there has in fact been a foundational offence: *Gregory* LR 1 CCR 77 at 79; *See Lun* (1932) 32 SR (NSW) 363; *Richards* (1974) QB 776 and *Howe* (1987) AC 417, and unless the person charged as an accessory, knowing of the essential facts which made what was done a crime, intentionally aided, abetted, counselled or procured those acts: *Giorgianni* (1985) 156 CLR 473; *Stokes & Difford* (1990) 51 A Crim R 25 and *Buckett* 79 A Crim R 303.

i) It is for the Crown to negative a claim of right where it is sufficiently raised on the evidence, to the satisfaction of the jury: *Lopatta* at 108, *Astor v Hayes* (1998) 38 A Crim R 219, *Lenard* and *Williams* at 475.

A claim of right operates to remove the mens rea of the offence. The cases suggest that the belief acts to negative the element of fraudulence or dishonesty in larceny ( *R v Langham* (1984) 36 SASR 48 per King CJ at 53; *Walden v Hensler* (1987) 163 CLR 561 per Brennan J at
The impact of Peters on claim of right

As mentioned above, claim of right can be seen to be a subset of dishonesty if both concepts are determined according to the same test. Thus if dishonesty were wholly subjective, a claim of right would be merely one means of proving that the defendant had a belief that operated to negative any dishonesty in the defendant’s conduct. Non-dishonest conduct could however range more broadly. For example the defendant could maintain a belief in a moral right to act as he or she did even though no they were aware that had no legal right to do as they did.

It is fear of this open-ended subjective approach to dishonesty that has exercised the minds of judges in their attempts to derive the combined objective/subjective test of Ghosh or the objective test of Peters. However, once dishonesty is tested against a broader community standard, dishonesty and claim of right begin to occupy slightly different territory. The problems have been starkly raised in the High Court decision of Macleod v R(2003) 197 ALJR 333.

In Macleod, the defendant was convicted of an offence under s173 Crimes Act 1900 (NSW), an offence of fraudulently appropriating company property while a director. That involved a finding, inter alia, that he had acted fraudulently in his use of corporate funds. Macleod’s defence was that he believed he had a legal right to do so: that is, he acted with a claim of right. The trial judge directed the jury in relation to dishonesty by use of the test in Peters but declined to make a second direction in relation to the claim of right defence.

The High Court reaffirmed that a claim of right was an honestly held, subjective belief in a civil law right. However they then held:

The appellant complains that there was no specific reference to the "subjective" criterion attending a claim of right. But the directions to be given about a claim of right must reflect the elements of the offence charged and the nature of the mens rea required.

Adopting the reasoning in Peters, as we do, and applying it to the offences now under consideration, there is no requirement that the appellant must have realised that the acts in question were dishonest by current standards of ordinary, decent people. To require reference to a "subjective" criterion of that nature when dealing with a claim of right would have deleterious consequences. It would distract jurors from applying the Peters direction about dishonesty, and it would limit the flexibility inherent in that direction. A direction about the "subjective" element of a claim of right was neither necessary nor appropriate in this case.

It was open to the jury, looking at the matter by reference to the standards of ordinary, decent people, to conclude that at the time of the various takings or applications of sums by the appellant he knew of his lack of entitlement to take or apply the funds of Trainex for his own use or benefit and that, on that account, his acts were dishonest.

In so holding, the Court has applied the Peters variant of the Feely test to the offence and having done so considered claim of right to be subsumed within dishonesty. However the second and third paragraphs quoted above appear to be in conflict. If there is no need for the appellant to have realised that his actions were dishonest, the jury could have concluded the actions were dishonest despite a positive belief in an entitlement to act as he did.

The difficulty that this decision highlights is the way in which a community based interpretation of dishonesty restricts the scope of a claim of right. It is worth noting how this comes about in Australia but not in England. In the Theft Act, dishonesty is defined in
s3(1) to not include actions done pursuant to a claim of right. The adoption of the *Feely* test by the High Court without this statutory protection of the claim of right defence causes the problems that arose in *Macleod*.

It therefore appears necessary to either ensure that both claim of right and dishonesty have an identical test or that claim of right is preserved as a sub-set of dishonesty, as it is in the *Theft Act*.

**Alternative approaches**

The meaning of dishonesty is defined in a quite narrow way in New Zealand.

**Crimes Act 1961 (NZ)**

217 Interpretation

In this Part, unless the context otherwise requires,—

dishonestly, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority

This definition was inserted in 2003.
FRAUDULENT CONVERSION

The common law offence of larceny, as has already been discussed, contained a number of lacunae. The major one related to when somebody, through a false pretence, induced the owner to willingly part with the goods. This was overcome by the statutory enactment of the false pretences offences. However there were also a number of other areas where the common law was considered to have developed in an inadequate way. These areas can be described as situations in which the defendant legitimately gained possession of the property but then dealt with the property in an unauthorised and dishonest way. There are also a number of forms of larceny that have been considered to be more serious and as a result have received special treatment in the Crimes Act. These offences are often described as offences of fraudulent conversion.

Note that as all of these offences are statutory, and refer to property, they encompass the broader definition of property set out in s4 and are not limited to choses in possession. This potentially makes these offences much more flexible than their foundation offence of larceny.16

Larceny as a bailee

One of the most important problems with the common law of larceny, in a commercial setting, was the problem of bailment. If the defendant had entered into a bailment of the goods and thereby had legally and lawfully gained possession of the goods there could be no larceny of the goods by the defendant. This was because the concept of larceny is based on possession not on ownership. Consequently there was no taking of possession.

In order to overcome this problem the judges in the Carrier’s case (1473) Y.B. pasch, 13 Edw IV f9 p15 created the legal fiction of “breaking bulk”. In that case the carrier had been instructed to deliver some bales of wool to Southampton. Instead, the carrier took the goods to another location and on arrival broke open the bales and sold the wool inside. Although a very old and confusing case, it became a precedent for the doctrine that while the defendant had been granted a bailment over the bales, he had not been given one over the contents of the bales. Therefore there was no larceny in taking the bales, unopened, to another destination - but the moment he broke open the bales and took the wool out of them there was then a larceny. A major limitation of such a doctrine was that a bailee could only be guilty of larceny if he or she made off with packaged goods. One could not be guilty, for example, of breaking open and stealing the contents of a horse.

This sort of legal sophistry was eventually replaced by a much more workable statutory enactment, s125.

125 Larceny by bailee

Whosoever, being a bailee of any property, fraudulently takes, or converts, the same, or any part thereof, or any property into or for which it has been converted, or exchanged, to his or her own use, or the use of any person other than the owner thereof, although he or she does

16 There may be some issues with the application of intangibles to the requisite dealing with the property.
not break bulk, or otherwise determine the bailment, shall be deemed to be guilty of larceny and liable to be indicted for that offence.

The accused shall be taken to be a bailee within the meaning of this section, although he or she may not have contracted to restore, or deliver, the specific property received by him, or may only have contracted to restore, or deliver, the property specifically.

The elements of this offence are:

- Bailment of property to the defendant (as defined)
- Taking or conversion of the property bailed, or any property into which it has been converted to his or her own use or another’s
- With fraudulent intent
  
  Note that the defendant is convicted of larceny.

**Bailment**

The definition of bailment for the purposes of s125 was explained by the High Court in Slattery v R (1905) 2 CLR 546. In that case Slattery had been employed to collect the rents of a number of houses. He was then to put the money into his own bank account and after deducting legitimate expenses for the maintenance of those properties, pay the balance every three months into the landlord’s own bank account. The money was never paid to the landlord. The High Court held that bailment constituted the following:

A definition was read during the argument from Pollock and Wright on Possession in the Common Law, which we are prepared to accept as a correct definition. It occurs at page 163, and is as follows: “Upon the whole, it is conceived that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person.”

Mr. Hamilton in his very able argument admitted that bailment implies three things: first the delivery of some specific article by one person to another; second, that the thing delivered should remain the general property of the bailor; and third, that it, or some specific thing into which it is converted under the terms of the bailment, is to be returned to the bailor or delivered to some person for him. That is substantially correct.

There are then three elements - a specific thing is delivered, the thing delivered remains the property of the bailor, or at least does not become the property of the bailee, and the thing itself or something for which it has been exchanged under the contract of bailment is to be restored or delivered. If the thing is applied under the instructions given by the bailor, as for instance, if an animal is entrusted to another to be sold and the proceeds applied in a particular way, the question whether the proceeds are or are not at common law the subject of a bailment, is a question of evidence, as appears from the case of R. v. De Banks (1).

However in this case what was claimed to have been bailed was in fact not property, but money. As this money was not held by Slattery in specie, but in a form of mixed funds in his own bank account it was a case of debt rather than bailment. He was therefore acquitted. As a direct result of this acquittal, the NSW Parliament passed s178A dealing with fraudulent conversion of money and valuable securities. This section is discussed below.
Delivery

It is an essential requirement of bailment that the property be delivered by the owner to the bailee. However such a delivery can, in some circumstances, be evidenced by a token act, as explained in *R v Bennie* [1953] VLR 583.

In that case the defendant had executed a bill of sale over his car in favour of a company and then, before the car had been redeemed, sold it to a third person. The question was whether following the sale of the car to the company his continued possession of it was in the form of a bailment and that he was therefore guilty of larceny by a bailee. Apart from signing the bill of sale, nothing had been done to pass possession to the company. Lowe ACJ held:

> I am dealing with a criminal and not a civil case and in criminal law at any rate words have to be construed with strictness. In my opinion it is essential to constitute a bailment that there should have been a delivery of the chattels made by the bailor to the bailee. That delivery may, in certain cases, be a token delivery and, as at present advised, in the case of a motor car, I think it would be a sufficient delivery for the bailor to deliver the ignition keys or the door keys of the car to the bailee and that would constitute a delivery. It may be that it would be sufficient evidence of delivery that there was some other action indicating a transfer of delivery taking place, such as placing one's hand on the car coupled with words which in substance indicated that the bailor was delivering the car to the bailee.

However, Bennie had not done anything to pass possession of the car to the company, even in a tokenistic way. Thus there was no basis on which the company could have bailed the property back to Bennie and consequently there had been no larceny by bailee.

Need for a genuine bailment

But not only must there be a delivery, there must also be a delivery by the bailor. Thus in *R v Rigbey* (1863) 2 SCR (NSW) 176 the defendant found “a man insensible from drink” and took money from him, merely with the bona fide intention of keeping it for the man. The defendant later converted the money to his own use. Stephen CJ held:

> ...the authorities show that to create a bailment there must be a bailor as well as a bailee; and as I do not see how the prosecutor, being in a state of hopeless intoxication, could entertain any specific intention as to the return of this specific money, I do not see how he could be a bailor, or the prisoner, therefore, a bailee within the Act.

Similarly, if the defendant gains possession of the property by a false pretence that he or she is willing to be a bailee, but with no genuine intention on his or her part to accept the bailment, there is no larceny by bailee. Instead it is either larceny by a trick or obtaining by false pretences. (*R v Pear* (1779) 2 East PC 685; *R v Parker* (1863) 2 SCR (NSW) 217; *R v Ward* (1938) 38 SR (NSW) 308. These cases are discussed below.)

Taking or Conversion

The defendant’s actions will only constitute larceny if the defendant deals with the goods in a way that is inconsistent with the terms of the bailment. For the purposes of s125, there must be either a taking or a conversion. Taking has already been discussed in relation to larceny where it was suggested that the taking must amount to a conversion because of the additional requirement that there be an intention to permanently deprive. Similarly, in s125 it would seem that the section requires that the taking (or converting) must also be to the defendant or another’s use and so consequently taking or converting are synonyms. Mere trespass by a bailee is insufficient.
For the purposes of the criminal law conversion has a slightly different meaning to that under civil law. In Rogers v Arnott [1960] 2 QB 244, Arnott had borrowed a tape recorder from his flatmate and had therefore become bailee of the tape recorder. He was apprehended attempting to sell the tape recorder to an undercover police officer. Arnott was convicted of attempting to steal the tape recorder (as a bailee), but in his appeal he argued that he had already completed the conversion when apprehended, and had therefore been wrongly convicted of attempt. On appeal Donovan J held:

It is contended by the prosecutor that there was no such fraudulent conversion in the present case, but simply an attempt at it, because in the events which happened the true owner was deprived of nothing, and, as in the case of the civil tort of conversion, some detriment to the owner is essential to the commission of the wrong. I think the proposition is doubtful and the analogy in any event misleading. Conversion per se has been defined in a civil action as an act intentionally done inconsistent with the owner's right: see Lord Porter's speech in Caxton Publishing Co. v. Sutherland Publishing Co. The analogy is misleading because no civil action is possible unless the true owner has suffered damage; but this is not so in the case of a criminal prosecution for fraudulent conversion. One cannot, therefore, determine for the purpose of the criminal law whether there has been a conversion simply by asking whether the true owner has suffered damage. He might, indeed, recover the article intact, but this would not of itself prevent a prosecution of the dishonest bailee.

The defendant contends that there was a fraudulent conversion here when he, having dishonestly assumed to himself the rights of ownership in the property, endeavoured to exercise it by offering the property for sale.

There appears to be no reported judicial decision directly in point.....

It would be rash, I think, to attempt a definition of the term "converts ... to his own use" which would cover every possible case. A sale of the property by the bailee, contrary to the terms of the bailment, and for his own benefit, is clearly such a conversion. The reason is that the bailee in such a case has usurped the rights of the owner for his, the bailee's, benefit. Is the position any different in the case of an attempted sale? I think not. If I am lent property, and then determine in my own mind to sell it for my own benefit contrary to the terms of the bailment, I have determined that in relation to the property I will no longer be a borrower but an owner, and an owner who wishes to sell. When I proceed to carry that intention into effect by offering the property for sale, I am standing in the owner's shoes in relation to that property and exercising an owner's right. In these circumstances I have, in my view, already converted the property to my own use whether the attempted sale takes place or not; and if I have acted dishonestly in the matter, as the defendant here is found to have done, then the offence of larceny is committed.

It is a little strange, perhaps, if the defendant should succeed on the grounds that he has committed the full offence and not merely attempted it, and it is said for him that in these circumstances he cannot be tried for the full offence. I express no opinion upon that. The point is not raised in the case, and may yet arise for decision. In the meantime I would dismiss this appeal.

These findings were approved by Gibbs CJ in Ilich v The Queen (1987) 162 CLR 110. It therefore seems clear that for s125 a conversion need not require any damage to occur to the property, nor that any disposal of the property occur. All that is required is a dishonest intention on the part of the defendant to deal with the property as if it was their own, and some action in fulfilment of that intention. Whether or not they do in fact successfully dispose of the property appears to be irrelevant.

Examples of acts which have been held to be conversion under sections equivalent to s125 are: including a borrowed boat in a schedule of chattel securities to secure a bank loan (R v Dunbar [1963] NZLR 253; painting a hired air compressor a different colour (R v Russell
[1977] 2 NZLR 20) and refusing to return a loaned bicycle (*R v Wakeman* (1912) 8 Cr App R 18).

In *Broom v Police* [1994] 1 NZLR 680 a mountain bike had been stolen from a Mr Filer by a person known to Broom. When Filer offered a reward for the bike, Broom obtained the bike and contacted Filer. In order to keep his identity secret he proposed that the bike be returned in parts and the reward be paid in instalments. Filer reluctantly agreed. Broom was arrested attempting to effect the procedure. He was convicted of larceny by conversion but his conviction was overturned on appeal. Tipper J held:

> The difficulty, as I see it, with Mr Pilcher’s submission is that although Mr Filer was not attracted to the cloak and dagger rigmarole proposed by Mr Broom, he did not at any stage withdraw his consent to Mr Broom’s continued possession of the bike. Albeit reluctantly, he decided that he would go along with the rigmarole. Indeed it was Mr Filer on Friday 2 July who indicated that the transaction could not take place that night. It was he who said that he wanted to defer the exchange until the following week. It was clearly implicit, if not explicit, in that stance that he was consenting to Mr Broom’s continued possession and was consenting to the method of exchange being proposed. Whatever mental reservations he may have had about the necessity for or the wisdom of Mr Broom’s rigmarole his natural anxiety to recover his bike led him ultimately to agree.

The learned authors of *Adams on Criminal Law* (2nd ed) say at para 220.05 that what constitutes conversion for the purposes of theft is not entirely clear. They then go on to say that any act inconsistent with the rights of the owner of the goods will be a conversion. A number of cases are cited. I do not think it necessary to discuss any of the cases which are referred to. Their facts are well removed from the facts of the present case. The key to the actus reus of conversion in the present context is conduct, whether active or passive, in derogation of the rights of the owner. An example of such active conduct is a bailee who mortgages a borrowed chattel as his own: *R v Dunbar* [1963] NZLR 253. Examples of passive conduct are retention when the original acquisition was innocent (*Police v Subritzky* [1990] 2 NZLR 717) and retention beyond the agreed period. The actus reus must of course be accompanied by the necessary mens rea … but without an actus reus the crime has not been committed. In the present case Mr Broom was not in substance acting in derogation of Mr Filer’s rights. He was simply proposing a rather peculiar method of returning the bike for the reward, which method Mr Filer ultimately accepted. I am therefore of the view, contrary to that of the Judge below, that there was in this case no actus reus of conversion by Mr Broom.

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**Or any property into or for which it has been converted, or exchanged**

The importance of this additional element of the offence is explained in *Slattery v R*:

That clearly made this change in the law, that, whether the conversion of the article bailed was authorized by the bailor or not, the bailee was equally guilty of larceny if he made away with the substituted property. But these words, as to which the difficulty arises, were added to the section: "And the accused shall be taken to be a bailee within this section although he may not have contracted to restore or deliver the specific property received by him or may only have contracted to restore or deliver the property specifically." What we have to do is to construe these words. It is said that they have entirely altered the law of bailment so far as regards larceny....

The first point arises on the words: “The accused shall be taken to be a bailee within this section.” Of what is he taken to be a bailee? It must be of something. You cannot have a bailee in the abstract, any more than you can have, for instance, a husband in the abstract. There must be some property of which he is a bailee.

[The court examined one possible construction of the words and continued …] Let us turn now to the second possible construction; the accused shall be taken to be a bailee of the substituted property within the meaning of this section, (and bear in mind that the legislature had in its mind that they were dealing with bailees of goods, and larceny by such persons of
those goods), although he may not have contracted to restore or deliver the specific property, that is, the original property, received by him.

Now that would make a material change in the law, because under the common law, if the bailee had not contracted to restore or deliver the specific thing received by him, it might be that he would not be a bailee of the goods substituted for them, for the reasons already pointed out [ie the lack of such a condition in the contract of bailment]. The property in those goods could not then have been laid in the bailor, and under these circumstances the words in the first part of the section would be inapplicable, because the offence is converting property "to the use of any person other than the owner thereof;" and, as there would in that case be no bailment of the particular goods in question, and consequently no bailee, the person who converted them would be the only owner known to the law. If the bailment was on the terms that he was to give the property back to the bailor, and he did not do so, but wrongfully converted it to or exchanged it for something else, he might not at common law be a bailee of the property put in its place. Hence arose a difficulty in laying the property in the thing substituted. That difficulty is removed by the second construction of the words of the section, and a full meaning is thereby given to them. In that sense it relates only to the ownership of the substituted article, and in that respect alters the third condition or element referred to by Mr. Lamb and Mr. Hamilton, that the thing, or some specific thing into which the thing bailed has been converted or exchanged under the terms of the bailment, is to be returned to or applied under the directions of the bailor. It becomes no longer material to consider whether the thing into or for which the original article was converted or exchanged was so converted or exchanged under the terms of the contract or not. But in all other respects the statute leaves the law unaltered. An essential condition in all cases is that the thing first delivered remained the general property of the bailor.

As the property in this case was money, and the money had not been handed over on condition that it be held in specie by Slattery, there had been no original bailment and so the extended definition had no role to play.

**Mens Rea: fraudulent intention**

In order for there to be larceny by bailee the dealing with the property must be fraudulent. This appears to have the same meaning as it does in the common law element of larceny, namely that of dishonesty. However there are two points of importance which separate the mens rea required for larceny by bailee from simple larceny.

Firstly, there is authority that suggests that there is no requirement in the section that the defendant have any intention to permanently deprive the owner of the goods. In *R v Hann* (1833) 17 SALR 119, the defendant had been given a bill of exchange in order to have the bill discounted. Instead of discounting it according to his instructions, the defendant had fraudulently given the bill to a third party as security for a loan. In his defence he had argued that he had no intention to permanently deprive the owner of the bill and that he fully intended to repay the loan and regain the bill. The Supreme Court of South Australia found that such an intention was irrelevant to a charge of conversion by bailee. All that was necessary was that the defendant was a bailee, that he converted the bill to his own use, and that he had done so fraudulently.

Secondly, as a bailee gains possession of goods lawfully, and only later decides to convert the goods to his or her own use, there is not a requirement that the mens rea exist at the time of delivery. Instead the mens rea must coincide with the act of conversion. Indeed if in taking the goods as a bailee the defendant were to have the mens rea to dishonestly deprive the possessor of the property this would amount to either obtaining by false pretences or larceny by a trick (see eg *R v Millard* (1906) 23 WN (NSW) 8).
Larceny by clerk or servant

The concept of constructive possession in relation to employers and employees has already been discussed. Consequently most unlawful taking of goods by servants or employees can be prosecuted as a case of simple larceny. However because of the degree of trust which is inherent in an employee/employer situation, s156 enacts an aggravated form of larceny for theft by clerks or servants.

156 Larceny by clerks or servants

Whosoever, being a clerk, or servant, steals any property belonging to, or in the possession, or power of, his or her master, or employer, or any property into or for which it has been converted, or exchanged, shall be liable to penal servitude for ten years.

This offence, in using the word “steals” incorporates all the elements of larceny. It is thus an aggravated form of larceny where the maximum penalty is doubled if the defendant falls within the definition of a clerk or servant.

Thus the elements of the offence are those as for larceny, but with an additional requirement that the defendant be a clerk or servant.

**Actus reus**
- A clerk or servant
- Larcenable property
- Belonging to, in possession or power of master or employer, or into which it has been converted or exchanged
- Takes and carries away
- Without consent of the master or employer

**Mens rea**
- With intent to permanently deprive the master or employer
- Without claim of right
- Fraudulently

**Property of master or employer**

The offence also extends the relevant scope of larcenable property beyond property that was in the possession of the employer to any property into or for which it has been converted or exchanged. This has been discussed above in relation to larceny by bailees. The fact that the section uses the word property also means that the definition of property in s4 applies. This includes both tangible and intangible property. However the fact that the dealing with the property amount to a stealing may have the effect of restricting the relevant property to tangible forms of property.

**Clerk or servant**

The meaning of clerk or servant is given an expanded meaning in s155, which mirrors the common law development and expansion of the terms.

155 Definition of clerk or servant

Every person employed for any purpose, as, or in the capacity of, a clerk, or servant, or as a collector of moneys, although temporarily only, or employed also by other persons, or employed to pay as well as receive moneys, or although he or she had no authority from his or
her employer to receive money, or other property, on his or her account, shall be deemed a clerk, or servant.

However, “clerk or servant” itself is not defined in s155. The traditional test at common law for whether a person is a clerk or servant is a test of control. In *R v Negus* (1873) LR 2 CCR 34 Bovill CJ expressed the test as follows.

A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer so as to be under his employer’s control...

An example of the breadth of the concept is found in *R v Foulkes* (1875) LR 2 CCR 150, an embezzlement case. In that case the father of the defendant was clerk to the local board of Whitechurch & Dodington. The defendant lived with his father and occasionally helped him out in conducting the business of the board. He was not appointed by the board nor paid any wages. In helping his father to organise a loan for the council he embezzled the money provided under the loan. Brett J held:

The prisoner undertook to do things for his father which a clerk does for his master, and to do them in the way a clerk does them. Now, assuming that there was no contract to go on doing those things, still as long as he did them with his father’s agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk.

Pollock B pointed out:

If it had been necessary to say absolutely that the prisoner was a clerk or a servant, I should have hesitated. But I think the words “employed as a clerk or servant” are wider, and that there is evidence to bring the case within them.

**The point in time at which the larceny occurs**

It may sometimes be important to know the exact point in time that the larceny by the clerk or servant occurs. Does it occur at the time that the employee first comes into possession of the property or does it occur at some later point in time?

The issue arose in an interesting case, *Peter Jackson Pty Ltd v Consolidated Insurance (Aust) Ltd* [1975] VR 480. In that case an employee, Jennings, had been given money to take from Peter Jackson’s Little Bourke St premises to the bank, but had instead absconded with it. Under Peter Jackson’s insurance policy with Consolidated Insurance they were indemnified for the loss of the money, provided that the theft occurred outside Peter Jackson’s premises. Crockett J held:

The crucial point being, “when was the money stolen?”, the first question must be “how was it stolen?” ... In order to establish [the insurance company’s contention of a] commission of a theft whilst the money was undoubtedly in the plaintiffs’ premises, it was suggested that, whether or not the offence was larceny as a servant, it certainly was larceny by a trick. As neither property in nor “legal” possession of the money was intended to be given Jennings, the offence could not, and was not, suggested to be that of obtaining money by false pretences. It is clear, of course, that Jennings possessed an intent to steal from the moment (and indeed before) the money was placed in his hands. His inquiries of and taking up a position in relation to the cashier show that he did not want her to fail to have him act as messenger as soon as she had completed the banking formalities. But she was not tricked into handing over the money. What Jennings did was what he was employed to do, and that being so, I am of the view that the offence, and the only offence, committed by him was that of larceny as a servant.

Well then, when precisely was the offence of larceny as a servant committed? The act of theft, of course, consists of the coincidence at the same moment of *cepit et asportavit invito domino* and *animus furandi*. Although the question whether the subsequent discovery of the error involved in what was an originally mistaken receipt of a thing or the finding of a thing of unknown ownership can amount to a taking so as to constitute larceny has for a very long time
been a vexed one, it is clear that the conceiving by a servant of an intention to convert after delivery to him of goods by his employer does amount to larceny: R. v. Jones (1842), Cor. & M. 611; 174 E. R. 657.

But what of the opposite case? The servant acts *animo furandi* when custody of the goods passes to him in order that he dispose of them in accordance with the wishes of the master. The servant proceeds to deal with the goods consistently with the instructions of the master, choosing some later and appropriate moment to convert them, i.e. physically deal with them in a manner inconsistent with the master’s command. Is it only at that moment of such unauthorized handling of the goods that the asportation (taking and carrying away) occurs so as to render the offence complete? Or is the offence committed when the servant first takes the goods - apparently in conformity with the employer’s instructions?

Cases are legion where on such facts the employee was found guilty of larceny as a servant - see *Russell on Crime* 12th ed., vol. 2, p. 915; *Archbold*, 36th ed., par. 1506 - but they do not, for the obvious reason that it was unnecessary so to do, determine precisely when the larceny was committed.

In my opinion, the taking and asportation of goods being carried in conformity with the master’s instructions can only amount to an element in the crime of larceny as a servant when there is a movement of the goods that involves a departure from the master’s instructions. This conclusion appears to me to be supported by a passage in Pollock & Wright’s highly authoritative *Essay on Possession In the Common Law* (1888). It is to this effect (p. 216): "in the case of a servant who has received the custody of the thing from his master there may be a difference according as it is the servant’s business to move the thing or not. If not, then as the servant’s possession is the master’s, it would seem that an ordinary taking and asportation is requisite and sufficient, as in the case of a mere stranger. But if the servant is charged with the duty of moving or carrying the thing, an actual and unequivocal diversion of the thing from its proper destination seems to be requisite and sufficient, as where a postman pockets a letter. (Poynton (1862), 32 L.J.M.C. 29; L. & C. 267 ... )."

Although the report of Poynton’s Case does not disclose whether the prisoner formed an *animus furandi* at the post office or the home of the addressee of the letter, the example of a postman as an illustration of the point appears to me to be particularly felicitous. Whilst sorting the mail at the post office he sees a letter which, believing it to contain money, he decides, when the time for delivery comes, he will pocket. In the meantime, he bundles it up with all the other mail in the normal way and goes upon his delivery round. When he reaches the home of the letter’s addressee he places the letter in his pocket instead of the letter box. Surely that is the act of taking and the moment of theft. Nor would it, I venture to think, ordinarily be thought that the postman had stolen the letter when he was proceeding upon his round in the normal manner notwithstanding his earlier formed fraudulent intent.

This view is consistent with the law concerning bailees. A servant entrusted with his master’s property (unless it has not already been in the master’s possession) never has “legal” possession of the property. Hence he is not considered a bailee in the usual sense of that term. A bailee of goods - who does have possession (but not property or ownership) to be guilty of the statutory offence of larceny as a bailee - must fraudulently appropriate the goods. Regardless of when the intent permanently to deprive the owner of the goods is formed, the offence is completed only, on the misappropriation of the goods. It is clear that that is constituted by a “conversion” of the goods which in law is some act quite inconsistent with the bailor’s title: see *Kenny’s Outlines of Criminal Law*, 16th ed., p. 221.

It follows that, for the reasons that I have endeavoured to express, in my opinion, the theft of the money occurred when Jennings reached the intersection of Little Bourke Street and Swanston Street and, instead of crossing the roadway to the bank, turned in a different direction and proceeded up Swanston Street to join his confederates. As it was at that point of time, and not before, that the plaintiffs’ money was stolen, it follows that their loss of that money did not occur whilst the money was in the insured’s premises. Nor, of course, was the theft committed whilst the money was in those premises.
This decision was confirmed by the majority on appeal (Peter Jackson Pty Ltd v Consolidated Insurance of Australia Ltd [1975] VR 781):

[We agree with the conclusion of the learned judge that although Jennings was guilty of the offence of larceny as a servant of the money in question, he did not commit that offence until after the money had been taken by him from the plaintiffs' building in Little Bourke Street. It is unnecessary for us to decide at what particular subsequent point of time Jennings did commit the offence, in particular whether it was (as the learned judge thought) when he turned left in Swanston Street, or when he joined his confederates in Franklin Street, or at some later time, although we think that the learned judge's view may well be correct. It is also unnecessary for us to decide whether, if Jennings had been intercepted as he was about to leave the plaintiffs' building, he could have been convicted of an attempt to steal the money: cf. R v Cheeseman (1862) 9 Cox CC 100. No doubt Jennings and Griffiths were guilty of conspiracy as soon as they had made their plan to steal the money, but this does not appear to us to be relevant.

When Jennings was given the money by the cashier he had custody of the money, not possession, because he received the money in his capacity as servant of the plaintiffs for the purpose of taking the money to the bank in pursuance of his duties as their servant; the plaintiffs as Jennings' employers had possession of the money. Jennings could not "steal" the money until, having the intention to steal it, that is to deprive the plaintiffs of it permanently, he did something with respect to the money, which was inconsistent with the terms of his custody of it as the plaintiffs' employee, so as to convert his custody of the money into possession and thereby take possession of the money from the plaintiffs. The terms of Jennings' custody of the money required him to take the money to the bank, and therefore he did not steal the money until, at the earliest, he turned left at the corner of Little Bourke Street and Swanston Street, instead of proceeding across Swanston Street to the bank; until then, everything which Jennings had done had been entirely consistent with the terms of his custody of the money.

Reference may be made generally to Pollock and Wright, Possession in the Common Law pp. 215-6 (to which the learned judge referred); Smith and Hogan, Criminal Law, 1st ed. (1965) pp. 348, 362-4, and 369-71; Russell on Crime 12th ed. (1964) pp. 914-5; Kenny's Outlines of Criminal Law 19th ed. (1966) pp. 269-70, and Smith's Law of Master and Servant 8th ed. (1931) pp. 323-33. See too the interesting discussion in Fitch v State of Florida (1938), 125 Am L R Annotated pp. 360-7 and see ibid pp. 375-7. A decision which is of particular relevance to the present question is R v Roberts and Jackson (1848) 3 Cox CC 74. In that case the accused Roberts was employed by one Pugh. Pugh sent Roberts on a journey with a wagon and horses. Hay and bran belonging to Pugh had been placed in the wagon by Pugh's direction for the use of the horses. When Roberts had travelled about four miles with the wagon and horses, the accused Jackson was seen in the road with a cart going towards Roberts. The hay and bran were later found in Jackson's cart. Jackson and Roberts were charged with stealing the hay and bran. Counsel for Jackson submitted that Jackson could be a receiver only, because the evidence tended to show that Roberts must have entertained a design to steal the hay and bran a considerable time before they were placed in Jackson's cart, so that the hay and bran must be taken to have been stolen by Roberts at the time when they were placed in his wagon. But Patteson, J, rejected this submission. His Lordship said: "The doctrine of an animus furandi has never been applied to cases of master and servant. A servant entrusted with plate may long have had an intention to steal it, before he actually removes it, but no case has gone to the extent that such an intention, animus furandi, constituted the larceny." And his Lordship said to the jury: "A man can only be guilty of receiving stolen goods when the goods were stolen previously. In this case the act of stealing was the delivery of the hay to Jackson." Reference may also be made to Russell on Crime, supra, at p. 1147 and to two of the cases there referred to, namely R v Butteris (1833) 6 C and P 147; 172 ER 1183, and R v Gruncell (1839) 9 C and P 365; 173 ER 870. See too Glanville Williams, Criminal Law, The General Part, 2nd ed. (1961) p. 1.
Gillard J dissented, arguing that the larceny was complete when Jennings took control of the money. In upholding the conviction the majority were thus emphasising the importance of the need for actions, not just thoughts, inconsistent with the owner’s intentions.

**Embezzlement**

As already noted in the discussion on larceny an employee cannot be found guilty of larceny from their employer if the property that he or she takes was never in the constructive possession of the employer. To a large extent employees deal with property which has previously been in the possession of their employer, and therefore the issue does not arise. This is because in so dealing with the property the courts accept that the employer retains constructive possession.

However if the property is being transferred from a third party and is being accepted by the employee on behalf of the employer, there must be a point in time in this transaction before which it is not in the possession of the employer. What the employee does with the property at this time is critical. If the employee deals with the property in a way that can be interpreted as consistent with the employee accepting that the possession is constructively in the employer, then any subsequent taking is larceny from the employer.

However, if no such act exists, and the actions of the employee are inconsistent with the behaviour of an employee, there can be no larceny. This is because the possession of the property was consensually given by the third party to the employee and consequently the employee is in lawful possession of the property. It was because of this problem that the statutory offence of embezzlement was enacted.

**157 Embezzlement by clerks or servants**

Whosoever, being a clerk, or servant, fraudulently embezzles, either the whole or any part of, any property delivered to, or received, or taken into possession by him or her, for, or in the name, or on the account of, his or her master, or employer, shall be deemed to have stolen the same, although such property was not received into the possession of such master, or employer, otherwise than by the actual possession of such clerk, or servant, and shall be liable to penal servitude for ten years.

The important issue then is to determine what action would move the possession of the property from the employee accepting the property, and into the constructive possession of the employer. As section 157 makes clear embezzlement can only occur if the property is “not received into the possession of such master ...”

The courts have held that acts amounting to such a receiving into possession occur when the employee does something beyond merely accepting the property, a further action that indicates that the property has been reduced into the constructive possession of the employer. Thus in *Williams v Phillips*, a case involving the collection of refuse by council workmen, the picking up of the refuse by the workmen moved the possession into the control of the workmen, but the placing of that rubbish into the council’s rubbish carts constituted a reducing of that possession into the constructive possession of the employer. It was therefore a larceny, not an embezzlement. The elements of the offence of embezzlement are as follows:

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17 On the other hand in Bazeley, the case that led to the introduction of the offence of embezzlement, the fact that Bazeley put the money into his pocket rather than into the bank’s till meant that possession had never reduced to the bank and larceny was not available.
• a clerk or servant
• embezzles
• property delivered to, or received or taken into possession by him
• for, or in the name, or on the account of his employer
• and embezzles fraudulently

**Embezzles**

This word describes the act of the employee. In *R v Masters* (1848) 1 Den 332; 169 ER 268 embezzlement was described as “fraudulent appropriation”. In the context of s 157 embezzles can be described as an act of appropriation. The implication of the cases is that it needs to be an act separate from the receiving. An act of taking is not needed, as the possession is already in the accused, but the cases would also suggest that there need not be divesting of possession by the accused. *Russell on Crime* describes embezzlement as the *retention* of property that the employee is under a duty to pass on to the employer (p1097)

The nature of the relevant act can be seen from the cases discussed below.

**Clerk or Servant**

This issue has been discussed above.

**Delivered to, or received or taken in possession**

This requirement appears to be relatively straightforward. However it is worth noting that there is no requirement that the defendant received the property from a third party. In fact, it is possible to convict a person of embezzlement in situations where they received money from a fellow employee, providing that employee has not done something to reduce the property to the constructive possession of the employer. It is also possible to be guilty of embezzlement in a situation where the previous possessor of the property is unknown.

**In the name, or on the account of, his employer**

The important point is not the state of mind of the third party, but the nature of the receiving by the employee. Thus in *R v Gale* (1877) 2 QBD 141, the defendant, the Head Manager of his employer’s company, received from other employees working under him cheques which were sent to the Head Office from regional branches. These cheques were often written out to his order. It was the manager’s role to endorse to the company any cheques in his own name and hand them to the cashier who would then cash those cheques and apply them to the company’s concerns. Having received a number of cheques payable in his name from one of the branches he then misappropriated those monies by endorsing the cheques to friends. The friends in return gave Gale the cheques’ cash equivalent before cashing the cheques with their own banks, Gale kept the cash instead of delivering it to the company cashier. Although he was in fact charged with embezzling the proceeds of the cheque, the court noted that there would have been no difficulty in convicting Gale of embezzling the cheques themselves that he had received from the branch offices.

However, because he had been charged with embezzling the proceeds of the cheque a second issue as to the requisite intention of a third party was raised. The argument by the defendant was that he could not be convicted of embezzlement because his friends, in paying the money to him, were unaware that these cheques had been destined for his employer, and thus their intention on giving him the money (the proceeds of the cheques)
were that the money be for Gale and not for the employer. The court saw no difficulty in this. Cockburn CJ held:

But the question is not whether these persons paid on account of his masters, but whether he received on account of his masters. That he did so because it was his duty to pay over the proceeds at once in whichever way he received them.

Lord Coleridge CJ held:

I am of the same opinion, and for the same reason. I will only add that the statute speaks not only of a receipt “for in the name of” of the master, which may contemplate knowledge in the person paying, but also of a receipt “on account” of the master, that is, where the servant is bound to account to the master.

This suggests that the question of whether the property was received “for, or in the name, or on the account of the employer” is an objective test, not a subjective one. It is a circumstance in which the act of the accused occurs, and thus part of the actus reus.

Although there is no requirement that the person passing the property be aware that the servant is accepting on behalf of their employer, there is a requirement that in such a situation the employer would be entitled to that property. Thus in R v Cullum (1873) LR 2 CCR 28, the defendant was found to be not guilty of embezzlement on the grounds that his employer was not entitled to the money that he had earned. Cullum was employed to captain a barge to and from London, carrying his employer’s goods. On one such trip the defendant was to bring the barge back from London empty. He suggested to his employer that on this trip he could carry manure for a customer to a location which was on his return route. His employer expressly told him not to pick up the manure but to bring the barge back empty. In defiance of these instructions, the defendant picked up the manure and delivered it. When he returned to his employer he did not account to his employer for the money he had earned in so carrying the manure. The court held that there was no embezzlement. Blackburn J held:

... the essence of the matter is, that the servant shall be deemed to have stolen the master’s property, if it be his master’s property, although not received otherwise than in the prisoner’s capacity of clerk or servant. ... Now, in the present case, I cannot see how this was the master’s property, or that the servant had authority to carry anything in this barge but the cargo he was directed to convey. He was actually forbidden to load this barge on the return voyage; he did load it, and very improperly earned money by the use of it; but in what sense he can be said to have received this sum for the use of his master I cannot understand. The test of the matter would really be this - if the person to whom the manure belonged had not paid for the carriage, could the master have said, “There was a contract with you, which you have broken, and I sue you on it?” There would have been no such contract, for the servant never assumed to act for his master, and on that ground his act does not come within the statute.

Property must not have been reduced into the possession of the employer

It is crucial to the offence of embezzlement that although the property come into the possession of the clerk or servant, that possession is not the constructive possession of the employer. If there is constructive possession by the employer, then there is no embezzlement but instead larceny by a clerk or servant. In R v Hayward (1844) 1 C&K 518; 174 ER 919 the defendant was sent by his employer to collect some straw. He brought the straw back to his employer’s property, placed it on the ground and then asked his employer’s niece to open the hayloft. After she opened the hayloft, he placed some of the straw into the hayloft and misappropriated the rest of it. The court held that this was not embezzlement, but instead larceny, because in placing the straw at the stable door he had
made a delivery of the property into his employer’s hands. This made any later misuse of the property a larceny and not an embezzlement.

In *R v Wright* (1858) 7 Cox CC 413, the defendant was employed to run a small regional branch of his employer’s bank. This branch was conducted in a room of the defendant own premises, in which he traded as a wine and spirits merchant. The bank provided the defendant with a safe in which he was to put the proceeds of the day’s business. A duplicate key to that safe was held by the bank. It was conceded that money received by the defendant and placed into the till in the defendant’s shop during the course of the day had not been reduced into the possession of the employer. But it was argued that any money which was placed into the safe at night then ceased to be in the exclusive possession of the defendant and was reduced into the constructive possession of the employer. The court upheld a conviction of larceny, rather than embezzlement. Lord Campbell CJ held:

> It is found to have been the duty of the prisoner, when money was paid over the counter by customers, to carry it, when night came, to the safe, and deposit it there to remain in a state of security until it should be taken out again to be applied to the purposes of the bank; and I think that when it was so placed in the safe, the exclusive possession of the prisoner was determined, that being a box or safe furnished by the employer, of which the employee had a duplicate key.

In that respect the safe in this case is very much resembles the till in a shop in London, where the shop man has access to it for lawful purposes, though if he takes money from it, animo furandi, he is a thief.

The distinction between possessing the property by the servant on their own behalf, and in receiving the property and then reducing it to the constructive possession of the employer is said to be demonstrated by two cases, *R v Murray* (1830) 1 Moody 276; 168 ER 1270 and *R v Masters* (1848) 1 Den 332; 169 ER 268. However, exactly what the distinction is, is not very clear from the decisions.

In *R v Murray* an employee received money from a third party on account of his employer. He then passed that money to a second employee so that the money could be used to pay for an advertisement in a newspaper. The second employee fraudulently misappropriated the balance of the money which was left after the advertisement was paid for. In *R v Masters* money was received from a third party by an employee, passed to a second employee, passed to a third employee, and then misappropriated by a fourth employee. The money had been passed through all four hands as part of an elaborate system of cross-checking to hopefully ensure that money would not be misappropriated. The court held in *R v Murray* that there was no embezzlement, but rather a larceny. This was because the way in which the first employee had dealt with the money meant that it had come into the possession of the employer. This was not the case in *R v Masters*. In *R v Masters* Pollock CB explained:

> This case is quite different from that of *R v Murray*, 1 Moo CC 276. There the case was not within the stat. 7&8 Geo.IV.c.29, s47, because the master had had possession of the money by the hands of another servant; and when it was given to the prisoner by that servant to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master: the fraudulent appropriation of it being thus a tortious taking in the first instance, was not embezzlement but larceny. But here the money never reached the master at all: it was stopped by the prisoner on its way to him. The original taking was lawful, and, therefore, the fraudulent appropriation was embezzlement.

The distinction that Pollock CB seems to be making is that property that is still “on its way in” to the employer can be embezzled, but not property that having been already received is now being put to a use of the employer’s (and thus “on its way out”). The
difficulty is that it would seem that the actions of the other employees in Masters would seem to have already reduced it to the possession of the employer.

**Mens rea: fraudulently**

Fraudulently in this section has the same meaning that fraudulently and dishonestly means throughout the Act. It has already been discussed above.

**Proof by general deficiency**

Both those charged with larceny as a clerk or servant, or embezzlement, may be convicted in the absence of direct evidence of the taking of the property, if it is money. Section 161 inserts a provision which deems that a general deficiency of actual money held in comparison to the records in a book of account, can constitute proof of the taking of specific sums of money.

**161 Proof of general deficiency in accounts**

On the prosecution of a person for larceny, or embezzlement as a clerk, or servant, or as a person employed in the Public Service, where the charge is in respect of money, it shall not be necessary to prove the larceny, or embezzlement, by the accused of any specific sum of money, if there is proof of a general deficiency on the examination of the books of account, or entries kept, or made by him, or otherwise, and the jury are satisfied that he or she stole, or fraudulently embezzled the deficient money, or any part thereof.

This is a statutory enactment of the common law doctrine of general deficiency, a common law doctrine that is also available to prove fraudulent conversion under s178A in exactly the same way. The development of this common law principle was outlined by Bleby J in *R v Rich* (1997) 68 SASR 390:

249. The ability to charge with larceny or embezzlement of a general deficiency was firmly established at common law with the decision in *R v Tomlin* [1954] 2 QB 274. That was a case of embezzlement where it was impossible to trace the individual items of property or sums of money embezzled over a period of time. It was notorious, of course, particularly in the case of larceny as a clerk or servant or embezzlement, that the taking of small sums continually over a period of time, and often with an adjustment to books of account to hide these defalcations, made it almost impossible to prove individual misappropriations. It was therefore permitted to charge larceny or embezzlement of the general deficiency thus calculated upon a reconciliation of the accounts or upon a stocktake as the case required. The amount or volume and nature of the money or goods taken was thereby identifiable but not when each component was taken. Whilst it was a method of facilitating proof, it also enabled a compendious fraud to be alleged even though it might be comprised of many individual thefts or appropriations. The ability to proceed in that manner was not dependent on there being a mixed fund owned by or in trust for a variety of people. ... The application of the principle relieves the Crown from proving fraudulent conversion of any specific item or sum of money, and enables it to allege and prove fraudulent conversion of the general deficiency in the account. In most cases this will require a reconstruction and reconciliation of the account in order to prove the fact and amount of the deficiency.

250. This Court recognised in *Goodall* [(1975) 11 SASR 94], however, that the principle is subject to an important qualification, namely that “where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency” (per Bray CJ at 97 quoting with approval *Tomlin* (ibid) at p282). See also statements to similar effect in *R v Koppen* (1975) 11 SASR 182 at 183-184 and *R v McMullen* (1990) 54 SASR 55 at 56.

The elements of general deficiency under s161 are explained in *R v Carratti* (1983) 10 A Crim R 328, a WA case dealing with a similar provision. There Brinsden J held:
That section was no doubt designed to displace the rule of the common law that where it is possible to identify individual items of property and to prove the fraudulent taking or fraudulent conversion of each of a number of such items on particular dates it is "undesirable" if not positively wrong to "lump" the items together and to charge the accused with stealing or with a fraudulent conversion of the total as a "general deficiency": see Goodall (1975) 11 S.A.S.R. 94, where the cases are discussed.

Even so, as it seems to me, the charge alleging the stealing of a sum of money being, as here, "the amount of the general deficiency" is a charge of stealing the amount of a shortfall, that being the ordinary meaning of the word "deficiency". To establish a "general deficiency" in that sense of an amount of money, the Crown must prove the amount of money that the accused had under his control and that on a date within the period charged he was unable to account for the total fund or for some part of it. In the proof of that case the Crown may prove that the shortfall consists of "any number of specific sums ... the taking or conversion of which extended over any space of time" or that the stealing or conversion of specific sums of money within the charged time span is within the shortfall although not equal to it. But, however it be done when, as here, the charge is opened to the jury upon the basis that the moneys received by the accused "were not being accounted for in the correct way and never were" and when the case is fought out on that issue it cannot at the end of the day be left to the jury upon the basis that the accused stole by a fraudulent taking of each sum of money which he received and without considering whether upon his accounting there was a "general deficiency" in the sense of a shortfall or not.
FRAUD: GENERAL OFFENCES

As has been discussed previously, larceny can only be committed if the property is taken from the owner without the consent of the owner. Traditionally, if the owner consented to the passing of the property then there was no criminal sanction. The idea was that the owner of property had an obligation to protect their own interests. If they were stupid enough, or gullible enough, to permit themselves to be duped by a fraudster, the criminal law would not come to their aid. Instead, they would be left to the common law remedy of deceit. In time this was remedied by statute, but not before a period of uncertainty during which the courts developed a doctrine known as larceny by a trick. This is not discussed in this chapter, but see Pear (1779) 168 ER 208, Ward (1938) 38 SR (NSW) 308 and Justelius [1973] 1 NSWLR 471.

Traditionally, the core fraud offence in NSW was the offence of false pretences contained in section 179 Crimes Act 1900. In the 1980’s this was supplemented by fraud offences based around obtaining financial advantage in s178BA. These offences were repealed in 2010 and replaced with general fraud offences. However much of the case law on the old offences remains relevant.

The current general fraud offence is:

192E Fraud

(1) A person who, by any deception, dishonestly:
   (a) obtains property belonging to another, or
   (b) obtains any financial advantage or causes any financial disadvantage,

is guilty of the offence of fraud.

Maximum penalty: Imprisonment for 10 years.

(2) A person’s obtaining of property belonging to another may be dishonest even if the person is willing to pay for the property.

(3) A person may be convicted of the offence of fraud involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.

(4) A conviction for the offence of fraud is an alternative verdict to a charge for the offence of larceny, or any offence that includes larceny, and a conviction for the offence of larceny, or any offence that includes larceny, is an alternative verdict to a charge for the offence of fraud.

Section 192E contains within it three separate offences, defined by subject matter. The elements of those offences are:

Obtaining property by deception

- the accused engages in a deception
- that deception causes the obtaining of property
- that property belongs to another
- the obtaining is dishonest
- the accused intends to permanently deprive the victim of the property (as defined in s192C(4) and (5))

Obtaining financial advantage by deception

- the accused engages in a deception
- that deception causes the obtaining of financial advantage
• the obtaining is dishonest

Causing financial disadvantage by deception

• the accused engages in a deception
• that deception causes a financial disadvantage
• the causation is dishonest

As the offences are differentiated by their subject matter this is discussed first.

The subject matter

Property belonging to another: s 192C(3)

192C Obtaining property belonging to another

... (3) For the purposes of this Part, property belongs to a person if:
(a) the person has possession or control of the property, or
(b) the person has a proprietary right or interest in the property (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust.

Section 192E is a statutory offence, and the offence refers to the word ‘property’ as its subject matter. Consequently the scope of property is not to be defined by common law, as with larceny, but by the scope of the definition of property in s4 of the Crimes Act.

“Property” includes every description of real and personal property; money, valuable securities, debts, and legacies; and all deeds and instruments relating to, or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and includes not only property originally in the possession or under the control of any person, but also any property into or for which the same may have been converted or exchanged, and everything acquired by such conversion or exchange, whether immediately or otherwise.

Section 4 makes clear that property, for the purposes of s192E, extends beyond chattels to also include money and other forms of choses in action. There is however authority that a valuable security is not a balance in a bank account: R v Cameron (1991) 57 ACrimR 406 at 408.

As discussed below, the need to prove an obtaining of the property may mean that by definition intangible property may not be within the offence.

Financial advantage and financial disadvantage

The term “financial advantage” is carried across from the previous s178BA and appears to be an adaptation of the term “pecuniary advantage” in the Theft Act 1968. The Theft Act term was however restricted by definition to circumstances whereby the defendant is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so, or is

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18 Now repealed. See Fraud Act 2006 (Eng).
given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting. 19

“Financial advantage” being unrestricted is a much broader concept. It has been held to be a term of clear and plain meaning and one not to be given any narrow construction. 20  In  Murphy v R  it was described as follows:

We are concerned with the denotation of a term. “The word ‘finance’ may cover, depending on context, inter alia, payment of a debt, or of compensation; a ransom; stock of money; borrowing of money at interest; the pecuniary resources of a state and, hence, of a company or individual; to engage in financial operations; to provide oneself with capital. (SOED). The word ‘advantage’, inter alia, has the meaning of having the better of another in any respect; the result of a superior position; to benefit or profit. (S.O.E.D.) ...

By refraining from any definition Parliament avoided sophistry ... and left the law to evolve case by case by an application of the ordinary meaning of the words used.

Cases where a person obtains services, money or property by means of a bogus cheque pose no difficulty. The services, money or property amount to a financial advantage (see Elliott, “Obtaining Financial Advantage by Deception” [1978] 2 Crim LJ p23) 21

It also appears that the length of time that the financial advantage is held for may be transitory. In  Murphy v R  [1987] Tas R 187, Murphy had induced people to hand over money in return for cheap electrical goods which were never delivered. Wright J noted:

By depriving his victim of funds and placing himself in possession of the same, he created for himself a position of “advantage” as that term is commonly understood, both  vis a vis  his victim and also in respect of the world at large. The retention of funds by the appellant before delivering the goods need not have been contemplated as extending for anything but a comparatively brief period for the transaction itself to have conferred an advantage upon him because, during the short time which it was anticipated would separate the payment from the receipt of goods in exchange, the appellant had both the power and the capacity to treat the money as his own (cf.  Matthews v Fountain  [1982] VR 1045 at p1049 per Gray J). It may be inferred that he was not merely a bailee of the cash at that time and that it was his to do with as he pleased.

Financial advantage and debts


However it is unlikely that the issue will now arise because of the enactment of an offence prohibiting the causing of financial disadvantage.

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19 Additional offences in the  Theft Act 1978 extend liability to persons who secure the remission of an existing liability to make a payment, induce a creditor to wait for payment or to forgo payment with intent to permanently default on the debt, or obtain an exemption from or abatement of liability to make a payment.


21 [1987] Tas R 187 per Nettleton J, the other judges agreeing.
Financial disadvantage

The term is not defined in the legislation. However it seems clear that it refers to situations where the victim’s financial situation is comparatively worse as a result of the deception of the accused.

“Financial” advantage and disadvantage

The following unreported decision of Coelho v Durbin (NSWSC 29 March 1993 (BC9304122)) suggests that there are also limits on the forms of advantage that can be described as “financial”.

Badgery-Parker J: The evidence before the magistrate showed that the plaintiff came into possession of two motor cars. One was a 1986 Nissan Pintara which was unregistered and in a seriously damaged condition; the other was a 1988 Nissan Pintara undamaged but also unregistered.

It appears that he carried out certain work on the 1986 car, restoring it to a driveable condition, and at some stage the plaintiff, for reasons which did not appear from any relevant evidence before the magistrate, transferred the compliance plate from the 1986 vehicle to the 1988 vehicle. He then presented the vehicle for inspection for the purpose of securing registration of it and there was no evidence otherwise than that he intended to pay whatever registration fee was thereby incurred.

The charge laid under s178BA was that he dishonestly attempted to obtain for himself "a financial advantage, to wit, motor vehicle registration" and the deception alleged was that he purported, by which I take it is meant, that the 1988 vehicle was the 1986 vehicle to which the compliance plate properly related.

The question which arises in these proceedings is whether, assuming that he effected a deception upon the motor vehicle examiner, and assuming, though I make no finding about it, that in doing so he acted dishonestly, what he attempted to obtain for himself, namely motor vehicle registration, is capable of being described as a “financial advantage” within the meaning of the section.

Other judges have declined to attempt to define the concept of “financial advantage” (see for example Matthews v Fountain (1986) VR 1945 wherein the judge was bold enough to describe the concept as a very simple one). I am not altogether sure that I agree with that, nevertheless it does seem to me to be the essence of the concept of financial advantage that the person alleged to have obtained such has obtained a benefit which can be valued in terms of money and a benefit which can be seen to be financial as distinct from benefits of another kind.

I have no doubt that to obtain the registration of a motor vehicle is an advantage in a practical sense to the person by whom that step is achieved, but it does not appear to me to be an apt use of English to describe the benefit as a financial benefit, except (perhaps) in circumstances where the evidence showed an intention on the part of the person involved to utilize the vehicle thus registered in some way which could confer upon him benefits which could be described as financial benefits.

I do not say, for example, what I think was ventilated in argument before the magistrate, that the offence would necessarily have been proved had it been shown that the plaintiff, having secured registration of the vehicle was in a position to sell it and achieve a profit which exceeded the cost of registration. It may be that proof of some such prospect and intention might make out the offence, but I do not so hold. I am content to rest my decision on a finding that the obtaining of registration of the vehicle is not the obtaining of a financial advantage.


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Obtaining and causing

Obtaining property

There is an unfortunate degree of complexity introduced into these offences by the continued use of property as a foundation of one limb of the offence, and the apparent desire to use the wording employed in the UK Theft Act and Model Criminal Code to describe the nature of the obtaining of property.

Section 192C contains the following:

**192C Obtaining property belonging to another**

(1) For the purposes of this Part, a person obtains property if:

(a) the person obtains ownership, possession or control of the property for himself or herself or for another person, or

(b) the person enables ownership, possession or control of the property to be retained by himself or herself or by another person, or

(c) the person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.

There is a lot of complexity in this section, but the underlying issues can be briefly explained. The section is drawn from the wording in the UK Theft Act, and originally applied to theft, not fraud. Section 192C(1) exists because under the Theft Act approach intangible property can be stolen. It seems the desire to maintain a property based fraud offence, together with the recognition that intangible property was part of the definition of property has led to the need to describe interaction with property as ownership and control in addition to possession.

The efficacy of this expansion is somewhat questionable in light of the decision of the House of Lords in *R v Preddy*. The case involved a mortgage fraud where some of the funds had been transferred to an account with another bank. Preddy and others were charged under the then s 15(1) of the UK Theft Act:

(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

(2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and “obtain” includes obtaining for another or enabling another to obtain or to retain ...

(4) For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

The wording of that offence is very similar to s 192E(1)(a) and s192C(1).

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23 The issue for the court was whether this could be an obtaining pursuant to s15 of the English Theft Act 1968:

(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
Lord Goff (the other Lords agreeing) held that in the case of an electronic transfer of funds, there was not an obtaining of a chose in action by the holder of the receiving account.

The question remains, however, whether the debiting of the lending institution's bank account, and the corresponding crediting of the bank account of the defendant or his solicitor, constitutes obtaining of that property. The difficulty in the way of that conclusion is simply that, when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary, that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor. In these circumstances, it is difficult to see how the defendant thereby obtained property belonging to another, ie to the lending institution.

Professor Sir John Smith, in his commentary on the decision of the Court of Appeal in the present case, has suggested that:

'Effectively, the victim's property has been changed into another form and now belongs to the defendant. There is the gain and equivalent loss which is characteristic of, and perhaps the substance of, obtaining.' (See [1995] Crim LR 564 at 565-566.)

But even if this were right, I do not for myself see how this can properly be described as obtaining property belonging to another. In truth, the property which the defendant has obtained is the new chose in action constituted by the debt now owed to him by his bank, and represented by the credit entry in his own bank account. This did not come into existence until the debt so created was owed to him by his bank, and so never belonged to anyone else. True, it corresponded to the debit entered in the lending institution's bank account; but it does not follow that the property which the defendant acquired can be identified with the property which the lending institution lost when its account was debited. In truth, s 15(1) is here being invoked for a purpose for which it was never designed, and for which it does not legislate.

I should add that, throughout the above discussion, I have proceeded on the assumption that the bank accounts of the lending institution and the defendant (or his solicitor) are both sufficiently in credit to allow for choses in action of equivalent value to be extinguished in the one case, and created in the other. But this may well not be the case; and in that event further problems would be created, since it is difficult to see how an increase in borrowing can constitute an extinction of a chose in action owned by the lending institution, or a reduction in borrowing can constitute the creation of a chose in action owned by the defendant. It may be that it could be argued that in such circumstances it was the lending institution's bank whose property was 'obtained' by the defendant; but, quite apart from other problems, that argument would in any event fail for the reasons which I have already given.

The effect appears to be that any fraud involving intangible property or funds transfers should be prosecuted under the financial advantage and disadvantage arms.

**Obtaining financial advantage**

*192D Obtaining financial advantage or causing financial disadvantage*

(1) In this Part, *obtain* a financial advantage includes:

(a) obtain a financial advantage for oneself or for another person, and

(b) induce a third person to do something that results in oneself or another person obtaining a financial advantage, and

(c) keep a financial advantage that one has,

whether the financial advantage is permanent or temporary.

Financial advantage is by definition a relative concept and the statutory definition of obtaining extrapolates the way in which that relationship can be derived. It can either be a
positive increase in advantage, or it can be a failure to have an advantage diminished. The advantage can also be obtained ephemerally.

The advantage can be for the accused or another. It is not clear why the word “induced” rather than “caused” was used to describe the causal connection to the actions of a third party. It may because the use of deception as the means makes it more appropriate to use induce.

**Cause financial disadvantage**

Similar considerations apply to the obtaining of disadvantage.

**192D Obtaining financial advantage or causing financial disadvantage**

(2) In this Part, *cause* a financial disadvantage means:

(a) cause a financial disadvantage to another person, or

(b) induce a third person to do something that results in another person suffering a financial disadvantage,

whether the financial disadvantage is permanent or temporary.

**Does “obtains” require that there be an action by the defendant?**

Both the property and financial advantage offences require that the defendant “obtains” the property, etc. either for themselves or another person.

Obtaining has been held in recent cases in NSW and WA to require that the property come into the defendant’s possession by the defendant’s own deliberate effort or request.

In *Byrnes v Burgess* [1999] NSWSC 419 Byrnes was charged with attempting to “obtain goods” as an undischarged bankrupt in breach of s269 of the *Bankruptcy Act* 1966. He had paid a deposit for a painting. Adams J held:

3. The Oxford English Dictionary (2nd edition) defines “obtain” as “to come into the possession or enjoyment of (something) by one's own effort, or by request; to procure or gain, as the result of purpose and effort; hence, generally, to acquire, get". In my view, the phrase "obtain goods" in s 269(1)(ac), to adopt the language of Street CJ in *R v Petronius-Kuff* [1983] 3 NSWLR 178 at 181 when discussing *R v Arnold* (1883) 4 LR (NSW) 347, is not directed to the concept of technical property, but rather to physical custody of objects; to "obtain goods" is to effect the translation of physical custody in an object.

Byrnes had thus neither obtained the goods, nor attempted to do so. All he had done was to promise to purchase the goods.

In *Haynes v Hughes* ([2001] WASCA 146), Hughes was charged with obtaining possession of objectionable material via email in breach of s101 of the *Censorship Act* 1996 (WA) it was held by Roberts-Smith J that a computer file was not obtained merely by its arrival in a person’s email inbox. He held:

A person who unwittingly receives material on their computer has not, in my view, by reason of that circumstance alone "obtained possession" of it ... However they would do so once they opened and viewed the material and deliberately followed a procedure to save it to their hard drive, home directory or to disc.

However, on appeal the WA Court of Appeal (Full Court) held differently:

It seems to me that an article is obtained by use of a computer service when that article is first received into the electronic systems comprising the computer service. Possession of the article is obtained at that point, or, at the very latest, at the point at which the computer service displays notification that the article has been received. From there it is available to have
applied to it the various computer functions such as the view function, the save function, the send function and so on. Once it has arrived, it is there on the computer service for the user to do with it what the user wishes to do with it. The user has, thus, "obtained" the article.24

It is therefore unclear whether obtaining requires a deliberate effort on the part of the defendant. Whether “obtaining” also operates to restrict the forms of property that may fall within the scope of the offence is also unclear.

Obtaining is a specific act, not a continuing state of affairs.25 The prosecution must therefore allege and prove an action that is said to have been the obtaining. There is no requirement that the act of obtaining be a personal act of the defendant. Any action by a partner or an innocent agent can suffice.26

**Deception**

**192B Deception**

(1) In this Part, *deception* means any deception, by words or other conduct, as to fact or as to law, including:

(a) a deception as to the intentions of the person using the deception or any other person, or

(b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.

(2) A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless.

These offences are based on the idea of deception rather than representation. The crucial difference is that a deception requires that the accused behaviour has caused the victim to be deceived and in that sense be successful, whereas a representation need not. The UK Fraud Act 2006 marked a shift in that jurisdiction from a deception based model to a representation based model. NSW has opted to continue a deception based model. This means that in terms of both the *He Kaw Teh* and Model Code typologies of crime, fraud is defined as a result-based offence.

Section 192B defines deception, expanding the scope to include reckless actions, and removing the restrictions the common law had placed on the fact/law and present/future distinctions.

The deception practised may relate not only to matters of fact but also to matters of law other than matters relating to legal proceedings. Thus in *Jamieson and Brugmans v The Queen* (1993) 177 CLR 574 the High Court held (per Deane and Dawson JJ):

The sole question in each appeal, therefore, can be formulated in abstract terms. It is whether the mere service upon a defendant, by (or with the authority of) the plaintiff, of an unverified statement of claim filed in an action for damages for personal injury can of itself constitute the actus reus of the criminal offence of attempting to obtain money by deception if, to the knowledge of the plaintiff, the statement of claim contains a false material assertion.

24 *Haynes v Hughes* [2001] WASCA 397 per Anderson J, the rest of the court agreeing. The defendant was charged with knowingly obtaining possession of objectionable material. The defendant’s acquittal was upheld on the basis that while he had obtained possession, at the time of its arrival in his email inbox he could not have known of its nature.


26 *R v Reid* (1996) unreported NSWCCA 21/10/96
The answer to the question is that, in the absence of contrary provision in some applicable statutory instrument or rule of court (and none has been relied upon in these appeals), the mere service upon a defendant of an unverified statement of claim does not, at least in so far as criminal liability is concerned, of itself constitute an express or implied positive representation by the plaintiff that the individual allegations of fact or of law which the statement of claim contains are objectively true or correct. Indeed, to characterize the factual assertions in a plaintiff’s unverified pleading as positive representations of the truth of their content would be to misunderstand or ignore the traditional nature and function of a declaration, statement of claim or bill. The traditional nature of such an unverified pleading was not that of a representation or warranty of the objective accuracy of the assertions of fact which it contained. It was that of a written identification and communication of the extent of the plaintiff’s claim. Its traditional function was not an evidentiary one. It was to identify the issues of fact which would, in the absence of admissions, arise for determination at the trial by defining the outer limits within which the plaintiff’s case would be confined.

Deception is also defined to extend to include deceptions as to the defendant’s intentions. Such intentions need not be promissory in nature, and the offence might therefore extend to more non-committal representations. In Bennett v Government of the United Kingdom (2000) 179 ALR 113, Bennett was resisting extradition to Scotland in relation to alleged fraud based on representations that had been made about his ability to obtain a Lamborghini motor vehicle from a private collector in Geelong. He argued that such actions did not constitute deception under s178BA.

93. ... There can be no doubt that when that definition [in 178BA] refers to "deception ... as to fact", it is referring at least to those sorts of knowingly false representations as to fact which would have amounted to a false pretence for the purpose of traditional offences like that contained in s 179 of the Crimes Act.

94 In the present instance, what was alleged against Mr Bennett in the case of each of the two offences (see par 13 above) was his pretending that he "was in a position to" do certain things. As to the first of those offences, the allegation was one of a knowingly false representation as to fact which would have amounted to a false pretence for the purpose of traditional offences like that contained in s 179 of the Crimes Act: see Greene v The King (1949) 79 CLR 353 at 363-64 (Dixon J). As to the second of those offences, the allegation either was one of a knowingly false representation as to fact which would have amounted to a false pretence for the purpose of traditional offences like that contained in s 179 of the Crimes Act: see R v Timperon (No 2) (1976) 15 SASR 1 (FC); or, alternatively, was one of a "deception ...as to law".

95 It is true that, in the case of one of the two offences, there was a further allegation of Mr Bennett’s pretending that he "was prepared to" do a certain thing. That may or may not have been an allegation of a representation which would have amounted to a false pretence for the purpose of traditional offences like that contained in s 179 of the Crimes Act (see, in particular, the discussion in Greene at 364 (Dixon J), 366-67 (McTiernan J (dissenting)) and 369 (Webb J (dissenting)) of R v Gordon (1889) 23 QBD 354). However, even if it was not, it was in any event an allegation of a deception within the meaning of s 178BA(2) of the Crimes Act, being an allegation of a deception "as to the present intentions of" Mr Bennett.

The section also extends the notion of a deception to include the doing of an action that is intended to cause an unauthorised function of a computer. This deeming provision is designed to overcome the requirement that there can only be a deception if a victim has been deceived. As computers and other machines are inanimate such deception cannot occur. Problems with such deeming provisions are discussed in Alex Steel, Giving and Taking, Criminal Law Journal 2011 (forthcoming).
Inducement of corporations

It has also been held that although the victim is the corporation, a deception must be shown to have operated on the mind of an officer of the corporation. If it cannot be shown that the company was deceived the property is passed or the benefit obtained with the consent of the company and no offence occurs.

The complication is that if one employee is deceived but another one is not there may not be a deception. If an employee is aware that the representation is false, then that knowledge is imputed to the entire corporation, irrespective of the deception of another employee. However, if the employee is engaging in the fraud themselves, then as they act outside of the scope of their employment in so doing, their knowledge is not imputed to the company.

In *R v Rozeik* ([1996] 3 All ER 28) applications were made by the defendant for loans from a finance company to purchase equipment for use by Rozeik’s companies. The applications contained false information and receipts relating to the nature, cost and existence of the equipment. However it was alleged that the managers of the relevant finance companies were aware that the applications were false.

Whether or not a company is fixed with the knowledge acquired by an employee or officer will depend on the circumstances. It is necessary first to identify whether the individual in question has the requisite status and authority in relation to the particular act or omission in point: El Ajou v. Dollar Holdings Plc [1994] 2 All E.R. 685, 696a-d. It follows from this that information given to a particular employee, however senior, may not be attributed to the company if that employee is not empowered to act in relation to that particular transaction. An employee who acts for the company within the scope of his employment will usually bind the company since he is the company for the purpose of the transaction in question: see per Lord Templeman in the Ready Mixed Concrete case (supra) at p. 465D.

The company may be liable to third parties or be guilty of criminal offences even though that employee was acting dishonestly or against the interests of the company or contrary to orders. But different considerations apply where the company is the victim, and the employee’s activities have caused or assisted the company to suffer loss. The company will not be fixed with knowledge where the employee or officer has been defrauding it. This has long been the law and it is accepted by Mr Shaw that this is so. Accordingly, [the managers] Birch and Wilkinson’s knowledge would not, he accepts, be attributed to the companies if they were acting dishonestly and were parties to the appellant’s fraud. But he submits that they must be proved to have been dishonest and they were not.

In such a case knowledge of a manager is not to be imputed to his employers if the manager is acting in fraud of his employers and the knowledge which he has is relevant to the fraud: Attorney-General’s Reference (No. 2 of 1982) (1984) 78 Cr.App.R. 131, [1984] Q.B. 624. It is not a question of the manager having notice of the fraud: his state of mind is the state of mind of the company, and the company is deceived, unless the manager is party to the deception. The reason why the company is not visited with the manager’s knowledge is that the same individual cannot both be party to the deception and represent the company for the purpose of its being deceived. Unless therefore it was proved that the managers were party to the fraud, with the result that their knowledge can be disregarded, their knowledge must be imputed to the companies, and the fact that other employees were deceived could not avail the companies.

On this point the jury could not be invited to assume what it was for the Crown to prove. Since Birch and Wilkinson were managers of their respective branches, their knowledge was the knowledge of their companies unless they were shown to be acting dishonestly. But the judge referred to no evidence that either manager was acting dishonestly, or from which the state of mind of either manager could be inferred. Indeed, from the way the judge put it in the passage cited above, it looks as though there may have been room for doubt about their state
of mind, especially in relation to the earlier transactions. It is therefore not possible to say with the necessary assurance that they must have been dishonest. But unless they were it could not have been proved that the companies were deceived. ...

In cases in which the company is the victim the person or persons who stand for its state of mind may differ from those who do so in cases in which a company is charged with the commission of a criminal offence. The latter are less likely to represent what Viscount Haldane called "the directing mind and will of the company". In D.P.P. v. Ray (1974) 58 Cr.App.R. 130, [1974] A.C. 370 the defendant was charged with dishonestly obtaining by deception a pecuniary advantage in the form of a meal for which he evaded payment. It was the waiter who was held to have been deceived, and the position would have been no different had the deception been perpetrated in a restaurant run by a company rather than a local Chinese restaurant which may not have been.

There were therefore two reasons why the judge's direction was wrong, that it was sufficient that any employee of the company was deceived who was concerned in the provision of each cheque. First, the question is not whether any employee of the company was deceived but whether any employee whose state of mind stood as that of the company knew of the falsity of the transaction, since if he or she did know, the company also knew. If the company knew, it would not matter how many fellow employees were personally deceived. Secondly, and in any event, a cheque could only be obtained from the company from an employee who had authority to provide it. The deception had to operate on the mind of the employee from whom the cheque was obtained. In no sense could a cheque be "obtained" from the person who merely typed it out. So the judge's references to "any" employee were fatally wide. What the Crown had to prove was that when the cheque was obtained from the company it was obtained from a person who was deceived. Although in no sense was it obtained from those who checked or typed it, the signatories of the cheques (apart from Birch and Wilkinson) were in a different position. They had a responsibility to ensure that the cheques were not signed unless satisfied that the money should be paid. They were more than mere mechanics and in our judgment, if they were deceived, the company also was, once Birch and Wilkinson were disregarded. That means that (1) where a manager only signed, the offence could not be made out; (2) where a manager signed with another employee, it had to be shown that that other was deceived; and (3) where two employees (other than a manager) signed, it had to be proved either that one was or that both were deceived, and that where one was, the other did not know of the fraud, since if he or she did, the company would not have been deceived.

See also R v Gomez [1993] AC 442 and R v Jenkins [2002] VSCA 224

On the other hand, if one employee is deceived and another passes possession in the property without relying on the false representation, deception is still proved. This is because the state of mind of a corporation “may be the components of different items of knowledge of more than one officer of the company”.

In Police v Carradine (1996) 66 SASR 584, Carradine entered a Woolworths store with another person. Carradine removed a radio cassette player from the shelf, put it into the other person’s bag and then they approached the refund counter. At the counter two Woolworths employees, Ms Stone and Ms Fenwick, dealt with the “refund”. Carradine produced the player and the other person filled in the application form. That form was then handed to, read, and signed by Ms Stone. Ms Stone then asked Ms Fenwick to authorise the refund. Ms Fenwick glanced at the refund and handed over the refund amount, $50. The magistrate dismissed the prosecution because he held that while the representation had been made to Ms Stone, the decision to make the “refund” had been Ms Fenwick’s and she had not been induced by the representation of Carradine. On appeal, Debelle J held:

The magistrate has taken a very narrow and restrictive view of the element of inducement. It is a view which fails to have regard to management structures and to the manner in which a corporation acts. It is inconsistent with the authorities on which he relied.
The prosecution had proved a management structure by which one employee reported to another in writing and the second employee, on being satisfied that the necessary procedures had been followed, authorised a course of action, in this case payment of the refund. ...

This procedure is of a kind which is commonly adopted in a hierarchical management structure. One officer will report to another who, on being satisfied that the appropriate procedure has been carried out, will then authorise a particular course of action. The reporting officer is conveying information to that officer. In this case Ms Stone was conveying information to Ms Fenwick. By handing her the complete application for a refund, she was informing her of the effect of the misrepresentation made to her by the respondent.

The person making the refund was not Ms Fenwick but Woolworths. The respondent was charged with obtaining money from Woolworths by false pretences. As employees of Woolworths, Ms Stone and Ms Fenwick were acting as its agents in this transaction by which the refund was made. The representation was made to Ms Stone as the agent of Woolworths and therefore to Woolworths. The representation was also made to Ms Fenwick by means of the written document and, relying on the document, she made the payment on behalf of Woolworths. The fact that Ms Fenwick did no more than take a cursory look at the form and the fact that Ms Fenwick did not herself speak to the respondent or the woman with him does not mean that the false representation did not operate upon her mind. Ms Fenwick satisfied herself that all the necessary information had been gathered concerning the claim for the refund. It was as if she had herself directly received the information. She then authorised the payment acting on the information she had received.

There is another way of examining the issue. The question the magistrate had to decide was whether Woolworths was induced to part with the sum of $50 because of the false representations made by the respondent. Woolworths could only act through its employees. A company can acquire a knowledge only through its employees who have authority to receive and communicate relevant information to it. The attribution of a mental state to a corporation can only be achieved by attributing to it the knowledge and belief actually possessed by one or more of its officers: Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705; Tesco Supermarkets Ltd v Nattrass [1972] AC 153. In this connection, a state of mind may be the components of different items of knowledge of more than one officer of the company: Brambles Holdings Ltd v Carey (1976) 15 SASR 270 at 275, 280, 281: see also Re Chisum Services Pty Ltd (1982) 7 ACLR 641 at 650. As Bray CJ pointed out in Brambles Holdings Ltd v Carey (at 275-276) there are some limitations upon this principle. It does not necessarily mean that a company can know or believe two contradictory things at once. As his Honour stated (at 276): “It is rational belief, not schizophrenia, which is to be attributed to it.” It is unnecessary for present purposes to pursue those limitations. Ms Stone and Ms Fenwick had authority to deal with applications for refunds. The authority of Ms Fenwick was more extensive than that of Ms Stone. The respondent made representations to Ms Stone which caused her to put in train the procedures which the management of Woolworths had prescribed for payment of refunds to its customers. She did what was necessary within the limits of her authority to obtain the refund. As the magistrate found, she accepted the claim for the refund. The representation made to Ms Stone and accepted by her was, therefore, a representation made to Woolworths. Having accepted the explanation, Ms Stone went to Ms Fenwick to authorise the refund and to pay it. The fact that Ms Stone had to have the refund authorised by Ms Fenwick and that Ms Fenwick was the person responsible for paying the refund is no more than an internal management control implemented by Woolworths. ...

The essence of the offence is knowingly making a false representation so as to induce another to part with money. The representation need not be made directly to the person who is to part with the money. In a simple business, consisting of a proprietor and an employee, the representation may be made to the employee who in turn communicates it to the proprietor who, on being satisfied with what he has been told, will authorise the payment. The position is no different in principle in a large and more complex organisation.
The forms deceptions can take

In most instances the deception will be in the form of misleading words or writing. However, the courts have recognised that misleading behaviour can be broader than this. The following examples range across offences requiring proof of deception and false pretence, but the principles are relevantly similar.

Conduct

The false representation need not be expressly stated. It can be implied into the actions of the accused, or in the omission of relevant facts in an otherwise true statement. Thus in *R v Barnard* (1837) 7 C&P 784, an ex-employee was convicted of obtaining money by false pretences when he handed in another person’s uniform in order to obtain his final wages.

The making of a false pretence by a partial statement is discussed in the following passage from *R v M* [1980] 2 NSWLR 195:

(21) It is now well established that the falsity of a statement may arise, not only because a fact therein alleged is falsely alleged, but because the statement, by omitting material facts, creates a false impression. This is recognized in both civil and criminal law: *Oakes v Turquand and Harding*; *Arkwright v Newbold*; *Lowndes v Lane*; *Lee v Jones*; *Thom v Associated Newspapers Ltd*. Of course, mere nondisclosure is not an offence. The non-disclosure must have the effect of amounting to deception: *Commonwealth Homes and Investment Co Ltd v Smith*. In *R v Kylsant (Lord)*, a prospectus for the issue of debenture stock issued by a company of which the appellant was chairman, was composed of statements which in themselves were perfectly true, but it omitted information about the company’s affairs, with the result that the prospectus, taken as a whole, gave a false impression of the affairs of the company. The appellant was tried on indictment on a charge under s 84 of the *Larceny Act*, 1861 and was convicted. In delivering the judgment of the court on the appeal Avery J said: “In the opinion of this Court there was ample evidence on which the jury could come to the conclusion that this prospectus was false in a material particular in that it conveyed a false impression. The falsehood in this case consisted in putting before intending investors, as material on which they could exercise their judgment as to the position of the company, figures which apparently disclosed the existing position, but in fact hid it. In other words, the prospectus implied that the company was in a sound financial position and that the prudent investor could safely invest his money in its debentures. This inference would be drawn particularly from the statement that dividends had been regularly paid over a term of years, although times had been bad—a statement which was utterly misleading when the fact that those dividends had been paid, not out of current earnings, but out of funds which had been earned during the abnormal period of the war, was omitted.”

(22) The case was referred to with approval in *R v Bishirgian*, in which a charge under s 84 of the *Larceny Act* was also under consideration. Lord Hewart LCJ said: "It has been said, and said correctly, that the decision of this court in that case laid down no new law. If a statement is impugned under this section, it is because there is such a partial and fragmentary statement of facts that the withholding of that which is not stated makes that which is stated false."

Continuing representation

One important difference between a false pretence under criminal law, and that under civil law is that the equitable doctrine of a continuing representation in the civil law has not been imported into the criminal law. Therefore a representation that at the time it is made is not knowingly untrue does not become a false pretence if the person becomes aware that the representation is false and omits to alert the representee of this. There is, in this sense, no doctrine of a continuing representation.
In *R v Nelson* (1986) 19 A Crim R 200 Nelson’s car was stolen and destroyed by fire. At the time that she filled out her insurance claim she truthfully stated that she did not know who had stolen the car. Subsequent to that statement her friend informed her that he and a couple of his friends had taken her car and destroyed it for her, as they knew that she was about to trade the car in and she could claim more money on her insurance than as a trade-in. She subsequently went to the office of the insurance company and picked up her cheque for the insured amount. She said nothing of her new information, and no-one at the insurance company counter asked her any questions in relation to her claim. She was charged with false pretences under the Western Australian Criminal Code. She could only be convicted if the criminal law recognised the civil law concept of a continuing representation. The Court of Criminal Appeal held, by majority:

The only way in which it could be found on the facts of this case that the appellant had made the representation of fact identified in the indictment on 6 March would be to find that by her conduct on that day, that is to say by signing the release and the authority to pay Natwest, she had represented as a fact that the name and address of the person who stole the car was then "not known" to her.

There is a well established rule of equity that if a person in a precontractual setting makes a statement of fact which is an inducement to the other party to contract which when made he believes to be true he is under a duty to advise the other party if prior to the contract being made he learns that it is false. Or if the statement is true when made but later to the knowledge of its maker and by reason of altered circumstances it becomes untrue the same duty to communicate arises. ... The rule is a rule of equity imposing in the circumstances a duty to communicate. It is not a rule which has anything to do with the criminal offence of obtaining something by a false pretence. [The equitable rule provides] no reason for saying that a person failing in his duty to communicate can be held to be guilty of a false pretence by a constructive or a notional or a deemed remaking of the representation true when made but which has become false.

The only way in which the making of a representation of fact either present or past could be found on the facts of this case to have been made by the appellant on 6 March 1985 would be to find that the appellant by her conduct in finalising the claim had then "continued" her statement made on 14 February that the person who had stolen the car was unknown. And I do not think that that finding could be made on the evidence for two reasons.

The first is that the statement "not known" was in fact when made a true statement of fact. The case is not that she had said that the car had been stolen when unknown to her it had not been. Such a statement would be false when made and if with knowledge of its falsity she completed her claim for insurance on that basis then some foundation for the application of "continuing" representation, a doctrine which has apparently been accepted for the civil law of deceit, would be apparent enough. However it was not the case, as the trial judge put it to the jury, that "the falsity of the document which had been signed on 14 February" had been brought "to light again".

The second reason is that as a fact the appellant when she finalised her claim said nothing bearing upon her knowledge of who had stolen the car. Indeed, she then appears not to have said anything about her claim at all. And for the purposes of the criminal law it cannot, I think, be said and if it can be said it should not he said that she did make any such statement at that time by her conduct.

However if an implicit representation is made through conduct, then the representation may continue as long as the conduct continues. See *DPP v Ray* below.
Silence

English courts have held that under the similar English provisions silence might in some circumstances represent a false pretence. This may arise because previous conduct has created an ongoing representation.

In DPP v Ray [1974] AC 370 the House of Lords examined the relationship between continuing representations and silence. The defendant had entered a restaurant with the intention of borrowing money from one of his companions to pay for it. However after eating the meal he and his companions decided to run out of the restaurant without paying. The House of Lords was divided over whether there had been any representation by the defendant. Lord Reid in dissent held:

So the respondent, after he changed his mind, must have done something intended to induce the waiter to believe that he still intended to pay before he left. Deception, to my mind, implies something positive. It is quite true that a man intending to deceive can build up a situation in which his silence is as eloquent as an express statement. But what did the accused do here to create such a situation? He merely sat still.

Lord Morris held:

In the present case it is found as a fact that when the respondent ordered his meal he believed that he would be able to pay. One of his companions had agreed to lend him money. He therefore intended to pay. So far as the waiter was concerned the original implied representation made to him by the respondent must have been a continuing representation so long as he (the respondent) remained in the restaurant. There was nothing to alter the representation. Just as the waiter was led at the start to believe that he was dealing with a customer who by all that he did in the restaurant was indicating his intention to pay in the ordinary way, so the waiter was led to believe that that state of affairs continued. But the moment came when the respondent decided and therefore knew that he was not going to pay: but he also knew that the waiter still thought that he was going to pay. By ordering his meal and by his conduct in assuming the role of an ordinary customer the respondent had previously shown that it was his intention to pay. By continuing in the same role and behaving just as before he was representing that his previous intention continued. That was a deception because his intention, unknown to the waiter had become quite otherwise. The dishonest change of intention was not likely to produce the result that the waiter would be told of it. The essence of the deception was that the waiter should not know of it or be given any sort of clue that it (the change of intention) had come about. Had the waiter suspected that by a change of intention a secret exodus was being planned, it is obvious that he would have taken action to prevent its being achieved.

It was said in the Divisional Court ([1973] 1 All ER 860, [1973] 1 WLR 317) that a deception under s 16 should not be found unless an accused has actively made a representation by words or conduct which representation is found to be false. But if there was an original representation (as in my view there was when the meal was ordered) it was a representation that was intended to be and was a continuing representation. It continued to operate on the mind of the waiter. It became false and it became a deliberate deception. The prosecution do not say that the deception consisted in not informing the waiter of the change of mind; they say that the deception consisted in continuing to represent to the waiter that there was an intention to pay before leaving.

On behalf of the respondent it was contended that no deception had been practised. It was accepted that when the meal was ordered there was a representation by the respondent that he would pay but it was contended that once the meal was served there was no longer any representation but that there was merely an obligation to pay a debt: it was further argued that thereafter there was no deception because there was no obligation in the debtor to inform his creditor that payment was not to be made. I cannot accept these contentions. They ignore the circumstance that the representation that was made was a continuing one: its essence was that
an intention to pay would continue until payment was made: by its very nature it could not cease to operate as a representation unless some new arrangement was made.

Lord Pearson noted:

The essential feature of this case, in accordance with the justices’ findings and opinions as I understand them, is that there was a continuing representation to be implied from the conduct of the respondent and his companions. By ‘continuing representation’ I mean in this case not a continuing effect of an initial representation, but a representation which is being made by conduct at every moment throughout the course of conduct. The course of conduct consisted of: (i) entering the restaurant, sitting down at a table and probably looking at the menu; (ii) giving to the waiter an order for a main course to be served; (iii) eating the main course; (iv) remaining at the table for about ten minutes. The remaining at the table for that time was consistent in appearance with continuing their conversation and deciding whether or not to order another course. In my opinion all those actions can properly be regarded as one course of conduct continuing up to but not including the running out of the restaurant without paying. That is where the course of conduct was broken off. Up to the moment of running out they were behaving ostensibly as ordinary customers of the restaurant, and ordinary customers of such a restaurant intend to pay for their meals in the appropriate manner before leaving the restaurant. The appropriate manner would normally be, according to the arrangements in the particular restaurant, either by paying the waiter at the table or by paying a cashier at a desk near the exit.

In *R v Silverman* (1988) 86 CR App R 213, Silverman was a tradesman who took advantage of two spinster twins and convinced them to employ him to undertake a series of repairs and improvements to their house. The amount that he charged them for this work was excessive. The spinsters trusted him because he had done work for them in the past and he was considered to be a friend of the family. The court held:

There was material for a finding that there had been a false representation although it is true that the appellant had said nothing at the time he made his representations to encourage the sisters to accept the quotations. He applied no pressure upon them, and apart from mentioning the actual prices to be charged was silent as to other matters that may have arisen for question in their minds....

Here the situation had been built up over a long period of time. It was a situation of mutual trust and the appellant’s silence on any matter other than the sums to be charged were, we think, as eloquent as if he had said: “What is more, I can say to you that we are going to get no more than a modest profit out of this.”


**Causation**

The deception must induce the passing of property, the obtaining of advantage or causing of disadvantage

This element requires that there be a causal connection between the deception underlying the fraud and prohibited result (i.e., obtaining property or financial advantage or causing financial disadvantage). In other words, the representation that constitutes the deception must have the effect of deceiving the victim into willing acting in a way that causes that result.27

The relevant issues are outlined in *R v Ho & Szeto* (1989) 39 A Crim R 145 where the NSW Court of Criminal Appeal examined the requirement that the obtaining be causally

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linked to the deception for the then s178BA. The case is also a good example of how confusing this section can become in situations where the prosecution attempt to establish alternative versions of events in order to secure a conviction.

The accused, futures traders, had deceived their clients and possibly their employers, into believing the shares were being traded on the Futures Exchange, when in fact they were being traded privately. The issue for the court was whether this deception was relevant to the amount of money the clients received. The court held:

It is not necessary, of course, for the Crown to establish that it was the person deceived who suffered the loss: *Kovacs* (1973) 58 Cr App R 412 at 416. What there must be established, however, is a causal connection between the deception used and the obtaining of the money: *Kovacs* at 416; *Charles* [1977] AC 177 at 192; *Clarkson* [1987] VR 962 at 980; 25 A Crim R 277 at 296-297. The deception must have been the means whereby the money was obtained, or the effective cause of the money having been obtained: *Royle* (1971) 56 Cr App R 131 at 141-142. In *Stanhope* (unreported, Court of Criminal Appeal, NSW, 10 September 1987), this Court said in relation to s 178BA that it is an essential ingredient of the offence created by that section that the cause of the payment of the money (or the handing over of the valuable thing or the giving of the financial advantage) was the deception used by the accused. ...

On this alternative Crown case against the appellant Ho, the member [the client] was deceived by Ho as to the true character of the money obtained for him, but in no way could it be said that Ho had obtained the money for the member by that means of deception. He had obtained it from either Smithson or Maxwell [his employers] for the member, but (on this alternative Crown case) not by any deception of the drawer of the cheque. There was no nexus between the deception by Ho upon the member and the obtaining of that money from the association for him.

[Szeto’s situation was slightly more complicated, as he had a profit sharing arrangement with his clients] ...

But, once again, this deception has not been shown to be the effective cause of the payment. The money was given to the appellant Szeto by the particular member pursuant to the private arrangement which he had made with that member to share the amount paid out by the association to that member as his profit. The money had in fact been paid out by the association to that member as his profit. Whether the money did or did not in fact represent his profit from trading on the Exchange does not alter the character in which it had been paid out to him by the association. Nor did the deception by Szeto upon the member as to the true character of the money paid out to him by the association alter the character in which the money had been paid out by the association. It was that character in which the money had been paid out by the association which triggered off the private sharing agreement. Again, there was no nexus between the deception by Szeto upon the member and obtaining that money from the member pursuant to that arrangement.

There was therefore no basis upon which the jury could properly have convicted either of the two appellants upon this alternative case put forward by the Crown.

The “knowing” victim

It must be shown that the representation operates on the mind of the victim such that they believe it to be true. If the purported victim is aware that the representation is false but hands over property anyway – such as in a sting operation – there is no offence of obtaining by false pretences or by deception. Thus in *Kassis v Katsantonis* [1984] 3 NSWLR 330 a case which dealt with obtaining money by false representations under s527A of the *Crimes Act 1900* the defendant, a driving instructor, falsely represented to an under cover police officer that if the officer paid the defendant an amount of money that money would be used to bribe the licence examiner to make sure that Kassis received a drivers licence. The defendant had no intention of paying the money to the licence examiner.
The whole operation had been conducted by the officer as a sting and at no time was the officer deceived by the representations of the defendant. Consequently the court found that the defendant could not be found guilty of obtaining by false representation or false pretences, but was instead found guilty of attempting to obtain by false representation (see also *R v Gulyas* (1985) 2 NSWLR 260).

**Operating cause**

It is not necessary that the representation be the sole cause of the property being passed or the advantage being obtained. All that is required is that it be an operating cause. Thus, there is not a necessity that the deception necessarily act on the mind of the victim in the way in which the accused might have originally intended, so long as the deception does in fact induce the prohibited result. In *R v Lambassi* [1927] VLR 349 the accused, in order to enter a handicap foot race falsely pretended that he had certain results in six previous races. As a result of these pretences he was given a handicap at eleven yards from scratch. From this handicap he then won his heat and then progressed to the final race which he also won and collected a prize of £11. He was charged with obtaining property by false pretences. Lambassi’s defence was that the false pretences had merely entitled him to enter the race, but that his own performances had resulted in him winning the money. The court disagreed:

The fact that the money would not have been paid to the prisoner if he had not, by his own exertions, won the race is immaterial. It merely shows that it was not solely in consequence of the prisoner’s fraud that the money was paid to him, but partly in consequence of the fraud and partly in consequence of his having won the race. The fraud was a direct cause - though not the sole cause - of the money being paid to the prisoner.

(See also *Hamilton v R* (1846) 9 QB 270). The problem cases such as these raise are ones of remoteness. While the defendant’s representations permit the course of conduct to begin, it is unclear at what point they cease to be an operating cause.

In contrast to *Lambassi*, the English decision in *R v Clucas* [1949] 2 All ER 40 is more favourable to the defendant. Clucas had falsely represented to a bookmaker that he was acting as a commissioning agent for a number of workmen at a nearby aerodrome. On this basis the bookmaker accepted that the defendant had an ability to pay for his bets and accepted a number of bets on racehorses. These horses then won their races and the defendant attempted to collect his winnings. The bookmaker argued that he had only been induced to accept the bets on the basis of false pretences and therefore was not obliged to pay out the winnings. The court held:

Does a man who induces a bookmaker to bet with him by making false pretences as to his identity or as to the capacity in which he is making the bets obtain money by false pretences if he is fortunate enough to back a winning horse and so receives money from the bookmaker? In the opinion of the court it is impossible to say that there was here an obtaining of the money by the false pretences which were alleged, because the money was obtained, not by reason of the fact that the accused persons falsely pretended that they were somebody or acting in some capacity which they were not, but because they backed a winning horse as a result of which the bookmaker paid them the sums obtained. No doubt, the bookmaker might never have opened an account with these men if he had known the true facts, but we must distinguish between a contributing cause and the effective cause which led the bookmaker to pay the money, namely, the fact that these men had backed a winning horse.

The English courts have now held that the question of whether or not the pretence, false promise or intended deception is an operating cause inducing the passing of property is a matter of fact for the jury: *R v King & Stockwell* [1987] 1 QB 547. This was a case in which the accused falsely pretended to be tree surgeons and attempted to convince the victim that
she should pay £470 to them to remove trees that they claimed would cause damage to her gas supply and house foundations. In upholding the conviction the Court of Appeal emphasised that the issue of the actual inducement by means of a deception is a common sense matter to be decided by a jury.

In our view, the question in each case is: was the deception an operative cause of the obtaining of the property? This question falls to be answered as a question of fact by the jury applying their common sense.

Moreover, this approach is in accordance with the decision of the Court for Crown Cases Reserved in Reg. v. Martin (1867) L.R. 1 C.C.R. 56, where it was held that a conviction for obtaining a chattel by false pretences was good, although the chattel was not in existence at the time that the pretence was made, provided the subsequent delivery of the chattel was directly connected with the false pretence. Bovill C.J. said, at p. 60:

"What is the test? Surely this, that there must be a direct connection between the pretence and the delivery - that there must be a continuing pretence. Whether there is such a connection or not is a question for the jury."

It is unclear whether this brings about any clarity.

Indifference

However if the representation is one that the victim is indifferent to there is no effective pretence, false promise or deception. For example in Clemesha v R the accused had hired a plate compacter from the victim by using a false name and giving a false address. The WA Court of Appeal held that there was no false pretence:

With hindsight, a few moments’ reflection will show that when the appellant proposed to X that he should hire a compactor he was not pretending anything, falsely or otherwise. He was simply proposing to hire the compactor. And when X handed over possession of that article to the appellant he did so not being induced thereto by any false pretence - any false representation of any matter of fact - but simply because the appellant had signed (albeit in a false name) the appropriate hiring agreement. The signing of the false name certainly could be regarded as a representation of a matter of fact which was false, but that was not an inducing factor; it was a matter of indifference to X whether the name of his supposed hirer was Y or Z.

More problematically, in England the issue arose in relation to the fraudulent use of cheque and credit cards. In such circumstances there is no actual representation by the defendant of authority from the bank to present the cheque card or credit card. In such circumstances could such a representation be implied, and could a store assistant be said to be induced by such a representation? It was argued that the store assistant was in fact indifferent to whether the person with a cheque card was entitled to use it because the bank had guaranteed payment irrespective. However the House of Lords in the decisions of Metropolitan Police Comr v Charles and R v Lambie rejected such a defence and held that there was such a representation and that it induced the handing over of property. In Charles Lord Diplock held:

29 Cheque cards were a forerunner of credit cards and constituted a guarantee from the bank issuing the card that any cheque presented on the card holder’s account would be honoured by the bank.
... the drawer represents to the payee that he has actual authority from the bank to make a contract with the payee on the bank’s behalf that it will honour the cheque on presentment for payment.  

But whether such an implied misrepresentation could be said to be the cause of the obtaining caused further difficulties. In Charles, the House of Lords found such inducement implicit in the evidence of the victim. However in Lambie, there was direct evidence from the store’s manager that she had not relied on any representation by the defendant but instead on the contractual relationship with the bank. The House of Lords however did not see this as of importance:

Following the decision of this House in Reg. v. Charles, it is in my view clear that the representation arising from the presentation of a credit card has nothing to do with the respondent’s credit standing at the bank but is a representation of actual authority to make the contract with, in this case, Mothercare [the store] on the bank’s behalf that the bank will honour the voucher upon presentation. Upon that view, the existence and terms of the agreement between the bank and Mothercare are irrelevant, as is the fact that Mothercare, because of that agreement, would look to the bank for payment. That being the representation to be implied from the respondent’s actions and use of the credit card, the only remaining question is whether [the manager] Miss Rounding was induced by that representation to complete the transaction and allow the respondent to take away the goods. My Lords, if she had been asked whether, had she known the respondent was acting dishonestly and, in truth, had no authority whatever from the bank to use the credit card in this way, she (Miss Rounding) would have completed the transaction, only one answer is possible - no. Had an affirmative answer been given to this question, Miss Rounding would, of course, have become a participant in furtherance of the respondent’s fraud and a conspirator with her to defraud both Mothercare and the bank.

The decisions have been heavily criticised The Law Commission has noted:

3.33 This reasoning is widely thought to be artificial, and it can lead to problems at trial. Shop assistants do not tend to consider themselves deceived about a fact which is of no interest to them, merely because they would have acted differently had they known the truth, and this may come across in their evidence. Those who do not appreciate the legal position may even admit that they would still have accepted the card even if they had known that the defendant had no authority to use it. In such a situation, the benefit would not have been obtained by deception, so the defendant would have to be acquitted.

Despite these issues, the High Court in National Commercial Banking Corporation of Australia Ltd v Batty appeared to accept the analysis in Lambie without comment.

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32 At 182. It was not merely a representation of ostensible authority. This was because:

The whole foundation of liability under the doctrine of ostensible authority is a representation, believed by the person to whom it is made, that the person claiming to contract as agent for a principal has the actual authority of the principal to enter into the contract on his behalf. (at 183)

33 In Australia, the retailer is generally liable for any fraudulent use of a credit card, and so the issue is unlikely to arise in this form. However, retailers are not always aware of this and it is possible that a mistaken belief in a guarantee from a bank could give rise to disinterest.


35 (1986) 160 CLR 251, although Brennan J expressed reservations about its application generally. See also De Bruyn v Republic of South Africa [1999] FCA 1344 where a majority found a basis for a breach of s178BA in the presentation of a cheque to a bank, but Gyles J in dissent doubted that cases such as Lambie could be applied to a presentation of a cheque to a bank.
No need for loss: financial advantage

Under the financial advantage limb there is no requirement that the person who is deceived actually suffers any loss. This is because the emphasis is on the obtaining of any financial benefit.

This was established in the UK case of Kovacs (1973) 58 Cr App R 412 where the accused fraudulently used a cheque card in order to buy goods. Under the arrangements between the bank and the shops the loss in fact fell on the bank, although shopkeepers were the persons deceived by Kovacs’ use of the credit card. The goods in question were a railway ticket and a Pekingese dog.

In our judgment, the loss suffered by the bank was the result of the appellant’s deception of the railway booking clerk and the pet shop owner. Section 16 (1), does not provide either expressly or by implication that the person deceived must suffer any loss arising from the deception. What does have to be proved is that the accused by deception obtained for himself or another a pecuniary advantage [the English equivalent to a financial advantage]. What there must be is a causal connection between the deception used and the pecuniary advantage obtained. There was such a connection in this case.

By contrast, the obtaining property limb requires that the property obtained is “belonging to another.”

Is there a need for the victim to be deceived at the time of obtaining by the defendant

There is English authority that although a deception must cause the obtaining of the property or financial advantage, there is no requirement that the victim be deceived at the time of passing the property. In R v Miller, the defendant had deceived victims into believing he was a legitimate taxi driver, but by the end of the journey there was evidence the passengers were aware that they had been initially deceived. The court held:

In our judgment, however, it is really not legitimate to isolate the moment when the money is handed over from the rest of the story. If on the whole of the story it can legitimately be said that the various deceptions alleged in the indictment were the cause for the money being handed over, it is, or may be, irrelevant that at the final moment the victim suspected or even believed that he or she had been swindled.

This is such a case. The passenger in each case was initially inveigled into agreeing to ride in the car by the lie that it was a proper taxi, and also by the inference that the charges levied by this applicant would be reasonable. By the end of the journey the victim realised, or partially realised in some cases, that the applicant had probably been lying. But by that time in each case the victim feels that he or she was under a compulsion or obligation to pay the extortionate sum requested. 36

The court held that despite the knowledge of the passengers, the initial deception remained an “operative cause” of the obtaining.

However it would seem that the findings in this case amount to theft, not deception. If the victim is aware of the ruse, but feels compelled to hand over the money nonetheless, there is no consent on the part of the victim. It is consent induced by intimidation and this amounts to theft. It is suggested that Australian courts would not see the need to extend

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the notion of deception in this way and that the theft offences are adequate to deal with such situations.  

**Mens Rea: awareness of the deception**

**Deliberate or reckless deception**

One of the reasons behind the *Theft Act* 1968’s use of deception rather than false pretence was the intention of the CLRC to move the focus of the offence away from the defendant’s intention and instead to focus on the effect the conduct had on the victim. They also felt the term was more apt when describing frauds by conduct.  

In so recommending they suggested a definition of recklessness that was in similar terms to that contained in s 192B(1)(a). In relation to the expansion beyond a knowing deception to a reckless one they stated:

*In our opinion it is right that deception for the purpose of the offences under clause 12 should cover recklessness in the sense of not caring whether the statement is true or false (the kind of recklessness which counts as deception for the purposes of the civil law, as in *Derry v Peek* (1889) 14 App Cas 337), but not mere carelessness.*

Such an approach was adopted in England in *R v Staines*, where it was held that reckless in relation to deception meant:

*... more than being careless, does mean more than being negligent, and does involve an indifference to or disregard of the feature of whether a statement be true or false.*

In Victoria recklessness in this context has been held to amount to a requirement that the accused have a subjective awareness of the probability that the conduct may be deceptive. In *Kalajdic and Italiano* the Victorian Court of Appeal held:

*The jury were told that it was sufficient to constitute recklessness as to the truth of the statement by the applicant if he appreciated the possibility that it might be false. More is required than mere possibility. At least the statement must be probably untrue, or perhaps it is sufficient that there was a substantial risk that the statement was untrue.*

This represents the general approach to the meaning of recklessness in Victoria. It is unfortunate that the inclusion of the idea of awareness of a substantial risk was prefaced with a “perhaps”. Substantial risk is the phrase used to define recklessness under the ACT and Commonwealth Criminal Codes where recklessness is defined to be awareness of a substantial risk that (for example) the statement is untrue, and that it is unjustifiable to take that risk. Whether there is a different level of awareness needed to prove substantial risk or probably is also unclear.

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37 It does however amount to attempted fraud on the part of the taxi-driver, though it is preferable to charge the complete offence of theft.


39 At para 101(i).


41 Per James LJ at 162.

42 [2005] VSCA 160 at [29] per Buchanan JA, the other judges concurring.


44 Section 5.4 Criminal Code (Cth) and s20 Criminal Code (ACT) - based on s5.4 Model Criminal Code.
However, in NSW the general understanding of recklessness is that all that is required is awareness of a possibility.\textsuperscript{45} There is no reported NSW decision on the concept of recklessness in this offence and so the level of foresight required is unclear.\textsuperscript{46}

A recent Court of Criminal Appeal on recklessness in Blackwell v Regina [2011] NSWCCA 93 has reaffirmed the rejection of the Victorian approach, at least in relation to offences of violence.

**Mens rea: statutory dishonesty and relevance of claim of right**

As discussed above, dishonesty is now governed by the definition in s 4B. This amounts to a rejection of the approach in Peters v R, which applies an objective test of community standards, unless dishonesty is used in a “special sense”. In Macleod v R, the majority judgment held, when referring to the decision in Peters:

Their Honours explained that the term “dishonestly” in a statutory offence may be employed in its ordinary meaning or in some special sense.\textsuperscript{47} The line of authorities concerning the statutory offence of dishonestly obtaining property by deception provides an illustration of the latter (original footnotes).

In this passage, the court references R v Love, a decision on the meaning of section 178BA which had an undefined element of dishonesty. In R v Love the Court of Criminal Appeal followed the approach taken in R v Salvo:

The majority (Murphy and Fullagar JJ), for reasons with which we respectfully agree, emphatically rejected the notion that it would have been sufficient for the trial judge to direct the jury that, in order to determine whether the appellant had "dishonestly obtained" the vehicle, they should simply apply the standards of ordinary decent people, without giving them any further instruction and without relating the matter to the facts of the instant case, and in particular to the appellant’s claim of right. They further held that the question to be considered was whether the appellant believed he had a legal right to obtain the motor car, not whether the appellant believed he had a legal right to practise the particular deception, that is to say, to pass a worthless cheque. Their Honours pointed out that, as a matter of construction of the statutory provision (which was similar to s178BA), it is contemplated that there may be a deceptive obtaining of property which is not dishonest. Of course in many cases the deception will be powerful evidence of dishonesty. However, when a claim of legal right of the kind now in question is raised, the issue is whether there was a belief in a legal right to obtain the property, not whether there was a belief in a legal right to practise the deception.\textsuperscript{50}

Although dishonesty is now statutorily defined, this passage remains apposite. The dishonesty must be in relation to the obtaining of property, financial disadvantage or causing disadvantage - not the use of deception. Claim of right should be explained to a jury as possibly justifying the obtaining (but see also the discussion of Macleod and its relationship to dishonesty above in the chapter on dishonesty).

\textsuperscript{45} See eg Coleman (1990) 19 NSWLR 467

\textsuperscript{46} Note however that the official NSW Criminal Trial Courts Bench Book suggested direction describes recklessness as an awareness that the conduct “might” be deceptive (see \url{http://www.jc.nsw.gov.au/ctcbb/main.html}). But cf Pollard v Cth DPP (1992) 28 NSWLR 659 a case dealing with the meaning of “reckless disregard” in s178BB Crimes Act 1900.

\textsuperscript{47} (1998) 192 CLR 493 at 510 [34].


\textsuperscript{49} Peters v The Queen (1998) 192 CLR 493 at 502 [11]-[13], 504 [18]-[19]; see also at 531 [86] per McHugh J.

\textsuperscript{50} (1989) 17 NSWLR 608 at 614 – 615.
“Altruistic” deceptions

A belief that the deception is necessary in order to benefit another person or is in the public interest is also not a valid defence to fraud. In *R v Pellow* (1956) 73 WN (NSW) 478 the accused was the Superintendent of a number of state coal mines and had been allocated funds for the preparation of two Hunter Valley coal mines. While one mine had been prepared ahead of schedule, the other mine required substantially more work than had been originally anticipated. The accused submitted false expenses claims on the completed mine in order to pay contractors to continue to work on the non-completed mine. He did this because the state authority would not have approved the expenditure of extra funds on the second mine if they had known of the true situation. Pellow claimed his false entries were made in the interests of the management committed to his charge and for the purpose of benefiting the state. The court held:

But, his good intentions, if he had them, will not excuse the deception he practised in order to have money available to spend as he thought best and defiance of what he knew would be his employers’ wishes. The very fact that he was compelled to resort to the use of deceit and falsehood, shows clearly that he knew that he was doing wrong. To take money and to use it in that fashion was equivalent to taking it with intent to defraud.

Further, it is immaterial that an accused intends to use the money for bona fide purposes or intends to ultimately repay the money or goods. It is also immaterial that the accused never personally receives any benefit of the property. In *R v Denning* [1962] NSW R 173 the accused induced a large number of people to pay deposits to Denning’s company in order that houses would be built on land which Denning claimed to own. He also falsely claimed that his companies had successfully operated and built houses and that they owned timber yards and plaster works. All of these representations were false to the knowledge of Denning. He claimed that his intentions were that having received enough deposits that would then enable him to build one or two houses and sell those houses and then with the proceeds build the next few houses, and so on. Despite this belief the Court of Criminal Appeal held that he had the requisite intention to defraud:

The appellant has said that he did not intend to defraud anybody or that he did not intend to make any wilfully false promises; and by that I understood he meant that he had never made up his mind actively to rob any person but he was the victim of some sort of misfortune, and that he was always intending to do the right thing but was never quite able to get around to it, that he had negotiations with people for finance but that these negotiations were fruitless or that they were never brought to fruition. ...

The appellant was labouring, I think, under the impression that in order to intend to defraud certain person, he must have made his mind up mischievously, maliciously and wilfully to rob persons, to misappropriate the funds of the companies in some fashion. ...

As applied to cases of fraud, it is, not necessary to travel beyond the authority of *R. v. Kritz*, [1949] 2 All E.R. 406; [11950] 1 K.B. 82, which is a decision of the court of Criminal Appeal. In that case it was laid down that if a man makes a statement to another and asks that other to pay him money which he knows that that other would not pay if he did not believe that that statement was true, and if he intends to use the money for purposes different from those for which, to his knowledge, the other had understood from the statement, it is to be applied, the intent to defraud, necessary to the crime of obtaining money by false pretence, is present; and it is immaterial that the person obtaining the money may both have intended to repay the money and have honestly believed in his ability to do so. In that case the learned judge of first instance, the trial judge, told the jury that: “If a false statement, false to the knowledge of the person making it, is made, and by this means money or credit is obtained, and the person who gives that money or credit does so in reliance on the false statements that have been made, that is sufficient and you need not go any further. ” ...
Judged by any objective test none of the statements made by the appellant could have been honestly made, despite his protestations that he did not intend to rob anybody. After all, whatever may have been the position when he first conceived this “south sea bubble” idea is one thing, but the position as it progressed was quite another, for by September and October 1958 he had taken in such a number of deposits that action by this time was certainly called for; and yet, although he was then besieged and plagued with depositors who wanted to see their houses built, who wanted refunds of their deposits because none were built, and despite the difficulties that the companies had got into because all the depositors’ money was being expended in promotional costs, he was still promising other depositors, numerous depositors, the same home building that he had been promising those in the first instance. So that, whatever may have been the position when he first embarked upon those schemes, the position altered very significantly indeed and by the end of 1958 it would be impossible for any reasonable person to say that he honestly believed that he could carry into effect the conditions of the contracts with the depositors.

However, a claim of right based on an honest belief in a legal entitlement to the property does form a defence.51

**Intention to permanently deprive – property**

Although long an element of the older false pretences offences, there have been surprisingly few decisions on this requirement. It is now only applicable to obtaining by property, not obtaining financial advantage or causing financial disadvantage. It remains to be seen whether this will mean prosecutions under the property limb will be less popular.

In the leading false pretences cases of *R v Kilham* a horse had been hired for a day under a false name and then returned. The court held that a conviction could not be supported. This was because “to constitute an obtaining by false pretences it is equally essential, as in larceny, that there be an intention to permanently deprive the owner wholly of his property”.52

In so holding, the court distinguished the ticket cases where tickets had been obtained by false pretences, because even though the ticket was returned to the possession of the issuer the defendant had “entirely converted it to his own use for the only purpose for which it was capable of being applied.”53

192C Obtaining property belonging to another

(2) A person does not commit an offence under this Part by obtaining or intending to obtain property belonging to another unless the person intends to permanently deprive the other of the property.

(4) A person obtaining property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person’s intention is to treat the thing as his or her own to dispose of regardless of the other’s rights. A borrowing or lending of the property may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(5) Without limiting the generality of subsection (4), if:

(a) a person has possession or control (lawfully or not) of property belonging to another, and

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51 See the discussion of claim of right earlier.
52 (1870) LR 1 CCR 261 at 263.
53 At 264.
(b) the person parts with the property under a condition as to its return that the person may not be able to perform, and

(c) the parting is done for the purposes of his or her own and without the other’s authority,

the parting amounts to treating the property as his or her own to dispose of regardless of the other’s rights.

This section, added in 2010, is the time that NSW has had a statutory definition of an intention to permanently deprive. Previously property offences had relied on common law cases, and larceny continues to do so (see the caselaw discussed above).

The wording of the statutory definition has significant complexity within it, and there are some logical difficulties with its interpretation. For an extended critique of the English interpretation of the section see: Steel, Permanent Borrowing and Lending: A New Interpretation of s6 Theft Act 1968 (2008) 17 Nottingham Law Journal 3 – 24.

There are divergences between the English and Victorian interpretations of the statutory definition. One controversy with the section is that it is clear that the drafters did not intend to expand the common law meaning of the term, but the breadth of the wording might well permit this. Early UK cases read down the scope of the definition to the common law meanings, later cases have taken an expansive approach. The Victorian cases have from the start been more expansive, but the extent of the definition remains somewhat uncertain.

Below is a commentary on the Victorian definition. That definition in the Crimes Act 1958 (Vic) is:

s73 Further explanation of theft

(12) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other’s rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(13) Without prejudice to the generality of subsection (12) where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other’s authority) amounts to treating the property as his own to dispose of regardless of the other’s rights.

In Victoria a robust approach to this definition was taken in Sharp v McCormick. McCormick had taken home a motor part from his employer and when apprehended had admitted “I was going to see if it fits and if it didn’t I was going to put it back”. The accused argued that this was at most a conditional appropriation, not an intention to permanently deprive. The Full Court rejected these arguments, holding that such an intention amounted to an intention to permanently deprive, either simpliciter or by means of s73(12).

Despite the fact that the court was referred to an article by Spencer that outlined the Parliamentary intention to not extend the scope of the element and Williams critique of the wording, the court had no difficulty in reading the s73(12) in a broad way and in finding what they thought was a clear role for the section.

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55 In Textbook of Criminal Law, 1978, 647ff
Two of the judges gave detailed reasons for their expansive definition. However the approaches taken reveal slightly different understandings of the scope of the section.

Murray J held:

If ... the defendant intended to return the coil unless he later decided to keep it, then it appears to me that the appropriation would fall within the first limb of sub-s. (12). His reservation of the probability or possibility of keeping it would amount to an intention to treat the coil as his own to dispose of regardless of the owner’s rights. It must be remembered that the operation of sub-s. (12) depends upon the absence of an actual intent permanently to deprive the owner of the property in question at the time of the appropriation.

It follows that what must be examined is the intention of the respondent at the moment he appropriated the coil. The evidence establishes that his intention at that time was to take the coil to see whether it fitted his motor car in which case to retain it and otherwise to return it to his employer. To say that his intention to return it to his employer if it did not fit his motor car was an intention to have regard to the rights of his employer is in my opinion little short of an abuse of language. When the respondent took the coil he was quite clearly treating the coil as his own to dispose of as he saw fit and he was paying no regard to the rights of the true owner. His stated intention of returning it if it did not fit his car was simply a matter of choice on his part which he may or may not have carried out when the time came. The rights of his employer in regard to the property were completely ignored at the time of the appropriation. Despite the criticism of the use of the word “dispose” (see [1977] Crim. L.R. 653) I do not understand why that word would not be appropriate to a disposition of the coil by the respondent either by way of using it in his car or returning it to the factory.

For Murray J, any mental reservation about returning the coil amounts to a breach of the section. For him the key aspect of the section is not the notion of disposing, but instead the disregarding of the rights of the owner. Irrespective of any intention as to what the accused finally intended to do with the property, for Murray J any appropriation that trespassed on the proprietary rights of the owner amounted to an “intention to treat the thing as his own to dispose of regardless of the others rights”. On this reasoning, such a violation of the owner’s rights need not be knowing or deliberate. In using words such as “paying no regard” and “ignored” there is a strong suggestion that reckless appropriations can amount to theft. In relation to the scope of the meaning of dispose, Murray J clearly includes retention and return to the owner as forms of disposition.56

Brooking J held:

... “If it fits, I will keep it; otherwise I will give it back.” That is as clear a case as one could imagine of intention to treat the thing as his own to dispose of regardless of the owner’s rights. How does it differ in principle from an intention to keep the car part if it fits, and otherwise to throw it away, or destroy it, or give it to a friend, or endeavour to sell it; or a bare intention to keep the part if it fits, with no decision as to its fate if it does not? In all these cases the person appropriating intends to behave as if he were the owner. The fact that in the case now under consideration the intention is to return the coil to the employer if it does not fit does not mean that the taker is having regard to the employer’s rights. If the coil is in fact returned to its owner, this will be, not because the taker recognizes that the rights of the owner put him under a duty to return it, but because the taker has decided that if it suits him to do so, in other words if the coil is of the wrong kind for his car, he will take it back. What brings him within sub-s. (12) is his intention to keep the coil if it fits his car. This is an intention to treat the thing as his own to dispose of regardless of the other’s rights. What, if anything, he plans to do with the coil if it does not fit is neither here nor there. He has said to himself, "I will keep it if it fits my car", and such a

56 This anticipates anticipating the findings in the later English cases of Coffey and Lavender.
state of mind has no regard to the owner’s rights. The necessary intention would similarly have been present if his state of mind had been, “I will keep this coil if it rains tomorrow.”

Sub-section (12) speaks of the intention to treat the thing as his own to dispose of regardless of the other’s rights, but this does not require an intention to make the property over to someone else. An employee takes a coil home from the factory; he intends to keep the coil if it fits his car and otherwise to do something else with it. As to that something else his intention may so far be unformed, or he may on the other hand have already decided what he will do with the coil if it does not fit - throw it away, or destroy it, or sell it, or give it away, or return it. The intention, if any, that he has in this regard makes no difference. He intends to treat the coil as his own to dispose of regardless of the owner’s rights, in that his intention is to keep the coil if it is useful to him and otherwise to dispose of it in some other way (which he may or may not have determined upon).

For Brooking J the key point is that the accused takes the coil with the intention to decide what to do with it. For him the core of the element is an intention “to behave as if he were the owner”. Thus for Brooking J disposal is also a very broad concept and incorporates a range of actions that form aspects of classical concepts of ownership. His Honour mentions intentions as to abandonment, destruction, gifting, sale and bare custody as all being assertions of a right to dispose of regardless of others. Specifically, Brooking J rejects the basis of the argument made by Smith, and later adopted in the English case of Cahill, that there must be an intention to completely make over all rights to the property. His Honour makes the point that any intention as to what to do with the property is irrelevant. The gravamen of the section is that the accused appropriates the property intending to assert the right to form such further intentions.

The approaches of Murray and Brooking JJ are not inconsistent, rather they concentrate on different aspects of the complex concept of an “intention to treat the thing as his own to dispose of regardless of the others rights”. Brooking J’s approach emphasises that aspect of the concept that is contained in the intention to “treat the thing as his own” and Murray J’s approach centres on the fact that Sharp’s intention was to act “regardless of the others rights”.

This robust and long-standing approach to the section has been cast into some doubt however by a 2003 decision of the Court of Appeal, R v Dardovska. 57 It was alleged that the victim, Akguner had borrowed money from Mutlu and failed to repay it. Dardovska lured Mutlu into a house where he was assaulted by Mutlu. During the assault Dardovska searched Akguner’s car removing items including personal documents relating an application to become a Justice of the Peace. She claimed that she had taken these documents with the intent of giving them to Police to prevent Akguner’s successfully applying to be a Justice of the Peace. Darvoska and her co-accused were acquitted of all assault charges but Dardovska was convicted of theft of the documents. In relation to the theft charge the prosecution had argued that such conduct amounted to an “intention to treat the thing as his own to dispose of regardless of the others rights”.

In the course of coming to its decision the Court reviewed the history of the section in both England and Victoria, taking note of academic comment and Parliamentary intentions. Charles JA concluded that on the basis of the Explanatory Memorandum to the Victorian Bill 58 the relationship between the two passages in s73(12) was that:

57 (2003) 6 VR 628
58 His Honour said the conclusion was clear based on the following passage:
... the first clause of the subsection lays down a general principle to which the second clause
makes a limited exception, in the case of an appropriation by borrowing or lending.\footnote{59}

His Honour then reviewed most of the English cases, and \textit{Sharp v McCormick}. Counsel for the prosecution argued that in intending to give the documents to the police, Dardovska had intended to "put it out of her power to return the documents to Akguner"\footnote{60} and that this therefore fell within s73(12). The court disagreed, Charles JA holding:

\footnote{61} .. I find it surprising that her actions might have been thought to have involved any intention of permanently depriving Akguner of the documents in the relevant sense. Dardovska clearly had no intention of obtaining any form of financial advantage from taking the documents, which were in any case worthless. She had, in Akguner's presence, rung the Melton Police Station. There was no reason to doubt her defence that she was outraged that Akguner was applying to become a Justice of the Peace and wanted the police to see the documents, to draw their attention to her argument that he should not succeed in that application. There was no obvious reason why the documents would not, once the police had seen and possibly copied them, have been returned to Akguner. In so far as s 73(12) is concerned, although Dardovska had no entitlement to take the documents from Akguner, her intention, far from treating the documents as her own to dispose of regardless of Akguner's rights, seems to have been rather to insist to the police that they were in fact Akguner's documents, and that the police should take notice of them accordingly.

Somewhat surprisingly, Charles JA then states that the appeal succeeds on other grounds and thus:

\footnote{59} all that I have said in relation to s 73(12) is thus unnecessary to, although I think strongly supportive of, this conclusion. I am obliged to mention this matter because s 73(12) was barely touched upon in argument by counsel, and none of the cases I have mentioned in relation to it were cited to us during counsel's arguments.

Not only is the conclusion thus obiter, but not informed by argument from counsel.

With respect, it seems that the approach taken in \textit{Dardovska} fails to appreciate the role of the section. Intended financial advantage is irrelevant and has been in both theft and larceny since the decision in \textit{Cabbage} (1815) Russ & Ry 292; 168 ER 809. On the approach taken in \textit{Sharp v McCormack} the rights of Akguner to keep the documents private were being "ignored", and Dardovska took the documents with the intention of asserting a key right of ownership – the right to hand possession to another. Even on the restrictive approach of \textit{Cahill}, her actions appeared to be an intention to completely divest herself of the property in the documents to the Police.

It is easy to see why the Court would baulk at seeing the provision of documents to the Police as examples of theft. It is clearly against good public policy to inhibit the actions of whistleblowers in this way, particularly because in giving documents to the Police the privacy of the owner of the documents would be appropriately safeguarded. But the reason that such actions are not theft is not because there is no intention to permanently deprive.

\footnote{59} \textit{Ibid} 635
\footnote{60} 639
\footnote{61} At 640 [33].
It is because the person who hands such documents to the Police does so in a spirit of public altruism and is thus not acting dishonestly.

It is difficult to see how the appropriation of personal documents with an intent to use them to embarrass and frustrate the owner of those documents in other activities could be anything other than an intention to disregard the owner’s rights. Despite some suggestion that s73(12) is broader than the common law exemptions, the reasoning in *Dardovska* appears to stand for the proposition that so long as the property is likely to be returned and is not exhausted of its value, no intention to permanently deprive can be inferred. If so, the decision represents a very strict reading of the section.

In light of these problems with the judgment it is suggested that the decision be considered as obiter and that *Sharp v McCormack* remains the Victorian interpretation of the section. 62

### False Statements

#### 192G Intention to defraud by false or misleading statement

A person who dishonestly makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) that is false or misleading in a material particular with the intention of:

(a) obtaining property belonging to another, or

(b) obtaining a financial advantage or causing a financial disadvantage,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

This offence is a re-enactment of the previous s178BB Obtaining money etc. by false or misleading statements. However there are two significant differences. Section 178BB allowed convictions for statements published with reckless disregard as to their truthfulness. Section 192G requires knowledge. Section 178BB did not require the accused act with dishonesty. Section 192G requires dishonesty.

These offences, and their constituent elements are:

*makes or publishes false statement:*

- make or publish
- false or misleading statement
- with intent to obtain for accused or another
- property belonging to another, or financial advantage or cause financial disadvantage
- knowing statement to be false or misleading
- where the statement is made or published dishonestly

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62 See also *Garven v Quilty* [1998] ACTSC 137 for an application of the equivalent ACT provision and discussion of conditional appropriation. The reasoning does not set out the scope of the section in any real detail and so is not discussed in this article.
**concurs in making or publishing false statement:**
- concur in the making or publishing
- false or misleading statement
- with intent to obtain for accused or another
- property belonging to another, or financial advantage or cause financial disadvantage
- knowing statement to be false or misleading
- where the statement is made or published dishonestly

**False statements and material particulars**

**Statement not statements**

It has been held by the Court of Criminal Appeal that under s178BB there was a requirement that the prosecution identify a particular statement that is said to be false or misleading, not a number of statements. However in some circumstances “more than one utterance or representation” can constitute a single statement. Whether the utterances or representations constitute one or more statements is determined by considerations of commonsense and fairness.63

**Statements of fact or law**

Although not deciding, the Court of Criminal Appeal in *R v Lethlean* noted that they saw it unlikely that there is any difference between a statement that relates to fact or law for the purposes of the then s178BB:

No final opinion is expressed on the argument that the statement must be a false statement of fact and cannot be a false statement of law. As presently advised it is not easy to see why a false statement of law knowingly made would not fall within s178BB. A representation is being made as to the true position.64

**False or misleading in a material particular**

In *R v Stolpe* the Court of Criminal Appeal held:

The term “material” in s178BB has been defined by this Court as requiring no more and no less than that the false particular must be of moment or of significance, not merely trivial or inconsequential. It will be material if it is relevant to the purpose for which it was being made, and that it will be relevant to that purpose if it may be taken into account by the person to whom the statement is made in making any decision upon the matter in respect of which the statement is made. It is unnecessary to establish that the statement is one which must or will be or was so taken into account. It involves an objective assessment. (These statements are taken from *Regina v Maslen and Shaw* (1995) 79 A Crim R 199 at 202-203).

In *R v Gervaise and Preece* (unreported CCA 13 November 1997) it was held that the addition of words to a document could be material, even if they were not necessary if the addition tended to prevent others from questioning the document or transaction. Gervaise and Preece befriended Cleghorn, an elderly and lonely old man, and convinced him to transfer his house to them after his death. Consequently a deed of conveyance was drawn

64 NSWCCA unreported 19/12/1997
up. The deed stated that that Cleghorn and Preece were uncle and niece. They were not related. The accused argued that this was not a material particular. The court held:

It was common ground that if the words "his niece" were omitted from the conveyance of the fee simple and the words "her uncle" were omitted from the conveyance of the life estate each conveyance would, upon registration and delivery of the title documents, be effective. The gifts would be perfected.

The appellants contended that the words "her niece" and "her uncle" were surplusage and of no consequence or materiality. They did not bear upon the conveyances in any way. They were not misleading in a material particular. It was pointed out that the appellants were not charged with defrauding Mr Cleghorn or some similar offence.

As there was no valuable consideration for the conveyance of the house from Mr Cleghorn to Mrs Preece the conveyance had to be perfected before it was effective. This required the assistance of solicitors. The appellants sought and obtained their assistance. A conveyance of the fee simple of the kind in question between apparent strangers would have caused a prudent solicitor who did not want to become an instrument of fraud, to ask questions, especially if he gathered that the stranger was a senior citizen and said to be an extremely sensitive and nervous person who could not be approached direct. It only needed one independent person to discuss what was happening with Mr Cleghorn for the scheme to be put at risk. Gervaise realised the purpose and importance of the false statement and his wife acquiesced in it. It helped to allay any suspicion and preclude any enquiries or other action and so enabled the so called gift to be perfected. She made the false statements in writing when she signed the deeds and Gervaise concurred in their making. The fact that Gervaise also made the statements at an earlier point of time does not detract from what is stated in the deeds and its importance. The so called relationship helped to explain the transaction.

In Regina v Masler and Shaw (1995) 79 A Crim R 199 at 202-203, in the course of discussing the decision of the Full Federal Court in Minister for Immigration, Local Government & Ethics Affairs v. Della Cruz (1992) 34 FCR 348, Hunt CJ at CL accepted the view that a particular will be material if it was relevant to the purpose for which it was being made and that it will be relevant to that purpose if it may be taken into account by the person to whom the statement is made in making any decision upon the matter in respect of which the statement was made. It was unnecessary that the statement must or will be so taken into account. The question is not whether that particular played any part in the decision made. An objective assessment has to be made.

It is sufficient if the particular may be taken into account. Both appellants admitted that the statements were made to obtain the property for Susan Preece. The statements were made to those whose business it was to read the deeds and that included Messrs Lee and Bisley [the solicitors]. On an objective assessment the statement may be taken into account by Messrs Lee and Bisley in preparing the conveyance and the inquiries which they would make. The statements were made more than once and this tends to underline their importance.

See also R v Clogher [1999] NSWCCA 397.

Makes or publishes

Publishing has been held in defamation law to be the disclosure of information to a third party.\textsuperscript{65} In relation to copyright law it involves the communication of material to the public.\textsuperscript{66} Although there does not appear to be a decided case on the scope of the concept of “publish” in relation to this offence, it would appear that the distinction turns on whether

\textsuperscript{65} Pullman v Walter Hill & Co Ltd [1891] 1 QB 524; (1890) 60 LJQB 299.

\textsuperscript{66} Copyright Act 1968 (Cth) s 29(1).
the defendant has made the statement in some public way. The NSW Criminal Courts Bench Book suggests that:

“To “publish” means to convey the offending statement to the mind of another: Webb v Bloch (1928) 41 CLR 331, 363”.

Cases involving publication under s178BB include sending a letter, placing an advertisement in the newspaper, and lodging an insurance claim form. While an oral statement is most likely both made and published at the same time, a written statement could be made privately and only shown to another later, thus publishing it.

### The required state of mind

#### Intent

A primary requirement is proof that the defendant intended to obtain for themselves or another property, financial advantage or cause financial disadvantage. There is no requirement that any such property or advantage be obtained, and in this respect the offence is potentially much broader than the offences in s192E.

Having proved this intent, the prosecution must also show that the defendant has the requisite state of mind in relation to the false statement that is necessary to prove it was made dishonestly. This will often be that the accused knew that the statement was false or misleading in a material particular.

In *Peters*, Gaudron and Toohey JJ held:

In a case in which it is necessary for a jury to decide whether an act is dishonest, the proper course is for the trial judge to identify the knowledge, belief or intent which is said to render that act dishonest and to instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest.

This suggests that dishonesty requires proof of knowledge or belief that the statement is false. It may however be possible that a court will recognise that dishonesty can involve reckless disregard in relation to truth.

#### Knowingly

In *R v Stolpe*, Stolpe was convicted of falsely stating that he owned land which he intended to subdivide and sell to his victims, and making those statements with the intention of obtaining an $18,500 deposit from his victims. The Court of Criminal Appeal held:

What must be established is actual knowledge. Knowledge is a state of mind and, as with any other state of mind, it may be established by any evidence of words or acts on the part of the appellant which point to or identify that state of mind; such evidence is admissible whether or not the statements and acts are substantially contemporaneous with the time when the state of mind is relevant, and the evidence is direct rather than hearsay in nature. There was

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67 R v Lethlean Matter No 60729/95 (19/12/1997)
undisputed evidence before the judge that the relevant statements were false. No suggestion of mistake was raised in the evidence. In the absence of any such suggestion, the truth or falsity of statements made by a person as to that person's ownership of land and as to an intention to subdivide must necessarily be within the knowledge of that person. Once it was found that these statements had been made by the appellant and that they were false, it irresistibly followed that he knew that they were false. 70

It is unclear from this judgment whether the court was intending to draw a distinction between knowledge and belief. In receiving offences, a belief that the property is stolen has been held to be sufficient to satisfy the statutory requirement of knowledge. 71 It might similarly be sufficient to prove that the defendant believed that the statement was misleading. Uncertainty as to its veracity would be insufficient unless the defendant were charged with “making” the statement with reckless disregard.

**The requirement of dishonesty**

The new offence is significantly different from the previous offence in that it requires that the accused act dishonestly. The previous offence did not include this element and the Court of Criminal Appeal had refused to imply it. See *R v Stolpe*72 and cf *Pollard v Commonwealth DPP*.73

Dishonesty is as defined in s 4B. However, there is a significant difference between this offence and s192E. Whereas in s192E the dishonesty must be related to the obtaining or causing, in s 192G the dishonesty relates to the making of the statement. No obtaining or causation need result.

**Fraudulent statements by corporate officers**

The *Crimes Act* 1900 also contains an offence of publishing false statements by corporate officers. Section 192H replaces the previous s 176. It is a simplification of the earlier offence.

**192H Intention to deceive members or creditors by false or misleading statement of officer of organisation**

(1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly makes or publishes, or concurs in making or publishing, a statement (whether or not in writing) that to his or her knowledge is or may be false or misleading in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) In this section:

 creditor of an organisation includes a person who has entered into a security for the benefit of the organisation.

 officer of an organisation includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation.

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71  *R v White* (1859) 1 F & F 665, 175 ER 189; confirmed in *R v Road* [1983] 3 NSWLR 344.

72  NSWCCA unreported 30/10/1996. Stolpe was convicted of falsely stating that he owned land which he intended to subdivide and sell to his victims, and made those statements with the intention of obtaining an $18,500 deposit from his victims.

73  (1992) 28 NSWLR 659
organisation means any body corporate or unincorporated association.
192F Intention to defraud by destroying or concealing accounting records

(1) A person who dishonestly destroys or conceals any accounting record with the intention of:

(a) obtaining property belonging to another, or
(b) obtaining a financial advantage or causing a financial disadvantage,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) In this section, destroy includes obliterate.

This offence is an updated version of the previous ss 158 and 175. The elements of the offence are:

- destroy an accounting record; or
- conceal an accounting record
- where the destruction or concealing is done dishonestly;
- and do so with intention to:
  - obtain property belonging to another, or
  - obtain a financial advantage, or
  - cause a financial disadvantage

The previous offence used a variety of words to describe destruction or falsification of records. This has now been replaced with destroy or conceals. Under the previous offence the record tampered with was described using a range of words. The current offence requires the item to fall within the concept of an accounting record.

### Accounting Record

This term is one used in a number of other statutory contexts to describe records required to be kept for regulatory purposes, etc.. See for example s49Q Insurance Act 1973 (Cth). Although defined in other legislation, it is not defined in the Crimes Act 1900.

The reasoning for the restriction in the scope of the documents in the Theft Act and Model Code approaches is outlined by the CLRC:

“Clause 13 penalises falsifying accounts or producing or using false documents for accounting purposes. It replaces 1861 ss.82 and 83 and the Falsification of Accounts Act 1875 but it somewhat alters the idea underlying those provisions.”... [T]he essence of the [current] offences is falsification of accounts in order to defraud an employer. The purpose of the offences is to deal with employees who take steps to defraud their employers which cannot be brought within the offences of larceny, embezzlement or other misappropriation. ... We considered whether to limit the offences to falsification to the prejudice of an employer or to make them, as now, general so as to cover falsification to the prejudice of anyone. We decided in favour of the latter course, partly in order to deal with cases of dishonesty which would not otherwise be covered and partly in order to avoid argument whether falsification in a particular case was of the purpose of defrauding the employer or somebody else. In consequence of widening offences the clause applies to using documents as well as to falsifying them; but as a corollary the offence under the clause is limited to
documents required for accounting purposes instead of including documents of all kinds. The practical effect however will be little, if at all, different.”

By contrast the Commonwealth Code offence (s 145.4) does not restrict the type of document, instead requiring that it be for a purposes of a law of the Commonwealth, or made or held by a Commonwealth entity.

In interpreting the phrase as part of Commonwealth corporations law, the Full Court of the South Australian Supreme Court held in Van Reesema v Flavel (1992) 7 ACSR 225, per King CJ with whom the other members of the court agreed, said:

“...The expression “accounting records” in its ordinary connotation is, in my opinion, apt to include the various books of prime entry such as cashbook and journal as well as the ledgers. The definition in s 5 extends the expression to include a range of source materials being “invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up”. The obligation then is to keep such books of account and source materials as are necessary for the purposes specified in s 267(1) Corporations Code.”

The use of “accounting record” can be contrasted with the phrase used in the Victorian and Model Code forms of the offence - “any account or any record or document made or required for any accounting purpose”. This is based on the Theft Act offence.

Accounting records and accounts are defined in the Income Act Assessment Act 1936(Cth) s 317 as:

"accounting records " includes invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up.

“accounts” means ledgers, journals, profit and loss accounts and balance-sheets, and includes statements, reports and notes attached to, or intended to be read with, any of the foregoing.

Note that the definition of accounts is exhaustive and so the range of documents that can amount to accounts is limited. It is possible that the false accounting offence would be similarly restrictively interpreted. If it were to be more broadly interpreted there would need to be some form of purposive test. This creates its own problems.

The use of a restriction based on purpose in the Victorian offence has led to difficulty of application, with uncertainty arising as to the exact scope of “accounting” documents. In the Victorian decision of R v Jenkins 75, the Court of Appeal considered the history of the Theft Act offence and English decisions in an appeal on the equivalent Victorian offence, s83 Crimes Act 1958. The case involved the making of false property valuations for the purposes of applying for a loan. The person who had made the valuations had not done so for any “accounting purpose” and consequently the prosecution alleged the valuation was “required for any accounting purpose”.

Ormiston JA held in relation to “required”:

“...It is not altogether clear by whom a record or document should be so required, although I would tend to the conclusion that it ought to be the body (or person)

74 at ACSR 229; ACLC 294.
75 (2002) 6 VR 81 per Ormiston JA, Charles JA agreeing. O’Bryan AJA was in dissent on the requirements of the section.
whose accounts are prepared and kept, who should “require” the record or
document for any of its accounting purposes. Nevertheless, having regard to the
fact that in many cases of this kind those subjected to dishonest attempts to gain
benefits may be either complicit in the defective keeping of accounts or may, on the
other hand, be so inefficient in their keeping of accounts that they are an easy target
for fraudsters, the word “required” should not be confined to what is subjectively
required but it should also comprehend the requirements of taxation and other
revenue authorities and those of regulatory authorities who are entitled to search or
investigate the relevant books of account, i.e. whatever is objectively required.
Thus, wherever a body’s accounts must be audited for a particular purpose, the
relevant accounting standards laid down for the preparation of those accounts may
relevantly require certain records or documents to be kept for the “accounting
purposes” of the subject entity. To that extent I would agree with the learned judge,
but clearly enough the requirement could be imposed, subjectively in a sense, by the
business (or person) who keeps the relevant accounts.76

In Jenkins, the valuations had been required by the lending institution in order to satisfy
regulatory prudential requirements, but the court found that the document was not
required for any accounting purpose. Ormiston JA pointed out:

The expression “required for any accounting purpose” is not, if I may say so, an
everyday English expression. It has two principal elements, both essentially matters
of mixed fact and law namely what is an “accounting purpose” and secondly what is
“required” for that purpose. What is “required” for a specific “purpose” involves
both a legal issue as to the combined meaning of those words and a factual question
as to what satisfies them. Though a “purpose” may ordinarily be easy to identify,
what is “required” necessitates at least an explanation to the jury as to by whom
and why something may be so required. As I have already pointed out, the
requirement may be one of law, which obviously requires some legal directions, but
it may only involve the requirements of a particular business which is essentially a
matter of fact, dependent on explicit evidence. But it cannot simply turn on the fact
that a given business, and its executives, may require something for their own
accounting system, for there must be an objective element in it. After all the
accused is being charged with creating or passing on false information of a particular
kind and in particular circumstances and, as Professor Sir John Smith has pointed
out77, the accused’s intent cannot fairly be taken to extend to some activity of which
reasonably he could not have been aware.

Secondly, and this largely follows from the last observation, a conclusion as to
what are “accounting purposes” of a particular business involves both a factual
issue, as to what that business does by way of keeping, maintaining and preparing
its accounts, and also a purposive issue, which requires rather a consideration of the
kind of information used and therefore needed for the keeping of those accounts.
Some cases may be very obvious, others such as, I venture to say, the present,
contain a number of hidden difficulties. Moreover what may seem relatively clear
when one is talking about a document setting out figures and financial details may
be far from obvious when the document, such as the present, does not even
condescend to any detail recorded or likely to be recorded in any part of a business’s

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76 (2002) 6 VR 81 at 85.

77 See Smith: Law of Theft, 8th ed. para.6-06; Smith and Hogan: Criminal Law, 10th ed. p.619.
books of account. In those circumstances one would expect evidence both of their connection with the relevant accounts and also as to their requirement for that purpose. Connection may be sufficient, inasmuch as identification of the relevant information in the document and the manner and reason for its entry into the particular accounting records of the business may show that it could not be argued that they were not so required, within the meaning of the section. On other occasions the bare facts as to the use of particular information may not in itself establish the relevant requirement, so that expert evidence may be called for in order to show why the particular business needed the information for its accounting purposes. I might mention the possible example, which so far I believe has not yet been directly raised in the authorities, of information in books of accounts or other accounting records which may be derived from one of a number of sources. The fact that a document, which is the subject of a charge, contains financial or other factual details which appear in the accounts may not be so important if the same information could be obtained from other sources. In consequence it would be important to show by evidence why the business “required” the information to appear in the relevant document or, more specifically, why it needed for its accounting purposes the particular document made the subject of the charge.78

His Honour pointed out that “business records” were not sufficient to satisfy the section, nor was the fact that documents were used in the “accounting process” sufficient to demonstrate that they were “required”.79

An “accounting purpose” may be a somewhat loose concept but the intent is clear enough, and so the documents in question should either form part of, or be made or required in connexion with the preparation of, the accounts of the business, in which I would again include both the accounting records as well as the ultimate accounts prepared and published to those with a relevant interest by way of balance sheet, profit and loss account, income and revenue statement or the like. Again one should not be too rigid about the extent to which a document is required, but it should not be a chance or barely incidental connection; there must be some purpose to be served by relating the document, by bringing it into existence, attaching it for one purpose or another, or using the information contained therein, to the totality of materials which are kept or retained by a business or other entity as part of its accounting processes. One might even conceive, though it is not necessary here to conclude, that a document may be required for accounting purposes which is kept quite separately or returned, thrown away or destroyed, which is nevertheless required at some particular stage for the purpose of making up a business’s books of account or used and needed for some other aspect of a business’s accounting records.

What one should be concerned with, however, is a connection with the accounting processes of a business or other entity, not mere use in its business or other operations. For example, documents may be required for the negotiation of contracts or, in large enterprises, for the preparation of prospectuses, but, though particular documents might be required for those purposes, they would not thereby be required for accounting purposes, unless there were accounting aspects of a transaction to which the document was particularly referable. So … a requirement

for some business purpose or another should not in itself be treated as sufficiently connected, at least unless there was also an incidental but related requirement for the accounting purposes of an enterprise.\textsuperscript{80}

The situation remains unclear.

\textbf{Destroying the accounting record}

\textsuperscript{80} (2002) 6 VR 81 at 98.

\textbf{Concealing the accounting record}

There does not appear to be any relevant caselaw on this concept, but whether it requires a positive act on the part of the accused, rather than a failure to disclose, may be an issue that arises.

\textbf{Is the offence necessary?}

It indeed may not be necessary to continue to have the offence on the statutebooks. The false accounting offences remain in essence an inchoate and preparatory offence. As Ormiston JA asked in \textit{Jenkins}:

\begin{quote}
Bearing in mind the general law as to attempts and the common law of conspiracy to defraud, one might fairly ask why this specific kind of inchoate offence was needed, especially in circumstances such as the present where, for the most part, financial advantage was indubitably obtained, indeed not disputed, by the applicant who challenges only the prosecution as to the criminal manner in which he obtained those advantages by way of loan, advance, guarantee and the like. Each of the reports points out, however, that at the time the various predecessor statutory provisions were passed, there were many deficiencies in the common law relating to fraud and the obtaining of benefits by deception, which at first were remedied by Parliament in one way or another, but by provisions largely directed to specific problems.\textsuperscript{81}
\end{quote}

\textsuperscript{81} (2002) 6 VR 81 at 94.

Such deficiencies no longer exist, and with the proposed new fraud offences a much simpler approach will be taken to conduct falling within the scope of the current offences. The offence is essentially a form of attempted fraud that is interrupted before deception

\begin{center}
\textsuperscript{80} (2002) 6 VR 81 at 98.
\textsuperscript{81} (2002) 6 VR 81 at 94.
\end{center}
As such it is unnecessary to maintain it as a separate offence and it is proposed to repeal the offence.

The availability of attempted fraud charges means that any attempt to restrict a false accounting offence by means of class of person or document would be ineffective. In light of this prosecutorial discretion must be relied on to not push the boundaries of attempted fraud too far.
Forgery and False Instruments

Forgery as an offence dates from medieval times, and there is both a large body of case law on the common law offence and also a large number of detailed statutory codifications. In 1989 the NSW Parliament amended the law of forgery by repealing previous codifying legislation and inserting a new part into the Crimes Act 1900. The offences were further amended in 2010. These offences are very closely modelled on the United Kingdom Forgery and Counterfeiting Act 1981.

The distinction between false accounting and false instruments

There is a crucial distinction between the offences of false accounting and false statements on one hand and the offences of forgery on the other. In an offence of false accounting or false statements the underlying document is a genuine one – all that is false is a material particular within the document. For a document to constitute a forgery the deception must be more fundamental. The entire document must be false.

This is often expressed as requiring that the document must be false in two ways. Firstly it must tell a lie in relation to information it contains. But secondly it must tell a lie about itself. The British Law Commission, in its Report on Forgery and Counterfeit Currency on which the United Kingdom provisions are based explained this requirement as follows:

22. The essence of forgery, in our view, is the making of a false document intending that it be used to induce a person to accept and act upon the message contained in it, as if it were contained in a genuine document. In the straightforward case a document usually contains messages of two distinct kinds - first a message about the document itself (such as the message that the document is a cheque or a will) and secondly a message to be found in the words of the document that is to be accepted and acted upon (such as the message that a banker is to pay a specified sum or that property is to be distributed in a particular way). In our view it is only documents which convey not only the first type of message but also the second type that need to be protected by the law of forgery. Forgery should not be concerned, for example, with the false making of the autograph of a celebrity on a plain piece of paper, but it should be concerned with the false making of a signature as an endorsement on the back of a promissory note. The autograph conveys only the message that the signature was written by the person who bears that name; the endorsement conveys not only that the signatory made the endorsement, but also that he has authorised delivery of the note and has made himself liable to the holder in due course.

This requirement that the document tell a lie about itself has resulted in complications both at common law and in the current legislative definitions of what constitutes a false document.

Amendments to the Crimes Act 1900 in 1989 largely replaced the common law based offence of forgery with new offences based on the concept of a false document. This in turn was changed in 2010 to offences of forgery, based on false instruments.

Making and using false documents

The central offences are contained in sections 253 and 254.

253 Forgery—making false document
A person who makes a false document with the intention that the person or another will use it:
(a) to induce some person to accept it as genuine, and
(b) because of its being accepted as genuine:
   (i) to obtain any property belonging to another, or
   (ii) to obtain any financial advantage or cause any financial disadvantage, or
(iii) to influence the exercise of a public duty, is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 10 years.

254 Using false document

A person who uses a false document, knowing that it is false, with the intention of:
(a) inducing some person to accept it as genuine, and
(b) because of its being accepted as genuine:
(i) obtaining any property belonging to another, or
(ii) obtaining any financial advantage or causing any financial disadvantage, or
(iii) influencing the exercise of a public duty,
is guilty of an offence.

Maximum penalty: Imprisonment for 10 years

The elements of the offences are:

Make a false document
- Makes a document
  - Which is a false document
- Knowing of the falsity of the document
- Intending to induce another person to
  - accept the instrument as genuine and
- Intending to
  - obtain any property belonging to another, or
  - obtain any financial advantage or causing any financial disadvantage, or
  - influence the exercise of a public duty.

Use a false document
- Makes a document
  - Which is a false document
- Knowing of the falsity of the document
- Intending to induce another person to
  - accept the instrument as genuine and
- Intending to
  - obtain any property belonging to another, or
  - obtain any financial advantage or causing any financial disadvantage, or
  - influence the exercise of a public duty.

Many of these elements are defined by following sections. They are reproduced below in connection with the commentary on that element.

Document

One of the major changes of the 1989 provisions was to replace the traditional description of forgery as a false document with a new concept of false instrument. This was a compound concept with sections defining both what an instrument was and what made
that instrument false. Somewhat circuitously, an instrument was then defined to include "any document". The current legislation reverts to the use of document as the key term.

Forgery at common law had a long and troubled history attempting to define the boundaries of the concept of a document. The British Law Commission, in its Report on Forgery and Counterfeit Currency (Law Com. No. 55 1973) on which the United Kingdom provisions are based explained their understanding of the word instrument as follows:

[23] … we think that the underlying distinguishing feature of the type of document to which forgery should apply is to be found in the idea of an instrument. At common law forgery has been defined as the fraudulent making of a written instrument which purports to be what is not, although the 1913 Act is primarily concerned with "documents" and section 7 of the 1913 Act makes it an offence to demand or obtain property under any forged instrument. In these contexts the word "instrument" is used to indicate a document upon which a person will reasonably act when it is tendered or presented to him.

Thus it appears to have been the Commission’s intention for the offence to only apply to a subset of documents on which a person would rely. However when the new offences were enacted in England, and subsequently adopted in NSW, the definition of instrument referred to “any document”. It is therefore unclear as to the extent to which the old authorities on documents were incorporated into the new provisions and the extent to which old difficulties might re-emerge under the current law.

In A.G. of Hong Kong v Chiuk-Wah83 the Privy Council held that the word “instrument” which included “document” under Hong Kong law was:

not confined to a formal document, but includes any document intended to have some affect, as evidence of, or in connection with, a transaction which is capable of giving rise to legal rights or obligations.

Consequently a national insurance stamp could be forged.

A T H Smith suggests:

Ordinarily, a document will consist of words written on paper or similar writing material. It can be a verbal symbol (including numerical symbols) or symbols written (either by hand, or mechanically produced) on some material base. Although the base will ordinarily be paper, it need not be. It could equally be on canvas or wood, or any material on which symbols are capable of being recorded. 84

Such an interpretation is consistent with the definition of “document” in the Interpretation Act 1987:

21 Meaning of commonly used words and expressions

(1) In any Act or instrument: ...

document means any record of information, and includes:

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sound, images or writings can be reproduced with or without the aid of anything else, or


(d) a map, plan, drawing or photograph.

However paragraph (c) of this definition extends the meaning of document beyond forms of physical writing to anything that can be reduced to writing, sound or images. It thus extends the meaning of a false document to electronic data files. As the definition permits the reproduction of the sound, images or writing by means of “anything else” the definition is broad enough to cover encrypted data.

The breadth of this concept has not yet been explored by the courts. However, it appears that the false instrument offences are flexible enough to incorporate all forms of electronic communication such as emails and webpages. The offences would also extend to any recorded voice or sound, and also to any picture or drawing. As such the scope of the offence now ranges far beyond its historical boundaries.

In light of this extended definition of document, the further definitions of instrument in s299(1) are of diminished importance. However, for completeness, they are discussed.

**Electronic records and the need for permanence**

The definition of document in s21 Interpretation Act refers to a “record” of information. This implies some degree of permanence. Similar issues have arisen in English cases dealing their extended definition of document as a “disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means”.

In *R v Gold & Schifreen* [1988] 1 AC 1063 the entering of a password into a computer system was held to not constitute the making of a false instrument within the English definition. As the password was only momentarily held in the computer memory for the purposes of checking, this was not considered sufficiently permanent to constitute a document.

The case for the respondents on the first question was this. The recording and storage of information referred to in section 8(1)(d) are processes of a lasting and continuous nature. The process relied on by the Crown involved no more than the C.I.N. and the password being held momentarily in the control area of the user segment while the checking of them was carried out, and then being totally and irretrievably expunged. The process did not, therefore, amount to the recording or storage of the C.I.N. and the password within the meaning of section 8(1)(d).

My Lords, section 8(1)(d) contemplates that information may be recorded or stored by electronic means on or in (i) a disc, (ii) a tape, (iii) a sound track (presumably of a film) and (iv) devices other than these three having a similar capacity. The words “recorded” and “stored” are words in common use which should be given their ordinary and natural meaning. In my opinion both words in their ordinary and natural meaning connote the preservation of the thing which is the subject matter of them for an appreciable time with the object of subsequent retrieval or recovery. Further, in relation to information recorded or stored on or in a disc, tape or sound track, that is the meaning of the two expressions which appears to me to be clearly intended. For both these reasons I have reached the conclusion that the respondents' case on the first question is right and that the Crown's case on it is wrong. Moreover I share the view of the Court of Appeal (Criminal Division), as expressed by Lord Lane CJ, that there is no reason to regret the failure of what he so aptly described as the Procrustean attempt to force the facts of the present case into the language of an Act not designed to fit them.

In that case, the need to prove the making of a false instrument led the prosecution to argue that the writing of data to a section of the computer’s memory constituted the creation of a device. This was considered artificial by the defence. The point was not specifically ruled on by the House of Lords but they endorsed criticism of the case as “a
Procrustean attempt to force the facts of the case into the language of an Act not designed to fit them.”

However, in *R v Governor of Brixton Prison and Another, ex parte Levin* [1997] QB 65 the Divisional Court held that false electronic funds transfer instructions recorded on a computer disk constituted a false instrument:

That disk is in our view within the definition of “instrument”. Did the applicant make a false disk? We consider the disk embraces the information stored as well as the medium on which it is stored, just as a document consists both of the paper and the printing upon it. Thus by entering false instructions on the disk it was in our opinion falsified. ... They were not merely held momentarily but were inserted on to the disk with the purpose that they should be recorded, stored and acted upon. The instructions purported to be authorised instructions given by Bank Artha Graha to Citibank. They were not authorised and in our view the disk with the instructions recorded and stored on it amounted to a false instrument.

Under the NSW definition it would seem that any file held on a computer or storage device would amount to a record.

**False documents**

Having determined that the item in question is a document, it is then necessary to determine if the document is false. These provisions are unchanged from the pre 2010 law.

250 False document—meaning

(1) For the purposes of this Part, a document is false if, and only if, the document (or any part of the document) purports:

(a) to have been made in the form in which it is made by a person who did not in fact make it in that form, or

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or

(c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms, or

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms, or

(e) to have been altered in any respect by a person who did not in fact alter it in that respect, or

(f) to have been altered in any respect on the authority of a person who did not in fact authorise its alteration in that respect, or

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or

(h) to have been made or altered by, or on the authority of, a person who did not in fact exist.
A key preliminary point is that the document itself, not the information it may contain, makes a false claim or “purports” to have made or altered in certain ways or circumstances. “Purports” in relation to each of the subsections (a) to (h) has been held to require that the document tell a lie about itself: *R v More* [1987] 1 WLR 1578.

It is common ground that the consistent use of the word "purports" in each of the paragraphs (a) to (h) inclusive of section 9(1) of the Act imports a requirement that for the instrument to be false it must tell a lie about itself, in the sense that it purports to be made by a person who did not make it (or altered by a person who did not alter it) or otherwise purports to be made or altered in circumstances in which it was not made or altered.

### Purporting to be made by another person – s250(1)(a) and 250(1)(c)

(1) For the purposes of this Part, a document is false if, and only if, the document (or any part of the document) purports:

- (a) to have been made in the form in which it is made by a person who did not in fact make it in that form, or ...
- (c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms, or ...

These subsections define a document to be false if it purports to have been made by a person other than the person who in fact made it. The document can be misleading in this way either in relation to its form or its terms.

In *R v Lack* (1987) 84 Cr App R 342, Lack’s company had financial difficulties and had been placed in liquidation. To avoid losing a lot of money in this liquidation Lack and his brother-in-law created a number of fictitious transactional documents which had the effect of selling or leasing some of the company’s assets to themselves. These were dated so as to appear that they had come into existence before the date of the liquidation. The court found that such documents fell within the definition of a false document that told a lie as to the form in which it was made.

Once one looks at the facts of this case, all the documents which were alleged to have been forged purported to be made by the company before it went into liquidation. The appellant had brought them into existence after the company had gone into liquidation. On that point alone, it is clear to us that the facts of this case fall clearly within section 9(1)(a). It is impossible to accept the submission which was put before the judge, and put before this Court, that these documents amounted to nothing more than representations about facts. Mr. Clark was right in saying that if there is nothing more in a document than a representation about facts, that does not amount in law to forgery.

The falsity in relation to form would appear to be that the documents purported to have the form of documents validly entered into by the company.

In *The Queen v Ceylan*, [2002] VSCA 53. the Victorian Court of Appeal examined the operation of the Victorian equivalent subsection (c) in s83A(6) of the Victorian *Crimes Act* 1958. Ceylan was a self-employed finance consultant who had clients seeking personal loans from the Westpac Banking Corporation. Ceylan assisted with the filling in of the bank’s application forms and forwarded them on to an officer of the bank. The forms were signed by the applicants and contained falsely inflated details of assets and income. The prosecution alleged that these details had been inserted by Ceylan without the applicant’s knowledge and that this made the documents to be false documents in that they purported
to be made in terms in which it is made by a person who did not in fact make it in those terms. The Court of Appeal held that the judge had not adequately directed the jury on the relevant issues. Winneke P, with whom the other members of the court agreed, stated:

[21] ...As Mr. Holdenson correctly submitted, the documents were not to be regarded as relevantly “false” for the purposes of s.83A simply because they contained a lie or lies. What the jury needed to be satisfied of, before they could convict, was that the application documents were not what they purported to be in the sense that they purported to have been made in the terms in which they were made by the persons (here the particular loan applicants) who did not in fact make them in those terms. It was only in that sense that a particular loan application could “tell a lie about itself”. ...

[23] The instructions which his Honour gave to the jury in this case do not, in my view, articulate with clarity the characteristics of the crime of “making a false document” and, in particular, what the section requires to be proved before the document in question can be said to “tell a lie about itself”. Indeed, as I have said, the directions are calculated to invite the jury to find the crime proved if the accused made or altered a document so that he knew that it contained a lie. If his Honour had instructed the jury as to what was required to be proved before the jury could be satisfied that the document “told a lie about itself” – namely that it purported to have been made in terms by a person who did not make it in those terms – it would have focussed the jury’s attention upon the real issue which was in contention between the Crown and the applicant. This is so because the applicant’s case was that each loan application purported to be precisely what it was, and made in the terms required by the loan applicant; and that the best evidence of that was to be found in the fact that the loan applicants had acknowledged and adopted their applications by signing them. Indeed, bearing those undisputed facts in mind, it would seem to me that the Crown could only have proved the making of false documents if the jury were satisfied that, subsequent to the relevant loan applicant signing and adopting the document, and without that person knowing or authorizing, the applicant had materially altered its terms so that it could be properly said that it purported to be made in the terms in which it was made when the relevant loan applicant had not in fact made it in those terms.

If the loan applicants had entered the amounts themselves, this would have been instead the making of a false statement. The documents expressed no falsity as to their form or who had signed them – the falsity was alleged to relate to specific terms within the documents.

In Ceylon the court adopted the following comments of McHugh J in Brott v R (1992) 173 CLR 426, on common law forgery as applicable to false documents:

The [authorities show] that the general rule of the common law was that forgery consisted in a person, with intent to defraud, making, altering or adding to an instrument so that the instrument contained a false representation that another person had signed or acknowledged the instrument or part of its contents. If the document contained no more than a false representation by the person who signed or acknowledged the instrument, or part of its contents, no forgery occurred.

**Signing documents with false names**

One issue that has arisen is whether the use of a false name in signing documents results in the document becoming a false document. In R v More [1987] 1 WLR 1578 More intercepted a cheque which was being sent to a Mr Jessell. More opened a bank account under the fictitious name Mark Richard Jessell and then banked the cheque. He then withdrew money from that account signing the withdrawal form M R Jessell. As the House of Lords noted, there was thus the clearest evidence of the theft of the cheque and the subsequent obtaining of that money by deception. However he was also charged with the use of a false instrument. The basis of the charge was that the withdrawal form was a false
instrument. The House of Lords held that no false instrument offence had occurred because:

... The Court of Appeal (Criminal Division), in my judgment, rightly concluded, however, that the withdrawal form could not be brought within either (a) or (c). Hodgson J., giving the judgment of the court said that the document "was undoubtedly made by the appellant and it was undoubtedly made in the form of a withdrawal form. It was undoubtedly signed by the person making it, and that signature was undoubtedly the signature of the holder of the account in the name 'Mark Richard Jessell."

The Court of Appeal might well have added that the document did not purport to have been made by the Mr. Jessell in whose name a cheque had been drawn to open the account, since the withdrawal form made no mention on the face of it of that cheque.

See also R v Macer [1979] Crim LR 659.

In R v Fischetti and Sharma [2003] ACTSC 16 Gray dealt with a similar issue:

2. The prosecution rely upon the presentation of a Commonwealth of Australia bank cheque to the CPS Credit Union Co-operative (ACT) Limited in the sum of $252,500.00 to be credited to the account Koliopoulos Property Investments held with that institution. In fact that account is said to be a sham in the sense that it was not opened, as it purported to be, by a Bill Koliopoulos but was opened or caused to be opened by the accused Frank Fischetti using a false identity of Bill Koliopoulos. A number of other accounts were purportedly opened by that identity including Millennium Property Investments and Millenium Commercial Rentals. By telephone transfer from the Koliopoulos Property Investment account, certain of these accounts were credited with funds based on the acceptance of the cheque. Transfers were also effected between the accounts by written transfer slips presented at the Credit Union's branches. An example forms the third and fourth counts on the indictment. Monies were then withdrawn from accounts to which the sums had been transferred by use of Automatic Teller Machines in sums of either $500.00 or $1,000.00. An example of each forms counts five and six on the indictment. ...

6. In the case of the charges forming counts 3 and 4 of the indictment, that of making and using a false instrument, the prosecution rely upon the evidence that Mr Fischetti was the real applicant in opening the accounts of both Millennium Property Investments and Millennium Commercial Rentals. In opening those accounts he purported to be Bill Koliopoulos. The prosecution also say that he made the transfer forms the subject of the third count transferring the sum of $10,000.00 being part of the proceeds of what is said to be a plainly false bank cheque which had been paid into another account that Mr Fischetti had allegedly opened also in the name of Koliopoulos Property Investments.

7. The question is whether in doing so it can be said that Mr Fischetti made a false instrument. Section 124(1)(a) of the Crimes Act 1900 (ACT) provides that an instrument is false if it purports to have been made in the form in which it is made by a person who did not make it in that form. The other provisions of s 124(1) are similarly concerned with falsity concerning the document itself.

8. It is clear from the authorities that it is not sufficient that the document be false in the sense that it contains untruths, but rather that it purports to be something which it is not. The relevant principle was expressed by Winneke P in delivering the judgment of the Victorian Court of Appeal in R v Ceylan (2002) 4 VR 208. It may be noted that s 124(1) of the Crimes Act 1900 (ACT) is the equivalent of s 83A(6) of the Crimes Act 1958 (Vic), and section 9 of the Forgery and Counterfeiting Act 1981 (UK). ...

10. Nor is this present case a case where the object of the transfer was funds which did not exist. That distinguishes the situation considered by the English Court of Appeal in Attorney-General's Reference (No. 1 of 2000) [2001] 1 WLR 331 and the cases discussed in that case of R
The circumstance of the crediting of funds to the account had taken place, albeit in this case in reliance upon a forged instrument.

11. The transfer document here does not tell a lie about itself. On the prosecution case it was made by Mr Fischetti in respect of an account that he had opened in the name of Millenium Property Investments and Bill Koliopoulos. It transfers an amount that is part of the credit in that account to another account. On those facts, the offence charged cannot be made out.

**Purporting to have been made on the authority of a person: s250(1)(b) and 250(1)(d)**

(1) For the purposes of this Part, a document is *false* if, and only if, the document (or any part of the document) purports: ... 

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or ... 

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms, or ... 

These subsections extend the concept of false document to documents where the defendant in creating the document, rather than impersonating another, claims to be acting on their authority. There does not appear to be any judicial comment on the scope of these subsections, however it seems implicit in the wording that the document could only purport to have been made on the authority of another person if the identity, or at least existence, of the person authorising the action was suggested by the document itself. This is because the claim to authority is made by the document itself.

**Purporting to have been altered by a person or on that person’s authority: s250(1)(e) and s250(1)(f)**

(1) For the purposes of this Part, a document is *false* if, and only if, the document (or any part of the document) purports: ...

(e) to have been altered in any respect by a person who did not in fact alter it in that respect, or 

(f) to have been altered in any respect on the authority of a person who did not in fact authorise its alteration in that respect, or ...

These subsections extend the concept of false document to situations where a pre-existing and genuine document is altered in some way by the defendant. The alteration must be more than a mere alteration of information in the document. Instead what is required is that the document suggests that the alterations to the document were in fact made by a particular person, who did not make those alterations – or made by the defendant with the apparent authorisation of a person who did not so authorise the changes.

There have not been any cases that have examined the subsections in detail.
For the purposes of this Part, a document is false if, and only if, the document (or any part of the document) purports: ...

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or

This subsection removes the need to determine whether the date on an document is of material significance, although it is still necessary to prove that the document actually purports to have been made on the date. Often documents are created prior to the date which is recorded on the document. For example, post-dated cheques and pre-signed property transfer documents dated at settlement.

The second aspect of the subsection, “or otherwise in circumstances” has caused difficulty for the English courts. Although it is now settled that the document must tell a lie about itself, earlier judgments on the meaning of subsection (g) appeared to take differing views about the issue. The problems largely concern the decision in *R v Donnelly* [1984] 1 WLR 1017. The defendant had created a fictitious valuation of six items of jewellery. The valuation form was an authentic, standard, valuation form and was signed by the defendant who was the manager of a well known jewellery store. The only falsity in the document was the claim that the jewellery had in fact been examined and that it had a particular value. Thus it was a classic example of a document which did not tell a lie about itself, but instead merely told a lie about other existing circumstances. The court held:

In our judgment the words coming at the end of paragraph (g) "otherwise in circumstances . . ." expand its ambit beyond dates and places to any case in which an instrument purports to be made when it was not in fact made. This valuation purported to be made after the appellant had examined the items of jewellery set out in the schedule. He did not make it after examining these items because they did not exist. That which purported to be a valuation after examination of items was nothing of the kind: it was a worthless piece of paper. In our judgment the trial judge's direction was correct. This purported valuation was a forgery.

However, in *R v More* the House of Lords reasserted the requirement that the document tell a lie about itself, but without overruling Donnelly. Consequently, the English courts have had some difficulty in reconciling the various judgments. The difficulty arises because the reference to circumstances in subsection (g) may mean that the document tells a lie about surrounding circumstances, rather than directly about itself.

The way out of the difficulty for the Court of Appeal in *Attorney General's Reference (No 1 of 2000)* [2001] 1 WLR 331 was to approve the following statement of principle of Laws J in *R v Warneford & Gibbs* (although the decision was disapproved):

The expression 'otherwise in circumstances in which it was not in fact made' must, in our judgment, refer to the circumstances of the making of the document just as surely as the references in the sub-paragraph to date and place concern the date and place on or at which the document was made. If, for example, the document on its face purports to have been made in the presence of certain named individuals who in fact were not present at all, it would fall within the sub-paragraph. Likewise, a document whose words purported to have been dictated by a particular person, when it was in fact entirely the work of the writer, would come within the definition. So would a document purporting to have been made at a different time of day from its actual making. Other examples may suggest themselves. But in every case the lie in the document must relate to the actual circumstances of the document's making. A lie about other facts, extraneous to the document, does not suffice; such a lie may go in proof of
other offences (notably under the Theft Act), but cannot establish forgery. The offences which, under the 1981 Act, require proof of forgery within section 9 are exclusively concerned with the document itself.

The difficulty is in determining the degree to which the circumstances must be linked to the form or content of the document. The following have been held to be false documents in England:

- **R v Donnelly** [1984] 1 WLR 1017: an authentic jewellery valuation form made in circumstances where the jewellery had not in fact been examined by the valuer (though the correctness of this must now be doubted).

- **R v Jeraj** [1994] Crim LR 595: a document signed by a bank manager, stating that he had seen a letter of credit, when the letter of credit did not at that time exist. The Court of Appeal found that a document signed by a bank manager, falsely verifying that he had seen a letter of credit, was a forgery under subsection (g). They considered that the letter did tell a lie about itself because it was clearly not an endorsement of the letter of credit which at that stage did not exist.

- **R v Warneford and Gibbs**: a letter stating that the defendant was an employee of the company when he was not so employed. The case proceeded on the basis that the prosecution had not objected to the fact that the document was not the company’s letter, and was not signed by its director. The only alleged basis of the offence was that at the time the document was made, the defendant was not an employee. The court held that such circumstances fell outside of subsection (g), but this has since been disapproved by the Court of Appeal in Attorney General’s Reference (No 1 of 2000) [2001] 1 WLR 331.

- **Attorney General’s Reference (No 1 of 2000)**: a truck’s tachograph record which recorded that the truck was being driven by a second driver, where the first driver was still driving the truck (the incorrect record was caused by the driver’s misuse of the tachograph device).

In this last case, Attorney General’s Reference (No 1 of 2000) [2001] 1 WLR 331, the Court of Appeal (Criminal Division) attempted to reconcile earlier decisions, but felt bound by its previous decisions. Consequently, it found:

> [T]he approach in Donnelly can be adopted without going so far as to make any instrument which tells a lie about some alleged past fact a forgery. It is of the essence of a valuation that the articles, the subject of the valuation, have been examined. This is because a bona fide valuation requires some examination of what is the subject of the valuation. The lie in Donnelly therefore related to an event which must have occurred ...

In view of the decision of this court in Jeraj [1994] Crim LR 595, we have come to the conclusion that the decision of Donnelly [1984] 1 WLR 1017 is still binding upon us. Both Donnelly and Jeraj should however be restricted in their application so that they apply only where circumstances need to exist before the document can be properly made or altered. If those circumstances do not exist there will then be a false instrument for the purposes of section 9(1)(g). If the circumstances do not exist the document is telling a lie about itself because it is saying it was made in circumstances which do not exist. ... In each case where we would hold the instrument to be false it could not have been made honestly if the circumstances which we have identified did not exist. Thus in Donnelly you could not make a valuation without having seen the jewellery which you purport to have valued. In Jeraj there had to be a letter of credit which could be endorsed. In Warneford there had to have been the relationship of master and servant before you could make a reference as an employer relating to an employee. The need for the existence of these circumstances prior to the making of the
instrument explains why if the circumstances do not exist the document is telling a lie about itself.

25 ... [In this case the] tachograph record is produced continuously over the period indicated by the record. It is being made throughout this time. In so far as the record was being produced in this case while the first driver was shown as driving there was no falsity in relation to its making. It was, however, capable of being a false instrument during the period when it showed that the first driver was not driving and that a second driver must therefore have been driving. To make that part of the instrument, it was essential for there to be a second driver during the period the tachograph was operated in the second driver position. There was no second driver and therefore the instrument was false. The circumstance which was false was that the record was being made during a period when there wrongly purported to be a second driver who was driving.

However, the court accepted that if a manual record had been in fact made by the driver, and the driver had falsely claimed another person was driving this would not constitute a false instrument.

An instance where an argument under the equivalent to subsection (g) failed is the Hong Kong case, HKSAR v Huynh Bat Muoi [2001] HKEC 692. In that case the defendant convinced Belgian authorities to reissue his passport with the photograph of another person. The Hong Kong Court of Appeal emphasised that the subsection limited the relevant circumstances to those in which the instrument was “in fact made”.

What is it that the passport purports to say about itself and about the circumstances in which it was made? Only that it has been issued by an official on such and such a date, and at such and such a place, pursuant to the authority which that officer had to issue it. The passport was in fact made in the form and upon the terms in which the maker made it. It has not since been altered, and was made on the date and place and in the circumstances in which it purports to have been made. If it also purports to represent that it was made after an application for a passport, then that too is an accurate representation about itself. The subject passport contains no lie about itself, although it contains a lie. It also contains no lie about the circumstances in which it was made, whether as to time, or place, or authority.

The continuing difficulty with the subsection is determining whether the circumstance is to be characterised as one that relates to the way in which the document was made. The current English approach appears to be to require that the circumstance be one that would be a prerequisite for the making or altering of a genuine document. However, as the decision in Muoi makes clear, not only must the circumstance be a prerequisite, but it must be proved that the document itself suggests that the circumstance occurred.

There have been no reported Australian decisions on this issue.

Purporting to be made or altered by a non-existent person: 250(1)(h)

(1) For the purposes of this Part, a document is false if, and only if, the document (or any part of the document) purports: ...

(h) to have been made or altered by, or on the authority of, a person who did not in fact exist.

This subsection refers to circumstances where the document purports to have been made or altered by a person who is entirely fictitious. It does not refer to a circumstance where the defendant is assuming a false identity. In such cases, although the name or title of the person is fictitious, the person does in fact exist as the relevant person is the defendant. This was explained by the House of Lords in R v More, a case where the defendant attempted to withdraw money from an account he had opened in a false name.
The Court of Appeal, however, decided that the withdrawal form came within section 9(1)(h) since it purported to have been made by an existing person but he did not, in fact, exist. But the appellant was a real person. It was he who was the holder of the account and in that capacity had signed the withdrawal form. The withdrawal form clearly purported to be signed by the person who originally opened the account and in this respect it was wholly accurate. Thus, in my judgment, it cannot be validly contended that the document told a lie about itself and I would therefore answer the second certified question in the negative.

The history of the subsection and another example of its difficulty of application was outlined in the Queensland case of *R v Kolence* (1996) 1 QDR 412. The relevant words are identical, although the overall offence is not.

Kolence opened a Building Society account under a false name, Oliver. However as the false name, when signed, looked very similar to his own name he used his own signature to authenticate the application and deposits and withdrawals. Further, the person he dealt with in opening the account was a friend of some years standing who knew that his real name was Kolence and was therefore not deceived. Kolence was charged under a section which was similar in effect to subsection (h), the prosecution arguing that the false name of Oliver on the forms meant that the instrument purported to have been made by a person who did not in fact exist. The court held:

The appellant is "an existing person". His surname, it is true, is Kolence but it is necessary to bear in mind that surnames are conventional only, and that, to quote Lord Lindley in *Cowley v. Cowley* [1901] A.C. 450, at 460:

"Speaking generally, the law of this country allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss."

It was therefore open to the appellant, if he wished, to use the name Oliver. To the extent that he did so it became his name, and hence the name of "an existing person". Of course, he was not at liberty to use that name for a fraudulent purpose. But he did not do that; and it was no doubt because he did not make any document in the name Oliver with the "fraudulent intention" referred to in s. 485(d) that the Crown did not attempt to rely on that paragraph of the section.

Instead, it took its stand on para. (c) of s. 485. It contains no reference to fraudulent intention. To secure a conviction in reliance on this paragraph it was, however, necessary to prove a document purporting to be made by or on behalf of "some person who does not, in fact, exist". Since the appellant does exist, it is evident that s. 485(c) does not readily fit his case. It can be made to do so only if the provision can be read as meaning that a document made in a name other than one's own is one that purports to be made by a person who does not exist. But that is not the way in which the law has developed.

The immediate source of the definitions in s. 485 is the draft Code of 1880 prepared by Sir Fitzjames Stephen. In other jurisdictions there are statutory provisions that more or less resemble s. 485(c). All have their origin in the offence of forgery at common law. Two early decisions are *R. v. Lewis* (1753) Fost. 116; 168 E.R. 57 and *R. v. Dunn* (1765) 1 Leach 57; 168 E.R. 131. In both the perpetrator pretended to be, or to be acting on behalf of, a non-existent relative of a deceased seaman in an attempt to obtain pay or prize money due to him using for that purpose a document purporting to be made by or on behalf of that relative. Such an offence is not always readily distinguishable from obtaining by false pretences. The difference is said to lie in distinction between a false document and false statements in a document. Hence the requirement that, for the purpose of the offence of forgery, it is not enough that the document should tell a lie; it must itself be a lie; or, as is sometimes said, it must tell a lie "about itself".

The cases are numerous and they are not all reconcilable. Simply to use a fictitious name in a document is not enough unless the name is represented as belonging to someone else: see *R. v. Marlin* (1879) 5 Q.B.D. 34, at 37, adopting what was said in *R. v. Dunn*, above. Hence, "the
use of an assumed name ... is not forgery if the name is used as that of the very person who assumes it, and without a fraudulent design to gain some undue advantage by the use of this particular name" : Perkins, Criminal Law, (2nd ed.), at 346 (New York, Foundation Press, 1969). Whether or not a name is used as that of some other or non-existing person can ordinarily be determined only by reference to surrounding circumstances, which must "make the document appear to be the document of a person who is in fact different from the person actually signing it": R. v. Haskett [1975] 1 N.Z.L.R. 30, at 32. To satisfy s. 485(c) something must be done to create the impression of another person, by whom "the document ... purports to be made", but "who does not, in fact, exist". As Professor Glanville Williams has expressed it ([1974] Crim. L.R. 71, at 76), "the use of an assumed name does not, so to speak, create a fictitious person, since the defendant attaches the assumed name to himself".

[His Honour discussed with approval R. v. More [1987] 1 W.L.R. 1578, and continued] In any event, the matter is concluded for us by the decision of this Court in R. v. Gamble (C.A. 154/1973; 20 December 1973, unreported). There the accused, a Mrs D.E. Gamble, opened a bank account in the name of D.J. Campbell and paid into it a cheque drawn to that name as payee. The cheque represented payment for work she had done for a company by which, however, she was never employed. Her conviction for forging an indorsement in the name D.J. Campbell on the cheque was set aside on appeal. Because it was a bearer cheque, no indorsement was needed in order to deposit it to the credit of that account; in consequence, Andrews J. held that it was not a "material" part of the document within s. 485(c). However, Wanstall S.P.J. considered that if it had been left to the jury to find that the accused had opened the account as her own but in the assumed name of Campbell, "they could, and probably would, have been satisfied that when indorsing the cheque she was not making a writing which purported to be made by a person who did not exist". E.S. Williams J. thought the jury should have been directed to return a verdict of not guilty, for the reason that:

"When Mrs Gamble produced the cheque in question and endorsed it with the obvious intention of passing it into the account of D.J. Campbell it seems to me that she was dealing with the account of a person who very much did exist, namely, herself under the name of D.J. Campbell,"

In my view the same reasoning applies to this case. In his dealings with the Society the appellant chose to use the name J.C.K. Oliver. For the purpose of his relationship with the Society, that name was his name. He was and is a person "who does, in fact, exist" within the meaning of s. 485(c) of the Code. Neither the application form nor any of the deposit forms could therefore be said to be a document that was false in the particular defined in s.485(c). It is impossible to say that those documents are not "genuine".

In R v Macer [1979] Crim LR 659, Macer drew a cheque on his own bank account but signed it with a different signature. He then denied signing the cheque and attempted to have the amount credited to his account. This action was held not to be forgery because although the signature was different it was still his own name and it did not purport to have been signed by a different person.

Multiple bases of falsity

The nature of a false document is such that it is likely that the document will contain falsity on a number of the bases set out in s299. An example of this is R v Sewell [2001] NSWCCA 299. In that case the defendant had without authority used his employer’s stamp to endorse cheques so as to enable them to be negotiated into an account under his control. The Court of Criminal Appeal held:

51 The Crown relied on several of the provisions of s 299(2). First, it relied on s 299(2)(a). The cheque as originally drawn payable to Westbus is not a false instrument. This case is concerned with the affixing of the Westbus stamp and the endorsement. They made it seem that Westbus had authorised the payment to Prospect Promotions. That is the "purporting".
Westbus did not affix the stamp or make the endorsement. That was done by the applicant for his own purposes and not on behalf of Westbus.

52 Section 299(2)(b) also applies. As the cheque was made payable to Westbus Pty Ltd and was presumably marked "not negotiable", it was Westbus Pty Ltd which had to authorise any endorsement. Westbus Pty Ltd did not authorise the applicant to endorse any of its cheques in favour of himself or Prospect Promotions (his firm or company). The cheques should have been paid into the account of Westbus. It follows that the instrument purported to have been in the form in which it was made on the authority of Westbus Pty Ltd, but Westbus Pty Ltd did not in fact authorise its making (that is, the stamped endorsement) in that form.

53 Further, for similar reasons s 299(2)(d) applies. The cheque was made payable to Westbus. The stamp and endorsement purported to have been made in the terms in which it was made on the authority of Westbus but it did not authorise the endorsement making the proceeds of the cheque payable to the applicant or Prospect Promotions.

54 Section 299(2)(f) is also capable of applying. The applicant submitted that it did not apply because the alteration was purportedly done on the authority of the applicant who authorised the alteration in that respect. I am unable to agree with this approach. An instrument is false if it purports to have been altered in any respect on the authority of a person. The instrument purported to have been altered on the authority of Westbus, the payee, by means of the Westbus stamp and the endorsement. However, Westbus did not authorise any endorsement which permitted the proceeds of the cheque to be paid into the account of the applicant or Prospect Promotions.

Is it possible for a judge to just read out the definition in the section and leave it to the jury to decide the basis on which the document is false? This was rejected in R v O’Hara [2005] VSCA 62:

Vincent. JA: Stripped of detail, the Crown contended at the trial that the applicant devised a scheme to sell two pistols, that he had acquired as normal purchases from gun dealers, as weapons in the possession of Adolf Hitler and Eva Braun in the Führerbunker in Berlin in 1945.

... The jury rejected this romantic tale, in part, it would seem reasonable to assume, by reason of the presence of evidence indicating that guns were obtained by the applicant in a far more prosaic manner. The pistol No. 803157 was purchased from a licensed gun dealer in Balwyn, Victoria, for $900, having been imported with a number of others from Canada. The other, No. 457044, was bought in Germany and imported into Australia through Mialls Gun Shop in Victoria.

As part of the scheme, quite remarkable endeavours were made by the appellant to create a history, supported by apparently genuine documents, designed to convince prospective purchasers of the provenance of the pistols. It was the fabrication of these documents that provided the bases of the counts on which he was convicted. ...

The contention was advanced ... that, as s.83A of the Crimes Act delineates eight ways in which a document could be properly described as false, it was incumbent upon the trial judge to identify for the jury the specific limb of the definition of “false document” upon which the prosecution was relying for each count.

[The court referred to the trial judge’s directions which in essence quoted the definition of false in s83A (6) verbatim (commenting that the definition was a result of “the ingenuity of Parliamentary Counsel, or of some other interested busybody”), and then summarised the Crown case as ”The Crown says the whole lot is false.”]

Counsel for the applicant took exception to this part of the judge’s charge, arguing that he should have related the specific allegations of falsity being made by the prosecution with respect to each of the documents in question to the provisions of s.83A(6). Initially his Honour accepted that there was force in this submission. However, after hearing from the prosecutor, he declined to re-direct the jury.
In his report to this Court, his Honour stated:

“I acknowledge the desirability of charging the jury in the manner suggested in grounds 1 and 2. As to ground 1, however, I found it impossible to select one form of falsity as applicable to the particular documents rather than another. Each document seemed (on the Crown case) to be false within most if not all the statutory descriptions. This difficulty was a main reason for my putting the statutory definition before the jury in a written form – a device I concede to be indicative of judicial despair.”

I understand his Honour’s reference to “judicial despair” to be directed to the nature of the task that he contemplated that he would have to undertake in the event that he acceded to counsel’s submission. According to the Crown case, the documents were either total fabrications or had been deliberately altered in a fundamental respect. To take each of them and then to attempt identifying, in a formalistic fashion, the various ways in which each could be said to lie about itself was, he considered, quite unreal in the circumstances and, I would add, when regard is had to the issues in the trial, would almost certainly have constituted little more than a source of bemusement for the jury.

Obviously an accused person is entitled to have the jury directed in clear terms as to the case that the prosecution advances against him. That is the case on which he has been presented for trial and the only one to which the jury can legitimately direct attention. Where an offence can be committed in a number of different ways, a trial judge will be required to identify for the jury, and with sufficient precision and clarity to enable them to determine properly the issues in the trial, the foundations of law and assertions of fact upon which the prosecution case has been constructed. Seldom would it be sufficient, in the case of the alleged commission of a statutory offence, to do no more than read out the relevant provisions or to give them to the jury in written form (See R v. Massie [1999] 1 V.R. 542 at 546 [14] – [16] per Brooking, J.A.). Even, or perhaps increasingly, in these days of the employment of what is euphemistically termed plain English, the interpretation of legislation is not necessarily simple and the potential for misunderstanding of meaning or misapplication of principle badly cannot be ignored.

Why then did the judge in the present matter, bearing in mind his Honour’s very considerable experience and knowledge of the criminal law, adopt the course that he did? The answer appears to lie in his Honour’s view (which I should add I share), of the unreality of the process in which he was invited to engage. All save two of the documents in question, the prosecution claimed, were brought into existence by the applicant and were not what they purported to be, that is, genuine documents or copies of genuine documents. The remainder, it was contended, had been altered so as to effectively create new documents that lied about themselves. ...

As a practical proposition, the questions to be considered with respect to the falsity of the various documents by the jury could not have been simpler. The case raised none of the difficulties addressed by the High Court in Brott or this Court in Ceylan. Whatever else may be encompassed by the definition, documents which are found to be total fabrications but purport to be genuine and are brought into existence by an accused are clearly false within the meaning of the provision. Whilst his Honour was correct in his view that more than one of the limbs of the statutory definition could be regarded as applicable to the different documents, according to their purported author and contents, he should not have presented the jury with the bald definition and said to them, in effect, “take your pick”. In the particular circumstances, it would have been quite sufficient to instruct them that, if they accepted the Crown assertion that the applicant had fabricated the documents encompassed by the respective counts and they were simply not what they purported to be, they were entitled to find that they were false in the relevant sense. I confess to difficulty in understanding why he did not do this.

However, there was realistically no potential for confusion in the minds of the jury, as to the task which they were to undertake, that can be detected in the circumstances or arising from the manner in which the issues were left for their consideration. ....Although the manner
in which the issue was left for consideration was unsatisfactory, in the particular circumstances the intervention of this Court is not required.

Batt and Buchanan JJA agreed with Vincent JA.

Making

Making a false document is defined in s250(2).

250 False document—meaning

(2) For the purposes of this Part, a person is to be treated as making a false document if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart from that alteration).

This means that a false document is made when; a document is made which is false, a genuine document is altered to become false; or an already false document is further altered to make it more false, or false in a further respect.

Makes or uses a copy

250 False document—meaning

(3) For the purpose of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

It is necessary to make special provision for the making or use of copies of false documents. That is because a copy of a false document, such as a photocopy, would not tell a lie about itself. It would be what it appeared to be — a copy of another document. This definitional section moves the locus of examination of falsity away from the copy to the document that has been copied.

There may be some issue with the way the section has been worded. If it is in fact a copy then it is logical to examine the original document for falsity. However, if it is in fact not a true copy — but a forgery purporting to being a copy — then one reading of this section would be that the document must be interpreted as if it were the original (and genuine) document.

However, s250(3) is only necessary if the copier or user or the copy is not the person who created the initial false document. This is because the primary offence occurs at the time of the making of the original document, not at the time of the copying or distribution of the document. Any copying is a subsidiary offence. If the maker and copier are the same person, the offence in s300 is the appropriate offence. This was explained in R v Ondhia [1998] 2 Cr App 150. Ondhia had created false instruments which he had then faxed to suppliers. The Court of Appeal rejected the argument that he should have been charged with using a copy of a false instrument:

Without explaining the technological details, having created the false document, [Ondhia] used his facsimile machine to transmit and create an identical but new document which, Mr Nicol argued, is what it purported to be, that is a copy of the original false document inserted by the appellant into his fax machine which told no lie about itself ... The document received by RPR was itself a facsimile copy, and equally told no lie about itself. ... In any event, although in a general sense the description "copy" can be applied to a facsimile, it is more precise to call it a duplicate, and it is on the basis that facsimiles duplicate originals that recipients act on them. ...
facsimile to RPR, anticipating that they would accept the document received by them and treat it as a duplicate of the false original. To adopt the language of the section to the facts of the present case, at the time when the appellant made the false document he intended that it should be used to induce RPR to accept, without ever seeing it, that the original false document of which they had received a duplicate was genuine. This use of the false document in the facsimile machine to achieve his objective therefore fell within the ambit of section 1 of the 1981 Act.

**Custody of false instruments**

**255 Possession of false document**

A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will use it:

(a) to induce some person to accept it as genuine, and

(b) because of its being accepted as genuine:

   (i) to obtain any property belonging to another, or

   (ii) to obtain any financial advantage or cause any financial disadvantage, or

   (iii) to influence the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Possession is defined in s 7 Crimes Act 1900 to mean:

7 "Possession" when criminal

Where by this or any other Act the unlawful receiving of any property, or its possession without lawful cause or excuse, is expressed to be an offence, every person shall be deemed to have such property in his or her possession within the meaning of such Act who:

(a) has any such property in his or her custody, or

(b) knowingly has any such property in the custody of another person, or

(c) knowingly has any such property in a house, building, lodging, apartment, field, or other place, whether belonging to or occupied by himself or herself or not, and whether such property is there had or placed for his or her own use, or the use of another.

This offence extends the scope of the forgery offences to catch those who act as intermediaries between the makers and users of false documents. The notions of custody and control have been discussed above. For the purposes of 255 the prosecution is required to prove that the defendant had control of the false document with full knowledge of its true nature and with an intention that they or another would use it in the prohibited way.

The offence does therefore not apply to those who have custody of false documents with no intention to use it to prejudice another. This means that persons such as law enforcement officers who take custody of false documents to prevent their use will not be liable.

**Making or possession of implements for making false documents**

**256 Making or possession of equipment etc for making false documents**
(1) A person who makes, or has in his or her possession, any equipment, material or other thing designed or adapted for the making of a false document:

(a) knowing that it is so designed or adapted, and

(b) with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) A person who, without reasonable excuse, makes or has in his or her possession any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(3) A person who possesses any equipment, material or other thing that is capable of being used to make a false document, with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(4) This section applies in respect of any equipment, material or other thing that is designed or adapted for the purpose of making a false document whether or not it is also designed or adapted for another purpose.

(5) This section applies to a person who intends to commit an offence even if committing the offence concerned is impossible or the offence concerned is to be committed at a later time.

(6) It is not an offence to attempt to commit an offence against this section.

This section criminalises the custody or control of the materials and tools for making false instruments. It contains three separate offences.

The first s 256(1) contains a traditional preparatory offence of being in possession of the materials “designed or adapted” for making false instruments together with an intention to facilitate forgery.

However, following subsections create new expansive possession offences.

First, s 256(2) creates an offence for knowing possession of such equipment simpliciter. This offence does not require proof that a false document be made or forgery committed. It is therefore significantly less onerous to prove for the prosecution. Further, there is a reversal of onus of proof. Thus any person found with what can be seen to be the implements of forgery is liable unless they can mount a plausible excuse.

Secondly, s 256(3) creates an offence of possession of any equipment, etc “capable” of making a false document. While this requires proof of intention to commit forgery and does not have a reversal of onus of proof, it removes the limitation on the subject matter of the previous offences. The item only need by capable of use in making a false instrument.
**Equipment, material or other thing**

“Equipment” is an extremely broad term – one wider than the concept of a tool. The notion of material relates to the raw materials from which the false instrument will be fashioned. The concept of a thing is the broadest form of definition of an item known to the law, and as such there would seem to be no practical limit to this element. However there is a major limitation in that the materials or implements must be “designed or adapted”.

**Designed or adapted**

This requirement in 256 (1) and (2) - but not (3) - precludes liability for any person merely found in possession of blank paper or a pen or computer. To be liable, the person must have already have either themselves adapted existing implements or materials or made or obtained such specialist items. The difficulty is in determining the point at which the item has the quality of a design or adaptation “for the making of a false instrument”.

The idea appears to be that the thing was designed with making a false instrument as one of its design purposes – and thus bespoke – or that there is a usual form or state of the thing that is lawful, and that something has been changed to permit it to make a false instrument.

Thus for example, custody of a computer would be insufficient to be in breach of this offence. Neither would the custody of a computer with photo image manipulation software and a high quality printer. However, if the computer had templates for driver’s licences and the defendant was not authorised to issue such licences, the computer might be seen to be “adapted” and also adapted to “make a false instrument”.

Similar considerations apply to the custody of raw materials. Unless they are manufactured with the making of false instruments as an intention of the designer it would be difficult to see how they could fall inside the offence. Possession of, for example, particular paper stocks or blank plastic cards would be likely to be insufficient. Paper printed to look like passport pages might however be designed for the making of a false instrument if the manufacturer’s were not authorised by the government.

**Capable**

Whereas designed or adapted implies that a person had deliberately shaped the item in such a way as to facilitate the making of a false document, s 256(3) merely requires that item be capable of so doing. So long as it can be demonstrated that the item can be used to assist in the making of a false instrument, it can fall within the offence, despite the use being contrary to the designer’s intentions or the items general use. It also means that there need not be any proof that the accused had made any alterations to the item. This offence is thus broad enough to cover an intended use of a pen or a laptop to create a document.

**Makes**

A final issue relates to the scope of the word “makes”. Recent media reports have highlighted the use of card skimming machines by which persons obtain a victim’s card data that can be reproduced on forged credit cards, etc. and used to access funds or buy goods and services. Such machines would appear to be “specially designed” for criminal purposes and they would supply requisite data in the making of the false cards. However it is unclear whether they are directly involved in the “making” of the cards. If the making of the false cards is seen as a process extending from data capture to the final coding of the false cards, it is clear that the skimming machines form part of the process of “making” the cards.
However it remains arguable that the false instrument is the card itself and not the data on it. If so, the skimming machines might not form part of the making of the card.

**Capable**

Section 256(3) creates an offence of possession of any equipment, etc “capable” of making a false document. This further requires proof of intention to commit forgery and does not have a reversal of onus of proof. The offence appears to be able to incriminate the possession of paper, ink and pens and consequently much will turn on the ability to prove the mental element of intention to commit forgery.

Subsections 256(4) and (5) underscore the breadth of the previous subsections. Section 256(3) enacts that the design or adaptation of the equipment need only be one of a number of purposes of the equipment. Presumably, the distinction drawn between “designed or adapted” and “capable” means that if the equipment, etc. is useful for purposes other than forgery, any standard features would make the equipment, etc. “capable” of creating a false document. There would need to be something non-standard or bespoke about a feature before the equipment, etc. would be seen to be “designed or adapted” to make a false document. Section 256(4) removes the impossibility defence and any requirement that the intended forgery be imminent.

**Mens rea**

The mens rea of the false instruments offences is twofold. The person must use the false instrument with the intention of inducing another person to, firstly, accept that instrument as genuine; and secondly, to thereby induce that person to obtain property or financial advantage, cause financial disadvantage or influence the performance of a public duty. Both intentions must be shown to have existed.

Both intentions are also required to be found at the time of the making or using of the instrument. Successful inducement or the causing of prejudice are therefore not required to be proved: *R v Ondhia* [1998] 2 Cr App 150.

**Intention to induce the victim to accept the document as genuine**

One of the important aspects of the false instrument offences are that they are an inchoate offence in relation to the effect on the victim. While in many cases a false instrument will only come to light when it is used, the mere making of the false instrument suffices to create liability. In such circumstances the intention of the defendant may be only of a general nature. Consequently, section 306 removes the requirement that the prosecution prove that the defendant had an intent to induce any particular person.

251  **Inducing acceptance of false document**

(1) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.

(2) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

Further, it has been held by the English courts that there is no requirement that the defendant have any specific intention as to the method by which the victim will be induced to accept the instrument as genuine. In *R v Ondhia* the court held:
The ways in which the document may be used, whether by the maker himself or someone else, with his knowledge, or as his agent, to "induce somebody to accept it as genuine" are not defined or limited, and the maker of the false document does not avoid prosecution under section 1 of the 1981 Act merely because at the time when he is creating the document he has not made up his mind about the method of despatch or intends that it should be transmitted by fax rather than delivered through the ordinary postal system, or by hand, direct to the intended ultimate recipient. Indeed if it were otherwise the means of delivery of the false document would direct attention away from the critical question, which is the intention of the maker at the time when he creates it.

The prohibited results

252 Interpretative provisions relating to obtaining property, financial advantage and financial disadvantage

The following provisions of Part 4AA (Fraud) also apply to this Part:

(a) section 192C (Obtaining property belonging to another),

(b) section 192D (Obtaining financial advantage or causing financial disadvantage).

The 2010 brought the prohibited results of forgery in line with those prohibited by the fraud offences, replacing a previous concept of economic prejudice.

Influencing a public duty

This is based on the MCCOC recommendations, and was inserted in 2010. MCCOC stated:

MCCOC has extended economic gain or loss to include the intent to influence the exercise of a public duty. This is consistent with the codification of intent to defraud in blackmail and the interpretation of the same phrase in the case law. The Forgery Act is broader in that it applies to any duty. This is too vague and has not been adopted.85

The meaning of public duty in relation to defrauding has been discussed in a couple of recent cases and is discussed below.

The knowledge of the defendant

Other than for the offence of making a false instrument in s300(1), the false instrument offences all require that the accused “know” of the falsity of the instrument. This provision is slightly different to the English legislation which refers to knowledge or belief of the falsity of the documents. Belief has been held to be a state of mind slightly below that of knowledge, and includes situations in which a person could draw no other reasonable inference.86 The requirement in the NSW legislation that there be knowledge of the falsity is a more appropriate requirement for a serious indictable offence and an approach also taken by the Model Code.87

85 At 221.
87 Note however the approach taken to proving knowledge in the offence of receiving.
Conspiracy to defraud

Conspiracy to defraud is a common law offence in NSW and SA and has a statutory formulation in other states and at Commonwealth level, though the statutory forms are interpreted in light of the common law (see eg R v Ansari [2007] NSWCCA 204 (Cth Code) and Bolitho v WA [2007] WASCA 102 (WA Code)...

It is one of a number of forms of conspiracy which can be charged. Therefore in order to discuss conspiracy to defraud in the particular it is first of all necessary to discuss the concept of conspiracy more generally.

Conspiracy has been defined in Ahern v The Queen (1988) 165 CLR 87 to be:

...the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means and it is the fact of the agreement, or combination, to engage in a common enterprise which is the nub of the offence.

What is important to note from this definition is that conspiracy is the agreement to do something, rather than the doing of the action itself. Thus the actus reus of conspiracy is constituted by the actions which create the agreement, whether they be words or gestures; and the mens rea is the state of mind that the conspirators have when forming that agreement. However the distinction between actus reus and mens rea in conspiracy can at times be highly artificial, as the agreement itself can be seen both as the actus reus and the mens rea. In Peters v The Queen McHugh J noted:

A real question arises, however, whether dividing the elements of conspiracy into an actus reus and a mens rea serves any useful purpose. In his treatise on the law of criminal conspiracy, Goode contends that "the concept of actus reus is an elusive one, particularly in the area of criminal conspiracy; so much so, in fact, that it may well be possible to say that the crime has no distinguishing mental and physical elements." In R v Churchill and Walton [1967] 2 AC 224 the accused was charged with conspiracy to commit an offence against a statute, the offence being one of strict liability. Viscount Dilhorne said that "mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act" and that in "cases of this kind, it is desirable to avoid the use of the phrase 'mens rea' ... and to concentrate on the terms or effect of the agreement".

One of the difficulties in dividing the offence of conspiracy into the traditional elements of an actus reus and a mens rea is that the agreement of the parties to pursue a common and unlawful design is traditionally regarded as the actus reus of the offence. Yet such an agreement, assuming it to be voluntary, necessarily includes a mental element. At the very least, there must be an intention to enter into the agreement, and the present state of the authorities suggests that there can be no conspiratorial agreement unless the accused and his or her co-conspirators also intend that the common design should be carried out.

The Agreement

The essence of conspiracy is the agreement. The crime of conspiracy is complete once the agreement has been entered into. There is no need to prove that any actions result from that agreement. In Carusi and Cassar (1989) 45 A CrimR 165 it was noted:

So far as material, conspiracy consists of the entering into an agreement between two or more people to commit a crime. For convenience I refer to the crime which they agree to commit as the substantive crime. The purpose of making the entering into the agreement to commit the substantive crime itself a crime is that the sanctions of the criminal law are attracted before the substantive crime occurs. The commission of the substantive crime may be
The crime of conspiracy is complete as soon as the agreement is entered into. Whether or not the substantive crime is thereafter committed is immaterial to whether or not the crime of conspiracy has been committed. Clearly it is of the essence of the crime of conspiracy that where the substantive crime is committed it is preceded by the agreement to commit it for it is the making of the agreement to commit it which is the conspiracy.

The nature of the subsequent actions themselves, not being part of the conspiracy, are therefore immaterial. In *The Queen v. Rogerson* (1992) 174 CLR 268, the High Court noted:

What makes a conspiracy unlawful is the unlawfulness of its intended object or the unlawfulness of the means intended to effect its object, as Willes J., delivering the opinion of the judges in *Mulcahy v. The Queen* (1868) LR 3 HL 306, at p 317, said:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."

As the "very plot" is the actus reus of the offence, the offence is complete before any further unlawful act is done or any further lawful act is done to carry the unlawful object into effect. When Willes J. spoke of an "unlawful act", he was speaking of an act which has not occurred when the conspiracy is formed. He must have meant an act which, if done in circumstances contemplated by the conspirators, would be unlawful. Although acts done in pursuance of an apparent agreement often furnish the evidentiary foundation for inferring that a criminal conspiracy was formed, those acts are not themselves elements of the offence. In that sense, it is immaterial whether an act done in pursuance of a criminal conspiracy is, in the event, unlawful, provided the act was intended to be done in circumstances which, had they eventuated, would have made the act unlawful. In the present case, we are concerned with an alleged conspiracy to do an unlawful act, namely, an act that would have the effect of perverting the course of justice. The prosecution had to prove that the conspirators intended that, if the relevant act was done pursuant to the conspiracy and in the circumstances contemplated by the conspirators, it would have the effect of perverting the course of justice.

However proof of the existence of the agreement is most usually shown by proof of the acts which follow from the agreement. Such evidence is usually circumstantial, but is still of probative value. In *R v Gunn and Howden* (1930) 30 SR (NSW) 336 the NSW Supreme Court commented:

It is not necessary however to prove an agreement in terms to act in combination to effect the end aimed at. As Coleridge, J., pointed out in *R. v. Murphy* (8 C. & P. 297 at p. 311), in many cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. Conspirators do not plot in public, nor do they formulate their design in the terms of an agreement. The proof of conspiracy is, as Grose J., said in *R. v. Brisac* (4 East. 17 1), generally "a matter of inference deduced from certain criminal acts of the parties accused done in pursuance of the apparent criminal purpose in common between them." All this is not in dispute. It is not, and it cannot be, contended that the Crown is limited to direct evidence of the agreement or combination, and that it is not entitled to put before the jury evidence of circumstances from which they may draw an inference of guilt. That is what was done in this case.

Proof of the exact time of the agreement is also unnecessary. In *R v Saffron* (1988) 17 NSWLR 395 it was held:

It is established that the prosecution is not bound to define the exact time at which the prosecution began or the exact act which marked its inception: *R v Pepper and Platt* (1921) 16 Cr App R 12 at 19 and *The Law of Criminal Conspiracy* - Gillies (1981) at 14. This is understandable for in the great majority of conspiracy prosecutions the Crown is compelled to
establish its case by proving the overt acts performed in the execution of the agreement and inviting the jury to infer that those facts compel the inference that the parties acted in concert. Obviously in those cases it would be impossible to assert the precise date or time at which the parties concluded the agreement. All that could be said is that the agreement was concluded at some time prior to the parties commencing to act in concert.

This was pointed out by Jordan CJ in *R v Ongley (1940) 57 WN (NSW) 116* at 117:

"Although facts necessary to establish an agreement between the accused must be proved, it is not necessary to adduce such evidence of agreement as would be required in an action of assumpsit. The prosecution is not called upon to define the exact moment at which the conspiracy began or the exact act which marked its inception: *R v Pepper AS Cr App R 12* at 19. If it is established that the accused did things which indicate that they were acting in concert to achieve a common purpose, this supplies all the evidence that is required to establish that they had agreed to achieve that purpose. Indeed, in a prosecution for conspiracy it is unusual for any other evidence of agreement to be tendered than is supplied by evidence of the respective overt acts."

This is because the agreement is one of continuing effect and therefore proof of point of creation is not crucial. In *Cornelius and Briggs (1988) A Crim R 49* Kennedy J noted:

It is clear that the offence of conspiracy is complete upon the making of the agreement: *Kamara (1974) AC 104* at 119; *57 Cr App R 880* at 895, per Lord Hailsham LC - but, in a very real sense, conspiracy is a continuing offence. That this is so was reaffirmed in *Doot (1973) AC 807; 57 Cr App 600*, a decision which concerned the question of whether an English Court had jurisdiction to try an alleged offence of conspiracy notwithstanding that the conspiracy was entered into outside England. Viscount Dilhorne said (at 822-823; 613-614):

"When there is agreement between two or more to commit an unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design . . . .

. . . The fact that a man who later joins a conspiracy may be convicted of it shows that although the offence is complete in one sense when the conspiracy is made, it is nevertheless a continuing offence."

Lord Pearson said (at 827; 618-619):

"When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place: *Aspinall (1876) 2 QB1* 48 at 58-59, per Brett JA. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So far as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."

By the very nature of the offence, the Crown is frequently unable to particularise when an agreement was made. But, as Lord Salmon observed in *Doot’s case* at 833; 627:

"Conspiracy was usually proved by what are called overt acts, being acts from which an antecedent conspiracy is to be inferred. Where and when the conspiracy occurs is often unknown and seldom relevant."

Not only must the agreement itself be proved to exist, but the participation of the accused in the agreement must also be proved. Common purpose between the parties is required As Brennan J held in *Gerakiteys v. The Queen (1984) 153 CLR 317*: 

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The identity of a conspiracy is to be found in what the conspirators commonly agree to or accept: a conspiracy is proved by evidence of the actual terms of the agreement made or accepted or by evidence from which an agreement to effect common objects or purposes is inferred. If two conspirators agree to effect several unlawful objects and a third person agrees with them to effect some only of those objects, there are two conspiracies not one: the original conspirators are parties to both conspiracies, the third person is a party only to the conspiracy with the more limited objects. That was the unanimous opinion of the judges who were summoned to advise the House of Lords in O'Connell v. The Queen (1844) 11 Cl & F 155 (8 ER 1061)...

That is not to say that a person who performs one only of several overt acts of a conspiracy cannot be a party to the conspiracy: the question is whether he has agreed that effect be given to all the objects or purposes of the conspiracy (so that his overt act gives only partial effect to those objects or purposes), or whether his agreement is limited to part only of those objects or purposes. In the latter case, it may be that his overt act gives effect fully to the agreed objects or purpose. In Reg. v. Griffiths (1966) 1 QB 589, at p 599 Paull J., speaking for the Court of Criminal Appeal, gave an illustration of the principle:

". . . the Post Office clerk who agrees to alter a date stamp in a case where a bookmaker has been swindled must know that the alteration is to be used for a fraudulent purpose. He therefore joins a scheme to defraud that bookmaker, of whom he may not have heard, but he cannot be indicted, merely because he has agreed to alter that stamp, on a charge of a conspiracy to alter date stamps and cheat bookmakers all over the country. We venture to say that far too often this principle is forgotten and accused persons are joined in a charge of conspiracy without any real evidence from which a jury may infer that their minds went beyond committing with one or more other persons the one or more specific acts alleged against them in the substantive counts, or went beyond a conspiracy to do a particular act or acts." (at p328)

Whether there is one conspiracy or a number of similar conspiracies can also present problems. A number of events over a period of time might represent one, ongoing conspiracy or a number of separate consecutive conspiracies (see R v Saffron (1988) 17 NSWLR 395 at 421-23). Further large-scale conspiracies are often characterised by a central ringleader and a number of other conspirators whose knowledge is limited in terms of the operation of the scheme and the other members of the conspiracy ("cartwheel" conspiracies). In such cases there are issues as to whether there is one overarching conspiracy or a number of similar conspiracies between the ringleader and each participant (see eg Gerakiteys v. The Queen (1984) 153 CLR 317).

Sometimes, of course, the circumstantial evidence is not sufficient to justify a jury drawing a conclusion that there was such an agreement. An example of such an insufficiency of evidence is to be found in the English case of O’Brien (1974) 59 Cr App R 222. He was charged with conspiring to effect the escape of prisoners charged with robberies which were alleged to be connected to Irish nationalist activism. The prosecution alleged he had conspired with Lennon to organise escapes from two prisons. However the jury had acquitted Lennon. O’Brien had been apprehended taking pictures with a camera of the walls of Winson Green Prison in Birmingham, and had maps of the prison surrounds. A search of his house revealed a large amount of literature espousing the Irish nationalist cause and detailed maps of Bedford prison – both internal plans and also routes from the prison to motorways. He said he had come up to Birmingham to find a friend in a pub but had been unable to do so and on an impulse decided to test out his camera.

In effect, the prosecution were saying that the appellant with others unknown has conspired to effect the escape of the "Luton Three", as they became known, from Bedford, and quite separately and independently had conspired with Lennon and others unknown to effect the escape of Sheridan from Winson Green ...
The story of the appellant was really blatantly untrue and it is not the least surprising that
the jury rejected it. He had in his possession an "A to Z Guide" to Birmingham, which fell open
at the page showing Winson Green Prison, and he told a number of transparent lies in
connection with his account of the matter. That he had gone to Birmingham with a view to
photographing the prison, and no doubt with a view to using that photograph for some purpose
of his own later, was really incapable of denial and such denials as the appellant put forward at
the trial were rejected by the jury, one would have thought almost inevitably....

In the event [the jury] did acquit Lennon, and the question for us is whether, Lennon
having gone out of the conspiracy for present purposes, there was evidence upon which the
judge could properly invite the jury to consider whether O'Brien's guilt had been established on
the basis that he had conspired with some other person or persons unknown. If they had
convicted Lennon, this problem would not have arisen because the necessary minimum of two
conspirators would have been present. But the moment they decided to acquit Lennon, it
becomes necessary to see whether a conspiracy between O'Brien and persons unknown can be
established. ... It is, we think, clear law that the jury were entitled to draw the inference of
conspiracy between O'Brien and persons unknown only if that was the only reasonable
inference which could be drawn from the primary facts, for this purpose not substantially in
dispute.

The difficulty which the learned judge might have encountered had he gone more fully into
this point is this, that the essence of a conspiracy is an agreement, and persons do not commit
a criminal offence merely by talking about the possibility of committing some wrongful or
unlawful act unless they reach the stage when they have agreed to commit that act if it lies in
their power. If the jury considered the background of this case and the inferences to be drawn,
they could quite properly, and no doubt would, have drawn the inference that O'Brien had told
them a pack of lies and that he had gone to Winson Green in order to take a photograph of the
wall for such value as that photograph might be in an escape. They might very well have drawn
the inference that it was most unlikely that O'Brien would have done all this entirely by himself
without consulting his friends in Luton because he was clearly well known in the Irish nationalist
circles in that town. But the point about which the jury must have been in considerable
difficulty, had the matter been explained to them, was in saying that the only possible inference
to be drawn here was not merely that O'Brien had discussed a prison break with his friends, but
that O'Brien had agreed to undertake a prison break with his friends.

The dividing line between those two matters is a very narrow one, as is illustrated by an
earlier decision in this Court: Mills (1963) 47 Cr App R 49; [1963] 1 QB 522. The relevant extract
is to be found on p 54 of the Criminal Appeal Reports. In his judgment Lord Parker CJ says this:

"No doubt in many cases it may be a very fine line whether the parties at the particular
moment under consideration are merely negotiating or whether they have reached an
agreement to do something if it is possible or propitious to do it, and it may be that those
cases will be decided largely on the form of the reservation. If the reservation is no more
than if a policeman is not there, it would be impossible to say that there had not been an
agreement. On the other hand, if the matters left outstanding and reserved are of a
sufficienly substantial nature, it may well be that the case will fall on the other side of the
fence, and it will be said that the matter is merely a matter of negotiation."

That difficulty mentioned there by Lord Parker CJ is a very real difficulty in the present case.
How is one to say that against the background of the facts which I have related the inference
that an agreement to break into the prison and release Sheridan had actually been made,
rather than that there had been discussion as to the possibility of entering into the prison and
releasing Sheridan?

There is no need to state any overt act in relation to a common law charge of conspiracy,
and it is also possible to charge a single person with conspiracy with "persons unknown" if
the prosecution are unable to establish who else was in the alleged agreement. Section 393
of the NSW Crimes Act states:
393 Indictment for conspiracy

In an indictment for conspiracy, it shall not be necessary to state any overt act, and each defendant in any case of conspiracy, whether two or more defendants are included in the same indictment or not, may be charged separately, in any count, as having conspired with divers persons, of whom it shall be sufficient to name one only, or as having conspired with one other named person only, and may be convicted on such count upon proof of his or her having unlawfully conspired for the purpose therein alleged with any one such person:

Provided always, that no more than three counts against the same defendant shall be inserted in any such indictment, and that the Court may, in any case before plea pleaded, order such particulars to be given, as to such Court shall seem meet, and that where conspiracies substantially different are charged in the same indictment, the prosecutor may be put to his or her election as to the one on which the prosecutor will proceed.

The operation of the section was discussed in R v Harrison (1995) 79 A Crim R 149:

The provisions in question are aimed at simplifying pleadings in a manner consistent with fairness to the accused. They provide that conspirators may be charged separately, and in the case of each charge it is sufficient to provide the name of only one alleged co-conspirator. They are not directed to a case where there is only one conspirator whose identity is known, and that person alone is charged. The legislation does not produce the result, as it were by side-wind that in such a case no charge can be laid and no conviction obtained. ...

It is easy to envisage circumstances in which there is only one of a number of conspirators available to answer a charge, and for that matter, only one conspirator whose name is known to the prosecuting authorities. The law of conspiracy is not the perfection of wisdom, but it is not so foolish as to allow such a person to escape prosecution and conviction on that account alone.

It is also possible to convict a person of conspiracy, even if all of the other people who have been charged with the same conspiracy are acquitted. (R v Darby (1982) 148 CLR 668 at 678). But there must still be an agreement. As McHugh J explained in Peters:

Nothing in R v Darby is inconsistent with the proposition that a person cannot be guilty of criminal conspiracy if the only other party to the alleged conspiracy never intended to carry out the agreement. In Darby, this Court held that one person could be convicted of criminal conspiracy even though the other alleged party to the conspiracy had been or was acquitted of the charge "unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person." This conclusion is plainly correct because, among other reasons, evidence which is admissible against one accused - for example, a confession - may not be admissible against the other accused. Where, however, one of the two parties never intended to carry out the alleged agreement to do an unlawful act, the conviction of the other is necessarily inconsistent with the conclusion that the other party is not a conspirator.


There is also authority that there is no need to know of the other parties to the conspiracy:

The gist of the crime of conspiracy lies in the making of the relevant agreement. It is the subject-matter and purpose of the agreement which determines whether it is criminally unlawful. There must be at least two parties to a conspiracy. That apart however, the number and identity of the co-conspirators may be inessential to the identification or proof of the particular conspiracy with which an accused is charged. Indeed, as a matter of common law principle, an accused may be convicted of conspiring "with a person or persons unknown" to commit an unlawful act (see Archbold's Pleading, Evidence and Practice in Criminal Cases, 41st ed. (1982), p. 2057; Reg. v. Howes (1971) 2 SASR 293; Reg. v. Anthony (1965) 2 QB 189, at pp 192-193). More in point to the present case, s. 393 of the Crimes Act 1900 (N.S.W.)
expressly provides that an accused "may be charged separately, in any count, as having
conspired with divers persons, of whom it shall be sufficient to name one only . . . and may be
convicted on such count upon proof of his having unlawfully conspired for the purpose therein
alleged with any one such person". On the other hand, the number and the identity of the co-
conspirators may be relevant and, conceivably, even essential to both the identification of the
subject-matter of the conspiracy which is alleged against an accused and to the actual proof of
guilt of that conspiracy. For example, the question whether the intended perpetrator of an
unlawful act is actually a party to a conspiracy is likely to be of critical importance on the
question whether the conspiracy is a conspiracy to commit the act as distinct from a conspiracy
to procure its commission by another. In such a case, s. 393 of the Crimes Act 1900 (N.S.W.) in
no way alters the established common law position that a person cannot be found guilty of a
distinct and different conspiracy to that which the count in the indictment alleges.

Gerakiteys v The Queen (1984) 153 CLR 317 at 334 per Deane J

In order for the agreement to be a conspiracy it must be an agreement to do either an
unlawful act or an agreement to do a lawful act by unlawful means. If the agreement is a
lawful act by lawful means, there is no conspiracy. Such a result occurred in Barbouttis
(unreported NSW CCA 18 September 1995). In that case the accused was charged with
conspiring to receive stolen property, namely stolen cigarettes. However the cigarettes had
in fact not been stolen — they had been borrowed by the police from a cigarette company for
the purposes of an undercover operation designed to catch the accused.

Conspiracy has been defined as the agreement of two or more persons to do an unlawful
act or to do a lawful act by unlawful means: Mulcahy (1868) LR 3 HL 306 at 317, Gunn &
Howden, supra. The identity of the conspiracy is to be found in what the conspirators
commonly agree to or accept: Gerakiteys (1984) 153 CLR 317 at 327 per Brennan J, and as the
gist of the offence lies in the making of the relevant agreement, it is the subject matter and
purpose of the agreement which determines whether it is criminally unlawful; ibid at 334 per
Deane J.

In the present case the conspiracy alleged was one to commit a specific substantive
offence, namely the offence of receiving stolen property contrary to s 188 Crimes Act 1900, by
receiving the cigarettes which were at the time in the back of the relevant truck and which
were not stolen. ...

But here, if the alleged conspiracy had been carried out, no substantive offence would have
been committed because the goods had not been stolen, even though the accused mistakenly
believed they had been, and proof of the stolen character of the goods is fundamental to a
conviction under the section: Sbarra (1919) 13 Cr App R 118.

It follows that the conspiracy alleged in this case was not an agreement to do an unlawful
act because the act agreed to be done, ie receive the cigarettes, was not an unlawful act; nor
was it an agreement to do a lawful act by unlawful means; and so it was not, in my view, a
criminal conspiracy. The subject matter of the agreement was the cigarettes in the back of the
truck and the purpose of the agreement was to acquire or receive them, but the acquisition of
those particular cigarettes would not have been criminal, irrespective of the beliefs of the
appellants.

If the alleged conspirators in Director of Public Prosecutions v Nock had succeeded in
carrying out their agreement to produce cocaine from the mixture they had (which was
impossible), they would have committed a substantive criminal offence and similarly, to borrow
the example referred to by the Chief Justice, if the two robbers had succeeded in robbing the
country branch of the bank (which was impossible because the branch had previously closed
down) they also would have committed a substantive criminal offence; but on the other hand,
if the appellants in the present case had succeeded in carrying out their agreement by acquiring
the cigarettes which were in the back of the truck (which was in fact possible) they would not
have committed any substantive criminal offence because the goods were not stolen.
This was based on the finding that the indictment alleged an intention to receive particular cigarettes. Gleeson CJ dissented on the basis that it was possible to interpret the indictment as a conspiracy to receive "stolen cigarettes".

**Conspiracy to Defraud**

Conspiracy to defraud is a particular form of conspiracy recognised by the courts. It is different to the general form of conspiracy in that instead of an agreement to commit a specific crime, the agreement is to engage in “defrauding”. There is no common law crime of “defrauding” and in this sense conspiracy to defraud is anomalous in that it criminalises agreement to do actions that if done by an individual would not be a crime.

Having said that, a significant degree of the forms of activities that fall within defrauding are covered by statutory fraud offences. There is however one crucial difference between these statutory offences and the common law notion of defrauding. In the statutory offences defrauding is described as a mental element, the “intent to defraud”. The actus reus is defined separately. For example in s179 False pretences etc Crimes Act 1900, the defendant must use deception as a means of obtaining property, and do so with an intent to defraud. Such offences thus constitute subsets of the scope of defrauding, but do not provide assistance on the outer limits of the concept.

Traditionally conspiracy to defraud was seen in similar terms to the statutory frauds. In *R v Weaver* (1931) 45 CLR 321 the High Court stated:

> It is not necessary, nor, perhaps, possible, to state exhaustively the description of fraud necessary to make criminal a combination to cheat and defraud: it is enough to say that every kind and description of fraudulent statement, conduct, trick, or device by which a party may be induced to part with his property for less than its value, or to give more than its worth for the property of another certainly fails within the description of fraud necessary to make criminal the combination to cheat or defraud. Thus it is a criminal conspiracy to cheat and defraud if two or more persons combine to defraud others by means of false accounts, fabricated shares, false representations; or conduct, or fraudulent betting

However the lack of any exhaustive definition of defrauding generally meant that the boundaries of conspiracy to defraud remained uncertain in two significant areas. Firstly, what means had to be used in the defrauding? Was deception required or could a person be defrauded without their knowledge? Secondly what were the intended objects of defrauding? Need it be an intention to obtain property or could it be broader? Need it be something that the defendant was not entitled to?

**Defrauding and deceit**

These issues were explored by the courts in a series of decisions flowing from the House of Lords decision in *Wellham v DPP* [1961] AC 103. This was a decision on the meaning of common law forgery, but it has since been applied to defrauding generally. Lord Radcliffe’s speech is now seen as the leading definition of defrauding:

> Now, I think that there are one or two things that can be said with confidence about the meaning of this word “defraud”. It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning. This is none the less true because since the middle of the last century the law has not required an indictment to specify the person intended to be defrauded or to prove intent to defraud a particular person.
Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by "to defraud." It may mean to cheat someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or; though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray's New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our "angry and " defrauded young. " There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.

Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (Commentaries, 18th ed., vol. 4, at p. 247) called " to the prejudice of another man's right." East, Pleas of the Crown (1803), vol. 2, at pp. 852, 854, makes the same point in the chapter on Forgery: " in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it.

Of course, as I have said, in ninety-nine cases out of a hundred the intent to deceive one person to his prejudice merely connotes the deceiver's intention of obtaining an advantage for himself by inflicting a corresponding loss upon the person deceived. In such cases the economic explanation is sufficient. But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflicting a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated.

Welham's rejection of a requirement of deceit was applied to conspiracy to defraud in Scott v Metropolitan Police Commissioner [1975] AC 819. In Scott's case the accused had conspired with cinema employees to borrow cinema films from the cinemas in order to make pirate copies. The films were then returned. Lord Dilhorne held:

Stephen, History of the Criminal Law of England (1883). vol. 2. contains the following passage, at p. 121:

"Fraud-There has always been a great reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested. But there is little danger in saying that whenever the words ' fraud ' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely: first, deceit or an intention to deceive or in some cases mere secrecy, and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy."

Stephen thus recognises that a fraud may be perpetrated without deceit by secrecy and that an intent to defraud need not necessarily involve an intent to deceive. In vol. 3 of his History at p. 121 he says that:

"Offences relating to property fall into two principal classes, namely, fraudulent offences which consist in its misappropriation, and mischievous offences which consist in its destruction or injury. Theft is the typical fraudulent offence ..."

The definition of the common law offence of simple larceny had as one of its elements the fraudulent taking and carrying away (see Hawkins' Pleas of the Crown, 6th ed. (1777), Book 1, p. 134; East's Pleas of the Crown, vol. 11 (1803), p. 553). " Fraudulently " is used in the definition
of larceny by a bailee in section 3 of the Larceny Act 1861 (24 & 25 Vict. c. 96) and in the definition of larceny in section 1 of the Larceny Act 1916. Theft always involves dishonesty. Deceit is not an ingredient of theft. These citations suffice to show that conduct to be fraudulent need not be deceitful.

...[Lord Dilhorne referred to Lord Radcliffe's comments in Welham extracted above and continued]

In the course of delivering the judgment of the Court of Appeal in Reg. v. Sinclair [1968] I W.L.R. 1246, where the defendants had been convicted of conspiracy to cheat and defraud a company, its shareholders and creditors by fraudulently using its assets for purposes other than those of the company and by fraudulently concealing such use, James J. said, at p. 1250:

"To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person's proprietary right."

Again, one finds in this case no support for the view that in order to defraud a person that person must be deceived.

One must not confuse the object of a conspiracy with the means by which it is intended to be carried out. In the light of the cases to which I have referred, I have come to the conclusion that Mr. Blom-Cooper's main contention must be rejected. I have not the temerity to attempt an exhaustive definition of the meaning of "defraud." As I have said, words take colour from the context in which they are used, but the words "fraudulently" and "defraud" must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought "fraudulently" means "dishonestly," then "to defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.

In Welham v. Director of Public Prosecutions [1961]A.C. 103, 124 Lord Radcliffe referred to a special line of cases where the person deceived is a person holding public office or a public authority and where the person deceived was not caused any pecuniary or economic loss. Forgery whereby the deceit has been accomplished, had, he pointed out, been in a number of cases treated as having been done with intent to defraud despite the absence of pecuniary or economic loss.

...In this case the accused bribed servants of the cinema owners to secure possession of films in order to copy them and in order to enable them to let the copies out on hire. By so doing Mr. Blom-Cooper conceded they inflicted more than nominal damage to the goodwill of the owners of the copyright and distribution rights of the films. By so doing they secured for themselves profits which but for their actions might have been secured by those owners just as in Reg. v. Button, 3 Cox C.C. 229 the defendants obtained profits which might have been secured by their employer. In the circumstances it is, I think, clear that they inflicted pecuniary loss on those owners.

Earlier Australian High Court decisions, notably Balcombe v De Simoni (discussed in relation to fraud) had suggested that deceit was necessary. However the analysis in Scott has now been accepted by the High Court in Peters and Spies. In Spies the court held:

The decision in Scott must mean that a person may also be defrauded without being deceived. It necessarily follows that, in an offence alleging "defrauding", deceit is not a necessary element of that offence, notwithstanding what was said in Balcombe v De Simoni. Statements to the contrary in that case can no longer be regarded as authoritative.

The requisite intended outcomes – economic loss?

Along with the rejection of deceit as an element of defrauding Welham suggested that defrauding extended beyond the obtaining of property and to a broader notion of the causing of economic loss. In Scott the House of Lords held that any purpose which would be to cause the victim economic loss by depriving him of some property or right to which he is
or might become entitled was enough to constitute conspiracy to defraud if the means by which that purpose was to be achieved were dishonest. However whether economic loss was a prerequisite was left undecided. Lord Dilhorne stated:

In this case it is not necessary to decide that a conspiracy to defraud may exist even though its object was not to secure a financial advantage by inflicting an economic loss on the person at whom the conspiracy was directed. But for myself I see no reason why what was said by Lord Radcliffe in relation to forgery should not equally apply in relation to conspiracy to defraud.

However, Lord Diplock in his judgment expressly stated that an intention to cause economic loss was necessary to found an intent to defraud. This caused difficulties for the Court of Appeal in *R v Allsop*, discussed below.

The issue came before the House of Lords again in *Wai Yu Tsang v The Queen* [1992] 1 AC 269. The accused were the senior management of the Hang Lung Bank of Hong Kong. They were charged with conspiring to defraud the bank, its shareholders, creditors and depositors by dishonestly concealing the dishonouring of a number of cheques which had been presented by the bank. The bank had apparently been part of a cheque-kiting cycle involving a number of companies and the Chemical Bank. When a rumour started by a taxi driver began a run on the bank, bank management instructed its employees to cease the purchase of any $US bank cheques. In halting the purchase of these cheques, the cheque kiting cycle collapsed and a number of cheques that the bank had previously bought, when presented to the Chemical Bank were dishonoured as the relevant company on which those cheques had been drawn had not been able to be put in funds by the purchase of subsequent $US cheques. The result was that the amount of money represented by the dishonoured cheques was greater than the assets of the bank at that time. In order to prevent a second run on the bank senior management decided to conceal the dishonouring of these cheques from more junior employees and created a series of fictional transactions in the books to balance the dishonoured cheques. There was no suggestion that the management were in anyway involved in the cheque-kiting ring. The Privy Council held:

With these principles in mind, their Lordships turn to *Reg. v. Allsop*, 64 Cr.App.R. 29 itself. In that case the defendant was a sub-broker for a hire-purchase company. Acting in collusion with others, he entered false particulars in forms submitted to the company, to induce it to accept applications for hire-purchase facilities which it might otherwise have rejected, although the defendant both expected and believed that the transactions in question would be completed satisfactorily and that the company would achieve its contemplated profit, as it appears in fact to have done. Examples of the false particulars were that the price of the car concerned would be inflated so as to allow an illusory deposit to be shown as having been paid by the intending hire-purchaser, or the value of the car taken in part exchange would be stated at more than the true figure; or a car dealer would be named as the seller when the transaction was a private one and no established car dealer played any part in it. What the defendant sought to achieve was an increase in the company's business, and therefore of his own commission. The defendant was charged with conspiracy to defraud. The judge directed the jury that they must be sure that the conspirators knew that they were inducing the company to act in circumstances in which they might cause or create the likelihood of economic loss or prejudice. The jury convicted the defendant. He appealed on the ground that the judge's direction was too wide; he should, it was submitted, have directed the jury that they must be sure that the defendant intended to cause economic loss to the company. The Court of Appeal dismissed the appeal. The judgment of the court was delivered by Shaw L.J. The central passage in the judgment reads, at p. 31:

"It seemed to this court that Mr. Heald's argument traversed the shadowy region between intent and motive. Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is 'intended' only in the sense that it is a contemplated outcome of the fraud
that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss."

In reaching this conclusion, the Court of Appeal found it necessary to reconcile it with the narrow definition of conspiracy to defraud expressed in the speech of Lord Diplock in *Reg. v. Scott* [1975] A.C. 819. 841, to which their Lordships have already referred. This they did on the basis that "economic loss" may be "ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists may he measured in terms of money." They continued, at p. 32:

"In the present case, the part of the history which is common ground reveals that in this sense [the company] did suffer actual loss for they paid too much for cars worth less than their pretended value; and they relied upon the creditworthiness of hire-purchasers as measured by the deposit stated to have been paid when none had been paid. It matters not that in the end the hire-purchasers concerned paid to [the company] what was due to them."

In the context of conspiracy to defraud, it is necessary to bear in mind that such a conspiracy is in agreement to practise a fraud on somebody (c.f. *Welham v. Director of Public Prosecutions* [1961] A.C. 103, 1331 per Lord Denning). In *R v Allsop*, 64 Cr.App.R. 29 what the defendant agreed to do was to present the company with false particulars, in reliance upon which, as he knew, the company would decide whether to enter into hire-purchase transactions. It is then necessary to consider whether that could constitute a conspiracy to defraud, notwithstanding that the defendant’s underlying purpose or motive was not to damage any economic interest of the company but to ensure that the transaction went through so that he would earn his commission. Their Lordships can see no reason why such an agreement should not be a conspiracy to defraud the company, substantially for the reasons given by the Court of Appeal. The defendant was, for his own purposes, dishonestly supplying the company with false, information which persuaded it to accept risks which it would or might not have accepted if it had known the true facts. Their Lordships cannot see why, this was not an agreement to practise a fraud on the company because, as Shaw L.J. said, it was a dishonest agreement to employ a deceit which imprecised the economic interests of the company...

The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that, as in *R v Allsop* and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It is however important in such a case, as the Court of Appeal stressed in *R v Allsop*, to distinguish a conspirator’s intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud. Of course, if the conspirators were not acting dishonestly, there will have been no conspiracy to defraud; and in any event their benign purpose (if it be such) is a matter which, if they prove to be guilty, can be taken into account at the stage of sentence.

The requisite intended object – otherwise lawfully obtained property

Conspiracy to defraud can also include an agreement to do an otherwise lawful action by unlawful means. This significantly expands the scope of the offence, because as will be seen below, the means are often unlawful because they are done dishonestly.

As a first proposition, there is no requirement that the outcome intended amount to a civil wrong. In *R v Proctor and Perry* [1963] QdR 335 the accused were convicted of
conspiring to defraud Queensland Newspapers Pty Ltd in connection to a competition run in the newspaper. Perry was employed by the newspaper to collate and check the entries into this competition. Having thereby ascertained the correct answers to the questions, he passed that information to Proctor who then submitted an entry. Clearly the means that Proctor had agreed to use were illegal means, because he was acting in breach of his employment obligations. However the competition that was run by the newspaper was subsequently held to be a lottery, and as it was not licensed, was an illegal competition. Therefore if Proctor and Perry had succeeded in being awarded the prize money this outcome would not have given the newspaper any legal right to reclaim the money because the competition was in itself illegal.

Then it was submitted that if an intention to defraud a particular person is alleged, it must be shown that he suffered an injury that would give him a civil remedy, and that Queensland Newspapers Pty. Ltd. could have had no civil remedy against Proctor since the competition was illegal. An argument that one who obtains money illegally may be defrauded of it with impunity has little to commend it. However, in my opinion, it is not the law that to support a prosecution for conspiracy to defraud it must be shown that the act, agreed to be done amount to an actionable civil wrong. A similar argument was rejected in R. v. *Timothy* ([1858] 1 F. & F. 39; 175 E.R. 616), where the accused was charged with conspiracy to defraud by means of a false and fraudulent oral representation as to the solvency or trade of another, and it was submitted that, since no civil action could have been brought on the oral representation by reason of the provisions of Lord Tenterden’s Act the charge of conspiracy did not lie. Channell B. however declined to withdraw the case from the jury. Other examples of conspiracies to defraud which would not give rise to a civil remedy may in my opinion be found in the judgments in *Welham v. Director of Public Prosecutions* ([1961] A.C. 103 at pp. 124-5 and pp. 131-2). If A. and B. agree that A. shall sign a forged order on the governor of a prison to secure the release from prison of B. (cf. R. v. *Harris* ([1833] 1 Mood. 393; 168 E.R. 1316)), or that A. shall forge a doctor’s prescription so that B. may, on payment of the full price, obtain drugs from a chemist (cf. *Welham v. Director of Public Prosecutions* (supra) at p. 131), there will be a conspiracy to defraud although neither the gaoler nor the chemist may have a civil remedy.

In *R v Horsington & Bortolus* [1983] 2 NSW LR 72, the approach in *R v Proctor and Perry* was approved by the Court of Appeal of NSW.

If the fraud involved in the conspiracy need only be the awareness that the victim will be subjected to economic risk then the major focus will be on the means used which may bring about this outcome, and whether those means are dishonest. In *Adams v The Queen* [1995] 1WLR 52 the prosecution arose out of the collapse of the Equiticorp group of companies in New Zealand. The accused were the senior directors of the group of companies (the “investment group”) and the prosecutions related to the “Yeoman loop” and its use. The “Yeoman loop’ was a method used by the directors to pass monies through a series of bank accounts in different countries and with different currencies in order to conceal the original source of the funds. The prosecutions related to five transactions which utilised this loop. Two transactions involved the monies raised by the allocation of shares in a subsidiary company to the directors and then the sale of those shares by the directors back to parent companies (“E.H.L.” and “E.A.H.L.”) for substantial profits. Such a course of action had not been approved by the independent directors, and there was a fictitious board meeting minute created to satisfy auditors’ concerns about this procedure. Another transaction involved the distribution of management fees paid to the directors by the parent companies. These fees, which were believed to be legal and appropriate, were not disclosed to the board as a whole. Two other transactions involved the moving of funds from Australia to New Zealand, one amount of funds being deliberately contrived to appear to be foreign exchange losses by Elders IXL in order to permit Elders IXL to pass funds to Equiticorp. However the judge was unable to make a finding on the evidence that either of these two
transactions were fraudulent. Consequently the directors appeared entitled to the money, and the basis of any conviction would rest on whether dishonest means had been used (to use the term developed in *Peters* subsequently).

The New Zealand Court of Appeal quashed the directors convictions and the Crown appealed to the Privy Council:

In quashing the convictions of Hawkins, Taylor and the defendant on count 4 the Court of Appeal concluded that since it was implicit in the judge's conclusions that the investment team honestly believed that they held the shares pursuant to an allocation properly made and taken up there was no occasion for them to disclose to other directors and executives what was their personal business. The judgment referred to the practice whereby sales of shares to directors were not formally notified to the board nor recorded with a disclosure of interest as supporting an honest belief that no disclosure to the board was called for. The judgment criticised the judge for equating secrecy in respect of share dealings and breach of fiduciary duty with dishonesty and intent to deceive and thereby defraud E.H.L. The judgment referred to the following passage in the speech of Lord Wilberforce in *Reg. v. Governor of Pentonville Prison, Ex parte Tarling* (1978) 70 Cr.App.R. 77, 110:

"Breach of fiduciary duty, exorbitant profit making, secrecy, failure to comply with the law as to company accounts (1 state these as assumptions) are one thing: theft and fraud are others."

And ultimately concluded that the investment team were entitled to the benefits of their realisation and under no obligation to disclose them to anyone.

Although it does not affect the position in relation to count 4 their Lordships take issue with these conclusions on two grounds. First Lord Wilberforce's observations in *Tarling's* case were made in the context of charges of conspiracy to defraud. The Divisional Court had already held that the evidence on these charges fell far short of setting up a prima facie case of dishonesty: see p. 96. Lord Wilberforce said, at p. 111:

"The highest, in my opinion, that the evidence can be put is that the participants made a secret profit at the expense probably of HPBHK (but Mr. Tarling was not a director of HPBHK), possibly and indirectly of HPBIL and that they kept it secret: it would not otherwise be a secret profit. This by itself is no criminal offence whatever other epithet may be appropriate."

Lord Keith of Kinkel, after stating that the alleged conspirators were in breach of their fiduciary duty to disclose the share dealings in question, continued, at pp. 137 -138:

"But that does not in itself constitute a crime under the law of England. The evidence, while clearly showing that Mr. Tarling and those of his co-directors who were party to the dealings missed a number of suitable opportunities for disclosing these dealings, does not indicate that positive steps were taken to conceal them."

Neither Lord Wilberforce nor Lord Keith of Kinkel went further than to say that non-disclosure per se amounting to breach of fiduciary duty did not amount to a crime. They were not dealing with a situation where there was a positive finding of dishonest concealment on the part of the defendants. In this case not only had the defendants sold both shares and warrants back to E.H.L. and E.T. respectively without disclosing that they were the vendors but the Yeoman Loop, whose purpose the judge had found to be dishonest concealment, had been used on two occasions in connection with the transactions in Keady shares. Furthermore the defendant and Hawkins had prepared a minute of a meeting of the board of E.H.L. which had never taken place, with the clear intention as the judge found of "fraudulently misleading by indicating to the auditors that two independent directors at the time were aware of and had approved the sale to the Keady consortium." In these circumstances their Lordships consider that the situation obtaining in this case is significantly different from that which obtained in *Tarling's* case and that the dictum of Lord Wilberforce, 70 Cr.App.R. 77, 110, upon which the Court of Appeal relied does not apply.
In the second place the existence of a practice of non-disclosure involving breach of fiduciary duty does not per se absolve those operating the practice from dishonesty. Actions which are basically dishonest are not rendered honest by repetition. Hawkins was chairman and managing director of E.H.L. and the defendant deputy chairman throughout its life. They were both therefore substantially responsible for the practice of non-disclosure to the board of share allocations to directors. If non-disclosure would have been dishonest, but for the practice, they cannot rely on that practice which they had instituted to negative dishonesty. It must in any event be remembered that the practice as found by the judge was related only to allocation of shares to directors and not to resale by directors at a profit to F.H.L. or its subsidiaries. Their Lordships cannot accept the proposition that a director of a company who acquires assets from that company, whether openly or clandestinely, is then entitled to trade those assets with the Company without disclosing that he is so doing.

In a further passage extracted below, the House of Lords explained how breaches of directors duties might amount to a conspiracy to defraud.

**Intention and causation**

In *R v Hollinshead* [1985] 1 AC 975 the accused conspired to manufacture and supply black boxes which, when attached electricity meters, caused the electricity to flow backwards and thereby reduce the apparent amount of use of the electricity in the appropriate house. Such a use of the devices would have constituted a fraud on the Electricity Board. However the only actions that the accused intended to carry out were to sell the black boxes. They would be installed and used by other people. In these circumstances they argued that they could not be convicted of conspiring to defraud the Electricity Board as none of their actions in fact could result directly in such a defrauding. The House of Lords however felt that this was not a major issue.

In *Attorney-General's Reference (No. I of 1982)* [1983] QB. 751, (the whisky label case), the Court of Appeal (Criminal Division) (Lord Lane C.J. and Taylor and McCowen JJ.) were primarily concerned with the question of jurisdiction to try persons for conspiracy which had been entered into in England but which was to be carried out abroad though that conspiracy would cause economic damage to persons in England. The court held that there was no such jurisdiction. But it is apparent from a passage in the judgment of that court delivered by Lord Lane C.J., at p. 757, that, but for the question of jurisdiction, the former defendants would have been guilty of conspiracy to defraud. Lord Lane C.J. said:

> In each case to determine the object of the conspiracy, the court must see what the defendants actually agreed to do. Had it not been for the jurisdictional problem, we have no doubt the charge against these conspirators would have been conspiracy to defraud potential purchasers of the whisky, for that was the true object of the agreement.”

The dishonest agreement there under consideration was to produce, label and distribute bottles of whisky so as to represent them as containing whisky of a well-known brand which in fact they did not contain. The object as the Lord Chief Justice said was to defraud potential purchasers of the whisky outside this country.

In my view the respondents were liable to be convicted of conspiracy to defraud because they agreed to manufacture and sell and thus put into circulation dishonest devices, the sole purpose of which was to cause loss just as the former defendants in the case just referred to would, apart from the jurisdictional problem, have been liable to be convicted of conspiracy to defraud because they agreed dishonestly to produce, label and distribute bottles of whisky, the sole purpose of the sale of which was to defraud potential purchasers of those bottles.

**The current Australian position**

In *Peters v R* the High Court reviewed these decisions and accepted the approach that the English courts had taken. Toohey and Gaudron JJ held:
...the offence of conspiracy to defraud is not limited to an agreement involving an intention to cause economic loss, even where the intended victim is a private person. It has always been sufficient that the accused be aware that there is a risk of economic loss. And even where the victim is a private person, there may be cases of fraud which do not involve an intention to put another persons economic interest at risk in any ordinary sense of that term. To take an example given by King CJ in *R v Kastratovic*, someone who believes that a person is indebted to him and that a defence which that person is genuinely asserting is without merit, nevertheless has an intention to defraud if he intends by dishonest means to deprive that other person of the opportunity of having the matter adjudicated.

Another matter which should be noted is that it is misleading to speak in terms of the purpose of a conspiracy to defraud, particularly as the purpose of the conspirators maybe quite different from the fraud perpetrated. The purpose of conspirators is usually to obtain some financial advantage; defraud on the other hand, is in depriving others of their property or of the opportunity to protect their interest. And, as is pointed in *Archbold*, the conspirator may never intend or, even, foresee the probability that others will suffer economic loss. Rather, they may genuinely believe that there will be no loss because their venture will be brought to a successful financial conclusion to the advantage of all concerned, even those whose interests have been put at risk.

Toohey and Gaudron JJ also elaborated on the forms of detriment that defraud could have as its object:

> [T]here are difficulties in attempting an exhaustive statement of what is involved in the notion of defrauding or in the offence of conspiracy to defraud. Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to "some lawful right, interest, opportunity or advantage", knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests. Thus, to take a simple example, a "sting" involving an agreement by two or more persons to use dishonest means to obtain property which they believe they are legally entitled to take is not a conspiracy to defraud.

In *R v Petroulias* [2005] NSWCCA 75 preliminary rulings were sought on the indictment in a defrauding the Commonwealth case brought against Nick Petroulias, a former deputy Commissioner of Taxation. As a part of his position, Petroulias had issued private rulings on tax liability issues which bound the Commissioner. It was alleged that he dishonestly issued rulings favourable to promotors of tax schemes he was connected with and unfavourable to competitors. The NSW Court of Criminal Appeal (Spigelman CJ & Hunt A-JA) interpreted the scope of defrauding set out in *Peters* as follows:

The three categories of fraud identified by Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493 at [30], are the intentional creation of a situation in which the accused:

1. deprives another person of money or property, or
2. puts the money or property of that other person at risk, or
3. prejudicially affects that person in relation to some lawful right, interest, opportunity or advantage,

 knowing that he has no right to deprive that person of that money or property or to prejudice his or her rights. (See also McHugh J to the same effect, at [73].)

4. In previous proceedings in the Court of Appeal relating to the case against this accused — *Wills v Petroulias* (2003) 58 NSWLR 598 — these three categories were described, respectively, as an actual loss of revenue, an actual risk of loss of revenue and the lost opportunity of testing the views expressed in the private rulings, the Commissioner being bound in other cases (at least administratively) by the rulings made. The distinction between the second and third categories is that, in the second category, there must be the possibility
that the Commissioner, were he not bound by the rulings made, would win a case by
demonstrating that the rulings were wrong (Wills v Petroulias at [64]), whereas in the third
category there is merely a loss of the opportunity to litigate whether the rulings were correct. ...

9 The three categories of fraud already adopted descend in order of seriousness —
and consequently in the nature of the punishment to be imposed — from the actual loss (when
it would be necessary in the present case to establish that the private rulings were wrong) to
the loss of an opportunity to test the views expressed in those rulings (when the Crown would
need to establish no more than the existence of a genuine dispute by the Commissioner
concerning those rulings). What must be established for the second category must therefore
be somewhere between those two categories.

In this case, in order to establish that the Commonwealth’s money or property (tax
revenue) was put at risk, the court held it was necessary to establish that there was an
arguable case that the private rulings were wrong in law. The court held by majority that the
trial judge was to first determine whether the argument against the private ruling was
“capable of success”. If it was then the jury were to be instructed on the nature of that case,
and they were, as finders of fact, to determine whether such an argument was one that was
“arguable”. An arguable case was:

An arguable case is (by definition) a case which is supported by an argument which is
plausible or apparently reasonable on its face. A plausible or apparently reasonable argument
is one which can be reasoned logically from one step to the next step to its conclusion. It is not
the function of the relevant tribunal to determine whether either the Commissioner’s argument
or the taxpayer’s argument is correct, or even which is the more plausible or the more
apparently reasonable argument. It may be that each of those parties has an arguable case.
That is not unusual in litigation. Even though the taxpayer may have an arguable case, it does
not mean that the relevant tribunal may not be satisfied beyond reasonable doubt that the
Commissioner also has an arguable case. If so satisfied that the Commissioner has an arguable
case, the relevant tribunal has resolved the issue posed by a second category fraud case,
subject to the mens rea component identified in par 3, supra.

Whether a case was arguable could be proved by evidence of subsequent court
decisions or by expert evidence from, presumably, lawyers.

**Limits of defrauding – is it an economic concept?**

The adoption by the High Court in Peters (and subsequently Spies) of the description of
defrauding as prejudicially affecting a person in relation to “some lawful right, interest,
opportunity or advantage” suggests that the concept has a very broad reach. A limit on the
reach of the concept was however held to exist by a majority of the Western Australian
Supreme Court in Bolitho v WA [2007] WASCA 102. Bolitho had falsely posed as an
orthopaedic surgeon and had induced her victim to fly from Melbourne to Perth for surgery
on her shoulder. The victim incurred a number of costs and inconveniences from the
accused, but no surgery was performed. At the trial the sole basis on which the case was
made was the use of a syringe to make a number of injections. It appeared that the trial was
brought as an offence of defrauding under the WA Code because of the absence of any
medical evidence with which to charge wounding or assault. The charge was that Bolitho
“with intent to defraud .... induced [the victim] to do an act that she was lawfully entitled to
abstain from doing, namely submitting to medical treatment by injection” Section 409 of
the WA Code enacted:

(1) Any person who, with intent to defraud, by deceit or any fraudulent means ...
(e) induces any person to do any act that the person is lawfully entitled to abstain from
doing ...

is guilty of a crime
McClure J held that the meaning of intent to defraud was the common law meaning and reviewed the leading cases. She continued:

152 Apart from the public duty category of cases, all the reported cases in which an intent to defraud is an element of an offence involve a situation where the victim has been deprived of something and that thing has actual or potential economic value. Based on the authorities, there will be an intent to defraud if the intent is that the victim (1) suffer economic loss; (2) suffer an economic detriment by being deprived of property, money, services or other things that have an economic value (even if the victim had no intention to exploit that value or received full consideration for the same); (3) be at risk of suffering an economic loss or detriment; (4) be deprived of an opportunity to make an economic gain; (5) be deprived of an opportunity to prevent an economic loss or detriment. At its broadest, the common law expression in this context would encompass actual or potential detriment relating to the economic interests of the victim.

153 We were not referred to, nor has our research revealed, any case where the intent relates to interference with the person or the gratuitous receipt of services by the victim. To the contrary, Peters is obiter authority for the proposition that the meaning of intent to defraud at common law does not extend beyond matters relating to the economic interests, public duty and perhaps private reputation and personal status of the victim.

154 As to s 409(1) of the Criminal Code, the prosecution must prove one of the consequences listed in pars (a) to (f) and in addition that the appellant had an intent to defraud and that the consequence was brought about by deceit or fraudulent means. However, in view of the Parliamentary intention that the common law meaning of "intent to defraud" shall apply, it cannot be contended that the width of the matters in pars (a) to (f) alter or enlarge the common law meaning of the expression. To the contrary, the mental element of intent to defraud has the effect of confining the scope of the offence in s 409. In particular, the expression intent to defraud in that section means something more than merely inducing a person to do (or abstain from doing) any act that the person is lawfully entitled to abstain from doing (or is lawfully entitled to do) by deceit or fraudulent means. The defendant must have the intention of inducing an act or omission relating to the victim's economic interests or public duty. If the appellant had intended that the complainant pay for the medical services that would be sufficient even if no payment eventuated (because the victim's act does not have to precisely correspond with the defendant's intention, as in Kastratovic). Further, what would ordinarily be characterised as non-economic interests such as social or sexual relations may in fact affect (and be intended to affect) economic interests where the victim would, but for the deceit or fraudulent means, have demanded payment for the services provided. ...

156 For these reasons I am satisfied that an intention to induce the complainant to accept free medical services which involved treatment to her person is not an intention to defraud the complainant. Accordingly I would uphold the appeal, set aside the convictions and enter a verdict of acquittal.

In the course of the judgments in Bolitho, the court also referred to a passage by Gaudron J in DM Cannane v J Cannane Pty Ltd (in liq) (1998) 192 CLR 557, a case dealing with intent to defraud creditors in bankruptcy. Gaudron J held:

"'Fraud' involves the notion of detrimentally affecting or risking the property of others, their rights or interests in property, or an opportunity or advantage which the law accords them with respect to property. Conversely, it is not fraud to detrimentally affect or risk something in or in relation to which others have no right or interest or in respect of which the law accords them no opportunity or advantage. And there is no intent to defraud if the person in question believes that others have no right or interest in or in relation to the property concerned and that the law accords them no opportunity or advantage with respect to that property."

The reasoning in Bolitho has been subsequently applied in a number of WA intent to defraud cases. In Brown v Deveroux [2008] WASC 299 it was held that a fraudulent alteration of a prescription to obtain repeats of a prescribed medicine. Hasluck J held:
It is apparent from Justice McLure’s observations [in *Bolitho*] that an intent to defraud can be found where the victim has been deprived of something and that thing has an actual or potential economic value. To my mind, tablets available for sale at a retail price, as in the present case, are property of that kind.

[87] It might be said that the pharmacist has not suffered an economic loss if the price is paid (or would have been paid, being an assumed fact in the present case). However, her Honour goes on to say, more specifically (her second proposition) that there will be an intent to defraud if the intent is that the victim suffer an economic detriment by being deprived of property, money, services or other things that have an economic value (even if the victim had no intention to exploit that value or receive full consideration for the same).

[88] Her Honour went on to note in her further observations that it is not enough merely to induce a person to do an act that the person is lawfully entitled to abstain from doing by deceit or fraudulent means. The accused person must have the intention of inducing an act relating to the victim’s economic interests.

[89] To my mind, this reasoning establishes that if the pharmacist is induced by deceit to do an act that he might not otherwise have done, namely, the handing over of tablets, being property belonging to him, and the act involves property with an economic value then this can be characterised as an intent to defraud, even if full consideration for the property in question is received (or is likely to be received in the case of an attempt).

[90] This conclusion is reinforced by the observations of King CJ in Kastratovic’s case mentioned earlier where it was said that the essential nature of defrauding is dishonestly depriving some person of property. The defrauding may be found in the mere parting by the victim of the fraud with property which he is entitled to retain and which he would not have parted with but for the use of dishonest means.

[91] These observations are applicable to the circumstances of the present case. The evidence permits an inference to be drawn that the pharmacist, who was not obliged to sell the tablets to a customer who asked for them, would simply not have sold them to the respondent, even in exchange for the correct price, if he found out or had reason to believe that she did not have an authorised prescription. The attempt, if successful, would have caused the pharmacist to part with property having an economic value that would otherwise have been retained.

[92] Chief Justice King was of the view that it is the effect upon the person who is the object of the fraud that ultimately determines the meaning of the crucial concept. He supported his reasoning by reference to Balcombe v De Simoni’s case. The reasoning of Gibbs J (as he then was) in that case is to much the same effect, namely, what is essential is that the accused person should have intended to obtain property by means of a deception; that is, to obtain property that would not otherwise have been obtained. His Honour went on to say that the accused person must have made the false representation with the intention of inducing another person to part with the subject property.

[93] In the course of argument at the hearing I endeavoured to illustrate the nature of the reasoning in this way. An elderly man might have a vase that has been in the family for many years and is regarded as an heirloom. If a stranger arrives, and by falsely representing himself to be a long lost member of the family, induces the proprietor to sell the vase to him at whatever is determined by an arbitrator to be the fair market value of the item, his deception would surely be said to have involved an intent to defraud, even though he paid the price fairly determined (so that it might be said, on one view of the matter, that the original proprietor had not suffered any economic detriment). In my view, in such a case the intent to defraud arises from the fact that the proprietor has been induced to part with property that would not otherwise have been obtained but for the deception.

See also *Khoo v the State of Western Australia* [2011] WASCA 75, which affirmed *Bolitho*. 

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It also appears that it is possible that the Commonwealth and the States can be defrauded by the failure to pay tax due (see eg *Iannelli* (2003) 56 NSWLR 247 and the cases discussed in Bell J’s judgment).

**Defrauding and public duty**

The decision in Peters referred to a species of defrauding that amounted to interferences with a public duty rather than causing of economic risk. This was directly considered in *R v Turner & Ors (No 4)* [2001] TASSC 51 a case where the accused were charged with attempting to defraud the Commonwealth in relation to the fishing of orange roughy. Blow J held:

[5] Orange roughy, being fish that live in the ocean, are ferae naturae, or wild by nature. The Commonwealth does not own them, and has never owned them. Thus acts of the sort alleged in the indictment to have been the object of the alleged conspiracy, namely causing and permitting false returns to be submitted to AFMA as to the quantity of orange roughy taken in the Australian Fishing Zone in 1992 and 1993, if carried out, could not have resulted in the Commonwealth or AFMA being deprived of any property, nor in the economic interests of either of them being imperilled. The demurrers were based upon the contention that the potential of economic loss to the Commonwealth or, I take it, a public authority under the Commonwealth, was an essential ingredient of the crime of conspiracy to defraud created by s86A. However, the Crown contends that this is not so; that a crime contrary to s86A was committed if two or more persons conspired by dishonestly agreeing to cause and permit false returns to be submitted to AFMA as to quantities of orange roughy that had been taken, knowing that public officers were likely to be deflected from the performance of their public duties as a result; and that, on that basis, the indictment in substance discloses a crime.

[6] There are a number of English cases which deal with the proposition that fraud can be constituted by the deflection of a public officer from carrying out his or her public duty. In *Board of Trade v Owen* [1957] AC 602, the accused had been charged at common law with conspiracy to defraud. It was alleged that they had conspired to defraud a department of the Federal Republic of Germany by causing it to grant export licences by fraudulently representing that certain metals were to be exported to Ireland, when in fact they were to be exported to communist countries. Lord Tucker, with whose reasons the other members of the House agreed, said the following in relation to the alleged conspiracy at 622:

"If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud and if it is necessary to aver and prove that the acts designed to be done or the objects to be achieved will result in some person acting to his detriment, I feel little doubt that a government department so acts if it issues a licence which enables something to be done which the department is charged with the duty to prevent."

Those comments were obiter, since the House of Lords held that the convictions had been rightly quashed for reasons that are of no present significance.

[7] In *Welham v Director of Public Prosecutions* [1961] AC 103, the appellant was the sales manager of a company that sold cars. He purportedly witnessed a number of forged hire-purchase agreements for the purpose of circumventing credit restrictions which prevented finance companies from lending money, and of also circumventing provisions in the companies' memoranda and articles which prohibited them from acting as moneylenders. He was charged with uttering forged documents, contrary to a statutory provision. His conduct contravened the section only if his acts were "committed with intent to defraud". He claimed at his trial that he had no intention to defraud the finance companies, but that the purpose of the forged hire-purchase agreements was to make it appear that those companies were advancing money in a permissible way, and that he uttered the forged documents to mislead the relevant authority, the Board of Trade, in case its officers inspected the records to see that the credit restrictions were being observed. It was the officers' duty to prevent the contravention of those restrictions. The
jury were directed that this was a sufficient intention to defraud. The appellant was convicted. He appealed on the ground that there could be no intention to defraud without an intention to cause some economic loss to the person deceived. The House of Lords dismissed his appeal, taking a wider view of the meaning of the word "defraud".

[8] At 124, Lord Radcliffe said the following:

"Murray's New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our 'angry and defrauded young.' There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.

Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (Commentaries, 18th ed, vol 4, at p247) called 'to the prejudice of another man's right.' East, Pleas of the Crown (1803), vol 2, at p852, p854, makes the same point in the chapter on Forgery: 'in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it.'

Of course, as I have said, in ninety-nine cases out of a hundred the intent to deceive one person to his prejudice merely connotes the deceiver's intention of obtaining an advantage for himself by inflicting a corresponding loss upon the person deceived. In all such cases the economic explanation is sufficient. But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated."

[9] His Lordship went on to discuss R v Harris (1833) 1 Mood CC 393, which involved the forgery of an order for the discharge of a prisoner; R v Sharman (1854) 1 Dears CC 285, which involved the use of forged references to obtain appointment as a schoolmaster; R v Moah (1858) Cox CC 503, which involved the use of a forged letter of recommendation to obtain appointment as a police constable, and R v Toshack (1849) 4 Cox CC 38, which involved the use by a seaman of a forged testimonial to obtain a master's certificate.

[10] Lord Denning said the following at 134:

"... it appears that Welham on his own evidence had an intent to defraud, because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practise a fraud on whomsoever might be called upon to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud."

[11] In my view it is significant that the "intent to defraud" in Welham did not involve any intention to corrupt any public officer, and involved only the possibility of prejudicing an investigation.

[12] Welham did not involve a conspiracy charge, but the principles discussed in that case were discussed by the House of Lords in Scott v Metropolitan Police Commissioner [1975] AC 819, which concerned a charge of conspiracy to defraud at common law. Viscount Dilhorne, with whose reasons all other members of the House agreed, said the following at 839:

"In Welham v Director of Public Prosecutions [1961] AC 103, 124 Lord Radcliffe referred to a special line of cases where the person deceived is a person holding public office or a public authority and where the person deceived was not caused any pecuniary or economic loss. Forgery whereby the deceit has been accomplished, had, he pointed out, been in a
number of cases treated as having been done with intent to defraud despite the absence of pecuniary or economic loss.

In this case it is not necessary to decide that a conspiracy to defraud may exist even though its object was not to secure a financial advantage by inflicting an economic loss on the person at whom the conspiracy was directed. But for myself I see no reason why what was said by Lord Radcliffe in relation to forgery should not equally apply in relation to conspiracy to defraud."

[13] Scott involved the bribing by the accused of employees of cinema owners. They provided him with films so he could copy them and let the copies out on hire. The comments I have quoted were obiter, since it was conceded that the copying of the films had inflicted more than nominal damage to the goodwill of the owners of their copyright and distribution rights.

[14] In the same case, Lord Diplock set out three propositions which he regarded as having been established by the authorities. The third of them (at 841) reads as follows:

"Where the intended victim of a 'conspiracy to defraud' is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone."

[15] Welham was also the subject of dicta in Director of Public Prosecutions v Withers [1975] AC 842. That case involved charges of conspiracy to effect a public mischief. The House of Lords held that no such generalised offence was known to the law. The defendants had conducted an investigation agency, and had provided their clients with reports as to third parties. They had obtained information from government departments, local authorities, and other sources by pretending to be enquiring in an official capacity, and had then passed on confidential information received from public officers. Viscount Dilhorne commented at 860 that the case "might have proceeded on the basis that the conspiracy charged in each count was conspiracy to defraud", but expressed no conclusion as to whether the accused could properly have been convicted on that basis. Lord Diplock made similar comments, again without reaching a conclusion, at 862. At 873, Lord Simon of Glaisdale commented that "the law seems to have evolved a class of conspiracy which consists of agreements to procure (at least dishonestly) that a person charged with a duty to the public acts in derogation of that duty".

[16] The House of Lords considered the meaning of the word "fraudulently" in R v Terry [1984] AC 374. The respondent in that case had been charged with fraudulently using a vehicle excise licence contrary to a statutory provision. He had hired a car, returned it without its licence disc, driven his own car with the hired car's licence disc displayed on the dashboard, and been intercepted by a police officer. His defence was that the licence disc had fallen off the hired car, that he was about to return it, that he had applied for a new licence for his own car, and that he was not using the licence from the hired car in an attempt to avoid paying the licence fee on his own car, as distinct from an attempt to avoid being charged with using his own car without its licence disc being exhibited. The critical issue was whether an attempt to avoid paying the licence fee was an essential element of the offence of using the licence disc fraudulently. The House of Lords held that it was not. Lord Fraser of Tullybelton, with whose reasons the other members of the House agreed, concluded at 381 that there was nothing in the relevant section to exclude the application of the general rule stated in Welham. His Lordship also cited with approval the third proposition formulated by Lord Diplock in Scott, which I have quoted above.

[17] It was submitted on behalf of the accused that, although deflecting a public officer from the performance of his or her public duty would be treated as fraud for the purposes of the common law in England, there is a lack of Australian authority to that effect, and that the word "defraud" in s86A did not refer to any such deflection. However, there is a substantial body of Australian authority to the effect that the deflection of a public officer from the performance of his or her public duty amounts to fraud.

[18] In R v Horsington [1983] 2 NSWLR 72, a builder and a real estate agent had been convicted of two counts of conspiracy to defraud contrary to the common law. The first count
alleged that they had conspired to cheat and defraud the Registrar of Co-operative Societies and a building society. The Crown case was that they had built and sold 21 houses, falsely representing that the sale price of each was below the maximum figure for the making available of low-interest loans, under a government-funded scheme, through the building society. Glass JA, with whom Street CJ and Lusher J agreed, considered Welham, Scott and Withers, and concluded that, as there was no authority in the High Court that contradicted the law then recently laid down in England, they should be followed. In analysing the effect of those decisions, he said at 75:

"A conspiracy to defraud may also be made out on proof of an agreement by fraudulent means to cause a public official to act contrary to his public duty even though no question of economic loss is involved."

[19] In Connor v Sankey [1976] 2 NSWLR 570, the plaintiffs, a former Minister and a former Prime Minister, had been charged with conspiring to deceive the Governor-General into committing a breach of duty by approving an authority to borrow in contravention of a Commonwealth statute. The applications were heard at first instance by the New South Wales Court of Appeal, which declined to grant relief. At 597 - 599 Street CJ reviewed the House of Lords cases and concluded that it was not reasonably open to dispute that a conspiracy as alleged fell within the category of a conspiracy to deceive a public officer in the execution of his duty. His Honour concluded that "the informations and summonses alleging a common law conspiracy are not so framed as to propound offences not cognizable at law". The other members of the Court did not deal with that point.

[20] In Peters v R (1998) 192 CLR 493, a case which concerned a conspiracy to defraud the Commonwealth Commissioner of Taxation by evading the payment of income tax, McHugh J (with whose reasons Gummow J agreed), said the following at 525:

Although most cases of conspiracy to defraud involve an agreement to use dishonest means which has the effect of inflicting economic loss on a third party, the infliction of such loss is not an essential element of the offence. It is sufficient that the conspirators intended to obtain some advantage for themselves by putting another person's property at risk (R v Sinclair [1968] 1 WLR 1246; [1968] 3 All ER 241; [1968] 52 Cr App R618; R v Allsop (1976) 64 Cr App R29; Wai Yu-Tsang v The Queen [1992] 1 AC 269) or depriving another person of a lawful opportunity to obtain or protect property (R v Kastratovic (1985) 42 SASR 59 at 65). It is also well established that a conspiracy to defraud may be established if the defendants agree to deceive a person into acting or refraining from acting contrary to his or her public duty (Board of Trade v Owen [1957] AC 602; R v Terry (1984) AC 374; Withers [1975] AC 842 and cf R v Bassey (1931) 22 Cr App R160)."

[21] Mr Abbott QC submitted that in Peters the High Court was divided as to whether the deflection of a public officer from the performance of his or her public duty amounted to fraud. He relied on two passages in the judgment of Toohey and Gaudron JJ. The first was a comment at 506 - 507 that "fraud involves an element of dishonesty over and above the use of dishonest means". The second was a passage at 509 where their Honours said that the offence of conspiracy to defraud "involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others". He argued to the effect that their Honours thereby defined the offence of conspiracy to defraud in such a way as to exclude cases of deflection from public duty. But I do not think any such exclusion can be read into the words of the judgment. Their Honours did not refer at all to the question whether fraud can be constituted by a deflection from the performance of a public duty. In the passages referred to, they were making the point that, contrary to a comment made in a publication by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, fraud involves not only dishonest means, but also an objective that is dishonest by ordinary standards — an objective described by their Honours as "a situation prejudicing or imperilling existing legal rights or interests of others". I think those words should be treated as referring (inter alia) to the interest that a public officer has in the proper discharge of his or her public duty. Alternatively, their Honours could be regarded as having overlooked the species of fraud constituted by the deflection of a public officer from the performance of his or her public duty, which that case was not concerned with,
so that what they said cannot be taken as authority for the proposition that that does not constitute fraud.

[22] In Peters, McHugh J made a second reference to the performance of a public duty in the following passage, at 529:

"In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person’s right or interest or performance of public duty by:

• making or taking advantage of representations or promises which they knew were false or would not be carried out;
• concealing facts which they had a duty to disclose; or
• engaging in conduct which they had no right to engage in."

[23] That passage was cited with approval by Gaudron, McHugh, Gummow and Hayne JJ in Spies v R (2000) 74 ALJR 1263 at 1278 - 1279, para80. Whilst that case had nothing to do with the deflection of a public officer from the performance of a public duty, it is significant that so recently four judges of the High Court have unreservedly adopted the passage quoted as accurately stating the law.

[24] The meaning of the phrase "with intent to defraud" in the Code, s264, was considered by Crawford J in R v Fitzgerald [1980] Tas R 157 at 161 where his Honour said:

"As to 'defraud', it is not necessary that there should be any intent to cause financial loss or detriment. And I hold, as was submitted by Mr Shott, that it is sufficient if the intent was that anyone was to be hindered or prevented in taking action by the fraud, if there was one."

[25] Scott and Welham were considered by the Court of Criminal Appeal in Taylor v R (1997) 6 Tas R 310. In that case, the appellant had been convicted on three counts of defrauding the Commonwealth contrary to the Crimes Act, s29D. The Crown case was that she had obtained payments of a sole parent pension by means of deception. The Court of Criminal Appeal held that it had not been necessary for the Crown to prove that the appellant was not entitled to the pension in any event, nor that the Commonwealth had suffered economic loss by reason of her conduct. However, none of the three judgments in that case was expressly based on the proposition that the deflection of a public officer from the performance of a public duty amounts to fraud.

[26] In R v Howes [1971] 2 SASR 293, the accused was charged with four counts of conspiracy to effect a public mischief, contrary to the common law. The Crown case was that he had taken part in a conspiracy to induce the Public Examinations Board of South Australia to believe, falsely, that he had obtained marks at matriculation examinations that fulfilled the requirements for matriculation to certain universities. He demurred. After reviewing the authorities, particularly Board of Trade v Owen and Welham, Wells J said, overruling the demurrer, at 303:

"In my opinion, those two cases are powerful, modern authorities which warrant the conclusion that the word 'fraud', and its derivatives 'defraud' and 'fraudulent', may properly, in the context of the criminal law, in general, and of criminal conspiracy, in particular, be applied to the disadvantage suffered by a public official or person charged with the performance of a public duty who has been induced, by some form of deception practised upon him — whether by words, documents, impersonation or other plainly dishonest conduct, trickery or cheating — to act contrary to his duty. 'Intent to defraud' should be construed accordingly."

[27] In Kastratovic v R (1985) 42 SASR 59, which involved a charge of demanding money by virtue of a forged guarantee with intent to defraud, King CJ (presiding in the Court of Criminal Appeal) said the following at 62:

"To defraud must involve something more than the mere inducing of a course of action by dishonest means: Welham v Director of Public Prosecutions per Lord Radcliffe at 127. In offences constituted by obtaining money or property with intent to defraud, that something
more may be found in the mere parting by the victim of the fraud, with money or property which he is entitled to retain and which he would not have parted with but for the use of the dishonest means: Balcombe v De Simoni (1972) 126 CLR 576. In other cases, the defrauding may consist of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done."

[28] In Simonidis v R (1983) 8 A Crim R 313, the appellant, a medical practitioner, had been convicted under the Criminal Code 1899 (Qld) of two counts of conspiracy to defraud the Workers' Compensation Board by providing people he had not seen or examined with false medical certificates. The only ground of appeal was that the two counts of conspiracy had been improperly joined since they both charged the same conspiracy to defraud. In the course of his judgment, D M Campbell J, with whom Douglas and Sheahan JJ concurred, referred to Scott and cited Lord Diplock's third proposition, which I have set out in para14 above, as defining what had to be proved to establish a conspiracy to defraud a public body.

[29] In Barker v R (1994) 54 FCR 451 at 462, the Full Court of the Federal Court had occasion to consider, in connection with the Proceeds of Crime Act 1987 (Cth), what constituted "public fraud offences" contrary to the Crimes Act, s29D and s86A. The case involved charges of defrauding the Commonwealth contrary to s29D by deceiving the Australian Taxation Office in various respects. It is authority for the proposition that a defrauding can be constituted by a deceit or concealment that has caused the imperilment of the economic interests of the person deceived, or of that person's principal, including the imperilment of the Commonwealth's interests to secure payment of income tax by a taxpayer. In the joint judgment of Jenkinson and O'Loughlin JJ at 462, their Honours cited Welham and Scott as authority for the following proposition:

"The Commonwealth may be defrauded in ways that involve no economic prejudice, nor any intention to cause economic prejudice"

[30] Clearly there is a substantial and highly authoritative body of Australian case law that supports the proposition that the deflection of a public officer from the performance of his or her public duty is a species of fraud. As far as I am aware, there is no reported Australian case that says the opposite.

[31] I do not see any reason to distinguish any of the cases that I have referred to on the basis that they relate to the nature of fraud in other contexts, such as fraud for the purposes of forgery, common law conspiracies to defraud, and so forth. There is nothing in the authorities to justify a different approach being taken in relation to the meaning of "defraud" in s86A, nor is there any logical reason for a different approach to be taken.

In Corruption and Crime Commission of Western Australia v Moodie [2009] WASC 72, Hasluck J also explored the scope of intent to defraud extending to the deflection from a public duty. Moodie had been charged with forgery offences involving false tax invoices for travel expenses as an employee of the South West Health Service. Forgery in WA requires proof of an intent to defraud. After referring to Re London and Globe Finance Corporation Ltd and Balcombe v De Simoni Hasluck J held:

[77] At first blush, reasoning of this kind might suggest that offences requiring an intent to defraud are confined to cases in which the victim has been deprived of some property or advantage. However, after a full review of previously decided cases, Roberts-Smith JA concluded in Bolitho's case at [232] that at the core of the concept of fraud at common law lies the notion of deceiving someone into acting in some way to their prejudice. That prejudice will ordinarily, but not necessarily, be economic or property loss (or the putting of such interest at risk), and may extend to situations in which the person upon whom the fraud is perpetrated suffers no personal loss, risk or prejudice at all but is thereby induced to perform a public duty in a way they would not otherwise have done.
[78] These observations were made in the course of a dissenting judgment but as to the notion that intent to defraud extends to cases concerning deflection from public duty, His Honour’s observations were consistent with the views of the majority, namely, McLure and Buss JJ.

[His Honour then referred to McLure JA’s references to Welham v DPP and Wai Yu-Tsang, and Buss JA’s references to Kastratovic.]

[85] These various observations go to show that there is clearly a substantial body of Australian case law supporting the proposition that the deflection of a public officer from the performance of his duty is a ‘species of fraud’ (being the description used by Blow J in R v Turner (No 4) [2001] TASSC 51 at [30]). The discussion of the New South Wales Court of Appeal in R v Horsington [1983] 2 NSWLR 72 shows that the possibility of an economic loss does not prevent reliance on the public duty type of intent to defraud.

[86] It is true that in Bolitho’s case McLure JA referred to the ‘public duty category’ of cases, but there is nothing further in her remarks or in the other cases to suggest that the deflection from public duty category should be regarded as a discrete offence with different elements. On the contrary, as Lord Denning observed in Welham, an intent to defraud is not limited to the idea of economic loss, it extends to the purpose of practising a fraud on someone or other. The common element is that if anyone may be prejudiced in any way by the fraud, that is enough. [His Honour went on to hold that this was also consistent with the approaches in Wai Yu-Tsang and Kastratovic]

[89] A number of cases establish that the time at which the prosecution must establish the mental element of an offence is at the time of the relevant act: Meyers v R (1997) 147 ALR 440; [1997] HCA 43 at 442; Royall v R (1991) 172 CLR 378 at 393 401 and 414 and 421; Ryan v R (1967) 121 CLR 205 at 217.

[90] It appears from the recently decided case of R v Turner (No 7) (2001) 10 Tas R 219 that whether or not a departmental employee was in fact deceived by the conduct complained of is not relevant to a charge of forging or uttering under s 473 of the Criminal Code.

[91] In that case the five accused were charged with conspiracy to defraud the Commonwealth and the Australian Fisheries Management Authority (AFMA) in that they submitted false returns to the AFMA as to orange roughy catches. It was submitted on behalf of the accused that the prosecution had to prove beyond reasonable doubt not only that the submission of false returns was likely to cause a deflection from the performance of a public duty but also that there was an actual deflection.

[92] His Honour Justice Blow made these observations:

The nature of a conspiracy to defraud the Commonwealth was considered by the High Court in Peters v R [1998] HCA 7; (1998) 192 CLR 493. At 509, Toohey and Gaudron JJ said that that offence ‘involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others’. As I have previously said, I think those words should be treated as referring (inter alia) to the interest that a public officer has in the proper discharge of his or her public duty: R v Turner (No 4) [2001] TASSC 51 at par 21. It is significant that an imperilling of legal rights or interests, ie the existence of a mere possibility that legal rights or interests would be adversely affected, is sufficient.

Similarly, McHugh J (with those reasons Gummow J agreed), said the following in Peters at 525:

Although most cases of conspiracy to defraud involve an agreement to use dishonest means which has the effect of inflicting economic loss on a third party, the infliction of such loss is not an essential element of the offence. It is sufficient that the conspirators intended to obtain some advantage for themselves by putting another person’s property at risk ... or depriving another person of a lawful opportunity to obtain or protect property...
In my view it must follow, in a case that involves the public duty of a public officer rather than private property, that the possibility of deflecting a public officer from the performance of his or her public duty is sufficient to establish the relevant element of the crime of conspiracy to defraud.

That was the position in *Welham v Director of Public Prosecutions* [1961] AC 103. In that case the appellant had forged hire-purchase agreements in order to make it appear that certain companies were advancing money in a permissible way, and had uttered the forged documents so that officers of the Board of Trade would be misled if they inspected the companies’ records to see whether credit restrictions were being observed. The House of Lords held that the trial judge had been correct in directing the jury that the possibility of prejudicing an investigation was sufficient for the appellant to have had an intention to defraud. [4]–[7]

[93] In *Taylor v R* [1997] TASSC 5; (1997) 6 Tas R 310 (19 February 1997) the thrust of the defence was that the appellant was not guilty because even if she made false statements in connection with the payment of the subject benefit she was entitled to the benefit in any event and therefore the Commonwealth had suffered no economic loss.

[94] Zeeman J made these observations:

> It is not an element of the crime of defrauding that the person obtaining the advantage is not entitled to it. The essence of the crime is the deceit. By removing the references to the appellant not being entitled to the benefit the crimes charged remained the same, ie, practising a deceit upon the Commonwealth with a view to obtaining the payment of a benefit. The references in the indictment to the non-entitlement of the appellant to the benefit were mere surplusage. [79]

[98] Second, the magistrate was of the view that in the deprivation of property or advantage category, the prosecution is required to establish that the accused person did not honestly believe that he was entitled to claim the property or advantage being sought.

[99] Third, his Honour proceeded from the premise that the prosecution is required to establish beyond reasonable doubt that the supposed or potential victim was actually deceived by the conduct of the accused. ...

[101] However, it emerges from my review of the decided cases that the views or assumptions principally relied upon by the magistrate in the present case are questionable.

[102] It appears from *Wai Yu-Tsang* that the public duty cases are not to be regarded as a special category but rather as exemplifying the general principle that intent to defraud is not restricted to cases of intention to cause the victim economic loss. As King CJ observed in *Kastratovic* 'in all cases' the element of intent to defraud connotes the intention to produce a consequence which is in some sense detrimental to a lawful right or interest (including deflection from the proper performance of a public duty) being an intention distinct from and additional to the intention to use the forbidden means (such as the creation of a fictitious invoice).

[103] This view leads to the further conclusion that in a case involving public duty it is sufficient that the existence of a likelihood or even a possibility that the complainant’s interest in the duty being performed will be adversely affected; that is, it will be sufficient if there is a likelihood or possibility that the complainant will be prevented from properly assessing an eligibility for the benefit being claimed.

... This was a public duty case and the question was whether at the time when the respondent created and utilised the fictitious invoices he intended to prevent or deflect the Department from performing its duty to properly assess the claim for reimbursement. If it were
not necessary to establish that the Department was actually defrauded (as shown by Turner’s case), then the state of the respondent's belief as to the nature of his entitlement was immaterial also. It would be sufficient for the prosecution to establish that there was a possibility its interest in the process could be affected because it could not properly assess the claim or, putting it another way, its opportunity to assess the claim was prejudiced.

... the key question to be addressed, which the magistrate failed to address, was whether there was sufficient evidence before him from which it could be inferred beyond reasonable doubt that at the time of creating each of the fictitious invoices the respondent intended to defraud the Department, as the party expected to meet the claim for reimbursement, because he had the intention to obtain payments in response to the fictitious invoices which he knew would not be made but for the deceit. If such an intent was found to exist then it could not be said that the respondent honestly believed he was entitled to the payments or acting lawfully. The consequence of findings of this kind would be that the party to whom fictitious invoices were submitted was deprived of its lawful interest (or at least prejudiced in the protection of that interest) in having the claims for reimbursement implicit in the invoices properly assessed or in having any dispute about the merits of the claim adjudicated...

[112] It follows from my review of the statutory provisions and decided cases that the elements of an offence under s 473 of the Criminal Code are that the respondent forged a record or uttered a forged record with intent to defraud. The time at which the prosecution was required to establish the relevant intention was at the time of the operative act, in this case, the preparation and submission of the invoices in question. In all cases the elements of intent to defraud connotes an intention which is in some sense detrimental to a lawful right or interest (including deflection from the proper performance of a public duty), being intention distinct from and additional to the intention to use forbidden means....

[120] It follows from my general observations that the question whether the respondent was entitled to the money in question, and thus whether the Department suffered any economic loss by reason of his conduct, was immaterial to the issue of criminal liability. Where the payment of the amount of the claim depends upon the decision of some alternative body or assessor, an intent to influence by dishonest means that decision in the respondent's favour by deflecting the body from the strict performance of its duty, is an intent to defraud notwithstanding that the respondent may genuinely believe that he is lawfully entitled to payment of the claim and therefore to a decision in his favour.

[121] It emerges from consideration of the decided cases that if the deceit which is employed imperils the economic interests of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.

[122] This is evident in the observations of King CJ in Kastratovic at 62 to the effect that if a party intends to influence the decision of some tribunal or assessing authority by dishonest means, there can be an intent to defraud regardless of whether the claim is genuine. King CJ acknowledged that defrauding may consist of deceiving a person responsible for public duty into doing something that he would not have done but for the deceit....

[125] It is always necessary for the prosecution to prove the intent which forms an ingredient of a particular crime, and any honestly held belief, whether reasonable or not, which is inconsistent with the existence of that intent will afford a defence. However, the prosecution's case at trial was that the intention to defraud was the intention to deceive employees of the SWHS into approving his claims contrary to their public duties. It was not alleged that the respondent intended to cause economic loss. An honest claim of right does not afford a defence in those circumstances because it does not defeat the existence of that intent. In other words, in circumstances where the respondent intended to influence the decision of some person exercising a public duty, it did not matter that his claim may have been genuine and a defence of honest claim of right was not available.
Dishonesty and Dishonest Means

Finally, it is necessary to discuss the aspect of dishonesty involved in the use of dishonest means. There had been some suggestion in some of the recent English cases that dishonesty was a separate element of conspiracy to defraud. However in *Peters*, the High Court held that dishonesty is not a separate element of conspiracy to defraud but that it is relevant in the characterisation of whether the means used are dishonest. In so finding the High Court laid down a test for dishonesty in relation to conspiracy to defraud. Toohey and Gaudron JJ held:

It is now necessary to indicate what is involved in dishonest means for the purposes of conspiracy to defraud.

As in other contexts, the question whether the agreed means are dishonest is, at least in the first instance, a question of knowledge, belief or intent and, clearly, that is a question of fact for the jury. On the other hand, the question whether, given some particular knowledge, belief or intent, those means are dishonest is simply a question of characterisation. And as in other contexts, the question whether an act done with some particular knowledge, belief or intent is properly characterised as dishonest is usually not in issue. Thus, putting to one side the exceptional case where it is in issue, it is sufficient for a trial judge simply to instruct the jury that they must be satisfied beyond reasonable doubt as to the knowledge, belief or intent alleged by the prosecution before they can convict. Alternatively, the trial judge may instruct the jury that, if satisfied as to the knowledge, belief or intent alleged, the means in question are properly characterised as dishonest and they should so find. ...

It is necessary to note one practical matter with respect to the knowledge that must be proved before there can be a conviction for conspiracy to defraud. As a matter of ordinary experience, it will generally be inferred from an agreement to use dishonest means to deprive another of his or her property or to imperil his or her rights or interests that the parties to that agreement knew they had no right to that property or to prejudice those rights or interests. And as with the defence of honest claim of legal right, it will be taken that there is no issue in that regard unless the absence of knowledge or, which is the same thing, belief as to legal right is specifically raised and there is some evidence to that effect. ...

As already explained, "dishonesty" does not appear in the statute establishing the offence of conspiracy to defraud the Commonwealth. But when properly analysed, the offence of conspiracy to defraud involves dishonesty at two levels. First, it involves an agreement to use dishonest means. Ordinarily, the means will be dishonest if they assert as true something which is false and which is known to be false or not believed to be true or if they are means which the conspirators know they have no right to use or do not believe that they have any right to use the means in question. And quite apart from the use of dishonest means, the offence involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. That, too, is dishonest by ordinary standards. If those matters are properly explained to a jury, further direction that the accused must have acted dishonestly is superfluous. Conversely, if those matters are not properly explained, a direction that the jury must be satisfied that the conspirators were dishonest is unlikely to cure the defect.

As discussed previously, their Honours set out a test for dishonesty that reverted to the *Feely* test of "dishonest by the standards of ordinary and decent people". Kirby J, for the purposes of a majority, agreed with Toohey and Gaudron JJ.

McHugh J, with whom Gummow J agreed, held that:

In so far as it is meaningful to speak of *mens rea* in the crime of conspiracy to defraud, *mens rea* means the intention to prejudice the interests of a third person by the use of means that are dishonest. Since the decision of the House of Lords in *R v Scott*, however, the notion has grown up that dishonesty is a separate element of the crime of conspiracy to defraud and that the prosecution must prove that the accused persons knew that they were acting dishonestly. ...
He analysed the judgments in Scott and concluded that the House of Lords made no such finding. Yet in Ghosh, the English Court of Appeal took Viscount Dilhorne's statements in Scott as meaning that proof of subjective dishonesty was essential to the proof of both theft under the Theft Act 1968 (UK) and the common law offence of conspiracy to defraud and that the tests were interchangeable. The test of dishonesty formulated in Ghosh has been applied in Australia in numerous cases concerned with conspiracy to defraud. The authors of Archbold seem to have been voices in the wilderness in robustly maintaining the view that it is "superfluous" to direct a jury as to dishonesty. In my opinion, however, the authors of Archbold are right. A successful prosecution for conspiracy to defraud does not require proof that the accused knew that he or she was acting dishonestly either in a Ghosh sense or a wholly subjective sense.

Proof of a conscious design on the part of the conspirators to use dishonest means is essential to proving the charge. But this does not mean that the defendants must know that they were acting dishonestly - whether dishonesty is judged by their standards or their knowledge of the standards of ordinary people. In Churchill Viscount Dilhorne, speaking for the House of Lords, said that "mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act". Similarly, in Meissner v The Queen, a case concerned with conspiracy to pervert the course of justice, Brennan and Toohey JJ and I pointed out that the requisite mental element is satisfied for the purpose of the offence if the accused intends to do acts that have the effect of perverting the course of justice even if he or she has never heard of the expression "perverting the course of justice". If two persons, intending to use means that are dishonest, agree to use those means to obtain an advantage for themselves by putting another person's property at risk, they agree to do an unlawful act. Similarly, if intending to use means that are dishonest they agree to deprive a person of the opportunity to obtain or protect property by those means, they agree to do an unlawful act. In both cases, they are guilty of conspiracy whether or not they know what they knew that those means were dishonest.

In the paradigm case of conspiracy to defraud - an agreement to induce persons to buy property by making fraudulent misrepresentations - the charge is made out upon proof that the accused agreed to induce persons to part with their property by the making of statements (by one or more of them or by others) which the accused knew were untrue. Whether or not the accused believed that what they were doing was honest is irrelevant to the charge. Obtaining property by statements which are known to be untrue is the employment of dishonest means. If the accused agree to obtain property by such means, they are guilty of the offence of conspiracy to defraud and the trial judge is entitled and, indeed, bound to direct the jurors to this effect. That is because the accused have the intention to do acts which for the purposes of the crime of conspiracy are unlawful acts and have agreed to do them. Similarly, in Scott a conspiracy to defraud the owners of the copyright and distribution rights in the films was made out upon proof that without the consent of the owners the accused had agreed to take and copy films for commercial distribution. None of the Law Lords suggested that the guilt of Scott depended on whether he knew that he was acting dishonestly or whether a jury could find that the taking and copying of the films was dishonest. The Law Lords themselves characterised the taking and copying of the films as dishonest means. ...

It is for the trial judge to determine whether the facts relied upon by the prosecution, if proved, establish an agreement to use dishonest means sufficient to constitute a conspiracy to defraud - that is to say whether those facts show an agreement to do an unlawful act for the purpose of the offence of conspiracy to defraud. In the context of conspiracy to defraud the prejudicing of another person's interests by dishonest means is an "unlawful act" of the kind described in Mulcahy. In determining whether, as a matter of law, the alleged facts show an agreement to use dishonest means to prejudice the interests of a third party, questions of intention, knowledge and claims of right on the part of the defendants will ordinarily be crucial because the common state of mind of the defendants in relation to various acts or omissions will usually be decisive in determining whether the object of the conspiracy was an unlawful act or whether its implementation involved the use of unlawful means. It is then for the jury to
determine whether the prosecution has proved the facts that the trial judge has held, as a matter of law, constitute dishonest means for the purpose of a conspiracy to defraud.

Note that in his judgment McHugh appears to see dishonesty as an entirely objective concept and appears to reject both the Ghosh and Feely approaches of a community-based standard, seeing it as an entirely legal question for the judge to decide.

Despite these apparent differences in Spies the Court unanimously stated:

In Peters, Toohey and Gaudron JJ said:

"Ordinarily, however, fraud involves the intentional creation of a situation in which one person deprives another of money or property or puts the money or property of that other person at risk or prejudicially affects that person in relation to some lawful right, interest, opportunity or advantage, knowing that he or she has no right to deprive that person of that money or property or to prejudice his or her interests. Thus, to take a simple example, a ‘sting’ involving an agreement by two or more persons to use dishonest means to obtain property which they believe they are legally entitled to take is not a conspiracy to defraud."

In the same case, McHugh J said:

"In most cases of conspiracy to defraud, to prove dishonest means the Crown will have to establish that the defendants intended to prejudice another person’s rights or interest or performance of public duty by:

• making or taking advantage of representations or promises which they knew were false or would not be carried out;

• concealing facts which they had a duty to disclose; or

• engaging in conduct which they had no right to engage in."

To prove that the appellant defrauded a person in his or her dealings with Sterling Nicholas, therefore, the prosecution had to prove that the appellant used dishonest means to prejudice the rights of such a person in his or her dealings with Sterling Nicholas.

It therefore appears that the Court sees a common ground between the two judgments.

Separating dishonesty and dishonest means

It is important to prove dishonest means rather than just dishonesty. In Iannelli (2003) 56 NSWLR 247 the accused was charged with being knowingly concerned in the commission of the offence of defrauding the Commonwealth by two companies she controlled. Among other issues, the companies deducted tax from their employees which they did not remit to the Commonwealth. The intention to defraud was said to arise from this failure to pay the tax due. Throughout the relevant period the accused had submitted group certificates correctly recording the tax withheld from the employee’s pay. Both the accused and the companies had also claimed tax credits and deductions for the amount of tax withheld. The accused claimed the companies had been in financial difficulties but intended to ultimately pay the outstanding tax. In the Crown case and the summing up attention was focused on the dishonesty of the appellant, but no mention was made of the use of dishonest means.

The difficulty in the case was determining whether there was any evidence of dishonest means. The court split three ways on the interpretation of the facts. Bell J held:

[117] The Crown acknowledged the necessity for it to prove that the appellant’s act involved the use of dishonest means. To submit otherwise would carry with it that any intentional failure to remit tax might constitute defrauding the Commonwealth. In the Crown’s submission, the case fell within the third category identified by McHugh J in Peters (at 529 [84]) (and approved in the joint judgment in Spies (at 631 [80])) of intending to prejudice another
person's right or interest or performance of public duty by engaging in conduct which they had no right to engage in.

[118] The Crown's reliance on the above passage in the judgment of McHugh J in *Peters* needs to be read in the context of his Honour's statement of the mental element of the offence of conspiracy to defraud (at 530 [85]), namely that it is the intention to prejudice the interests of a third person by the use of means that are dishonest.

[119] In *Peters*, the majority were of the view that proof of the use of dishonest means for the purpose of an offence of defrauding is a question, in the first instance of knowledge, belief or intent. Generally the question of whether an act done by a person possessed of that knowledge, belief or intent is dishonest will not be an issue. In the exceptional case in which it is in issue, the majority held that it should be left to the jury (assuming the means are capable of being characterised as dishonest). The jury should be instructed that the question of whether the means used are to be characterised as dishonest is to be determined by the standards of ordinary, decent people (Toohey J and Gaudron J (at 508 [28]-[29]) Kirby J agreeing (at 555 [145])).

[121] ... Read as a whole, it seems to me that the summing up left open that the jury might be satisfied that the Crown had established the ingredient of "defrauding the Commonwealth" if it found that the appellant, knowing that she was not entitled to prejudice the interests of the Commonwealth in the receipt of group tax, allowed the companies that she controlled to fail to remit group tax as it fell due.

[122] The Crown did not submit that intentional non-remittance of group tax (knowing that there was no entitlement so to do) of itself constituted the offence of defrauding the Commonwealth. Yet the effect of the directions was that the Crown would succeed if it established no more.

[123] The question of whether the means used by the appellant (the non-remittance of group tax by the companies that she controlled) were dishonest was critical. It was not a case in which it was immediately apparent that they were. It was necessary that the directions make clear that the Crown must prove that (i) the appellant intended to prejudice the economic interests of the Commonwealth (knowing that she was not entitled to allow the companies that she controlled to fail to remit group tax to the Commissioner), (ii) by the use of means that were dishonest. Whether the appellant's act in allowing the companies that she controlled to fail to remit group tax was to be characterised as dishonest was a question of fact for the jury to be determined by the standards of ordinary decent people; *Peters* (at 508 [28] and [29]) per Toohey J and Gaudron J, (at 555 [145]) per Kirby J. ...

[127] There was no evidence that the appellant had taken any step to conceal from the Commissioner the true state of affairs concerning the liability of Dromore or Iannelli Freight for the payment of group tax. In each instance the company furnished group certificates stating the amount deducted from the salary or wages of its employees. There was no evidence of the making of false representations, or of a scheme such as that employed in *R v Walters*. The Crown case was that the two companies controlled by the appellant did not remit group tax in accordance with the statutory obligation on them to do so.

[128] In oral submissions the Crown sought to contend that while the case had not been put as one involving deceit, the appellant's income tax returns and the companies' income tax returns were "false" and that this was material to the issue of dishonesty. The companies' income tax returns claimed gross wages as expenses. The appellant's income tax returns claimed credits for the deductions of tax from her salary made by each of the companies.

[129] The evidence as to the contents of the companies' income tax returns was given by Mr Lane. The returns themselves were not in evidence nor were the companies' annual accounts. I do not think that it can be said that the companies' income tax returns were false because they recorded the gross wages as expenditure when the group tax had not been remitted to the Commissioner. The company did incur expenditure in the amount of the gross wages and it incurred a liability in the amount of the unremitted group tax. Equally, I do not
think it right to describe the appellant’s income tax returns as false because she claimed a
credit for the income tax that had been deducted from her salary in circumstances in which she
knew that the sums deducted had not been remitted to the Commissioner.

The Crown also submitted that the provision of group certificates to the employees
and to the ATO was capable of being seen as a representation that “all was in order” and, thus,
of amounting to evidence of dishonest means. The practical effect of issuing the group
certificates was said to be that the employees believed that their income tax had been
collected at source and remitted to the ATO. The ATO is a large organisation and it was
suggested that it might receive the group certificates in the ordinary course without making
inquiry to see if the amount of the deductions had been remitted.

It does not seem to me that issuing group certificates accurately setting out the
information that is required to be contained in them by s 221F(5A) of the Income Tax
Assessment Act 1936 (Cth) can be said to evidence dishonesty. Section 221F(5A) requires that a
group certificate set out the total of the amounts paid to the employee as salary or wages
during the period of twelve months ending on 30 June in the same year and, where deductions
from the salary or wages have been made by the employer, the total of the amounts of the
deductions. The certificate does not purport to evidence that the deductions have been
remitted to the ATO.

Handley JA held all the evidence established was a bare omission to pay tax, and that
this was not a basis on which defrauding could be proved. He held that defrauding required
that the accused make “use of active steps to ‘achieve his or her object’ of defrauding the
victim.” He also considered that the returns contained no fraudulent misrepresentations of
or non disclosure.

By contrast Simpson J in dissent held that it was possible to imply dishonest means:

There was ... no express statement made by the appellant (on behalf of either
corporation) that could be shown to have been false. However, in my opinion, when regard is had
to the scheme under which income tax payments are to be made, it was open to a jury to find
that the appellant represented, falsely, both to employees and to the Commissioner, that
payments had been made. The representation was an implied one, but could, in my opinion,
have been seen by a jury as dishonest. By reason of s 221H [which permits employees credit for
taxes withheld even if the money has not been paid to the ATO], the representations on the
group certificates put the Commonwealth’s economic interests at risk.

Further, Lannelli Pty Ltd at least, claimed, on its income tax returns, deductions for the
gross wages said to have been paid to employees, even though employees had been paid only
the amounts properly payable after the statutory deductions had been made, and those
deductions had not been paid, as required, to the Commissioner. This, too, was, in my opinion,
evidence of dishonesty. The appellant, through Lannelli Pty Ltd, was impliedly claiming that the
payment had been made. She knew that was not true. The same applies to the appellant’s own
income tax return. She, as an employee, had been given group certificates indicating that
deductions for tax had been made, and she accordingly claimed in her own returns, that tax had
been paid on her behalf. She knew that deductions had been made, but she also knew that it
was not true that those payments had been made to the Commissioner. By reason of s 221H,
she, like the other employees who, (unlike her) were ignorant of the truth, was entitled, by
reason of the conclusive nature of the group certificates, to credit for taxation in the amounts
shown on the group certificate.

There is, I recognise, a distinction to be drawn between proof of dishonest means in
the perpetration of the fraud alleged, and proof of a dishonest state of mind. Evidence of the
latter kind may shed some light on the evidence going to dishonest means. I incline to the view
that the evidence of the plainly dishonest claims in the income tax returns of Lannelli Pty Ltd
and of the appellant was evidence of the latter kind -- that is, of a dishonest state of mind as
distinct from evidence of dishonest means. But I remain of the view that the evidence of the
issue of the group certificates, and the furnishing of the reconciliation statements, containing,
by clear implication, false representations, was evidence that could establish to the satisfaction of a jury properly instructed that the appellant used dishonest means to defraud the Commonwealth.

Corporate issues

One issue that arises in relation to schemes involving corporate structures is whether it is possible for a person to conspire with a company. In other words, if a director is both an individual and also the directing mind and will of the company, do that person’s actions constitute a conspiracy between the two legally distinct legal entities? The issue arose for preliminary decision in *R v McDonnell* [1966] 1 QB 233. McDonnell was the sole person in control of companies from which he had removed monies and was charged with fraudulent conversion of those funds and false accounting. In addition, he was charged with conspiring with the companies to defraud. Nield J held:

I have now considered all the cases which have been cited to me by counsel, and at the end one is presented with a new situation in that there is no English authority upon the point. I have reached the conclusion that, ... I should express the opinion or give an anticipatory ruling that these charges of conspiracy cannot be sustained, upon the footing that in the particular circumstances here, where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds. If it were otherwise, I feel that it would offend against the basic concept of a conspiracy, namely, an agreement of two or more to do an unlawful act, and I think it would be artificial to take the view that the company, although it is clearly a separate legal entity, can be regarded here as a separate person or a separate mind, in view of the admitted fact that this defendant acts alone so far as these companies are concerned.

It is of course always possible that the director’s actions are in fact frauds on the company. This can occur in situations that may just be on the wrong side of “entrepreneurial”. In *R v Sinclair* [1968] 1 WLR 1246 the directors of a shell company whose only asset was money created a round-robin of cheques that permitted a person, Burden, to take over the company by using the company’s own funds. This was done in an alleged to be an honest belief that Burden would then use those funds to purchase assets he controlled but which were valued at greater than the amount they would be sold for. The directors were found guilty of conspiring to cheat and defraud the company, by exposing the company to the risk that the assets would not be obtained. The court held:

To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person’s proprietary right. In the context of this case the alleged conspiracy to cheat and defraud is an agreement by a director of a company and others dishonestly to take a risk with the assets of the company by using them in a manner which was known to be not in the best interests of the company and to be prejudicial to the minority shareholders.

Finally, in *Adams v The Queen* the Privy Council explained how director’s duties, if not properly followed by a number of directors could amount to a conspiracy to defraud the company.

Mr. McLinden submitted that, since the defendant was not found to have acted dishonestly in relation to the funds which formed the subject of any of the five transactions, one of the ingredients necessary to a conviction for conspiracy to defraud was missing. It was not enough that the use of the Yeoman Loop had been found by the judge to be dishonest. This submission, however, ignores the fact that the defendant as a director of E.H.L. and some of its subsidiaries was throughout his tenure of these offices under a duty, when entering into a transaction with these companies or when using the resources of these companies for his own benefit, to act with perfect good faith and to make full disclosure to the company in question of all material circumstances. A director is in the same position as an agent (*Aberdeen Railway Co. v. Blaikie Bros.* (1854) 1 Macq. H.L. 461, 471) and it is trite law that
"No agent may enter into any transaction in which his personal interest might conflict with his duty to his principal, unless the principal, with full knowledge of all the material circumstances and of the exact nature and extent of the agent’s interest, consents."

This proposition is further expanded in the above work, at p. 167:

"Where an agent enters into any contract or transaction with his principal, or with his principal’s representative in interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative."

Furthermore an agent has a duty to obtain his principal’s informed consent before he uses the latter’s property for his own personal benefit: Bowstead on Agency, 15th ed., p. 175. In applying these principles to conspiracy to defraud, regard must be had to the following dictum of Viscount Dilhorne in Reg. v. Scott [1975] A.C. 819, 840:

"it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

Since a company is entitled to recover from directors secret profits made by them at the company’s expense, it would follow that any dishonest agreement by directors to impede a company in the exercise of its right of recovery would constitute a conspiracy to defraud. In their Lordships' view a person can be guilty of fraud when he dishonestly conceals information from another which he was under a duty to disclose to that other or which that other was entitled to require him to disclose. It was the element of dishonest concealment which was absent in Tarling's case, 70 Cr.App.R. 77.

Taking transactions 1 and 4 together certain things clearly emerge. The defendant and the other co-defendants acquired Keady shares and warrants from E.A.H.K. without disclosure to the board of E.H.L. They sold all these shares and warrants at a large profit, a substantial number of them being sold back to E.H.L. or E.T., once again without disclosure to the board of E.H.L. Until the resales the shares appeared to be registered in the name of E.A.H.K. Thereafter Hawkins and the defendant concocted a minute of a fictitious meeting in order to deceive E.H.L.'s auditors into thinking that the board of E.H.L. had sanctioned the allocation to the investment team of Keady shares. $6m. from the February 1987 sale of some 20,440,000 10 cent Keady shares which had been received by E.A.H.K. was paid to E.T. in Australia and then for unexplained reasons by way of Y.F.P.'s account in Hong Kong to R.W.S. or E.A.L. whence it found its way into the hands of the investment team or their various interests. After five members of the investment team sold their Keady warrants to E.T. at a very large profit they passed a substantial sum of money round the Yeoman Loop for unexplained reasons at a cost of $37,000. The defendant and his co-defendants were accordingly not merely failing to disclose their activities to the board of E.H.L. but they were taking positive steps whose only object was to make it more difficult for persons such as other directors the shareholders and the auditors of E.H.L., who had a legitimate interest in the transactions, to discover what they were doing. The board could, as the judge said:

"legitimately have considered that if profits were being made on the sale of Keady shares, that were still in the name of Equiticorp Investments (HK), some if not all of those profits should belong to E.H.L. Had they been aware of the later proposals for the investment team to sell some of their Keady shares back to E.H.L. they would, having regard to the obvious conflict of interest, want to be informed about, and be satisfied as to, the terms. The same applies to the later shares for warrants swap. But the concealment of all of these transactions from the board deprived them of that opportunity. There is a further aspect. The secrecy that surrounded the activities of Messrs. Adams and Taylor on behalf of the investment team, and the lack of any documentary evidence in the hands of anyone other than Messrs. Adams and Taylor, meant that they had effectively hedged their bets. If,
contrary to all the indications, the February sales had not yielded a worthwhile profit, they
could have decided that the shares sold were not theirs, but Equiticorp Investment (HK)’s.
They were still in the name of Equiticorp Investments (HK). As no one else knew whose were
the shares being sold, that could and would not be challenged. Leaving that option in their
hands was also to E.H.L.’s detriment."

Although these observations were made in relation to count 4 they are equally applicable
to consideration of transactions 1 and 4 in the context of count 1.

In the case of transaction 2 the Crown was unable to prove that the investment team
derived any benefit from the "retreat" fee. The defendant would not or could not explain its
origin nor why it was passed round the Yeoman Loop instead of being paid direct from B.G.L.s
account in Singapore to E.I.G.L. The interposition of the Yeoman Loop between B.G.L. and
E.I.G.L. necessarily rendered more difficult legitimate inquiries into the origin of the money and
the reason for its payment to E.I.G.L. However notwithstanding the unusual nature of the
transaction their Lordships do not feel able to affirm that on the facts as found by the judge the
investment team were under a duty of disclosure in relation to the "retreat" fee.

Transaction 3 was used to transfer moneys payable against invoices issued by E.H.L. for
services performed by E.H.L. from an account with E.F.G.L. around the Yeoman Loop and
through R.W.S. into the hands of the investment team or their trusts or companies at a cost of
some $7,500. Even although the defendant may have thought that his share of the money was
a bonus authorised by the independent directors, that did not absolve him from his duty of
disclosure at least to the shareholders. Once again the interposition of the Yeoman Loop
between E.F.G.L. and R.W.S.’s trust account impeded inquiries into money in which E.H.L. had
an undoubted interest.

The position in relation to transaction 5 is somewhat different from that obtaining in
relation to the other four transactions in as much as it was not established that E.H.L. or any of
its subsidiaries had any interest in the 'H' fee, nor was it proved that it was per se dishonest.
However the resources of E.H.L. in the form of E.A.L. were used to set up a contrived foreign
exchange transaction and the Yeoman Loop was then used to conceal what had gone before, as
well as the origin of the benefits to the investment team. To whomever the "H" fee may have
belonged in law Hawkins and the defendant at least were aware that the Yeoman Loop was
being used to conceal the obviously dishonest foreign exchange transaction in Australia, a
transaction which because of its use of E.H.L.’s resources they were under a duty to disclose.
Thus transaction 5 was itself dishonest.

It follows that the defendant, having been party to the use of the Yeoman Loop in the case
of four out of the five transactions for the purpose of dishonest concealment of information
which, as a director, he was under a duty to disclose to E.H.L., was properly convicted on count
1.
RECEIVING AND GOODS IN CUSTODY

Receiving Stolen Property

188 Receiving stolen property where stealing a serious indictable offence

(1) Whosoever receives, or disposes of, or attempts to dispose of, any property, the stealing whereof amounts to a serious indictable offence, knowing the same to have been stolen, shall be guilty of a serious indictable offence, and may be indicted, either as an accessory after the fact, or for a substantive offence, and in the latter case whether the principal offender has been previously tried or not, or is amenable to justice or not, and in either case is liable:

(a) if the property is a motor vehicle or a motor vehicle part, or a vessel or a vessel part, to imprisonment for 12 years, or

(b) in the case of any other property, to imprisonment for 10 years.

(2) In this section:

  motor vehicle has the same meaning as it has in Subdivision 5A.

  vessel means a vessel within the meaning of the Marine Safety Act 1998.

189 Receiving etc where principal guilty of minor indictable offence

Whosoever receives, or disposes of, or attempts to dispose of, any property, the stealing whereof is a minor indictable offence, knowing the same to have been stolen, shall be guilty of a minor indictable offence, and whether the person guilty of the principal offence has been previously tried or not, or is amenable to justice or not, shall be liable to imprisonment for three years.

The elements of this offence are:

• Stolen property, the stealing of which was either a serious or minor indictable offence

• Receiving or disposing of that property (or attempting to do so)

• Knowing that the property was stolen

• With a guilty knowledge at the time of the receiving or disposing

It is possible to convict a person of receiving even if the thief has not been convicted, tried or made amenable to justice. Section 188 also enacts that a person can either be charged with the substantial offence of receiving or alternatively with being an accessory after the fact to the stealing offence. This provision reflects the history of receiving which began its life as an accessorial charge but which faced substantial limitations in that form. To be an accessory the defendant must be in some way attempting to assist the principal offender to escape justice and thus a bare receiving of the property did not constitute the crime of accessory (see eg Davies v DPP [1954] AC 378).

A minor indictable offence is one with a maximum penalty of less than 5 years. Indictable offences are those offences that are not described as summary or have a maximum penalty of 2 years imprisonment or less (ss 5 and 6 Criminal Procedure Act 1986). One can only be convicted of being an accessory to a serious indictable offence (s347).
Stolen Property

Tangible and intangible property, and tainted property

The use of the word property in the offence has the result that the offence is broad enough to encompass not only tangible but also intangible property, using the extended definition in s4:

*Property* includes every description of real and personal property; money, valuable securities, debts, and legacies, and all deeds and instruments relating to, or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and includes not only property originally in the possession or under the control of any person, but also any property into or for which the same may have been converted or exchanged, and everything acquired by such conversion or exchange, whether immediately or otherwise.

To date there has been little use of the offence in relation to choses in action. In AG’s Ref (No 4 of 1979) [1981] 1 WLR 667 the similar English Theft Act definition of property was considered broad enough to encompass money in a bank account. Payment of that money by way of a cheque was considered to amount to handling of stolen property or its proceeds.

Next, it is clear that a balance in a bank account, being a debt, is itself a thing in action which falls within the definition of goods and may therefore be goods which directly or indirectly represent stolen goods for the purposes of the offence.

However, the decision in *Preddy* [1996] AC 815 suggests that there may be some problem with the receiving of intangibles.

The definition of property also includes all property that is tainted by the original stolen property.

The stealing of which was a serious or minor indictable offence

Section 33(1) of the English Larceny Act 1916 referred to the property having been “stolen or obtained in any way whatsoever [which amounts to] a felony or misdemeanour.” Until recently ss188 and 189 also referred to felonies and misdemeanours. Section s187 makes a similar expansion of the offences on which receiving can be based:

187 Term “stealing” in sections 188 and 189

For the purposes of sections 188 and 189:

Stealing includes the taking, extorting, obtaining, embezzling, or otherwise disposing of the property in question.

There is authority that embezzlement could found a charge of receiving without the need for statutory intervention (*R v Frampton* (1858) Dears & B 585). However s187 is needed to ensure that receiving from bailees falls within the offence (*cf R v Harris* (1850) 5 Cox 151 and *R v Parker* (1863) 2 SCR (NSW) (L) 217). The concept of obtaining has been held in England to be broad enough to encompass any offence as a result of which property was obtained. This includes conspiracy to defraud (*R v Kutas and Jerichower* (1923) 87 JP 196) and hire purchased goods where the credit was obtained fraudulently (*R v New* (1957) 41 Cr App R 207). But an offence known to law must be specified in the indictment (*R v Schweller* (1924) 18 Cr App R 52.

Under the Larceny Act 1916 formulation it was held that if the property had initially been acquired lawfully a later change of intention to fraudulently convert them did not form a basis for receiving (*R v Missell* (1926) 19 Cr App R 109, *R v Bianchi* (1958) Crim LR 813). However s187 also refers to “otherwise disposing” of the property. This may mean that
such actions do in fact fall within the offence. The wording is also apt to describe dealings with intangible property, although the problem of such property being received remains.

On very rare occasions it may be that the apparently stolen property might have been taken in circumstances that in fact disclose no offence with the consequence that the property is thus not stolen and cannot be received. In *Walters v Lunt* [1951] 2 All ER 645, a child of seven years age had “stolen” a tricycle and this had then been appropriated by the child’s parents. They were charged with receiving stolen goods. The Court of Appeal upheld their acquittal for the following reasons:

> In the case now before us the child could not have been found guilty of larceny because he was under eight years of age, and, unless he is eight years old, he is not considered in law capable of forming the intention necessary to support a charge of larceny. Therefore, the justices came to a perfectly proper decision in point of law on the charge of receiving. This, however, will not prevent the prosecution from preferring a further charge against the respondents for larceny, because, in my opinion, the facts show that it would be open to the justices to convict them either of larceny as bailees or of larceny by finding. …

In the case before us the child brought the goods home, and the respondents took possession of them and kept them. It can, therefore, be submitted to the justices that the respondents put themselves in the position of bailees of the true owner, and, by doing the acts and telling the untruths which they did, provided a ground on which the justices could find that they converted the goods to their own use. Alternatively, it could be submitted to the justices that this was a case of larceny by finding, the respondents finding the goods in their house, brought there by the child. If the justices come to the conclusion that at the time when the respondents found the goods, i.e., when the child brought them home, they believed that the owner could be discovered by taking reasonable steps -- and I should not think the justices would have much difficulty in finding that -- the respondents will be guilty of larceny by finding. Therefore, we dismiss this appeal. It will be for the police to decide whether they will prefer any further charge before the justices. If they do so, the decision of the justices on the receiving charge will be no bar to a conviction if they find the facts for larceny.

The second part of this extract makes it clear that despite the unavailability of receiving as a charge, there are other charging options available. One is left to wonder, however, why charges were brought in the first place.

*Walters v Lunt* was followed in *R v Farrell* [1975] 2 NZLR 753. In that case Farrell had been charged with receiving a cheque from a woman referred to as “X”. At her trial the woman had successfully argued a defence of insanity. Thus although her obtaining of the cheque was unauthorised it was not criminal. Wild CJ held:

> The ground of the motion is that X was charged with stealing that cheque form and, after electing summary jurisdiction and pleading not guilty, was acquitted on account of her insanity. In that situation the point taken is that the depositions do not disclose an essential ingredient of the charge, namely, that the cheque was "obtained by any crime". Mr Twaddle relies primarily on Walters v Lunt [1951] 2 All ER 645 where, on a case stated, it was held that justices were right in refusing to convict a person of receiving an article knowing it to have been stolen when it had been stolen by a child aged seven years. That decision was held correct in that the child, being under eight years of age, could not have been found guilty of larceny.

If anything, this case is stronger in that the depositions contain evidence that X was acquitted on account of her insanity. Therefore they show positively that the cheque was not "before then obtained by a crime"

The Crown Prosecutor indicated that he proposed to add to other charges which the accused is facing a count charging him with theft of the cheque in question. Mr Twaddle raised no objection to that.
Not restored to lawful possession

Stolen goods can clearly not remain such for ever. If this were not the case the police who retrieved the stolen goods could be, on the face of the offence, guilty of receiving. This would be equally true of the owner himself or herself if they were to get the property back. Thus the courts have held that once the possession property is restored to the owner or other lawful possessor, the property ceases to be stolen property.

A further complexity arises when the property is intercepted on its way to the receivers by the owner or the owner’s agent. In such circumstances a close examination of whether the interception amounted to a retaking of possession is required. In addition, the courts have held that any such interference by police is considered to be an action undertaken as an agent of the owner.

These issues are examined at length in *R v Alexander and Keely* [1981] VR 277. In that case police officers had a motel room under surveillance which they suspected was being used by jewel thieves. They had seen the room being booked at reception but had not seen anybody inside the room. While the room was still empty, a Senior Detective Hall borrowed a key to the room from the motel manageress. He then entered the room and examined a number of boxes and cases. He discovered jewellery and equipment that could have been used in effecting a robbery. He left the items as he found them and returned the key to the room. The police later entered the room and surprised the appellants sitting at a table examining the jewellery. The appellants argued that they had not previously been in the room and had only just entered when surprised by the police. The court reviewed the evidence and held:

The essence of the argument for the applicants was that there was evidence which raised the issue whether the goods had at the relevant time ceased to be stolen goods. That issue arose, it was submitted, because it would have been open to the jury to have had reasonable doubt whether, in the circumstances, the goods had not been restored to the lawful possession or custody of one or more of the police who were keeping surveillance. ...

Mr Weinberg submitted that there was evidence which tended to show that after Hall entered unit 9, Hall or one or more of the police had custody of the goods in the room which had earlier been stolen. He contended that when police in the course of their duties take control of goods which have been stolen, they take custody of the goods rather than possession. As the police hold the goods for the owner they hold them in custody not possession, he submitted. He drew an analogy with the position of an employee having custody of the goods of his employer or a dinner guest having custody of the knife and fork owned and provided by the host. Mr Weinberg finally put it that under s90(3) the test to determine whether someone has custody is the same test which is applicable to determine whether someone has possession, except that a person with custody does not intend to exclude the owner from the goods. With that exception, the test to determine whether the police had custody of the goods in the room is, according to the applicants’ argument, the familiar test for possession. That accords with authority: see *Moors v Burke* (1919) 26 CLR 265, at pp. 270-1. In this case there is no need to decide whether, if the police had the requisite exclusive control of the goods and intended to exercise it, they would have had custody or possession. We will for convenience speak in terms of possession.

[The court referred to the wording of s90(3) of the Victorian Crimes Act 1974 which is in similar terms to the English Theft Act] The Court of Appeal in Attorney-General’s Reference (No. 1 of 1974), [1974] QB 744, at pp. 749-750 observed that it is hardly appropriate to say that stolen goods are “restored” to the lawful possession or custody of a police officer who has never before had possession or custody of them. The Court was satisfied, however, that the section, the equivalent of s90(3), applies whenever a police officer in the course of his duty...
takes possession or custory of stolen goods. We take the same view. When the section speaks
of goods being restored to lawful possession or custody it is looking to the state of the goods
rather than to a person who previously had possession or custody of them. We think that s90(3)
states the common law position....

We accept Mr Weinberg's submission that the goods would have ceased to be stolen goods
if the police had resumed possession of them for however short a time. They would not have
again become stolen goods if the police had relinquished such possession before the applicants
entered the motel room on the Monday morning. .... We will assume without deciding, that the
police were entitled to take possession of the goods and to take any necessary steps to enable
them to do so. On that assumption it would follow that if they did take possession, it was
lawful.

In deciding an issue whether the goods had not been restored to the possession of the
police, the jury would, of course, decide an issue of fact: Pendlebury v Kakouris, [1971] VR 177,
at pp. 193-4. The ordinary test of possession stated in Pollock and Wright, Possession in the
Common Law, p. 129 and approved by the High Court in Moors v Burke (1919) 26 CLR 265, at p.
270 is: "had he the separate undivided and exclusive control of the thing". The question here is
whether at the relevant time one or more of the police had such control of the goods. Several
persons in concert may hold possession: Moors v Burke (1919) CLR 265, at p. 271. The police
would have possession only if they in fact controlled or had the power to control the goods to
the exclusion of other persons and if they intended to do so: Beard v Brebner, [1962] SASR 223.
Legal rights existing in relation to the goods are relevant because inferences may be drawn
from them which can be used in finding the facts upon which possession depends. Pollock and
Wright, supra at pp. 10-6; AES Tay, "The Concept of Possession in the Common Law:
Foundations for a New Approach" (1964), 4 Melbourne University Law Review 476, at pp. 489-
90 and 493-4.

We now consider the extent to which the evidence, on the view most favourable to the
applicants, could be regarded as suggesting that the police were in possession of the goods
before the applicants' arrival at the motel.

Mr Weinberg argued that it was open to the jury to entertain reasonable doubt whether
Hall had not taken possession of the stolen goods during his inspection. Before Hall entered
unit 9, the goods were in the possession of a person or persons other than the police. It does
not matter whether they were in the possession of the occupants of unit 9 or of someone else.
Nor does it matter whether they were in the possession of the thieves or in other unlawful
possession. If the police obtained possession, it was obtained without the consent of whoever
possessed the goods in unit 9 before Hall's entry. A greater degree of demonstrable change of
exclusive control is required to show that possession has been taken without the consent of the
prior possessor than to show a consensual change of possession. Pollock and Wright, supra, pp.
14 and 44. At any relevant time the goods were either in the possession of those who held
possession before Hall's entry or else they were in the possession of the police. Pollock and
Wright, supra, p. 129.

During the night there had been no lights burning in unit 9 and Clarke had formed the view
that there was no one in it. Until Hall's inspection, the police did not know whether there were
in the unit any goods which would be of interest to them or whether the door was locked. Hall's
evidence is the only evidence of the instruction he was given. He said that he was instructed by
Clarke to go and have a look in room 9. Hall took the small black case and the light blue suitcase
from the top of the wardrobe to examine their contents. Both cases contained stolen goods. He
may have taken other stolen goods in his hands to examine them. He did nothing but examine
the stolen goods and left them as they were. He did nothing which made it more difficult for
those in possession of the goods to have access to them or to take them away. While he was in
the room he did nothing which placed the police in a better position to control the goods than
they had been before. As soon as he had completed his examination he locked the door and
returned the key to the office. It would be reasonable to infer that during his inspection Hall
formed the belief that the goods were stolen goods and could have formed the belief that they
were stolen from the Feore brothers. There is, however, nothing in the evidence to suggest that
Hall ever intended to do anything but find out whether there were goods in the room which might be stolen goods. We do not consider that there is anything in the evidence to suggest that Hall took possession of the stolen goods.

Several cases were cited to us where conduct by an owner or the police involving the inspection of stolen goods was held to amount to the taking of possession of the goods so that a later receiving was not a receiving of stolen goods.

In R v Dolan (1855) 6 Cox CC 449; Dears CC 436, stolen brass castings were found by the owner in the pockets of the thief. The owner called a policeman. The policeman took the goods and wrapped them in a handkerchief. The owner, the policeman and the thief walked towards the shop of the accused. The policeman then returned the goods to the thief who sold them to the accused. Four of the five Judges of the Court for Crown Cases Reserved held that the goods had been restored to the possession of the owner or the custody of the policeman. In R v Schmidt (1866) LR 1 CCR 15, luggage, which the indictment laid as the property of a railway company, was stolen. One of the thieves forwarded by the railway of that company, portion of the stolen goods in a parcel addressed to the prisoner at her address in Brighton. The theft was discovered and soon after the parcel reached Brighton station, a policeman attached to the company opened it and satisfied himself that it contained portion of the stolen property. He tied it up again and gave it to the charge of a porter telling him not to part with it. When one of the thieves called for the parcel, the porter told him it was not there. The porter on the direction of the policeman then delivered the parcel to the prisoner. The majority of the Court for Crown Cases Reserved held that the goods had got back into the possession of the railway company. Erle, CJ dissented, holding that the company was the innocent agent of the thieves. Mellor, J agreed with Erle, CJ and said that the policeman merely looked at the goods and did not take possession of them. In R v Hancock and Baker (1878) 14 Cox CC 119, a manufacturer of cigars saw an employee take a cigar and put it in his pocket. The employer called a policeman who in the presence of the employer searched the employee, found the cigar in his pocket, took it, marked it and returned it to the employee. The policeman instructed the employee what to do and the employee went to the prisoner and gave it to him. It was held by the Court for Crown Cases Reserved that the goods had been restored to the possession of the employer. In R v Villensky, [1892] 2 QB 597, an employee of a carrier took a parcel of goods, which the indictment laid as the property of the carrier. He put on a new label so that it was addressed to the prisoners. The parcel was taken to the superintendent of the carrier who inspected it and directed that it be replaced where the dishonest employee had put it and be delivered to the address on its label. Two detectives went in the delivery van and after the prisoners had received the parcel, they were charged. At the trial, a submission that there was no case to the jury was overruled. The prisoners were convicted. The Court for Crown Cases Reserved held that there had been a resumption of possession and quashed the convictions. Pollock, B. said, at ([1892] 2 QB) pp. 599-600:

"The decisions in R v Dolan (1855) Dears 436 and R v Schmidt (1866) Law Rep 1 CC 15 are, in my judgment, founded on law and on solid good sense, and they should not be frittered away. It is, of course, frequently the case that when it is found that a person has stolen property he is watched; but the owner of the property, if he wishes to catch the receiver, does not resume possession of the stolen goods; here the owners have done so, and the result is that the conviction must be quashed."

Those were all cases where a case was stated after a jury had convicted the prisoners of receiving. The question for the Court was, in effect, whether on the evidence the jury were entitled to be satisfied beyond reasonable doubt that there had been no restoration of the goods to lawful possession. They were all cases which were significantly different from the present case of two respects. The first difference is that in each case the goods had previously been in the possession of the owner or the person in whom the indictment laid the property: see Pollock and Wright, Possession in the Common Law, p. 122. The stolen goods were inspected by the owner or his employee or by a policeman acting with the authority of the owner. In each case the Court (or a majority of the Court) held that the goods had been restored to the possession of the owner. In such a situation the inference is strong that the
owner, on finding that the goods are his goods which have been stolen, has the immediate intention of resuming exclusive control of them. In that situation no great degree of control needs to be asserted to amount to a resumption of possession. Pollock and Wright, supra, p. 44. The position in that situation may be contrasted with the position in R v Petch (1878) 14 Cox CC 116, where the prisoner trapped and took possession of rabbits on the property of another, thus reducing them to possession for the first time. He hid the dead rabbits in a bag in a hole on the property, intending to take them later. A gamekeeper of the property owner found the rabbits, marked them and replaced them in the hole. He and a policeman then kept watch and saw the prisoner take them. The prisoner was convicted of larceny on the basis that the rabbits had been in the possession of the property owner when the prisoner took them from the hole. The Bench of the Court for Crown Cases Reserved which on the same day decided R v Hancock and Baker (1878) 14 Cox CC 119, quashed the conviction, holding that the marking of the rabbits had not been for the purpose of reducing them into the possession of the property owner but for the purpose of identifying them: see also R v Boyce (1976) 15 SASR 40, at p. 45. The second difference is that in each of the cases mentioned, the stolen goods were in the course of transit to the receiver when discovered; they were taken out of the normal course of transit while they were picked up and inspected: then they were put back in transit to the receiver.

Another case was cited where, in dismissing an appeal against conviction, the Court of Criminal Appeal held, in effect, that on the evidence the jury were entitled to be satisfied beyond reasonable doubt that the goods has not been restored to the lawful possession of the police. In R v King, [1938] 2 All ER 662, police investigating the theft of a fur coat went to a flat and told a man, Burns, that they were making inquiries about some stolen property. Eventually he admitted the theft of the fur coat and produced it from a wardrobe done up in a parcel. While the policeman was in the act of examining the contents of the parcel, the telephone rang. The police then heard Burns arrange for the caller to come to the flat. The police then suspended their operations so that the arrangement might be carried out. Later, from a hiding place, the police observed the appellant ask Burns for the coat and receive it from him. The Court held that the coat had not been reduced into the possession of the owner or the police at the time when the appellant received it. The Court took the view that the coat had been within a few moments of being reduced into the possession of the police. The decision has been treated with reservation. Due to the great economy used in stating the facts of the case and the reasoning of the decision, it is difficult to know the precise basis of the decision. At least it is clear that it was the view of the Court that if a few more moments had passed before the telephone rang, the coat would have been reduced into the possession of the police. At that stage the police would have had in their hands the coat identified by admission and inspection as the coat, the theft of which they were investigating. There would have been no reason for their having any intention other than of retaining control of it. The decision must be treated as one, where, for reasons which are not apparent from the report, the police had not reached the stage of having possession of the coat.

The present case does not in our opinion fall within the principles of the cases relied on by Mr Weinberg. In inspecting the goods, Hall was not acting with the authority of the owners of the goods. He had no more interfered with the control of the goods by whoever possessed them before he entered the room, that an inquisitive housemaid would have, who satisfied her curiosity by examining the goods in the way that Hall did. The evidence indicates that Hall’s purpose in entering the unit was to find out whether there were stolen goods there. His examination of the goods did not go beyond what was necessary to ascertain this. It was obviously easier in the cases which have been discussed, for a person to be regarded as taking into possession a parcel or small items of stolen goods which could be physically controlled by holding them in the hands, than it would be in the case of the numerous items found in unit 9. The evidence does not indicate that Hall in fact took control of the goods or ordered affairs so that he would be able to do so. There is nothing in the evidence or the circumstances to indicate that he himself formed the intention to, or was asked by his superior officer to, take control of the goods. The evidence suggests that Hall never had any intention of taking control of them.
Mr Weinberg also argued that it was open to the jury to entertain reasonable doubt whether the police had not taken possession of the goods after Hall's inspection. He relied in particular on the decision of the Court of Appeal in Attorney-General's Reference (No. 1 of 1974), [1974] QB 744. The facts set out by the Court of Appeal, at p. 748, were these:

"A police constable found an unlocked, unattended car containing packages of new clothing which he suspected, and which in fact subsequently proved to be stolen. The officer removed the rotor arm from the vehicle to immobilize it, and kept observation. After about ten minutes, the accused appeared, got into the van and attempted to start the engine. When questioned by the officer he gave an implausible explanation, and was arrested."

The accused was charged with receiving stolen goods. At the close of the Crown case a submission was made that there was no case to answer. It was submitted that prior to the receiving, the stolen goods had, within the meaning of a section in the same terms as s90(3) of the Crimes Act, been restored to the lawful possession or custody of the police officer. The submission was upheld and the accused acquitted by direction. The Attorney-General referred a point of law to the Court of Appeal for its opinion under a procedure similar to that under s450A of the Crimes Act. The point of law referred was:

"Whether stolen goods are restored to lawful custody within the meaning of s24(3) of the Theft Act 1968 when a police officer, suspecting them to be stolen, examines and keeps observation on them with a view to tracing the thief or a handler": [1974] QB 744, at p. 749.

The Court considered a number of the common law authorities which we have discussed. Then with those authorities in the background it considered whether the conduct of the police officer amounted to taking possession of the goods in the back seat of the car. The Court said, at ([1974] QB) p. 753:

"In our judgment it depended primarily on the intentions of the police officer. If the police officer seeing these goods in the back of the car had made up his mind that he would take them into custody, that he would reduce them into his possession or control, take charge of them so that they could not be removed and so that he would have the disposal of them, then it would be a perfectly proper conclusion to say that he had taken possession of the goods. On the other hand, if the truth of the matter is that he was of an entirely open mind at that stage as to whether the goods were to be seized or not and was of an entirely open mind as to whether he should take possession of them or not, but merely stood by so that when the driver of the car appeared he could ask certain questions of that driver as to the nature of the goods and why they were there, then there is no reason whatever to suggest that he had taken the goods into his possession or control. It may be, of course, that he had both objects in mind. It is possible in a case like this that the police officer may have intended by removing the rotor arm both to prevent the car from being driven away and to enable him to assert control over the woollen goods as such. But if the jury came to the conclusion that the proper explanation of what had happened was that the police officer had not intended at that stage to reduce the goods into his possession or to assume the control of them, and at that stage was merely concerned to ensure that the driver, if he appeared, could not get away without answering questions, then in that case the proper conclusion of the jury would have been to the effect that the goods had not been reduced into the possession of the police and therefore a defence under s24(3) of the Theft Act 1968 would not be of use to this particular defendant."

The Court of Appeal expressed the opinion that the issue as to the restoration of the goods to the possession of the police officer should have been left to the jury with a direction along those lines.

That decision indicates that the common law principles provide a guide to the application of s90(3) of the Crimes Act. It also illustrates one facet of the application of the provision in the particular case. It is not of course to be taken as providing a formula for other cases. It is to be noted that the decision does not discuss the test for deciding whether there has been a restoration of possession, insofar as the fact or the power of control are concerned. It discusses only the test for ascertaining, on the facts of that case, whether the intention to control, which
is an inherent part of the fact of possession, was present. The Court of Appeal appears to have proceeded on the basis that on the facts of the case it was not possible to have reasonable doubt that the police officer controlled or had power to control the goods.

When Hall, having completed his inspection and returned the key, went to unit 30 and told the other police what he had seen, it is a fair inference that all three police then believed the goods to be stolen and could have believed them to have been stolen from the Feore brothers. It could be inferred that after the other police arrived they were told of what had occurred and were of a similar state of mind. The question whether the police took possession of the goods at this stage is to be considered on the background that the police, we have assumed, had a right to take possession of the goods. It would be open to infer that the police knew that they had that right.

From the time that Hall returned from the inspection, to the time when the police entered unit 9 and arrested the applicants, the police in fact exercised no control over the goods. They would be in possession however, if, while intending to exercise present exclusive control over the goods, they were, relatively to other persons, the ones most able to do so: see for example Williams v Douglas (1949) 78 CLR 521; Beard v Brebner, [1962] SASR 223. On the other hand, if they had the present physical capacity to take exclusive control of the goods but their intention was to do so only when certain future events occurred, that would not amount to possession: R v Boyce (1976) 15 SASR 40.

If the evidence disclosed any difference in intention with regard to the goods among the police the intention of the man in charge, Clarke (or perhaps Irwin), is likely to be the relevant one. However, no relevant difference in intention is disclosed.

At this stage the goods were locked in unit 9 and the police, who had no key to unit 9, were in units 30 and 10. Short of obtaining a key or breaking into unit 9 the police were not able to gain access to the goods or the room that the goods were in. It is to be inferred from the evidence that the persons who had booked unit 9 or whoever had the occupants’ key to the unit, had free access to the goods. Until the police entered the unit they did nothing to prevent the goods being removed from it. The evidence indicates that the interest of the police was not primarily in the goods but in the persons who might come to the goods. It was for this reason that the room was being watched. Page and Aarons went to unit 10, not to guard the goods, but to prevent the escape of persons who might come to the goods. The inference from the evidence is that the police all intended that if anyone entered unit 9, they would be given a time to settle, then the police would enter the unit and catch them with the goods, breaking the lock if necessary. There could be no doubt that their intention was that if they entered the unit in those circumstances, they would then arrest the persons and take possession of the goods. In due course they did that. In our opinion there is nothing in the evidence or the inferences which could arise from it, to suggest that the police were in possession of the stolen goods at any time before they arrested the applicants.

The learned trial Judge was correct in declining to leave to the jury the issue whether the goods had not been restored to the possession of the police. These applications must be dismissed.

Note that in this case the Police did not remove the property or direct a person in possession of the property to deal with it in any particular way. What remains unclear is the degree to which an interference with the property in these ways amounts to a restoration of the property to the possession of the owner.

In cases such as Schmidt, the prior possessor (and thus “owner” for the purposes of larceny) is the carrier and so any interference that returns control to the carrier would amount to such a restoration. However if the thief were to for example post stolen property and the police were to engage in surveillance of the package through the post, careful examination would need to be given to the degree of interference in the property’s passage through the postal service.
Receiving

As noted above, the law on receiving is based on a notion of possession of tangible goods. This is undoubtedly because stolen property could only refer to larcenable property. However the extended definitions of stolen and property may have the effect that it is possible for a chose in action to be received. However, if the approach taken to choses in action in Preddy’s case is followed in Australia then there may not be any taking or obtaining of the property. Whether one could extort or otherwise dispose of intangibles is also unclear. To date all of the case law has centred on tangible property.

Bearing that caveat in mind, the case law on receiving have generally insisted on proof of physical possession either directly or through an agent R v Pearson (Nos 1 and 2) (1908) 72 JP 449,451, 1 Cr App R 77,79. The crucial issue is however one of control over the property.

The complexity of the issues are illustrated in R v Wiley (1850) 2 Den 37, 169 ER 408. Straughan and Williamson were seen entering Wiley’s house, Straughan carrying a full sack. About 10 minutes later the three were seen walking to and entering a stable attached to Wiley’s house. When the police entered the stable they found the three standing around the sack which was on the ground and tied closed. When opened the sack contained stolen poultry. Wiley’s defence was that he “did not think he would have bought the hens”. The case was heard before twelve judges.

Martin B., Talfourd J, Platt B, Coleridge J. and Alderson B. held that there was no receiving as the possession was still in the thieves who had no intention to part with it until a bargain had been concluded. Coleridge J and Alderson B pointed out that while Wiley may have intended to have the possession he was interrupted before his plan could succeed. Coleridge J stated:

Now, I conceive that receiving imports possession, actual or constructive, and, therefore, that the verdict was wrong.

Patterson J. also found that there was no receiving. He emphasised control:

I don’t consider a manual possession or even a touch essential to a receiving. But it seems to me that there must be a control over the goods by the receiver, which there was not here.

Parke B held:

Receiving must mean a taking into possession actual or constructive, which I do not think there was here.... I think the possession of the receiver must be distinct from that of the thief; and that the mere receiving of a thief with stolen goods in his possession would not alone constitute a man of receiving.

Vaughan Williams J, Earle J and Lord Campbell CJ dissented on the grounds that there was joint possession between all three on the grounds of common purpose. Earle J went further and held that receiving could be proved by the depositing of the property in some place controlled by the defendant and with the defendant’s permission.

As later cases show, the legal expositions of both the majority and the minority are correct. The issue is one of interpreting the facts.

Joint possession

One of the issues that Wiley’s case was later held to have settled was that it was possible to be guilty of receiving if the possession was held jointly with the thief. This was despite the fact that joint possession was an argument used by the minority in Wiley.
In *Gleed* (1916) 12 Cr App R 32 the defendant was convicted of receiving a cask of 60 gallons of gin. The gin had been stolen by one of the distillers’ carmen and after a discussion with the carman, the defendant had followed him into the defendant’s garage yard and helped him to lower the cask to the ground. These actions alone were considered sufficient to prove joint possession.

In *Seiga* (1960) 45 Cr App R 26 the appellant was found sleeping in a van with another person, Atherton. It was 5.30am and the van was being driven without any of its lights on. The back of the van contained goods stolen that night from a grocer’s store and Seiga’s fingerprints were found on a bottle of orangeade which was in the front of the van. Seiga claimed that he knew nothing of the stolen goods and was in the van as he had merely accepted a lift from Atherton. Ashworth J held:

> Before the jury could convict him of receiving, they would have to be satisfied that he was in possession either personally or jointly with Atherton of the stolen goods, and the jury were rightly so directed. But the question whether he was in such possession was a matter which, in the circumstances of this case, called for careful direction. His acquittal on the first count [of breaking, entering and stealing] involved the consequence that he did not obtain possession at the time of the theft, and an important question for the jury was whether at some later stage he came into possession of the goods jointly with Atherton or possibly on his own...

In paragraph 2002 of the 34th edition of *Archbold*, it is stated: “Even if there is proof of a criminal intent to receive and a knowledge that the goods were stolen, if the exclusive possession still remains in the thief, a conviction for receiving cannot be sustained.” Various authorities are cited in support of this statement, including *Wiley* (1850) 2 Den 37 and *Berger* (1915) 11 Cr App R 72. … [Despite the quashing of the conviction in this case because of deficiencies in the summing up] this judgment is not to be taken as casting any doubt on the proposition that, if the evidence is sufficient, a person having joint possession with a thief may be convicted of receiving.

And see also *Fien* [1962] NSWR 134.

It is also possible for a person who is not involved in the initial receiving to become jointly liable if they gain a joint possession of the property. An overt action is however required. This is emphasised in the wonderfully eccentric case of *R v Dring* (1857) Dears & Bell 329, 169 ER 1072 the wife was convicted of receiving stolen potatoes and the husband charged with later adopting that receipt. But there was no evidence that the husband took any active part in the matter and therefore he was acquitted, although one of the judges did suggest that eating the potatoes may have been such evidence.

**Possession not custody**

In *R v Smith* ((1855) Dears 494, 169 ER 818) it was alleged that, in essence, an associate of the defendant had stolen the prosecutor’s watch and that in return for money the defendant had instructed the thief to place it onto the table. There was no evidence of the watch ever being in the defendant’s possession. The court held there was sufficient evidence to convict. But both Lord Campbell CJ and Earle J, who had been in dissent in *Wiley* relied on the decision in that case to emphasise that manual possession was unnecessary. Earle J held:

> In *Regina v Wiley*, Patteson J says, that a manual possession, or even a touch, is not essential to a receiving, but that there must be control over the goods by the receiver. Here the question of control was left to the jury, an they expressly found, that though the watch was in Holland’s’ hand or pocket, it was in the prisoner’s absolute control.

On the other hand, proof of control requires more than just evidence of manual possession of the property. In *Hobson v Impett* (1957) 41 Cr App R 138, the appellant was a
lodger with the family of a Porritt. He helped Porritt unload a sack of gold ingots from a sack that Porritt had stolen and take the ingots inside. The appellant was aware that the ingots were stolen. He subsequently helped load the ingots into a motor car and then travelled in that car as a passenger, when he was at times alone in the car, but he took no part in attempted sale of the ingots at the end of the journey. The Divisional Court held:

It is not the law that, if a man knows goods are stolen and puts his hands on them, that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom his is assisting, and the alleged receiver may be only picking up the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping. What the Appeal Committee might have found on these facts, and could obviously have found, was that there was a joint possession here and that both Porritt and this appellant were receiving the goods. But the court can only come to the conclusion that the Appeal Committee, by the way in which they have stated the Case, mean: “We found he received the goods because we had directed ourselves in this way, that the mere manual possession in these circumstance was sufficient to be a felonious possession”. That is far too wide. It cannot be the law that merely because a man picks up goods which he knows are stolen he is receiving the goods.

See also Frost and Hale (1964) 48 Cr App R 238.

Not merely negotiating on thieves’ behalf

Because of the need to establish possession or control an attempt to dispose of stolen property which is in someone else’s possession does not constitute receiving. In R v Watson [1916] 2 KB 385, Watson approached a jeweller on the behalf of thieves with the intention of selling jewellery stolen by the thieves. The Court of Criminal Appeal held:

[The jury] found that he was a negotiator for disposing of the jewellery with the full knowledge that the goods were stolen, but in our view it cannot be said that that amounts to a finding that he was in possession or control of the goods. If he was merely directing the other two men to a place where he thought they might conveniently dispose of the stolen property, or was merely acting in the capacity of a messenger or a conduit-pope between the person he thought might become a purchaser and the receivers, it cannot be said that that finding means that he was either in possession or control of the goods. Being in possession or control of the goods is necessary in order to constitute the offence with which he was charged. … Notwithstanding that here is the clearest evidence that the appellant had full knowledge that the other two persons were in possession of stolen property and that he was assisting them to dispose of it, it is impossible to support the conviction.

Control and constructive possession

The essence of the insistence on possession is the ability to control the property. It is therefore possible to have that control without the need for actual physical possession. Such constructive possession through other persons as agents is often a hallmark of receiving.

In R v Smith ((1855) Dears 494, 169 ER 818) it was alleged that in essence an associate of the defendant had stolen the prosecutors watch and that in return for money the defendant had instructed the thief to place it onto the table. There was no evidence of the watch ever being in the defendant’s possession. The court held there was sufficient evidence to convict. But both Lord Campbell CJ and Earle J, who had been in dissent in Wiley relied on the decision in that case to emphasise that manual possession was unnecessary. Earle J held:

In Regina v Wiley, Patteson J says, that a manual possession, or even a touch, is not essential to a receiving, but that there must be control over the goods by the receiver. Here the
question of control was left to the jury, and they expressly found, that though the watch was in Hollands’ hand or pocket, it was in the prisoner’s absolute control.

Similarly in *R v Miller and Connors* (1854) 6 Cox CC 353 Miller was the proprietress of a public house. When a thief entered the shop with stolen cotton, Miller instructed her servant to take the cotton and pawn it. The money was then handed by the servant to the thief. At no time did Miller touch the money or the cotton. The court held:

> It appears to us that it was virtually a receiving by Mary Miller, inasmuch as her servant, by her order and direction, received the goods from the thief, took them to the pawn office, and brought back the money to the thief. This, in our opinion was virtually as much a receiving of stolen goods as if her own hand, and not that of her servant, had received them.

Patteson J’s judgment in *Wiley* which emphasised control was again stated to be the leading statement of the law in the more modern case of *Berger* (1915) 11 Cr App R 72, where the mere fact that goods had been left by thieves in a shop occupied by the defendant in circumstances where were renting the room above was seen to raise:

> “… a very fine point whether or not there was sufficient evidence against [the owner of the shop] of having received these goods well knowing them to have been stolen … The jury should have been told that ... they must be satisfied that the goods were under the control of the prisoner.”

**Dropping off property**

As is by now clear the courts have endeavoured to make the concept of receiving a broad and flexible one. The extremity of this is shown in the acceptance by the courts that the leaving of stolen property for others can sometimes constitute the receiving by that person even though they are not present at the time.

In *R v Cavendish* [1961] 2 All ER 859 Lisle, a driver for an oil heating company, delivered less barrels of oil to a customer than had been ordered and then later dropped off seven barrels in the defendant’s yard. Lisle took seven empty barrels from the yard as replacements. The defendant was away at the time and on his return denied any knowledge of what had occurred. The Court of Appeal upheld the conviction of receiving:

> The sole question, as it seems to this court, is whether a case was made out at the end of the prosecution case which called for an answer. Certain propositions are quite clear. It is quite clear, without referring to authority, that for a man to be found to have possession, actual or constructive, of goods, something more must be proved than that the goods have been found on his premises. It must be shown either, if he was absent, that on his return he has become aware of them and exercised some control over them or—and this was the case sought to be made here—that the goods had come, albeit in his absence, at his invitation or by arrangement. It is also clear that a man cannot be convicted of receiving goods of which delivery has been taken by his servant unless there is evidence that he, the employer, had given the servant authority or instructions to take the goods.

> Counsel for the appellant, to whom the court is indebted for his argument, has contended in effect that there was nothing more here than the fact that the goods were found on the appellant’s premises in his absence and that delivery of them had been taken by a servant. The court feel that this is undoubtedly rather a border-line case, but they have come to the clear conclusion that there was evidence in this case, and that the deputy chairman was right in overruling the submission. Perhaps the matter can be put shortly by asking the rhetorical question—why did Lisle deliver these goods to this yard and take away seven empties? He was undoubtedly the thief, and one has only to think of the answer to that question to realise that there was certainly some evidence which made it more probable than not that the delivery was by arrangement with this appellant. On that short ground the court is satisfied that in this case the deputy chairman was right in overruling the submission.
The time of receiving

Allied to the problems of proving receiving when property has been left for the defendant is the need to prove that there was knowledge that the goods were stolen at the time of the receiving. One strategy that the courts have developed to make this defence less available is to take a transactional approach to the concept of receiving. On this approach the defendant is not taken to have received the property until the transaction that passes the possession is complete. The relevant time for the knowledge of the defendant is therefore at the conclusion of the transaction, not its inception.

In *R v Woodward* (1862) Le & Ca 122, 169 ER 1329 the thief had delivered goods to the defendant’s wife for which she had paid sixpence on account. However the actual price to be paid was not determined until a later meeting with the defendant. The conviction was upheld, Blackburn J holding:

The thief left the property with the wife ... but there was no guilty knowledge in the husband then; but as soon as he met the thief, having acquired a guilty knowledge, he approved of and ratified the receipt. That would amount to a receipt with a guilty knowledge. So if a thief were to leave stolen goods with a pawnbroker’s apprentice in the absence of the master, and the pawnbroker on his return, being told of the circumstances, and knowing that the goods were stolen, were to say “It is all right; put them away,” no one could doubt that he would be rightly convicted of receiving stolen property.

Wilde B distinguished *R v Dring* on the basis that there the ratification had been passive but in this case it was active. In *Dring*, the husband knew of the potatoes but had not eaten them.

In *Queen v Curlija* [1967] SASR 1 the defendant lived in the Andamooka Opal Fields. One morning at between 3 am and 4 am an acquaintance arrived at Curlija’s house, asked for a beer and said he had money for Curlija. Money was then thrown on the floor, money which had just been stolen from another house. Curlija claimed that he put the money on the table and returned to bed. Later at 6am he got up and put the money in a wardrobe. Later that morning he claimed to have realised that the money was stolen and later still hid it in a disused mine shaft. The Court of Appeal held that at all times Curlija had *de facto* control of the property. The only issue was the time at which he had made up his mind to exercise control. The court held:

As Erle CJ said in *R v Woodward*: “Receipt is a complex term: and what constitutes it has been the subject of much argument” but we think that the practical common sense of the matter is that, for this purpose, the time of receipt is not a moment of time, but the period occupied by a transaction. In the present case, if the appellant’s evidence is accepted, the transaction began when Stic threw the bundle of notes on the floor, and ended when the appellant made up his mind to keep them, whenever that was. But on his own showing there was nothing in the appellant’s mind at 6am that had not been in it at 4am.

However this statement of principle was refined in *Murphy v Porter* (1984) 12 A Crim R by Jacobs J. In that case a person called Moran attempted to sell a masonry saw to the appellant. Moran wanted $500 for it but the appellant was not willing to spend that much. Moran, who was leaving for Queensland, offered to leave it with the appellant for his use in Moran’s absence and a decision as to whether the appellant would purchase it could be made on Moran’s return. The saw was delivered to the appellant’s house in his absence, and without his knowledge, where it was accepted on his behalf by someone else. The appellant only used the saw once, and the appellant admitted that he suspected the saw did not belong to Moran as it was worth much more than $500. He unsuccessfully attempted to contact Moran. Jacobs J held:
"Receipt" is a complex term and what constitutes it has been the subject of much argument (per Erie C.J. in Woodward (1862) Le. & Ca. 122 at 125; 169 E.R. 1329 at 1331). No doubt the notion of exercising control may in many cases be a useful test. Such a case was Curlija [1967] S.A.S.R. 1 on which the learned special magistrate relied. But that was a very different factual situation...

But Napier C.J., who presided over the court in Curlija has himself said on many occasions that the decision in every case must be read "secundum subjectam materiam", and I do not think it necessarily follows from the decision in Curlija that one must in every case find some overt act of control in order to constitute receipt of the goods. No doubt that will be so in many cases, but it seems to me that the critical question in the present case was whether, having regard to the arrangement that the appellant had made with Moran - namely to deliver a specific piece of equipment, a masonry saw, to the home of the appellant with the intention that the appellant should thereafter have the use of it and the option of purchasing it - the delivery itself pursuant to that arrangement was sufficient to constitute "a receipt" of the machine by the appellant and place it under his control. The arrangement was not in respect of unknown or unidentified goods, but in respect of a specified piece of equipment, a masonry diamond-cutting saw. There was nothing in the arrangement to suggest that receipt by delivery was incomplete, or that there was any contingency, or condition of inspection or approval or anything else, to suggest that the transaction was not complete or that the saw was not received and under the control of the appellant, from the time it was delivered.

That view of the matter was urged upon the learned special magistrate, but he appears to have rejected it without discussion, in preference to the dicta in Curlija [1967] S.A.S.R. 1. There are, however, other cases which clearly support the case for the appellant. The decision in Johnson (1911) 6 Cr.App.R. 218 lays down the general principle that merely to retain possession of stolen property, which was originally innocently received, when knowledge was obtained that it had in fact been stolen, is not receiving stolen property with guilty knowledge. Grantham J., who delivered the judgment of the court, in the course of his reasons said at 220:

"The innocent receipt of a chattel and a subsequent dishonest appropriation of it after knowledge that it is stolen do not constitute the crime of receiving unless something takes place after the guilty knowledge which can be regarded either as a fresh act of receiving or as completing the original receiving if the latter was in fact incomplete at the time. " (Emphasis supplied.)

There is nothing in the present case to suggest that there was a fresh act of receiving, or that the original receipt, including the right to control, was incomplete at the time of delivery. The principle as stated by Grantham J. was applied in Balogh (1955) 72 W.N. (N.S.W.) 108 in which the arrangements for delivery bore some similarity to the present case. A suggestion was made to the accused in that case that he should purchase certain wool, he being engaged in the business of buying and selling wool, which was to consist of what were called "job lots" purchased at various places in the country and brought down to Sydney, without going through the ordinary wool sales. There was nothing unusual or extraordinary in such a transaction. The arrangement was that instead of submitting samples the wool was to be sent to a designated place, a named wool store. The accused was then to go to the store after the wool had been delivered there, and having inspected the wool a price was to be fixed which was to be a fair market price for the wool of that type and quality whatever that might be. The wool was in fact delivered to the named store and later the same day the accused went to the store. As soon as he saw the wool that had been delivered he found that it had been dumped and packaged and was obviously marked for export, bearing as it did on each package the name of a vessel by which it was to be carried. The accused at once became apprised of the fact that this wool had been dishonestly come by, but he subsequently agreed to buy it notwithstanding his then guilty knowledge. Street C.J., speaking for the Court of Criminal Appeal, and after referring to Johnson said at 109:

"I find it impossible to find in this case any distinguishing facts which would take the first count out of that general rule. It is true that Grantham J. refers to guilty knowledge at the time of some fresh act of receiving, but again in the present case the evidence discloses, so
far as my understanding of it is concerned, nothing which could be regarded as a fresh act of receiving. There was a fresh attitude of mind on the evidence, the first attitude being innocent, the second attitude being a nefarious intent, but the original arrangement was to receive wool and to receive it innocently. There is no question of anything illicit in the original contemplated transaction. Wool was in fact received and only after its receipt did the applicant obtain guilty knowledge of the origin of that wool and the fact that it was stolen wool. But that is not sufficient to justify a conviction of receiving stolen property knowing the same to have been stolen. The authorities are all the other way and I think that this count was one which should not have been left to the jury, that there was no evidence upon which the jury could find that the applicant had any guilty knowledge at the time of receipt, and that that conviction cannot stand and must be quashed."

More recently, the principle has been restated by Lord Parker C.J. in Cavendish [1961] 1 W.L.R. 1083 although in a rather different context, for there the question was whether there was evidence, on the Crown case, that the accused had received goods into his possession. [His Honour quoted the passage from Cavendish extracted above] ...

That case, of course, decides no more than this: that when there is a prior specific arrangement for the delivery of specific goods to a person’s premises such delivery may constitute receipt and possession of those goods by the person to whose premises they are so delivered. Whether it does so must depend upon the particular facts in each case, but the principle is obviously subject to some limitation. It cannot, for example, be extended in such a way as would open a door through which thieves could dispose of stolen property simply by making a standing arrangement to deliver unspecified property to named premises from time to time. At the very least, before holding that a prearranged delivery of goods to named premises was a receipt of those goods for the purpose of the offence of receiving, one would expect to find a specific arrangement for such delivery of specific goods, the absence of any evidence of "receipt" after the delivery, and the absence of any evidence in the arrangement itself to show that delivery itself was not sufficient to pass possession and control of the goods. Indeed, in a case of the kind mentioned, in which an arrangement is made with known thieves to deliver unspecified stolen property to named premises from time to time, the guilty knowledge of the receiver would attach to the goods from the very moment of delivery (but see, contra, Merriman [1907] V.L.R.1 which was expressly disapproved by Lord Goddard C.J. speaking for Court of Criminal Appeal, in Fallows (1948) 45 T.L.R. 93). In the end, each case will depend, as usual, upon its own facts and the facts in issue, and in particular the facts touching the alleged arrangement for delivery of the goods.

Applying the proper legal tests to the evidence in the present case, however, I do not think it can be said that this appellant received this particular masonry saw knowing it to have been stolen. Accepting the adverse finding of the learned special magistrate, the appellant did not know that the saw "must have been stolen" until after he received it. I therefore allow the appeal, quash the conviction, and dismiss the information.

Disposing

There do not appear to be any reported cases on the disposal of property under these sections. It would appear however that it would not be possible to dispose of property unless it was already in one’s possession or control. Thus in most instances any attempt to dispose of stolen property could be charged as receiving. A charge of disposing might however be preferred if the defence were to raise a defence of an innocent receiving and only a subsequent intent to fraudulently convert.

Knowing that the property was stolen

The third essential element of receiving is that the defendant must know that the property was stolen. It is in this element that the criminality arises. From the earliest reports the courts have held that for this offence, knowledge is based on belief.
In *R v White* (1859) 1 F & F 665, 175 ER 189, White had been charged with “receiving lead, the property of the Queen, he will knowing it to have been stolen. Bramwell B instructed the jury:

The knowledge charged in this indictment need not be such knowledge as would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances were such, accompanying the transaction, as to make the prisoner believe that it had been stolen.

There was some suggestion in Australian judgments that the lack of reference to belief in the words of the offence meant that application of *White* was misconceived (see eg *R v Fallon* (1981), 28 SASR 394; *Anderson v Lynch* (1982) 17 NTR 21) However the Court of Criminal Appeal in *R v Raad* [1983] 3 NSWLR 344 (extracted below) has reaffirmed the concept of belief as the mental element of receiving.

**Actual belief, not that of the reasonable person**

In a case where the knowledge or belief of the defendant is in issue, this will be because the defendant denies the requisite knowledge or belief. In such cases the jury must decide whether to belief the defendant and in so doing will most likely begin by an examination of what the circumstances would have suggested to the reasonable person. It is impermissible however, for the jury to make their decision on that basis.

In *R v Parker* [1974] 1 NSWLR 14 the Court of Criminal Appeal held:

That portion of the judge’s charge to the jury which introduces the question of the reasonable man is erroneous, as, in the crime of receiving, it is the guilty knowledge of the accused which constitutes the offence, and the accused is not to be convicted because the hypothetical reasonable man, having the facts and circumstances before him and the knowledge that the accused had of all the circumstances, would have come to the conclusion that they were stolen; see Russell on Crime, 12th ed., p. 1144: “Knowledge that the goods were stolen. The prosecution must prove that the prisoner, at the time when he first received the goods, knew that they were stolen”. For the proposition is cited *R. v. Snelling*(1); *R. v. Fallows*(2).

**Belief not suspicion**

Such a belief is however greater than suspicion. In *R v Raad*, Raad had claimed he had a stolen Kombi van from a man named “Frank”, the circumstances of which seemed improbable. He appealed his conviction. Street CJ held:

The law, in my view, has remained clear since at least 1859. The case of *R v White* does not appear ever to have been called in question. There has of course been legislative change in the enunciation of offences of receiving since then. In particular in 1968 the English legislation was amended by inserting the alternative of belief along with knowledge in the relevant statutory provision. The New South Wales provision still stands in the form in which it has existed for many years.

As I understand the purport of *R v White*, Bramwell B was putting to the jury a commonsense meaning attaching to the word “knowing”. It was a meaning which involves a state of belief such as to result in the believer accepting the truth of that which he believes. It is a state of mind of a far greater confidence in the truth of that which is believed than the state of mind which could be described more accurately as mere suspicion. The law has been consistently accepted since *R v White* as involving an actual belief of this degree of confidence in the truth of that which is believed. Belief of that degree is equivalent to knowledge under the section.
In the present case, her Honour told the jury that the Crown has to prove actual knowledge or belief. If it could be seen that the jury might have thought that “belief” in this particular direction was wide enough to include mere suspicion, then the matter would stand very differently. Her Honour has, however, in the latter part of the passage which I have quoted, distinguished the state of mind of suspicion as falling short of belief. Her Honour told the jury expressly that the jury could take into account suspicion and deliberate closing of the eyes as matters to be weighed in determining the final issue, that is to say whether the appellant believed it to have been stolen. This plainly enough conveyed to the jury the necessity of a state of mind tantamount to acceptance of the truth of the stolen character of the van.

For those reasons, I am not persuaded that the learned judge erred in the manner in which she left this case to the jury. She had made it abundantly plain that the jury must direct its mind to the actual knowledge or belief of the appellant. I am satisfied that she exposed to the jury the necessity of distinguishing in their thought processes between a mere suspicion on the one hand and on the other hand knowledge in the sense of acceptance of the truth of the subject matter of belief.

In the same case Lee J noted:

Nor do I see that there is any ambiguity or uncertainty in the use of the word “belief” in the context of knowledge, to which the section is referring. A “belief” in the sense of acceptance by the mind of a fact, is plainly distinguishable from suspicion. But I cannot see why in a charge of receiving “knowledge” should not include such belief, and indeed, as Bramwell B stated, if it does not include such belief, it is difficult to see how the offence of receiving could be regarded as having any practical scope in the criminal justice system.

An example of evidence that might give rise to suspicion only was considered in R v Snelling (1942) 28 Cr App R 117. In that case the appellant, during a period of food rationing, had bought food on a person she knew was the storekeeper at the Infectious Diseases Hospital. The food was in fact stolen. The court held:

The main argument for the Crown is that the relative positions of the storekeeper Mabel Kena and the appellant must have suggested to the appellant that these goods were stolen from the hospital, and secondly that, as these goods were being supplied, at any rate so far as the cheese is concerned, in quantities in excess of what the Rationing Order allows, that too, should have engendered in her mind some suspicion. So far as the second ground is concerned, it does not appear to this Court that a suspicion that goods have been supplied in breach of a rationing order need suggest a further suspicion that they have been stolen. As regards the first argument, this was a case of a storekeeper of a hospital selling goods to someone else. Might not the appellant well have supposed, even if she knew that these article had originally belonged t the hospital, that the storekeeper had authority to dispose of surplus stores at her discretion, if she received proper payment for them? There seems to be nothing absurd in that supposition.

More recently the meaning of the requirement of knowledge was summarised by Gleeson CJ in R v Schipanski (1989) 17 NSWLR 618. This was another case of an improbable purchase – this time of a boat from an unknown person on the side of the road. His Honour stated:

Before coming to the directions which his Honour gave the jury, it is convenient to summarise the relevant principles of law, which have been the subject of substantial agreement on this appeal. It is well-settled that, although the relevant provisions of the Crimes Act 1900 speak in terms of a receiving of property by a person who knows the property to have been stolen, the reference to knowledge includes an actual belief by the accused that the property was stolen: R v Raad [1983] 3 NSWLR 344. Whilst the mere suspicion that the goods have been stolen is not sufficient to constitute the requisite mental element, nevertheless it will rarely be the case that a person found guilty of this offence will have actually seen the goods being stolen.
or will have had made to him, by the thief, an admission concerning the theft. It suffices to constitute knowledge, within the meaning of the statutory provision, that the receiver of the goods entertains a belief that the goods have been stolen. It is also established that a state of mind involving suspicion that the goods have been stolen is relevant to the question whether the accused knew or believed that the goods had been stolen, in that suspicion, coupled with a deliberate or wilful failure to make further inquiries as to the provenance of the goods may, depending upon the circumstances, provide evidence from which a jury may conclude that there was actual knowledge or actual belief that the goods were stolen.

**Wilful blindness**

The question of whether a jury can be instructed that the requisite belief can be proved if the jury are satisfied that the defendant was willfully blind to the provenance of the property has led to a number of appeals in recent years. The problems with such a direction were explained by Gleeson CJ in *Schipanski*:

References, however, to “wilful blindness”, are capable of giving rise to confusion and error. The ultimate question of fact to be determined is a question as to the subjective state of mind of the accused person. It is a question as to his personal state of knowledge or belief. The existence of suspicion or suspicious circumstances and the deliberate failure to make inquiries may, depending on the circumstances, be of evidentiary significance in relation to that ultimate question. However, a wilful shutting of the eyes to avoid suspicions hardening into actual belief is insufficient if that is all there is to it: *R v Fallon* (1981) 28 SASR 394; 4 A Crim R 411 and *R v Wilton* (Court of Criminal Appeal, 30 July 1987, unreported).

In *Pereira v Director of Public Prosecutions* (1989) 63 ALJR 1; 82 ALR 217; 35 A Crim R 382, the High Court, in a different context, warned against the error to which reference has been made. Their Honours said (at 3; 219-220; 385):

> “Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or a necessary element of the guilty mind required for the offence, it may be established as a matter of inference from the circumstances surrounding the commission of the alleged offence. However, three matters should be noted. First in such cases the question remains one of actual knowledge. ... It is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge. Secondly, the question is that of the knowledge of the accused and not that which might be postulated of a hypothetical person in the position of the accused, although, of course, that may not be an irrelevant consideration. Finally, where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer’s shorthand, be referred to as wilful blindness. Where that expression is used, care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt.”

These concerns were reiterated in *R v Dykyj* (1993) 29 NSWLR 672 a case involving the purchase of a forklift and tools. Gleeson CJ returned to his theme from *Schipanski*:

Juries ought to be told, where it is otherwise appropriate, that they may have regard to what an ordinary reasonable person in the position of the accused would have believed in the circumstances, but they must clearly understand that they can only do that for the purpose of helping them to arrive at a conclusion on the critical issue which is an issue as to what this particular accused in fact believed on this particular occasion.

I note that Watson & Purnell, Criminal Law in New South Wales, vol 1, par [702] at 258 contains the following statement:
“Belief without actual knowledge is sufficient. The knowledge need not be such as would be acquired if the accused had actually seen the property stolen: it is sufficient if the jury think that the circumstances accompanying the transaction were such as to make the accused believe that the property was stolen. Mere negligence (or even recklessness) in not realizing that the property was stolen will not create guilt: the accused must have wilfully closed his eyes to facts from which ordinary men would realize clearly that the property was stolen.”

The case of R v Havard (1914) 11 Cr App R 2 is cited as authority for that proposition. That case is authority for the first part of the proposition but not the second. The judgment in that case is extremely brief and includes the following (at 3):

“… the proper direction is that the jury must take into consideration all the circumstances in which the goods were received, and must say if the appellant, at the time when he received the goods, knew that they had been stolen.”

In fairness to the authors of the text to which I have just referred, I should however point out that the passage I have quoted followed immediately by the following paragraph (par [702] at 258):

“It is the actual knowledge or wilfulness of the accused which constitutes this element of the offence, not the test that might be applied to the hypothetical reasonable man.”

There is, however, if I may respectfully say so, an element of ambiguity even in that statement. It depends upon the meaning of “wilfulness”. I repeat that references to wilful blindness or wilful closing of eyes and to the reaction or state of mind of a hypothetical reasonable person have a legitimate place in directions given to a jury about the subject of guilty knowledge in connection with a charge of receiving, provided always that it is made clear that the relevance of such considerations is by way of the light they throw upon the question which has to be decided, that is to say, the question of the actual state of mind of the accused person. In other words, the danger to be avoided in any instructions which make reference to such concepts is the danger of suggesting to the jury that it is open to them to apply an objective as distinct from a subjective test of knowledge, and to treat a conclusion as to what a reasonable person would have thought as sufficient.

The weight of evidence needed to permit a finding of belief

While the courts reiterate that judges must be very careful to emphasise in their summing up the need to prove a defendant’s actual belief that the property was stolen, the amount of evidence such a finding can be based upon can be quite weak.

In R v Sbarra (1918) 13 Cr App R 118 the appellant was seen to be receiving the goods in the middle of the night through a side door. In relation to belief that the goods were stolen, and whether proof of such a belief could also prove the goods to be in fact stolen, the court held:

The Court desires to express the law in the following terms. The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft. We have come to the conclusion that the circumstances here were enough to prove that the goods had been stolen.

This was approved in R v Petrie (1946) 47 SR (NSW) 20.

In R v Fushillo (1940) 27 Cr App R 193 the conviction of the appellant was upheld even though the only evidence was Fushillo’s own admission at the time of arrest, namely:

“My God, I’m a bloody fool. Don’t bring the old lady into this, she knows nothing about it. ...I don’t know why I took it in. I’m a bloody fool. This means going away... Be satisfied and take
it away, but don’t take me... Can’t we do something about this? For the old lady’s sake take the stuff away and don’t charge me”

Nothing else was said by the defendant after arrest or at trial and no other evidence was led. Fushillo’s admissions were considered by the court to be “ample evidence”. See also R v Gibbons [1971] VR 79.

***The specificity of the knowledge***

There is English authority that there is no need to prove knowledge of the actual offence by which the property was stolen. However in that decision, DPP v Neiser [1958] 3 All ER 662, the court held that the defendant had to have a belief that the property had been stolen in such a way that amounted to either a felony or misdemeanour, depending on the receiving offence charged. Serious indictable offence and minor indictable offence have now replaced the use of the terms felony and misdemeanour in ss 188 and 189.

At common law the offence of receiving was a misdemeanour and was limited to cases of property which was stolen. There is ample authority (See, eg, R v Montague (1839), 3 JP 149, and R v Sbarra (1918), 87 LJKB 1003, and see, generally, 15 Digest (Repl) 1142–1144, 11,502–11,523) that in cases of stolen goods, which are by far the most frequent subject of receiving charges, it is unnecessary to prove detailed knowledge by the receiver of the circumstances of the original taking and this was so not only at common law but also under the Larceny Act, 1861, and is still so under the present sub-section. The Larceny Act, 1861, created by s 91 the offence of felonious receiving, limiting it to cases of property which had been and was known by the receiver to have been obtained (whether by stealing or not) in circumstances which amounted to felony at common law or under that Act. By a separate section, s 95, a new misdemeanour was created of receiving property which had been and was known by the receiver to have been obtained (whether by stealing or not) in circumstances which amounted to misdemeanour under the Act of 1861. Under the law as it stood between 1861 and 1916 there were thus two separate statutory offences chargeable under different sections of the Act of 1861 and a common law misdemeanour of receiving stolen property the stealing of which was not a felony even under the Act of 1861. It is, we think, plain from the wording of ss 91 and 95 of the Act of 1861, first, that to constitute the offence of felonious receiving it was necessary to show that the receiver knew that the property received had been feloniously obtained, and that to constitute the statutory misdemeanour of receiving that the receiver knew that the property had been obtained in circumstances amounting to a misdemeanour, and secondly, that it was sufficient in either case to show that he knew that the property came within the general category of property with which the respective sections dealt; it was not necessary to show that he knew by what specific felony or by what specific misdemeanour the property had been obtained. We think that sub-s (1) of s 33 of the Larceny Act, 1916, did no more than to re-enact in a single section provisions corresponding to those of ss 91 and 95 of the Larceny Act, 1861.

We are therefore of opinion that where property has been obtained in circumstances which amount to misdemeanour it is still sufficient under s 33(1) of the Larceny Act, 1916, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained in circumstances which do in law amount to misdemeanour and that it is unnecessary to prove that he knew that the property was obtained in circumstances which amount in law to the specific misdemeanour by which they were in fact obtained. On the other hand it is not sufficient merely to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell which we feel compelled to hold is an essential ingredient of the offence charged.
Similarly, where property has been stolen or obtained in circumstances which amount to felony it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained in circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained in circumstances which amount in law to the specific felony by which it was in fact obtained. But although this is sufficient to establish an offence of felonious receiving under s 33(1) of the Larceny Act, 1916, more specific knowledge is required where property has in fact been stolen and it is desired for the purpose of proving guilt to adduce evidence of guilty knowledge of the receiver of the kind referred to in s 43(1) of the Act of 1916. This evidence (that is of other stolen property having previously been found in his possession and of previous convictions for dishonesty) is admissible only in the cases where property has been stolen and the receiver knows that it has been stolen. To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way even in circumstances which amount to felony.

It follows that in the present case the justices were right in holding as a matter of law that it was not sufficient to show that the accused knew that the goods were obtained by some dishonest means. The prosecution must go further and adduce evidence to show that he knew that they were obtained in circumstances which do in law amount to misdemeanour as opposed to felony. The justices were wrong, however, in supposing that it was necessary for the prosecution to adduce evidence to show that the accused knew the precise nature of the misdemeanour by which the property was in fact obtained.

The decision has not been applied to the NSW offences, and it is possible that the different wording of the NSW offences would not necessitate such a degree of knowledge.

**Recent possession**

In circumstances where there is not direct evidence of the accused having stolen or received the goods, the jury are entitled to find the accused guilty on the basis of circumstantial evidence. This is the so-called “rule” of recent possession. Recent possession is available to prove both larceny and receiving. The concept was explained by Griffith C.J. in *Trainer v. The King* (1906) 4 C.L.R. 126 at 132 - 133:

> In any indictment for larceny you must prove first of all that the property has been stolen, and you must then prove that the person who stole it was the prisoner, or that it was stolen by some other person, and received by the prisoner. It is a well known rule that recent possession of stolen property is evidence, either that the person in possession of it stole the property, or received it knowing it to have been stolen, according to the circumstances of the case. Prima facie the presumption is that he stole it himself but if the circumstances are such as to show it to be impossible that he stole it may be inferred that he received it knowing that someone else had stolen it. This is only an illustration of the rule as to circumstantial evidence.

More recently, in *Bruce v The Queen* (1987) 61 ALJR 603, at 603, the High Court said:

> Where an accused person is in possession of property which is recently stolen, the jury is entitled to infer as a matter of fact, in the absence of any reasonable explanation, guilty knowledge on the part of the accused. Such an inference will be drawn from the unexplained fact of possession of such property and not from any admission of guilt arising from the failure to proffer an explanation. It is the possession of recently stolen property in the absence of explanation or explanatory circumstances, which enables the inference to be drawn. Thus the absence of any reasonable explanation must not itself be explicable in a manner consistent with innocence.

The accused must have had an opportunity to give an explanation in circumstances where, if he is innocent, an explanation might reasonably be expected. Those circumstances do not encompass the situation where an accused, having been duly cautioned, declines to answer questions by the police in the exercise of his right to do so. On the other hand, the
fact that the caution was given or that the right to silence was asserted or exercised does not itself provide an explanation of the recently stolen goods or necessarily negate the existence of circumstances of unexplained possession of such goods where such circumstances otherwise exist.

But as O’Connor J. pointed out in Trainer at 139-4:

All the authorities lay down the law in the same way, namely, that the first necessity in applying the law of presumption from recent possession is that there must be evidence to go to the jury that the goods were stolen. Frequently the evidence is that the owner has missed the goods under circumstances leading fairly to the inference that they had been stolen. Sometimes the evidence is more direct. There is always some evidence of that kind given. There are cases undoubtedly in which it is impossible to name in the indictment the owner of the goods, although it is perfectly clear that they have been stolen from some person; but that does not alter the law with respect to the necessity of the proof of corpus delicti, (that is that the goods have been stolen) in applying the law of recent possession.

Recency

The period of time that is available as “recent” in an argument based on recent possession will vary according to the property in question. This was explained by Wood CJ at CL in R v Sinanovic [2000] NSWCCA 395. In March 1992 Sinanovic pawned a ring as security for a loan of $300. The ring was never redeemed. The Crown alleged that the ring was worth $10,000 and had been stolen in August 1991. Sinanovic claimed he had bought the ring from a jeweller for $1,500. The Crown relied on recent possession to prove guilty knowledge. His Honour held:

Counsel appearing for the Appellant in this Court submitted that, having regard to the nature of the item the subject of the charge, seven months was just far too long for an inference of guilt to be drawn even if one could conclude that the Appellant had not provided any, or any acceptable, explanation for his possession.

[His Honour referred to Bruce v R ]

In R v Smail (unreported CCA 15 August 1986) Lee J, with the concurrence of the other members of this Court said:-

“The doctrine is concerned with possession of stolen property and at its base is the proposition that possession of stolen property of itself can, in certain circumstances, point the finger of suspicion to the accused, in the sense that it suggests that he may be the thief or the receiver...

In ...cases where the property...is of a kind that it would be expected that the accused would be able to account for his possession, the degree of recency need not be nearly as close to the theft as in the case (of a bank note). There may, however, be a point of time where the relationship in time between the theft and the possession is so remote that the law recognises that it would be unreasonable to require the accused to account for his possession and the doctrine has no application.

That understanding of the doctrine of recent possession which I have set out accords with the approach which was taken in The King v McCaffery (1911) VLR 92 by the Victorian Full Court. At p95, Their Honours said:-

“That term, however, is a relative term. There is no fixed period of time which in all cases will constitute recent possession. The period is relative to the subject matter which is found in the Prisoner’s possession... For example, in the case of a common place thing, like a piece of money, which, even if it were marked, might still pass in the ordinary course of exchange unnoticed, or in the case of those classes of commodities which would challenge nobody’s attention when bought in the open market or at the door, the period would be very short... if, on the other hand, the thing found is a thing not commonly passing from hand
to hand - a thing which would challenge enquiry and fix the dates in the memory of a man into whose possession it came - in that case the period of time which would be “recent possession” would be a much longer period.”

23 Lee J went on:-

“...in most of the cases that are likely to come before the courts, it will be appropriate to let the question of “recency” go to the jury because it is not a word of any precise significance so far as time is concerned, and it can legitimately mean different things to different people. The jury should therefore rule upon it, not the judge. It is certainly not to be understood as importing the notion of “very recently” except where the nature of the property requires that view.”

24 In that last mentioned passage, I do not understand His Honour to be suggesting that a judge should never take the question of recency from the jury. It is clear that that is not the law. As was said in Bellamy (1991) 3 A Crim R 432 at 436:-

“The question of whether the Crown is in a given case entitled to invite the jury to draw the inference of guilt will initially involve a decision of law. The evidence called by the Crown may not be such as to permit a finding of possession. Again, the stealing may be so remote in point of time as not to be capable of being regarded as recent. Once these legal boundary lines are crossed, it becomes in every case a matter for the jury to determine the facts.”

25 In R v Smail the subject property was a motor vehicle stolen some 5½ months before the police found it in an accused’s possession and or, if one relied on statements by the accused as to when he obtained possession of the vehicle, held by him for a couple of months. The court took the view that on either basis the vehicle was “recently” indeed “quite recently” stolen.

26 Once one has regard to the basis of the doctrine, namely “the unexplained fact of possession” and of the nature of the property, even if one takes its value to be that which the accused said he paid viz $1,500, it is impossible to conclude that the seven month period between August 1991 and March 1992 was too long for the Appellant’s possession to be regarded as “recent”.

27 Furthermore, the instant case was not one where there was no explanation by the Appellant. The jury’s verdict indicates that they were not persuaded that the explanation provided was even a reasonably possible explanation for the Appellant’s possession of the ring, the subject of the charge. The ground fails.

Appropriate directions on recent possession

In the course of his judgment in Sinanovic Wood CJ at CL made criticism of the form of direction to the jury in the current Judge’s Bench Book. He therefore suggested his own formula for directions:

If the directions are oral, I would suggest the following:-

“Where an accused person is in possession of property which is recently stolen, a jury may, but is not obliged to, infer as a matter of fact, in the absence of any reasonable explanation, that the accused person was the thief or knew at the time of acquisition that the property was stolen.

In judging (i) whether the stealing was recent, (ii) whether there has been any reasonable explanation, and (iii) whether the inference of guilt should be drawn, all the circumstances should be considered. These include the nature and value of the property, whether the circumstances of its acquisition are likely to be remembered and what is known of the circumstances of acquisition by the accused.

An explanation is not reasonably to be expected if its absence is due to an accused exercising his right not to respond to questions from persons known by him to be police officers.”

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An alternate and fuller direction, drafted in a form suitable for giving in writing, is:

1. Where a jury is satisfied beyond reasonable doubt that

(i) an accused person has been found with property the subject of the charge in his possession
and
(ii) that property has been stolen

then in circumstances identified below, a jury may, but is not obliged to, infer as a matter of fact that the accused person was the thief, or knew at the time of acquisition that the property was stolen.

2. The circumstances are:

(i) That the stealing was recent, and
(ii) The accused has given either,

(a) no explanation as to how he came by the property notwithstanding circumstances where an explanation is reasonably to be expected.

or

(b) an explanation which the jury is satisfied could not reasonably be true.

NOTE:
In judging (i) whether the stealing was recent, (ii) whether there has been any reasonable explanation, and (iii) whether the inference of guilty should be drawn, all the circumstances should be considered. These include the nature and value of the property, whether the circumstances of its acquisition are likely to be remembered and what is known of the circumstances of acquisition by the accused.

An explanation is not reasonably to be expected if its absence is due to an accused exercising his right not to respond to questions from persons known by him to be police officers.”

The paragraphs referring to an Accused’s right to silence may obviously be omitted in appropriate circumstances.

The formulation of these directions reflects my view that it is unnecessary to go much beyond the first sentence of the explanation of the concept of recent possession given by the High Court in *Bruce v R* (1987) 61 ALJR 603 and which I have quoted.

Recent possession and section 189

There is a suggestion that recent possession might not be an available option for s189. In *DPP v Nieser* Lord Diplock, referring to the felony/misdemeanour dichotomy of the English provision held:

On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused’s having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing not merely that it had been unlawfully obtained but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is unlawfully obtained is by stealing. But conversely, where property has been obtained in circumstances which amount to misdemeanour the inference cannot be drawn from its being found in his possession that he knew that it had been obtained in this much less common way as opposed to having been stolen. There may, however, in such a case be facts proved additional to the fact of recent possession which entitle the court to draw the inference that the accused knew the true facts as to the circumstances in which the property was unlawfully obtained, as where there is evidence of some association between the receiver and the person...
who obtained the goods, from which it might be inferred that the receiver was in the confidence of the other person and knew what he had in fact done.

**With a guilty knowledge at the time of receiving**

Although not specified in the offence the courts have implied a mens rea that the person’s knowledge that the property is stolen is in some way guilty and not innocent. The guilty knowledge must also coincide with the receiving. There is not a doctrine of continuing trespass as there is in larceny.

The reasons for this are explained in *R v Matthews* [1950] 1 All ER 137. Matthews admitted that he had received property that he knew was stolen but claimed that he had intended to hand it into the police. However having made an appointment with the police he failed to hand over the property. The Court of Criminal Appeal held:

> If the appellant received the property with the intention at once of handing it over to the police, that would not be a felonious receiving. The court cannot possibly accept the argument which has been addressed to it on behalf of the prosecution that a person who intends at once to hand to the police, or its true owner, stolen property which has come into his possession, is nevertheless guilty of the felony of receiving stolen property. That is so startling that I am surprised the argument can be put, and, if, when the property is received, the receipt is innocent, the fact that the receiver changes his mind and later misappropriates the property does not turn the receipt into a felony. What might happen in such a case? Where a person, having received property innocently, then changed his mind and misappropriated it, it has been more than once attempted to be said that that would amount to larceny. A little time ago in the Divisional Court we considered in *Ruse v Read* the old case of *R v Riley*, and we pointed out that, if the original taking is wrongful, though not felonious—that is to say is trespass—then, if the taker subsequently alters his mind and appropriates the property, that does amount to felony. In *R v Riley* a man drove his sheep into a field. Next day, driving them out, he found that among his flock was a sheep which he knew did not belong to him. No doubt he was innocent of felonious intent, but it was nevertheless a trespass to goods. When afterwards, having wrongfully, though not feloniously, taken the property, he made up his mind to appropriate the sheep, he became guilty of felony. In *Ruse v Read* the justices found that a man who, while under the influence of liquor, took a bicycle, rode about on it, and then took it home, had no felonious intent at the time he took it. On the next day, instead of returning the bicycle to the police or to the true owner, he packed it up and addressed it from the west country to himself at some station in the north. We found that that amounted to stealing. It was never said in *R v Riley* or in *Ruse v Read* that the accused had become guilty of receiving. What was said was that he had become guilty of stealing.

> In the present case, if the jury had believed the appellant’s evidence that he had innocently taken the property in the sense that he was returning it to the true owner or to the police, there would be no trespass, and, therefore, he could not be guilty of the offence of stealing. In any case, there was a complete misdirection by the chairman on the law of receiving, and, therefore, the conviction on this count must be quashed.

See also *R v Johnson* (1911) 6 Cr App R 218; *Balough v The Queen* (1955) 72 WN 108. Note the tension between the rejection of a concept of continuing trespass in receiving and the extended idea of the transaction of receiving.

**No need for proof of profit**

It was held in two early cases that there is no requirement that the person receiving the property need have any ulterior motive or intent to benefit themselves by their action. All that is required is that they receive the property with the guilty knowledge.

In *R v Davis* (1833) 6 C & P 177, 172 ER 1196, Gurney B held:
If the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same.

The next year this was reinforced by Taunton J in his summing up in *R v Richardson* (1834) C & P 335, 172 ER 1265:

Whether he made any bargain or not. Is a matter of no consequence. If he received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute.

**Claim of right**

However, one cannot be guilty of receiving if the property is received in circumstances where the defendant has a genuine belief that the property is theirs. In *R v Dickson*, the defendant had organised the theft and receiving of race horses which she claimed were in fact hers. Stephen CJ held:

If the jury rightly or not were of the opinion that the prisoner Dickson believed, when she received the horses, that she had some claim to them, she could not have been lawfully found by them guilty of felony: and the legal conclusion, which the jury drew from the circumstances of concealment, denial &c, that there was a felonious receiving, was therefore wrong. It may be that this fact of the prisoner Dickson on believing herself to have some claim, lead the jury to acquit her of the stealing; for that she took the horses, there is not manner of doubt whatever. But having acquitted the prisoner of larceny, the jury ware equally bound to have acquitted her on the same ground of the felonious receiving also.

**Prosecutions for both stealing and receiving**

It is possible to charge the same person with both the larceny and the receiving of the same property. *Criminal Procedure Act 1986* s 74 enacts:

**Stealing and receiving in one indictment**

74 (1) In an indictment containing a charge of stealing property, a further charge may be added against the same person for unlawfully receiving the property, or any part of the property, knowing it to have been stolen.

(2) The prosecuting authority is not to be put to election as to those charges.

The reason for the ability to charge both offences is explained in the following passage from *R v Seymour* [1954] 1 All ER 1006:

It is necessary, in cases of receiving, that the jury should have it explained that they must be satisfied that the prisoner received the property from somebody else. Very likely one cannot say who the other person was because one does not know the thief. For instance, supposing stolen property is found in the possession of a shopkeeper who deals in that particular property, the jury are entitled to say: “He did not steal the property himself, but we think he is a ‘fence’”, but there are a great many cases where I do not think anybody who applies his mind to the case can have any doubt that the person found in possession of the property is the thief. If he is the thief, he cannot be found guilty of receiving because a man cannot receive from himself, but must receive the property from somebody else.

In the present case, for some reason which I do not understand, the indictment charged the appellant with receiving only. The evidence was that on Nov. 7 or 8, 1953, a Belgian folding gun was stolen from a hut on an allotment. The next thing known about that gun was that a few days afterwards it was in the possession of the appellant -- within such a time after the theft that the doctrine of recent possession could be applied. Counsel on his behalf put forward the case that the gun of which he had possession was not the gun stolen. The jury rejected that. The evidence was overwhelming that it was the gun which had been stolen and that he had made away with it before he was arrested. He was in possession of this gun a few days after the
stealing, and, therefore, said counsel: "You may come to the conclusion that he was the thief, and, if he was, you cannot find him guilty on this indictment which charges him only with receiving". In my opinion, the right verdict would have been one of larceny.

The court desires to lay this down. In cases where the evidence is as consistent with larceny as with receiving, the indictment ought to contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then, to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the larceny count. Equally, if they come to the conclusion that it is larceny, they should be discharged from giving a verdict on the receiving count.

If the jury are uncertain they are to convict on the lesser offence, namely larceny.

121 Verdict of “larceny or receiving”

Where, on the trial of a person charged with larceny, or any offence which includes larceny, and, also, with having unlawfully received the property charged to have been stolen, knowing it to have been stolen, the jury find specially that the person either stole, or unlawfully received, such property, and that they are unable to say which of those offences was committed by the person, such person shall not by reason thereof be entitled to acquittal, but shall be liable to be sentenced for the larceny, or for the unlawful receiving, whichever of the two offences is subject to the lesser punishment.


**Goods in Custody**

The doctrine of recent possession is also supported by legislation. The Crimes Act creates a less serious offence of goods unlawfully held in custody.

In addition to the indictable offence of receiving, there exists a summary offence of goods in possession.

**527C. Persons unlawfully in possession of property**

(1) Any person who:
   (a) has any thing in his or her custody,
   (b) has any thing in the custody of another person,
   (c) has any thing in or on premises, whether belonging to or occupied by himself or herself or not, or whether that thing is there for his or her own use or the use of another, or
   (d) gives custody of any thing to a person who is not lawfully entitled to possession of the thing,

which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained, is liable on conviction before a Local Court:
   (a) if the thing is a motor vehicle or a motor vehicle part, to imprisonment for 1 year, or to a fine of 10 penalty units, or both, or
   (b) in the case of any other thing, to imprisonment for 6 months, or to a fine of 5 penalty units, or both.
(1A) A prosecution for an offence under subsection (1) involving the giving of custody of a motor vehicle to a person who is not lawfully entitled to possession of the motor vehicle may be commenced at any time within 2 years after the date of commission of the offence.

(2) It is a sufficient defence to a prosecution for an offence under subsection (1) if the defendant satisfies the court that he or she had no reasonable grounds for suspecting that the thing referred to in the charge was stolen or otherwise unlawfully obtained.

(3) In this section:

"motor vehicle" has the same meaning as it has in section 154AA.

"premises" includes any structure, building, vehicle, vessel, whether decked or undecked, or place, whether built on or not, and any part of any such structure, building, vehicle, vessel or place.

In *Haken v Johnson* (NSWSC unreported 15/10/1993 BC9302396) Wood J outlined the key aspects of the offence:

In the case of this charge it was the duty of the magistrate to decide whether he was satisfied, at the time of decision rather than at the time of arrest or charging of the accused, or even commencement of the case, whether it was proper to entertain a reasonable suspicion that the goods were stolen or unlawfully obtained: *R v English* (1989) 17 NSWLR 149 at 153, per Gleeson CJ; applying *Ex Parte Partnoy Re Jack* (1944) 44 SR 351. To similar effect was the decision in *Cleary v Hammond* (1976) 1 NSWLR 111, where Lee J (as he then was held that, the fact that the whole of the evidence sought to be relied on at the hearing as showing that the goods "may be reasonably suspected of being stolen" was not available to the police at the time when they took possession of the goods, or at the time of arrest, or charge, does not render inadmissible evidence obtained after taking possession of the goods, or arresting the person to be charged, or after charging that person.

The inquiry required is objective and does not depend upon the state of mind of the arresting officer: *R v Carter* (1978) 4 Petty Sessions Review 1859 at 1861. Further, the mental element required is qualified, in that it is enough that the thing in custody may be reasonably suspected of being stolen or otherwise unlawfully obtained. As was pointed out in *Anderson v Judges of the District Court of New South Wales* (1992) 27 NSWLR 701 at 714 (which held inter alia, following *Grant v The Queen* (1981) 147 CLR 503) that bank notes were "a thing"), Kirby P said at 714: "The word 'may' falls short of 'is'. The word 'suspected' falls short of 'known, or even 'convinced' or 'shown' ... The suspicion must, it is true, be 'reasonably' held. It must be determined not according to the subjective beliefs of the police at the time, but according to an objective criterion determined by the Court before whom the accused stands charged."

Next, it is not necessary for the prosecution to point to the commission of a specific or general offence, nor is it necessary for it to elect whether it contends that the property to which the reasonable suspicion may attach is "stolen" or "unlawfully obtained". In *R v Chan* (1992 28 NSWLR 421, Abadee J said, at 432/433: "It is true that in some of the cases referred to by Mr Byrne, evidence had been adduced pointing to the statutory thing as having been the subject of a specific crime or perhaps otherwise associated with some criminal activity. Presumably this was because the evidence of such was available or would otherwise facilitate proof, not because that evidence was essential or required to be proved to establish the charge. The mere fact that there is some evidence of a specific offence, or even of some link between an offence and the property in question, does not lead to the conclusion that there is any requirement upon the prosecution to provide the connection contended for namely, in every case, or indeed, necessarily, in any case. There is no necessity for prosecution to point to the commission of a specific or general offence. Authority does not support such a proposition and it indeed appears to be clearly against it. . . . Further, against acceptance of the appellant's contention, is the fact that the offence created has never been regarded as duplicitous. Whether under the earlier provisions or the present provision, the prosecution has never been required to make an election as to whether it contended that the property to which the reasonable suspicion may attach is 'stolen' or 'unlawfully obtained': see Moore v Allchurch
(1924) SASR 111 at 119. As The Crown submitted, this lends further weight to its contention that there is no necessity for the prosecution to point to the commission of a specific offence before it can succeed.9

History of the offence

This offence, commonly known as goods in custody, has a long history.88 The offence to was first introduced into NSW in 1855 and was based on similar English law. In its original form it was intended to be a complement to a power granted to police to search persons in public streets whom were carrying property it was suspected was stolen or otherwise unlawfully obtained. If a police officer arrested a person pursuant to this power, the arrested person was then to be taken before a magistrate who, if he agreed with the officer’s suspicions, could convict the person of the goods in custody offence. Although it was possible to proceed under the offence by way of information rather than by way of arrest, it was held that the relationship with the power of arrest section limited the scope of the offence to goods carried in public and not kept in houses.89

However, as a result of amendments in 1908 the offence became an individual substantive offence unrelated to any suspicious conduct at the time of arrest. In Ex parte Patmoy,90 Jordan CJ held that none of the original restrictions on the scope of the offence applied. It was to be interpreted according to its natural meaning. See the extract from R v English below.

The offence contains a complicated set of elements. The prosecution must show that the thing was in the custody of the defendant. The prosecution must then satisfy the court beyond all reasonable doubt that, as at the date of the hearing, there may be reasonable grounds for a suspicion that the thing is stolen or otherwise unlawfully obtained. Following this determination by the court the defendant will be guilty of the offence unless the defendant gives evidence to the court that establishes on the balance of probabilities that the defendant had no reasonable grounds for suspecting the thing was stolen or otherwise unlawfully obtained.91 These elements are discussed in more detail below.

Thing

Thing is a word of wide import. While it does apply to money in specie, it has been held to not extend to money in currency or credits in bank accounts.92

In Grant v R (1981) 147 CLR 503, money which was alleged to be the proceeds of drug dealing, was withdrawn from a bank account, paid into a solicitor’s trust account, a cheque drawn on that account, and cashed. The cash was intended to be used to bail a person.

88 Its various enactments prior to s527C Crimes Act 1900 are: Act 2 and 3 Victoria, Chapter 71; s1 Act 19 Victoria No 24 (1855); s27 Police Offences Act 1901 (amended Act No 12, 1908); s40 Summary Offences Act 1970.
89 See Ex parte Patmoy; Re Jack (1944) 44 SR (NSW) 351 for a detailed outline of the offences and their history.
90 Ex parte Patmoy; Re Jack (1944) 44 SR (NSW) 351.
91 One important historical aspect of the requirement of the defendant to give an account is the realisation that in NSW in 1855 there were significant restrictions on the rights of an accused to give evidence, and in many summary and committal proceedings accused were “examined” by magistrates without a clear right to silence. In such circumstances the requirement to give account would not have been seen to be unusual and in fact may have been a protection of the accused’s rights. See Woods, G.D. A History of Criminal Law in New South Wales: the Colonial Period 1788 – 1900, Federation Press, Sydney, 2002.
92 R v Grant (1981) 147 CLR 503.
Grant was arrested in possession of the money when he attempted to provide the money to police as the bail surety. He was charged with goods in custody under its former enactment in the Summary Offences Act 1970. Gibbs C.J., Mason, Aickin and Wilson JJ held:

The offence has a long history. It was enacted as s. 1 of 19 Vict. No. 24 (following s. 24 of 2 & 3 Vict. c. 71 (U.K.)), and later as s. 27 of the Police Offences Act 1901 (N.S.W.). Its reach has broadened somewhat since it was originally enacted, but it is unnecessary for the purposes of this case to examine the matter in any detail. It may be noted that with the enactment of the Summary Offences Act in 1970 the word “otherwise” appeared before the words “unlawfully obtained”; the effect of the change was discussed in Purdon v. Dittmar (1972) 1 NSWLR 94. In 1979 s. 40 was repealed and provision in similar terms made in s. 527C of the Crimes Act 1900: see Crimes (Summary Offences) Amendment Act 1979.

From the history of this offence it is important to note the consistency with which courts, both in the United Kingdom and in Australia, have insisted upon a strict construction of the words outlining the elements of the offence, recognizing the extraordinarily serious character of a law which authorizes the arrest of a person on mere suspicion, to be followed by his conviction and possible imprisonment unless he satisfies the court that he had no reasonable grounds for suspicion that the thing in his custody bore the taint of illegality: Hadley v. Perks (1866) LR 1 QB 444; In re Keyes (1884) 5 NSW 359; In re Frith (1896) 17 NSW 421; Tatchell v. Lovett (1908) VLR 645; Moors v. Burke (1919) 26 CLR 265; Aldridge v. Marks (1943) 44 SR (NSW) 69; Purdon v. Dittmar (1972) 1 NSWLR 94; Reg. v. Dittmar (1973) 1 NSWLR 722. (at p507)

The question now to be answered falls within a short compass: it is whether in the circumstances of the case the banknotes, totalling $10,000, found in the custody of the applicant on 24 March 1978 can be reasonably suspected of having been unlawfully obtained. Let it be assumed that such a finding was made of the original cheques and/or banknotes totalling $35,470 before they were paid to the credit of Rowe’s account in the savings bank. It appears that there was reason to suspect that those cheques and/or banknotes were the actual proceeds of the illegal sale of drugs. The question is whether the character of illegality attached to the banknotes handed by Thom to the applicant.

…. Having regard to the plain words of the section, together with its history, and its character as a penal provision, there is no warrant for resorting to the common law doctrine of following or tracing or to any other process of reasoning in order to give those words an extended meaning. The word “thing” in the section is a reference to the same physical object throughout, and it is that object to which the reasonable suspicion of being stolen or otherwise unlawfully obtained must attach. As Jordan C.J., speaking for the Full Court of the Supreme Court of New South Wales said in Aldridge v. Marks (1944) 44 SR (NSW), at p 71:

"I think that the section is available only when there is a reasonable suspicion that there has been at least something unlawful in the obtaining of the very thing which the accused had in his custody".

The Court of Criminal Appeal seems to have thought that this view ceased to apply once the expression "stolen or unlawfully obtained" became "stolen or otherwise unlawfully obtained". We do not agree. The amendment merely displaced one ground for the decision - the ejusdem generis construction of "unlawfully obtained". It did not affect the second ground which is expressed in Jordan C.J.’s insistence that “thing” means "very thing". See, also, Brebner v. Seager (1926) VLR 166.

Of course, sub-s.(2) makes it clear, as Begg J. observed, that the section extends to a person who was not himself responsible for the unlawful obtaining, but this provision does not justify an extension of the reach of the section to embrace property other than the original thing actually obtained. The section has been held to extend to a banknote (Reg. v. Dittmar (1973) 1 NSWLR 722), but in our opinion this means no more than that money in specie may be a thing. It does not extend to money as currency or to credits in bank accounts. If it were otherwise, the whole course of commercial dealing would be affected. Bankers and individuals
receiving cash, bank cheques or other cheques in the course of business would be obliged to satisfy themselves that each was not the ultimate product of illegal dealing or face the prospect of being arrested and charged. In such a case, it affords little comfort to reflect that it is a sufficient defence to a prosecution to satisfy the court that the alleged offender had no reasonable grounds for suspicion. If it was the intention of the legislature to expose law-abiding citizens to the risk of conviction in such circumstances, then in our opinion the legislature has failed to make its intent plain, and we can find no warrant for departing from the ordinary effect of the words used. (at p509)

The facts of this case supply the further ingredient that not only would the original "thing" (the banknotes or cheques totalling $35,470) have lost its identity as the "thing" when it was converted into another form of currency or exchanged for another thing, but also it was paid into a bank account. It then ceased to be a "thing" at all. As Barwick C.J. said in Croton v. The Queen (1967) 117 CLR 326, at p 330:

"But, though in a popular sense it may be said that a depositor with a bank has 'money in the bank', in law he has but a chose in action, a right to recover from the bank the balance standing to his credit in account with the bank at the date of his demand, or the commencement of action. That recovery will be effected by an action for debt. But the money deposited becomes an asset of the bank which may use it as it pleases: see generally Nussbaum, Money in the Law: s. 8, p. 103".

We cannot perceive that any illegality attached to the transaction whereby moneys were withdrawn from the savings bank account and credited to the solicitor's trust account. Nor can we see that there was anything unlawful about the procedure by which Thom cashed the two cheques payable to "cash" which were legitimately in his possession, a procedure which brought within the purview of this case the actual banknotes which were found in the custody of the applicant and to which the charge relates. There was no reason to suspect that those banknotes were unlawfully obtained.

Custody

For the purposes of s527C(1) the thing must be in the custody of the defendant at the time of arrest or charge. In R v English (1989) 17 NSWLR 149, the defendant had lost her handbag and it had been handed into police containing a small amount of cannabis and $1,540 in cash. She did not give a convincing account to police as to how the cash came to be in her bag and she was charged and convicted of goods in custody. On appeal to the NSWCCA Gleeson CJ held (Enderby and McInerney JJ agreeing):

In argument in this Court both parties sought to take comfort from different features of the history of the offence of "goods in custody".

The appellant placed strong reliance upon the origins of the offence. These were described by Street CJ in R v Abbrederris [1981] 1 NSWLR 530 at 538. His Honour said:

"The creation of an offence conditioned upon the possession of property as to the origin of which suspicion attaches has a long history in summary offences legislation. ... The general pattern of such legislation is to provide that a person having possession of goods suspected of being stolen may be arrested forthwith and taken and charged before a court; if he then fails to give a satisfactory explanation he will be convicted. An early Australian case to which reference is frequently made as authoritative is Brown v Schiffman [1911] VLR 133. ... It was held that the purpose of the legislation was to deal with persons caught in flagrante delicto and thus that it was necessary that the suspicion should exist at the time when the person is in possession of the property."

Street CJ went on to observe that the approach that the relevant time for determining whether the suspicion and the reasonable grounds for such suspicion existed was the time when the person was in possession of the property (which, in the context set by his Honour,
would presumably also have been the time of apprehension), was followed in Queensland, Western Australia, Tasmania, and South Africa.

The respondent, however, relies upon an important change of direction that was taken in the law of New South Wales. It is now settled law in this State that when a magistrate deals with a charge of goods in custody it is the duty of the magistrate to decide whether he is satisfied, at the time of his decision, that it is then proper to entertain a reasonable suspicion that the goods were stolen or unlawfully obtained: Ex parte Patmoy; Re Jack (1944) 44 SR (NSW) 351; 61 WN 228; Cleary v Hammond [1976] 1 NSWLR 111 and R v Abbrederis. The existence of such a suspicion is related in time to the proceedings before the magistrate rather than the arrest or charging of the accused.

The explanation of this apparently distinctive feature of the law of New South Wales was given by Jordan CJ in Ex parte Patmoy. His Honour traced the origins of the offence, pointing out that, prior to 1908, s 27 of the Police Offences Act, like the corresponding earlier provisions, was closely related to other provisions concerning powers of arrest. Section 27 was intended to be complementary to s 36 of the Police Offences Act, which in turn was designed to authorise police constables to stop, search and detain persons who might be reasonably suspected of having or conveying anything stolen or unlawfully obtained. Section 27 made it an offence for a person to be carrying or conveying anything in a public street in such circumstances that it might be reasonably suspected of having been stolen or having been unlawfully obtained, unless he gave an account to the satisfaction of a magistrate as to how he came by it. However, his Honour said that the amendments made in 1908 altered the whole framework of s 27. Following that amendment, the following position applied (at 356; 230):

“It is obviously no longer a mere complement of s 36. All that the relevant part of that section does is to authorise a constable to ‘stop, search and detain’ persons; and this has always been held to be restricted to persons having or conveying readily portable articles in public streets. In its new form, s 27 is divorced from s 36. It stands by itself, and creates new offences entirely unrelated to that section. Indeed, the power of arrest given by s 36 would no longer be available in relation to s 27 except in certain cases arising under s 27(a); and a constable who desired to arrest without a warrant for an offence provided for by s 27 would, in all other cases, have to rely on the general provisions of s 352(2)(a) of the Crimes Act 1900. Since the amendments of 1908, it is, in my opinion, no longer proper or possible to regard s 27 as controlled by s 36; as being restricted to persons detected in a street, in flagrante delicto; and as being inapplicable except to cases in which the suspicion which existed in the mind of the detecting constable was reasonable at the time when he effected the arrest or decided to lay the information. In its altered form, s 27 is an independent, offence-creating section. According to its natural meaning, read as a piece of English, it now deals with persons having in their custody, or knowingly having in the custody of another person, or in a house or other place, anything which may be reasonably suspected of being stolen or unlawfully obtained. It takes its stand at the point when such a person is charged before a Magistrate with so having a thing with respect to which such a suspicion may be reasonably entertained, and it provides that if he does not give an account, to the Magistrate’s satisfaction, of how he came by it, he shall be liable to a penalty. It follows, in my opinion, that what the section now requires is that, at the time when the charge is being heard for the purpose of being disposed of, it is for the Magistrate to decide, in the first instance, on the evidence then placed before him, whether he is satisfied (beyond reasonable doubt, since it is a criminal charge) that it is then proper to entertain a reasonable suspicion that the thing was stolen or unlawfully obtained.”

The particular principle established in Ex parte Patmoy, which is one as to the relevant time at which the existence of grounds for suspicion about the goods is to be considered, and which has since been applied in many cases, does not bear directly on the issue in the present case. However, the respondent relies upon the underlying reason for that principle, involving as it does a major departure from the earlier concept of an offence of being caught, as it were, red-handed, in possession of goods which appear to be stolen but which, because of their nature, are of such a kind that actual proof that they were stolen could be difficult. Once it is accepted
that there need be no contemporaneity between the time when the goods are found in the defendant’s custody and the time for considering whether they may reasonably be suspected of being stolen, why the respondent asks, should there be contemporaneity between the fact of custody and the time of apprehension or laying a charge? It should also be noted that Jordan CJ was speaking of s 27 of the Police Offences Act, and there are two additional reasons why the same conclusion applies, with even greater force, in relation to s 527C of the Crimes Act, quite apart from the settled course of authority since Ex parte Patmoy. First, the opening words of s 27, which gave some additional strength to the argument rejected by Jordan CJ, have now been replaced by more neutral words. Secondly, the presence in s 527C(1) of par (d) now makes it impossible to say that the section only applies to people caught in flagrante delicto. Plainly, in relation at least to people charged under s 527C(1)(d), it does not, unless that paragraph is to be given the extremely narrow meaning of being confined to cases where a person is actually apprehended in the course of transferring custody. It has not been argued in this Court that par (d) has such a narrow meaning.

There are cases which deal with the problem that arises where a defendant has ceased to be in possession of the relevant goods.

In Cleary v Wilcocks (1946) 63 WN (NSW) 101, a case decided after Ex parte Patmoy, the accused was charged with having in his custody on 14 May 1945, thirty-two wrist watches suspected of being stolen. He was first spoken to by the police on 17 May 1945 having, in the meantime, sold and delivered all the wrist watches to a third party in an arms-length transaction. It was not until some months later that he was charged and, later still, he came before a magistrate. The magistrate dismissed the charge upon the ground that, in the circumstances, the accused did not have the goods in his custody “upon being charged”. Herron J upheld the magistrate's decision, and, in his reasons for judgment, appeared to treat as the relevant time for considering the element of custody the time when the charge was laid. His Honour said (at 102) that “the time at which the section begins its operation is when the person is being charged before a justice with having a thing in his custody”. He evidently did not consider that Ex parte Patmoy was in any way inconsistent with this view. It should be observed, having regard to the precise terms of the question asked in the present case stated, that there was in that case a substantial time delay between the date when the accused was apprehended and the date when he was charged, and that Herron J appears clearly to have regarded the latter, and not the former, date as being relevant. That decision plainly supports the appellant in the present case.

Herron J relied to some extent upon the reasoning of Street J in Ex parte Miller; Re Hamilton (1934) 51 WN (NSW) 23. That case was decided before Ex parte Patmoy and should, for that reason, be treated with some caution. The accused, whilst driving a lorry on which were loaded bags of wool, was accosted by the police and questioned as to the ownership and contents of the bags. His replies were regarded as unsatisfactory, and the bags were taken from him and placed in a shed at the police station. After inquiries, he was charged with “goods in custody”. The argument that was put on his behalf proceeded on a view of the law that was later contradicted by Ex parte Patmoy. The argument is reported as being to the effect that “the (accused) had been deprived of possession before the police could reasonably suspect that the goods had been stolen”. Street J apparently accepted at face value the proposition, implicit in that argument, that the relevant suspicion was that of the arresting police (rather than the magistrate) but answered the argument by finding that the temporary detention of the goods by the police for the purpose of pursuing their inquiries did not involve any loss by the defendant of the custody of the goods. His Honour said (at 24):

“... Where there has been a mere taking by the police for the purpose of testing in order to see whether a reasonable suspicion may or may not arise upon the facts, I do not think that there has been such an abandonment of possession as to enable the accused to say that the suspicion and the possession did not co-exist in his case.”

The premise upon which the argument and much of the reasoning in that case proceeds was, in my view, destroyed by the decision in Ex parte Patmoy and it should not be regarded as authority for any proposition beyond the precise point which it decided, which is that goods do
not cease to be in the custody of an accused simply because the police require him to hand them over.

It may be observed in passing that the question asked by Shadbolt DCJ in the case stated was evidently formulated upon the assumption that the appellant did not, at any time after her bag was lost or stolen on 10 October 1986, have custody of the money in the bag. There is room for argument as to whether that assumption can stand with the actual decision in Ex parte Miller. In that case, as in the present case, and unlike the case of Cleary v Wilcocks, there was no voluntary parting with the possession of the goods by the appellant. The appellant was at all material times the owner of the handbag and, apparently (subject to the suspicion as to their origins), of its contents. She lost the bag, but when Mr Kokubun found it, he handed the bag over to police. The difference between the position with respect to the money in the present case and the bags of wool in Miller is not clear to me. I would also add that there may have been a further issue as to whether the case fell within s 527C(1)(b). It seems rather odd that the outcome of the present case would have been different if the police had returned the handbag to the appellant for a few moments on 18 October. These, however, are matters that are not raised by the stated case. They have not been argued in this Court and I express no concluded view about them. As has been said, the stated case assumes that the appellant had custody of the goods on 10 October 1986 but not thereafter and, in particular, that she had ceased to have custody by the time she was apprehended and charged. It does not in terms advert to the significance of any difference between the time of apprehension and the time of charge, but that is understandable in the light of the assumption mentioned.

As a result of the decision in Ex parte Patmoy, and the later decisions of this Court which follow that decision, and also having regard to the opening words of s 527C and to the presence in s 527C of subs (1)(d), it is now impossible to resolve the question raised by the case stated simply upon the basis that (to use the language of Street CJ in R v Abbrederis) “the purpose of the legislation is to deal with persons caught in flagrante delicto”. That was the purpose of the original legislation to which s 527C can be traced, but it cannot now be regarded as an accurate and complete statement of the purpose of the present legislation, or, for that matter, of the corresponding legislation which immediately preceded the present provision.

On the other hand the purpose of the older legislation provides an important clue to a puzzle which arises as to the form of the present legislation and which must be solved according to the ordinary processes of statutory interpretation. The puzzle is this. If s 527C(1)(a) covers the case of a person who once had the relevant goods in his custody, but later ceased to have custody of them, what is the need for a provision such as s 527C(1)(d)? To pick up the words of the Minister’s speech in 1970, “an intermediary possessor” would already have been caught by s 527C(1)(a). The presence in the present legislation of par (d) reflects, in my view, an assumption about the meaning of par (a) which is that, at least in relation to the element of custody, the offence retains its historical connotation of being caught red-handed.

This consideration is reinforced by the notion, also expressed by the Minister, that s 527C(1)(d) was intended to replace s 29 of the Police Offences Act. The terms of that section also reflected a view of the meaning of s 27(a) which accords with the appellant’s submission, in that s 29(2) would have been largely unnecessary had s 27(a) meant what the respondent submits it meant.

The situation is very similar to that which led the High Court of Australia to its decision in Meyer Heine Pty Ltd v China Navigation Co Ltd (1966) 115 CLR 10. In that case the Australian Industries Preservation Act 1906 (Cth) was construed as having a territorial operation much more limited in scope than that of modern anti-trust legislation. The limitation, which reflected legal views that were current at the time of the original enactment of the legislation, was not found in the language of the principal provisions of the Act, but was reflected in the language of an ancillary provision, which clearly expressed the legislative assumption upon which the Act had been based. The High Court held that, construing the Act as a whole, the meaning of the more general language was much narrower than would have been the case if that language had been read in isolation.
So it is in the present case. Section 527C is to be read as a whole and, in particular, par (a) is to be read together with par (d). If par (a) is given the narrower meaning for which the appellant contends, then that makes sense of par (d), and there is, in turn, a clear historical explanation for the resulting legislative pattern which then emerges.

I would answer the question in the stated case in the affirmative, and remit the matter to Shadbolt DCJ to be dealt with according to law. The respondent prosecutor must pay the costs of the case stated.

Custody has been held to be broader than “actual possession” and extends to include “the immediate de facto control or charge of the article in question”. If the defendant is then not currently in custody of the thing, the prosecution must rely on subsections (1)(b) – (d).

These subsections extend the scope of custody to include circumstances where the thing is found to be held for the defendant by another person (s527C(1)(b)) or found on any premises where the defendant can be shown to be aware of its presence (s527C(1)(c)). A further extension is where liability remains in the event of an unlawful disposal to another person (s527C(1)(d)).

On the other hand it has been held that the “giving” of custody to another pursuant to subsection (1)(d) does not require a permanent giving up of custody and can encompass a temporary handing over of custody. No requirement of a giving up of dominion or the creation of a bailment is to be read into the concept. Nor is there any requirement of consideration. There would therefore appear to be significant overlap between (1)(b) and (1)(d) in Gilroy v Jebera (1992) 29 NSWLR 20, the defendant had bought stolen power tools. The magistrate had held that sales fall outside of s527C(d). On appeal to the NSWSC Abadee J disagreed (ex tempore):

It seems to me, that s 527C(1)(d) is not restricted to bailees whether guilty or innocent and that par (d) can operate beyond this type of situation. ...par (d) contemplates the giving of custody, whether temporary or permanent and whether for consideration or not. It is not in its terms confined to the giving of a bailment which situation is one, that is capable of being accommodated by s 527C(1)(b). This further argument suggests that par (d) applies to circumstances beyond that of bailment. ...

Further, I consider that the words of s 527C(1)(d) and indeed the history of the section as referred to in R v English and indeed, in its predecessor, do not support the construction advanced by the defendant. Section 29 of the Police Offences Act 1901 was not confined to bailees. There is nothing in the Second Reading Speech to suggest that the 1970 provision was to be so confined: see R v English. Rather, for reasons given in R v English and indeed, as appears in the Second Reading Speech, the provision focuses upon the “intermediary possessor of the property” irrespective of the manner in which he gives custody of the property to another. ... s 527C(1)(d) applies where custody is given whether by sale or otherwise. ... the section applies in the situation where a person who had once been in custody of the goods in question has given custody to another person who was not lawfully entitled to their possession and that it catches the “intermediary possessor of the property”.

I agree with the submissions that s 527C(1)(d) should not be construed as applying only to a temporary arrangement whereby, for example, A gives goods to B for B to retain the goods subject to the control of A. Such may be caught by s 527C(1)(b). For all these reasons I consider that the magistrate was in error and that the plaintiff’s first contention referred to in the case stated is a contention that should be accepted.

93 Ex parte McPherson (1933) 50 WN (NSW) 25.
In order for there to be liability under (1)(d) there is also an additional requirement that, the transferee is not lawfully entitled to custody of the thing. In *Gilroy v Jebera* 95 Abadee J rejected a submission that this had the effect that no transferor could be liable if the transferee was a bona fide purchaser for value without notice. Instead it was held that the question of lawful entitlement was to be determined at the moment prior to the transfer of the custody.96

**May be reasonable grounds for suspicion**

This is a question of law for the court. On the evidence presented by the prosecution, the court must be satisfied beyond all reasonable doubt that “it is then proper to entertain a reasonable suspicion that the thing was stolen or unlawfully obtained”.97 It is an objective assessment unrelated to the state of mind of the defendant.98

The evidence that forms that suspicion may come to light at a time subsequent to the charging of the person. The wording of the section means that the relevant date for the reasonable suspicion is the date of the hearing and no earlier. On this basis police are able to charge a person with having goods in custody and then subsequently obtain the evidence to support that charge, possibly through confession. This is highly unusual. For most offences, the grounds for reasonable suspicion must exist at the time of arrest or charging. In large part, the reason for this anomaly appears to be due to the historical coupling of the offence with a power of arrest, discussed above.

It is not necessary that any person in fact does suspect the property to be stolen or unlawfully obtained. All that is necessary is that a court find that such a suspicion “may” be reasonably held.99 In *Anderson v Judges of District Court of NSW* (1992) 27 NSWLR 701 Kirby P (Meagher and Sheller JAA concurring) held:

> [I]t emerges that Mr John Anderson (the claimant), otherwise known as “Fast Bucks”, arrived at the Coffs Harbour airport terminal on 14 September 1990. He hired a car. Into it he loaded amplification speakers and a suit case which he had brought with him. He then took the Sawtell Road. But he did not get far before he was stopped by police. The police were acting on information provided to them by an informant who had seen the claimant arrive at the Coffs Harbour airport on previous occasions. This informant apparently became suspicious because, on each occasion, the claimant had changed his clothes before driving off in the hired car.

> The ostensible purpose given for stopping the claimant was that a commitment warrant was outstanding in the sum of $623, seemingly connected with a printing offence. In the presence of three other police officers, Detective John Quinn confronted the claimant with the warrant. When asked "Do you have that money with you?" the claimant said "No". …

> When pressed as to whether he could meet the warrant, the claimant eventually produced a quantity of banknotes. Some $2,500 were first produced from his pocket. He explained that he was going to buy a car with the money.

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96 The bona fide belief would however protect the transferee from liability under the section.

97 *Ex parte Patmoy; Re Jack* (1944) 44 SR (NSW) 351 at 356.

98 *R v Chan* (1992) 28 NSWLR 421 per Hunt CJ at CL.

99 It is enough that it is shown that the thing in custody “may be reasonably suspected of being unlawfully obtained”. The word “may” falls short of “is”. *Anderson v Judges of the District Court of NSW* (1992) 27 NSWLR 701.
At the request of the police, the claimant accompanied them to Sawtell Police Station. Soon afterwards, a search was made of the objects in the car he had hired. One of the speakers was opened. In it, taped to the interior, was found a package. When opened, this package revealed $5,000 in cash in Australian currency. At this stage, the claimant was cautioned by Detective Quinn. He was asked to explain where he had obtained the money and why it was packaged in such a way. The claimant declined to explain how he had come by the money. He did say that it had been packaged inside the speaker "for safety". When asked if he had other cash in his possession he said "No". He was then charged with an offence under s 527C of the Crimes Act. Soon afterwards his luggage was searched. In the luggage, rolled in a sock, a further quantity of banknotes was found. These amounted to some $7,000 in Australian currency notes. After the discharge of the outstanding warrant, the amount of cash found on the claimant was some $13,900. ...

The claimant complained that Herron DCJ gave no consideration whatever to whether the actual notes found in his possession were reasonably suspected of having been unlawfully obtained, as distinct from the product of some unlawful dealing. But whilst it is true that his Honour did not direct express attention to this issue, it was clearly open to him to find that a reasonable suspicion attached to the actual notes. The way in which these notes were hidden, in combination with the original denial (repeated in the case of the money found hidden in the sock) at least left it open to Herron DCJ to conclude that the actual notes were reasonably suspected of having been unlawfully obtained.

Secondly, the claimant asserted that there was no evidence of guilt and that such evidence as existed was at least equally consistent with his innocence. The real reason for the police search of the claimant’s possessions was, so it was argued, a suspicion that he had been engaged in drug dealing. This suspicion was not borne out by the discovery of any drugs in his possession. Carrying $13,000 in cash, although unusual, was not unlawful. Police should not be able to intrude into the lives of citizens and force them, in effect, to account for money in their possession and to do so before they can recover such money. I acknowledge the force of these arguments. I have sympathy with them. However, the section under which the claimant was charged is an exceptional one. It has stood in our law, in varying forms, for a very long time. Attention must be drawn to the qualified mental element which must be established in order to attract the operation of the section. It is enough that it is shown that the thing in custody "may be reasonably suspected of being ... unlawfully obtained". The word "may" falls short of "is". The word "suspected" falls short of "known" or even "convinced" or "shown". In another context, it has been said that "suspicion" is a state of conjecture or surmise when proof is lacking: see George v Rockett (1990) 170 CLR 104 at 115f. The suspicion must, it is true, be "reasonably" held. It must be determined not according to the subjective beliefs of the police at the time but according to an objective criterion determined by the court before whom the accused stands charged: see R v English (at 153) Ex parte Patmoy; Re Jack (1944) 44 SR (NSW) 351 at 356; 61 WN (NSW) 228 at 230. (1992) 27 NSWLR 701 at 715

It is probably impossible, and certainly undesirable, to attempt to enumerate all the circumstances which may reasonably attract suspicion to a "thing" found in the possession of a person. Usually, where the "thing" is clearly owned by another person and bears a label, identifier or reputation of such ownership, the basis of the suspicion will be readily established. Where, as here, the "thing" is a quantity of banknotes, which could have come from a wide range of dealings, legal and illegal, it may be more difficult to establish the suspicion to which the section refers. As was observed during argument, there is an ambivalence in the section. The pre-conditions must, as in any other criminal offence, be established beyond reasonable doubt. How a level of thought which is qualified by what "may" be (and does not need to reach beyond what is "suspected") can be established beyond reasonable doubt is not entirely clear. But the section exists and has survived for more than a century in substantially the same form. It can apply to banknotes. It must therefore be given meaning. Presumably the criminal onus and the words of the section must be reconciled by saying that the court before which the person is charged must be satisfied beyond reasonable doubt that the circumstances are such that the thing in question may reasonably be suspected of being stolen or otherwise unlawfully obtained.
The circumstances in which the thing is found and the behaviour of the person under suspicion are clearly relevant to establishing the pre-conditions for the operation of the section: see, eg, Patmoy (at 357; 230-231); O’Sullivan v Tregaskis [1948] SASR 12 at 16. False answers, evasion and prevarication on the part of the person under suspicion may fortify a suspicion which has arisen anyway from the circumstances of the discovery of the thing in custody: see O’Sullivan (at 16).

In the present case, Herron DCJ referred to a combination of circumstances to sustain his satisfaction of the proof of the offence. Individually none would have been sufficient. But in combination, it was, in my view, open to his Honour to find that the money found on the claimant "may be reasonably suspected of being ... unlawfully obtained". Most telling were the false answers given to the police officers by the claimant, as his Honour accepted, the way in which various parts of the fund were hidden and the very amount of the money in the circumstances of the claimant, an avocado farmer. Putting entirely out of mind, as Herron DCJ did, the suggested but unproved involvement of the claimant in drug dealing, upon the combination of elements to which I have referred it would have been open to Herron DCJ, within the language of this extraordinary provision, to reach the level of reasonable suspicion required.

It was also pointed out in Burnett v Brown (1929) 24 Tas LR 23 at 34 that:

The words ‘suspicion’ and ‘suspect’ convey the idea of doubt and mistrust as much as belief, a doubting and mistrusting inclination to believe. The inclination may exist in various degrees according to the cogency of the evidence, but the idea of doubt and mistrust is always present.

The circumstances that may give rise to such a finding can be many and various. In R v Madden (unreported NSWCCA 15/12/95) the Court of Criminal Appeal noted:

In determining whether the prosecution has made out its case, the court may have regard to the nature of the thing in question (the subject of the charge), the circumstances in which it was found in the defendant’s custody and the behaviour of the defendant with respect to it, including any lies which he tells or evasion which he exhibits as to his custody of it and its provenance.

The suspicion can arise by inference and may not be the only possible suspected circumstances by which the thing was obtained. In R v Chan (1992) 28 NSWLR 421 at 423-4 it was suggested by Mahoney J that a three-stage approach was helpful. These were:

1. Was the occasion of the obtaining of custody one for suspicion? This would normally come about through lack of explanation by the defendant or the giving of an explanation that was objective unlikely and disbelievable.

2. What possible suspicions could be entertained about how the thing had been obtained? These suspicions as to how the thing had been obtained could be inferred from the circumstances surrounding the custody of the thing and other evidence. These suspicions could include legitimate ways in which the thing had been obtained.

3. Is a suspicion that the thing had been unlawfully obtained one of the possible suspicions? It is not necessary that it be the only suspicion, or presumably the strongest, merely one of the possible suspicions. It must however be a suspicion that could be reasonably entertained.

The standard of proof is thus exceptionally low. However it is important to note that the suspicion must attach to the thing itself and not to the defendant.100 There is difficulty in

100 Murray v Gunst [1915] VLR 232.
exactly elaborating this difference. On the one hand the courts have held that there cannot be a suspicion that the property is stolen merely because there is a suspicion that the defendant is a thief.\textsuperscript{101} However, it appears to be permissible to suspect the goods are stolen on the grounds that their cost appears to be far greater than could be afforded on the income of the defendant.\textsuperscript{102}

**Stolen or otherwise unlawfully obtained**

Although originally a summary offence related to larceny and related offences, the offence currently extends far beyond such origins to encompass all forms of illegal obtaining of custody. In *R v Grant*, Murphy J observed:

> We live in a society with extensive unlawful activities. Apart from the traditional forms of stealing there are widespread illegal activities such as gambling, company frauds, deceptive commercial conduct, other white collar crimes, and drug trafficking which apparently come within the expression “otherwise unlawfully obtained” (see *Purdon v. Dittmar* (1972) 1 NSWLR 94) and the section applies to a person who has custody of a thing although he was not responsible for stealing or unlawfully obtaining it.\textsuperscript{103}

There is no need for the prosecution to prove the source of the illegality. All that must be proved is that there may be grounds for reasonable suspicion of illegality in some way.\textsuperscript{104} Further, acquittal of a charge of larceny or receiving is no bar to conviction under this offence.\textsuperscript{105} Indeed it may possibly be no defence to prove that the thing was in fact not illegally obtained.\textsuperscript{106}

**Defence**

Once a court has determined beyond reasonable doubt that there may be a reasonable suspicion that the property is stolen or otherwise unlawfully obtained the defendant is liable for a maximum penalty of six months imprisonment. As the offence requires no proof of the state of mind of the defendant the offence is one of strict liability. However s527C(2) grants a statutory defence. Combined with s527C(1) this has the effect of reversing the onus of proof and requiring the defendant to exculpate themselves.

The defence is a combination of objective and subjective elements. Firstly the defendant must convince the court of his or her actual state of awareness of the circumstances surrounding the thing. Then the court must determine objectively whether such knowledge constituted reasonable grounds for a suspicion that the thing was stolen or otherwise unlawfully obtained.

In *Anderson* the defendant also argued that Herron DCJ had wrongly cast upon him an onus to disprove his guilt. The Court of Criminal Appeal held:

\textsuperscript{101} *Murray v Gunst* [1951] VLR 232.
\textsuperscript{102} *Gilroy v Jebar* (1992) 29 NSWLR 20.
\textsuperscript{103} (1981) 147 CLR 503 at 510.
\textsuperscript{104} See eg *R v Chan* (1992) 28 NSWLR 421; *Willis v Burnes* (1921) 29 CLR 511.
\textsuperscript{105} See eg *R v Cleary* [1914] VLR 571.
\textsuperscript{106} See comments of Cussens J in *Murray v Gunst* [1915] VLR 232. Query the position where the actions of law enforcement officers have restored stolen property to the possession of the owner through the agency of the police.
[The defence provided by s 527C(2) does not, either by its terms or by its effect, require a person accused under s 527C(1) to show that the suspicion "is not well grounded". Nor does it require the accused to show "that the money was ... lawfully in his possession". It is likely that in attempting to satisfy the Court that he "had no reasonable grounds for suspecting that the thing ... was stolen or otherwise unlawfully obtained", a defendant may show that the original suspicion was not well-grounded or that the thing in question was lawfully in his possession. So much has recently been called to attention in an emphatic way: see Tegge v Caldwell (1988) 15 NSWLR 226 at 227f. ...

Thus, in the present case, the defence provided by s 527C(2) is not, as Herron DCJ suggested, expressed in such terms as to impose on the accused the obligation to show that the "suspicion is not well grounded". Instead, the section is concerned with whether the person, having the thing in his or her custody, had reasonable grounds for suspicion that it was stolen or otherwise unlawfully obtained. It is concerned with what the accused’s belief was, not with what was the suspicion of the arresting police, the prosecutor or the court concerning the thing suspected of having been unlawfully obtained. Similarly, there is no onus on the accused, as such, to show that the money was lawfully in his possession. This might suggest that the accused was bound to show how he came by the money. Showing that may be one way of establishing that he had "no reasonable grounds for suspecting that the thing ... was otherwise unlawfully obtained". But it is not a necessary obligation imposed by the subsection providing for the defence.

...[A]n accurate explanation would have included an explanation that the onus cast upon him by the subsection did not require positively that he had lawfully obtained the "thing" but simply that he had no reasonable grounds for suspecting that it was stolen or otherwise unlawfully obtained.

I am not critical of Herron DCJ’s conduct of the proceedings. As I have earlier said his Honour showed great patience in dealing with the claimant. But it was important for his Honour to have explained clearly to the claimant precisely what s 527C(2) provided. It was equally important, the claimant having declined to give evidence of his own, that his Honour should nonetheless have considered whether the prosecution had proved its case against him according to the criminal onus. That issue remained. It was not determined by the finding that a prima facie case had been established.

In DPP v Brown (unreported SASC 10/6/94), Ollson J, dealing with an analogous offence summarised the court’s reasoning thus:

The court must therefore successively pose to itself the questions - What was the state of mind of the accused? Did the accused genuinely deal with the property without, in fact, suspecting that the property was derived or realised, directly or indirectly, from some form of unlawful activity? If yes, was that state of mind reasonably arrived at, in the sense, were there no reasonable grounds for entertaining the suspicion referred to in the statute?

The enquiry here focuses on whether or not there were facts and circumstances, known to the accused at the time in question, which, fairly considered, were capable of leading a reasonable person, and should have led the accused, to entertain the type of suspicion envisaged by the subsection. ...

On the one hand the primary emphasis is the actual possession of an innocent state of mind. On the other the subsection excludes the situation of purely idiosyncratic thinking, arising from, perhaps, undue naivety and/or a failure to consider and appreciate factual circumstances which ought, compellingly, to have excited suspicion.

There is no requirement that the defendant remove all doubts from the mind of the court. All that is required is that the defendant satisfies the court that it is more probable than not that the defendant had no reasonable grounds for suspicion.
Overuse of the offence

Despite the high degree of judicial criticism of the offence it remains an extremely widely used offence in NSW. It is far more often prosecuted than the receiving offences. It is also regularly charged as a “back up” offence, in order to gain a conviction if an indictable offence is not proved.

In DPP v Shirvanian (1998) 44 NSWLR 129, the NSWCCA upheld (in theory) the right of a magistrate to grant a permanent stay of proceeding for a charge under s527C on the grounds of abuse of process. Mason P (with whom Beazley J agreed, Powell JA dissenting) set out the facts as follows:

The property subject to the particular charge is set out in an annexure to the Bench Sheet. It consists of more than 5,000 items of household furniture. The annexure is divided into sections relating to each of the four bedrooms in the residence, the linen press, the laundry, the roof and the garage. The list appears to span practically every conceivable household appliance or personal content. It includes a single “Teddy” found in one of the bedrooms, and a forty-piece cutlery set found in the roof. The police fact sheet has been put into evidence. It is important to observe that it records what the police seek to prove, not what has been proved. That fact sheet records that the defendant was employed by Kmart at its Chatswood Store between 1985 and 1993 as a “doorman security officer”. The fact sheet asserts that the property has been valued at approximately $250,000 and that many of the items still retain Kmart price stickers. Many of them also contained handwritten stickers over the top marking down the Kmart prices at approximately 20 per cent. When questioned by the police the defendant stated that he had obtained some of the property from Kmart whilst employed there, purchasing the large amount due to his staff discounts. He was unable to produce any receipts and stated that the property had been stored in his house as an investment for his children.

On 20 September 1995, the Director of Public Prosecutions took over the proceedings. We were informed that the delay in prosecuting the summary charge came about because that charge was a “back up” to charges of larceny and receiving. Those charges were ultimately disposed of in the defendant’s favour. After various adjournments, the information was listed before the second defendant sitting at the Downing Centre Local Court on 17 November 1997 for a hearing estimated to take five days. Evidence was given by the police officer who had proffered the information. He was then cross-examined for some period before application was made for an order staying the prosecution on the grounds of oppression.

On 20 November 1997 the learned magistrate stayed the proceedings as an abuse of process on the basis that they were oppressive ...

However, I am far from persuaded that it was proper to exercise it in the present case. It is no part of the judicial function to decline jurisdiction (whether by granting a stay or otherwise) on the ground that the court disapproves of the charge that has been laid: see Barton v The Queen (1980) 147 CLR 75 at 96; R v Brown (at 478-479).

The learned magistrate’s remarks that an alternatively framed charge could have been laid raise an issue whether the line between preventing oppression and disapproving of a particular prosecution has been crossed. I intend to infer nothing higher than this. It is a matter for a judge of the Common Law Division [to whom the matter was remitted] to decide in the light of all relevant evidence, including the transcript of the proceedings below.

Indeed it has been held that even if a conviction is recorded for the indictable offence, the defendant may still be convicted of goods in custody – it is not an alternative verdict.107 The courts have however frowned on such a use of the section.108

107 R v Grace (1930) 47 WN (NSW) 51.
Persons unknown

It is possible to charge a person with larceny of goods from persons unknown, but there must be evidence that the goods did in fact belong to someone.

In Anglim and Cooke v Thomas [1974] VR 363 at 374 Harris J noted:

Proof of larceny was one element of this charge and there are well-established principles of law relating to the charge of larceny which control the significance of the proof that the property stolen was the property of a person. The information may lay the property in a specific person, or it may lay the property in persons unknown. If the property is laid as being the property of a person named, then there must be, at all events, some evidence to show that that named person was the owner of the goods which are alleged to have been stolen. If the property is alleged to be the property of persons unknown, then the evidence must show that the Crown is unable to ascertain who was the owner of the goods. These principles are to be found set out, so far as Australia is concerned, in an early decision of the Full Court of the Supreme Court of New South Wales. The case is R v Isaacs (1884) 5 LR (NSW) 369. The relevant passage is in the judgment of Martin CJ (at p. 372) where he said:

"It has always been the law, and is one of the things essential in cases of larceny, that the ownership of the property stolen should be proved. If, at the trial, it were shown that the goods stolen were the goods of A., instead of being the goods of B. as charged, an amendment of the information could be made. But here no such amendment was applied for. The prisoner was found guilty of receiving the goods, knowing them to be stolen, and that being so, the question is whether there ought to have been a conviction, there being no proof whatever as to whom the goods belonged. An information charging the prisoner with receiving goods the property of some person to the Attorney-General unknown, would have sufficed; but it would not have sufficed if it turned out that the owner was known. It is an essential thing to show that they were not the property of a person unknown, or of some person named."

This case has the authority of the High Court, for it was specifically approved in Trainer v R (1906) 4 CLR 126; 8 ALR 53, especially at (CLR) pp. 132-4.

In Trainer v R Griffiths CJ also issued the following caution:

The foundation of the charge of stealing is that the property in question is stolen property. ... The foundation is not that it is not the property of the accused, but that it is the property of someone from whom it has been feloniously taken. A person is not called on to give an account of how he became possessed of his own property. If it does not appear whether the property belongs to the prisoner or not, then you cannot draw any inference from his refusal to give an account of it. If the man gives a false account of it, and the account is proved to be false, how does the case stand then? You know nothing. The only account given is untrue, and you know nothing about it. That reasoning cannot be evaded merely by alleging that the property is that of some person unknown. As was pointed out by Sir Matthew Hale, the stealing must be first proved.

See also R v White (1783) 1 Leach 252; R v Flood (1869) 8 SCR (NSW) (L) 299; R v Fitzsimmons (1899) 20 LR (NSW) 42; R v Joiner (1910) 4 CrAppR 64; R v Hempenstall [1937] St R Qd 343; R v McCoy [1938] St R Qd 249; R v Thompson (1947) 47 SR (NSW) 466; Noon v Smith [1964] 3 All ER 895

See eg Ex parte Harris; Re Carne (1936) 53 WN (NSW) 87; Baldwin v Samuels (1973) 6 SASR 144.
In England in 1968 the common law based offence of larceny was replaced with a new statutory formulation contained in the *Theft Act*. This Act is based on the recommendations of the 1966 report by the Criminal Law Review Committee (“CLRC”).

The theft offence was adopted unchanged in Victoria in 1975, and a modified form that attempted to take account of a couple of identified difficulties of the original version was adopted in the Australian Model Criminal Code. The basic structure of the Model Code is now law in Victoria, the ACT, NT and the Commonwealth, with a variant of it being enacted in South Australia. Because there are essentially now 3 forms of the theft offence in Australia – the Victorian/English, Model Code and South Australian versions – it is difficult to discuss them without the need to constantly note differences. For the purposes of this course the approach is to use the English and ACT wording of the offence. As the majority of caselaw is English that version is referred to rather than the Victorian sections, and the ACT version of the Model Code version is used as the simplest wording, the Commonwealth being subject to complex jurisdictional restrictions.

Theft is defined in the English Theft Act 1968 as:

**Basic definition of theft.**

1.(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly.

(2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief’s own benefit.

(3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

The following five sections then go on to provide detailed elaborations of the concepts of dishonesty, appropriates, property, belonging to another, and with intention to permanently deprive.

The elements of theft are thus:

- Property
- Belonging to another
- Which is appropriated
- With the intention of permanently depriving the other of it
- Dishonestly

Other than dishonestly, all of these elements represent a major expansion or alteration of the meaning of the corresponding terms in larceny. What was intended was to create a broader, more flexible form of theft that would enable the repeal of all of the various fraudulent conversion offences that were associated with larceny.

For ease of reference, the following discussion will be based on the wording of the English *Theft Act* and the relevant sections of the ACT *Criminal Code*. This is because the ACT Act essentially reproduces the Commonwealth version, but without jurisdictional subsections mandated by Constitutional limitations. Both versions are based on the *Model*
Criminal Code adaptation of the Theft Act. For ease of reference, the ACT/Commonwealth form of the Theft Act will be described as the Model Code version.

The ACT version of theft is:

ACT Criminal Code 2002

308 Theft

A person commits an offence (theft) if the person dishonestly appropriates property belonging to someone else with the intention of permanently depriving the other person of the property.

Maximum penalty: 1 000 penalty units, imprisonment for 10 years or both.

This is substantially identical wording to the Theft Act 1968. As will be seen however, there are a number of differences in the further definition of the elements of theft.

Property

The Commonwealth Criminal Code 1995 defines stealable property in the following terms:

130.1 Definitions

In this Chapter: ...

property includes:

(a) real property; and
(b) personal property; and
(c) money; and
(d) a thing in action or other intangible property; and
(e) electricity; and
(f) a wild creature that is:
   (i) tamed; or
   (ii) ordinarily kept in captivity; or
   (iii) reduced (or in the course of being reduced) into the possession of a person.

131.4 Theft of land or things forming part of land

(1) For the purposes of this Division, a person cannot commit theft of land, except in the following cases:

(a) the case where the person appropriates anything forming part of the land by severing it or causing it to be severed;

(b) the case where:
   (i) the person is a trustee or personal representative, or is authorised (by power of attorney, as liquidator of a company or otherwise) to sell or dispose of land belonging to another; and
   (ii) the person appropriates the land, or anything forming part of it, by dealing with it in breach of the confidence reposed in the person.

(2) For the purposes of this section, land does not include incorporeal hereditaments.

By contrast the ACT Criminal Code 2002 and Legislation Act 2001 state:

Dictionary (Legislation Act)
property means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes a thing in action.

Note A thing in action is an intangible personal property right recognised and protected by the law. Examples include debts, money held in a bank, shares, rights under a trust, copyright and right to sue for breach of contract.

Dictionary (Criminal Code)

property includes the following:

(a) electricity;
(b) gas;
(c) water;
(d) a wild creature that is tamed or ordinarily kept in captivity or that is, or is being taken into, someone’s possession;
(e) any organ or part of a human body and any blood, ova, semen or other substance extracted from a human body.

The English Theft Act is to largely similar effect as the Commonwealth definition except for the following differences:

- The Theft Act does not include electricity
- The Theft Act includes reference to wild flora – which is dealt with under separate legislation in Australia

The key differences between the Commonwealth and ACT versions of the definition are:

- The Commonwealth (and Model Code) version adopts the Theft Act wording of “4(1)”Property” includes money and all other property, real or personal, including things in action and other intangible property, though separated into separate subsections. The ACT Act attempts a new description of the scope of property
- One important aspect of the ACT approach is that the Note makes clear that copyright and rights to sue for breaches of contract amount to forms of property, both controversial in terms of their use as a basis for theft.
- Land is excluded in the Commonwealth version, but 131.4(1)(a) ensures liability for all severing of fixtures and emblements. The ACT Criminal Code does not include reference to theft of land, presumably because in the ACT all land is owned by the Crown and cannot be alienated (see s9 Seat of Government (Administration) Act (ACT) 1910)
- The ACT Criminal Code also makes clear that body parts and substances are species of property. By implication, the body itself is not property. It therefore remains unclear whether a corpse is a form of property.

The main difference with the common law is the extension of property to cover intangible property and electricity. Otherwise the definitions show an intention to maintain the status quo in relation to land and wild animals.

Things in Action

The term “things in action” (or chose in action) is one that has slightly different meanings in different contexts, and has had a long and complex history. While the exact
extent of its meaning is not easily defined. The definition in *R v Kohn* (1979) 69 Cr App R 395 the English Court of Appeal noted:

We refer to the well-known passage in *Torkington v. Magee* [1902] 2 K.B. 427 in the judgment of Channell J. which appears at pp. 430, 431 of the report to see the force of the argument. It runs as follows:

"'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is an expression large enough to include rights which it can hardly have been intended should be assignable by virtue of the subsection in question, as, for instance, shares, which can only be transferred as provided by the Companies Acts. It is probably necessary, therefore, to put some limit upon the generality of the words; but I think that the necessary limitation is shown by the considerations to which I have already referred, and also by the words of subsection 6 itself. I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable.'"

If one wants further illumination, one turns to Halsbury's Laws of England (4th ed.), Vol. 6, para. 1, which reads as follows: "The expression 'chase in action' or 'thing in action' in the literal sense means a thing recoverable by action, as contrasted with a chose in possession which is a thing of which a person may have not only ownership but also actual physical possession. The meaning of the expression 'chose in action' has varied from time to time, but is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession."

It is illuminating perhaps to read footnote 2 to that passage, which will demonstrate the length and breadth of the meaning of this particular expression. This is what the footnote says:

"... The expression is found in the history of English law with so many meanings attached to it, and has been and still is employed to denote so many and such various classes of things, that it is impossible to give an accurate and complete definition of what it means and may include at the present day. The various kinds of property included under the term have little in common beyond the characteristic fact of their not being subject to actual physical possession ..."

So the prosecution start off with the advantage of the fact that that expression is plainly one which covers a multitude of matters and over the history of English law has spread really far beyond its original concept.

Because of the antiquity of the concept there are examples of choses in action that are both equitable and non-assignable. Such things in action may not constitute forms of property. Some of the problems with such a broad concept can be seen in a statement by the English Court of Appeal (Criminal Division) in the recent case of *R v Marshall and ors*. The defendants had been charged with reselling railway tickets obtained from persons who had completed their rail journey but whose tickets remained valid. This was held by the court to be theft of the actual tickets from London Underground Ltd. Although the prosecution was framed in terms of the physical tickets, the court discussed the chose in action the ticket represented:

On the issuing of an underground ticket a contract is created between London Underground and the purchaser. Under that contract each party has rights and obligations. Theoretically those rights are enforceable by action. Therefore it is arguable, we suppose, that by the transaction each party has acquired a chose in action. On the side of the purchaser it is represented by a right to use the ticket to the extent which it allows travel on the underground

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system. On the side of London Underground it encompasses the right to insist that the ticket is used by no one other than the purchaser. It is that right which is disregarded when the ticket is acquired by the Appellant and sold on.  

This passage suggests that contractual duties could constitute property for the purposes of theft and it seems that that the ACT definition of property is intended to include such rights (see the Note). It has been argued by some commentators that such actions cannot constitute theft because any disregarding of the obligation under the contract that gives a right to sue is not an appropriation of it and thus cannot amount to theft. No theft cases have yet been based on such an expansive concept of property.

Some idea of the scope of the concept of things in action can be gained from R v Kohn. Kohn was a director and shareholder in a company controlled by himself and another. While the other director was overseas, Kohn drew a number of cheques on the company to pay his own debts and to fund investment in other companies he wished to acquire. The first cheques were paid by the bank when there was still money in the company’s account, later cheques on the basis of an agreed overdraft facility, and a final cheque paid when the company’s overdraft was beyond the agreed limit.

So far as the first situation is concerned, when the account is in credit, the prosecution say that, where an account is in credit the relationship of debtor and creditor exists between the bank and the customer. The customer is the creditor, the bank is the debtor. The debt is owing by the bank to the customer. That debt is something which cannot be physically handled, it is not a thing or chose in possession; it is a thing in action, namely something which can only be secured by action and, goes the argument, this is a case of a thing in action par excellence, and if it be proved that the defendant has stolen, in other words appropriated that thing in action, then the offence is made out. ... [The court agreed with this analysis, rejecting an argument by the defence that the chose in action had been destroyed before any appropriation as “untenable”]

We now turn to the counts which cover the situation when the account was overdrawn, but the amount of the cheque was within the agreed limits of the overdraft. ... If the account is in credit, as we have seen, there is an obligation to honour the cheque. If the account is within the agreed limits of the overdraft facilities, there is an obligation to meet the cheque. In either case it is an obligation which can only be enforced by action. For purposes of this case it seems to us that that sufficiently constitutes a debt within the meaning of the word as explained by Lord Reid [in DPP v Turner]. It is a right of property which can properly be described as a thing in action and therefore potentially a subject of theft under the provisions of the 1968 Act. The cheque is the means by which the theft of this property is achieved. The completion of the theft does not take place until the transaction has gone through to completion.

[The court referred to authorities on banking law and continued:] It seems to us, in the light of those authorities and in the light of the wording of the Theft Act 1968, that in this situation, when the order to the bank is within the agreed limits of the overdraft, a thing in action certainly exists and accordingly the judge was right in rejecting the submission. The appeal so far as those particular counts are concerned must fail.

That leads us to the third situation, which affects only count 7, that being, it will be remembered, the count which dealt with the cheque presented to the bank at a time when the account was over the agreed overdraft limit which had been imposed by the bank.

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111 JC Smith, Stealing Tickets [1998] Crim LR 723 at 726. “It is like a breach of copyright which is unlawful but not theft of the copyright. The contrary view would turn all deliberate breaches of contract into theft which would be an unacceptable extension of the criminal law.”
112 (1979) 69 Cr App R 395.
The situation here is that there is no relationship of debtor and creditor, even notionally. The bank has no duty to the customer to meet the cheque. It can simply mark the cheque "Refer to drawer." It can decline to honour the cheque. The reasons for that are obvious. If then a bank declines to honour a cheque, there is no right of action in the customer. If they do as a matter of grace - that is all it can be - honour the cheque then that is a course which does not retrospectively create any personal right of property in the customer and does not create any duty retrospectively in the bank. It seems, therefore, on that bald statement of principle, that this count which alleges a theft of a thing in action when the account was over the agreed limit must be quashed, unless some external reason can be found for saving it.

The chose in action must be real and not fictional. Thus, creation of false credits in a bank account does not amount to choses in action irrespective of the mistaken treatment of the entries as such by a bank. Such circumstances can however been seen as either false accounting or the obtaining of money from the bank by means of fraud. It is also important to determine whether any intangible form of property has been misused. In Akbulut v Grimshaw, the appellant made unauthorised telephone calls. The court rejected a submission that the rights the subscriber had to use the telephone service were a form of other intangible property. The court did this on the basis that no form of intangible property right was held by the subscriber prior to the use of the phone. The use created an obligation on the subscriber; it did not appropriate an existing right.

Areas of uncertainty

One area of uncertainty is in relation to intellectual property. Such forms of property are created by Commonwealth legislation. That legislation, such as the Copyright Act 1968, contains a comprehensive and sophisticated regulatory regime involving both criminal and civil penalties for misuse of intellectual property rights. Despite this, such forms of property would fall within the definition of stealable property.

There is however uncertainty as to whether forms of intellectual property can be appropriated. There is dicta from the House of Lords in an early Theft Act case that copyright could not be stolen (Rank Film Distributors Ltd v Video Information Centre [1981] 2 All ER 76 per Lord Fraser at 83) and in some textbooks, but whether this is the case depends on how broad an interpretation of the elements of appropriation and intention to permanently deprive is adopted by the courts.

Other intangible property

This phrase is intended to prevent the offence hinging on technical definitions of whether proprietorial rights are in fact choses in action. On one influential view choses in action are seen to be a residual form of personal property encompassing all forms of personal property that is not a chose in possession. This suggests that the phrase is redundant. However, there is one decision that draws a distinction between the two concepts. R v Attorney General of Hong Kong v Nai Keung concerned a transferable export quota, the holder of which was entitled to apply for an export licence up to the amount in the quota. The quota itself however conferred no rights to export. This was

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113 R v Thompson [1984] 3 All ER 565.
115 Colonial Bank v Whinney (1885) 30 Ch D 261 at 285.
found not to be a thing in action, but it was other intangible property. The Privy Council held:

In summary, to be registered as the holder of an appropriate quota is a prerequisite to obtaining an export licence; it confers an expectation that, in the ordinary course, a corresponding licence will be granted, though not an enforceable legal right. In their Lordships' opinion the definition of "property" in the English Theft Act 1968 and the Hong Kong Theft Ordinance was intended to have the widest ambit. It would be strange indeed if something which is freely bought and sold and which may clearly be the subject of dishonest dealing which deprives the owner of the benefit it confers were not capable of being stolen. Their Lordships have no hesitation in concluding that export quotas in Hong Kong although not "things in action" are a form of "other intangible property."

**Electricity**

It has been held in England that electricity is not a form of intangible property.117 The Model Code includes electricity as an additional form of property. This is a novel approach. There are major issues of principle involved in redefining property in order to accommodate electricity. For example temporary use of an electrically powered item, while not theft of the item itself, might give rise to theft of the electricity used by the item, thus subverting the intended limits of the offence of theft.

**Land**

At common law only tangible and moveable property was larcenable. Consequently land could not be stolen. The history of land holding in England also militated against the use of the criminal law of larceny to control misuse as rights to land were often shared between various parties. The difficulty of proving documentary title to land also resulted in the courts accepting that adverse possession of land over a period of time could crystallise into a form of title better than that of the true owner. As the CLRC concluded, it would be anomalous to criminalise conduct that is recognised as creating a valid title to land. However, the Committee accepted that it should still be possible to charge a person with fraudulent conversion of land that had been given into their possession or control.118

**Belonging To Another**

**English Theft Act 1968**

"Belonging to another".

5.(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

(2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

(3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a

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117 In Low v Blesse [1975] Crim. L. R. 513 the defendant made unauthorised telephone calls. He was charged with stealing electricity while using the telephone. On appeal, the court held that the electricity was not property within the meaning of s. 4 of the Theft Act 1968 (Eng.) which had a similar extended definition of "property" to include "things in action and other intangible property".

118 At paragraph 22.
particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

(4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

(5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

ACT  *Criminal Code* 2002

301 Person to whom property belongs for ch 3

(1) Property *belongs* to anyone having possession or control of it, or having any proprietary right or interest in it (other than an equitable interest arising only from an agreement to transfer or grant an interest, or from a constructive trust).

(2) This section is subject to section 330 (Money transfers).

305 Person to whom property belongs for pt 3.2

(1) If property belongs to 2 or more people, a reference to the person to whom the property belongs is taken to be a reference to each of them.

(2) If property is subject to a trust—

(a) the person to whom the property belongs includes anyone who has a right to enforce the trust; and

(b) an intention to defeat the trust is an intention to deprive any such person of the property.

(3) Property of a corporation sole belongs to the corporation despite a vacancy in the corporation.

(4) If a person (*A*) receives property from or on account of someone else (*B*) and is under a legal obligation to *B* to retain and deal with the property or its proceeds in a particular way, the property or proceeds belong to *B*, as against *A*.

(5) If a person (*A*) gets property by someone else's fundamental mistake and is under a legal obligation to make restoration (in whole or part) of the property, its proceeds or its value—

(a) the property or its proceeds belong (to the extent of the obligation and as against *A*) to the person entitled to restoration (*B*); and

(b) an intention not to make restoration is—

(i) an intention to permanently deprive *B* of the property or proceeds; and

(ii) an appropriation of the property or proceeds without *B*'s consent.

(6) In this section:

*fundamental mistake*, in relation to property, means—

(a) a mistake about the identity of the person getting the property; or

(b) a mistake about the essential nature of the property; or

(c) a mistake about the amount of any money, if the person getting the money is aware of the mistake when getting the money.

*money* includes anything that is equivalent to money.
Examples of things equivalent to money

- a cheque or other negotiable instrument
- an electronic funds transfer

Note: An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Larceny at common law is based on the concept of possession. This aspect is reproduced in s5(1) Theft Act and ACT s301(1) ACT Criminal Code where property belongs to any person having possession or control.  The concept of “control” is, however, added. What this amounts to is unclear. One view it might be necessary to deal with intangible forms of property that can be effectively controlled but not actually possessed. On the other hand, English commentators have considered that control is a synonym for custody, with the effect that belonging to is extended beyond possession to those merely having physical control of property. Choses in action would thus fall within the scope of “having a proprietary right or interest”.

The Theft Act and Model Code however also extend the definition to any proprietary right or interest in property other than some forms of equitable interests. The primary reason that it does so is based on the intention of the drafters of the Theft Act 1968 to collapse all property offences other than fraud into one compendious offence of theft.

Excluded equitable interests

ACT Criminal Code 2002

301 Person to whom property belongs for ch 3

(1) Property belongs to anyone having possession or control of it, or having any proprietary right or interest in it (other than an equitable interest arising only from an agreement to transfer or grant an interest, or from a constructive trust).

The drafters of the Theft Act 1968 could only think of one species of equitable right that ought to be exempted from the scope of theft. This was the equitable interest arising from an agreement to transfer interests in property. No policy reason for this exception appears to have been articulated, although it has been suggested that it is because the equitable interest is in essence a contractual one and civil remedies are sufficient.

Unlike the Theft Act, the Model Code also contains a second exemption of constructive trusts. This exemption has had to be implied by the English courts. The Model Code specifically exempts such trusts on the basis that the civil notions of unconscionability are not sufficiently culpable to constitute theft and that are so vague that they offend the principle that the criminal law should be certain and knowable in advance.

Misappropriation of trust property

ACT Criminal Code 2002

305 Person to whom property belongs for pt 3.2

(2) If property is subject to a trust—

119 Control in this context appears apt to describe those various forms of constructive and legal possession where the possessor is not in actual physical possession of property. These could however be included in “possession” itself under the expansive civil law understanding of the concept.

120 ATH Smith, Property Offences, p101.

(a) the person to whom the property belongs includes anyone who has a right to enforce the trust; and

(b) an intention to defeat the trust is an intention to deprive any such person of the property.

The definition (s301(2) ACT Criminal Code) also ensures that the theft applies to misappropriation of trust property. This subsection has the effect that trust property belongs to any and all beneficiaries of a trust, including beneficiaries of discretionary trusts. A beneficiary of a discretionary trust will often have no property interests in trust property prior to the exercise of the trustee’s discretion to direct property to the beneficiary. Without this additional subsection it might be possible for a trustee to consent to an appropriation of property subject to a discretionary trust in circumstances where the person appropriating the property was not guilty of theft on the basis that the property did not belong to anyone other than the consenting trustee.

Misappropriation of property received on account

ACT Criminal Code 2002

305 Person to whom property belongs for pt 3.2

(4) If a person (A) receives property from or on account of someone else (B) and is under a legal obligation to B to retain and deal with the property or its proceeds in a particular way, the property or proceeds belong to B, as against A.

The definition also extends to persons receiving property on account. This was intended by the CLRC to replicate the scope of the fraudulent conversion offence, and was also seen to embrace actions which had previously also fallen within the more restricted offences of larceny by bailee and embezzlement. However it is much broader.

The obligation under which the defendant receives the property must be a legal obligation and not just a moral one. In other words the victim must have a cause of action against the defendant in relation to the misuse of the property. Thus in circumstances where property passes without any intention to create legal relations relating to the property (such as is often the case in domestic situations) there can be no theft as a result of misappropriation of the property.

However in most situations the obligation will be equitable in nature, rather than contractual and so for the purposes of this definition “legal” should be read to include both legal and equitable obligations.

English courts have thus accepted that this subsection has an operation beyond proprietary rights to property. While the courts have held that obligation in this context requires proof of a legal obligation as opposed to a moral or social obligation (this is not stated in the Theft Act provision (s5(3)) but has been implied), there is otherwise little restriction.

In R v Arnold [1997] 4 All ER 1, Arnold, a franchisor, was found guilty of theft when he discounted bills of exchange. The bills were drawn up on his own letterhead and were only temporarily out of his possession for the purposes of signing. They were thus property owned by himself. However the court found that had he procured the signatures of his

122 Para 30.
franchisees on bills of exchange in exchange for agreeing that he would only hold the bills as security. The Court of Appeal held that such an obligation was sufficient to amount to “belonging to another”:

Section 5(3) is in terms which cover property received from another under an obligation short of actual trusteeship. If it were not intended to go wider than what has gone before[ in s5(1) and 5 (2)], its provisions would be otiose. As previously indicated, it is apparently intended to cover the former offences of embezzlement, larceny by a servant and fraudulent conversion, but there seems to us no good reason so to limit it in the light of the clear and widely framed terms of the subsection.

So far as its limits are concerned, it is of course well-established that the obligation of the recipient must be a legal as opposed to a moral or social obligation .... However, provided the obligation is one which clearly requires the recipient of the property to retain and deal with that property or its proceeds in a particular way for the benefit of the transferor, we see no good reason to introduce words of limitation in relation to the interest of the transferor, save that at the time of handing over the property to the recipient he should lawfully be in possession of it in circumstances which give him a legal right vis-a-vis the recipient to require that the property be retained or dealt with in a particular way for the benefit of the transferor.

Nor do we consider that the position must be different where the recipient is throughout the 'true owner' if by agreement (whether made earlier or at the time) he recognises a legal obligation to retain or deal with the property in the interest and/or for the benefit of the transferor, but subsequently, in knowing breach of that obligation, misappropriates it to his own unfettered use.124

The potential complexity of the nature of such obligations leads to what appears to be the unavoidable need to rely on a court’s direction as to whether any legal obligation exists. In *R v Breaks* [1998] Crim LR 349, (Transcript: Smith Bernal) it was held:

We do not consider that the Judge was correct to hold that s 5(3) obviated the need to consider questions of civil law on the facts of this case. Section 5(3) requires an obligation to retain and deal with the property of another, or its proceeds, in a particular way, and it is to the civil law that one must look to see whether such a duty exists. Where the facts are not in dispute, it is for the Judge to rule, as a matter of law, whether such an obligation exists. Where the material facts are in dispute, the correct approach is that stated by Lawton LJ in *R v Mainwaring and Madders* (1982) 74 Cr.App.Rep. 99, at page 107:

"We think that it may help judges if we make this comment about that section of the Act. Whether or not an obligation arises is a matter of law, because an obligation must be a legal obligation. But a legal obligation arises only in certain circumstances, and in many cases the circumstances cannot be known until the facts have been established. It is for the jury, not the judge, to establish the facts, if they are in dispute. ...

Insofar as the facts, or any alternative version of the facts, are clear, it will normally be desirable for the Judge to rule on the law before, or at, the commencement of the trial.125

*Breaks* involved allegations of misappropriation of client’s funds by an insurance brokerage firm. The conviction was overturned because the trial judge failed to determine what the legal effect was of the complex nature of the contractual obligations and banking arrangements of the companies controlled by the accused.

Given the complexity of the property rights issues that might be involved, a question arises as to the knowledge that is required of the accused. In *R v Wills*126 a financial

124  Ibid, 9.
125  Ibid (Transcript: Smith Bernal)
consultant’s colleagues misapplied cheques paid into the consultant’s company account. There was no evidence led that he was aware of the transaction. In these circumstances the Court of Appeal held that the obligation to retain or deal with the property must be known to the accused:

Whether a person is under an obligation to deal with property in a particular way can only be established by proving that he had knowledge of that obligation. Proof that the property was not dealt with in conformity with the obligation is not sufficient in itself.127

However, this interpretation is based on the implication of a mental element into what is otherwise an actus reus element of the offence, and might face some difficulty in light of the implications of Chapter 2 of the Criminal Code – discussed below. Of course if the accused is entirely unaware of any obligation, then dishonesty could not be proved. But what is the outcome if the accused is generally aware of the situation?

In Clowes (No 2)128 liability was considered to turn on whether investor’s money was held on trust. The Court of Appeal upheld the approach of the trial judge in directing the jury that the legal interpretation of the relevant documents was that a trust did exist and the only question for the jury was that of dishonesty. The jury were entitled to make a finding of dishonesty even if they accepted that the accused was unaware that the money was held on trust. The court held:

It was a question of law, not a question of fact, what legal relationship was created between Barlow Clowes and its investors when they invested moneys with it under its Portfolios 28 and 68 investment schemes: ... Now in one sense it might be argued that whether he was dishonest depended upon whether he knew that in law he was a trustee of the investors’ funds and had appropriated their funds. Where, as here, the question of law was open to argument among lawyers it could have been very difficult, if not impossible, to make a jury sure that Clowes, a layman, had reached such a conclusion of law.

However, dishonesty is an ingredient of many offences and does not necessarily depend upon a correct understanding by an accused of all the legal implications of the particular offence with which he is charged. ... The fact that he did not know what was criminal and what was not or that he did not understand the relevant principles of the civil law could not save him from conviction if what he did, coupled with his state of mind, satisfied the elements of the crime of which he was accused. ...

It was for the judge to direct the jury as a matter of law, as he did, that Clowes’s conduct amounted to the appropriation of the property of the investors, and for the jury to determine as a question of fact whether, whatever his own legal interpretation of the relationship between Barlow Clowes and its investors, he was acting dishonestly.129

This analysis has been criticised for overlooking the defence of a claim of right and its relationship to dishonesty.130 On the other hand such issues have not concerned the High Court in fraud cases, which has held that a finding of dishonesty by ordinary standards trumps any subjective claim of right.131 Those issues aside, Clowes (No 2) appears to reduce the

127 Ibid, 301
128 [1994] 2 All ER 316.
129 Davis
130 Macleod v R
131
The obligation to retain or deal with the property must be known to the defendant.\textsuperscript{132} It can be imposed by either the person who gives the defendant the property or the person on whose account the property is received. In some cases both classes of obligation may be imposed, such as in situations where a person is receiving property as an agent for another.

However, it will remain necessary for the prosecution to prove that there was an obligation that related specifically to the property in question. Thus while receiving payment in order to purchase building materials will fall within the definition, a pre-payment for building services will not.\textsuperscript{133}

The obligation is also one that is owed to the person from whom the property is received, and there is English authority that a defence of \textit{jus tertii} is not permitted. In \textit{R v Meech}\textsuperscript{134} the court held that a subsequent knowledge that the property received under an obligation to a second person had in fact been stolen from a third person constituted no defence to the operation of this subsection. However commentary on the decision in that case has pointed out that there may be circumstances where property is received under an obligation that subsequently expires, or is unenforceable. In such circumstances the dealing with the property may be otherwise quite lawful, but may still constitute theft as a result of this subsection.

Under this extended definition property that is owned by the defendant can become property belonging to another if the defendant accepts an obligation to only use the property in a certain way.\textsuperscript{135}

\textbf{Relativity of title}

One crucial issue not considered by the definition in the \textit{Model Code} is the question of relativity of title. The common law accepts a large range of interests in property and resolves conflicting interests in the same property by generally ranking interest by time of acquisition and refusing to accept a plea of jus tertii. Thus the law recognises that the owner and the thief have property interests in the same property, but that as between them the owner has better rights. The \textit{Model Code} definition of belonging to another does not recognise this and consequently a retaking of stolen property from a thief by an owner constitutes all the elements of theft other than dishonesty. Such a result is unfortunate. This can result in dilemmas caused by cases such as \textit{R v Turner}.\textsuperscript{136} In that case the owner of a car retook it from a garage without paying for repairs. Previously, the existence of a lien held by the garage would have provided the basis for a conviction. In this case however, the English Court of Appeal (Criminal Division) held such a lien was irrelevant on possession or control:

\begin{quote}
This court is quite satisfied that there is no ground whatever for qualifying the words 'possession or control' in any way. It is sufficient if it is found that the person from whom the property is taken, or to use the words of the Act, appropriated, was at the time in fact in
\end{quote}

\begin{footnotes}
\textsuperscript{132} Wills (1990) 92 Cr App Rep 297.
\textsuperscript{133} Compare Stephens \textit{v} The Queen (1978) 139 CLR 315 and Andrews \textit{v} The Queen (1968) 126 CLR 198.
\textsuperscript{134} \textit{R v Meech} [1974] QB 549.
\textsuperscript{135} In \textit{R v Arnold} [1997] 4 All ER 1, the defendant, a franchisor, was found guilty of theft when he discounted bills of exchange. The bills were drawn up on his own letterhead and were only temporarily out of his possession for the purposes of signing. They were thus property owned by himself. However the court found that had he procured the signatures of his franchisees on bills of exchange in exchange for agreeing that he would only hold the bills as security. Consequently the bills fell within the extended meaning of “belonging to another”.
\textsuperscript{136} [1971] 1 WLR 901.
\end{footnotes}
possession or control. At the trial there was a long argument whether that possession or control must be lawful, it being said that by reason of the fact that this car was subject to a hire-purchase agreement, Mr Brown could never even as against the appellant obtain lawful possession or control. As I have said, this court is quite satisfied that the judge was quite correct in telling the jury that they need not bother about lien, and that they need not bother about hire-purchase agreements. The only question was: was Mr Brown in fact in possession or control?  

While on the facts the decision is unobjectionable the reasoning highlights that the courts would not be able to justify a taking of property based on a better proprietary title, only a taking of property in the absence of any other competing title.  

**Appropriates**

English *Theft Act* 1968

"Appropriates".

3.(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

(2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

**ACT Criminal Code 2002**

304 Appropriation of property for pt 3.2

(1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom the property belongs, is an appropriation of the property.

(2) If a person has come by property (innocently or not) without committing theft, subsection (1) applies to any later assumption of those rights without consent by keeping or dealing with it as owner.

(3) If property is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights the person believed the person was acquiring is not an appropriation of property because of any defect in the transferor's title.

Arguably the greatest change to the concept of stealing as represented by the *Theft Act* and *Model Code* models is the introduction of the notion of appropriation in place of the common law notion of asportation.

As discussed below, the word “appropriates” was inserted into the *Theft Act* in the belief that it was synonymous with “converts”. However the judicial interpretation of the word in England and Victoria has been much broader. In England appropriation has been defined to mean any act that in some way assumes any right of the owner. There is currently no need

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138 One piece of property could “belong” to a multitude of people, all of whom have a small interest in the property. Traditionally the reliance on possession made it was clear who controlled the property and thus who was the victim of theft. The new approach makes the scope of the possible victims much broader and often not apparent. As a result the mental element implicit in appropriation becomes much more important.
for proof of an assumption of all the rights, nor need the assumption be in any way adverse to the interests of the owner. In fact the owner may fully consent to the assumption and may indeed initiate it. On the other hand the Commonwealth and ACT versions require consent and limit appropriation to the assumption of “ownership, possession or control”. The following discussion is necessarily long and relates the history of the interpretation of the term. It is therefore useful to set out at the beginning which cases represent the current law.

- Crimes Act, Victoria (which contains Theft Act unchanged): *Morris* (adopted in *Roffel*) – *Gomez* and *Hinks* have not been judicially considered.
- Model Code: unclear. See concluding discussion.

**Asportation and Appropriation**

Appropriation, by contrast to asportation, is broader than the taking of possession of tangible property. It can include interference with many aspects of ownership and does not of itself appear to require anything equivalent to the assumption of all possessory rights. Where asportation has the assumption of a minimum number of rights implicit in the taking of possession appropriation does not. Further the taking of possession is a single event and is an action that the defendant can only relevantly commit once. On the other hand it is possible to commit cumulative appropriations of various property rights to the same item of property.

It is therefore important to define both the minimum interference or assumption of rights that are required to show an appropriation, and the time at which the appropriation occurs. Both of these issues have caused significant problems for the English courts.

**Does appropriation import the concept in larceny of a lack of consent?**

In *Lawrence*, a decision of the House of Lords relatively early in the life of the *Theft Act* the court was asked to decide if appropriation required proof of a lack of consent by the victim. Occhi, an Italian student who had just arrived in London and whose English was poor caught Lawrence’s taxi. Lawrence falsely told Occhi that the fare was very expensive, and when the student offered his open wallet, Lawrence took out far more money than he should have. Occhi admitted through an interpreter that he had “permitted” this to occur. The House of Lords held:

Prior to the passage of the *Theft Act* 1968, which made radical changes in and greatly simplified the law relating to theft and some other offences, it was necessary to prove that the property alleged to have been stolen was taken “without the consent of the owner” (*Larceny Act* 1916, section 1 (1)).

These words are not included in section 1 (1) of the *Theft Act*, but the appellant contended that the subsection should be construed as if they were, as if they appeared after the word "appropriates." ...

I see no ground for concluding that the omission of the words “without the consent of the owner” was inadvertent and not deliberate, and to read the subsection as if they were included is, in my opinion, wholly unwarranted. Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner’s consent. That is no longer an ingredient of the offence.

It was therefore not necessary to prove, separately, that the appropriation had been done without consent. What was unclear following this decision was whether there were any other consent-related requirements implicit in appropriation. Did this decision merely...
hold that an apparent consent vitiated by fraud was no barrier to conviction, or did it make issues of consent totally irrelevant. Also, was there any restriction not based on consent that remained implicit in appropriation.

**Does appropriation require there be an assumption of all of the rights of the owner?**

One such restriction could be that appropriation, like civil law conversion, incorporate a requirement that “the degree of user of [the property] amount to employing the [property] as if it were one’s own”. That this was the original intention of the CLRC is made clear in the following passages from their Report:

33. The Committee are strongly of the view that larceny, embezzlement and fraudulent conversion should be replaced by a single new offence of theft. The important element of them all is undoubtedly the dishonest appropriation of another person’s property - the treating of “tuum” as “meum”.

35 The expression “dishonestly appropriates” in clause 1(1) means the same as “fraudulently converts to his own use or benefit, or the use or benefit of any other person” in 1916 section 20(1)(iv); but the former expression is shorter and, we hope, clearer.

The intention of the CLRC appeared to be that appropriation required an act that evinced an intention to assume all of the rights of the owner to the property. However there were conflicting approaches taken to the interpretation of the courts until 1984 when the House of Lords in *R v Morris* provided what appeared to a definitive rejection of any such intention. *Morris* also appeared to find the inherent restriction in appropriation that Laurence had left room for.

**Lord Roskill:** The facts giving rise to these appeals are simple. Morris, the appellant from the Court of Appeal, Criminal Division, on 30 October 1981 took goods from the shelves of a supermarket. He replaced the price labels attached to them with labels showing a lesser price than the originals. At the check-out point he was asked for and paid those lesser prices. He was then arrested. Burnside, the appellant from the Divisional Court, was seen to remove a price label from a joint of pork in the supermarket and attach it to a second joint. This action was detected at the check-out point but before he had paid for that second joint which at that moment bore a price label showing a price of £ 2dp73 whereas the label should have shown a price of £ 6dp91fD. Burnside was then arrested.

The only relevant difference between the two cases is that Burnside was arrested before he had dishonestly paid the lesser price for the joint of pork. Morris was arrested after he had paid the relevant lesser prices ...

Counsel for the appellants submitted that the phrase in s 3(1) 'Any assumption by a person of the rights [my emphasis] of an owner amounts to an appropriation' must mean any assumption of 'all the rights of an owner'. Since neither appellant had at the time of the removal of the goods from the shelves and of the label-switching assumed all the rights of the owner, there was no appropriation and therefore no theft. Counsel for the prosecution, on the other hand, contended that the rights in this context only meant any of the rights. An owner of goods has many rights: they have been described as 'a bundle or package of rights'. Counsel for the prosecution contended that on a fair reading of the subsection it cannot have been the intention that every one of an owner’s rights had to be assumed by the alleged thief before an appropriation was proved and that essential ingredient of the offence of theft established.

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My Lords, if one reads the words 'the rights' at the opening of s 3(1) literally and in isolation from the rest of the section, the submission of counsel for the appellants undoubtedly has force. But the later words 'any later assumption of a right' in sub-s (1) and the words in sub-s (2) 'no later assumption by him of rights' seem to me to militate strongly against the correctness of the submission. Moreover, the provisions of s 2(1)(a) also seem to point in the same direction. It follows therefore that it is enough for the prosecution if they have proved in these cases the assumption by the defendants of any of the rights of the owner of the goods in question, that is to say, the supermarket concerned ...

My Lords, counsel for the prosecution sought to argue that any removal from the shelves of the supermarket, even if unaccompanied by label-switching, was without more an appropriation. In one passage in his judgment in [the Court of Appeal’s decision in] Morris’s case, Lord Lane CJ appears to have accepted the submission, for he said:

'. . . It seems to us that in taking the article from the shelf the customer is indeed assuming one of the rights of the owner, the right to move the article from its position on the shelf to carry it to the check-out . . .'

With the utmost respect, I cannot accept this statement as correct. If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the check-point there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket. In the context of s 3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied authority of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the check-point and there to pay the correct price, at which moment the property in the goods will pass to the shopper for the first time. It is with the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts and thus obtained at least control if not actual possession of the goods preparatory, at a later stage, to obtaining the property in them on payment of the proper amount at the check-point. I do not think that s 3(1) envisages any such act as an 'appropriation', whatever may be the meaning of that word in other fields such as contract or sale of goods law.

If, as I understand all of your Lordships to agree, the concept of appropriation in s 3(1) involves an element of adverse interference with or usurpation of some right of the owner, it is necessary next to consider whether that requirement is satisfied in either of these cases. As I have already said, in my view mere removal from the shelves without more is not an appropriation. Further, if a shopper with some perverted sense of humour, intending only to create confusion and nothing more, both for the supermarket and for other shoppers, switches labels, I do not think that that act of label-switching alone is without more an appropriation, though it is not difficult to envisage some cases of dishonest label-switching which could be. In cases such as the present, it is in truth a combination of these actions, the removal from the shelf and the switching of the labels which evidences adverse interference with or usurpation of the right of the owner. Those acts, therefore, amount to an appropriation and if they are accompanied by proof of the other three elements to which I have referred, the offence of theft is established. Further, if they are accompanied by other acts such as putting the goods so removed and relabelled into a receptacle, whether a trolley or the shopper’s own bag or basket, proof of appropriation within s 3(1) becomes overwhelming. It is the doing of one or more acts which individually or collectively amount to such adverse interference with or usurpation of the owner’s rights which constitute appropriation under s 3(1) and I do not think it matters where there is more than one such act in which order the successive acts take place, or whether there is any interval of time between them. To suggest that it matters whether the mislabelling precedes or succeeds removal from the shelves is to reduce this branch of the law to an absurdity.

[The other Lords concurred.]
This interpretation of appropriation affirmed that the scope of theft was significantly larger than that of larceny. It permitted the assumption by the defendant of any right of the owner to be the sole act required to prove theft. While in most cases the right asserted is one that acts to deny other rights, such as the taking of possession of tangible property, there are many situations in which a non-possessory right may be assumed or exercised. The panoply of rights that an owner has to property are both many and varied and often involve complex forms of property rights.

However the judgment was also a strong statement that a lack of consent was implicit in the notion of appropriation and that the interference had to amount to a trespass. The decision in *Morris* was followed in Victoria in *R v Roffel*[^141^], and remains the Victorian understanding of appropriation. Thus in Victoria, although lack of consent is not a separate requirement, the act of appropriation must amount to a usurping of the rights of the owner – which in practice amounts to almost the same thing.

A Victorian case is a good example of how broad the offence can be, even with a requirement of usurpation. In *W (a child) v Woodrow*[^142^] the defendant accepted a ride as a passenger in a stolen car.

**Gray J:** On 20 June 1984, W (hereinafter referred to as “the appellant”) appeared before the Children’s Court at Box Hill on one count of theft of a motor car. … I was told by counsel that the question to be answered is whether the Children’s Court was correct in finding the charge proved and, more particularly, in finding that the appellant had appropriated the motor car the subject of the charge.

The relevant parts of the statement of facts read as follows: … “On the night of Tuesday 17 January 1984 the appellant was at his said flat when a person known to him as AM arrived at the flat, together with several other persons. “4. The appellant was invited by one or more of his visitors to accompany them for a ride in a motor vehicle. He accepted this invitation. Shortly before midnight he left his flat and entered the rear of a Holden sedan. Before entering this vehicle he became aware that it had been stolen, and did not belong to any of the persons visiting him. He was aware also that neither he nor any of his visitors had any right to be in control or custody of that vehicle on that night. “5. The appellant was thereafter a passenger in the rear seat of the vehicle. While he remained so, the vehicle was driven by one of his visitors from his home in Blackburn to Nunawading, from Nunawading to Croydon, from Croydon to a hotel known as the Sky High, and from there to The Basin and finally back to Blackburn. “6. The appellant took no part in directing where the motor vehicle should be driven. His role was entirely passive. He simply permitted himself to be driven wherever the person in control of the motor vehicle determined to drive it. “7. The appellant made no effort to dissuade the driver or the others from continuing to drive the vehicle in which he was a passenger.” …

It has already been held that a person who drives a motor car knowing that he does not have the owner’s consent assumes the rights of the owner within the meaning of s73(4). This is so whether or not the original thief is a passenger in the car: *Stein v Henshall* [1976] VR 612; *Howard v Edwards*, unreported judgment of Fullagar J, 20 March 1984. In the former case, Lush J said (at p. 615): -

"In my opinion, the assumption of the rights of an owner referred to in subs(4) involves the taking on one’s self of the right to do something which the owner has the right to do by virtue of his ownership. I do not accept the argument that the conduct required to establish an assumption of the rights of an owner extends to establishing an intention to exclude all others, and I think that Mr. Uren’s argument that subs(14)(a) illustrates this is valid. In my

[^141^][1985] VR 511, and see also *R v Baruday* [1984] VR 685.

[^142^][1988] VR 358. This appears to have been approved by the Victorian Court of Criminal Appeal in *R v Marijancevic* (1991) 54 A Crim R 431.
opinion, in order to determine whether there was an ‘appropriation’ by the defendant in this case, it is not necessary to consider whether the original thief, Graham, gave up all his possessory rights to the defendant or retained them, or lent the car to the defendant so that the defendant was in possession of it by gratuitous bailment. "The question is - and is only - whether the defendant acted in relation to the car in a manner in which the owner would have the right to act."

These passages were relied upon by Fullagar J in *Howard v Edwards* in reaching his conclusion that the driver had assumed the rights of the owner, notwithstanding the presence in the motor car of the original thief.

The conclusion reached in the two Victorian cases that an appropriation of the property of another is constituted by the assumption of any of the owner’s rights was re-affirmed by the House of Lords in *R v Morris* [1983] 3 All ER 288.

… once it is accepted that an appropriation can be constituted by the assumption by the appellant of any of the car owner’s rights, the question comes down to whether the appellant’s conduct in travelling in the car as a passenger amounts to an assumption of a right of the owner.

It is clear enough, in my opinion, that one of the car owner’s rights is the right to travel in the car as a passenger. This is no less a right than the owner’s right to drive his car.

On the appellant’s behalf, it was submitted that if mere use of the car was intended to amount to an appropriation, the Act would have employed the verb "use" in s73(4) as it did in s73(14). There is no substance in this point because the concept of the assumption of the rights of the owner includes use, but extends far beyond it. It was next submitted that it could not have been intended that all forms of use of an owner’s property should be regarded as an appropriation. For example, it was said that to sit upon the bonnet of a parked car could not be so treated. It was contended that the line must be drawn somewhere and that mere occupancy of the car as a passive passenger lies on the innocent side of the line.

Conduct such as sitting on the bonnet of another’s car without his consent may well amount to a technical theft. However, upon such facts, the better view may be that there is no use of the motor car as a motor car and no sufficient adverse interference with or usurpation of the owner’s rights: see *R v Morris*, supra, per Roskill LJ at p. 293.

But, in my view, the act of travelling as a passenger in another’s car knowingly without his consent amounts to a use of the car for one of its ordinary purposes and involves an assumption and usurpation of one of the owner’s rights.

The offence charged in this case was that of stealing a car, which under s73(14)(a) deems any non-consensual appropriation to amount to an intention to permanently deprive. Essentially, joyriding is considered theft in Victoria.

Does appropriation require a usurping of the rights of the owner?

The key limitation to appropriation in *Morris* was that the act, however how minor, must be one that was adverse to the owner. The concept used was one of usurpation. *Woodrow* is a good example of how such a usurpation can itself be minimal in the overall circumstances. Despite the flexibility of the notion it was overruled by two following House of Lords decisions: *Gomez* and *Hinks*.

In *Gomez* a store manager was deceived into authorising the supply of goods against stolen and worthless cheques. It was a classic case of fraud, not larceny. However the defendants were charged with theft. This raised the issue of whether consent was a

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[1993] AC 442.
relevant consideration in appropriation. That is, if the victim consented to the passing of property, could there be an appropriation. In favour of such a finding was the broad statement in *Lawrence*. Against it was the statement in *Morris* that there had to be a usurping of the rights of the owner. If there was a consensual transfer these rights may not have been usurped because there was a contract for sale of goods in existence – though it was voidable for fraud.

Lord Keith of Kinkel held that Lord Roskill’s observations in *Morris* were incorrect because the definition of appropriation only referred to assumption of the rights of an owner. Adverse interference could not be implied into the concept. In any event the requirement would not operate as an effective restriction:

In the first place, it seems to me that the switching of price labels on the article is in itself an assumption of one of the rights of the owner, whether or not it is accompanied by some other act such as removing the article from the shelf and placing it in a basket or trolley. No one but the owner has the right to remove a price label from an article or to place a price label upon it. If anyone else does so, he does an act, as Lord Roskill puts it, by way of adverse interference with or usurpation of that right. …

While it is correct to say that appropriation for purposes of section 3(1) includes [an act of adverse interference], it does not necessarily follow that no other act can amount to an appropriation and in particular that no act expressly or impliedly authorised by the owner can in any circumstances do so. Indeed, *Reg. v. Lawrence* [1972] A.C. 626 is a clear decision to the contrary since it laid down unequivocally that an act may be an appropriation notwithstanding that it is done with the consent of the owner. It does not appear to me that any sensible distinction can be made in this context between consent and authorisation.

*Lawrence* makes it clear that consent to or authorisation by the owner of the taking by the rogue is irrelevant. The taking amounted to an appropriation within the meaning of section 1(1) of the Act of 1968. *Lawrence* also makes it clear that it is no less irrelevant that what happened may also have constituted the offence of obtaining property by deception under section 15(1) of the Act.

In my opinion it serves no useful purpose at the present time to seek to construe the relevant provisions of the *Theft Act* by reference to the report which preceded it, namely the Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences (1966) (Cmdn. 2977). The decision in *Lawrence* was a clear decision of this House upon the construction of the word "appropriate" in section 1(1) of the Act, which had stood for 12 years when doubt was thrown upon it by obiter dicta in *Morris*. *Lawrence* must be regarded as authoritative and correct, and there is no question of it now being right to depart from it.

Lord Brown-Wilkinson also held:

In *Reg. v. Lawrence* [1972] A.C. 626 Megaw L.J. in the Court of Appeal [1971] 1 Q.B. 373, 376 analysed the constituent elements of the offence created by section 1(1) of the Theft Act 1968 as being "(i) a dishonest (ii) appropriation (iii) of property belonging to another (iv) with the intention of permanently depriving the owner of it." This analysis was adopted and approved by this House and I do not intend to cast any doubt on it. But it should not be overlooked that elements (i) and (ii) [unlike elements (iii) and (iv)] are interlinked: element (i) (dishonest) is an adjectival description of element (ii) (appropriation). Parliament has used a composite phrase "dishonest appropriation." Thus it is not every appropriation which falls within the section but only an act which answers the composite description.

The fact that Parliament used that composite phrase - "dishonest appropriation" - in my judgment casts light on what is meant by the word "appropriation." The views expressed (obiter) by this House in *Reg. v. Morris* [1984] A.C. 320 that "appropriation" involves an act by way of adverse interference with or usurpation of the rights of the owner treats the word appropriation as being tantamount to "misappropriation." The concept of adverse interference with or usurpation of rights introduces into the word appropriation the mental state of both
the owner and the accused. So far as concerns the mental state of the owner (did he consent?), the Act of 1968 expressly refers to such consent when it is a material factor: see sections 2(1)(b), 11(1), 12(1) and 13. So far as concerns the mental state of the accused, the composite phrase in section 1(1) itself indicates that the requirement is dishonesty.

For myself, therefore, I regard the word "appropriation" in isolation as being an objective description of the act done irrespective of the mental state of either the owner or the accused. It is impossible to reconcile the decision in Lawrence (that the question of consent is irrelevant in considering whether there has been an appropriation) with the views expressed in Morris, which latter views in my judgment were incorrect.

It is suggested that this conclusion renders section 15 of the Act of 1968 otiose since a person who, by deception, persuades the owner to consent to part with his property will necessarily be guilty of theft within section 1. This may be so though I venture to doubt it. Take for example a man who obtains land by deception. Save as otherwise expressly provided, the definitions in sections 4 and 5 of the Act apply only for the purposes of interpreting section 1 of the Act: see section 1(3). Section 34(1) applies subsection (1) of section 4 and subsection (1) of section 5 generally for the purposes of the Act. Accordingly the other subsections of section 4 and section 5 do not apply to section 15. Suppose that a fraudster has persuaded a victim to part with his house: the fraudster is not guilty of theft of the land since section 4(2) provides that you cannot steal land. The charge could only be laid under section 15 which contains no provisions excluding land from the definition of property. Therefore, although there is a substantial overlap between section 1 and section 15, section 15 is not otiose. 144

As a result of Gomez there was now no practical distinction between theft and fraud – other than for exceptional cases involving land. As long as some right of the owner had been in some way assumed by the defendant, there was an appropriation. Lord Lowry’s speech however provided a detailed and comprehensive rejection of the majority approach. It was based on a consideration of both the intentions of the CLRC and the language of the Act. An extended extract of his judgment is set out in the appendix to this chapter.

Can it be appropriation if the ‘victim’ gives the defendant the property without any fraud on the defendant’s part?

The extreme breadth of the meaning of appropriation following Gomez was underlined by the finding of the House of Lords in Hinks. Hinks represents a further extension of the meaning of appropriation.

In this case there was no adverse assumption, nor was there any fraud. Hinks had been caring for an elderly man. Over the course of a summer the elderly man had withdrawn all of his life savings and given them to Hinks. There was no evidence of fraud and there was no evidence that the elderly man was in any way unaware of what he was doing. However, the circumstances suggested strongly that Hinks had in some way dishonestly encouraged or influenced the man to do so. What this meant was that there was evidence of a complete and consensual gift of money to Hinks in circumstances where an ordinary decent person might have refused to accept the gift. Could this be theft?

In a judgment that clearly and completely rejected any academic criticism of the route taken in Gomez, Lord Steyn for the majority held:

...it is immaterial whether the act was done with the owner’s consent or authority. ...

... the majority judgments [in Gomez] do not differentiate between cases of consent induced by fraud and consent given in any other circumstances. The ratio involves a proposition of general application. Gomez therefore gives effect to section 3(1) of the
Act by treating "appropriation" as a neutral word comprehending "any assumption by a person of the rights of an owner." [The decision] in Gomez, ... destroys the argument advanced on the present appeal, namely that an indefeasible gift of property cannot amount to an appropriation.  

An extended extract of the judgment is set out in the appendix to this chapter.

**Criticism of Hinks**

One of the major problems with the expansive English interpretation of appropriation is the way in which it separates the criminal law from civil liability and potentially criminalises actions for which the person would not be civilly liable. This is explained in Simester and Sullivan, *Criminal Law: Theory and Doctrine* as follows:

"The main problem with the decision [in Hinks] is that it turns the very rationale of property offences on its head. Theft is not a crime in thin air. It is designed to protect and reinforce property rights. That is the whole point of theft. Since the offence has no other raison d'être, it is inherently derivative upon the civil law of property. If I have no property right in D's car, which is sitting on the road beside my house, I cannot complain when D drives it away. Neither am I allowed to drive it away myself without D's permission. All this is because, at civil law, the car belongs to D. Without that crucial piece of initial information, we have no way of deciding whether anything wrong has occurred, any sort of property wrong that requires the attention of the criminal law. Unless there is a violation of someone's property rights, where (as Mill and Feinberg would ask) is the harm? The law of theft cannot dispense with the requirement for violation of a property right because its whole purpose is dependent upon and secondary to the allocation of rights through property law.

Hinks, alas, cuts property offences adrift from the law of property rights. There can be a crime without either a wrong or a harm: the cart is now before the horse. Lord Hobhouse sees this in his dissent, when he observes that "There is no law against appropriating your own property".

There are also powerful dissents against the decision in Hinks and Gomez by Lords Hobhouse (in Hinks) and Lowry (in Gomez). They are reproduced at the end of this chapter in an appendix, along with Lord Steyn’s judgment in Hinks.

**The only restriction? The Need for a Dealing with the Property**

However assumption of ownership on its own is insufficient. Without more it would include situations such as Bloxham\(^\text{146}\) where the defendant falsely promised to sell property belonging to another, but at no stage did any action that was directed towards the property itself. Cases such as these constitute the obtaining of financial advantage by deception, but are not theft.

In the context of theft, the facts of *R v Ngan*\(^\text{147}\) provide an example of what is necessary to constitute a dealing with intangible property. Ngan had been the recipient of mistaken...
But it must be remembered that the right assumed is not to the cheque, but to the property or chose in action, that is, to the debt mistakenly due from the Bank. "Keeping" as owner in relation to a bank account may be difficult to prove in a case where a Defendant does no more than refrain from bringing the mistake to the attention of the Bank. There can be no obligation to restore the credit but only the 'value' of it, that is, an equivalent amount. But 'keeping' or 'dealing' is unequivocally demonstrated when upon presentation an account holder treats the credit as his own.

When the Appellant sent the cheques in blank to her sister, it may be said that she intended to appropriate such sums as her sister proceeded to insert into any of the cheques that she used. But any such appropriation was inchoate. ... until on each occasion a cheque was presented for payment, there was no dealing with any of FCA's rights to the balance mistakenly standing to the credit of the Appellant. Her acts of signing the cheques and sending them to her sister were preparatory acts, and more needed to be done by or on behalf of the Appellant before FCA could be deprived of their property. The Appellant's acts were remote from FCA and any rights of theirs, and none but a lawyer would think of calling them theft.

In our judgment no right was assumed to the part of the Appellant's credit balance that was not hers until a cheque was presented for payment in a sum which necessarily drew upon the mistaken credit balance. That represented the assertion of a right adverse to FCA to have the cheque met by the Bank.¹⁴⁹

In both Bloxham and Ngan the rights of the owners were not affected by the relevant actions of the defendants.¹⁵⁰

The Model Criminal Code version of appropriation: is it narrower?

The definition of appropriation in the Model Criminal Code contains two key differences to the version in the Theft Act and Victorian Crimes Act. One significant difference is the limitation of appropriation to appropriations without consent. This is discussed below.

There is also one other limitation. That is the definition of appropriation is not merely an assumption of the rights of an owner, but it must also be an assumption of ownership, possession or control of property. This creates a degree of uncertainty. As mentioned before, English commentators have suggested that control means custody. If that is the case, then for intangible forms of property appropriation under the Commonwealth and ACT legislation may be limited to an assumption of ownership of the property as possession and custody are not applicable.

The Explanatory Memorandum to the ACT amendments stated:

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¹⁴⁸ It is clear from R v Shadrokh-Cigari [1988] Crim LR that the chose in action belonged to the payees both under the definition of mistake in the Theft Act and also through the operation of equitable principles. Whether there is a need for a definition of mistake in theft is discussed below.

¹⁴⁹ At 336-337.

¹⁵⁰ However, Bloxham could have been charged with fraud and Ngan could have been charged with accessorial and conspiracy offences.
Thirdly, it is only an assumption of the owner’s rights relating to the “ownership, possession, or control” of the property that can amount to an appropriation for theft. In contrast, paragraph 86(1)(b) [of the previous legislation that was based on the Theft Act] speaks of “any of the rights of the owner”. Strictly speaking this could include a case where a person simply sits on a car bonnet, which is clearly a right of an owner but on the other hand, far too trivial to count as an appropriation. Accordingly, MCCOC recommended restricting the rights to be protected by the theft offence to the rights relating to ownership, possession or control.

It is unclear from this passage how “rights relating to ownership” are different from “a right of an owner”, and how sitting on the bonnet of a car is not an assumption of a right of control. No cases have yet considered this point.

Is Appropriation a Single or Continuing Action?

Under the offence of larceny it is essential that the property be asported from the possession of the prior possessor. This means that there can only be one action that is available to found the element of asportation, that of the taking of possession. However the concept of appropriation, being devoid of a requirement for a taking of possession, is theoretically not so restrained. It might therefore be possible to conceive of a number of appropriations by a thief in the course of stealing one item of property. The problems this would cause have been illustrated by Glanville Williams:

A man steals a watch, and two weeks later sells it. In common sense and ordinary language he is not guilty of a second theft when he sells it. Otherwise it would be possible, in theory, to convict a thief of theft of a silver tea pot every time he uses it to make the tea.151

In *R v Atapku* the Court of Appeal (Criminal Division), agreeing with Williams, stated “we flinch from that conclusion”. They held that if a thief has:

come by the property by stealing it then his later dealing with the property is by implication not included among the assumptions of the right of an owner which amount to an appropriation within the meaning of s 3(1). ... In our judgment, if goods have once been stolen, even if stolen abroad, they cannot be stolen again by the same thief exercising the same or other rights of ownership over the property.152

A related problem is the length of time that the act of appropriation lasts. If there is merely one act that qualifies as an appropriation, rather than a series of appropriations, is it possible for that act to be a continuing act? If so, how long can it continue? To date the English courts have not been forced to decide on the point and have preferred to leave the issue unresolved. However in *R v Atakpu* the Court’s preference was made clear:

We find it more difficult to answer the first question we posed as to whether or not theft is a continuous offence. On a strict reading of *R v Gomez* any dishonest assumption of the rights of the owner made with the necessary intention constitutes theft and that leaves little room for a continuous course of action.

We would not wish that to be the law. Such restriction and rigidity may lead to technical anomalies and injustice. We would prefer to leave it for the common sense of the jury to decide that the appropriation can continue for so long as the thief can sensibly be regarded as in the act of stealing or, in more understandable words, so long as he is ‘on the job’ as the editors of Smith and Hogan Criminal Law (7th edn, 1992) p 513 suggest the test should be.

Since the matter is not strictly necessary for our decision we, like the court in R v Pitham and Hehl (1976) 65 Cr App R 45 will leave it open for further argument. 153

In R v Ngan the Court of Appeal summarised the decision in R v Atakpu thus:

... appropriation may occur in different ways and may be a continuing process. 154

Theft by Bailees and the Doctrine of Continuing Trespass

ACT Criminal Code 2002

304 Appropriation of property for pt 3.2

(2) If a person has come by property (innocently or not) without committing theft, subsection (1) applies to any later assumption of those rights without consent by keeping or dealing with it as owner.

As discussed above, under the common law offence of larceny there is a requirement that there be a taking of the property out of the possession of the victim. In addition the requisite mental elements of fraudulence and intention to deprive have to also be present at the time of that taking. In some situations however the taking could be innocent and the fraudulent intent only occur at a later time. This occurs in two main situations, thefts by bailees and fraudulent retention of property by finders of lost property.

With the removal of the requirement of a taking out of possession, any dealing with the property at a later date that amounts to a conversion will still satisfy the requirement of appropriation. There is probably no need to spell this out in the legislation but both the CLRC and the Model Code include a second sentence in the definition of appropriation to put the matter beyond doubt. That sentence is:

(1) …[Appropriation] includes, if a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner.

The CLRC commented on these provisions as follows:

36. The offence [of theft] will also cover cases of dishonest retention or disposal after an innocent acquisition such as are mentioned in paragraphs 21-25. This result is probably implicit in the concept of appropriation (or “conversion”) but it is made explicit by the provision in clause 3(1) that a person’s assumption of the rights of an owner “includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner”. It seems natural to regard dishonestly keeping or dealing with the property as theft (as it is now in the case of bailees). This has the advantage that the case referred to will be brought within the single concept of dishonest appropriation. If taking were to be kept as the basis of the offence, it would be necessary to create a separate offence of dishonest retention or disposal in order to deal with these cases.

As the CLRC notes, there is no need for the additional sentence other than for more abundant caution.

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153 At 80.
ACT Criminal Code 2002

304 Appropriation of property for pt 3.2

(3) If property is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights the person believed the person was acquiring is not an appropriation of property because of any defect in the transferor’s title.

The expansive general definition of appropriation means that any action by this person dealing with the property amounts to an appropriation.\(^{155}\) Thus a person who takes property with a belief that they are acting lawfully can still be seen to engage in a further act of appropriation if they use the property after being informed that the property is in fact subject to the legal rights of another. In such circumstances the temporal possibilities for theft are far broader than was the case with larceny. For larceny, once the possession has been assumed, no subsequent act can form the basis of the offence, unless the continuing trespass fiction applies.

Thus under the concept of appropriation used in the Model Code, a refusal to return property to the rightful owner could amount to an act of appropriation even if the property was innocently acquired. Given that the refusal will often be in circumstances where the person is aware that their claim to the property is contested they may no longer maintain their belief that they have a property right and consequently become liable for theft despite having previously acted lawfully.\(^{156}\) Absent some restriction on the availability of acts amounting to appropriation or some extension of the claim of right defence being implied by the courts, these persons will become liable for theft even if their actions are essentially passive.\(^{157}\)

In discussing the scope of appropriation, the CLRC commented:

37. We propose however that there should be a special exception for one case. A person may buy something in good faith, but may find out afterwards that the seller had no title to it, perhaps because the seller or somebody else stole it. If the buyer nevertheless deals keeps the thing or otherwise deals with it as owner, he could, on the principles stated above, be guilty of theft. It is arguable that this would be right; but on the whole it seems to us that, whatever view is taken of the buyer’s moral duty, the law would be too strict if it made him guilty of theft. Clause 3(2) accordingly ensures that a later assumption of ownership in such circumstances will not amount to theft.

The Model Code Officers Committee Report in its discussion of this area recommended that the exception the CLRC referred to be extended to cover those receiving property as bona fide donees as well as purchasers.\(^{158}\) The Report points out that it is unprincipled to protect purchasers and not other recipients of property.

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155 That is, of course, unless the action is to return the property to the owner.

156 Despite an appropriation being without the consent of the owner the conduct is not theft if the defendant believes that they have a right to appropriate the property. In situations contemplated by this subsection, such a belief would have been held initially, but the person has subsequently been informed that their claim of right was mistaken. With this knowledge, a subsequent decision to retain the property would be seen as dishonest, and maintained without an honest belief in a claim of right. That is of course, unless the defendant could demonstrate that they did not believe that that the owner’s claim to the property was correct.


158 At pp 43-5.
Section 304(3) is thus intended to avoid such situations being seen as theft. The subclause operates to excuse from criminal liability a retention or other dealing with the property following notification of the rights of the true owner.

However the exception only applies to situations where a defect in the title to the property that is professed by the transferor results in the fact that despite the innocent initial act of appropriation, the appropriation is in fact without the consent of the true owner. The approach taken in the Theft Act and Model Code is that the assumption of property rights must be as a result of a consensual transaction and that the transferor so consenting be believed by the recipient to be the title-holder of that property right. This ensures that the limit on the acts available for appropriation is tied to initial honesty or good faith on the part of the recipient.

The exception would not appear to protect finders. This represents a partial reversal of the common law position. Under the common law of larceny, a person cannot be found guilty of larceny if when they found the property, there was no way they could have reasonably discovered the true owner. If that owner later came forward, a retention of the property by the finder did not amount to larceny.

Under the Model Code approach, such a retention would amount to theft. Subsection (3) does not extend to assumptions of property rights where no transaction has taken place.

Note also that the use of the phrase “later assumption” is consistent with the interpretation adopted to appropriation in Atapuki.

**Without Consent**

### The Problem of Lack of Consent

**304 Appropriation of property for pt 3.2**

(1) Any assumption of the rights of an owner to ownership, possession or control of property, without the consent of a person to whom the property belongs, is an appropriation of the property.

(2) If a person has come by property (innocently or not) without committing theft, subsection (1) applies to any later assumption of those rights without consent by keeping or dealing with it as owner.

(3) If property is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights the person believed the person was acquiring is not an appropriation of property because of any defect in the transferor’s title.

As discussed above, the Theft Act does not require evidence of lack of consent, and following Gomez and Hinks consent is irrelevant. In contrast the Model Code incorporates into the definition of appropriation a requirement that the appropriation be without consent. This was as a direct reaction to the confusion generated by Lawrence and Morris. It is therefore necessary to determine what role consent plays in the Model Code.

Under larceny the locus of the consent is straightforward. As the offence is based on possession, any removal of goods out of the possession of a person without that person’s consent amounts to an asportation.

However the Model Code offence is not based on a notion of possession but instead on a concept of ownership. Thus it might be that the consent of all persons with any interest in the property would need to be gained to avoid an action being an appropriation. Problems may arise where a person obtains property from another with that person’s consent unaware that another person holds an interest in the property.
This highlights the fact that notions of appropriation must in some way involve a mental element on the part of the defendant. Before an appropriation can be found to have occurred the defendant must be aware or be reckless as to the fact that the property belongs to another and that consent from that person is required. Otherwise the defendant would not be intentionally interfering with that person’s rights of ownership.

Such an approach would also help to limit the notion of “belonging to another”. While a myriad of persons might have some interest in the property the only persons who are relevant to a theft prosecution are those of whom the defendant is aware are associated with, or could assume to be associated with the property. Thus a defendant who steals a car appropriates it from the current possessor of the car but arguably should not be seen to be also stealing it from the finance company that has a chattel mortgage on it. Further, the actions of the defendant should be seen to be one offence not a number of concurrent thefts against all property interest holders. The appropriation would therefore remain in most cases a taking of possession from the possessor and in terms of choses in action a taking of control from the immediate controller.

Such an interpretation relies heavily on the approach taken by the dissenting speeches in *Gomez* and *Hinks*. That is, it sees the elements of theft as interrelated and assumes that dishonest appropriation is a composite term. As such a degree of knowledge is then implicit in any appropriation in order for it to be able to be characterised as dishonest.

It should be accepted though that such an interpretation is not necessarily one that the courts will take. In particular it is open to the courts to see the lack of consent as an objective circumstance of theft – in much the same way that it is in larceny. In such circumstances it would seem that as long as the prosecution can show that one “owner” did not consent would be sufficient to satisfy the requirement.

A conservative approach would assume that consent is merely a surrounding circumstance and that a defendant can appropriate without consent even without knowledge of the disposition of the owner.

An additional complication is the role of Chapter 2 of the *Code* in the interpretation of consent. The *Code* sets up as a default a requirement that every physical element has a concomitant mental element. If no explicit mental element is connected to a physical element, the *Code* implies a mental element. That mental element is determined according to eg s22 ACT Criminal Code:

22 Offences that do not provide fault elements

(1) If the law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.

(2) If the law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.

The difficulty is therefore threefold. Firstly, is appropriation a physical element? Secondly, is there a mental element connected with appropriation, and what is that element? Thirdly, does the fact that consent is part of the definition of appropriation and not a term of the offence mean that it is not an element of the offence?

It would appear that appropriation is a physical element – in that decisions such as *Ngan* hold that total inaction is not appropriation. This would mean that a mental element might need to be implied. The answer to this question will lie in whether the courts consider the various elements of theft to be separate for the purposes of s22. In other words, is the offence one of “dishonestly appropriating” or one of appropriating in circumstances that are
dishonest. It seems likely that the courts will hold that the element of appropriation does in fact have the fault element of dishonestly provided for it and that s22 would not apply.

This means that any implication of knowledge or recklessness as to the owner must come from the meaning of dishonesty. As has been seen in the discussion on dishonestly, the High Court has held that dishonesty is a description of a particular combination of an act and knowledge, belief or intent as to the circumstances in which that act occurs. It may be possible to argue that a person cannot be dishonest as to an act of appropriation if they do not know of the owner.

The third issue relates to the drafting of the lack of consent requirement. By placing it within the definition of appropriation it is arguable that lack of consent is not an element of the offence. Thus it need not be proved by the prosecution in every case, only in circumstances where the defence raises it as an issue.

The Model Code Approach to Mistake

English Theft Act 1968

"Belonging to another".

5(4) Where a person gets property by another’s mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

ACT Criminal Code 2002

305 Person to whom property belongs for pt 3.2

(5) If a person (A) gets property by someone else’s fundamental mistake and is under a legal obligation to make restoration (in whole or part) of the property, its proceeds or its value—

(a) the property or its proceeds belong (to the extent of the obligation and as against A) to the person entitled to restoration (B); and

(b) an intention not to make restoration is—

(i) an intention to permanently deprive B of the property or proceeds; and

(ii) an appropriation of the property or proceeds without B’s consent.

(6) In this section:

fundamental mistake, in relation to property, means—

(a) a mistake about the identity of the person getting the property; or

(b) a mistake about the essential nature of the property; or

(c) a mistake about the amount of any money, if the person getting the money is aware of the mistake when getting the money.

money includes anything that is equivalent to money.

The contentious common law doctrine of mistake has been codified in the Theft Act and Model Code definitions of property belonging to another. Whereas the Theft Act version merely repeats the form of the common law doctrine without further definition, the Model Code version comprehensively defines what is meant by the notion of mistake.
In *Ilich* the majority of the High Court (while doubting the correctness of the precedent decisions) found that the existing case law could be rationalised into three categories:

- mistake as to the identity of the person to whom the money was delivered,
- mistake as to the identity of the thing delivered, and
- mistake as to the quantity of the thing delivered.

The *Model Code Officers Committee* recommended adoption of the *Theft Act* approach which codifies a rationalisation of the *Ashwell* and *Middleton* cases (corresponding to the first two categories identified by the High Court). The third category of mistake as to quantity was not included, on the basis that such mistakes were not sufficiently fundamental.\(^{159}\)

However they also recommended the adoption of the *Theft Act’s* extension of the doctrine to mistake as to an amount of money if the recipient is aware of the overpayment at the time of receipt.\(^{160}\)

### Permanent Deprivation

**English Theft Act 1968**

"With the intention of permanently depriving the other of it".

6.(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other’s rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other’s authority) amounts to treating the property as his own to dispose of regardless of the other’s rights.

**ACT Criminal Code 2002**

306 **Intention of permanently depriving for pt 3.2**

(1) A person (A) has the intention of permanently depriving someone else (B) of property belonging to B if—

(a) A appropriates property belonging to B without meaning B to permanently lose the property; and

(b) A intends to treat the property as A’s own to dispose of regardless of B’s rights.

(2) For subsection (1), if A borrows or lends property belonging to B, the borrowing or lending may amount to treating the property as A’s own to dispose of regardless of B’s rights if, but only if, the borrowing or lending is for a period, and in circumstances, making it equivalent to an outright taking or disposal.

(3) Without limiting this section, if—

(a) A has possession or control (lawfully or not) of property belonging to B; and

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\(^{159}\) Chapter 3 p 67.

\(^{160}\) Such an overpayment would at common law pass as currency, and mistake would not be applicable.
(b) A parts with the property under a condition about its return that A may not be able to carry out; and

(c) the parting is done for A’s own purposes and without B’s authority;
the parting amounts to treating the property as A’s own to dispose of regardless of B’s rights.

(4) This section does not limit the circumstances in which a person can be taken to have the intention of permanently depriving someone else of property.

It was not the intent of the CLRC in its 1966 report and draft Theft Bill to make any change to the current law on intention to permanently deprive. However in the course of the Theft Bill’s introduction to and passage through Parliament a section further defining the element was introduced. This further definition has been reproduced in the Model Code.

The Theft Act definitions have been described by the English Court of Appeal as a section that “sprouts obscurities at every phrase”. The subsections do not sit well together and it is unclear on the face of the legislation which subsections have precedence over other subsections.

It has been suggested that the definitions were merely an attempt to restate the various extensions to the concept at common law. On this analysis it was held by the Court of Appeal in Lloyd, per Lord Lane:

Bearing in mind the observation of Edmund Davies L.J. in Warner (1970) 55 Cr.App.R. 93, we would try to interpret the section in such a way as to ensure that nothing is construed as an intention permanently to deprive which would not prior to the 1968 Act have been so construed. Thus the first part of s 6(1) seems to us to be aimed at the sort of case where a defendant takes things and then offers them back to the owner to buy if he wishes. If the taker intends to return them to the owner only on such payment, then, on the wording of s 6(1), that is deemed to amount to the necessary intention permanently to deprive: see for instance Hall (1848) 1 Den. 381, where the defendant took fat from a candlemaker and then offered it for sale to the owner. His conviction for larceny was affirmed. There are other cases of similar intent: for instance, ‘I have taken your valuable painting. You can have it back on payment to me of £X,000. If you are not prepared to make that payment, then you are not going to get your painting back’ …

Borrowing is ex hypothesi not something which is done with an intention permanently to deprive. [The second] half of the subsection, we believe, is intended to make it clear that a mere borrowing is never enough to constitute the necessary guilty mind unless the intention is to return the ‘thing’ in such a changed state that it can truly be said that all its goodness or virtue has gone. For example R v Beecham (1851) 5 Cox CC 181, where the defendant stole railway tickets intending that they should be returned to the railway company in the usual way only after the journeys had been completed. He was convicted of larceny. The judge in the present case gave another example, namely the taking of a torch battery with intention of returning it only when its power is exhausted.

On this analysis the section is merely a clumsy attempt to express the three common law exceptions to the requirement that there be an intention to permanently deprive: the

161 For discussion of this see Spencer, op cit.
163 [1985] QB 829 at 836-837. In Lloyd the accused had taken films for a cinema in order to make pirate copies. It was central to their scheme that the films be only taken for a short period and thus not be noticed as missing. The court found that this was not a borrowing that amounted to an outright taking, and that the value of the films had not been exhausted by the actions. There was therefore no theft.
ransom principle, destruction of value, and the pawning of property with a hope of redemption.

However this attempt to read down the definitions was rejected by a differently constituted Court of Appeal in *R v Fernandes*. There Auld LJ held:

"In our view, section 6(1), which is expressed in general terms, is not limited in its application to the illustrations given by Lord Lane C.J. in *Lloyd* ((1985) 81 Cr App R 182). Nor, in saying that in most cases it would be unnecessary to refer to the provision, did Lord Lane suggest that it should be so limited. The critical notion, stated expressly in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights". The second limb of subsection (1), and also subsection (2), are merely specific illustrations of the application of that notion. We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss."

The approach in *Fernandes* was followed the Court of Appeal in *R v Marshall* and so *Fernandes* would appear to represent the current English approach to the definition.

As such any requirement of "permanent" deprivation would appear otiose and, despite section 6(2), borrowing may now be prosecuted as theft even if the goods are returned undamaged or not exhausted. This is a major development as it appears to significantly downgrade the nature of the intention in theft. If all the intention that is required is that the defendant intend to deal with the property without soliciting the owner's permission the intention ceases to be one of converting the property and instead becomes one of trespass to the property (though arguably significant interference is required).

A second issue is that the requisite state of mind is no longer one of intention and is merely recklessness. This is because the key notion is acting "regardless" of the owner's rights. This was recognised by the *Model Code* Officers Committee Report and accepted on the basis that recklessness was the basic fault element of the *Model Code*. This could have been better expressed as recklessness being the default fault element of the *Model Code*. In fact many of the *Model Code* offences are based on knowledge and intent. In relation to theft, the fundamental fault elements have always been intent and dishonesty, with specific intents for the various offences. It may therefore not be appropriate to define an offence in terms of intent and then allow a supplementary definition to replace it with recklessness.

The *Model Code* version makes no significant changes to the Theft Act version, other than to make the definition much easier to read. The *Model Code* makes it clear that all that is required is that the defendant intends to treat the property as their own to dispose of regardless of the owner's rights.

In Victoria a more robust approach to the meaning of Victoria's equivalent to s6(1) (s73(12) *Crimes Act 1958*) was taken in *Sharp v McCormick*. The case was decided in 1986 and thus before the decision in *Lloyd*.

164 [1996] 1 Cr App R 175 at 188.
166 MCCOC Report Ch3 p75.
167 The Theft Act was largely adopted unchanged by Victoria in 1975 (add amending Act)
McCormick had taken home a motor part from his employer and when apprehended had admitted “I was going to see if it fits and if it didn’t I was going to put it back”. The Full Court held that such an intention amounted to an intention to permanently deprive, either simpliciter or by means of s73(12), and was not an example of conditional appropriation. Despite the fact that the court was referred to Spencer’s article that outlined the Parliamentary intention to not extend the scope of the element and Williams critique of the wording, the court had no difficulty in reading the s73(12) in a broad way and in finding what they thought was a clear role for the section. In no way is there any reading down of the scope of an “intention to treat the thing as his own to dispose of regardless of the others rights”.

Two of the judges gave detailed reasons for so holding. However the approaches taken reveal slightly different understandings of the scope of the section.

Murray J held:

If … the defendant intended to return the coil unless he later decided to keep it, then it appears to me that the appropriation would fall within the first limb of sub-s. (12). His reservation of the probability or possibility of keeping it would amount to an intention to treat the coil as his own to dispose of regardless of the owner’s rights. It must be remembered that the operation of sub-s. (12) depends upon the absence of an actual intent permanently to deprive the owner of the property in question at the time of the appropriation.

It follows that what must be examined is the intention of the respondent at the moment he appropriated the coil. The evidence establishes that his intention at that time was to take the coil to see whether it fitted his motor car in which case to retain it and otherwise to return it to his employer. To say that his intention to return it to his employer if it did not fit his motor car was an intention to have regard to the rights of his employer is in my opinion little short of an abuse of language. When the respondent took the coil he was quite clearly treating the coil as his own to dispose of as he saw fit and he was paying no regard to the rights of the true owner. His stated intention of returning it if it did not fit his car was simply a matter of choice on his part which he may or may not have carried out when the time came. The rights of his employer in regard to the property were completely ignored at the time of the appropriation. Despite the criticism of the use of the word “dispose” (see [1977] Crim. L.R. 653) I do not understand why that word would not be appropriate to a disposition of the coil by the respondent either by way of using it in his car or returning it to the factory.

Brooking J held:

... "If it fits, I will keep it; otherwise I will give it back." That is as clear a case as one could imagine of intention to treat the thing as his own to dispose of regardless of the owner’s rights. How does it differ in principle from an intention to keep the car part if it fits, and otherwise to throw it away, or destroy it, or give it to a friend, or endeavour to sell it; or a bare intention to keep the part if it fits, with no decision as to its fate if it does not? In all these cases the person appropriating intends to behave as if he were the owner. The fact that in the case now under consideration the intention is to return the coil to the employer if it does not fit does not mean that the taker is having regard to the employer’s rights. If the coil is in fact returned to its owner, this will be, not because the taker recognizes that the rights of the owner put him under a duty to return it, but because the taker has decided that if it suits him to do so, in other words if the coil is of the wrong kind for his car, he will take it back. What brings him within sub-s. (12) is his intention to keep the coil if it fits his car. This is an intention to treat the thing as his own to dispose of regardless of the other’s rights. What, if anything, he plans to do with the coil if it does not fit is neither here nor there. He has said to himself, "I will keep it if it fits my car", and such a state of mind has no regard to the owner’s rights. The necessary intention would

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168 In Textbook of Criminal Law, 1978, 647ff
similarly have been present if his state of mind had been, "I will keep this coil if it rains tomorrow."

Sub-section (12) speaks of the intention to treat the thing as his own to dispose of regardless of the other’s rights, but this does not require an intention to make the property over to someone else. An employee takes a coil home from the factory; he intends to keep the coil if it fits his car and otherwise to do something else with it. As to that something else his intention may so far be unformed, or he may on the other hand have already decided what he will do with the coil if it does not fit - throw it away, or destroy it, or sell it, or give it away, or return it. The intention, if any, that he has in this regard makes no difference. He intends to treat the coil as his own to dispose of regardless of the owner’s rights, in that his intention is to keep the coil if it is useful to him and otherwise to dispose of it in some other way (which he may or may not have determined upon).

The approaches of Murray and Brooking JJ are not inconsistent, rather they concentrate on different aspects of the complex concept of an “intention to treat the thing as his own to dispose of regardless of the others rights”. Brooking J’s approach emphasises that aspect of the concept that is contained in the intention to “treat the thing as his own” and Murray J’s approach centres on the fact that Sharp’s intention was to act “regardless of the others rights”.

This robust and long-standing approach to the section has been cast into some doubt however by a 2003 decision of the Court of Appeal, *R v Dardovska*. It was alleged that the victim, Akguner had borrowed money from Mutlu and failed to repay it. Dardovska lured Mutlu into a house where he was assaulted by Mutlu. During the assault Dardovska searched Akguner’s car removing items including personal documents relating an application to become a Justice of the Peace. She claimed that she had taken these documents with the intent of giving them to Police to prevent Akguner’s successfully applying to be a Justice of the Peace. Darvoska and her co-accused were acquitted of all assault charges but Dardovska was convicted of theft of the documents. In relation to the theft charge the prosecution had argued that such conduct amounted to an “intention to treat the thing as his own to dispose of regardless of the others rights”.

In the course of coming to its decision the Court reviewed the history of the section in both England and Victoria, taking note of academic comment and Parliamentary intentions. Charles JA concluded that on the basis of the Explanatory Memorandum to the Victorian Bill the relationship between the two passages in s73(12) was that:

... the first clause of the subsection lays down a general principle to which the second clause makes a limited exception, in the case of an appropriation by borrowing or lending...  

His Honour then reviewed most of the English cases, and *Sharp v McCormick*, and quoted the relevant passages of *Fernandes*. As a result of this the Court appears to accept that s73(12) ranges more broadly than the previous common law exceptions, but drew no conclusions as to what the cases stood for as a whole. No mention was made of the impact.

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169  (2003) 6 VR 628

170  His Honour said the conclusion was clear based on the following passage:

Sub-section (13) states that a person is to be regarded as intending permanently to deprive another of his property if he intends to treat it as his own regardless of the other’s rights, even though he does not mean the other permanently to lose the thing itself. Specifically, a borrowing or lending of another’s property may amount to a permanent deprivation if and only if the circumstances and the period of time in question make the transaction equivalent to an outright taking or disposal.

171  Ibid 635
of Fernandes on Lloyd, or the broader approach that appears to have been taken in Sharp v McCormack.

Counsel for the prosecution argued that in intending to give the documents to the police, Dardovska had intended to “put it out of her power to return the documents to Akguner” and that this therefore fell within s73(12). The court disagreed, Charles JA holding:

.. I find it surprising that her actions might have been thought to have involved any intention of permanently depriving Akguner of the documents in the relevant sense. Dardovska clearly had no intention of obtaining any form of financial advantage from taking the documents, which were in any case worthless. She had, in Akguner’s presence, rung the Melton Police Station. There was no reason to doubt her defence that she was outraged that Akguner was applying to become a Justice of the Peace and wanted the police to see the documents, to draw their attention to her argument that he should not succeed in that application. There was no obvious reason why the documents would not, once the police had seen and possibly copied them, have been returned to Akguner. In so far as s 73(12) is concerned, although Dardovska had no entitlement to take the documents from Akguner, her intention, far from treating the documents as her own to dispose of regardless of Akguner’s rights, seems to have been rather to insist to the police that they were in fact Akguner’s documents, and that the police should take notice of them accordingly.

This is strictly obiter as the appeal succeeded on other grounds.

It is easy to see why the Court would baulk at seeing the provision of documents to the Police as examples of theft. It is clearly against good public policy to inhibit the actions of whistleblowers in this way, particularly because in giving documents to the Police the privacy of the owner of the documents would be appropriately safeguarded. But the reason that such actions are not theft is not because there is no intention to permanently deprive. It is because the person who hands such documents to the Police does so in a spirit of public altruism and is thus not acting dishonestly.

It is difficult to see how the appropriation of personal documents with an intent to use them to embarrass and frustrate the owner of those documents in other activities could be anything other than an intention to disregard the owner’s rights. Despite some suggestion that s73(12) is broader than the common law exemptions, the reasoning in Dardovska appears to stand for the proposition that so long as the property is likely to be returned and is not exhausted of its value, no intention to permanently deprive can be inferred. If so, the decision represents a very narrow reading of the section. As the passage is obiter, it would seem that Sharp v McCormack remains the leading authority in Victoria.

Similar issues arose in Garven v Constable Quilty [1998] ACTSC 137, under the then version of the offence. The relevant provision is unchanged in impact in the current law. In that case it was alleged that the defendant, an Australia Post employee had dishonestly kept a package containing a valuable ring when he discovered that its intended recipient, Ms Nagy, was not home. He claimed to the contrary that he had delivered the package to Nagy’s front door and that a neighbour had signed for it. However on noticing that some days later it was still on Ms Nagy’s front porch he had retaken possession and left a collection card. He then returned the parcel to the Post Office, where it was found a day after the police began their investigations. Higgins J held:

172  At 640 [33].
173

297
At common law, a conditional intent permanently to deprive was insufficient for theft. [His Honour referred to *R v Easom* [1971] 2 QB 315]

That authority supports the view that an intent to appropriate permanently would not be constituted by an intent to retain the package, only if, after a short interval, no enquiries about it were made and then only if the contents proved, on examination, to be goods the appellant would wish to retain and dispose of as his own. The lack of interference with the package, notwithstanding the lapse of three days, is supportive of that intention, though it is not inconsistent with an intent to retain the package and its contents irrespective of whatever those contents were, either absolutely or conditionally on no enquiries being made. ... *R v Easom* (supra) was distinguished in *Sharp v McCormick* [1986] VR 869. In that case the defendant had taken an electrical coil, intending to keep it if it fitted his motor vehicle. The Full Court (Murray, Brooking and Nathan JJ) held that a conviction on those facts was not inconsistent with *R v Easom*. [His Honour then referred to the relevant statutory provisions applicable in the ACT]

It follows that the appellant could be convicted of stealing:

-- if he had, when he appropriated the package, intended not to return it to Australia Post or to deliver it to Ms Nagy as instructed by Australia Post, not merely for a defined time, but indefinitely, doing so only to avoid being found out, having become aware of police enquiries; or

-- if he had, when he appropriated the package, intended to retain it, unless he became aware of inquiries about its non-delivery, and, if no such enquiries eventuated after a suitable lapse of time, then to deal with it as his own. That intent would be deemed to be an intent permanently to deprive the owner thereof by virtue of s97(1).

However, if he had, when he appropriated the package, the intent, if no enquiries were made and after a suitable time, of examining the package's contents to see if they were worth treating as if his own, then that intent might well not suffice for conviction. No attention was given by his Worship or by the parties as to whether the appellant might have had this latter intent and, then, as to whether *Easom’s* case was good law. Thus, even if the finding made by his Worship that the appellant had dishonestly appropriated the package had stood unchallenged, a real issue as to whether that intent included an actual or deemed permanent deprivation remained undetermined

**Dishonesty – further definition**

*English Theft Act 1968*

"Dishonestly".

2.(1) A person's appropriation of property belonging to another is not to be regarded as dishonest—

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.
ACT Criminal Code 2002

300 Definitions for ch 3

In this chapter:

... dishonest means—

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

302 Dishonesty a matter for trier of fact

In a prosecution for an offence against this chapter, dishonesty is a matter for the trier of fact.

303 Dishonesty for pt 3.2

(1) A person’s appropriation of property belonging to someone else is not dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) However, subsection (1) does not apply if the person appropriating the property held it as trustee or personal representative.

(3) A person’s appropriation of property belonging to someone else can be dishonest even if the person or another person is willing to pay for it.

The Theft Act does not define dishonesty in general terms. Instead it provides a partial definition in s2 of three situations that are not dishonest.

In 1966 the CLRC report stated:

39 The word “dishonesty” could probably stand without a definition, and some members of the committee would have preferred not to define it. But we decided to include the partial definition in clause 2 in order to preserve specifically two rules of the present law. The first is the rule mentioned above that a “claim of right made in good faith” is inconsistent with theft; this rule is preserved in different language in paragraph (a)174 of clause 2(1). The second is the rule in 1916 1(2)(d) that a finder of property cannot be guilty of stealing it unless he “believes that the owner can be discovered by taking reasonable steps”; this rule is reproduced in slightly different language in paragraph (b)175 of clause 2(1).

As discussed in the materials on dishonesty the English courts in Feely and Ghosh developed a general test for dishonesty based on ordinary standards. The Model Code approach adopts the Ghosh test and enacts it as a statutory definition of dishonesty. In the ACT this is the s300 definition. The third English partial negative definition is relating to finders also reproduced in s303. Importantly the claim of right exception to dishonesty in the English s2(1)(a) and the belief that the owner would consent if they knew situations are not included in s303.

In Victoria, the Feely and Ghosh tests have been rejected and it has been held that dishonesty exists if none of the three exceptions are satisfied (R v Salvo) This approach has been questioned following the High Court’s decision in Peters, but the issue has not been fully addressed by either Victorian courts or the High Court.

174 Enacted as 2(1)(a) and (b).
175 Enacted as 2(1)(c).
Claim of right is not contained in the Model Code’s further definition, as it is separately defined. The Model Code Officers Committee Report also states that it was unnecessary to include a reference to a belief that the owner would consent on the basis that this was implicit in the general definition of dishonesty (which they defined according to the Ghosh test).176

**Theft by Finding**

**ACT Criminal Code 2002**

303 Dishonesty for pt 3.2

(1) A person’s appropriation of property belonging to someone else is not dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

One subsection in the definitions refers to appropriations in circumstances where there is a belief that the owner cannot be discovered by reasonable means. This is a codification of part of the law relating to larceny by finding.177 At common law a finder can be convicted of larceny if they find property and keep it without attempting to return the property to its owner.

In such cases issues arise concerning both the consent of the owner and the state of mind of the defendant. The courts have held that the initial taking of the property in the act of finding is done with the implied consent of the owner. However that implied consent extends only for a limited time and for the purpose of attempting to return the property. If no such attempt is made to locate the owner, the courts have held that this is both evidence of a taking beyond the scope of the consent and also evidence of a fraudulent intent to permanently deprive. A long series of cases have held that such dishonest intent does not exist if the owner cannot reasonably be found. In order to show that the finder believed that the owner could not be found by reasonable means both the person’s actions and lack of actions are examined. Each case depends on its circumstances but the courts have held that it is usually expected that the finder engage in actions such as leaving some note at the place of finding, contacting police or placing advertisements in newspapers.178

However, if at the time of the finding the owner could not be ascertained, but information as to their identity subsequently comes to light, a refusal to return the goods to the now ascertained owner is not larceny. This is because the taking was complete at the time of the initial finding and therefore despite the fraudulent intent there is no relevant asportation.179 Such an outcome was specifically referred to by the CLRC as a gap in the law that needed filling.180

That “gap” is now filled because an act of appropriation need not be a taking of possession. Any act inconsistent with the rights of the owner following the defendant’s discovery of who the owner was would amount to a fresh act of appropriation, and so would constitute theft.

176 MCCOC Report p15.
177 The issues of continuing trespass have already been discussed.
179 R v Thurborn (1849) 1 Den 387; 169 ER 239; R. v. Matthews (1873) 12 Cox, C.C. 489; Thompson v Nixon [1966] 1 QB 103.

300
Claim of Right

**ACT Criminal Code**

**38 Claim of right**

(1) A person is not criminally responsible for an offence that has a physical element relating to property if—

(a) when carrying out the conduct required for the offence, the person is under a mistaken belief about a proprietary or possessory right; and

(b) the existence of the right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of a proprietary or possessory right that the person mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

Under the Model Criminal Code approach claim of right has a statutory basis. There is some difficulty with the wording of the defence. It seems that a claim of right is only available if that belief if it were in fact true, would negate a fault element of the offence. The fault elements of theft are intention to permanently deprive and dishonesty. Neither of these fault elements have any relationship to a claim of property right in the accused. It therefore seems that claim of right may well not apply to theft, though it is doubtful that this was the legislators intention. Ian Leader-Elliot has commented:

Belief in the existence of a proprietary or possessory right is no answer to an allegation of dishonesty unless that belief is inconsistent with the imputation of fault. It is quite possible for a person to take action in pursuit of a claim of right in circumstances where they know very well that ordinary people would consider their action to be dishonest. Beliefs in legal entitlement, whether true or false, can provide a powerful incentive to indulge in oppression and sharp practice. In the Code offences of dishonesty, this potential for conflict between the defendant’s claim of right and the statutory formulation of the Feely/Ghosh test is resolved in favour of the ordinary person’s standard of honesty.

It is possible, in other words, for a person to commit an offence of dishonesty in circumstances where the conduct is motivated by a claim of right. That is a consequence of the fact that claim of right has no effect unless it negates a fault element - in this case, knowledge that the conduct is dishonest according to the standards of ordinary people. Since dishonesty is exhaustively defined, claim of right cannot extend or modify that definition in its application to particular offences. If the offender knows their conduct to be dishonest by those standards, the fact that they acted in pursuit of a claim of right is no answer to the charge. Instances will be highly unlikely to arise of course, but it would be arrogant for lawyers to assume that conduct based on a well founded legal claim provides an irrefragable guarantee against an ordinary person’s condemnation of that conduct as dishonest. 181

By contrast the English Theft Act and Victorian definitions of dishonesty explicitly state that a person is not dishonest if acting pursuant to a claim of right. The issue has not as yet come before the courts.

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Under the law before 1968 the facts of this case would have led to charges, to which there would have been no defence, of obtaining goods by false pretences. Since the passing of the Theft Act 1968 the accused could equally well have been prosecuted successfully for obtaining property by deception contrary to section 15 of the Act. Under the old law they could not have been found guilty of larceny, because the seller agreed to transfer the property in the goods to Ballay, and the fact that the seller's agreement was obtained by a fraud does not affect that conclusion. Indeed, if the seller's consent could have been vitiating in that way, Parliament would never have needed to create the statutory offence of obtaining by false pretences. The accused in this case, however, were prosecuted for theft under section 1(1) of the Act and were convicted notwithstanding the submission of counsel for the defence to the effect that the crime for which the accused were indicted did not amount to theft because the seller had consented to sell the property, albeit consent had been obtained by fraud, as alleged. When the defendant appealed, the Court of Appeal upheld that submission and quashed his convictions. In order to restore those convictions, the Crown must say that the Act of 1968 has altered the law in such a way (among others) that anyone who, by a false representation such as a worthless cheque, induces an owner to sell property is thereby guilty of stealing. ...

To be guilty of theft the offender, as I shall call him, must act dishonestly and must have the intention of permanently depriving the owner of property. Section 1(3) shows that in order to interpret the word "appropriates" (and thereby to define theft), sections 1 to 6 must be read together. The ordinary and natural meaning of "appropriate" is to take for oneself, or to treat as one's own, property which belongs to someone else. The primary dictionary meaning is "take possession of, take to oneself, especially without authority," and that is in my opinion the meaning which the word bears in section 1(1). The act of appropriating property is a one-sided act, done without the consent or authority of the owner. And, if the owner consents to transfer property to the offender or to a third party, the offender does not appropriate the property, even if the owner's consent has been obtained by fraud. This statement represents the old doctrine in regard to obtaining property by false pretences, to which I shall advert presently.

The references in sections 2, 3 and 4 qualify but do not impair the meaning of the words "appropriates" and "appropriation," as they are used in section 1. Section 2(1) does not change the meaning of appropriation but it tells us when appropriation is not to be regarded as dishonest (and so does not amount to stealing). Paragraphs (a), (b) and (c) of the subsection all describe unilateral, though honest, acts of the appropriator, who takes the property for himself and treats it as his own. For the benefit of those who would suggest that section 2(1)(b) shows that appropriation is something which can be done with the consent of the owner, I would paraphrase that provision by saying "if he appropriates the property in the belief that he would have the other's consent if the other knew what he had done and the circumstances in which he did it." The opportunity for confusion arises from the use of the word "appropriates" in a clearly unilateral sense followed by the word "appropriation" (describing what the appropriator has unilaterally done) hypothetically linked to the idea of consent.

Coming now to section 3, the primary meaning of "assumption" is "taking to oneself," again a unilateral act, and this meaning is consistent with subsections (1) and (2). To use the word in its secondary, neutral sense would neutralise the word "appropriation," to which assumption is here equated, and would lead to a number of strange results. Incidentally, I can see no magic in the words "an owner" in subsection (1). Every case in real life must involve the owner or the person described in section 5(1); "the rights" may mean "all the rights," which would be the normal grammatical meaning, or (less probably, in my opinion) "any rights:" see Reg. v. Morris [1984] A.C. 320, 332h. For present purposes it does not appear to matter; the word "appropriate" does not on either interpretation acquire the meaning contended for by the Crown. Still looking at section 3(1), I point out that "any later assumption of a right to it"
(that is, a right to the property) amounts to an appropriation of a right to it and that normally "a right to it" means a right to the property and not a right in it." Section 3(2) protects an innocent purchaser from an accusation of theft when, having bought in good faith from someone with a defective title, he later treats the property as his own.

Section 4(2) lists three exceptions to the general proposition that a person cannot steal land etc. The word "appropriates" in paragraphs (a), (b) and (c) is thoroughly consistent with unilateral action.

Section 6(1) introduces a deemed intention of permanently depriving the owner of his property when the person appropriating the property "for the time being," as one might say, intends "to treat the thing as his own to dispose of regardless of the other's rights; . . . " Here again the offender's act is unilateral and the same can clearly be said of section 6(2).

Mr. Hacking, for the defendant, also drew attention to sections 24(4) and 28(6) of the Theft Act, which can be required only on the basis that section 15, in at least some respects, is not dealing with theft. He also pointed out the amendment in section 26 of the Criminal Justice Act 1991 (effective from 1 October 1992) reducing the maximum term of imprisonment for theft from ten to seven years, thereby distinguishing theft from obtaining by deception, the maximum term for which remains at ten years.

Accordingly, reading sections 1 to 6 as a whole, and also taking into account sections 24(4) and 28(6) and the 1991 amendment, the ordinary and natural meaning of "appropriates" in section 1(1) is confirmed. So clear is this conclusion to my mind that, notwithstanding anything which has been said in other cases, I would be very slow to concede that the word "appropriates" in section 1(1) is in its context ambiguous. But, as I have indicated, the Crown case requires that there must be ambiguity and further requires that the ambiguity must be resolved against the ordinary meaning of the word and in favour of the neutral meaning preferred and required by the Crown's argument. Therefore, my Lords, I am willing for the purpose of argument to treat the word "appropriates" as ambiguous in its context and, on that basis, following the principles enunciated in Black-Clawson International Ltd. v. Papierwerke Woldhof-Ashaffenburg A.G. [1975] A.C. 591 and the example of Lord Ackner in Reg. v. Kassim [1992] 1 A.C. 9, 16, where the construction of section 20(2) of the Act of 1968 was the question at issue, I turn, for such guidance as it may afford, to the Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences.

While the report may not completely resolve the question for your Lordships, it provides in the first place a very useful summary of the state of the law in 1966. It also discusses in some detail the shortcomings of the law in regard to theft and kindred offences, as they appeared to the committee, and it proposes remedies. A reading of the Act of 1968, which was based on the draft Bill annexed to the report, leads me to the conclusion that, when using the very words of the draft, Parliament intended to implement the committee's thinking. Of course, if the words of the Act clearly achieve a different result from that which seemed to be intended by the committee, it is the words which must prevail and strained constructions must not be adopted in order to give effect to the report.

[His Lordship quoted extensively from the report.]

My Lords, as I would submit, the report contains a great deal which confirms and nothing which contradicts the interpretation of the word "appropriates " which I have preferred, and a comparison of the Act with the draft Bill gives no support to the contrary view. ...
department and the parliamentary draftsmen all thought that section 15 (clause 12) was needed, which turns out to be a mistaken view when section 1 is properly understood. I call this an alternative theory because it seems obvious to me that the committee did think that clause 12 was necessary - and I am not simply referring to the definition of "deception." The Crown say that section 15 merely describes a particular type of theft and that all stealing by means of deception can be prosecuted under section 1 just as well as under section 15. I would point out that section 15 covers what were formerly two *478 offences, obtaining by false pretences (where the ownership of the property is transferred by the deceived victim) and theft (or larceny) by a trick (where the possession of the property passes, but not the ownership). In the former case, according to the interpretation which I prefer, the offender does not appropriate the property, because the ownership (in colloquial terms, the property) is transferred with the owner's consent, albeit obtained by deception. In the latter case the offender does appropriate the property because, although the owner has handed over possession by consent (which was obtained by deception), he has not transferred the property (that is, the ownership) and the offender, intending to deprive the owner permanently of his property, appropriates it, not by taking possession, but by the unilateral act, adverse to the owner, of treating as his own and taking to himself property of which he was merely given possession. Thus, the kind of obtaining by deception which amounts to larceny by a trick and involves appropriation could be successfully prosecuted under section 1, but the old false pretences type of obtaining by deception could not. Of course, unless the facts were absolutely clear, it would be foolish to prosecute under section 1 an offence of obtaining by deception, since something which at first looked like larceny by a trick might turn out to have involved a transfer of the ownership, in which case only section 15 would meet the prosecution's needs, if I am right. Some theft cases can be prosecuted under section 15, but it is fallacious, having regard to what I perceive as the true meaning of appropriation, to say that all cases of obtaining by deception can be prosecuted under section 1.

There are only three cases which I need to look at in detail, Reg. v. Lawrence [1972] A.C. 626, Reg. v. Morris [1984] A.C. 320 and Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274, a decision of the Court of Appeal in a case where a policy holder was insured against "loss or damage caused by theft." Reg. v. Lawrence is reported in the Court of Appeal (Criminal Division) [1971] 1 Q.B. 373, where the main contention of the defence, noted at p. 376h by Megaw L.J., who delivered the judgment of the court, was that there must be implied into section 1(1) of the Act of 1968 a requirement that the dishonest appropriation must be without the consent of the owner of the property. Megaw L.J. then said, at p. 377:

"In our view, no such implication is justified. The words contained in the former definition of larceny, in section 1 of the Larceny Act 1916, 'without the consent of the owner,' have been omitted, and, we have no doubt, deliberately omitted from the definition of theft in the new Act. If the owner does not resist the taking of his property, or actually hands it over, because of, for example, threats of violence, in one sense it could be said that there is 'consent:' yet the offence of robbery, as defined in section 8(1) of the Theft Act 1968, involves, as one of its elements, theft. Again, the former offences of larceny by a trick and obtaining property by false pretences, though technically distinct offences under the old law, both involved what in one sense could be described as 'consent' by the victim. It was conceded by counsel for the defendant, necessarily and rightly, that the old offence of larceny by a trick is covered by *479 section 1(1) of the Act of 1968, as well as by section 15(1) to which we shall refer later, despite what may be called the apparent consent of the victim. Of course, where there is true consent by the owner of property to the appropriation of it by another, a charge of theft under section 1(1) must fail. This is not, however, because the words 'without consent' have to be implied in the new definition of theft. It is simply because, if there is such true consent, the essential element of dishonesty is not established. If, however, the apparent consent is brought about by dishonesty, there is nothing in the words of section 1(1), or by reason of any implication that can properly be read into those words, to make such apparent consent relevant as providing a defence. The prosecution have to prove the four elements already mentioned, and no more. No inference to the contrary is to be drawn from the words
of section 2(1)(b), already quoted. That reference does no more than show that the essential element of dishonesty does not exist if the defendant when he appropriates the property believes that the owner would consent if he knew the circumstances. The circumstances are, of course, all the relevant circumstances. 'The belief' is an honest belief. That paragraph does not give rise to the inference that an appropriation of property is not theft when there is a 'consent' - if it can be rightly so described - which is founded upon the dishonesty of the defendant. The primary submission on behalf of the defendant, therefore, fails."

My respectful view, for reasons which your Lordships will have noted, is that both the contention of the defence and the court's refutation of it were misconceived: the absence of consent on the part of the owner is already inherent in the word "appropriates," properly understood, and therefore the argument for the defence got off on the wrong foot and the counter-argument that the words specified by the defence cannot be read into section 1(1) did not assist the prosecution. and the observation, without further discussion, that the omission of the words "without the consent of the owner" is deliberate seems to have led directly to the erroneous conclusion that a supposed appropriation with the consent of the owner is one of the four ingredients which are required (and which suffice) to constitute theft. I do not propose to restate the facts of *Reg. v. Lawrence*. It is enough to recall that the Court of Appeal, accepting the defence submission on that point, regarded it as an example, according to the old law, of obtaining by false pretences: see p. 378b. But the court did not accept the legal conclusion which the defence sought to draw from that fact, since Megaw L.J. continued, at p. 378:

> "The court sees no ground for saying that, for present purposes, it makes the slightest difference whether under the old law the offence would have been false pretences or larceny by a trick. The old and unsatisfactory distinction is not to be unnecessarily perpetuated where the language of the Theft Act 1968 does not so require. There is no magic in the word 'property' in section 1(1) in view of the definition in section 4(1) of the Act. In either case, the fact that a charge could have been brought under section 15(1), which covers both, in no way operates to prevent the charge being validly laid as *480* theft under section 1(1) if the prosecution can prove what they must prove, as previously described, under that subsection. This is conceded in respect of an offence which would once have been larceny by a trick. It applies equally to what would once have been obtaining by false pretences, if, as is here the case, the requirements of section 1(1) are also satisfied. That submission also fails. It may be that the result of our decision is that in any case where the facts would establish a charge under section 15(1) they would also establish a charge under section 1(1). The alternative, however, involves the writing back into section 1(1) of words which the legislature, no doubt deliberately, omitted, and the re-introduction into the criminal law of the distinction between larceny by a trick and obtaining by false pretences."

It is true that it would make no difference whether under the old law the offence would have been false pretences or larceny by a trick, provided the charge was laid under section 15(1). It was, indeed, with the object of getting over that difference that the Criminal Law Revision Committee (Cmnd. 2977) proposed their clause 12(1). But the "old and unsatisfactory distinction" continues to operate if the charge is laid under section 1(1) and this is due to the true meaning in that subsection of the word "appropriates." That is why section 15(1) is needed and why it is best to prosecute under that provision in cases where deception is alleged to have been practised. It can be seen that the entire reasoning of the passage I have just quoted is based on a misconception of the meaning of the word "appropriates," and that misconception springs from the misconceived argument and counter-argument at p. 377 of the judgment.

Turning back to the earlier extract which I have quoted, I note that Megaw L.J. gives two examples in order to show that theft may be committed, although the (so-called) appropriation is made by the offender with the consent of the owner, (1) in the case of robbery and (2) where there has been larceny by a trick.

As to the former, before 1968 robbery was a felony at common law and, according to *Archbold, Criminal Pleading Evidence & Practice*, 36th ed. (1966), p. 644, para. 1761, consisted...
"in the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear."

The old authorities, Coke, Hale, Hawkins and Blackstone, are cited in Reg. v. Desmond [1965] A.C. 960, 980 et seq. by Lord Morris of Borth-y-Gest. Section 8(1) of the Act of 1968 was modelled on clause 7(1) of the draft Bill and provides:

"A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force."

(I can see no sign of any intention to change the common law, as declared in Reg. v. Desmond.) When, in response to the highwayman's threat, "Your money or your life," the victim delivered up his money, he *481 did so against his will and there was no question of consent. The highwayman was guilty of an aggravated form of stealing and did not obtain even a voidable title. The same holds good today and it would be idle to suggest that the victim of a robbery consents in any way to hand over his property, much less to transfer its ownership, to the robber.

In the case of larceny by a trick, as I explained earlier, the owner consents to hand over possession but he does not consent to transfer ownership of his property, unlike the victim of what was formerly known as false pretences, who does indeed consent to transfer his ownership. That is the difference which makes it irrelevant and misleading to say (Reg. v. Lawrence [1971] 1 Q.B. 373, 377b) that both larceny by a trick and obtaining by false pretences involved "consent" by the victim, because what is involved is consent to two different things.

The reference to "true consent" (Reg. v. Lawrence, at p. 377c) calls for a further observation which will also be apt when I consider Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274. The victim of false pretences does truly consent and acts of his own volition, although his consent to transfer his property to another has been obtained by fraud. I refer again to Archbold, 36th ed., this time at p. 549, para. 1479:

"Where the owner, of his own free will, parts not only with the possession but also with the property in the goods taken, the person taking the goods cannot be guilty of larceny, however fraudulent were the means by which the delivery of the goods was procured."

At paragraph 1497, it is stated that in larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. Of the nine cases cited for this proposition I refer to just one, Whitehorn Brothers v. Davison [1911] 1 K.B. 463, a decision of the Court of Appeal to the effect that the false pretences rule concerning the passing of a good title to an innocent purchaser applied when the owner had been induced by false pretences to deliver goods to the buyer on sale or return. Buckley L.J. said, at p. 479:

"It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power, and the power is exercised, the person who takes under the execution of the power obtains the property, not against, but by the authority of, the original owner, and none the less because the authority was obtained by fraud." (Emphasis supplied.)

Paragraph 1499 deals with larceny by intimidation (which has much in common with one branch of robbery):

"Where a man, having the animus furandi (see ante, para. 1469), obtains possession of goods by frightening the owner, as by threatening him with temporary imprisonment unless he delivers up *482 his goods, and the owner does deliver them under the influence of the fear inspired by his threat, this is considered such a taking (although there is a delivery in fact) as to constitute larceny: Reg. v. Lovell (1881) 8 Q.B.D. 185."
I have cited these passages in order to illustrate the difference between larceny by a trick and obtaining by false pretences and the important, if obvious, fact that the owner’s consent to transfer the property prevents the offender from being guilty of larceny, although the consent was obtained by fraud and, in the words of Megaw L.J. ([Reg. v. Lawrence [1971] 1 Q.B. 373, 377c), is not a “true consent.” I say “obvious” because, if this proposition did not prevail, the property would not pass and the offender would be guilty of larceny, now described as theft. Accordingly, the statement in the judgment of the Court of Appeal, at p. 377d, to the effect that, if the apparent consent of the owner is brought about by dishonesty, there is nothing in the words of section 1(1) to make such apparent consent relevant as providing a defence is, with respect, erroneous in relation to a charge of theft (which was the relevant charge) if the words “appropriates” bears the meaning which the Criminal Law Revision Committee (rightly, in my opinion) has deliberately given it.

In The Law of Theft, 6th ed. (1989), ch. II, Professor J. C. Smith discusses the difference between larceny by a trick and obtaining by false pretences and continues, at p. 20, para. 38:

“It may of course be perfectly proper for the court to put on the Act an interpretation different from that intended by the framers of it. The question is one of the proper interpretation of the words enacted by Parliament and it could be that the Act does what the committee thought was not practicable and what they did not intend to do. It is submitted, however, that the right interpretation of the Act is that intended by the committee.”

His further comment, at paragraph 39, is also valuable, in my opinion:

“There is, however, a considerable degree of doubt about this matter, because of the case of Lawrence. The Court of Appeal in that case thought that the distinction between larceny by a trick and obtaining by deception depended on the presence in the Larceny Act of the words ‘without the consent of the owner,’ and, as these words do not appear in the definition of theft, the distinction is gone; all cases of obtaining by deception, contrary to section 15, are also theft. This argument, however, appears to give insufficient weight to the notion of ‘appropriation’ and to the words ‘property belonging to another.’”

The report of the argument in this House in Reg. v. Lawrence [1972] A.C. 626 shows that the appellant, understandably from his own point of view, again approached the case as one of false pretences. That basis would provide grounds for an acquittal of the charge of theft if the word “appropriates” in section 1(1) connotes an absence of consent by the owner, and the appellant presented his argument on the meaning of that subsection, at p. 630a, in the same way as in the Court of Appeal and *483 with the same unsuccessful result. But that was not all. Viscount Dilhorne, at p. 631, when reviewing the evidence, expressed the opinion that the facts of the case fell far short of establishing that Mr. Occhi, the Italian student who was the victim of the taxi driver, had consented to the acquisition by the appellant of the £6, as argued at p. 628. On that footing the taxi driver could have been guilty of larceny by a trick (in old-fashioned terms), so as to be guilty of theft under any interpretation of section 1(1). It has to be said, however, that the way in which Mr. Occhi left the taxi at the end of the journey without further question seems more consistent with his having accepted that £7 in all was the fare to be charged and that he had been induced by the driver’s false representations to part out and out with all the money which he had passively allowed the taxi driver to take from his wallet. It is of no assistance, however, to your Lordships in the present appeal to debate the finer points of Reg. v. Lawrence with a view to deciding whether the decision in this House (although not that of the Court of Appeal) can be justified on the special facts. What is important is the unequivocal, but in my respectful opinion wrong, statement of the law made by Viscount Dilhorne, at p. 632a (to which I referred at the outset of my speech), that Parliament by omitting the words "without the consent of the owner" from section 1(1) of the Act of 1968 "has relieved the prosecution of the burden of establishing that the taking was without the owner's consent." He added "That is no longer an ingredient of the offence" (sc. "of theft"). The reasoning which follows is based on the opinion, already inseparable from what has been said, that appropriation is a neutral expression and does not convey the sense of taking property for oneself without the owner’s authority. As in the Court of Appeal, the defence argument was primarily directed towards implying words into section 1(1), a difficult task at best, and only
secondarily towards the meaning of "appropriates:" see p. 631a. But the only speech delivered did not consider this second point and the summary treatment of the appellant's argument is reflected in the opinion expressed, at p. 633, that the point certified and argued was scarcely worthy of their Lordships' attention. My Lords, I have found nothing in Lawrence which affects my view of the present appeal. The crucial statement, apart from what was said at p. 632a, was at p. 632e: "[Appropriation] may occur even though the owner has permitted or consented to the property being taken." If "taken" there signifies a permitted change of ownership, I respectfully cannot agree.

In Reg. v. Morris [1984] A.C. 320, the label-switching case, the facts to be considered by the jury and subsequently by the Court of Appeal [1983] Q.B. 587 were, like those of many supermarket frauds, more complex than those of the present case. There would have been no defence (just as in Reg. v. Lawrence) if the charge had been laid under section 15(1) and, as in Reg. v. Lawrence and the present case, it was the Crown's resort to section 1(1) which alone gave rise to a legal problem. Lord Lane C.J. expounded the main points on each side, at p. 593:

"As to the meaning of the word 'appropriation,' there are two schools of thought. The first contends that the word 'appropriate' has built into it a connotation that it is some action inconsistent with the owner's rights, something hostile to the interests of the owner or contrary to his wishes and intention or without his authority. The second school of thought contends that the word in this context means no more than to take possession of an article and that there is no requirement that the taking or appropriation should be in any way antagonistic to the rights of the owner. Support can be found for each of those two points of view both in the authorities and also amongst the textbook writers."

He then reviewed a number of cases, concluding with Lawrence, and, referring to Viscount Dilhorne, said, at p. 597:

"He stated tersely in terms, at p. 633: 'The first question posed in the certificate was: "Whether section 1(1) of the Theft Act 1968 is to be construed as though it contained the words 'without having the consent of the owner' or words to that effect." In my opinion, the answer is clearly No.' That being the emphatic view of their Lordships, it would, we think, be quite wrong in effect to re-import into the offence the necessity of proving what amounts to absence of consent on the part of the owner by saying that the word "appropriates" necessarily means some action contrary to the authority or interests of the owner and that that is one of the requirements which the prosecution must prove."

Here again (understandably, since Reg. v. Lawrence was a decision of this House) the misconceived argument and refutation, which were related to the possibility of implying words into section 1(1), took precedence. I am much attracted, as indeed the Court of Appeal may have been, by Mr. Denison's argument for the appellant which Lord Lane C.J. summarised, at p. 599a-c. His comment was significant:

"Whilst appreciating the simplicity of this approach, we think, for the reasons already set out, that the wording of the Act, coupled with the decision in Reg. v. Lawrence [1972] A.C. 626, does not allow us to adopt this solution."

This House, having granted leave to appeal, affirmed the Court of Appeal's decision in Reg. v. Morris [1984] A.C. 320, but reached its conclusion by a different route, as explained in the speech of Lord Roskill, to which I have already referred. I would respectfully agree with his description, in relation to dishonest actions, of appropriation as involving an act by way of adverse interference with or usurpation of the owner's rights, but I believe that the less aggressive definition of appropriation which I have put forward fits the word as used in an honest sense in section 2(1) as well as elsewhere in the Act. The important feature, of course, which our definitions have in common is that the appropriation must be an act done without the authority or consent, express or implied, of the owner. I do not consider that it would help towards the solution of your Lordships' present problem for me to discuss further the points which arose in Morris (including the question whether it really is an example of theft) or in the many other cases on section 1(1) which have occupied the anxious attention of the courts and the academic writers. I must, however, look at Dobson v. General Accident Fire and Life
Assurance Corporation Plc. [1990] 1 Q.B. 274, which I referred to above. That was the case in which the owner, Mr. Dobson, sold his gold watch and diamond ring in return for a building society cheque which turned out to be a stolen cheque and worthless. When he tried to recover his loss, the insurers denied liability on the ground that, whereas his policy insured him against "loss or damage caused by theft," the circumstances did not disclose a theft within the meaning of the Act of 1968. The owner sued the insurers and obtained judgment in the county court for £5,199.30. The insurers appealed to the Court of Appeal, contending that there had been no appropriation of the property by the buyer but that the owner had transferred the ownership of the property to the buyer, who had obtained a voidable title. The insurers also sought to distinguish Lawrence by contending that in that case the student's money had not passed to the taxi driver and that the student had not conferred on the taxi driver the rights of an owner. Furthermore, they contended, Morris should be preferred to Lawrence, in so far as those cases were in conflict. The plaintiff relied on Lawrence to show that an appropriation could occur, even if the owner consented.

The Court of Appeal, dismissing the insurers' appeal, simply followed the Lawrence approach. Parker L.J. said correctly, at p. 279, that on the basis of that case:

"the facts of the present case appear to establish that the rogue assumed all the rights of an owner when he took or received the watch and ring from the plaintiff."

Having discussed certain arguments relating to the time when the property passed (which were relevant to an additional and unsound argument put forward by the insurers), he continued, at p. 280:

"Having regard to the terms of the contract, the conduct of the parties and the circumstances of the case, I have no doubt that the property was not intended to pass in this case on contract but only in exchange for a valid building society cheque, but even if it may be regarded as intended to pass in exchange for a false, but believed genuine, building society cheque it will not in my view avail the insurers." (Emphasis supplied.)

I would respectfully join issue with this statement on two grounds. (1) No doubt everyone who sells property in exchange for a cheque intends to sell only in exchange for a valid cheque. But the buyer has induced the owner to sell by the false pretence that the cheque is good. Unless the owner stipulates to the contrary, the property passes on delivery, if it has not already passed, and the buyer obtains a voidable title. (2) On any hypothesis, unless the statement in Reg. v. Lawrence [1972] A.C. 626 is right, there was no theft, because the property passed with the fraudulently obtained consent of the owner and the buyer was guilty of obtaining by deception in the false pretences sense.

Dealing with a further argument of the insurers as to when the property passed, Parker L.J. said, at pp. 280-281:

"If [the argument] were right, then the result would merely be that the making of the contract constituted the appropriation. It was by *486 that act that the rogue assumed the rights of an owner and at that time the property did belong to the plaintiff."

This observation merely perpetuates what I would call the Lawrence fallacy and disregards the unilateral meaning of appropriation.

Parker L.J. then turned to the argument derived from Reg. v. Morris [1984] A.C. 320 and said, at p. 281:

"The difficulties caused by the apparent conflict between the decisions in Reg. v. Lawrence [1972] A.C. 626 and Reg. v. Morris [1984] A.C. 320 have provided, not surprisingly, a basis for much discussion by textbook writers and contributors of articles to law journals. It is, however, clear that their Lordships in Reg. v. Morris did not regard anything said in that case as conflicting with Reg. v. Lawrence for it was specifically referred to in Lord Roskill's speech, with which the other members of the Judicial Committee all agreed, without disapproval or qualification. The only comment made was that, in Reg. v. Lawrence, the House did not have to consider the precise meaning of 'appropriation' in section 3(1) of the Act of 1968. With respect,
I find this comment hard to follow in the light of the first of the questions asked in Reg. v. Lawrence and the answer to it, the passages from Viscount Dilhorne's speech already cited, the fact that it was specifically argued 'appropriates is meant in a pejorative, rather than a neutral, sense in that the appropriation is against the will of the owner,' and finally that dishonesty was common ground. I would have supposed that the question in Reg. v. Lawrence was whether appropriation necessarily involved an absence of consent. Lord Roskill's comment on Reg. v. Lawrence is, however, not the only difficulty presented by his speech in Reg. v. Morris, but before I consider other difficulties it is necessary to set out in short form the facts of the two cases considered in that speech.

Then, having stated the facts, he criticised in some detail the reasoning in Morris, at pp. 282a-285d, and considered Reg. v. Skipp [1975] Crim.L.R. 114 and Reg. v. Fritschy [1985] Crim.L.R. 745. It is true that Morris contains no disapproval or qualification of Lawrence, but, in my view, the main statements of principle in these cases cannot possibly be reconciled and the later case therefore must not be regarded as providing any support for the earlier.

Coming back to Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274, Parker L.J. rightly observed that the insurers' main arguments were negatived by Lawrence and concluded, at p. 286:

"I am fully conscious of the fact that in so concluding I may be said not to be applying Reg. v. Morris. This may be so, but in the light of the difficulties inherent in the decision, the very clear decision in Reg. v. Lawrence [1972] A.C. 626 and the equally clear statement in Reg. v. Morris [1984] A.C. 320 that the question whether a contract is void or only voidable is irrelevant, I have been unable to reach any other conclusion. I would therefore dismiss the appeal."

*487 Bingham L.J., when considering the meaning of section 1(1), attached importance to the omission of the words "without the consent of the owner." I have already commented on this point. Having adverted briefly to supermarket offences, he then said, at p. 287-288:

"This analysis appears to me to have been authoritatively adopted by the House of Lords in Reg. v. Lawrence [1972] A.C. 626. The first question certified was 'Whether section 1(1) of the Theft Act 1968 is to be construed as though it contained the words "without having the consent of the owner" or words to that effect.' The House answered the question with an emphatic 'No,' requiring no argument from the prosecutor and expressing surprise that the Court of Appeal (Criminal Division) had certified the question as fit for the consideration of the House. Although it appears that the Italian student who was the victim in the case permitted or allowed the taxi driver to take £6 from his wallet, Viscount Dilhorne (with whose speech the other members of the House agreed) was in no doubt that there had been an appropriation. He said, at p. 632: 'Belief or the absence of belief that the owner had with such knowledge consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation. That may occur even though the owner has permitted or consented to the property being taken.'"


"Reference was not made to Viscount Dilhorne's ruling that appropriation may occur even though the owner has permitted or consented to the property being taken. I do not find it easy to reconcile this ruling of Viscount Dilhorne, which was as I understand central to the answer which the House gave to the certified question, with the reasoning of the House in Reg. v. Morris [1984] A.C. 320. Since, however, the House in Reg. v. Morris considered that there had plainly been an appropriation in Reg. v. Lawrence [1972] A.C. 626, this must (I think) have been because the Italian student, although he had permitted or allowed his money to be taken, had not in truth consented to the taxi driver taking anything in excess of the correct fare. This is not a wholly satisfactory reconciliation, since it might be said that a supermarket consents to customers taking goods from its shelves only when they honestly intend to pay and not otherwise. On the facts of the present case, however, it can be said, by analogy with Reg. v. Lawrence, that although the plaintiff permitted and allowed his property to be taken by the third party, he had not in truth consented to the third party becoming owner without giving a
valid draft drawn by the building society for the price. On this basis I conclude that the plaintiff is able to show an appropriation sufficient to satisfy section 1(1) of the Theft Act 1968 when the third party accepted delivery of the articles. “(Emphasis supplied.)

I consider that Bingham L.J.'s rationalisation of the failure of Morris to disapprove of Lawrence is of some significance. I have already *488 commented, when discussing the judgment of Parker L.J., on the seller's expectation that he would receive a valid cheque. In short, Dobson's case follows the erroneous interpretation which was endowed with authority by Lawrence and was therefore, in my respectful opinion, wrongly decided. I would refer with respectful approval to Professor Smith's note [1990] Crim.L.R. 271, 273-274 on Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274.

The judgment in the Court of Appeal in this case, which was delivered by Lord Lane C.J., is reported at [1991] 1 W.L.R. 1334. The matter is clearly put at p. 1338:

"What in fact happened was that the owner was induced by deceit to agree to the goods being transferred to Ballay. If that is the case, and if in these circumstances the appellant is guilty of theft, it must follow that anyone who obtains goods in return for a cheque which he knows will be dishonoured on presentation, or indeed by way of any other similar pretence, would be guilty of theft. That does not seem to be the law. Reg. v. Morris [1984] A.C. 320 decides that when a person by dishonest deception induces the owner to transfer his entire proprietary interests that is not theft. There is no appropriation at the moment when he takes possession of the goods because he was entitled to do so under the terms of the contract of sale, a contract which is, it is true, voidable, but has not been avoided at the time the goods are handed over."

Exception has been taken by some commentators to the words "Reg. v. Morris... decides," but the proposition which is stated in the judgment of the court follows inevitably from Lord Roskill's statement as to the meaning of appropriation.

Having reviewed the judgment in Dobson, Lord Lane C.J. said, at pp. 1339- 1340:

"We do not consider that the judgment in [Dobson] requires or allows us to disregard what we have earlier in this judgment sought to extract as the ratio of the decision in [Morris]. We therefore conclude that there was a de facto, albeit voidable contract, between the owners and Ballay; that it was by virtue of that contract that Ballay took possession of the goods; that accordingly the transfer of the goods to him was with the consent and express authority of the owner and that accordingly there was no lack of authorisation and no appropriation. In the absence of any charge under section 15 of the Theft Act 1968, this appeal must therefore be allowed and the conviction quashed."

I respectfully agree.

My Lords, to sum up, every indication seems to me to point away from adopting a neutral meaning of the word "appropriation." I would reinforce that view by recalling that in George Wimpey & Co. Ltd. v. B.O.A.C. [1955] A.C. 169, 191, Lord Reid stated that if the arguments are fairly evenly balanced (not that I believe they are in this case), that interpretation should be chosen which involves the least alteration of the *489 existing law. Maxwell on Interpretation of Statutes, 12th ed. (1969), states, at p. 116:

"Few principles of statutory interpretation are applied as frequently as the presumption against alterations in the common law. It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question."

If the change in the law of theft which is signalled by decisions such as that reached in Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274 has in reality occurred, the position of insurers in that field has in the result been prejudiced by legislation the effect of which was far from clear.

I come back to the word "assumption" in section 3(1). If it is said that that word is capable of a neutral meaning, my answer is that, in order to read section 3(1) harmoniously with section
1(1) in its natural sense, "assumption" must receive a unilateral meaning. So to limit the interpretation of the word would follow the principle that words in a statute which have, or can have, a general meaning may have to be given a specialised and narrower meaning in order to make sense of the legislation and to avoid the conclusion that changes have been made to the existing law which cannot have been intended by Parliament. This principle must be stronger when, as in the present case, the specialised and narrower meaning is also the primary meaning.

Not only Reg. v. Lawrence [1972] A.C. 626 and Reg. v. Morris [1984] A.C. 320, but a large number of cases on section 1(1), have furnished the material for animated and often penetrating academic discussion. I am encouraged to have seen that submissions based on such discussion are increasingly made by counsel and entertained by the courts and your Lordships have in the present appeal benefited from counsel's industry in this respect. I could not possibly do justice in this speech to all that has been written on the subject, but I hope that I have profited from the many articles which I have read since the hearing. Perhaps because his view on the main point is the same as mine, but certainly because I consider it to be a clear exposition, I here reproduce the statement of Professor Smith in The Law of Theft, 6th ed., ch. II, pp. 13-14, para. 31, on which Mr. Hacking strongly relied:

"The Larceny Act 1916 required that the taking and carrying away should be 'without the consent of the owner.' The absence of the owner's consent was an essential feature of the trespassory taking which had to be proved. The omission of these words from the definition of theft lends some support to the argument that an act may amount to an appropriation although it is done with the consent of the owner. The omission of the words is, however, sufficiently accounted for by the fact that they were part of the definition of the trespassory taking which it was a principal object of the [Theft Act 1968] to abolish. It is not a reason for giving to the word 'appropriate' a meaning narrower than it would naturally bear. The [Act of 1916] itself provided for an alternative form of stealing — larceny by a bailee who 'fraudently converts' the bailed goods. The section did not say 'converts without the consent of the owner.' That would have been absurd because the word, 'converts,' itself implied that the bailee had done something with the bailed goods which was not authorised by the terms of the bailment. Similarly, fraudulent conversion, contrary to section 20(1)(iv) of the [Act of 1916], required an act inconsistent with the terms on which the property was received. Section 20(1)(iv) was the model for the definition of theft and 'appropriate' was intended to bear the same meaning. If 'converts' in the [Act of 1916] implied an unauthorised act, notwithstanding its proximity to the definition of larceny with its requirement of the absence of the owner's consent, there is, a fortiori, no reason why the word 'appropriates' in the [Act of 1968] should not be similarly construed.

"In Reg. v. Morris [1984] A.C. 320 the House of Lords held that 'in the context of section 3(1), the concept of appropriation . . . involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of [the owner's] rights.' This statement by Lord Roskill, with whom all their Lordships agreed, was probably an obiter dictum since there was no doubt in that case that the act was done without the consent of the owner. It is submitted that it is correct in principle. It is in accord with the legal meaning of 'converts,' and with the natural meaning of 'appropriates' which suggests 'helping oneself' to the property of another. A person does not 'assume' the rights of an owner if the owner has conferred those right on him."


"One of the questions of law of general public importance which the House was required to answer was: 'Whether section 1(1) of the Theft Act 1968 is to be construed as though it contained the words "without having the consent of the owner" or words to that effect.' Viscount Dilhorne, with whom the whole House concurred, dealt with the matter with extreme brevity. He said, 'In my opinion, the answer is clearly No.' The answer to the question played no part in the actual decision. Viscount Dilhorne had already decided that the appeal should be
dismissed before he turned to it. The certificate asked the wrong question and merited the short shrift which it received. The expression 'appropriates without the consent of the owner' would have been just as inept as 'converts without the consent of the owner.'"

"491 My Lords, I think I have in passing taken account of most of the points made in the pro-Lawrence academic contributions to the debate. I feel no qualms about taking sides against these contributions, nearly all of which seem to me to disregard the Criminal Law Revision Committee Report and to neglect to analyse the meaning in its context of the word "appropriate." Moreover, they choose to disregard the ordinary law governing the transfer of title, calling it the civil law, as if to contrast it with the criminal law and thus render it surplus to requirements. At least, Bingham L.J. refused to fall in with this idea, saying in Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274, 289:

"But whether, in the ordinary case to which section 5 of the Theft Act 1968 does not apply, goods are to be regarded as belonging to another is a question to which the criminal law offers no answer and which can only be answered by reference to civil law principles."

Accordingly, it is both proper and rational to rely on such cases as Phillips v. Brooks Ltd. [1919] 2 K.B. 243 and Lewis v. Averay [1972] 1 Q.B. 198, 207g. ...

In my opinion, any attempt to reconcile the statements of principle in Lawrence and Morris is a complete waste of time. and certainly reconciliation cannot be achieved by the unattractive solution of varying the meaning of "appropriation" in different provisions of the Act of 1968. It is clear that, whether they succeeded or not, both the Criminal Law Revision Committee and the draftsman must have intended to give the word one meaning, which would be the same in the Act as in the committee's report.

To simplify the law, where possible, is a worthy objective but, my Lords, I maintain that the law, as envisaged in the report, is simple enough: there is no problem (and there would have been none in Lawrence, Morris and the present case) if one prosecutes under section 15 all offences involving obtaining by deception and prosecutes theft in general under section 1. In that way some thefts will come under section 15, but no "false pretences" will come under section 1.

The defendant can already count himself lucky to have received only a two-year sentence, having regard to the amount involved and to the position of trust which he held. He will be even more fortunate if he has his conviction quashed, since there was against him an open-and-shut case under section 15. But, if I am right in my analysis, one cannot simply be content to say that, if his conviction is restored, the respondent will have suffered no injustice. The right legal answer, based on the true meaning of the Act, must be found and applied.

If my submissions are correct, the question finally remains whether your Lordships are bound by the doctrine of precedent to follow and apply the statements in Reg. v. Lawrence [1972] A.C. 626, 632 that Parliament, by omitting the words "without the consent of the owner" from section 1(1) of the Act of 1968, has "relieved the prosecution of the burden of establishing that the taking was without the owner's consent" and that "[appropriation] may occur even though the owner has permitted or consented to the property being taken." I suggest not. In the first place, Viscount Dilhorne had already expressed the opinion that the facts of the case fell far short of establishing that the victim had consented to the acquisition by the appellant of the money he was alleged to have stolen. This line of reasoning (though not the approach of the Court of Appeal in Lawrence) supports a conviction for theft under section 1(1) on any view of the law and enables your Lordships to regard the statements at p. 632 as obiter dicta.

Secondly, it follows that Dobson v. General Accident Fire and Life Assurance Corporation Plc. [1990] 1 Q.B. 274, the only case of authority on the point which is at the heart of this appeal (which case in any event is not binding on your Lordships), applied the obiter dicta in Lawrence to reach an erroneous conclusion. Thirdly, Lord Roskill's statement in Reg. v. Morris [1984] A.C. 320, while it may be obiter, contradicts Viscount Dilhorne's.

Lastly, let me assume that Viscount Dilhorne's statements have the character of a "decision" as that word is used in the Practice Statement (Judicial Precedent) [1966] 1 W.L.R.
314, which intimated that this House would depart from a previous decision "when it appears right to 495 do so." Your Lordships might then so elect. The Practice Statement referred to "the especial need for certainty as to the criminal law," but there is ample proof that both before and after Morris certainty has been lacking. The cases on the Practice Statement are conveniently found in Halsbury's Laws of England, 4th ed., vol. 26 (1979), p. 296, para. 577. A previous decision should not be departed from merely because the House considers it to be wrong and only rarely should questions of construction be reconsidered. But the precise meaning of section 1(1) has not received serious judicial attention before. Furthermore, your Lordships may feel that it is inconvenient and undesirable for the criminal law as enunciated in Lawrence and Dobson to be in conflict with the law affecting the title to money and other kinds of property.

Accordingly, for the reasons already given, I would dismiss the Crown’s appeal.

R v Hinks

HOUSE OF LORDS

[2001] 2 AC 241

LORD STEYN: ... Since the enactment of the Theft Act 1968 the House of Lords has on three occasions considered the meaning of the word "appropriates" in section 1(1) of the Act, namely in Reg v Lawrence (Alan) [1972] AC 626; in Reg v Morris (David) [1984] AC 320; and in Reg v Gomez [1993] AC 442. The law as explained in Lawrence and Gomez, and applied by the Court of Appeal in the present case (Reg v Hinks [2000] 1 Cr App R 1) has attracted strong criticism from distinguished academic lawyers: see for example, JC Smith [1993] Crim LR 304 and [1998] Crim LR 904; Edward Griew, The Theft Acts, 7th ed (1995) pp 41-59; ATH Smith, "Gifts and the Law of Theft" [1999] CLJ 10. These views have however been challenged by equally distinguished academic writers: PR Glazebrook, "Revising the Theft Acts" [1993] CLJ 191-194: Simon Gardner, "Property and Theft" [1998] Crim LR 35. The academic criticism of Gomez provided in substantial measure the springboard for the present appeal. The certified question before the House is as follows: "Whether the acquisition of an indefeasible title to property is capable of amounting to an appropriation of property belonging to another for the purposes of section 1(1) of the Theft Act 1968." In other words, the question is whether a person can "appropriate" property belonging to another where the other person makes him an indefeasible gift of property, retaining no proprietary interest or any right to resume or recover any proprietary interest in the property.

Before the enactment of the Theft Act 1968 English law required a taking and carrying away of the property as the actus reus of the offence. In 1968 Parliament chose to broaden the reach of the law of theft by requiring merely an appropriation. The relevant sections of the Act of 1968 are as follows:

"Basic definition of theft. 1(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.

"Dishonestly. 2(1) A persons appropriation of property belonging to another is not to be regarded as dishonest -- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or (b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

"Appropriates. 3(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."
These provisions, and in particular the word "appropriates" in section 1(1), read with the explanatory provision in section 3(1), have been authoritatively interpreted by the House in Lawrence [1972] AC 626 and Gomez [1993] AC 442. It will be a matter for consideration whether such earlier rulings are dispositive of the question of law before the House. In the meantime, it is necessary to give a narrative of the background and the proceedings below.

II

In 1996 the appellant was 38 years old. She was the mother of a young son. She was friendly with a 53-year-old man, John Dolphin. He was a man of limited intelligence. The appellant described herself as the main carer for John Dolphin. It is not in dispute that in the period April to November 1996 Mr Dolphin withdrew sums totalling around £60,000 from his building society account and that these sums were deposited in the appellant's account. During the summer of that year Mr Dolphin made withdrawals of the maximum permissible sum of £300 almost every day. Towards the end of this period Mr Dolphin had lost most of his savings and moneys inherited from his father. In 1997 the appellant was charged with six counts of theft, five counts covering moneys withdrawn and one count a television set transferred by Mr Dolphin to the appellant. In November 1997 the appellant stood trial on these counts in the Wolverhampton Crown Court before Judge Warner and a jury. It was the prosecution case that the appellant had influenced and coerced Mr Dolphin to withdraw the moneys from his building society account, which were then deposited in her account. A substantial volume of evidence was led during the trial which lasted five days. A police analyst produced documents summarising the flow of funds from Mr Dolphin's account to that of the appellant. Building society employees testified about the daily visits by the appellant and Mr Dolphin to effect withdrawals. The thrust of their evidence was that the appellant did most of the talking and would interrupt Mr Dolphin if he tried to say something. Dr Fuller, a consultant psychiatrist, assessed Mr Dolphin's IQ as in the range between 70 to 80 (the average being 90 to 110). He said that Mr Dolphin was able to live a normal if undemanding life. Mr Dolphin had worked as a packer in a dairy for some 30 years. Dr Fuller described him as naive and trusting and having no idea of the value of his assets or the ability to calculate their value. Dr Fuller accepted that Mr Dolphin would be capable of making a gift and understood the concept of ownership. He thought that Mr Dolphin was capable of making the decision to divest himself of money, but that it was unlikely that he could make the decision alone. Two police officers testified that after cautioning the appellant she denied "having any money" from Mr Dolphin except for a single cheque which she said represented a loan. In a nutshell the prosecution case was that the appellant had taken Mr Dolphin for as much as she could get.

The defence made a submission that in law there was no case to answer. The defence argument was that the moneys were a gift from Mr Dolphin to the appellant, that the title in the moneys had passed to the appellant, and that there could therefore be no theft. The defence cited the writings of Professor Sir John Smith QC. The judge rejected the submission and held that a gift was capable of amounting to an appropriation.

The starting point must be the words of the statute as interpreted by the House in its previous decisions. The first case in the trilogy is Reg v Lawrence [1972] AC 626, in 1971. The defendant, a taxi driver, had without objection on the part of an Italian student asked for a fare of £6 for a journey for which the correct lawful fare was 10s 6d. The taxi driver was convicted of theft. On appeal the main contention was that the student had consented to pay the fare. But it was clear that the appellant had not told the student what the lawful fare was. With the agreement of all the Law Lords hearing the case Viscount Dilhorne observed, at pp 631-632:

"Prior to the passage of the Theft Act 1968, which made radical changes in and greatly simplified the law relating to theft and some other offences, it was necessary to prove that the property alleged to have been stolen was taken 'without the consent of the owner' (Larceny Act 1916, section 1(1)). These words are not included in section 1(1) of the Theft Act, but the appellant contended that the subsection should be construed as if they were, as if they appeared after the word 'appropriates.' Section 1(1) reads as follows: 'A person is guilty of theft
if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.' I see no ground for concluding that the omission of the words 'without the consent of the owner' was inadvertent and not deliberate, and to read the subsection as if they were included is, in my opinion, wholly unwarranted. Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence. Megaw LJ, delivering the judgment of the Court of Appeal, said [1971] 1 QB 373, 376 that the offence created by section 1(1) involved four elements: '(i) a dishonest (ii) appropriation (iii) of property belonging to another (iv) with the intention of permanently depriving the owner of it.' I agree. That there was appropriation in this case is clear. Section 3(1) states that any assumption by a person of the rights of an owner amounts to an appropriation. Here there was clearly such an assumption. That an appropriation was dishonest may be proved in a number of ways. In this case it was not contended that the appellant had not acted dishonestly."

Lord Dilhorne expressly added that belief that the passenger gave informed consent (ie knowing that he was paying in excess of the fare) "is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation:" p 632D. The appeal was dismissed. The ratio decidendi of Lawrence, namely that in a prosecution for theft it is unnecessary to prove that the taking was without the owner's consent, goes to the heart of the certified question in the present case.

The second decision of the House was Reg v Morris [1984] AC 320 in 1983, a consolidated appeal involving two cases in each of which the defendant attached a price label to goods in a supermarket which showed a price lower than that which was properly payable for the goods. The defendant intended to pay the lower price at the checkout. In the first case the defendant's deception was detected at the checkout point and in the second he paid the lower prices at the checkout. He was convicted of theft in both cases. The House concluded that the defendant had been rightly convicted of theft on both counts. In each case the certified question was the rolled-up one whether there had been a "dishonest appropriation" of goods. These questions were answered in the affirmative. However, in the single substantive judgment Lord Roskill made an observation, which was in conflict with the ratio of Lawrence and had to be corrected in Gomez. Lord Roskill said, at p 332:

"If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the checkpoint there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket. In the context of section 3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights."

It will be observed that this observation was not necessary for the decision of the case: absent this observation the House would still have held that there had been an appropriation. Lord Roskill took the view that he was following the decision in Lawrence. It is clear, however, that his observation (as opposed to the decision in Morris) cannot stand with the ratio of Lawrence. And as his observation, cast in terms of "the honest customer," shows Lord Roskill conflated the ingredients of appropriation and dishonesty contrary to the holding in Lawrence.

The third decision of the House was in Reg v Gomez [1993] AC 442 in 1992. The defendant was employed as an assistant shop manager. He agreed with two accomplices that goods would be supplied by the shop in return for cheques which he knew to be stolen. He told the manager of the shop that the cheques were as good as cash. The Court of Appeal held that there was a voidable contract between the owner of the shop and the dishonest receivers of the goods; that the transfer was with the consent of the owner; and that accordingly there was no appropriation. The Court of Appeal quashed the conviction arising from a plea of guilty. The following question was certified, at p 444:

"When theft is alleged and that which is alleged to be stolen passes to the defendant with the consent of the owner, but that has been obtained by a false representation, has (a) an
appropriation within the meaning of section 1(1) of the Theft Act 1968 taken place, or (b) must such a passing of property necessarily involve an element of adverse [interference] with or usurpation of some right of the owner?"

By a majority (Lord Lowry dissenting) the House answered branch (a) of the certified question in the affirmative and branch (b) in the negative. In crystalline terms Lord Keith of Kinkel speaking for all the members of the majority ruled, at p 464C-D: (1) The meaning of the relevant provisions must be determined by construing the statutory language without reference to the report which preceded it, namely the Eighth Report of the Criminal Law Revision Committee on Theft and Related Offences (1966) (Cmnd 2977). (2) The observations of Lord Roskill in Morris [1984] AC 320 were unnecessary for the decision of that case; they were in clear conflict with the ratio of Lawrence [1972] AC 626; and they were wrong. (3) Lawrence must be accepted as authoritative and correct, and "there is no question of it now being right to depart from it." At the same time Lord Keith, at p 463H, endorsed the judgment of Parker LJ in the civil case of Dobson v General Accident Fire and Life Assurance Corporation Plc [1990] 1 QB 274 where Parker LJ highlighted the conflict between Lawrence [1972] AC 626 and Morris [1984] AC 320 and chose to follow Lawrence. (4) Any act may be an appropriation notwithstanding that it was done with the consent or authorisation of the owner. In Gomez [1993] AC 442 the House was expressly invited to hold that "there is no appropriation where the entire proprietary interest passes:" at p 4488. That submission was rejected. The leading judgment in Gomez was therefore in terms which unambiguously rule out the submission that section 3(1) does not apply to a case of a gift duly carried out because in such a case the entire proprietary interest will have passed. In a separate judgment (with which Lord Jauncey of Tullichettle expressed agreement) Lord Browne-Wilkinson observed, at pp 495-496:

"... I regard the word 'appropriation' in isolation as being an objective description of the act done irrespective of the mental state of either the owner or the accused. It is impossible to reconcile the decision in Lawrence (that the question of consent is irrelevant in considering whether there has been an appropriation) with the views expressed in Morris, which latter views in my judgment were incorrect."

In other words it is immaterial whether the act was done with the owner's consent or authority. It is true of course that the certified question in Gomez referred to the situation where consent had been obtained by fraud. But the majority judgments do not differentiate between cases of consent induced by fraud and consent given in any other circumstances. The ratio involves a proposition of general application. Gomez therefore gives effect to section 3(1) of the Act by treating "appropriation" as a neutral word comprehending "any assumption by a person of the rights of an owner." If the law is as held in Gomez, it destroys the argument advanced on the present appeal, namely that an indefeasible gift of property cannot amount to an appropriation.

VI

Counsel for the appellant submitted in the first place that the law as expounded in Gomez and Lawrence must be qualified to say that there can be no appropriation unless the other party (the owner) retains some proprietary interest, or the right to resume or recover some proprietary interest, in the property. Alternatively, counsel argued that "appropriates" should be interpreted as if the word "unlawfully" preceded it. Counsel said that the effect of the decisions in Lawrence and Gomez is to reduce the actus reus of theft to "vanishing point" (see Smith & Hogan, Criminal Law, 9th ed (1999), p 505). He argued that the result is to bring the criminal law "into conflict" with the civil law. Moreover, he argued that the decisions in Lawrence and Gomez may produce absurd and grotesque results. He argued that the mental requirements of dishonesty and intention of permanently depriving the owner of property are insufficient to filter out some cases of conduct which should not sensibly be regarded as theft. He did not suggest that the appellant's dishonest and repellent conduct came within such a category. Instead he deployed four examples for this purpose, namely:

(1) S makes a handsome gift to D because he believes that D has obtained a First. D has not and knows that S is acting under that misapprehension. He makes the gift. There is here a
motivational mistake which, it is submitted, does not avoid the transaction. (Glanville Williams, Textbook of Criminal Law, 1st ed (1978), p 788.)

(2) P sees D's painting and, thinking he is getting a bargain, offers £ 100,000 for it. D realises that P thinks the painting is a Constable, but knows that it was painted by his sister and is worth no more than £ 100. He accepts P's offer. D has made an enforceable contract and is entitled to recover and retain the purchase price. (Smith & Hogan, Criminal Law, pp 507, 508.)

(3) A buys a roadside garage business from B, abutting on a public thoroughfare; unknown to A but known to B, it has already been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A's garage. There is an enforceable contract and A is entitled to recover and retain the purchase price. The same would be true if B knew that A was unaware of the intended plan to construct a bypass road. (Compare Lord Atkin in Bell v Lever Brothers Ltd [1932] AC 161, 224.)

(4) An employee agrees to retire before the end of his contract of employment, receiving a sure of money by way of compensation from his employer. Unknown to the employer, the employee has committed serious breaches of contract which would have enabled the employer to dismiss him without compensation. Assuming that the employee's failure to reveal his defaults does not affect the validity of the contract, so that the employee is entitled to sue for the promised compensation, is the employee liable to be arrested for the theft the moment he receives the money? (Glanville Williams, "Theft and Voidable Title" [1981] Crim LR 666, 672.)

My Lords, at first glance these are rather telling examples. They may conceivably have justified a more restricted meaning of section 3(1) than prevailed in Lawrence [1972] AC 626 and Gomez [1993] AC 442. The House ruled otherwise and I am quite unpersuaded that the House overlooked the consequences of its decision. On the facts set out in the examples a jury could possibly find that the acceptance of the transfer took place in the belief that the transferee had the right in law to deprive the other of it within the meaning of section 2(1)(a) of the Act. Moreover, in such cases a prosecution is hardly likely and if mounted, is likely to founder on the basis that the jury will not be persuaded that there was dishonesty in the required sense. And one must retain a sense of perspective. At the extremity of the application of legal rules there are sometimes results which may seem strange. A matter of judgment is then involved. The rule may have to be recast. Sir John Smith has eloquently argued that the rule in question ought to be recast. I am unpersuaded. If the law is restated by adopting a narrower definition of appropriation, the outcome is likely to place beyond the reach of the criminal law dishonest persons who should be found guilty of theft. The suggested revisions would unwarrantably restrict the scope of the law of theft and complicate the fair and effective prosecution of theft. In my view the law as settled in Lawrence and Gomez does not demand the suggested revision. Those decisions can be applied by judges and juries in a way which, absent human error, does not result in injustice.

Counsel for the appellant further pointed out that the law as stated in Lawrence [1972] AC 626 and Gomez [1993] AC 442 creates a tension between the civil and the criminal law. In other words, conduct which is not wrongful in a civil law sense may constitute the crime of theft. Undoubtedly, this is so. The question whether the civil claim to title by a convicted thief, who committed no civil wrong, may be defeated by the principle that nobody may benefit from his own civil or criminal wrong does not arise for decision. Nevertheless there is a more general point, namely that the interaction between criminal law and civil law can cause problems: compare J Beatson and AP Simester, "Stealing One's Own Property" (1999) 115 LQR 372. The purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be some disharmony between the two systems. In any event, it would be wrong to assume on a priori grounds that the criminal law rather than the civil law is defective. Given the jury's conclusions, one is entitled to observe that the appellant's conduct should constitute theft, the only available charge. The tension between the civil and the criminal law is therefore not in my view a factor which justifies a departure from the law as stated in Lawrence and Gomez. Moreover, these decisions of the House have a marked beneficial consequence. While in some contexts of the law of theft a judge cannot avoid explaining civil law concepts to a jury (e.g in respect of
section 2(1)(a)), the decisions of the House of Lords eliminate the need for such explanations in respect of appropriation. That is a great advantage in an overly complex corner of the law.

VII

My Lords, if it had been demonstrated that in practice Lawrence and Gomez were calculated to produce injustice that would have been a compelling reason to revisit the merits of the holdings in those decisions. That is however, not the case. In practice the mental requirements of theft are an adequate protection against injustice. In these circumstances I would not be willing to depart from the clear decisions of the House in Lawrence and Gomez. This brings me back to counsel's principal submission, namely that a person does not appropriate property unless the other (the owner) retains, beyond the instant of the alleged theft, some proprietary interest or the right to resume or recover some proprietary interest. This submission is directly contrary to the holdings in Lawrence and Gomez. It must be rejected. The alternative submission is that the word "appropriates" should be interpreted as if the word "unlawfully" preceded it so that only an act which is unlawful under the general law can be an appropriation. This submission is an invitation to interpolate a word in the carefully crafted language of the Act of 1968. It runs counter to the decisions in Lawrence and Gomez and must also be rejected. It follows that the certified question must be answered in the affirmative. …

[Lord Slynny of Hadley, Lord Jauncey of Tullichettle and Lord Hutton concurred with Lord Steyn, though Lord Hutton further thought that one could not be dishonest if one had received a valid gift. Lord Steyn expressed declined to decide the question.]

LORD HOBHOUSE OF WOODBOROUGH: … [The decision of the Court of Appeal draws no distinction between a fully effective gift and one which is vitiated by incapacity, fraud or some other feature which would lead both the man in the street and the law to say that the transfer was not a true gift resulting from an actual intention of the donor to give. Another aspect of the Court of Appeal's reasoning which also has to be examined is the relationship of that proposition to the concept of dishonesty. It is explicit in the Court of Appeal judgment that the relevant definition of the crime of theft is to be found in the element of dishonesty and Reg v Ghosh [1982] QB 1053 and that this is to receive no greater definition than consciously falling below the standards of an ordinary and decent person and may include anything which such a person would think was morally reprehensible. It may be no more than a moral judgment.

The reasoning of the Court of Appeal therefore depends upon the disturbing acceptance that a criminal conviction and the imposition of custodial sanctions may be based upon conduct which involves no inherent illegality and may only be capable of being criticised on grounds of lack of morality. This approach itself raises fundamental questions. An essential function of the criminal law is to define the boundary between what conduct is criminal and what merely immoral. Both are the subject of the disapprobation of ordinary right-thinking citizens and the distinction is liable to be arbitrary or at least strongly influenced by considerations subjective to the individual members of the tribunal. To treat otherwise lawful conduct as criminal merely because it is open to such disapprobation would be contrary to principle and open to the objection that it fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights.

I stress once more that it is not my view that the resort to such reasoning was necessary for the decision of the present case. I would be reluctant to think that those of your Lordships who favour dismissing this appeal have fallen into the trap of believing that, without adopting the reasoning of the Court of Appeal in this case, otherwise guilty defendants will escape justice. The facts of the present case do not justify such a conclusion nor do the facts of any other case which has been cited on this appeal.

The Act

The Theft Act 1968 was passed in an attempt to simplify the law of theft and remove excessive and technical complications which arose from the concepts used in the Larceny Act 1916 and its predecessors. One source of complication had been the fact that larceny was a
possession based crime and used the criteria "takes and carries away" and "without the consent of the owner" in the definition of stealing. The Theft Act on the other hand defines theft in a deceptively simple way -- "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it:" (section 1(1)).

In order to try and limit the number of separate offences under the Act, the Theft Act 1968, in contrast with the Larceny Act, adopts the approach of a single short definition of "theft" and then expands that definition so that it can cover a wide range of more complex situations. Thus, sections 2 to 6 have been included in the Act to amplify and extend the meaning of the expressions used in the section 1 definition. Section 2 deals with "dishonestly," section 3 with "appropriates," section 4 with "property," section 5 with "belonging to another" and section 6 with "with the intention of permanently depriving the other of it." These provisions, although each given a distinct title are in their terms interlinked and implicitly cross-refer to each other. They cannot be construed or applied in isolation. Some are used to qualify the definition of theft and give it a different meaning to that which would have been understood by the simple definition standing alone. It is therefore imperative, as is specifically required by section 1(3), to have regard to these sections when construing section 1(1).

But this structure of sections 1 to 6 has had an unfortunate by-product. It has led to a practice (started by Megaw LJ in the Court of Appeal in Reg v Lawrence [1971] 1 QB 373) of construing each of the words or phrases in section 1(1) as if they were independent and not part of a single complex definition. The words and phrases have an inter relation, the one affecting the meaning of another and of the whole. Lord Browne-Wilkinson warned against this in his speech in Reg v Gomez [1993] AC 442, 495:

"But it should not be overlooked that elements (i) and (ii) . . . are interlinked: element (i) (dishonest) is an adjectival description of element (ii) (appropriation). Parliament has used a composite phrase 'dishonest appropriation.' Thus it is not every appropriation which falls within the section but only an act which answers the composite description. The fact that Parliament used that composite phrase -- 'dishonest appropriation' -- in my judgment casts light on what is meant by the word 'appropriation.'"

Another point which has arisen from the general intention of the Act and its drafting is the assumption that all questions arising in connection with the law of theft should now be capable of answer without involving any concept or rule derived from the civil law or using any technical legal terminology. Whilst there can be no doubt about the general intention of the Act, to proceed from such a general intention to that assumption is simplistic and erroneous. It is, of course, part of the duty and function of the judge at the criminal trial to separate the questions of law from the questions of fact and only direct the jury on matters of law so far as the issues in the case make it necessary for them to know the law in order to decide the issues of fact and determine the defendant’s guilt or innocence; but, when there are relevant questions of law, they must be recognised and the jury directed accordingly.

The truth is that theft is a crime which relates to civil property and, inevitably, property concepts from the civil law have to be used and questions answered by reference to that law. Lord Roskill (expressing sentiments similar to those voiced by others before and since) was no doubt right in Reg v Morris [1984] AC 320, 334 to warn in general terms against introducing into the criminal law questions whether particular contracts were void or voidable on the ground of mistake or fraud or whether any mistake was sufficiently fundamental to vitiate a contract. But the Act at times expressly requires civil law concepts to be applied. Section 1(1) uses the expression "belonging to another." Thus, in some criminal cases, it may be necessary to determine whether the relevant property belonged to the alleged victim or to the defendant. In Reg v Walker [1984] Crim LR 112 the case turned upon whether the article in question had been rejected by the buyer so as to revest the title to it in the seller, the defendant. (See also per Bingham LJ in Dobson v General Accident Fire and Life Assurance Corporation Plc [1990] 1 QB 274.) This was an issue which had to be answered by reference to the civil law and about which the criminal law had nothing to say except to pose the question. (Another case which illustrated the same need to recognise and give effect to the civil law is Reg v Preddy [1996] AC
815 and the consequence of having failed to do so was that the Court of Appeal had then to reconsider a considerable number of wrongly based convictions.)

Section 5: "belonging to another"

"5(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

(2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

(3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

(4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

(5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation."

Section 5 qualifies and defines the expression "belonging to another" and specifically makes use of a number of civil law concepts. Under subsection (1) the jury may have to decide who had the possession of the article or whether someone other than the defendant had a "proprietary right or interest" including an equitable interest (subject to the stated exception) and receive the requisite direction as to the civil law. Subsections (2) and (3) necessitate the consideration of the law of trusts and the rights of beneficiaries and the law of bailment and agency. Subsection (4) makes provision for the situation "where a person gets property by another's mistake." The criterion which the subsection then applies is whether or not the recipient came under an obligation to make restoration of the property (or its value or proceeds). This is a sophisticated criterion wholly dependent upon distinctions to be drawn from the civil law. Unless the criterion is satisfied this constituent of the crime of theft has not been proved.

It is relevant to look at this example further because it is an example of a person who has acquired a defeasible title. Where the transferor has made a mistake, the mistake can be so fundamental that the transferee acquires no rights at all in respect of the chattel transferred as against the transferor. But there may be cases where the mistake does not have so absolute an effect and the transferor may only have equitable rights (cf subsection (1)) or restitutionary rights against the transferee. If, however, the transferee has already had validly transferred to him the legal title to and possession of the chattel without any obligation to make restoration, a later retention of or dealing with the chattel by the transferee, whether or not "dishonest" and whether or not it would otherwise amount to an appropriation, cannot amount to theft. However much the jury may consider that his conduct in not returning the chattel falls below the standards of ordinary and decent people, he has not committed the crime of theft. The property did not belong to another.

Section 5 and, particularly, section 5(4) demonstrate that the Theft Act has been drafted so as to take account of and require reference to the civil law of property, contract and restitution. The same applies to many other sections of the Act. For example, section 6 is drafted by reference to the phrase "regardless of the other's rights" -- that is to say rights under the civil law. Section 28, dealing with the restoration of stolen goods, clearly can only work if the law of theft recognises and respects transfers of property valid under the civil law, otherwise it would...
be giving the criminal courts the power to deprive citizens of their property otherwise than in accordance with the law.

Section 5 shows that the state of mind of the transferor at the time of transfer may be relevant and critical. Similarly, the degree of the transferee’s knowledge will be relevant to the section 5 question quite independently of any question under section 2. For instance, where there has been a mistake on the part of the transferor, the position under section 5(4) can be different depending on whether or not the transferee was aware of the mistake.

Further, it will be appreciated that the situations to which section 5 is relevant can embrace gifts as well as other transactions such as transfers for value. The prosecution must be able to prove that, at the time of the alleged appropriation, the relevant property belonged to another within the meaning given to that phrase by section 5. Where the defendant has been validly given the property he can no longer appropriate property belonging to another. The Court of Appeal does not seem to have had their attention directed to section 5. The question certified on the grant of leave to appeal is self-contradictory. The direction of the trial judge approved by the Court of Appeal is inadequate. There is no law against appropriating your own property as defined by section 5.

Section 2: "dishonestly"

Section 2(1), rather than expanding the section 1(1) definition, limits it. It illustrates the point made by Lord Browne-Wilkinson as to the inter relation of the words "dishonestly" and "appropriates" used in section 1(1). (It does however raise difficulties for the later steps in his reasoning to which I will have to revert.) Section 2(1) reads:

"A person's appropriation of property belonging to another is not to be regarded as dishonest -- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps."

Although section 2 is headed "Dishonestly," this quotation shows that it is as much involved with the application of the concepts "appropriation" and "property belonging to another." Paragraph (a) contemplates that the defendant believes that he has the right to appropriate the property and (b) his belief that he would have the consent of the person to whom the property belongs to appropriate it. If belief in such a right or such consent can prevent the defendant's conduct from amounting to theft (whatever the jury may think of it), how can it be said that his knowledge that he has such a right or the actual consent of the person to whom the property belongs is irrelevant? How can it be said that the right of the defendant to accept a gift is irrelevant -- or the fact that the transferor has actually and validly consented to the defendant having the relevant property? Yet it is precisely these things which the judgment of the Court of Appeal would wholly exclude.

Section 2(1) is cutting down the classes of conduct which the jury are at liberty to treat as dishonest. They qualify the Ghosh approach [1982] QB 1053 and show that in any given case the court must consider whether it is adequate to give an unqualified Ghosh direction as the Court of Appeal held to be sufficient in the present case.

Gifts

The discussion in the present case has been marked by a failure to consider the law of gift. Perhaps most remarkable is the statement of the Court of Appeal [2000] Cr App R 1, 9 that "a gift may be clear evidence of appropriation." The making of a gift is the act of the donor. It involves the donor in forming the intention to give and then acting on that intention by doing whatever it is necessary for him to do to transfer the relevant property to the donee. Where the gift is the gift of a chattel, the act required to complete the gift will normally be either delivery to the donee or to a person who is to hold the chattel as the bailee of the donee; money can be transferred by having it credited to the donee's bank account -- and so on.
Unless the gift was conditional, in which case the condition must be satisfied before the gift can take effect, the making of the gift is complete once the donor has carried out this step. The gift has become the property of the donee. It is not necessary for the donee to know of the gift. The donee, on becoming aware of the gift, has the right to refuse (or reject) the gift in which case it revests in the donor with resolutive effect: see Halsbury’s Laws of England, 4th ed reissue, vol 20 (1993), pp 32-33, paras 48-49 and the cases cited.

What consequences does this have for the law of theft? Once the donor has done his part in transferring the property to the defendant, the property, subject to the special situations identified in the subsections of section 5, ceases to be “property belonging to another.” However wide a meaning one were to give to “appropriates,” there cannot be a theft. For it to be possible for there to be a theft there will have to be something more, like an absence of a capacity to give or a mistake satisfying section 5(4). Similarly, where the donee himself performs the act necessary to transfer the property to himself, as he would if he himself took the chattel out of the possession of the donor or, himself gave the instructions to the donor’s bank, section 5(1) would apply and mean that that constituent of the crime of theft would at that time have been satisfied.

If one treats the "acceptance" of the gift as an appropriation, and this was the approach of the judge and is implicit in the judgment of the Court of Appeal (despite their choice of words), there are immediate difficulties with section 2(1)(a). The defendant did have the right to deprive the donor of the property. The donor did consent to the appropriation; indeed, he intended it. There are also difficulties with section 6 as she was not acting regardless of the donors rights; the donor has already surrendered his rights. The only way that these conclusions can be displaced is by showing that the gift was not valid. There are even difficulties with section 3 itself. The donee is not "assuming the rights of an owner:" she has them already.

Section 3: "appropriates"

3(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner. (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor’s title, amount to theft of the property.”

This is the shortest of the explanatory sections. Its purpose is undoubtedly to get away from some of the technicalities of the law of larceny which arose from the need for the defendant to have taken the property. It uses a different concept which does not require an acquisition of possession. The concept is any assumption of the rights of an owner (which has been held to mean “the assumption of unit of the rights of an owner:” Reg v Morris [1984] AC 320). The second part of subsection (1) clearly has to be read with section 5.

Subsection (2) deals with the purchase for value of a defective title and provides a further illustration of two of the points I have already made. It is drafted by reference to the position under civil law. It cross-refers to factors which are primarily relevant to honesty -- "good faith" and what the defendant "believed" he had acquired -- so demonstrating again the intimate interrelationship of the drafting of one section with another and with the definition in section 1(1) as a whole.

Section 3 does not use any qualitative expression such as "misappropriates" nor does it repeat the Larceny Act expression “without the consent of the owner.” It has thus been read by some as if "appropriates" was a wholly colourless expression. This reading declines to draw any guidance from the context in which the word is used in the definition in section 1(1) and the scheme of sections 2 to 6. It also declines to attach any significance to the use of the word "assumption." This led some curious submissions being made to your Lordships.

It was for example suggested that the garage repair mechanic employed to change the oil of a car would have appropriated the car. The reasoning is that only the owner has the right to
do this or tell someone to do it therefore to do it is to assume the rights of the owner. This is an absurdity even when one takes into account that some of the absurd results can be avoided by other parts of the definition of theft. The mechanic is not assuming any right he is merely carrying out the instructions of the owner. The person who accepts a valid gift is simply conforming to the wishes of the owner. The words “appropriate” (property belonging to another) and “assume” (the rights of that other) have a useful breadth of meaning but each of them in its natural meaning includes an element of doing something which displaces the rights of that other person. The rights of that other (the owner) include the right to authorise another (the defendant) to do things which would otherwise be an infringement of the rights of the owner.

For the sake of completeness, I should mention that it is not necessary for the present appeal to consider the questions of timing that may arise in relation to appropriation. A carrier may receive goods of which he intends to deprive the owner at a convenient moment: Reg v Skipp [1975] Crim LR 114; Reg v Fritschy [1985] Crim LR 745. If goods are entrusted to the defendant for one purpose and he takes possession of them for another, it may well be that he has then and there appropriated them since he is thereby assuming the rights of an owner not those of a bailee. This also helps with understanding the supermarket cases. Putting back an article which has been lifted off the shelf in order to read the label or packet does not without more assume any right of ownership. Nor does taking the article to the checkout in order to offer to buy it; that is merely to comply with an implicit request by the owner (the supermarket). On the other hand to interfere with the price label or to take the article with the purpose of smuggling it out of the shop without paying is an assumption of the rights of an owner: Reg v Morris [1984] AC 320.

The considerations which I have discussed now at some length all lead to the conclusion that sections 1 to 6 of the Theft Act 1968 should be read as a cohesive whole and that to attempt to isolate and compartmentalise each element only leads to contradictions. This vice is particularly clear where alleged gifts are involved. In such a situation greater care in the analysis is required under sections 2, 3 and 5 and it will normally be necessary to direct the jury in fuller terms and not merely ask them if they think that the defendant fell below the standards of an ordinary and decent person and realised that such persons would so regard his conduct.

The authorities: the House of Lords

The appellant has submitted that your Lordships should, if needs be, overrule Reg v Lawrence [1972] AC 626 and Reg v Gomez [1993] AC 442. I do not consider that either case should be overruled nor is it necessary for the decision of the present case. Neither is inconsistent with my analysis of the law. What appears to have happened is that some of the language used in the three successive House of Lords decisions (Lawrence, Morris [1984] AC 320, Gomez) has been misread without sufficient regard to the context in which the language in each case was used an without a constructive consideration of the intent of sections 1 to 6 as whole.

Lawrence was the case of the deceitful taxi driver and the foreign student. It was decided shortly after the Theft Act 1968 came into force. The two questions certified were questions of the construction of the Theft Act. They both sought to perpetuate features of the Larceny Act 1916 and rightly received a robust response. The first was whether the words “without the consent of the owner” should be read into section 1(1). The second was whether section 1 and section 15 were mutually exclusive. The student had allowed the taxi driver to take £6 out of his wallet (making £7 in all) for a 10s 6d fare. The transaction was vitiated by the taxi driver’s fraud; in truth the student never agreed to pay him £6. The taxi driver got the money as the result of a mistake of the student induced by the taxi driver’s fraud. The facts of the case fell “far short” of establishing that the student had consented.

Viscount Dilhorne with whom the other members of the House agreed said, at p 632:

“that there was an appropriation in this case is clear. Section 3(1) states that any assumption by a person of the rights of an owner amounts to an appropriation. Here there was
clearly such an assumption. That an appropriation was dishonest may be proved in a number of ways. In this case it was not contended that the appellant had not acted dishonestly. Section 2(1) provides, inter alia, that a person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it. A fortiori, a person is not to be regarded as acting dishonestly if he appropriates another's property believing that with full knowledge of the circumstances that other person has in fact agreed to the appropriation." (Emphasis supplied.)

This passage, including the important (but sometimes overlooked) sentence which I have emphasised, supports what I have said above in relation to section 2(1)(b). He added:

"Belief or the absence of belief that the owner had with such knowledge" -- ie knowledge that £7 was far in excess of the legal fare -- "consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation."

If one asks the question "was there a dishonest appropriation?" the need to make the distinction disappears. The perceived difficulty only arises because the definition is fragmented. As I have pointed out in relation to section 5(1), where the defendant himself removes the property from the owner, he will be taking property belonging to another. The situation in Lawrence is not problematical. The whole transaction was driven and coloured by the taxi driver's fraud. It does not strain the language to describe what happened as an appropriation of property belonging to another. It was never a case of consent except possibly in a technical Larceny Act sense. The damaging legacy of the Lawrence judgment has been the adoption of the fragmented approach and the separation of the statement that consent was not relevant to appropriation from its context and from the accompanying statement that knowledge of actual consent is incompatible with dishonesty.

The second question was answered by saying that sections 1 and 15 were not mutually exclusive. This of itself should not have caused any further difficulty once an authoritative decision had been given. But a reluctance to leave behind the features of the law of larceny has meant that the interrelation of those sections has been a recurring sub-plot in the decisions subsequent to Lawrence.

Reg v Morris [1984] AC 320 was a supermarket case. The defendant dishonestly switched the labels so as to show lower prices. He then acquired the goods by paying only the lower price at the checkout as was his intention throughout. The submission was that this fell outside section 1(1) and could only come within section 15(1), obtaining property by deception, and that the changing of the label was only relevant to the deception. (The significance of the distinction was apparently to the time at which the offence was committed and the consequences which flowed from that: pp 334-335.) The House unanimously agreed with Lord Roskill in rejecting the submission. He held that an assumption of any of the rights of an owner would suffice and answered the certified question by saying that such conduct did amount to a dishonest appropriation where it "adversely interferes with or usurps the right of the owner to ensure that the goods concerned are sold and paid for" at the full price. Lord Roskill clearly treated the phrase "dishonestly appropriates" as a composite one (a view which seems to have led him to distinguish the example of the practical joker: p 332).

In the Court of Appeal in Morris [1983] QB 587, 596 Lord Lane CJ had expressed the opinion that merely taking the goods to the check-out in order there to pay the proper price was an appropriation. Lord Roskill [1984] AC 320, 332 disagreed. It was not an assumption by the shopper of the rights of the supermarket.

"In the context of section 3(1), the concept of appropriation in my view involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the implied authority of the owner of the supermarket to take the goods from the shelf, put them in the trolley, take them to the checkpoint and there pay the correct price, at which moment the property in the goods will pass to the shopper for the first time. It is with
the consent of the owners of the supermarket, be that consent express or implied, that the shopper does these acts . . ."

Applying the same reasoning to the case of the dishonest shopper who removes goods from the shelf and hides them in her shopping bag intending from the very beginning to steal them, he approved the decision in Reg v McPherson [1973] Crim LR 191 that in that situation there was an appropriation.

The contentious part of this decision was (or should have been) the treatment of the assumption of any right of an owner as sufficient for section 3. But, given their decision on that point, the decision is wholly consistent with the decision in Lawrence [1972] AC 626 and is free from the influence of the language of Viscount Dilhorne which I have criticised. On the same basis, the decision and the speech of Lord Roskill correctly understood the intent of sections 1 to 6 of the Theft Act 1968: this was clearly the view of the remainder of the House and is a view I respectfully share.

However, some of the language used by Lord Roskill itself gave rise to difficulty. It was believed that he had been saying that any consent to the act of the defendant necessarily negatived appropriation and that he was contradicting Lawrence: fraudulently induced consent would be as conclusive as any other form of consent or authorisation. This belief was only plausible if the reader of his speech was adopting the mind-set of the Larceny Act 1916. It is clear that Lord Roskill was not intending to contradict the decision in Lawrence.

It was in these circumstances that the matter of consent and fraud was brought back before your Lordships' House nine years later in Gomez [1993] AC 442. The defendant, Gomez, an employee of a shop selling electrical goods, fraudulently accepted from an associate called Ballay cheques, which both of them knew to have been stolen, against an order by Ballay for goods. Ballay collected the goods a few days later after the shop manager, deceived by Gomez's fraudulent statements, had authorised the "sale." Gomez and Ballay were convicted of theft contrary to section 1(1). The argument was that, since the manager had authorised the transaction, there could not have been any appropriation. The Court of Appeal accepted this submission.

The certified question asked whether there has been an appropriation where "that which is alleged to be stolen passes to the defendant with the consent of the owner, but that has been obtained by a false representation." It therefore starts from the premise that there has been overt and directly relevant dishonesty and that the acquisition comes squarely within section 5(4) and (1). The significance of the argument would again seem to be to whether section 1 or section 15 was the relevant section, a point which had already been disposed of by Lawrence. The question also asked, puzzlingly in view of the premise, but obviously directed at Lord Roskill's choice of words: "Must such a passing of property necessarily involve an element of adverse [interference] with or usurpation of some right of the owner?" It might be thought that to obtain possession of another's goods by fraudulently causing him to allow you to do so would be a clear case of an adverse interference with his rights.

It was in this connection that Lord Keith of Kinkel said, at p 460:

"While it is correct to say that appropriation for purposes of section 3(1) includes [an unauthorised interference], it does not necessarily follow that no other act can amount to an appropriation and in particular that no act expressly or impliedly authorised by the owner can in any circumstances do so. Indeed Reg v Lawrence [1972] AC 626 is a clear decision to the contrary since it laid down unequivocally that an act may be an appropriation notwithstanding that it is done with the consent of the owner. It does not appear to me that any sensible distinction can be made in this context between consent and authorisation." (Emphasis supplied.)

The context is consent or authorisation induced by fraud. That was the subject matter of the primary question asked. That this is the context to which Lord Keith is referring is confirmed by his reference to Lawrence. Lord Keith is emphatically not saying that consent or
authorisation not induced by fraud cannot be relevant to the question of appropriation for the purposes of the definition of theft.

This reading is further confirmed by quotations from the judgment of Parker LJ in Dobson v General Accident Fire and Life Insurance Corporation Plc [1990] 1 QB 274, 283, 285 which Lord Keith of Kinkel agreed with and adopted [1993] AC 442, 461, 463:

"Moreover, on general principles, it would in my judgment be a plain interference or usurpation of an owners rights by the customer if he were to remove a label which the [supermarket] owner had placed on goods or put another label on. It would be a trespass to goods and it would be usurping the owner’s rights, for only he would have any right to do such an act and no one could contend that there was any implied consent or authority to a customer to do any such thing. There would thus be an appropriation."

"... I have reached the conclusion that whatever Reg v Morris did decide it cannot be regarded as having overruled the very plain decision in Reg v Lawrence that appropriation can occur even if the owner consents and that Reg v Morris itself makes it plain that it is no defence to say that the property passed under a voidable contract."

What Parker LJ, and through him Lord Keith, is doing is rejecting the misreading of Lord Roskill’s speech. Neither is saying that consent and authorisation are irrelevant to appropriation but, rather, that they do not necessarily exclude the possibility of appropriation. The consent or authority may be limited in its scope and not cover the acts done by the defendant because the defendant has an unauthorised purpose (Parker LJ and Morris) or the consent or authorisation may have been obtained by fraud (Lawrence and Gomez). The fundamental argument which all these authorities are having to battle with is the resurrection of the former possession-based rule that consent negatived larceny, distinguishing between larceny by a trick and obtaining by false pretences. It is clear that the Theft Act 1968 declined to adopt that rule and defined theft in terms which were not dependent on it.

Lord Keith’s speech includes language which is capable of giving rise to the same difficulties as that upon which I have commented in the speech of Viscount Dilhorne in Lawrence and it contains criticisms of the speech of Lord Roskill in Morris which for my part I do not consider to have been justified. But its main thrust is that consent or authorisation can be relevant to the question of appropriation though not in circumstances such as those in Lawrence and Gomez. It does not justify the decision of the Court of Appeal in the present case where ex hypothesi there is no fraud.

The speech of Lord Browne-Wilkinson is differently reasoned. He recognises that the Theft Act 1968 uses the composite phrase "dishonestly appropriates." But he then proceeds (it may be thought, inconsistently and with a lack of logic) from this to the adoption of a meaning of appropriate "in isolation" which is devoid of any content dependant upon the mental state of the owner or the accused. He goes further than Lord Keith. But he does not refer to any of the difficulties discussed earlier which would arise from that view nor does he consider the elaboration of the criterion "dishonestly" which is necessary in order to preserve the contextual meaning of the composite phrase. If the criterion "appropriates" is to become less discriminating, the criterion "dishonestly" has to become more discriminating in order to retain the meaning of the composite phrase in its context in sections 1 to 6 of the Act.

The dissent of Lord Lowry is based upon the need in his view to preserve the same type of distinction between sections 1 and 15 of the Theft Act 1968 as formerly existed between sections 1 and 32 of the Larceny Act 1916. If anything, that disagreement lends force to my reading of the speech of Lord Keith.

The decision of the House in Gomez [1993] AC 442 set a new agenda. Instead of discussing what had been decided in Morris, the discussion now centred upon what had been decided in Gomez. It is to be hoped that the present appeal to your Lordships’ House will not again have such an unproductive outcome, a consequence which I believe will be inevitable if this appeal is not allowed and a return made to construing sections 1 to 6 as a coherent whole.

The later authorities
In *Reg v Mazo [1997] 2 Cr App R 518*, the defendant had worked as the maid of an 89-year-old lady. The defendant received from the old lady a series of cheques and some valuables which the defendant said were gifts but the prosecution alleged she had stolen. She was convicted of theft. There had been evidence at the trial that the old lady was not mentally competent to make such gifts and that the defendant must have realised this. However, in his summing up the trial judge directed the jury saying:

"If you are sure, first of all, that Lady S gave these cheques and the other items as a result of her reduced mental state; secondly, if you are sure that the defendant, Miss M, knew that but for that mental state those gifts would not have been made and, finally, if you are sure that by acting as she did in accepting them with that knowledge she was acting dishonestly, then in those circumstances you would be entitled to convict her."

On her appeal against her convictions, the defendant submitted that the judge had failed to deal with her defence that she had received valid gifts which she was entitled to accept: had valid gifts been made by a donor competent to make them? The Court of Appeal allowed her appeal. Pill LJ giving the judgment of the court said, at p 521:

"It is clear that a transaction may be a theft for the purpose of section 1(1) of the Theft Act 1968 notwithstanding that it was done with the owner’s consent if it was induced by fraud, deception or a false representation: see *Gomez* . . . It is also common ground that the receiver of a valid gift, inteR vivos, could not be the subject of a conviction for theft. In *Gomez*, reference was made to the speech of Viscount Dilhorne in *Lawrence* . . . In the course of his speech, with which the other members of the House agreed. Lord Dilhorne stated [p 632]: 'A fortiori, a person is not to be regarded as acting dishonestly if he appropriates another’s property believing that, with full knowledge of the circumstances, that other person has in fact agreed to the appropriation.' It is implicit in that statement that if in all the circumstances, there is held to be a valid gift there can be no theft."

Later in the judgment Pill LJ referred to the criteria for deciding whether such a gift was valid as explained in *In re Beaney, decd [1978] 1 WLR 770*, having regard to lack of comprehension and mental incapacity. He concluded, at p 523, with the timely warning that the summing up created "a danger that the jury would take a view that the appellant’s conduct was not of a moral quality of which they could approve and convict her on that ground rather than on the true basis of the law of theft."

In my judgment, my Lords, the explanation of the law in the judgment in *Mazo* [1997] 2 Cr App R 518 is correct and accurately reflects the scheme and purpose of sections 1 to 6 of the Theft Act 1968 and demonstrates a correct understanding of the speech of Lord Keith of Kinkel in *Gomez* [1993] AC 442.

*Mazo* was distinguished and not followed in *Reg v Kendrick and Hopkins [1997] 2 Cr App R 524*. There a residential home where a nearly blind 99-year-old lady was living took control of her affairs. They were given a power of attorney. They liquidated her assets and paid the proceeds into an account which they controlled. They drew out large sums, they said implausibly, with her consent and for her benefit. The defendants were charged with conspiracy to steal and convicted. On the basis of *Mazo*, the summing up was criticised as not going sufficiently deeply into the question of validity. These criticisms were rightly rejected; the summing up was not deficient. The appeal was dismissed.

However, the Court of Appeal also criticised the judgment in *Mazo* as not reflecting what was said in *Gomez* particularly by Lord Browne Wilkinson: the concept of appropriation was distinct from the concept of dishonesty; appropriation could be looked at "in isolation;" other factors, including the incapacity of the donor and fraud only came in in relation to dishonesty; a simple Ghosh direction sufficed.

The Court of Appeal in the present case preferred to follow the judgment in *Kendrick and Hopkins* rather than that in *Mazo*. There was probably no conflict between the actual decisions in the two cases. The Court of Appeal in *Kendrick and Hopkins* were justified in dismissing the appeal and, on an overall assessment, rejecting the criticisms of the summing up in that case.
and upholding the safety of the convictions. They were in error in their adoption of Lord Browne-Wilkinson’s view that appropriation should be looked at in isolation.

**The present case -- conclusions**

The question certified demonstrates the further step which your Lordships are being asked to take beyond that involved in answering the question in *Gomez*. Does the primary question in *Gomez* receive the same answer if one deletes the words “obtained by false representation?” The Court of Appeal in the present case held that it should. Two strands of reasoning led them to this conclusion. The first was that section 3(1) should be construed in isolation from the remainder of sections 1 to 6. In this they followed the lead given by Lord Browne-Wilkinson and the Court of Appeal judgment in *Kendrick and Hopkins* [1997] 2 Cr App R 524. I have already explained why I consider that this is wrong.

The second was the view that Lord Keith of Kinkel and Parker LJ had ruled that consent of the owner is always wholly irrelevant to what acts amount to appropriation. They achieved this position only by standing on its head what Lord Keith and Parker LJ had said. What Lord Keith and Parker LJ confirmed was that “consent” (in the Larceny Act 1916 sense) will not necessarily negative appropriation. What Rose LJ has derived from this is that consent can never negative appropriation. (The incomplete quotation by Rose LJ [2000] 1 Cr App R 1, 8 from Parker LJ is revealing.) This leads Rose LJ directly to the position that a valid gift is fully consistent with theft, a proposition which is seriously inconsistent with the scheme of sections 1 to 6 and with other parts of the Act of 1968 and which is not a proposition to be derived from any of the House of Lords decisions (with the possible exception of the speech of Lord Browne-Wilkinson in *Gomez* [1993] AC 442).

To say, as does Rose LJ [2000] 1 Cr App R 1, 10, that “civil unlawfulness is not a constituent of the offence of theft” is of course true. That expression does not occur in section 1(1) and it is anyway not clear what it encompasses. But to proceed from there to the proposition that the civil law of property is irrelevant is, as I have explained earlier in this speech, a far greater error.

My Lords, if, contrary to my view, your Lordships are to travel down the route adopted by the Court of Appeal, your Lordships are faced with a choice between two options neither of which are consistent with dismissing this appeal. One option is to accept the "Browne-Wilkinson" approach and adopt a sanitised concept of appropriation isolated from any context of or interdependence with the other parts of the definition and sections 1 to 6 (particularly sections 2 and 5) and then make the necessary qualifications of the concept of dishonesty when the factual issues raised by an individual case require it. The other is to revert to the law as stated by the majority in *Gomez* and by Viscount Dilhorne and, so far as still relevant, by your Lordships’ House in *Morris*, and correctly understood by the Court of Appeal in *Mazo* [1997] 2 Cr App R 518. It is not an option to do neither as happened in the present case. The unqualified Ghosh approach cannot survive in conjunction with the "Browne-Wilkinson" approach.

In my judgment the correct answer is that adopted by Pill LJ but if your Lordships are of a different opinion the least that should be done is to draw attention to and confirm the provisions of sections 2 and 5 and their implications for cases where the issue raised is whether the property alleged to have been stolen was transferred to the defendant as a gift. What must be erroneous is to treat as "belonging to another" property which at the time of the alleged appropriation belongs to the defendant in accordance with section 5(4). Similarly it must be wrong to treat as a dishonest "appropriation of property belonging to another" under section 2(1) an appropriation for which the defendant correctly knows (as opposed to mistakenly believes) he actually had (as opposed to would have had) the other’s consent, the other knowing of the appropriation and the circumstances of it (as opposed to the other person only hypothetically having that knowledge).

My Lords, the relevant law is contained in sections 1 to 6 of the Act. They should be construed as a whole and applied in a manner which presents a consistent scheme both internally and with the remainder of the Act. The phrase “dishonestly appropriates” should be construed as a composite phrase. It does not include acts done in relation to the relevant
property which are done in accordance with the actual wishes or actual authority of the person to whom the property belongs. This is because such acts do not involve any assumption of the rights of that person within section 3(1) or because, by necessary implication from section 2(1), they are not to be regarded as dishonest appropriations of property belonging to another.

Actual authority, wishes, consent (or similar words) mean, both as a matter of language and on the authority of the three House of Lords cases, authorisation not obtained by fraud or misrepresentation. The definition of theft therefore embraces cases where the property has come to the defendant by the mistake of the person to whom it belongs and there would be an obligation to restore it -- section 5(4) -- or property in which the other still has an equitable proprietary interest -- section 5(1). This would also embrace property obtained by undue influence or other cases coming within the classes of invalid transfer recognised in In re Beaney, decd [1978] 1 WLR 770.

In cases of alleged gift, the criteria to be applied are the same. But additional care may need to be taken to see that the transaction is properly explained to the jury. It is unlikely that a charge of theft will be brought where there is not clear evidence of at least some conduct of the defendant which includes an element of fraud or overt dishonesty or some undue influence or knowledge of the deficient capacity of the alleged donor. This was the basis upon which the prosecution of the appellant was originally brought in the present case. On this basis there is no difficulty in explaining to the jury the relevant parts of section 5 and section 2(1) and the effect of the phrase "assumption of the rights of an owner." Where the basis is less specific and the possibility is that there may have been a valid gift of the relevant article or money to the defendant, the analysis of the prosecution case will break down under sections 2 and 5 as well as section 3 and it will not suffice simply to invite the jury to convict on the basis of their disapprobation of the defendant's conduct and their attribution to him of the knowledge that he must have known that they and other ordinary and decent persons would think it dishonest. Theft is a crime of dishonesty but dishonesty is not the only element in the commission of the crime.