

THREE PROBLEMS IN THE LAW OF THEFT

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[*The Victorian Parliament has at last abolished the old law of Larceny with all its baffling intricacies. The new legislation is copied from an English Act but its deceptively simple language conceals a host of difficulties. Mr Elliot, in an exhaustive examination of the English authorities examines first the relation between the offences of theft and obtaining property by deception. Next he considers the ingredient of 'dishonesty' in the offences created by the new Act. Finally he examines the nature of the requirement that a dishonest intention accompany the appropriation or deception. Despite the fundamental revision of the law he finds the Appeal Courts still peopled by old thieves in new clothes.*]

The Crimes (Theft) Act 1973¹ is a long overdue renovation of the law governing offences against property in Victoria. The existing law is inelegant and often unintelligible. The Crimes (Theft) Act 1973 goes far to remove these defects.

The Act follows the provisions of the English Theft Act 1968 and does not, in the main, deviate from this model. The English Act was the product of seven years deliberation by the Criminal Law Revision Committee, which presented its very full Report to Parliament in May 1966 together with a Draft Theft Bill.² After various amendments had been made, the Bill received the Royal Assent in July 1968. The Act came into force on January 1, 1969. It is to be expected that the development of case law on the Victorian Act will be largely governed by English decisional law.

The Crimes (Theft) Act 1973 creates, or reconstitutes, the major offences of Theft, (sections 72-74), Robbery, (section 75), Burglary and Aggravated Burglary, (sections 76-77), Obtaining Property by Deception, (section 81), Obtaining Financial Advantage by Deception, (section 82), Blackmail, (section 87), and Handling Stolen Goods, (section 88). There is, in addition, a number of lesser or more esoteric offences.³ But the Act

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¹ The Act, No. 8425 was passed by the Victorian Parliament on 17 April, 1973. Section 1(3) provides that it is to come into effect not less than twelve months after the date of its passing. It will come into force on 1 October, 1974.

² United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmd 2977.

³ Removal of articles from places open to the public, s. 78; Stealing a motor car with intent to use in the commission of a felony, s. 79; Unlawfully taking control of an aircraft, s. 80; False accounting, s. 83; False statements by company directors

does not displace those provisions of the Crimes Act 1958 which deal with forgery.

It is immediately apparent that the new offences are more general prohibitions than those of the existing law. Under the Act, the offences of embezzlement and fraudulent conversion, for example, have gone. Gone too is the categorization of different varieties of larceny.⁴ Moreover, the range of dishonest conduct covered by the Act is far greater than that covered by the existing law.

The defects of the existing structure of offences against property are manifest. It is complex and not infrequently uncertain in impact. Too often this complexity results in fruitless dispute. The desirable outcome in a particular case may be obvious on grounds of policy and principle. But the outcome may often depend on the manipulation of rules for which no sensible policy or principle can be found. It is distinctly possible that the new Act will be no less productive of uncertainty and disputed cases which go on appeal. Nor will the issues be less complex. But dispute will be more closely oriented to issues of policy and principle.

This article will deal with three major problems which have arisen in the course of interpreting the English Theft Act 1968. The first is the nature of the distinction between the offences of theft and obtaining property by deception; second, the issues arising from the general requirement of contemporaneity of act and intention in criminal law; third, the role of dishonesty in the new offences. Despite the radical surgery of the Act, these problems are closely akin to those which arose under the preceding law. The English courts have not yet shaken off the heritage of the past in their approaches to the Theft Act 1968 (Eng.).

I THE RELATIONSHIP BETWEEN THEFT AND OBTAINING PROPERTY BY DECEPTION

No proposition is more fundamental in the law of larceny than that larceny and false pretences are mutually exclusive offences. If D acquires ownership of property by subterfuge, he cannot be held to have stolen it. He will be guilty of obtaining by false pretences, or by false promise,⁵ if his subterfuge matches either of those descriptions. He cannot be guilty of either offence if ownership of the property did not pass. The distinction

and others, s. 85; Suppression and destruction of documents, s. 86; 'No questions asked' advertisements for the return of stolen property, s. 89; Going equipped for stealing, s. 91.

⁴ The definition of theft is significantly different in its application to motor cars and aircraft however. See Crimes (Theft) Act 1973, s. 73(14) which also consequentially affects the offence of stealing a motor car with intent to use in the commission of a felony, s. 79.

⁵ Section 187, Crimes Act 1958.

lacks any practical or policy justification and it has been productive of continuing confusion.⁶

The offences of theft and obtaining property by deception do overlap. The new problem is the extent of that overlap. There is one clear category of cases in which a conviction for obtaining property by deception will be possible, but not conviction for theft. Land cannot, save in special circumstances,⁷ be stolen. The definition of property is limited for the purposes of theft. There is no similar restriction on the statutory definition of property in the offence of obtaining property by deception. This distinction has not, so far, caused problems of interpretation and no further reference will be made to it. With this exception, the question is whether acts which amount to obtaining property by deception are always capable of redescription as theft of the same property.

The basic definition of theft in section 72(1) of the Crimes (Theft) Act 1973⁸ provides that: '[a] person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it'. Section 81(1) provides that: '[a] person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, . . . is guilty of the offence of obtaining property by deception'.⁹ That some overlapping is intended to occur will be apparent from the fact that a person is to be treated as obtaining property by deception 'if he obtains ownership, *possession or control* of it',¹⁰ with the requisite state of mind. If D induces V to hire him a dinner suit by means of deception, he steals under section 72 and he also obtains by deception under section 81, if he had a dishonest intent to deprive permanently.

Since theft can be committed by deception, the overlapping problem can be restated. Are there any cases where D can be said to have obtained property, but cannot be said to have appropriated it? The grammar of the expressions 'obtains' and 'appropriates' is different, both in everyday speech and in the Act. A minor example of the possible consequences of this differentiation may be given first. Suppose O lends his dinner suit to V so that he can attend a formal dinner. D, who has been invited to the same function and who also lacks a dinner suit, goes to V and dishonestly tells him that O now wishes the suit to be lent to him rather than V. D obtains the suit by this subterfuge, wears it and returns it to O. If the words of the Act are taken at face value, it appears that D has committed the offence of obtaining property by deception under section 81.

⁶ For a recent instance of the continuing vitality of the doctrine, see *Justelius* [1973] 1 N.S.W.L.R. 471.

⁷ See Crimes (Theft) Act 1973 s. 73(6).

⁸ Referred to simply as, 'The Act', for the remainder of this article.

⁹ Both offences are felonies, carrying a maximum penalty of ten years imprisonment. Compare the differentiation in ss. 74, 187, between larceny (felony) and false pretences (misdemeanour).

¹⁰ Crimes (Theft) Act 1973, s. 81(2). Emphasis added.

For the purposes of the Act, the suit 'belonged' to V as he had possession of it¹¹ and it appears that D had the intention of permanently depriving V ('the other') of the suit.¹² The fact that D always intended to return the suit to O, its true owner, seems irrelevant. If this argument is correct and D did obtain the suit by deception, it is still open to argue that he did not steal it however.¹³ The suit 'belonged' to V and D intended to deprive him of it. But it may be doubted whether he appropriated the suit. For appropriation requires an assumption of the 'rights of an owner'.¹⁴ Something more than an assumption of V's very limited rights would be necessary before D could be held to have stolen the suit.

The foregoing suggestions may or may not be correct. The reference to the rights of an owner, rather than the victim's rights, in the definition of appropriation is a source of obscurity—not an indication of a clear rule.¹⁵ But the example serves its purpose as an illustration of ways in which the concept of appropriating might be more limited than that of obtaining.

Of more serious import is the uncertainty on the question whether transfer of ownership of property from V to D precludes a conviction of D for theft. Can D be said to have appropriated property 'belonging to another' in such cases? Consider first of all, cases of obtaining property by deception. If D induces V to part with possession of property by deception he may be guilty under section 81 though V remains the owner of the property. So also in cases where D obtains a transfer of ownership but V retains possession of the property. In these cases D obtains property which—in one or another sense of the expression—still 'belongs' to V after D has obtained it. Nevertheless, section 81 must be taken to cover as well situations where V was induced to part with possession, control and all proprietary rights over the property.¹⁶ Situations, that is, where D obtained property which belonged to V *before* D obtained it.¹⁷ Suppose a case where D goes to a department store and purchases a dinner suit. The suit is parcelled and handed to him and he pays for it with a stolen cheque. It is a clear case of obtaining by deception. Is it also a case of appropriating property belonging to another?¹⁸ If D's physical receipt of the suit

¹¹ *Ibid.*, s. 71(2): '[P]roperty 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).

¹² Smith, *The Law of Theft* (2nd ed. 1972) para. 248.

¹³ *Contra*, Smith, *ibid.* para. 131.

¹⁴ Crimes (Theft) Act 1973 s. 73(4). Emphasis added.

¹⁵ Griew, *The Theft Act 1968* (2nd ed. 1972) para. 2-24.

¹⁶ Section 81(2) of the Act is to be read as meaning that D obtains property if 'he obtains ownership, possession or control of it' or if he obtains ownership and possession and control of it. However obvious, this is nevertheless an interpretational point. Cf. Heaton, 'Belonging to Another' [1973] *Criminal Law Review* 736, 746.

¹⁷ See Heaton, *ibid.* 747.

¹⁸ The question whether s. 73(10) of the Act is relevant in such cases is discussed in Text accompanying note (hereafter TAN (61-72)). Please note that footnotes recommence after n. 99.

marks the point at which he appropriates, he cannot be said to appropriate property which (still) belongs to the store. But is it necessary to limit theft in this manner? It is possible to argue, by analogy with the offence of obtaining by deception, that D appropriated property which belonged to the store prior to appropriation and that this provides a sufficient basis for convicting him of theft. The appropriation occurs when he assumes the rights formerly vested in V. If this is a correct analysis of the way in which the Act will apply to the problem, all cases of obtaining by deception are also cases of theft.¹⁹

The objections to the above argument may be summarized:

(a) As a matter of ordinary English, 'obtaining' in this context requires the participation of another person. It presupposes a transaction between parties. 'Appropriation' seems to refer to a unilateral act by D. He can obtain rights which are conferred on him, but he cannot appropriate them. Appropriation, it may be suggested, involves the notion that D must do something *with* the property before he can be said to have appropriated it.²⁰

(b) It is not easy to find a role for section 73(10) if the words 'belonging to another' in the definition of theft are made to refer to the point of time immediately before appropriation.²¹

(c) The suggestion that D might be guilty of theft runs counter to the apparent intentions of the Criminal Law Revision Committee which drafted the Act.²² In a similar vein, it has been asserted that complete overlapping would make nonsense of the legislative intention to create a separate offence of obtaining property by deception.²³

It is difficult to assess the force of these objections because they depend so much on a shadowy foundation provided by the law relating to larceny and false pretences. Appropriation is an indeterminate and vague concept.²⁴ It is all too easy to slip back into old habits of thought conditioned by the cluster of doctrines surrounding the concept of taking in larceny. There is a further consideration. If D is guilty of theft in the last example, the offence is very wide indeed. It will cover the vast majority of cases of obtaining by deception. It will also cover cases where V transfers all possessory and proprietary rights to D without having been induced to do so by deception. Suppose a case where V offers his old dining suite to D as a gift. D recognizes it as a priceless antique. He knows that V does not realize its value and that he would not part with it if he did. D accepts the

¹⁹ Subject to the exception for land and the possible exception in cases where V is deprived of a limited interest in the property. See TAN (12-14).

²⁰ See the discussion in Griew, *op. cit.* para. 2-23 ff. where this view is apparent.

²¹ See TAN (60-70).

²² United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmnd 2977 para. 38.

²³ See the comment on *Lawrence (C.A.)* [1971] *Criminal Law Review* 51, 53.

²⁴ It is related, but by no means equivalent, to the civil law concept of conversion. See Griew *op. cit.* para. 2-24.

gift without disabusing V. If the argument is correct, D appropriates property belonging to another when he accepts the gift and assumes the rights of an owner. The only remaining barrier to conviction for theft is the requirement that he be proved dishonest.²⁵ It has been objected that this is to overburden the concept altogether.²⁶

The overlapping problem was considered by the Court of Appeal and the House of Lords in the unsatisfactory case of *Lawrence*.²⁷ The case has been much discussed in texts and legal journals.²⁸ No clear understanding of its import has so far emerged. The case marked an inauspicious beginning for the House of Lords on the problems of interpreting the Theft Act 1968. D was a taxidriver of undoubted dishonesty. V, who was a stranger in London, was his passenger. V indicated his destination to D and proffered £1 for the fare. The driver, who had mentioned previously that the journey would be expensive, said that £1 was not enough. He removed a further £6 from V's wallet which was still open. The correct fare was 10/6. D was convicted of theft and the conviction was upheld by the Court of Appeal and the House of Lords.

In the Court of Appeal D contended that he could not be guilty of theft if V had consented to the appropriation of £6. The Court rejected the argument on the ground that V's consent (if, indeed, he had consented) was in no way relevant to the question whether D had appropriated property belonging to V. Consent, or apparent consent, to appropriation was relevant to the issue of dishonesty but not otherwise. In a case where D dishonestly induces V to consent by deceit, there is no barrier to conviction.

In his other major argument, D sought to turn the clock back. It was contended that his offence was, if anything, that of obtaining property by deception.²⁹ Accordingly, the argument ran, he could not be guilty of theft. The Court of Appeal rejected this attempt to resuscitate the old distinction between larceny and false pretences and give them new life in the Theft Act 1968 (Eng.). Megaw J., who delivered the judgment of the Court, expressed the view that D would have been held guilty of obtaining property by deception had he been charged with that offence. But that was no reason why he should escape conviction for theft.

²⁵ See TAN (97-47 (second series)).

²⁶ See Glazebrook, 'Overcharging as Theft' [1971] *Cambridge Law Journal* 9, 185.

²⁷ [1971] 1 Q.B. 373; [1970] 3 All E.R. 933; [1970] 3 W.L.R. 1103; 55 Crim.App. R. 73; affirmed *sub nom. Lawrence v. Metropolitan Police Commissioner* [1972] A.C. 626; [1971] 2 All E.R. 1253; [1971] 3 W.L.R. 225; 55 Crim.App.R. 471.

²⁸ See, for example, the comments in [1971] *Criminal Law Review* 51, 667; Glazebrook, 'Overcharging as Theft' [1971] *Cambridge Law Journal* 9, 185; Heaton, 'Belonging to Another' [1973] *Criminal Law Review* 736 and the discussions in Smith, *op. cit.*; Griew, *op. cit.*

²⁹ Had Lawrence been charged with this offence he would have contended, in all likelihood, that he did not obtain by deception but simply appropriated money from his victim's wallet. See *Lawrence* [1972] A.C. 626.

The Court was of the view that ownership of the £6 had passed to D at the time of appropriation.³⁰ It was accepted as a consequence of the decision that all cases of obtaining property by deception would also amount to theft. The judgment was unequivocal, though it seems likely that the full implications of the decision were not realized.³¹ Clarity cannot be claimed as a virtue of the speech delivered by Viscount Dilhorne for the House of Lords however.³² It was agreed that theft and obtaining property by deception are not mutually exclusive offences. It was held that the dishonest taxidriver had been rightly convicted of theft. But the decision did not unequivocally confirm the view that D can be held guilty of theft in cases where V has conferred all his proprietary and possessory rights on him.³³

The difficulty of interpreting Viscount Dilhorne's speech arises from the fact that it is at least possible that the House of Lords was of the view that the passenger retained ownership of the £6 throughout the entire transaction.³⁴ Viscount Dilhorne said:

'[b]elonging to another' in section 1(1) and in section 15(1) in my view signifies no more than that, at the time of the appropriation or the obtaining, the property belonged to another . . . The short answer to this contention on behalf of the appellant is that the money in the wallet which he appropriated belonged to another, to Mr. Occhi.³⁵

This may mean that the money belonged to V before D assumed the ownership conferred on him by V. Or it may mean that the money never ceased to belong to V.³⁶

The consequences of this uncertainty became apparent in the Court of Appeal decision in *Gilks*.³⁷ In *Lawrence* the Court had expressed the hope 'that it will not be found that the provisions of the new Act necessitate the introduction of fresh technicalities or legal subtleties'.³⁸ *Gilks* is a decision of the utmost ambiguity. If a pessimistic view is taken of the case, it involves technicalities and subtleties which are painfully familiar—

³⁰ See *Lawrence* [1971] 1 Q.B. 373, 378 (C.A.): '[h]ad the old law prevailed, the offence would have been obtaining by false pretences, not larceny by a trick.'

³¹ See *ibid.* The Court obviously overlooked the differences between the offences arising from the restricted definition of property in theft.

³² The framing of the points of law for consideration by the House of Lords arguably contributed to the obscurity of the decision. See [1971] *Criminal Law Review* 53-5, and *Lawrence* [1971] 3 W.L.R. 225, 229, (H.L.(E.)) [1972] A.C. 626.

³³ For alternative interpretations of the House of Lords decision, see Griew, *op. cit.* para. 2-33; Smith, *op. cit.* para. 32.

³⁴ See Smith, *ibid.*

³⁵ *Lawrence* [1971] 3 W.L.R. 225, 228-9 (H.L.(E.)) [1972] A.C. 626.

³⁶ The House of Lords concluded with the tantalisingly vague statement: '[i]n some cases the facts may justify a charge under section 1(1) and also a charge under section 15(1). On the other hand, there are cases which only come within section 1(1) and some which are only within section 15(1)'. See *Lawrence, ibid.* 229.

³⁷ (1972) 56 Crim.App.R. 734; [1972] 1 W.L.R. 1341; [1972] 3 All E.R. 280; (pet. dis.) [1972] 1 W.L.R. 1347B, (H.L.(E.)).

³⁸ [1970] 3 W.L.R. 1103, 1105.

Middleton's case,³⁹ suitably tarted up for the occasion, making its debut under the Theft Act 1968 (Eng.).⁴⁰ Or, more optimistically, it is merely the logical extension of the approach taken by the Court of Appeal in *Lawrence*, but marred a little by poor craftsmanship.

D placed money on a horse called Fighting Taffy. The race was won by Fighting Scot. D's bookmaker mistakenly thought that D had backed the winning horse and paid out a sum in excess of £100 to D. His actual winnings, on other races, were £10.62. D did not induce V's mistake by conduct or representation but he was aware, at the time of receiving the money, that he was the beneficiary of V's error. He was convicted at his trial. The Deputy Chairman ruled that the money belonged to another at the moment when D appropriated it.⁴¹ The ruling accords with the Court of Appeal decision in *Lawrence*. D appropriated property belonging to another when he assumed rights formerly vested in V.⁴² As the jury concluded that he was dishonest at the time he received the money, there was no barrier to his conviction for theft.

The judgment of the Court of Appeal may be read as confirming this straightforward view of the case. Prior to the Theft Act 1968 (Eng.), said the Court, a person 'who accepted overpayment with knowledge of the excess was guilty of theft'.⁴³ Nor was the position different under the 1968 Act. V would not have made the payment but for his mistake. D knew this when he dishonestly took advantage of the mistake and he was accordingly guilty of theft.⁴⁴

Unfortunately, *Gilks* is susceptible of more complex analysis. It is possible to read the judgment of the Court of Appeal as limiting liability for theft in cases of mistaken overpayment to situations where V has not parted with all his possessory and proprietary rights over the property.⁴⁵ The question, did property pass, which so disfigured the law of larceny,⁴⁶

³⁹ (1873) L.R. 2 C.C.R. 38.

⁴⁰ See the analyses in [1972] *Criminal Law Review* 585-90, Orchard, 'The Borderland of Theft Revisited' [1973] *New Zealand Law Journal* 110.

⁴¹ *Gilks* [1972] 1 W.L.R. 1341, 1344.

⁴² The case also involves discussion of s. 5(4) of the Theft Act 1968 (Eng.). See TAN (60-74).

⁴³ This is a distortion, perhaps purposive, of the common law position. But see n. 46.

⁴⁴ *Gilks* [1972] 1 W.L.R. 1341, 1344: '[a] bookmaker who pays out money in the belief that a certain horse has won, and who certainly would not have made the payment but for that belief, is paying by mistake just as much as the Post Office clerk in *Reg. v. Middleton*.' Nothing more is said of *Middleton's* case and there appears to be no sufficient justification for the supposition that the Court of Appeal meant to suggest that the reasoning in *Middleton's* case was applicable to the Theft Act 1968 (Eng.).

⁴⁵ See [1972] *Criminal Law Review* 585-90; Orchard, 'The Borderland of Theft Revisited' [1973] *New Zealand Law Journal* 110. The latter treatment of the case discusses its relevance in New Zealand where the *Middleton* arguments are, apparently, still relevant.

⁴⁶ Howard, *Australian Criminal Law* (2nd ed. 1970) argues that the question had ceased to be relevant in cases of accidentally mistaken overpayment before the

may have returned to haunt the Theft Act 1968 (Eng.). On this approach, D would be guilty of theft only in cases where V's mistake was a mistake as to the identity of the subject matter, the identity of D or, possibly, a mistake as to the quantity of what was handed over.⁴⁷ The simplest answer to this suggested analysis of *Gilks* is that it fails to explain why the Court of Appeal upheld his conviction. For the mistake made by V was in no way inimical to the passing of ownership of the money to D.⁴⁸

At worst, *Gilks* is an ambiguous decision. The suggestion that D is guilty of theft in any case where advantage is dishonestly taken of mistaken overpayment is a tenable interpretation.⁴⁹ It is consistent with the *Lawrence* decisions and it avoids the wholesale reintroduction of a set of distinctions which were so complex as to be consistently misunderstood and misapplied under the preceding law.

In the familiar sense of the term, D steals when he takes something which belongs to another with intent to deprive permanently. But the concept of appropriation is capable of far wider application than that. It is apt to include cases where D assumes rights he has not and cases as well where D assumes rights *which are conferred on him by V*. As a consequence, almost all cases of obtaining property by deception will amount to theft. The exceptions to that rule are clearly marked.⁵⁰ Cases where D takes dishonest advantage of a mistaken transfer of property by V will also amount to theft. Nor will it matter that V, as a consequence of his mistake, intended to transfer all his possessory and proprietary rights over the property to D.

II COINCIDENCE OF ACT AND INTENTION

Nothing that has been said so far indicates the solution to cases such as *Moynes v. Cooper*⁵¹ where D does not discover that V has mistakenly overpaid him until some time has elapsed after the property has ceased to belong to V. In such cases, the appropriation and formation of a dishonest intent do not coincide in time. Nor are problems of coincidence of act and

introduction of the Crimes (Theft) Act 1973. This justifiably cavalier attitude to the earlier cases appears to find a parallel in the reasoning of the Court of Appeal in *Gilks* [1972] 1 W.L.R. 1341.

⁴⁷ Williams, 'Mistake as to Quantity in the Law of Larceny' [1958] *Criminal Law Review* 221, 307; Cross, 'Russell v. Smith Reconsidered' [1958] *Criminal Law Review* 529. See also the argument that ownership does not pass in cases where V lacks authority to transfer ownership; *Stewart* (1845) 1 Cox C.C. 174.

⁴⁸ See [1972] *Criminal Law Review* 585-90; Orchard, 'The Borderland of Theft Revisited' [1973] *New Zealand Law Journal* 110.

⁴⁹ The manner in which the Court of Appeal formulated the points of law certified under s. 33(2) of the Criminal Appeal Act 1968 (Eng.) supports the argument that the Court considered the question whether ownership passed as irrelevant to the issues in the case.

⁵⁰ There can be no theft of land and it is possible that D is not guilty of theft in cases where D intends to deprive V of a very limited interest in property. See TAN (11-14). Problems may also arise in the interpretation of s. 73(7).

⁵¹ [1956] 1 Q.B. 439.

intention confined to theft. The offences of obtaining by deception raise similar issues.

(a) COINCIDENCE OF ACT AND INTENTION IN THEFT

The definition of appropriation in section 73(4) of the Act contains its own sub-rule on coincidence of act and intention:

[a]ny 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.

So long as the property belongs to another, in one or other of the senses given that expression in the Act, D may appropriate. If he is a bailee he may assume the rights of an owner and so appropriate. A finder who decides after a time not to return what has been found, appropriates.⁵² The borrower who decides, after a period of time, that he will not return what he has borrowed similarly appropriates. Appropriation occurs at a particular point of time which is, in theory at least, specifiable.⁵³ It is not a continuing act.⁵⁴ The old arguments over 'continuing trespass',⁵⁵ the special rules for larcenous bailees and larcenous servants, and the attempt to squeeze rules for problem cases from the jurisprudence of possession, are no longer necessary. This is a consequence of the abandonment of a particular physical act ('taking possession') as a defining characteristic of the offence. In its place is the more abstract conception of dishonest assumption of the rights of an owner.

Cases where D comes by property innocently and appropriates at some later time may often raise a dishonesty issue. There is a point where dishonesty shades into pardonable inertia. Or where the temptation to retain is so strong that the defendant who gives way to it may be pardoned. The Act contains one formularized rule dealing with such situations. Section 73(5) provides that:

[w]here 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.⁵⁶

⁵² *Thompson v. Nixon* [1966] 1 Q.B. 103. But see *Minigall v. McCammon* [1970] S.A.S.R. 82; *O'Toole v. Samuels* (1972) 3 S.A.S.R. 30.

⁵³ In some cases, the point at which appropriation occurs may be practically unascertainable. As, for example, in cases where D steals by dishonestly retaining. In this case appropriation occurs when D dishonestly decides to retain to the permanent deprivation of V.

⁵⁴ Smith, *op. cit.* para. 19. As Professor Smith points out, however, it is perfectly possible for D to appropriate property belonging to another on more than one occasion. For a case where specification of the time at which appropriation occurred was relevant to criminal liability, see *Meech* [1973] 3 W.L.R. 507; [1973] 3 All E.R. 939.

⁵⁵ Smith, *op. cit.* para. 26, 27.

⁵⁶ D's later dealings with the property may render him liable to conviction for obtaining property by deception or handling stolen goods however. See Smith, *ibid.* para. 42.

Generally, however, the question of dishonesty is one for the finder of fact.⁵⁷

These provisions are not, of themselves, sufficient to enable a conviction in cases such as *Moynes v. Cooper*.⁵⁸ In that case D was the beneficiary of an unsolicited error by a wages clerk. Unlike the defendant in *Gilks*, however, he did not perceive the mistake immediately as he did not open his pay packet until he had returned to his home. On discovering the excess, he decided to keep it. The case was decided before the Theft Act 1968 (Eng.) and it was held that D could not be held guilty of larceny. There was no *animus furandi* at the time of the taking and none of the special exceptions to the general rule requiring coincidence of act and intention was applicable.⁵⁹

The Act contains two provisions covering this and similar situations.⁶⁰ Of these, section 73(10) has aroused the more interest because of its presumed relevance to the overlapping problem.⁶¹ The other, section 73(9), will not be treated as its role is clear.⁶² Section 73(10) was designed to allow a conviction for theft in the *Moynes v. Cooper* situation.⁶³

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.

The sub-section extends the already very wide meaning of the words 'belonging to another',⁶⁴ in section 71(2). The victim of error is deemed to continue the owner of property he has parted with. But recourse to section 73(10) is necessary only in cases, like *Moynes v. Cooper*, where V parts with possession, control and ownership of property at T(1) and D does not form his dishonest intention until T(2).⁶⁵ The section has nothing to do with the overlap between theft and obtaining by deception.

⁵⁷ See TAN (97-47 (second series)).

⁵⁸ [1956] 1 Q.B. 439.

⁵⁹ But see Howard, *op. cit.* 215-23.

⁶⁰ Section 73(9) of the Act corresponds to s. 5(3) of the Theft Act 1968 (Eng.); s. 73(10) to s. 5(4) of the Theft Act 1968 (Eng.).

⁶¹ See, for example, Stuart, 'Law Reform and Reform of the Law of Theft' (1967) 30 *Modern Law Review* 609, 616-23; Smith, *op. cit.* para. 78; Griew, *op. cit.* para. 2-21. Of course, if the *Lawrence* [1971] 1 Q.B. 373 (C.A.) principle is wrong, s. 73(10) does become relevant to the overlapping problem.

⁶² That is not to say that the section presents no problems of interpretation. See *Hall* [1973] Q.B. 126; [1972] 3 W.L.R. 381; [1972] 2 All E.R. 1009; 56 *Crim.App.R.* 547; *Meech* [1973] 3 W.L.R. 507; [1973] 3 All E.R. 939. For a discussion of the contemporaneity problem in the latter case, see the commentary in [1973] *Criminal Law Review* 771-5.

⁶³ United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmnd 2977 para. 24.

⁶⁴ The concluding passage, which equates the intention not to restore with the intention to deprive, states a proposition which would otherwise be certainly implied.

⁶⁵ Section 73(9) is subject to the same limitation.

It merely allows the court to pick a point of time later than the point at which V mistakenly conferred ownership, possession and control, as the moment of appropriation by D.⁶⁶

Gilks provides support for the suggested reading of section 73(10). In that case, it will be remembered, D perceived V's error immediately and resolved to take advantage of it. It was held that D appropriated property belonging to another when he assumed ownership, possession and control of the money. Recourse to section 5(4) of the Theft Act 1968 (Eng.) was unnecessary in the absence of any time gap between D's assumption of the rights of an owner and the formation of the dishonest intent to retain. In order to reach this conclusion, however, the Court of Appeal found it necessary to deal with an argument for the defendant based on the sub-section. It had been earlier held, in *Morgan v. Ashcroft*,⁶⁷ that money paid in error by a bookmaker could not be recovered in law. It was accordingly argued that *Gilks* had not appropriated property belonging to another as the bookmaker had, in effect, 'simply made him a gift of the money'.⁶⁸ It is another form of the argument that D cannot be convicted of theft in cases where V confers ownership, possession and control on D. At *Gilks*' trial the argument was rejected on two grounds. The first has already been discussed.⁶⁹ The second, and alternative, ground required the elucidation of section 5(4). The Deputy Chairman had held that D was under a moral obligation to return the excess and that it accordingly 'belonged' to V within the meaning of section 5(4). This was to read the sub-section as applicable to cases where D was legally or morally obliged to restore property to V.

The Court of Appeal rejected this interpretation of section 5(4). Nothing less than a legal obligation to make restoration would suffice in cases where the sub-section was relevant. But *Gilks* was not such a case. There was no need for the prosecution to rely on this special rule in the absence of a contemporaneity problem. Nor could the defence derive benefit from the fact that D was not obliged to make restoration of the excess. Section 5(4) extends the scope of theft in cases where contemporaneity is an issue: but it does not limit the offence in those cases where the issue does not arise.⁷⁰

These suggestions derive little support from English academic writings on the Theft Act 1968 (Eng.).⁷¹ The virtues of the analysis are that it is consistent with the cases and that it minimizes the impact of esoteric

⁶⁶ Appropriation may occur when D discovers V's error and resolves to retain, or it may occur later as a result of the operation of s. 73(4). Compare *Meech* [1973] 3 W.L.R. 507, 513.

⁶⁷ [1938] 1 K.B. 49; [1937] 3 All E.R. 92.

⁶⁸ *Gilks* [1972] 1 W.L.R. 1341, 1344.

⁶⁹ TAN (41-49).

⁷⁰ *Gilks* [1972] 1 W.L.R. 1341, 1345.

⁷¹ But see Heaton, 'Belonging to Another' [1973] *Criminal Law Review* 736.

doctrines of civil law on the question of criminal guilt. D's guilt will depend on the question whether he was dishonest—not on a civil law analysis of the relationship between D and V. The question, did property pass, almost ceases to be relevant in the context of theft. Cases where D's guilt depends on a precise assessment of V's civil law rights against him are limited to those where contemporaneity is an issue. If V pays a prostitute an excessive amount as a result of an unsolicited error in counting his money, she is guilty of theft if she knows of his error at the outset and dishonestly resolves to take advantage of it. If she does not discover the error until later she may still be guilty of theft if the mistake was such as to prevent ownership of the money passing to her. If the mistake was not of that nature, she cannot be guilty of theft. For, unlike the *Moynes v. Cooper* situation, there is no obligation to restore for the purposes of section 73(10).⁷² The old problems can arise, but may be expected to do so more rarely. They could have been avoided altogether by adopting the course suggested by the Deputy Chairman in *Gilks* of making the subsection extend to moral as well as legal obligations. But the policy arguments against that course, quite apart from the Court of Appeal holding, seem compelling.⁷³ There remains, for the courts, the task of assigning a precise meaning to the '(legal) obligation to make restoration of the property or its proceeds or of the value thereof'.⁷⁴

(b) COINCIDENCE OF ACT AND INTENTION IN OBTAINING PROPERTY OR FINANCIAL ADVANTAGE BY DECEPTION

What is at stake in problems of contemporaneity is the extent to which the Act makes criminals of those who dishonestly evade their obligations. In theft, the issue centres around the concept of appropriation. Once the requirement of a physical taking in larceny, however corrupted by special rules, was abandoned the offence gained enormously in power. In the offences of obtaining by deception, there has been a similar development. The extent of that development is less certain however. In the offence of obtaining by false pretences the concept of a 'false pretence' was much limited by technical rules. In Victoria, the alternative offence of obtaining by false promise was limited by a procedural barrier.⁷⁵ The meaning of deception is not limited in the same way. Section 81(4) provides that:

⁷² *Benyon v. Nettlefold* (1850) 3 Mac & G. 94.

⁷³ Where D perceives V's error at the time the property is transferred simple honesty requires that he return what has been mistakenly given to him. Where time has elapsed between transfer and D's discovery of V's error, the temptation not to return is far greater. In the absence of a legal obligation to make restoration it seems a wise policy to exclude the possibility of criminal liability despite D's dishonesty. Cf. the policy underlying s. 73(5) in United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmnd 2977 para. 37.

⁷⁴ See Smith, *op. cit.* para. 76-81, Heaton, 'Belonging to Another' [1973] *Criminal Law Review* 736. See also *Meech* [1973] 3 W.L.R. 507, 512-3, which appears to take a less firm stand on the requirement of a legal obligation in the context of s. 73(9). See the discussion in [1973] *Criminal Law Review* 771-5.

⁷⁵ As a result of s. 193 of the Crimes Act 1958, proceedings cannot be launched for obtaining by false promise except with the consent of the Attorney-General.

"deception" means any deception (whether deliberate or reckless) by words or by 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.

This is hardly a definition of deception. It is rather a deliberate abandonment of limitations formerly attached to the concept of false pretence. The contemporaneity problem in the offences of obtaining by deception centres around the elucidation of 'deception'. Nor is it a technical legal term. Unlike appropriation, which is a portmanteau concept referring to some act which D did or failed to do and the legal meaning of his action or inaction as well, deception describes a human relationship in a non-legal context. The problems encountered in the cases so far have more to do with English language than with law.

The very simply drafted section 82, which makes it an offence for D to 'dishonestly obtain for himself or another any financial advantage',⁷⁶ allows a straightforward solution to some cases which might otherwise raise the contemporaneity issue. Suppose D drives his car to a service station and asks for the tank to be filled with petrol. When the tank is filled he acquired ownership, possession and control of the petrol.⁷⁷ If he never intended to pay for it and avoids payment by driving away he is guilty of obtaining petrol by deception.⁷⁸ The request to the attendant contains an implied promise that it will be paid for. Suppose, however, that after the tank is filled D falsely tells the attendant that he is entitled to charge the petrol to the account of X company. If he was dishonest from the beginning he is still, of course, guilty of obtaining the petrol by deception. And his second misrepresentation provides the basis for a charge of obtaining financial advantage by deception or, if the attendant was not deceived, of attempting to do so. He obtains, or attempts to obtain, the financial advantage of not paying for what he has got. If, on the other hand, he originally intended to pay and conceived the plan of deceiving the attendant after the tank was filled, he cannot be guilty of theft,⁷⁹ or of obtaining property by deception.⁸⁰ But the charge of obtaining a financial advantage by deception will still succeed.

But D cannot be convicted in such cases unless there has been deception. The definition of the offence of obtaining financial advantage is, in one respect, far wider than the old offence of obtaining credit by fraud.⁸¹ 'Credit' was a limiting concept. But it may be that, in another respect, the

⁷⁶ This section is peculiar to the Victorian Act. It replaces s. 16 of the Theft Act 1968 (Eng.) which has been the one undoubted failure of the English Act. That section has been referred by the Home Secretary to the Criminal Law Revision Committee for consideration and will, in all probability, be amended.

⁷⁷ The conclusion that D obtains ownership is probably inescapable. But see *Collis-Smith* [1971] *Criminal Law Review* 716, where the question appears to have been left open.

⁷⁸ *Collis-Smith* *ibid.*

⁷⁹ *Greenberg* [1972] *Criminal Law Review* 331.

⁸⁰ *Collis-Smith* [1971] *Criminal Law Review* 716.

⁸¹ On the meaning of 'obtaining credit', see *Fisher v. Raven* [1964] A.C. 210.

offence is narrower than its predecessor. 'Fraud' was not subject to the same limitations as 'false pretence' and covered a wider range of dishonest conduct than the latter concept.⁸² And it may well have reached a wider range of dishonest conduct than deception. It is apparent that certain recurrent types of petty dishonesty will go unpunished unless the meaning of deception is enlarged.⁸³ What of the motorist who changes his mind about paying and simply drives off after the tank is filled? Or the diner who decides, after sampling a culinary disaster, that the meal is not worth paying for and makes a bolt for the door? In the latter case at least, the problem cannot always be avoided by doubting D's credibility.

*Ray v. Sempers*⁸⁴ was the culmination of a series of unreported cases on restaurant bilking.⁸⁵ The defendant had gone with four friends to a Chinese restaurant. It was accepted by the justices who tried the case at first instance that he intended to pay for his meal when it was ordered. When they had finished eating, the defendant and his friends decided that they would not pay. After reaching this decision they waited ten minutes until the waiter had gone to the kitchen and then ran from the restaurant. The defendant was convicted under section 16 of the Theft Act 1968 (Eng.) of obtaining a pecuniary advantage by deception. On a case stated to the Divisional Court the conviction was quashed. On a further appeal to the House of Lords the conviction was restored by a majority of the Law Lords.

In the Divisional Court the prosecution argued that the defendant 'practised a deception by continuing to sit in the restaurant as a normal customer and by failing to correct the originally true representation that he was an honest customer'.⁸⁶ This deception, it was argued, induced the waiter to grant the defendant credit, or further credit, for a period of ten minutes. Moreover the alleged deception allowed D to seize the opportunity of making an unobstructed getaway and so evade his debt. The prosecution conceded that there could be no conviction in cases where D made a bolt for the door on the spur of the moment. On this approach, the ten minute wait made all the difference. The Divisional Court was unsympathetic to the argument. The Court could see no essential difference between the diner who bolts for the door without waiting and one who waits until

⁸² *Jones* [1898] 1 Q.B. 119.

⁸³ Apart from contemporaneity cases, see also those where D obtains a service by 'deceiving' a machine. It has been held that deception implies the existence of a person who is deceived. See *Davies v. Flackett* [1972] *Criminal Law Review* 708, where D obtained a pecuniary advantage by putting washers in a parking meter. The case is discussed in Lamming, 'Can You Deceive a Machine?' [1972] *New Law Journal* 627. If D obtains property, rather than a service, from a machine in this manner he is, of course, guilty of theft.

⁸⁴ [1973] 1 W.L.R. 317; [1973] 1 All E.R. 860; 57 Cr.App.R. 324; (pet. all.) [1973] 1 W.L.R. 614; [1973] 3 W.L.R. 359; [1973] 3 All E.R. 131.

⁸⁵ See, 'No Crime to Bilk' (1970) 134 *Justice of the Peace and Local Government Review* 692; 'Bilking' *ibid.* 857; 'Restaurant Bilking' (1971) 135 *ibid.* 336.

⁸⁶ *Ray v. Sempers* [1973] 1 W.L.R. 317, 320.

the coast is clear. The defendant's plan 'was totally lacking in the subtlety of deception'.⁸⁷ Despite the practical problem posed by the restaurant bilking cases, it would be contrary to the spirit of the Theft Act 1968 (Eng.) to deem his conduct a deception.

A majority of the House of Lords⁸⁸ held that the conviction should be restored. The dissenters, Lords Reid and Hodson, followed essentially the same line of reasoning as the Divisional Court. At first sight, the decision of the majority seems defective in two ways. It depends on the notion of 'continuing representation': a subtlety which sacrifices simplicity in the definition of the offences of obtaining by deception. And, if the majority decision is limited in its effect to cases where the dishonest diner waits for an opportunity to make his getaway, it does nothing to resolve the practical problem of restaurant bilking. It is difficult to believe that the introduction of the notion of continuing representation was meant to be quite so fruitless. Like the House of Lords decision in *Lawrence, Ray v. Sempers* conceals possibilities of development behind a veil of obscurity. The desirability of development is more doubtful in this case however.

It was accepted by the majority that nothing which occurred after D's change of mind could, of itself, count as a deception.⁸⁹ But the waiter was deceived by an implied representation, made at T(1) when D ordered the meal, which became false at T(2) when he resolved not to pay for it. There is very little, if anything, in the *arguments* of the majority to make it appear that the ten minute wait after the dishonest change of mind was essential to D's guilt. The concession made by the prosecution appears to have been unnecessary, though no member of the House of Lords made the point explicitly.

D's original representation induced the waiter to trust him. The representation became false when D resolved not to pay. The waiter was deceived from this point of time as D did not, of course, communicate his intention. The waiter's behaviour founded as it was on the assumption that D was honest, became inappropriate. Whether he went to the kitchen, turned his back or merely refrained from requesting payment, his behaviour necessarily provided D with an opportunity to make a getaway:⁹⁰

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 act on the mind of the waiter. It became false and it became a deliberate deception.⁹¹

⁸⁷ *Ibid.* 323.

⁸⁸ Lords MacDermott, Morris of Borth-y-Gest, Hodson and Pearson, comprised the majority.

⁸⁹ *Ray v. Sempers* [1973] 3 W.L.R. 359, 365, 369, 373.

⁹⁰ It was suggested somewhat faintly in the Divisional Court proceedings that D obtained a pecuniary advantage in that he would have been required to pay immediately after he had finished the meal had it not been for his 'deception'. This argument was not pursued in the House of Lords nor does it appear sustainable.

⁹¹ *Ray v. Sempers* [1973] 3 W.L.R. 359, 369, *per* Lord Morris of Borth-y-Gest.

The reasoning will encompass cases where D decides to make a run for it *because* the waiter's back is turned. For the waiter would not have turned his back had it not been for the original representation which D has decided to falsify. The fact that the defendant in the instant case waited ten minutes before putting his intention into effect ceases to be of crucial importance. The ten minute wait was not the deception, nor was it the pecuniary advantage obtained.

If this analysis is correct, *Ray v. Sempers* does solve the restaurant bilking problem. D obtains a financial advantage by deception in any case where he induces trust by an honest representation at T(1) and dishonestly takes advantage of that misplaced trust at T(2) in order to gain a financial advantage. The only cases which will not fall within the continuing representation principle are those where it cannot be said that D gained his advantage by exploiting V's trust in him. If an initially honest diner, appalled at the magnitude of the bill, assaults the waiter and stalks from the restaurant without paying he obtains no advantage by deception. The effect of the decision, on this analysis, is far reaching and potentially harmful in effect. As Lord Hodson remarked in his dissenting speech:

[t]o rely on a breach of a continuous representation . . . in administering a criminal statute . . . is going too far and seems to involve that an ordinary man who enters into a contract intending to carry it out can be found guilty of a criminal offence if he changes his mind after incurring the obligation to pay unless he has taken a step to bring the change of mind to the notice of the creditor.⁹²

Whatever the niceties of civil law, it is suggested that the notion of continuing representation has no place in cases under the Act. This is not to say that D's behaviour at T(1) will be irrelevant to the question whether he practised a deception at T(2). If D offers a Dobell to V on Friday, discovers that the painting is a worthless work by Dauber on Saturday and sells it to V on Monday for the original price without disclosing his discovery, he obtains property by deception. It does not matter that he may have said nothing untrue at the time of sale. For the act of selling amounts to a deception in the circumstances. Here there is something more than mere failure to communicate a dishonest change of mind and no need to rely on the obscuring technicality of continuing representation. D's behaviour at T(2) *is* the deception.

Though deception is a term common to sections 81 and 82 of the Act and *Ray v. Sempers* purports to deal generally with the term, it is arguable that the decision is inapplicable in Victoria. In cases of obtaining property by deception, the notion of continuing representation seems unnecessary. For the whole of D's conduct prior to the transfer of property may be scrutinized for deception without running into problems over the contem-

⁹² *Ibid.* 371-2.

poraneity issue. Dishonesty after the transfer—as in a case where D cancels a cheque given in payment for the property—cannot make him guilty of the offence.⁹³

The controversy in *Ray v. Sempers* could only arise because D was charged, under section 16 of the Theft Act 1968 (Eng.), with obtaining a pecuniary advantage. The form of advantage gained was that of evading a debt for which he had made himself liable. But the Crimes (Theft) Act 1973, unlike its English counterpart, does not define financial advantage. It is arguable that *Ray v. Sempers* has more to do with the English definition of pecuniary advantage than with the concept of deception. D's deception, if deception it was, merely obtained for him the opportunity to evade payment by making an unobstructed escape. Whatever the exigencies of interpreting the English section, it is open to a Victorian court to hold that an opportunity to make a getaway is not a *financial* advantage. The section should cover only those cases where D intends to obtain, and V intends to confer, a benefit the financial worth of which is apparent to both parties.⁹⁴ It is not enough that D has managed to induce an unwitting victim to act in a way that V can turn to his financial advantage. Under section 81 the requirement that D obtain property ensures that the intentions of deceiver and deceived mesh in this way. If a similar approach is followed in the interpretation of section 82, the notion of continuing representation will be similarly inapplicable.⁹⁵

⁹³ Cases where V retains a proprietary interest, or possession, or control of the property will amount to theft in these circumstances however.

⁹⁴ Even with the omission of the English definition of pecuniary advantage, the section can be expected to cause problems of interpretation. The expression 'financial advantage' is, in this context, highly ambiguous. It certainly covers cases where D obtains and V intends to confer, an intangible benefit which is, strictly speaking, financial—such as credit, or the deferment of a debt. It must also cover cases where money is obtained so that s. 82 must overlap s. 81. If it covers money, why not money's worth? (See Stuart, 'Law Reform and Reform of the Law of Theft' (1967) 30 *Modern Law Review* 609, 628-34, on the predecessor to s. 16 of the Theft Act 1968 (Eng.) which was embodied in the Draft Theft Bill.) If the Victorian section covers cases where D obtains money's worth, does it matter that neither D nor V had any thought of a *financial* benefit passing to D? Or is it sufficient that the benefit was worth money though that consideration was not in D's or V's mind? The section is intended to cover, *inter alia*, cases where D obtains services by deception. (See the Explanatory Memorandum which went to the Victorian Legislature with the Victorian Draft Bill, p. 8.) This is an example of obtaining money's worth. Often D will intend to obtain the service without paying and V will be duped into supplying the service without requiring payment. But suppose a case where D obtains entry to a free concert performance open only to those who have been invited. If his sole motive is avoid payment on those nights when the concert is not free, he intends to and does get a financial advantage. Does it matter that V had no intent to confer such an advantage? Suppose D is indifferent to financial advantage—he obtains entry by deception because this is the only night he can attend, or this is the only programme he wishes to hear. The rule suggested in the text is necessarily imprecise. It does, however, avoid some of the problems which might otherwise arise.

In *Turner* [1973] 3 W.L.R. 352, 354, Lord Reid (with whom the remainder of the Lords expressed general agreement) suggested the possibility of further problems for s. 82. Can a penniless man obtain a financial advantage by way of avoiding a debt? See also, *Ray v. Sempers* [1973] 3 W.L.R. 359, 364, *per* Lord MacDermott.

⁹⁵ The proper measure for cases such as *Ray v. Sempers*, is legislative provision to make certain categories of bad debtors criminally liable.

III DISHONESTY UNDER THE CRIMES (THEFT) ACT 1973

(a) THE MEANING OF DISHONESTY IN THEFT

The single most important change effected by the Act is that of making dishonesty a defining element of the offences of theft, obtaining by deception and handling stolen goods.⁹⁶ This is particularly apparent in the law of theft. If appropriation means no more than an assumption of the rights of an owner, almost all transfers of property involve an appropriation. If D intends to keep what he has got, or otherwise dispose of it, the only barrier to a conviction for theft is the requirement of dishonesty. The offences of obtaining by deception are less dependent on the requirement of dishonesty as a defining element. 'Obtaining by deception' has not the same reach into the area of innocent transactions as 'appropriation'. Cases where D obtains honestly by deception are conceivable but not frequent. To the extent that cases such as *Ray v. Sempers* dilute the meaning of deception, however, the tendency will be to increase reliance on dishonesty as providing the borderline between criminal and non-criminal obtaining.⁹⁷

Dishonesty is partially defined⁹⁸ in section 72(2) and (3):

(2) 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.

(3) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

The partial definition is limited to the offence of theft. It is partial in the sense that it merely preserves a limited set of rules distilled from the cases on honest claim of right under the preceding law. It does not limit the meaning of the term.

The case of *Feely*,⁹⁹ decided by the Full Court of Appeal in early 1973, was the culmination of a series of cases¹ and continuing academic

⁹⁶ See also, ss. 83, 86.

⁹⁷ See the suggestion in Lamming, 'The Meaning of Dishonesty' [1973] *New Law Journal* 73, 76, that the requirement of deception should be omitted from s. 16 of the Theft Act 1968 (Eng.).

⁹⁸ United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmnd 2977 para. 39 p. 125.

⁹⁹ [1973] Q.B. 530; [1973] 2 W.L.R. 201; [1973] 1 All E.R. 341; 57 Cr.App.R. 312.

discussion.² The Criminal Law Revision Committee had discussed and rejected a proposal to make the dishonest borrower guilty of a criminal offence.³ The offences of theft and obtaining property by deception require proof of an intention to deprive permanently. But no specific provision was devised to cover cases where D 'borrows' with the intention of returning an equivalent item of property. If D borrows V's umbrella he cannot be guilty of theft so long as he intends to return it.⁴ If he borrows V's money, he normally does so with the intention of spending it and replacing it with an equivalent amount. He intends to deprive V of that which was taken. It does not matter that the money may have been replaced by an equivalent amount by the time V discovers what has happened. Common sense might suggest an alternative interpretation of intention to deprive permanently, but the history of the phrase precludes that course.

In *Feely's* case D had borrowed approximately £30 from his employer's till. When the shortage was discovered some four days later, D gave an IOU covering the amount. He maintained that he had always intended to repay the money. As the employees had been specifically forbidden to take money from the till for their own purposes, it was impossible to maintain a denial of dishonesty on the ground that V would have consented had he known of the appropriation. In these circumstances the trial judge directed the jury that: '[a]s a matter of law . . . even if he were prepared to pay back the following day and even if he were a millionaire, it makes no defence in law to this offence. If he took the money, that is the essential matter for you to decide.'⁵ In the light of cases preceding the Theft Act 1968 (Eng.), the direction was unexceptionable. *Cockburn*⁶ enunciated the same rule in 1968. Early cases on the Theft Act 1968 (Eng.) had shown few signs of departure from the principle in *Cockburn*.⁷ The Court of Appeal thought little of D's case on the merits. He lied to the police and in court as to the reason for taking the money. His failure to provide an IOU until the defalcation had been discovered hardly favoured his case. But the trial judge had treated the dishonesty issue as

¹ See, for example, *Halstead v. Patel* [1972] 1 W.L.R. 661; [1972] 2 All E.R. 147; 56 Crim.App.R. 334; *Rao* [1972] *Criminal Law Review* 451; *Pang Hei Chung* [1971] *Criminal Law Review* 440. The latter decision is reported from the Supreme Court of Hong Kong interpreting a provision substantially enacting s. 1 of the Theft Act 1968 (Eng.).

² See, for example, the discussion in Smith, *op. cit.*; Griew, *op. cit.*; Royall, 'Mens Rea and Offences of Dishonesty' (1970) 4 *Journal of the Association of Law Teachers* 77; Elliott; *Dishonesty Under the Theft Act* [1972] *Criminal Law Review* 625; Lamming, 'The Meaning of Dishonesty' [1973] *New Law Journal* 73.

³ United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmnd 2977 paras 56-8.

⁴ Unless 'the borrowing . . . is for a period and in circumstances making it equivalent to an outright taking', s. 73(12) Crimes (Theft) Act 1973.

⁵ [1973] 2 W.L.R. 201, 204.

⁶ [1968] 1 W.L.R. 281; [1968] 1 All E.R. 466; 52 Crim.App.R. 134.

⁷ See *Halstead v. Patel* [1972] 1 W.L.R. 661, 665-6, where *Cockburn supra* was cited with evident approval by the Divisional Court.

one of law rather than fact and the Court, somewhat surprisingly, held this to be an error and accordingly quashed the conviction.⁸

The judgment treats the requirement of dishonesty in a very broad way. In the Court's view, the word 'can only relate to the state of mind of the person who does the act which amounts to appropriation'.⁹ Nor is dishonesty susceptible of legal definition. It is a word in current use which has no specialized legal meaning.

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 the jury box, they should require the help of a judge to tell them what amounts to dishonesty.¹⁰

Comment on *Feely's* case so far indicates a certain scepticism among commentators that the Court of Appeal really meant what it said. Professor Smith, in a comment on the case, has suggested that it will be appropriate for the court to limit the jury's discretion in cases where the evidence of dishonesty is 'overwhelming'.¹¹ Cases, that is, where an acquittal would be perverse. But the Court appears to have rejected any compromise approach of this nature. Dishonesty in theft is, in one sense, like intention in murder. Unless there is a formal admission the issue must go to the jury. If the trial judge pre-empts jury consideration of the issue he errs in law. There is one qualification however. An error of this nature followed by conviction will not guarantee a successful outcome to D's appeal in either case.¹²

Though the Court of Appeal may have meant what was said, it is by no means clear what their meaning was. Nor is it at all clear what further impact the decision may have on other problems of interpretation. The principle that ordinary words in statutes are not susceptible of judicial definition was derived, in part, from the House of Lords decision in *Cozens v. Brutus*.¹³ If it is applied generally to the interpretation of the Act the balance between judge and jury functions would be drastically altered. To instance only one example: is 'financial advantage' in section

⁸ No application was made by the prosecution to have the proviso to s. 2(1) of the Criminal Appeal Act 1968 (Eng.) applied. Cf. *Potger* (1971) 55 Crim.App.R. 42.

⁹ *Feely* [1973] 2 W.L.R. 201, 205.

¹⁰ *Ibid.*

¹¹ [1973] *Criminal Law Review* 192, 194. See also, McConville, 'Directions to Convict—A Reply' [1973] *Criminal Law Review* 164, 172-3, n. 59: '[i]t is submitted with great respect to the court in *Feely*, that even if "dishonesty or not" is a "jury issue", the judge can, in those cases where there can be only one possible answer, where the case is beyond any reasonable line that can be drawn, direct the jury that they must find the issue proved'. The argument is seductive, but the court that considered *Cockburn* and its predecessors were surely of the view that the facts admitted of 'only one possible answer'.

¹² On the issue of intention in murder see, for example, *Smythe* (1957) 98 C.L.R. 163, 165, where special leave to appeal was refused by the High Court. See also n. 8 *supra*.

¹³ [1972] 3 W.L.R. 521; [1972] 2 All E.R. 1297.

82—a term which is deliberately left undefined —susceptible of legal definition? But the major difficulty in understanding *Feely* arises from the Court's failure to make clear the nature of the problem. Dishonesty is said to 'relate to D's state of mind' and accordingly to be a matter for the jury. Yet it is also an issue on which the jury is to apply 'the current standards of ordinary decent people'.¹⁴ We do not ordinarily apply those standards in determining D's state of mind. That approach was rejected in *Parker*.¹⁵ But ordinary standards *are* appropriate when it comes to assessing the worthiness of D's intentions. The uncertainty of interpretation is compounded by the penultimate paragraph of the judgment which refers to the impropriety of convicting a defendant 'who takes money from a till intending to put it back and genuinely believing on reasonable grounds that he will be able to do so'.¹⁶

It appears that the Court had in mind two quite separate tasks for the jury to perform. It must ascertain D's intentions and beliefs at the time of appropriation. And, having ascertained his 'state of mind' they must judge of his honesty according to standards generally obtaining in the community. If D takes from the rich to give to the poor in the firm conviction that it is morally right to do so, he may yet be convicted.¹⁷ For it is open to the jury to say, and indeed likely that they will say, 'your standards are not ours and by our standards you are dishonest'. It is not, in the words of the Court, a taking 'to which no moral obloquy can reasonably attach'.¹⁸ So also in the more mundane case where D takes with the intention of repaying in circumstances where repayment is utterly unlikely. He may have had the intention, but it will also be possible for the jury to conclude that the taking was dishonest in the majority of such cases. Suppose D, who is penniless, gets a tip from a horsetrainer. He takes money from V to back the horse. This time he is sure that his luck will turn. He intends to replace the money which was taken from his winnings. Granting his intentions and his belief that the horse would win, it remains possible to conclude that he was dishonest. For by ordinary standards it is dishonest to take that kind of risk with another's money.¹⁹

¹⁴ *Feely* [1973] 2 W.L.R. 201, 205.

¹⁵ (1963) 111 C.L.R. 610, 632-3.

¹⁶ [1973] 2 W.L.R. 201, 209. Griew, *op. cit.* para. 2-58, n. 60 suggests that the reference to 'reasonable grounds' is an error inconsistent with the main thrust of the judgment.

¹⁷ The example is taken from the comment by Professor Smith in [1973] *Criminal Law Review* 192, 194.

¹⁸ *Feely* [1973] 2 W.L.R. 201, 207.

¹⁹ In cases before *Feely*, courts tended to distinguish between cases where D intended to repay and cases where he merely hoped to repay. See *Rao* [1972] *Criminal Law Review* 451, 452; *Halstead v. Patel* [1972] 1 W.L.R. 661, 663, 666. The distinction had little point, inasmuch as neither a hope nor an intention to repay would defeat the allegation of dishonesty. After *Feely* it is apparent that these cases involve an impermissible judicial characterisation of D's state of mind. Whether D intended or merely hoped to repay is now a matter for the jury. Whether either state of mind is inconsistent with the allegation of dishonesty is also a matter for the jury.

The true, if somewhat paradoxical, role of section 73(2)(a) is now apparent. It provides that D is not to be regarded as dishonest: '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 . . .' It is necessary to make special provision for this kind of case because it is common enough for D to act with the requisite belief whilst knowing his conduct to be dishonest by ordinary standards. The possibility was adverted to in *Gilks* but the Court found it unnecessary to deal with it at length. D maintaining at his trial that he did not act dishonestly in keeping the money mistakenly paid to him. In his view there was 'nothing dishonest' about taking advantage of a bookmaker's error. The trial judge asked the jury to consider whether the defendant might have believed that: '[w]hen dealing with your bookmaker if he makes a mistake you can take the money and keep it and there is nothing dishonest about it'.²⁰ At the appeal it was argued that the trial judge had erred in asking the jury to consider whether D might have believed that he was legally entitled and honest as well. On the facts, the argument was over refined. D's evidence did not go so far as to indicate that he may have believed himself legally entitled to keep the money but not honest in doing so. Accordingly the direction worked no unfairness. But it was implicit in the judgment that a defendant who believed himself to be acting lawfully, albeit dishonestly, cannot be convicted. If D finds property in circumstances where the true owner may easily be found and resolves to keep it because he believes that finders are keepers he may be able to escape conviction on the ground that he believed that finders are legally entitled to keep. It would not matter that he also thought it dishonest to do so.²¹ If he had, on the other hand, no belief as to legal entitlement he may yet claim that he considered himself morally entitled to do so. If that is the case, the issue of dishonesty must still go to the jury which may be expected to condemn his morality.²²

The suggested analysis of *Feely* preserves the rule that the court must not restrict the jury's role as arbiters of community standards by restricting the meaning of dishonesty. And it avoids the criticism advanced by Professor Griew who argues that a belief in moral entitlement alone cannot defeat the imputation of dishonesty:

²⁰ *Gilks* [1972] 1 W.L.R. 1341, 1346.

²¹ Of course, the fact that D considered his conduct dishonest bears on the credibility of his claim that he believed the law allowed him so to act.

²² A related problem arises in cases where D appropriates property belonging to another in ignorance of the fact that he is legally entitled to do so. He may know his actions to be dishonest by ordinary moral standards. It was held by the Court of Appeal in *Turner* (No. 2) [1971] 1 W.L.R. 901; [1971] 2 All E.R. 441; 55 Crim. App.R. 336, that D might be held guilty of theft in these circumstances. The text of the Act seems to compel this conclusion but the case has been criticised on the ground that it would be incongruous to convict D of theft in circumstances where the law entitled him to appropriate. See Smith, 'Civil Law Concepts in the Criminal Law' [1972] *Cambridge Law Journal* 197, 215-7. See also *Meredith* [1973] *Criminal Law Review* where the problem was avoided by sleight of hand.

[i]t is difficult to see how such a claim could be allowed as a matter of law to go to the jury as excluding dishonesty. The issue being a subjective one, the jury would be bound to resolve it by deciding simply whether D actually believed he was morally entitled to appropriate the property and not whether he reasonably so believed. This would be in effect to make D his own legislator as to the scope of theft.²³

Subjective tests of D's state mind require only that the jury consider what were D's own intentions and beliefs. It is not open to impute the intentions or beliefs of the reasonable man to him. But once his state of mind has been ascertained, it remains possible for the jury to condemn him as dishonest by reference to common standards of honesty. Nothing in the Act, or in *Feely*, allows him to act as 'his own legislator'.²⁴

Professor J. C. Smith has advanced another argument against *Feely*. It is that 'different juries may well give different answers on facts which are indistinguishable'.²⁵ The argument that fairness to defendants requires uniformity lacks substance. Cases where inconsistency is likely are those where D has, in any case, sailed too close to the wind. But inconsistency may dilute the deterrent effect of the law on occasion. The facts of different cases might be distinguishable by reference to community standards but deterrent policy may require uniformity of outcome. Consider, for example, the provision dealing with joyriders in the Crimes (Theft) Act 1973. Section 73(14)(a)²⁶ provides that in any proceedings:

for stealing a motor car or an aircraft proof that the person charged took or in any manner used the motor car or aircraft without the consent of the owner or person in lawful possession thereof shall be conclusive evidence that the person charged intended to permanently deprive the owner of it . . .

The provision is peculiar to the Victorian Act. It is a remnant of the preceding law which sits ill in its new surroundings.²⁷ But the legislative policy to turn joyriders into thieves is plain. A fictional intent to deprive permanently is imputed to the joyrider, but there is no similar provision allowing the imputation of dishonesty to him. After *Feely* the issue must go to the jury and it is at least possible that cases where V has suffered no damage other than use of his car without permission for a limited time and without damage may result in an acquittal. Of course, it will rarely be a taking to which no moral obloquy can attach. But the finder of fact may well take the view that D was not *so* dishonest as to be guilty of theft.

²³ Griew, *op. cit.* para. 2-59.

²⁴ *Ibid.*

²⁵ [1973] *Criminal Law Review* 192, 193.

²⁶ The section has no counterpart in the Theft Act 1968 (Eng.). Section 12 of that Act creates the offence of taking a motor vehicle or other conveyance without authority. Section 73(14)(a) deals with attempts.

²⁷ Section 73(14) and s. 79 incorporate the provisions dealing with offences relating to motor cars and aircraft enacted in the Crimes (Amendment) Act 1972.

The requirement of moral culpability in theft distinguishes the offence from the bulk of those which make up the criminal law. If it is accepted that theft is a moral, as well as a legal, category; rule governed uniformity in decisionmaking becomes less attainable. But that is a consequence of making dishonesty an essential ingredient of the offence. It was an error, however attractive the prospect of attaching a stigmatising label to the defendant, to attempt to make theft into a deterrent workhorse for use against joyriders.

(b) DISHONESTY AND THE OFFENCES OF OBTAINING BY DECEPTION

The partial definition of dishonesty in section 73(2) and (3) is not expressly applied to these offences. But they are nevertheless prohibitions directed against the *dishonest* obtaining of property or financial advantage.²⁸ They do not simply penalize the use of deception with intent to gain²⁹ and the Act implies that D may, on occasion, obtain honestly albeit by deception.

Professor Smith and Professor Griew agree that D will not be guilty in cases where he uses deception in order to obtain that which he believes himself legally entitled to obtain.³⁰ Section 73(2)(a), while not formally applicable in this context, indicates the scope of this exception. Of the remaining provisions peculiar to theft, section 73(2)(b) and (c) provide no assistance in supplying content to the meaning of dishonesty in obtaining by deception. Section 73(3) is suggestive, but its relevance is not immediately apparent.

The dishonesty problem in these offences is a consequence of the apparent incongruity of the notion of obtaining by deception without dishonesty. But the incongruity is apparent only and arises from a tendency to ask whether a *deception* can ever be honest. The correct question is whether the *obtaining* was dishonest.

Cases where D was charged with obtaining by false pretences under the preceding law held that D might escape conviction if the false pretence was made to effect the transfer of property to which D believed himself legally entitled, or in order to force V to pay a debt.³¹ If the false pretence was not a means to secure a benefit of this kind, however, the fact of deception was sufficient to show an intent to defraud.³²

²⁸ Compare s. 85 of the Crimes (Theft) Act 1973 which penalises dishonest deception by officers of corporate bodies or unincorporated associations without requiring proof of benefit to D.

²⁹ Compare the offence of blackmail, s. 87. D may be guilty of this offence even in cases where he has a right to what is demanded and is aware of his right. See Smith, *op. cit.* paras 240-1. Here it is the making of an unwarranted demand which is the essence of the offence.

³⁰ Smith, *op. cit.* paras 240-5; Griew, *op. cit.* para. 627.

³¹ Williams (1836) 173 E.R. 158. Cf. Smith, *op. cit.* para. 245.

³² Carpenter (1911) 22 Cox C.C. 618, 624. See also the cases discussed in Howard, *op. cit.* 204-206. Brett & Waller, *Criminal Law—Cases and Text* (3rd ed. 1971) 415-6, argue that this is to make the requirement of an 'intent to defraud' in s. 187

The effect of *Feely* on the interpretation of dishonesty in the offences of obtaining by deception is uncertain. Professor Griew suggests that it is difficult 'to imagine cases in which a jury should be allowed to say that one who has obtained property by deception without a claim of right has not obtained it dishonestly'.³³ Professor Smith, writing before the decision in *Feely*, argued that an intent to make repayment would not negative dishonesty in the obtaining offences to any greater extent than it did under the preceding law. Where D deceives V and so obtains property, 'an intention to cause V to act to his detriment is enough, even if there is no intention to cause any ultimate economic loss'.³⁴ There is dishonesty if V is 'induced to risk his property when, if he had known the true circumstances, he may well not have done so'.³⁵ It has been argued that the risk principle lacks policy justification. For if D obtains V's umbrella by deception, intending to return it, he cannot be guilty though the property may be just as much at risk.³⁶ Only in the case of fungibles does the risk principle allow conviction. Moreover, Professor Smith's statement of the principle is ambiguous. Often D's deception will conceal the extent of the risk he intends to take with V's money and the extent of the risk of non repayment. But this is by no means necessarily true. The intended risk of financial detriment to V may be no different or it may be less than the pretended risk. Consider, for example, a case where X threatens to tell D's employer of D's homosexual proclivities unless D pays X a sum of money. D obtains a loan from his employer by telling him that he needs the money to cover a gambling debt and pays X. He makes arrangements with his employer for regular repayment from his wages. Here the intended risk of financial loss to the employer is certainly no greater than the pretended risk. In one sense, the employer has not been deceived about the risk at all. In another he has however. For his dislike of homosexuals would have induced him to avoid lending his money and so risking it at all, had he not been deceived. If the latter is the correct interpretation of the risk theory, it leads to the conclusion that D is dishonest. But it does so at the cost of abandoning an independent role for the concept of dishonesty. D is guilty simply because he deceived V and his deception was effective to induce V to risk his money by lending it. If the first interpretation of the risk theory is the correct one, the question of dishonesty remains open. D can advance in his defence the argument that he intended to repay and that the risk of non repayment was no greater than V had accepted in acting on the deception.

of the Crimes Act 1958 mere surplusage and that it is open to D to argue that there was no intent to defraud despite the false pretence.

³³ Griew, *op. cit.* paras 6-29.

³⁴ Smith, *op. cit.* para. 246.

³⁵ *Ibid.*

³⁶ See Elliott, 'Dishonesty Under the Theft Act' [1972] *Criminal Law Review* 625, 633-4. Cf. the formalistic criticism of Elliott's argument in Miers, 'Dishonesty, Deception and Dud Cheques' (1973) *Northern Ireland Law Quarterly* 177, 188.

The fact that D intends that V shall suffer no loss is far from being a conclusive answer to the charge of dishonesty. The answer will depend, in part, on a comparison to be made between D's need and the harm, not necessarily to his property or financial interests, suffered by V. This is clear enough in the law of theft. If D is short of his train fare home and takes from his employer's till, leaving an IOU promising payment on the following day, he may escape conviction on the ground that this was not a dishonest appropriation. The fact that he may have been specifically forbidden to borrow is not conclusive against him. Had he taken the money from a pensioner's purse his intent to repay would be far less likely to exculpate him however. In each case the appropriation is known to be against V's wishes. When D takes from the pensioner, however, the likelihood that V will be distressed outweighs any consideration based on D's need and his intention to repay. When he takes from his employer, the fact that no real harm was intended or likely, together with D's need, provides a reasonable basis for the judgment that he was not dishonest. There is no difference in principle in cases where D obtains by deception. Dishonesty is an extremely limiting concept. But it does allow of some accommodation between the interests of D and his victim. Current community standards determine whether D is dishonest at least in part by reference to the question whether contravention of V's wishes is a matter serious enough to warrant conviction for theft.

The factors bearing on the dishonesty issue are apparent in the unsatisfactory case of *Potger*,³⁷ which was decided before *Feely*, in 1971. D was a magazine salesman who obtained subscriptions by pretending that he was a student engaged in a points competition. He was convicted of obtaining and attempting to obtain property by deception. He appealed on the ground that the trial judge had not specifically directed the jury that dishonesty was an essential ingredient of the offence. So far as is known, the magazines were sold at a fair price and they are delivered to those who ordered them. The Court of Appeal held that dishonesty was a separate and necessary element of the offence and that the jury should normally be directed to consider the issue. In the present case, the 'standard direction' would have required the jury to be 'satisfied that the particular deception was made dishonestly in each case'.³⁸ The Court concluded that the jury, though not specifically directed on the point, must have been satisfied of D's dishonesty and accordingly upheld the conviction. Of course the deception was dishonest: the real question was whether D had *obtained* dishonestly. D's falsehoods induced his victims to subscribe, but the fact that they got their money's worth no doubt satisfied D's own conscience. It is not quite like the case of the bogus beggar instanced by the Criminal

³⁷ (1970) 55 Crim.App.R. 42. Cf. *Balcombe v. De Simoni* (1972) 46 A.L.J.R. 141.

³⁸ *Ibid.* 47.

Law Revision Committee.³⁹ It is more akin to cases falling under section 73(3) of the definition of dishonesty in theft: '[a] person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property'. In the such cases the issue of dishonesty, with its undertone in the present case of policing sharp sales practice, is appropriately one for the finder of fact.

The argument so far has sought to show that there is nothing unintelligible in the suggestion that D may not be dishonest even in cases where he has obtained by deception without belief that he is legally entitled to do so. The conclusion should follow that dishonesty is as much an issue for the jury in obtaining by deception as it is in theft. Unfortunately there is an express rejection of the argument in *McCall*,⁴⁰ where the Court of Appeal relied on *Carpenter*,⁴¹ which was decided in 1911. In *McCall*, D obtained a loan from V, who was elderly and gullible, by telling her that he must either pay a fine or go to gaol. The story was quite untrue and the money was spent on a car and a trip to Spain. Though D maintained that he had always intended to repay V, the evidence lent scant support to his testimony. Despite errors at his trial the Court upheld his conviction on the ground that he had, in effect, admitted dishonesty. '[H]e said that he had told lies in order to get the loan and he had also said that, having got the money, he used it for purposes other than those for which he had suggested to Miss Benbow that he needed it.'⁴² The fact that he intended to repay the loan was no answer to the charge of dishonesty and it was not open to a jury to hold that it was. As a matter of law he was dishonest.

What remains is the question whether *Feely*, decided after *McCall*, would require a different outcome if the case were to arise again.⁴³ In *Feely* the Court of Appeal avoided the issue. But the conclusion that *McCall*

³⁹ United Kingdom, *Criminal Law Revision Committee, Eighth Report, Theft and Related Offences* (1966) Cmnd 2977 para. 38.

⁴⁰ (1970) 55 Crim.App.R. 175. Cf. *Waterfall* [1969] 3 W.L.R. 947; [1969] 3 All E.R. 1048; [1970] 1 Q.B. 148; 53 Crim.App.R. 596. See also, *Halstead v. Patel* [1972] 1 W.L.R. 661. This was a cheque case in which D presented a cash cheque on his overdrawn account. In the circumstances, there was deception as the Divisional Court took the view that D had no more than a 'pious hope' of making repayment at some future date. D had no defence based on intention to repay. 'The element of dishonesty is satisfied on proof that he had no belief based on reasonable grounds that the money would be there when the cheque was presented' [1972] 1 W.L.R. 661, 666. This is to treat dishonesty as raising an issue of law rather than fact. It equates a finding of dishonesty with the fact of deception. Moreover the reference to 'reasonable grounds' vitiates the requirement that the deception be intentional, or at least reckless. *Halstead v. Patel* was mentioned in *Feely* with apparent approval. But it seems clear that the Court of Appeal misunderstood the import of the case. See Griew, *op. cit.* paras 2-29 n. 76. There is a similar misunderstanding of *Halstead v. Patel* in the report of the Victorian Chief Justice's Law Reform Committee, *Law of Theft*, para. 11. Little weight should be placed on the apparent endorsement of *Halstead v. Patel* in *Feely*.

⁴¹ (1911) 22 Cox C.C. 618.

⁴² (1970) 55 Crim.App.R. 181.

⁴³ Or would require, at least, an application of the proviso to s. 2(1) of the Criminal Appeal Act 1968 (Eng.) in order to save the conviction.

was impliedly overruled is nevertheless unavoidable. In theft dishonesty is an ordinary word in ordinary use which admits of no legalistic definition. There is no reason why it should change its spots when transplanted into the context of obtaining by deception. The argument from *Cozens v. Brutus*⁴⁴ is no less convincing here. There is an additional reason for holding that *Feely* must govern the interpretation of dishonesty in these offences. On any view, there is a substantial overlap between theft and obtaining property by deception. There is a similar overlapping of obtaining financial advantage by deception with both offences.⁴⁵ It would be an extraordinary state of affairs if the fortuitous choice of the offence to be charged against D were to determine whether the finder of fact might consider the issue of dishonesty.⁴⁶

Feely provides no charter for Robin Hoods⁴⁷ whether they appropriate or obtain by deception. All that is required is that the finder of fact consider D's own intentions and beliefs before considering whether what he intended made him dishonest by ordinary standards. Even if *McCall* had the resources and intention to repay the loan, it is highly unlikely that any jury would acquit him. For by any ordinary standards it is dishonest to cheat old ladies of their money by false stories calculated to enlist sympathy.

⁴⁴ [1973] A.C. 854.

⁴⁵ See n. 94.

⁴⁶ Smith, *op. cit.* para. 241.

⁴⁷ For the recent revival of academic interest in Robin Hood, see Royall, 'Mens Rea and Offences of Dishonesty' (1970) 4 *Journal of the Association of Law Teachers* 77, 80 and [1973] *Criminal Law Review* 192, 194.