

# TAKING POSSESSION: THE DEFINING ELEMENT OF THEFT?

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*[This article argues that the Theft Act 1968 (UK) c 60 and subsequent legislative developments in Australia have overlooked the principle of preventing public violence that was historically a justification for the common law offence of larceny. The article outlines the English Criminal Law Revision Committee's decision to amalgamate previously separate offences into one overarching theft offence in the Theft Act 1968 (UK) c 60. It then describes the historical development of the common law offence of larceny, and its basis in the protection of the possessory rights of victims. The author argues that the restriction of the term 'property belonging to another' to possession in the context of larceny provides a strong and principled boundary to the offence. The article then outlines four particular issues arising from the statutory expansion of the definition of theft, and concludes that retaining the distinction between offences such as theft and fraudulent conversion would be preferable to a single statutory offence.]*

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## I INTRODUCTION

In the *Theft Act 1968* (UK) c 60 ('*Theft Act*'), England and Wales replaced the common law offence of larceny<sup>1</sup> and a large number of separate statutory extensions of larceny with one compendious statutory offence of theft. To ensure that the new offence captured those statutory extensions, substantial changes

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<sup>1</sup> It had previously been codified in the *Larceny Act 1916*, 6 & 7 Geo 5, c 50.

were made to the definition of ‘stealing’ as used in larceny.<sup>2</sup> One such change was to the requirement that the stolen property be ‘property belonging to another’, that is, property in the possession of a person other than the accused immediately prior to the stealing.

Common law larceny protects the possessory rights of victims. Consequently, its application is limited to situations where the accused unlawfully takes property out of the possession of another. Circumstances where the accused unlawfully appropriates property of which they are already in possession fall outside the offence of larceny but are prohibited by a range of separate statutory enactments. These statutory additions either create offences in their own right or deem certain situations to fall within larceny. The *Theft Act* reform aimed to do away with this range of additional enactments and replace it with a general theft offence.<sup>3</sup> In order to achieve this economy, the *Theft Act* offence dispenses with possession as the basis of the offence by extending the definition of ‘belonging to another’ to also include any other proprietary rights of the victim.<sup>4</sup>

In Australia, New South Wales is the only jurisdiction that maintains a possession-only offence.<sup>5</sup> Queensland,<sup>6</sup> Western Australia<sup>7</sup> and Tasmania<sup>8</sup> have an offence of stealing, which includes fraudulent conversion, but they maintain a conceptual distinction between a taking<sup>9</sup> and a conversion<sup>10</sup> within the wording of their stealing offence. The Western Australian offence extends further than the Queensland and Tasmanian offences by including intangible property within the scope of the stealing offence. The remaining Australian jurisdictions — the Commonwealth, Victoria, the Australian Capital Territory, the Northern Territory and South Australia — have broadly framed theft offences based on the English *Theft Act* model that extend to all forms of non-consensual appropriation of both tangible and intangible property.<sup>11</sup>

<sup>2</sup> For the purposes of this article, ‘stealing’ is used as a general term to describe the crime that is legally defined as either larceny or theft. It is used when a general comment is being made about the gist of the crime without reference to its specific definitional form.

<sup>3</sup> See generally Criminal Law Revision Committee (‘CLRC’), House of Commons, *Eighth Report: Theft and Related Offences*, Cmnd 2977 (1966).

<sup>4</sup> See *Theft Act 1968* (UK) c 60, s 5(1). This also permits the offence to be broadened so as to include the stealing of intangible forms of property. For the purposes of this article it is assumed that theft is limited to tangible forms of property. For an argument as to why this should be the case, see Alex Steel, ‘Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property’ (2008) 30 *Sydney Law Review* 575.

<sup>5</sup> It does so in a non-codified form, relying entirely on common law precedent for the elements of the offence: see *Crimes Act 1900* (NSW) s 117.

<sup>6</sup> *Criminal Code Act 1899* (Qld) ss 390–1.

<sup>7</sup> *Criminal Code Act Compilation Act 1913* (WA) ss 370–1, 378.

<sup>8</sup> *Criminal Code Act 1924* (Tas) ss 226–7, 234.

<sup>9</sup> This involves taking and carrying away, that is, a physical removal of property: C R Williams, *Property Offences* (3<sup>rd</sup> ed, 1999) 22–6, 57–60. See, eg, *R v Johnston* [1973] Qd R 303, 304 (Hanger ACJ); *R v McDonald* [1992] 2 Qd R 634, 644–5 (Williams and Cooper JJ); *R v Davies* [1970] VR 27, 29 (Gowans J for Winneke CJ, Gowans and Newton JJ).

<sup>10</sup> This involves ‘some dealing with ... goods in a manner inconsistent with the rights of the true owner’: Williams, *Property Offences*, above n 9, 58. See, eg, *R v Hally* [1962] Qd R 214, 228 (Gibbs J); *R v Angus* [2000] QCA 29 (Unreported, McMurdo P, McPherson and Pincus JJA, 18 February 2000); *Rogers v Arnott* [1960] 2 QB 244.

<sup>11</sup> The theft offence in s 1(1) of the *Theft Act 1968* (UK) c 60 is reproduced essentially unchanged in s 72 of the *Crimes Act 1958* (Vic). A slightly modified version of the English theft offence is enacted in the *Criminal Code Act 1995* (Cth) sch 1 s 131.1 and the *Criminal Code 2002* (ACT)

This article examines the different approaches to ‘property belonging to another’ in larceny and theft. The article suggests that, despite the limitations of larceny, the restriction of the term ‘property belonging to another’ to circumstances where possession is unlawfully taken from the victim provides a strong and principled boundary to the offence. Although larceny is an offence based on property rights in their modern form, the original rationale of larceny was to protect against public violence. This rationale still underpins the requirement in larceny that there be an unlawful taking of possession. The article then suggests that there are good reasons, in principle, for maintaining the possession requirement in the modern theft offence. It is also suggested that there are benefits in maintaining separate, but simplified, offences that deal with situations where property is already in the possession of the accused. Such separation, it is argued, allows the offences to more accurately reflect the nature of the type of appropriation and the moral culpability involved in the different types of appropriation.

It is assumed in this article that theft is, in practice, restricted to tangible property. Elsewhere, I have argued that any extension of theft to include intangible property is less significant a change than it would seem, as there is doubt as to whether many forms of intangible property can be stolen and the remedial nature of some forms of intangible property rights have the effect of creating significant uncertainty about the scope of the offence.<sup>12</sup> Consequently, I argue that it is in fact better to restrict theft to tangible forms of property, with specialist offences for those categories of intangible property which require the protection of the criminal law.

Of course, it needs to be acknowledged that the Commonwealth, Victoria, ACT, NT and South Australia currently extend their theft offences to include intangible forms of property. However, even if arguments concerning the inaptness of the use of the theft offence to protect intangible property are unlikely to lead to reform in jurisdictions which have adopted the *Theft Act* model, it remains the case that four jurisdictions have, to date, declined to adopt that model,<sup>13</sup> and three of these jurisdictions restrict theft to tangible property.<sup>14</sup> Thus, it is important to determine whether there are grounds beyond historical accident that might justify retaining the requirement that stealing involve the taking of property from the possession of another.

## II FROM LARCENY TO THEFT

### A *The Common Law Approach*

The common law offence of larceny requires a number of highly articulated elements to be satisfied in order to obtain a conviction. First, the offence only

s 308: see Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code — Chapter 3: Theft, Fraud, Bribery and Related Offences — Final Report* (1995). More substantially modified forms of the *Theft Act*'s theft offence appear in s 134 of the *Criminal Law Consolidation Act 1935* (SA) and s 209 of the *Criminal Code Act* (NT).

<sup>12</sup> Steel, ‘Issues with the Use of the Theft Offence to Protect Intangible Property’, above n 4.

<sup>13</sup> These jurisdictions are NSW, Queensland, Tasmania and Western Australia.

<sup>14</sup> These jurisdictions are NSW, Queensland and Tasmania.

applies to tangible forms of moveable property.<sup>15</sup> Secondly, that property must belong to another — that is, be in the possession of another person,<sup>16</sup> although this possession need not be lawful.<sup>17</sup> Thirdly, the accused must, at least temporarily, take the property out of the other person's possession.<sup>18</sup> Fourthly, this taking must occur without the consent of the other person.<sup>19</sup> Fifthly, the thief must intend to permanently deprive the victim of the possession of the property.<sup>20</sup> Sixthly, the thief must act in a way that is fraudulent.<sup>21</sup>

For many years, larceny was the only general property offence, and legislative extension of the criminal law in this area drew on the conceptualisation of property rights and the classifications of their breach that the common law courts had developed in case law on larceny. From the 1700s onwards, a collection of statutory offences extended liability to areas which otherwise fell outside the requirement that the property taken must be property belonging to another. These statutory offences may be classified into three groups. The first set of offences ('fraudulent conversion offences') deal with situations where property is misappropriated by persons who initially gain possession of the property with the consent of the victim, pursuant to undertakings to return the property or deal with it in accordance with the victim's wishes — for example, misappropriations by bailees and agents.<sup>22</sup> A second set of offences ('embezzlement offences') deal with situations where an employee or other trusted agent received property, ostensibly on behalf of the victim, but appropriates the property for themselves.<sup>23</sup> The third major set of legislative extensions to larceny are the fraud offences.<sup>24</sup> These offences deal with situations where consent to the passing of possession is

<sup>15</sup> The offence does not apply to land or things attached to land: see, eg, *Billing v Pill* [1954] 1 QB 70, 74–5 (Lord Goddard CJ). It also does not apply to intangible forms of property such as debts: see, eg, *Croton v The Queen* (1967) 117 CLR 326, 331 (Barwick CJ).

<sup>16</sup> This means wild animals cannot be stolen: see, eg, *R v Townley* (1871) LR 1 CCR 315, 316–17 (Bovill CJ). Moreover, owners can be guilty of stealing from bailees: see, eg, *Rose v Matt* [1951] 1 KB 810, 814 (Lord Goddard CJ).

<sup>17</sup> See, eg, *Anic v The Queen* (1993) 61 SASR 223, 231–2 (Bollen J), which concerned the stealing of illegal drugs.

<sup>18</sup> See, eg, *R v Cherry* (1803) 2 East PC 556; *R v Bloxham* (1944) 29 Cr App R 37; *R v Davies* [1970] VR 27, 29 (Gowans J for Winneke CJ, Gowans and Newton JJ).

<sup>19</sup> See, eg, *Kennison v Daire* (1986) 160 CLR 129.

<sup>20</sup> See, eg, *R v Holloway* (1848) 1 Den 370; 169 ER 285.

<sup>21</sup> See, eg, *R v Cabbage* (1815) Russ & Ry 292; 168 ER 809; *R v Weatherstone* (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Street CJ, Hunt and Finlay JJ, 20 August 1987). If claim of right is raised, this must also be disproved by the prosecution: see, eg, *R v Fuge* (2001) 123 A Crim R 310, 315 (Wood CJ at CL).

<sup>22</sup> See, eg, *Crimes Act 1900* (NSW) s 125. For examples of fraudulent conversion, see *R v Dunbar* [1963] NZLR 253 (listing a borrowed boat in a schedule of chattel securities to secure a bank loan); *R v Russell* [1977] 2 NZLR 20 (painting a hired air compressor a different colour); *R v Wakeman* (1913) 8 Cr App R 18 (refusing to return a loaned bicycle).

<sup>23</sup> See, eg, *Crimes Act 1900* (NSW) s 157. For examples of embezzlement, see *R v Wright* (1858) 7 Cox CC 413 (bank tellers who pocket deposits instead of placing them in the till); *R v Davenport* [1954] 1 All ER 602 (employees who pay the cheques of their employers' creditors into their own bank accounts); *R v Campbell* [2001] NSWCCA 162 (Unreported, Dowd J and Smart AJ, 9 April 2001) (employees who misappropriate the proceeds of cheques cashed on behalf of employers). See generally *R v Bazeley* (1799) 2 Leach 835; 168 ER 517.

<sup>24</sup> In this article, the term 'fraud offences' is used to describe such offences generally, and 'false pretences' to describe the offences enacted to complement the common law offence of larceny.

induced by false representations by the accused.<sup>25</sup> In addition to general fraud offences, specific offences were also created to cover fraudulent trustees, factors and agents.<sup>26</sup>

### B *The Approach of the Theft Act*

When the English Criminal Law Revision Committee ('CLRC') recommended wholesale reform of larceny (and its statutory extensions and additions) in the form that became the *Theft Act*, it attempted as much as possible to reduce the number of offences to two — a theft offence and a fraud offence — with both being based on the protection of property interests. In so doing, they drafted an offence of theft which was broad enough to include the statutory extensions to larcenable property as well as fraudulent conversion, embezzlement and fraudulent trustee offences. The resulting offence in s 1(1) of the *Theft Act* is worded in a very general manner:

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.

Subsequent sections further define many of these terms, with the effect of often broadening them beyond their common law meanings. For example, 'property' is expanded beyond tangible and moveable property to cover most forms of property, including choses in action, other than land.<sup>27</sup> The concept of 'belonging to another' is extended to include exercising any form of control over a property interest.<sup>28</sup> Much of the litigation on the *Theft Act* has centred on attempts to limit the offence by finding restrictive boundaries in the meaning of 'appropriates', 'intention to permanently deprive' and 'dishonestly'. Nevertheless, English courts have consistently interpreted these elements broadly.

Attempts to restrict appropriation to an appropriation without consent,<sup>29</sup> an appropriation of all or substantially all of the property rights of the victim,<sup>30</sup> or an act that 'usurps' the rights of the victim<sup>31</sup> have all been rejected by the House of Lords.<sup>32</sup> Following the decision in *R v Hinks*,<sup>33</sup> appropriation — for the purposes of theft — is 'a neutral word comprehending "any assumption by a

<sup>25</sup> In the modern criminal law, fraud offences (as a category) are now better seen as conceptually separate from larceny offences. This is because the newer forms of criminal fraud no longer retain any necessary relationship to possession or even property: see, eg, *Crimes Act 1900* (NSW) s 178BA; *Criminal Code Act 1899* (Qld) s 408C; *Fraud Act 2006* (UK) c 35 ('*Fraud Act*'). However, in their original form they were seen as extensions to larceny, distinct only in the manner in which the property was obtained. Such forms of fraud are still in force in NSW: see, eg, *Crimes Act 1900* (NSW) s 179.

<sup>26</sup> See *Crimes Act 1900* (NSW) ss 164–78.

<sup>27</sup> *Theft Act 1968* (UK) c 60, s 4.

<sup>28</sup> *Theft Act 1968* (UK) c 60, s 5.

<sup>29</sup> *Lawrence v Metropolitan Police Commissioner* [1972] AC 626, 632 (Viscount Dilhorne).

<sup>30</sup> *R v Morris* [1984] AC 320, 332 (Lord Roskill).

<sup>31</sup> *DPP v Gomez* [1993] AC 442, 495 (Lord Lowry).

<sup>32</sup> For Australian commentary on the problems of an overly broad notion of appropriation, see C R Williams, 'Reining in the Concept of Appropriation in Theft' (2003) 29 *Monash University Law Review* 261.

<sup>33</sup> [2001] 2 AC 241.

person of the rights of an owner”<sup>34</sup>. Specifically, appropriation includes transfers of property given with full consent. The *actus reus* of theft may therefore be satisfied even where a person voluntarily passes property rights to another.

The requirement that there be an ‘intention to permanently deprive’ has also proven to be less restrictive than it might appear. The purpose of this element in larceny is to exclude from the offence circumstances that merely constitute a wrongful borrowing of property, which at most leads to tortious liability. This is achieved in larceny by interpreting the element to require that the perpetrator ‘take the entire dominion over the property’,<sup>35</sup> with limited exceptions to cover situations where property is returned with all of its value exhausted,<sup>36</sup> the nature of the property returned has changed,<sup>37</sup> or where the taker imposes conditions that must be satisfied before the property will be returned.<sup>38</sup> Despite the restatement of the common law element in the theft offence and the lack of any indication from the CLRC that a change to the definition of permanent deprivation in larceny was intended, a partial definition of what the term meant was inserted by Parliament in s 6 of the *Theft Act*.<sup>39</sup>

The wording of the section has been criticised as unclear, and there have been differing judicial approaches to its meaning. For some time, attempts were made to read the section as if it did nothing more than restate the three common law exceptions to the ‘taking of dominion’ requirement.<sup>40</sup> However, the wording of the section appears to be broader, and this narrow reading has been rejected. The current English interpretation appears to be that an intention to permanently deprive may exist if it is proven that there is an intention of the accused to treat the thing as their own to dispose of, regardless of another person’s rights in the property.<sup>41</sup> Exactly how minimal this requirement might be is unexplored to date, but this interpretation does suggest that all that may be required is a degree of interference with property rights irrespective of another’s rights, rather than a wholesale rejection of the victim’s rights.<sup>42</sup>

The extension of theft to include the appropriation of forms of intangible property also undermines the requirement that an appropriation be intended to be permanent, as intangible forms of property may not be capable of being borrowed. In *R v Preddy*, the House of Lords held that choses in action represented

<sup>34</sup> Ibid 251 (Lord Steyn).

<sup>35</sup> *R v Holloway* (1848) 1 Den 370, 375; 169 ER 285, 287 (Parke B).

<sup>36</sup> See, eg, *R v Beecham* (1851) 5 Cox CC 181 (return of an expired ticket).

<sup>37</sup> See, eg, *R v Smalls* (1957) 74 WN (NSW) 150 (cutting railway sleepers in half).

<sup>38</sup> See, eg, *Lowe v Hooker* [1987] Tas R 153 (an attempt to get a purchase refund on stolen goods).

<sup>39</sup> For the legislative history of s 6, see J R Spencer, ‘The Metamorphosis of Section 6 of the *Theft Act*’ [1977] *Criminal Law Review* 653; John Smith, ‘The Sad Fate of the *Theft Act 1968*’ in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999) 97.

<sup>40</sup> See Alex Steel, ‘Permanent Borrowing and Lending: A New View of Section 6 *Theft Act 1968*’ (2008) 17 *Nottingham Law Journal* 3.

<sup>41</sup> *R v Fernandes* [1996] 1 Cr App R 175, 188 (Auld LJ for Auld LJ, Mantell and Sachs JJ). For a critique of this approach and an alternative interpretation, see *ibid*.

<sup>42</sup> For a detailed examination of how the section has been interpreted and alternatives, see Steel, ‘Permanent Borrowing and Lending’, above n 40.

by credit in bank accounts never pass from one person to another.<sup>43</sup> Instead, in any such transfer of intangible property, the chose in action held by the transferor is destroyed. An identical but separate and new chose in action is then created in favour of the transferee. Even if an accused intends in a general sense merely to ‘borrow’ the money (for example, through a temporary transfer of funds from one bank account to another with the intention to return it the next day), the intention to transfer the debt results in its destruction, and that intention can thus be construed as an intention to permanently deprive through destruction of the victim’s property. It may be possible that the reasoning of the House of Lords applies generally to all choses in action<sup>44</sup> which, for theft, may have the effect of treating all forms of intangible property as fungible.<sup>45</sup> At the very least, the decision means that any misuse of electronic funds amounts to a permanent destruction of property rights.

The breadth of the elements of theft means that it is very easy for a prosecution to establish appropriation and an intention to permanently deprive. Thus, in practical terms, a determination of whether a person’s actions constitute an act of theft depends largely on whether the person is seen as dishonest.<sup>46</sup> Dishonesty has thus become the key inculcating element of theft. Indeed, the situation is so extreme that the Law Commission of England and Wales has noted: ‘When a person selects a newspaper to buy at a newsagent’s, he or she has committed all the elements of theft save for dishonesty.’<sup>47</sup> In this sense, the Commission commented, dishonesty ‘does all the work’.<sup>48</sup>

### C *The CLRC’s Reasons for Replacing Larceny with Theft*

In hindsight, much of the difficulty in providing clear boundaries for the scope of theft appears to have been caused by the eagerness of the CLRC to collapse a

<sup>43</sup> [1996] AC 815.

<sup>44</sup> See *ibid* 834 (Lord Goff), 841 (Lord Jauncey), where the reasoning of their Lordships appears to apply more broadly than just to transfers of bank credits. Greg Tolhurst suggests that all transfers of property involve the extinguishment/creation of property rights but that in many cases there may be an additional non-property right that passes in an assignment, such as a right to contractual performance: see Greg Tolhurst, *The Assignment of Contractual Rights* (2006) 36–7.

<sup>45</sup> If correct, this might also be applicable to transfers of property rights applying to tangible property. However, the insistence on a taking of possession argued for in this article would allow theft of tangible property to relate to transfers of the ‘thing’ and not the associated property rights. For cases in which such an analysis was adopted, see, eg *R v Petronius-Kuff* [1983] 3 NSWLR 178, 181 (Street CJ); *Byrnes v Burgess* [1999] NSWSC 419 (Unreported, Adams J, 5 May 1999) [3]; *R v Arnold* (1883) 4 LR (NSW) 347, 352 (Martin CJ).

<sup>46</sup> In fact, a majority of the House of Lords considers this to be desirable. In *R v Hinks* [2001] 2 AC 241, 252–3, Lord Steyn stated:

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. ... 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.

<sup>47</sup> Law Commission, England and Wales, *Legislating the Criminal Code — Fraud and Deception: A Consultation Paper*, Consultation Paper No 155 (1999) 31.

<sup>48</sup> *Ibid* 30.

range of offences into a single, overarching theft offence. This compression of offences — particularly the collapse of embezzlement and fraudulent conversion into theft — resulted in the need to expand the meaning of ‘belonging to another’, and consequently required the use of the broad notion of appropriation rather than a taking. Embezzlement and fraudulent conversion offences involve situations where the tangible property is already in the possession of the accused and thus a taking of possession cannot be an element of the offence. Fraudulent conversion offences are further extended to include money and other valuable securities. The CLRC declined to consider the adequacy of maintaining an embezzlement offence because they felt that ‘the distinction between embezzlement and larceny ... is clearly one of the technicalities which ought to be abolished.’<sup>49</sup> They also noted that fraudulent conversion was wide enough to cover the offences of larceny by a bailee or part owner and embezzlement.<sup>50</sup> On the basis of the CLRC’s reasons, it would have been possible to restate the law as an offence of larceny and an expanded offence of fraudulent conversion. However, the CLRC declined to do this because they considered that:

The important element of them all is undoubtedly the dishonest appropriation of another person’s property — the treating of ‘tuum’ as ‘meum’; and we think it not only logical, but right in principle, to make this the central element of the offence. In doing so the law would concentrate on what the accused dishonestly achieved or attempted to achieve and not on the means — taking or otherwise — which he used in order to do so.<sup>51</sup>

The CLRC’s approach was to expand fraudulent conversion to such an extent that it incorporated larceny, thereby creating a single offence of theft. As noted above, this required a very broad definition of ‘property belonging to another’.

In this article, an attempt is made to highlight the uncertainty of the current definition of ‘belonging to another’ in the *Theft Act*, and to consider whether the restriction of ‘taking of possession’ in larceny has any underlying practical or theoretical benefits. In this context, the article argues that a return to a form of theft that is restricted to a ‘taking of possession’, with separate offences for fraudulent conversion, embezzlement and fraud, could provide a far greater degree of certainty in this area of law without any practical drawbacks.

### III MANIFEST CRIMINALITY AND POSSESSORIAL IMMUNITY

In order to understand the reasons for the ‘taking of possession’ requirement in larceny, and the impetus for the change towards the broader notion of ‘appropriation’ in the *Theft Act*, a historical perspective is needed. In their earliest forms, the offences of larceny, robbery<sup>52</sup> and burglary<sup>53</sup> were primarily aimed at

<sup>49</sup> CLRC, above n 3, 16–17.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* 17–18.

<sup>52</sup> For discussion of the elements of common law robbery, see, eg, *R v Gnosil* (1824) 1 Car & P 304; 171 ER 1206; *Smith v Desmond* [1965] AC 960; J W Cecil Turner, *Russell on Crime* (12<sup>th</sup> ed, 1964) vol 2, 851–67; Williams, *Property Offences*, above n 9, 192–202.

<sup>53</sup> For discussion of the elements of common law burglary, see, eg, Turner, above n 52, vol 2, ch 45; Williams, *Property Offences*, above n 9, 214–26.

protecting public safety.<sup>54</sup> This focus has long been lost as an aspect of the legal definition of these offences, but it clearly remains part of the public's understanding of the wrongfulness of robbery and burglary. The history of larceny also reveals that notions of public safety are fundamental to the definition of the offence, yet were overlooked in the drafting of the *Theft Act*.

*A Unnerving Acts, Manifest Criminality and Possessorial Immunity*

In an influential study of the history of larceny, George Fletcher has argued that larceny in its original English form prohibited two forms of socially 'unnerving' acts: the taking of property by stealth and the taking of property out of the physical possession of another.<sup>55</sup> In both instances, the aim was not to protect an individual owner's property rights, but instead to avoid the possibility of violence that could arise from such activities.

As Michael Tigar has pointed out, ownership in pre-mercantilist societies was not a concept that was of significant concern to the majority of the population. Instead, the right to use items of shared community property was paramount:

Neither early Roman law nor English feudal and manorial law placed emphasis upon property as we understand that term. Neither society based its social relations upon commerce, and neither displayed a highly developed sense of the institution of property as the exclusive right to use and dispose of a thing. One's lawful possession of a beast, a plow, or a store of feed was not regarded as proprietary in the sense bourgeois law makes us familiar with; in feudal England, for example, possessing these things was an incident of a complex set of social relations based upon the reciprocal duties and obligations inherent in the concepts of fealty and vassalage. The rules against stealing were designed to interdict and punish conduct that risked disturbing public order by interfering with a right more appreciated than the right to 'own' something — the right to possess and 'use' it.<sup>56</sup>

Larceny was thus primarily a public order offence intended to prohibit acts that caused disquiet to the social order — what Fletcher describes as a socially 'unnerving and disturbing' act.<sup>57</sup> This was the main concern of the authorities, as demonstrated by the fact that the royal courts would only entertain a writ for larceny if an allegation of violence was made in addition to the taking of property.<sup>58</sup> Any other form of property interference was not a matter for the

<sup>54</sup> George P Fletcher, *Rethinking Criminal Law* (1978) 31.

<sup>55</sup> Regardless of whether Fletcher's analysis can be supported historically, the idea of manifest criminality is a useful heuristic device with which to analyse the law. For alternative interpretations based on the development of a market economy, see Jerome Hall, *Theft, Law and Society* (2<sup>nd</sup> ed, 1952). For a class-based protection of property interests, see Michael E Tigar, 'The Right of Property and the Law of Theft' (1984) 62 *Texas Law Review* 1443. For a critique of Fletcher's thesis, see Lloyd L Weinreb, 'Manifest Criminality, Criminal Intent, and the "Metamorphosis of Larceny"' (1980) 90 *Yale Law Journal* 294. For a response, see George P Fletcher, 'Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb' (1980) 90 *Yale Law Journal* 319.

<sup>56</sup> Tigar, above n 55, 1448 (citations omitted).

<sup>57</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 232–3.

<sup>58</sup> Following the Norman conquest, access to the jurisdiction of the *curia regis* required an allegation that the taking had been 'vi et armis': James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (1913) 37–8. The civil action of trespass emerged at a later date

courts, and the later development of trespass as a civil action emerged as an alternative to a plea of larceny where no violence was alleged.<sup>59</sup>

Since the idea of violence was a defining factor in larceny — either as a violent taking of possession or as the possibility of violent reaction by victims or bystanders — it was possible for the early English courts to base a conviction largely on the fact that the accused looked and behaved like a thief (that is, the accused was manifestly a thief) with little further explanation.<sup>60</sup> Such an approach formed the basis of an underlying theory of crime, which Fletcher calls the principle of ‘manifest criminality’. Manifest criminality describes crimes where the prohibited act can be recognised as a crime by a neutral third party observer without special knowledge of the offender’s intention.<sup>61</sup> Fletcher considers the requirement that the act be manifestly criminal as the underlying justification for the doctrine that no larceny was committed if a person managed to escape the scene of the crime and was only later found with property that seemed unlikely to be their own, or where the misdeed involved the appropriation of property of which the person had previously gained lawful possession. No larceny was seen to have occurred in either of these two scenarios because there was no manifestly violent (or potentially violent) act which could be seen by third parties.<sup>62</sup>

In such circumstances, the principle of liability on the basis of manifest criminality was defeated by the competing principle of possessorial immunity. Possessorial immunity meant that a person who was in possession of property was considered by the law to be the rightful possessor<sup>63</sup> of that property. The onus of disproving this assumption rested with any competing claimants. It is not hard to imagine that in a largely illiterate society, physical control of property rather than documentary evidence of title was a far more practical method of determining property disputes.<sup>64</sup> Indeed, possession came to be seen as the basis of civil personal property rights.<sup>65</sup> Operation of this principle meant that convic-

as an alternative to an appeal of larceny: at 48–9. See also *Carrier’s Case* (1473) Y B Pasch 13, Edw IV, f 9, pl 5; *R v Meeres* (1794) 1 Show KB 50; 89 ER 441.

<sup>59</sup> The appeal of felony for larceny is generally considered to be the precursor to the civil writ of trespass: see, eg, Sir James Fitzjames Stephens, *A History of the Criminal Law of England* (1883) vol 3, 132–4; Theodore F T Plucknett, *A Concise History of the Common Law* (5<sup>th</sup> ed, 1956) 369.

<sup>60</sup> See George P Fletcher, ‘The Metamorphosis of Larceny’ (1976) 89 *Harvard Law Review* 469, 473, where Fletcher states: ‘The premise of the traditional approach to larceny was that it was possible to perceive thievery directly as an event in the world and that the courts should rely on this unanalyzed perception in framing the law of theft’. See also Stephens, above n 59, vol 3, 129, who notes that a person was presumptively a thief if they travelled through a wood without shouting or blowing a horn.

<sup>61</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 115–16. Fletcher argues that such crimes are rare in modern criminal law but sees the original form of common law larceny as the paradigmatic form of such crimes: at 60–1.

<sup>62</sup> *Ibid* 82–3.

<sup>63</sup> At common law, ownership was an unknown term. Possession was the highest form of property right a citizen could have, with such possessory rights being seen in later times to be divided into lawful and unlawful possession: see generally Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (1888).

<sup>64</sup> See, eg, Michael E Tigar and Madeleine R Levy, *Law and the Rise of Capitalism* (1<sup>st</sup> ed, 1977) 66–7.

<sup>65</sup> Pollock and Wright, above n 63.

tion was highly unlikely if a person had not been observed taking the property from another, if indeed any charge was available.

Possessorial immunity can be seen to have developed from feudal forms of property holding, where common property predominated and the right to quiet possession was the key property right.<sup>66</sup> Fletcher argues that the principle of possessorial immunity was a way of distinguishing private and public harms:

Possessorial immunity presumably emerged in Western jurisprudence as an institution that facilitated privately structured understandings about the management of money, tools, animals and other chattels. If one of these privately ordered relationships miscarried in a dishonest misappropriation, the harm was apparently felt to be private rather than public.<sup>67</sup>

As such, relief was sought through the developing civil writs of detinue or trover, rather than in the criminal courts.<sup>68</sup> The criminal law's role was to protect the King's peace, not to regulate private disputes. Possessorial immunity acted as a significant barrier to the reach of the criminal law into private lives.

The interaction between the two principles of manifest criminality and possessorial immunity is important. Manifest criminality constitutes an expression of shared community fears, but it criminalises not only behaviour which does not appear to be innocent on its face (including clearly unlawful acts), but also behaviour that appears to be ambiguous. What amounts to a punishable act of manifest criminality is determined by the application of rules — for larceny, this 'rule' was the principle of possessorial immunity. Thus

[i]t is true that the common law of larceny was grounded in the principle of manifest criminality and the theory of crime as an unnerving event. Yet ... larceny required ... the 'breaking' of possession as a condition of liability. These rules mediated between the theory of liability and the day-to-day decisions of the courts. The courts did not appeal directly to their sense of who looked like a thief; rather they sought to interpret rules that, in turn, were inspired by a shared image of thieving.<sup>69</sup>

#### B *The Metamorphosis of Larceny from Manifest Criminality to Subjective Criminality*

Fletcher then argues that the success of the writings of the rationalist and instrumentalist thinkers of the late 18<sup>th</sup> century — notably Cesare Beccaria and Jeremy Bentham — moved the understanding of criminal law towards a set of generalised principles. Their reconceptualisation of criminal law was to insist that criminal penalties apply only to interference with identified social interests

<sup>66</sup> Tigar, above n 55, 1444, 1446–8, 1452–6; Tigar and Levy, above n 64, 80–96.

<sup>67</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 62.

<sup>68</sup> Fletcher speculates that 'it may be that the institution was well suited for a form of commercial life in which relationships with strangers were seen as private matters, subject to autonomous regulation by contract and therefore properly exempt from the jurisdiction of the criminal courts': *ibid* 65.

<sup>69</sup> *Ibid* 145.

worthy of protection, rather than merely prohibited acts.<sup>70</sup> The interest that larceny was said to protect was that of property:

The focus on the interests protected by the criminal law led to the conceptualization of larceny as a crime against property. The criminal, it turned out, was rational like the rest of us; he sought wealth and would steal so long as the benefit of theft outweighed the cost of prospective punishment.<sup>71</sup>

This, Fletcher argues, constituted an important shift in the basis of larceny. Previously, larceny was founded upon the socially shared sense of unease caused by manifestly criminal actions, whereas now the basis for the offence is interference with another's property rights. This change was not achieved in a single moment of judicial or legislative revolution. According to Fletcher, this change can, however, be demonstrated by an analysis of the changes in reasoning in a number of key decisions on the limits of larceny. With the diminishing insistence on a manifestly criminal action, the gravamen of the offence moved to the intent of the accused — that is, to an alternative basis for criminality, which Fletcher labels 'subjective criminality'.<sup>72</sup>

Subjective criminality describes crimes where the act itself is less important than the intention of the actor to violate a legally protected interest.<sup>73</sup> As part of the metamorphosis of larceny in cases such as *R v Pear*<sup>74</sup> (a case dealing with deception in the supposed hiring of a horse) and *R v Thurborn*<sup>75</sup> (a case dealing with the pocketing of money found on the road), proof of a pre-existing intent trumped the principle of possessorial immunity.<sup>76</sup>

The breakdown of possessorial immunity and the rise of a subjective analysis of crimes has also impacted upon the scope of criminal law generally. Under both manifest criminality and subjective criminality, the private is beyond the scope of the criminal law, and

<sup>70</sup> Oddly, given the importance of this theoretical realignment to his thesis, Fletcher does not devote much space to a discussion or justification of this part of the argument.

<sup>71</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 101 (citations omitted).

<sup>72</sup> Inchoate offences, such as attempts and conspiracies, are strongly tied to this principle: *ibid* 166–74.

<sup>73</sup> This does not mean that intent did not play an important part in the offence of larceny prior to its metamorphosis. Intent has always been a central element. The manifestly criminal nature of the action, however, simply meant that the requisite intent was assumed. Thus, issues of intent were only raised as a defence to exculpate what otherwise appeared to be a criminal action: *ibid* 85–6, 117. See also Fletcher, 'The Metamorphosis of Larceny', above n 60, 476 (citations omitted), where he states:

Because the required act provided presumptive evidence of intent, the issue was seldom, if ever, litigated. If the issue of intent was called into question, it was because appearances were deceptive. Someone might have looked like a thief without having been one in fact. Like the early use of the fault concept in torts, the issue of non-intent functioned as an excuse that could defeat the normal inference from appearances.

A third principle, the principle of harmful consequences, provides a basis for criminal liability where the harm caused by the act is such that liability arises without the need to establish either a firm intent to do the harm or a particular method by which it was caused. For Fletcher, murder is the prime example of this type of crime: *ibid* 235.

<sup>74</sup> (1779) 1 Leach 212; 168 ER 208.

<sup>75</sup> (1848) 1 Den 387; 169 ER 293.

<sup>76</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 120.

the 'purely private' in the case of manifest criminality encompasses all routine, unthreatening conduct; in the theory of subjective criminality, the realm of the private is reduced to the world of fantasy, belief and other purely subjective experience; as soon as thoughts are translated into action, they come within the purview of the state's authority.<sup>77</sup>

Under a subjective approach, however, the actions of the accused merely constitute evidence of the firmness of their intent. Since the acts of the accused are merely evidentiary and the offence is not founded on them, their actions can be equivocal or ineffective, allowing the scope of the criminal law to stretch back to inchoate actions.<sup>78</sup> The long-term result of such a shift is a significant expansion of the scope of the criminal law. The effect of this shift on property-related offences is that it becomes more difficult to see any breach of another's property rights as non-criminal in nature, unless positively virtuous or mistaken states of mind accompany the breach.

### C *The Introduction of Crimes Based on Breach of Trust*

Along with judicial attempts to extend the scope of larceny beyond manifestly criminal acts, Fletcher sees the introduction of the statutory offences of embezzlement and false pretences<sup>79</sup> as evidence of the beginnings of this new approach of subjective criminality. In these situations, the behaviour of the accused appears to bystanders to be routine private actions that can only be characterised as criminal once special knowledge of circumstances that inform the intent of the accused are known.<sup>80</sup>

Relying on a strict interpretation of the principle of manifest criminality combined with the doctrine of possessorial immunity, these forms of actions cannot be socially unnerving public wrongs because there is no clear external act that is manifestly criminal. It seems, however, that breaches of some specific private relationships of trust — such as an employer–employee relationship, or the entrusting of goods to a courier — were sufficiently unnerving in a general sense for Parliament to overcome the reluctance to criminalise acts that were not manifestly criminal.

In their original form, Fletcher argues that false pretences<sup>81</sup> and embezzlement offences<sup>82</sup> were thus seen as a breach of trust,<sup>83</sup> entirely different to the public

<sup>77</sup> Ibid 121.

<sup>78</sup> Ibid 99, 233.

<sup>79</sup> For an account of the introduction of these statutes, see Hall, above n 55, ch 2.

<sup>80</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 122–4.

<sup>81</sup> Fletcher admits that the offence of false pretences does not fit neatly into his story of the shift from manifest to subjective criminality. Even in its most restrictive form (a demonstrable lie about an existing fact), such a lie would not be manifest to a bystander. In fact, Fletcher describes lies as to existing facts as examples of 'external criminality', but not 'manifest criminality', because they can only be demonstrated to be lies after further enquiry: *ibid* 124.

<sup>82</sup> Fletcher draws on German embezzlement law for his argument, suggesting that embezzlement has never really been seen by common lawyers as based on a breach of trust because the emphasis has focused on the harm caused, not the nature of the action. By concentrating on the harm, Fletcher argues that it was possible to see embezzlement as being merely a variant of larceny because both protect property interests: *ibid* 123–4.

<sup>83</sup> *Ibid* 34–5.

crime of larceny which prevented acts disturbing to the general public.<sup>84</sup> Following the metamorphosis of larceny from protecting the peace to protecting property, and from manifest criminality to subjective criminality, it became possible for all three offences to be seen as only protecting property interests; thus, all three offences could be amalgamated in the *Theft Act*.

Even though he argues that the key impetus of change in the law was economic development,<sup>85</sup> Jerome Hall agrees that embezzlement is a crime based on a breach of trust. He points out that violation of public trust is one of the oldest criminal concepts, but that its extension to the prohibition on ‘violation of private financial trust’ only dates from the 18<sup>th</sup> century.<sup>86</sup>

Both Hall and Fletcher note that the English were disinclined to expand the breach of trust offences, instead stretching the notion of possession to allow larceny to cover the actions of servants and employees. When it became clear that the courts were not willing to allow possession to be broadened to cover the misappropriation of property received by employees from third parties, statutory offences of embezzlement were introduced to fill the gap.<sup>87</sup> Nevertheless, private embezzlement offences were never really accepted as a separate class of offences and they were eventually rolled into theft in the *Theft Act*.

When situations of property being consensually transferred as a result of fraud were first recognised as prohibited under the criminal law, they too were incorporated into an expanded form of larceny. In *R v Pear*, the Court held that if a person was induced to hand over property by a false pretence that the accused was merely borrowing or hiring it, then it was possible to convict the accused of the theft of the title to the property.<sup>88</sup> The fiction inherent in this reasoning has long been criticised.<sup>89</sup>

Even when false pretences was recognised as a separate and general statutory offence,<sup>90</sup> it was still interpreted by the courts as a variant on larceny, with the courts implying larceny-based restrictions into the offence.<sup>91</sup> As a result of these strong interpretative links to larceny, it was possible for the CLRC to consider collapsing fraud into the broad theft offence.<sup>92</sup> Despite the decision to maintain

<sup>84</sup> Ibid.

<sup>85</sup> Fletcher considers this account adrift on the ‘simplistic shoals of historic determinism’: *ibid* 59–60. See also 68–70. Jerome Hall’s account is preferred by Tigar and Weinreb: see Tigar, above n 55, 1444, 1452; Weinreb, above n 55, 302. The argument developed in this article does not require a choice between the accounts because the historic development of larceny is merely a preliminary basis for development of a theoretical position.

<sup>86</sup> Hall, above n 55, 36–40.

<sup>87</sup> *Ibid* 39; Fletcher, *Rethinking Criminal Law*, above n 54, 23, 44–9.

<sup>88</sup> (1779) 1 Leach 212; 168 ER 208.

<sup>89</sup> See, eg, Graham Ferris, ‘The Origins of “Larceny by a Trick” and “Constructive Possession”’ [1998] *Criminal Law Review* 175; Joseph H Beale Jr, ‘The Borderland of Larceny’ (1892) 6 *Harvard Law Review* 244; Turner, above n 52, vol 2, 921–6, 931, 934, 941–2.

<sup>90</sup> In *Young v The King* (1789) 3 TR 98, 102–3; 100 ER 475, 478 (Lord Kenyon CJ), the King’s Bench reinterpreted the Statute of 30 Geo II to amount to a general false pretences offence. This widened the offence from a specific prohibition on the use of false weights: see Hall, above n 55, 45–52.

<sup>91</sup> *R v Kilham* (1870) LR 1 CCR 261, 263 (Bovill CJ for Bovill CJ, Willes, Byles and Hannen JJ and Cleasby B).

<sup>92</sup> See David Ormerod, *Smith and Hogan Criminal Law* (11<sup>th</sup> ed, 2005) 651–8; CLRC, above n 3, 20. See, eg, *DPP v Gomez* [1993] AC 442.

separate fraud offences,<sup>93</sup> the breadth of the theft offence has meant that most situations of fraud can be prosecuted as theft.<sup>94</sup>

Since 1968, the basis of fraud has increasingly moved away from any proprietary basis towards the prevention of dishonest financial gain or loss. In Australian jurisdictions, false pretences offences have been supplemented by offences based on gaining financial advantage or causing financial detriment,<sup>95</sup> and in some jurisdictions the offence extends further to non-pecuniary gain or loss.<sup>96</sup> In England and Wales, the *Fraud Act 2006* (UK) c 35 ('*Fraud Act*') has gone even further, basing liability on conduct *intended* to cause a gain or loss of money or property. As a result of the repeal of previous offences, general fraud offences based on obtaining property no longer exist in England.<sup>97</sup>

In recommending these reforms, the Law Commission stated: 'If an employee embezzles her employer's money, both lawyers and non-lawyers would agree that her conduct can properly be described as fraud'.<sup>98</sup> That proposal is now enacted as part of the *Fraud Act*, under which it is an offence to dishonestly intend to make a gain from an abuse of position.<sup>99</sup> A 'position' includes the role of employee, and embezzlement seems clearly to have been contemplated by the Law Commission as a form of abuse of position. This provision is controversial, and the merits of the approach of enacting broadly framed offences rather than a redrafting of existing offences are beyond the scope of this article.<sup>100</sup> However, the new offences do underline the extent to which the new *Fraud Act* significantly overlaps with the broader aspects of theft, but without any link to the property basis of theft.

As fraud increasingly detaches itself from theft-based origins, this reinvigorates the possibility that other offences, previously considered as part of the broad theft offence, may also be seen as having a separate conceptual basis. Any impetus for such disaggregation of theft<sup>101</sup> requires evidence that the current

<sup>93</sup> CLRC, above n 3, 20.

<sup>94</sup> See Ormerod, *Smith and Hogan Criminal Law*, above n 92, 655–6.

<sup>95</sup> *Criminal Code Act 1995* (Cth) sch 1 ss 135.1–4; *Criminal Code 2002* (ACT) ss 332–4; *Crimes Act 1900* (NSW) s 178BA; *Criminal Code Act* (NT) s 227; *Criminal Code Act 1899* (Qld) s 408C; *Criminal Code Act 1924* (Tas) s 252A; *Crimes Act 1958* (Vic) s 82; *Criminal Code Act Compilation Act 1913* (WA) s 409. See further Alex Steel, 'Money for Nothing, Cheques for Free? The Meaning of "Financial Advantage" in Fraud Offences' (2007) 31 *Melbourne University Law Review* 201.

<sup>96</sup> See, eg, *Criminal Code Act 1899* (Qld) s 408C. For discussion of these offences, see Alex Steel, 'General Fraud Offences in Australia' (Working Paper No 55, The University of New South Wales Faculty of Law Research Series, 2007).

<sup>97</sup> See generally David Ormerod and David Huw Williams, *Smith's Law of Theft* (9<sup>th</sup> ed, 2007) 127.

<sup>98</sup> Law Commission, England and Wales, *Fraud*, Report No 276, Cm 5560 (2002) 61.

<sup>99</sup> *Fraud Act 2006* (UK) c 35, s 4.

<sup>100</sup> See further David Ormerod, 'The *Fraud Act 2006* — Criminalising Lying?' [2007] *Criminal Law Review* 193. For a compelling argument that fraud itself contains a range of distinctly different offences, see Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (2007).

<sup>101</sup> This is on the basis that theft is an offence that is inextricably tied to property rights infringements whereas fraud is not. For an alternative perspective, see, eg, Alan L Bogg and John Stanton-Ife, 'Protecting the Vulnerable: Legality, Harm and Theft' (2003) 23 *Legal Studies* 402; Simon Gardner, 'Appropriation in Theft: The Last Word' (1993) 109 *Law Quarterly Review* 194. These perspectives arguably do not militate against a disaggregation of theft into separate offences; instead, they suggest further bases for offences. See also below n 192.

broad offence contains difficulties, which can be avoided with a narrower offence — in particular, with an offence that reasserts possession as the defining boundary of liability. In the following Parts, the removal of the possession boundary is considered by comparing the differences in the forms of property and property rights protected in larceny and theft in light of the theoretical issues raised by Fletcher's thesis.

#### IV DOES MODERN LARCENY RETAIN ITS ORIGINAL PUBLIC ORDER CHARACTER?

At common law, the offence of larceny is based on possession, not ownership or any other property right. With the original emphasis on protecting the public from unnerving acts of violent taking, there was no need to distinguish between a right to present possession and other rights to use the property. With the development of a mercantile society, this simplistic approach became a significant hindrance to law enforcement. Fletcher's analysis of the metamorphosis of larceny is largely based on the tortured case law that this tension created. As noted above, Fletcher's thesis is that the doctrine of possessorial immunity collapsed under this pressure and emphasis shifted from manifest criminality to an examination of the subjective intentions of the accused. Despite this metamorphosis, larceny still insists on a possession-based analysis of liability, albeit subject to doctrinal expansions of the meaning of possession. If the accused lawfully gains possession, such as through a bailment, a subsequent misuse of the property cannot amount to stealing<sup>102</sup> (other than through statutory deeming provisions)<sup>103</sup> because the law sees the property as belonging to the thief. A person who severs things from land cannot be guilty of larceny because they are the first possessor of the new personal property.<sup>104</sup> On the other hand, an owner of property can be convicted of larceny if they take it out of the hands of a bailee in breach of the terms of the bailment.<sup>105</sup>

The key cases that Fletcher discusses — *Carrier's Case*,<sup>106</sup> *R v Chisser*,<sup>107</sup> *R v Pear*<sup>108</sup> and *R v Thurborn*<sup>109</sup> — all involve judicial retreats from the strictures of the doctrine of possessorial immunity. These cases can be seen both as a combination of opportunistic judicial innovation and as mirroring the increasingly sophisticated understanding of possession, which was developing in the civil courts. One significant development was acceptance by the criminal courts that constructive possession could satisfy the element of 'belonging to another'. Constructive possession deems apparently manifest control over property by an employee as amounting to mere custody of the property. Control amounting to

<sup>102</sup> This was a key issue in *Carrier's Case* (1473) Y B Pasch 13, Edw IV, f 9, pl 5.

<sup>103</sup> For example, larceny by bailee was a legislative innovation which deems a misappropriation by a bailee as amounting to larceny: see, eg, *Crimes Act 1900* (NSW) s 125.

<sup>104</sup> *R v Townley* (1871) LR 1 CCR 315; *Billing v Pill* [1954] 1 QB 70.

<sup>105</sup> *Rose v Matt* [1951] 1 KB 810.

<sup>106</sup> (1473) Y B Pasch 13, Edw IV, f 9, pl 5.

<sup>107</sup> (1678) T Raym 275; 83 ER 142.

<sup>108</sup> (1779) 1 Leach 212; 168 ER 208. For a detailed examination of the circumstances in which the case was decided, see Ferris, above n 89, 179.

<sup>109</sup> (1848) 1 Den 387; 169 ER 293.

possession is seen to reside in the employer, with the implication that the employee accepts that such control rests with the employer.<sup>110</sup> The development of this doctrine significantly undercuts any notion of manifest criminality in workplace settings.<sup>111</sup> If the person in possession of the goods is in fact an employee and the goods have previously been in the employer's possession, they are deemed to remain in the employer's possession; thus, the goods can be stolen by an employee absconding with them.

Despite these significant judicial movements to loosen the grip of possessorial immunity on larceny, most of the limitations were overcome by a large number of statutory offences and extensions to larceny in the 19<sup>th</sup> century which broadened the scope of the criminal law to cover situations where, at the time of the appropriation, the property was in the possession of the accused.<sup>112</sup>

From a theoretical perspective, however, the fact that the protection extended to such rights statutorily, rather than through common law doctrines, means that, with some exceptions, it is possible to see a strong distinction between the public nature of the protection in the scope of larceny and the private right extensions in the statutory offences.<sup>113</sup> Larceny protects against potentially violent takings of property. The statutory offences protect people from private ruin resulting from the misdeeds committed by those to whom they have entrusted their property. Such extensions have also largely been made on a case-by-case basis, with government needing to justify each extension. Good examples of this incremental expansion are contained in the number of embezzlement offences that were created for specific types of employees over the course of the 18<sup>th</sup> century.<sup>114</sup> An Australian example from the 20<sup>th</sup> century is the enactment of s 178A of the *Crimes Act 1900* (NSW), which covers fraudulent misappropriation of moneys collected or received. Section 178A was a specific legislative response to a decision of the High Court of Australia holding that bailment offences did not extend to money held on account.<sup>115</sup> It created a new offence limited to the issue ruled on by the High Court.<sup>116</sup>

There is thus an argument that larceny is an offence distinctly different from the other statutory offences — that is, larceny is a general offence justified because of the injury such actions cause to public safety.<sup>117</sup> However, each

<sup>110</sup> See, eg, *R v Reed* (1854) Cox CC 284; *Williams v Phillips* (1957) 41 Cr App R 5, 9 (Lord Goddard CJ).

<sup>111</sup> 'The problem is that except in the very early stages of the common law, possession has sometimes been more and sometimes less than what meets the eye. ... The concept of possession has matured (or degenerated, depending on your taste) from a natural to a legal fact': Fletcher, *Rethinking Criminal Law*, above n 54, 6. A situation which looks like possession, yet is not, is described as custody.

<sup>112</sup> See, eg, *Crimes Act 1900* (NSW) ss 124–5, 157, 162, 165–6, 168–70, 172–3, 178A, 527.

<sup>113</sup> Of course, this is an academic viewpoint with the advantage of hindsight. It is unlikely that any such distinction was consciously articulated.

<sup>114</sup> See generally Hall, above n 55, 35–40, 61–6.

<sup>115</sup> *Slattery v The King* (1905) 2 CLR 546, 562 (Griffith CJ for Griffith CJ, Barton and O'Connor JJ).

<sup>116</sup> See *R v Ward* (1938) 38 SR (NSW) 308, 316 (Jordan CJ).

<sup>117</sup> For detailed discussion of this issue, see, eg, A P Simester and G R Sullivan, 'On the Nature and Rationale of Property Offences' in R A Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005) 168. Cf Alex Steel, 'The Harms and Wrongs of

statutory offence is individually justified on different private interest grounds. While the demise of manifest criminality was linked to the inappropriateness of a conception of larceny which did not take account of the much more complex nature of property rights and social interactions of a mercantile society, a key difference between larceny and other property offences remains discernible. Larceny is the only offence in which a possessor of property has that possession taken away without consent.<sup>118</sup> As a result of the lack of prior consent, there always exists the possibility of violence if the thief is interrupted in the course of the taking. Such violence is unlikely if the taking is consensual, as in fraud cases. Such violence is also unlikely if the thief already has custody or possession of the property, as in cases of bailees and embezzlement. Further, the level of violence possible in an appropriation of an intangible property right is minimal due to the lack of any significant act of taking, and the fact that any actions are likely to be remote from the presence of the victim.

By contrast, situations where the property is misappropriated by a person already in possession of the property amount to a breach of trust. Embezzlement by employees, misappropriations by bailees and agents, and misuse of trust funds by trustees all amount to actions which are only possible because the victim has granted possession in the belief that the accused will behave in an agreed or reasonably expected way. The actions would not be possible without this misplaced trust.

Fletcher and Hall have noted that this was the historical foundation of the embezzlement offences.<sup>119</sup> Fletcher also argues that the original fraudulent conversion offences were based on a sense of a breach of trust.<sup>120</sup> Similarly, fraud offences are clearly based on a breach of trust. Prior to the statutory introduction of the false pretences offences, the courts considered that such breaches of trust were largely the fault of careless victims and that their civil remedies should be sufficient.<sup>121</sup> As such, these offences provide an alternative basis for criminalisation, suggesting that such activities should constitute separate offences to theft.

There is, however, a need to reconcile this approach with what might be termed the 'unprincipled' extensions of larceny, which Fletcher describes as constituting the metamorphosis of larceny. Fletcher's analysis centres on the role of judicial fictions in extending larceny to suit the times. He argues that much of the tension in the development of larceny is due to the fact that the courts did not consider that any other property offence could be used to deal with difficult

Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 *University of New South Wales Law Journal* 712.

<sup>118</sup> In fraud offences, possession is lost with consent. In offences relating to misappropriation by bailees etc, possession is lost with consent prior to the taking. Larceny by a servant is probably best seen as an example of a non-consensual taking. Although the employee has control of the property, if the employer interrupts the taking, the employer is likely to object to the taking, which raises the possibility of violence. Due to issues with proving the element of lack of consent, subsidiary legislation is often enacted providing for a lesser penalty for dishonest retention of property: see, eg, *Crimes Act 1900* (NSW) s 124.

<sup>119</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 34–5; Hall, above n 55, 36–40.

<sup>120</sup> Fletcher, *Rethinking Criminal Law*, above n 54, 34–5.

<sup>121</sup> See, eg, *R v Wheatly* (1761) 2 Burr 1125, 1127–8; 97 ER 746, 748 (Lord Mansfield).

cases and so judicial fictions were considered necessary to allow the extension of larceny to cover perceived gaps in the law. Fletcher points out as an alternative that expansion of the conceptual framework of the statutory crimes of embezzlement<sup>122</sup> and fraud could have been a more appropriate pathway for development of the law. He argues that situations such as the dishonest finder and mistaken delivery could have been more easily included in an expanded offence of embezzlement, if it were seen as a general offence of appropriation.

The situation of a person who finds lost property and keeps it, either knowing who the owner is or without attempting to ascertain the identity of the owner, has long added complexity to larceny. In a series of cases, a doctrine developed that it was not larceny if the accused, at the time of the finding, did not know or *could not have been expected to know* the identity of the owner.<sup>123</sup> If there was a way in which the finder could have been expected to identify the owner, this could be a basis on which they could be liable for larceny. In more recent times, existence of these circumstances appears to have developed into a *de facto* presumption of guilt.<sup>124</sup> This introduction of liability based on failure to comply with expected forms of behaviour amounts to an anomalous introduction of community standards into larceny. If, however, the situation is reconceptualised as being based on a breach of trust — that is, an expectation that respect for personal property rights means that citizens are trusted to assist in returning lost property to its owner — it is possible to see the situation as an example of constructive embezzlement. It must be admitted that whether seen as an extension of larceny or embezzlement, imposing liability on finders requires a wide view of societal obligations not normally associated with the criminal law. However, it is suggested that if such liability is to be imposed, it appears more akin to a breach of trust rather than a non-consensual taking. This is particularly the case given that the common law implies that the victim gives consent for a finder to take possession of property in order to enable the return of the property.<sup>125</sup> The breach of this trusted consent forms the basis of liability.

A similar analysis can be made in mistaken delivery cases, where the victim hands over property under a mistake as to either the identity of the transferee, the nature of the property or the quantity of the property.<sup>126</sup> Whether liability should arise in such situations has long been a vexed issue — and in South Australia it is no longer a part of the theft offence.<sup>127</sup> However, if any liability is to arise it

<sup>122</sup> Fletcher argues that embezzlement is an underdeveloped category of offence in English law. Embezzlement can be seen as a crime of breach of trust, but it can also be extended to amount to a crime of dishonest appropriation. Fletcher describes how German criminal law views dishonest finders as guilty of embezzlement on the basis that embezzlement is a general appropriation offence, whereas larceny is the more specific offence of taking possession of tangible goods: Fletcher, *Rethinking Criminal Law*, above n 54, 18–20.

<sup>123</sup> See, eg, *R v Thurborn* (1848) 1 Den 387; 169 ER 293 and the discussion of the case in *ibid* 104–7.

<sup>124</sup> For a discussion of this development, see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4<sup>th</sup> ed, 2006) 1002–5.

<sup>125</sup> See, eg, *R v Thurborn* (1848) 1 Den 387; 169 ER 293.

<sup>126</sup> For reviews of the relevant case law, see *R v Potisk* (1973) 6 SASR 389; *Ilich v The Queen* (1987) 162 CLR 110.

<sup>127</sup> See South Australia, *Parliamentary Debates*, House of Assembly, 22 August 2002, 1307 (M J Atkinson, Attorney-General).

would seem to be best conceptualised as a failure of the recipient to behave in ways that can be expected of members of society. That is, any person who receives property from another as a result of the transferor's mistake and becomes aware of this either at the time of receipt, or at a later time, may be subject to some implied obligation to return the property. The basis of that obligation might be based on a duty not to take advantage of others.<sup>128</sup> If breach of that obligation is to be criminal, it would seem best to conceptualise it as a breach of trust rather than a taking from the victim.

#### V ARE THERE PROBLEMS WITH THE EXPANSION OF STEALING IN THE *THEFT ACT*?

The residual public safety concern in preventing violence associated with taking, which remained part of the essence of larceny, was not recognised by the CLRC when it recommended one all-encompassing theft offence incorporating larceny and the statutory extensions. This effectively removed any final public-private division in the law that had been left by possessorial immunity.

The CLRC was well aware of the practical difficulties of the previous law, emphasising that possession was a major limiting factor:

These defects stem from larceny being regarded as essentially a violation of the owner's possession and not of his rights of ownership. Thus the offence originally depended on a *taking* of the property; and although the notion of taking was extended, judicially or by statute, to certain cases of obtaining possession without a taking in the ordinary sense, or of appropriation by a person already in actual possession, the offence still does not cover many kinds of misappropriation which are in substance indistinguishable from stealing.<sup>129</sup>

The CLRC also argued that unnecessary complications arose from having larceny, embezzlement and fraudulent conversion as separate offences:

Whether a misappropriation is larceny or embezzlement may depend on subtle questions such as whether the clerk or servant has placed the property in what the law regards as the employer's possession. ... It seems wrong that cases which differ little in essence should fall under one or other of these offences depending on matters of detail, which moreover may be difficult to ascertain before the trial. It is also wrong that the time of the courts should be occupied with deciding such technicalities and that a conviction or acquittal should depend upon them.<sup>130</sup>

Such difficulties in prosecution clearly did exist, and there was clear public support for the reforms; however, it is unfortunate that the CLRC did not consider whether there was any reason for such complexity other than historical accident. This significant collapsing of the categories of crime should have

<sup>128</sup> A parallel may be drawn with the growth of civil liability for unconscionable behaviour. This growth demonstrates that the law requires basic standards of behaviour in transactional situations. Whether this is properly a role for the criminal law is unclear. It might be that mistake cases could constitute the basis for a separate offence in a disaggregated notion of theft: see further above n 101.

<sup>129</sup> CLRC, above n 3, 10.

<sup>130</sup> *Ibid* 12.

commanded more justification and analysis. In fact, the CLRC failed to mention the intended scope of their new definition of ‘belonging to another’.

The approach recommended expanded the scope of the fraudulent conversion offence to encompass larceny:

The new offence will in fact consist of the present offence of fraudulent conversion without the requirement that the offender should, at the time of the conversion, be in possession of the property either in the circumstances mentioned in s 20(1)(iv) or at all. With the removal of this requirement the offence will extend to ordinary stealing by taking property from another’s possession. The effect will be as if fraudulent conversion were widened to include the whole of larceny and embezzlement; the new offence will indeed include conduct which may not be criminal under the present law such as the dishonest appropriation by a parent of things taken and brought home by a child under the age of criminal responsibility.<sup>131</sup>

On Fletcher’s analysis, this meant that the private offences based on breach of trust, which had been introduced as limited exceptions to the doctrine of possessorial immunity, now completely replaced the public offences based on breach of possession. Possessorial immunity was no longer a doctrine recognised by law.

#### A Extending ‘Belonging to’ to All Property Interests

While the definition of ‘belonging to another’ in s 5(1) of the *Theft Act* continues to include possession, it extends significantly beyond that concept:

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).

This definition retains reference to the concept of possession, but pairs it with a concept of control. It might appear that this pairing occurs because it is not possible to possess intangibles. Therefore, ‘control’ was required to express the equivalent of possession for intangibles. However, another interpretation appears possible. Successive editions of *Smith’s Law of Theft* have assumed that control is synonymous with custody.<sup>132</sup> If so, this presents a significant expansion of the concept of theft. Custody has never been considered a property right.<sup>133</sup> While the person having custody maintains physical control of the property, they do not have any intention to take possession (*animus possidendi*), recognising that such possessory rights lie with another.<sup>134</sup> To include custody within theft has the perverse effect of ensuring that any employer who retakes property from an employee commits the *actus reus* of theft. In effect, it is a throwback to the early

<sup>131</sup> Ibid 19 (citations omitted).

<sup>132</sup> The current edition of the text is Ormerod and Williams, above n 97, 80. Cf A P Simester and G R Sullivan, *Criminal Law Theory and Doctrine* (3<sup>rd</sup> ed, 2007) 449, who suggest that control adds nothing and can only mean a form of possessory right.

<sup>133</sup> *Horsley v Phillips Fine Art Auctioneers Pty Ltd* (1995) 7 BPR ¶97557, 14 371–2 (Santow J). Cf *Moors v Burke* (1919) 26 CLR 265, 274 (Isaacs J for Isaacs, Gavan Duffy and Rich JJ). See also E L G Tyler and N E Palmer, *Crossley Vaines’ Personal Property* (5<sup>th</sup> ed, 1973) 49, 54.

<sup>134</sup> *Horsley v Phillips Fine Art Auctioneers Pty Ltd* (1995) 7 BPR ¶97557, 14 371–2 (Santow J); *Moors v Burke* (1919) 26 CLR 265, 270 (Isaacs J for Isaacs, Gavan Duffy and Rich JJ).

days of larceny when the distinction between custody and possession had not been developed.

By contrast, the second half of the subsection moves in the completely opposite direction. It extends the protection of theft to any person who has a proprietary interest in the property, including equitable interests. As a result, any form of interest not covered by theft must be explicitly excluded. The drafters of the *Theft Act* could only think of one species of equitable right that ought to be exempted from the scope of theft — an equitable interest arising from an agreement to transfer interests in property. No policy reason for this exclusion appears to have been articulated, although it has been suggested that this exception is due to the essence of this type of equitable interest as contractual, and thus that civil remedies are sufficient.<sup>135</sup> The Australian *Model Criminal Code*<sup>136</sup> also contains a second exemption of constructive trusts.<sup>137</sup>

Whereas larceny insisted that there be only one relevant interest holder — the possessor — the theft offence permits multiple interest holders to be all victims of theft. This means that the owner or possessor of the property may be a thief. Actions which appear to bystanders to be the legitimate actions of an owner may amount to an act of stealing. Whereas possession can be easily identified, other forms of property rights require further evidence (often documentary) and legal knowledge. This may be particularly problematic in the area of equitable interests as it can be exceptionally difficult to be conclusive as to the existence of the rights, and so significant litigation may be needed before the situation becomes clear.<sup>138</sup>

The scope of ‘belonging to another’ is, however, impacted by the requirement of theft that the accused also have a dishonest intention to permanently deprive. This appears to require the accused be aware of the particular property right in question. The more complex or contingent that right is, the less likely it is that the accused will be aware of it. Consequently, the law of diminishing returns tends to apply to the extension of theft to complex and arcane forms of property rights.

In fact, theft may not be the most appropriate way to characterise knowing interference with property rights other than possessory rights. In circumstances where the accused is aware of the interests of other parties but is already the owner or lawfully in possession of the property, it is likely that the accused is in

<sup>135</sup> A T H Smith, *Property Offences: The Protection of Property through the Criminal Law* (1994) 100–1. It seems that contractual relationships to property are now included under s 5(3): see below Part V(B).

<sup>136</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, above n 11.

<sup>137</sup> At s 14.5, the *Model Criminal Code* specifically exempts constructive trusts from theft on the basis that the civil notions of unconscionability are not sufficiently culpable to constitute theft, and that the principles surrounding the existence of constructive trusts are so vague that they offend the principle that the criminal law should be certain and knowable in advance: *ibid* 50–5. There is no such exclusion in Victoria. See further Steel, ‘Issues with the Use of the Theft Offence to Protect Intangible Property’, above n 4.

<sup>138</sup> See, eg, *R v Clowes [No 2]* [1994] 2 All ER 316 (‘*Clowes*’); Mitchell C Davis, ‘After *R v Clowes (No 2)*: An Act of Theft Empowered — A Jury Impoverished?’ (1997) 61 *Journal of Criminal Law* 99; Steel, ‘Issues with the Use of the Theft Offence to Protect Intangible Property’, above n 4.

some form of fiduciary relationship with the other parties. Whether that relationship be of employee, trustee or agent, it is likely that the misappropriation of the property is best characterised as fraud or fraudulent conversion rather than a straight-out theft. The rare situations where the accused owes no fiduciary obligation to the victim are examples *par excellence* of contractual disputes or other civil law matters, and arguably beyond the proper scope of the criminal law. However, these are exactly the problems that s 5(3), relating to persons receiving property on account, raises in attempting to further explain the scope of s 5(1).

B *Extending 'Belonging to' to Include Non-Proprietary Relationships to Property*

The definition of 'belonging to another' is extended in s 5(3) to persons receiving property under a duty to account for its use:

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.

The CLRC probably inserted this subsection to ensure that courts interpreted the definition in s 5(1) to include the full scope of the previous fraudulent conversion offence which applied to 'persons receiving property on account' as well as actions which had previously also fallen within the more restricted offences of larceny by bailee and embezzlement.<sup>139</sup> But in so doing, s 5(3) separates the notion of 'receives property' from that of 'obligation' and extends the scope of theft to include breaches of obligations that are non-proprietary in nature.

This occurs because without the nexus to 'property', 'under an obligation' becomes a general phrase. By contrast, under the fraudulent conversion offences associated with larceny, the nature of the obligation was an equitable one, described as the accused being 'entrusted'<sup>140</sup> or having the property 'upon terms'.<sup>141</sup> In *Stephens v The Queen*, the High Court of Australia held that offences of this sort required proof that there was 'a fiduciary element in the relationship of the accused person to the property alleged to have been fraudulently converted by him'.<sup>142</sup> No such restriction exists on the forms of 'obligation' that can satisfy s 5(3). Indeed, all such fiduciary relationships to property already fall within the main definition of 'belonging to another' in s 5(1), which extends to all situations where the victim can be seen as having 'any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).'

<sup>139</sup> CLRC, above n 3, 17.

<sup>140</sup> See, eg, *Criminal Law Consolidation Act 1935* (SA) s 184, repealed by *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA).

<sup>141</sup> See, eg, *Crimes Act 1900* (NSW) s 178A.

<sup>142</sup> (1978) 139 CLR 315, 333 (Gibbs J).

As a result of the broad scope of 'obligation', English courts have accepted that s 5(3) operates beyond proprietary rights to property. Even though the courts have held that the obligation in this context requires proof of a legal obligation as opposed to a moral or social obligation,<sup>143</sup> there is otherwise little restriction. In *R v Arnold*, the England and Wales Court of Appeal held:

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 ss 5(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-à-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.<sup>144</sup>

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. The bills were, therefore, property owned by Arnold. However, the Court found that he had 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'.

What amounts to a 'legal obligation' is itself somewhat unclear. While it seems well settled that it includes all contractual obligations, there is also some authority that it may extend to legally unenforceable contractual obligations.<sup>145</sup>

Compounding the uncertainty in this area is the seemingly unavoidable need to rely on a court's direction as to whether any legal obligation exists. In

<sup>143</sup> *DPP v Huskinson* (1988) 20 HLR 562, 564 (Stuart-Smith LJ); *R v Gilks* [1972] 3 All ER 280, 283 (Cairns LJ). See also *R v Hall* [1973] QB 126, 132 (Edmund-Davies LJ for Edmund-Davies and Stephenson LJJ and Boreham J); *Wakeman v Farrar* (Unreported, High Court of Justice, Queen's Bench Divisional Court, Lord Widgery CJ, Ashworth and Eveleigh JJ, 27 November 1973), noted in [1974] *Criminal Law Review* 136.

<sup>144</sup> [1997] 4 All ER 1, 9–10 (Potter LJ for Potter LJ, Owen J and Judge Tucker).

<sup>145</sup> In the Divisional Court decision of *R v Cullen* (1974) (Unreported, discussed in Ormerod and Williams, above n 97, 93), it was held that misappropriation of £20 by the victim's mistress amounted to theft. The Court rejected an argument that such a situation was a domestic transaction and not legally enforceable.

*R v Breaks*, there were allegations of misappropriation of a client's funds by an insurance brokerage firm.<sup>146</sup> The conviction was overturned because the trial judge failed to determine the legal effect of the complex nature of the contractual obligations and banking arrangements of the companies controlled by the accused. The Court decided that:

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.<sup>147</sup>

Given the complexity of the property rights issues that might be involved in ascertaining whether the requirement of 'belonging to another' is satisfied, a question arises as to the degree of knowledge required of the accused. In *R v Wills*, a financial consultant's colleagues misapplied cheques paid into the consultant's company account.<sup>148</sup> No evidence was 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.<sup>149</sup>

This interpretation is based on the implication of a mental element into what is otherwise part of the *actus reus* of the offence. The interpretation might be vulnerable to the approach taken by the House of Lords in *R v Hinks* that the words of the offence be given a broad meaning, and that the element of dishonesty is all that is necessary to separate legal behaviour from criminal behaviour. Of course, if the accused is entirely unaware of any obligation, then dishonesty cannot be proved. However, it is unclear what the outcome would be if the accused was generally aware of the situation, but not the legal basis of any obligation.

<sup>146</sup> [1997] EWCA Crim 3031 (Unreported, Phillips LJ, Kay and Moses JJ, 21 November 1997).

<sup>147</sup> *Ibid.*

<sup>148</sup> (1991) 92 Cr App R 297.

<sup>149</sup> *Ibid* 301 (Farquharson LJ for Farquharson LJ, Garland and Ognall JJ).

In *R v Clowes [No 2]* ('Clowes'), liability turned on whether an investor's money was held on trust.<sup>150</sup> 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 existed; thus, 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.<sup>151</sup>

This analysis has been criticised for overlooking the defence of a claim of right and its relationship to dishonesty.<sup>152</sup> Nevertheless, such issues have not concerned the High Court of Australia in fraud cases, which has held that a finding of dishonesty according to ordinary community standards may trump any subjective claim of right,<sup>153</sup> and it may be that a claim of right is not even available under the wording of the defence in the *Criminal Code Act 1995* (Cth).<sup>154</sup> Those issues aside, *Clowes* appears to reduce the applicability of *R v Wills* to situations where there is no evidence at all of impropriety. If the accused's behaviour is not 'lily white', the Court seems happy to hold that knowledge of the nature of the obligation is unnecessary. The decision in *Clowes* makes it clear that theft has moved very far from being grounded in the manifest criminality of taking possession of another person's property. Indeed, theft can occur when the true proprietary situation as to who the property belongs to is unknown to the accused, is unclear to lawyers, and requires significant legal

<sup>150</sup> [1994] 2 All ER 316.

<sup>151</sup> Ibid 330–1 (Watkins LJ for Watkins LJ, Scott Baker and Auld JJ).

<sup>152</sup> Davis, above n 138.

<sup>153</sup> *Macleod v The Queen* (2003) 214 CLR 230, 245 (Gleeson CJ, Gummow and Hayne JJ).

<sup>154</sup> See Ian Leader-Elliott, Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 203–17.

argument before a court in order to determine any infringement of a property right.

More recent cases seem to have gone even further. In *R v Klineberg* ('*Klineberg*'), the Court of Appeal stated:

[Section 5(3)] is essentially a deeming provision by which property or its proceeds 'shall be regarded' as belonging to another, even though, on a strict civil law analysis, it does not. Moreover, it applies not only to property in its original form but also to 'its proceeds'. The Act does not define 'proceeds' and it is neither necessary nor desirable to construe it in a way which necessitates consideration of complicated civil concepts such as tracing.<sup>155</sup>

In *Klineberg*, the Court of Appeal used the approach quoted above to justify a finding that the issue of whether a chose in action could be 'received' by the accused could be ignored. In *R v Preddy*, the House of Lords held that choses in action constituting money held in bank accounts did not transfer from one person to another.<sup>156</sup> Instead, the transferor's original chose in action was destroyed and a new and identical chose in action was created in favour of the transferee. In *Klineberg*, the Court held that so long as a legal obligation of some sort existed, s 5(3) deemed the property to belong to another irrespective of the '*Preddy* problem'.<sup>157</sup> This approach has been followed in subsequent cases,<sup>158</sup> but is doubted in academic commentary.<sup>159</sup>

An extreme reading of the breadth of s 5(3) occurred in *Floyd v DPP*.<sup>160</sup> Relying on the statement in *Klineberg* quoted above, the Divisional Court held that a person collecting money from colleagues to make monthly payments to a Christmas hamper company owed an 'obligation' to the company, despite there being no contractual arrangements between them. The decision has been questioned,<sup>161</sup> and seems difficult to justify.

Two key results thus flow from this case law. First, in attempting to include all forms of fraudulent conversion in one theft offence, the CLRC produced an extended form of 'belonging to another' that is no longer a property right based concept, but merely a property related one. While it is necessary for the prosecution to prove that there was an obligation relating specifically to the property in

<sup>155</sup> [1999] 1 Cr App R 427, 432 (Maurice Kay J for Rose LJ, Scott Baker and Maurice Kay JJ).

<sup>156</sup> [1996] AC 815.

<sup>157</sup> *Klineberg* [1999] 1 Cr App R 427, 433 (Maurice Kay J for Rose LJ, Scott Baker and Maurice Kay JJ).

<sup>158</sup> *R v Adams* [2003] EWCA Crim 3620 (Unreported, Laws LJ, Pitchford and Williams JJ, 21 November 2003); *Re Kumar* (Unreported, Divisional Court, Simon Brown LJ and Turner J, 15 December 1999), noted in [2000] *Criminal Law Review* 504.

<sup>159</sup> See Ormerod and Williams, above n 97, 89, who suggest that *R v Preddy* precludes reliance on s 5(3). However, *R v Preddy* [1996] AC 815 may not apply, since it held that such choses in action cannot be 'obtained' from another. Similar reasoning applies to 'receives'. But there is no requirement in s 5(3) that the property received come 'from another', merely that it be 'on account' of another; arguably, the creation of the new right is still received by the accused. Thus it can be said that one 'receives' a credit in one's account, even if it never existed elsewhere. In contrast to the emphasis in 'obtaining', the emphasis in receiving is on the fact that it was not previously in the accused's control.

<sup>160</sup> (Unreported, Divisional Court, Tuckey LJ and Moses J, 1 November 1999), noted in [2000] *Criminal Law Review* 411.

<sup>161</sup> See Ormerod and Williams, above n 97, 90–1, who suggest that a conviction could have been based on an obligation owed to the colleagues.

question, the accused may be either the owner or possessor of property, or both the owner and possessor, and still be guilty of stealing the property if they are under some legal obligation to another in relation to the property. These legal obligations need only be contractual in nature (assuming *Floyd v DPP* is wrongly decided). It does not matter whether they are imposed by the transferor<sup>162</sup> or subsequently accepted by the accused in relation to any party.<sup>163</sup> 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. This latter situation encompasses circumstances which were previously considered to be embezzlement.

Secondly, in extending 'belonging to another' to include all forms of property right, and reinforcing the breadth of such an expansion by the further extension in s 5(3), many highly complex instances of property right infringement now fall within theft. In order to enable such situations to still be prosecuted, the courts have interpreted s 5(3) in such a way that relieves the prosecution of having to prove that the accused was aware of the nature of the proprietary interest that the victim held in the property. At the extreme, *Clowes* suggests that it is possible to believe that no property interests 'belong to another' and still be convicted of theft if the jury is convinced that the accused was dishonest in a some more general sense.

The problem may well be that the general property rights basis of theft is forcing such cases into artificial formats. This is not to say that these criminal conversion offences should not be part of the criminal canon. The point is merely that the nature of the offence is significantly different from that of theft. Indeed, by seeing such wrongdoing as a separate class of offence, it would be possible to fashion more precise requirements as to the knowledge and intent required, and also to consider whether the basis of the offence should be linked to property rights at all or whether it is the nature of the assumed fiduciary or contractual relationship that should form the basis for liability.

### C Relativity of Title

One crucial issue not traversed by the *Theft Act's* definition of 'belonging to another' is the problem of relativity of title. The common law accepts a large range of interests in property and resolves conflicting interests in the same items of property by generally ranking interests by time of acquisition and refusing to accept a plea of *jus tertii*.<sup>164</sup> The effect of a denial of *jus tertii* is to permit adjudication of disputes as to the better titleholder between the two contesting parties without any reference to other potential rights holders. Such rights

<sup>162</sup> This is the basis of the analysis in *Klineberg* [1999] 1 Cr App R 427, 433 (Maurice Kay J for Rose LJ, Scott Baker and Maurice Kay JJ).

<sup>163</sup> See, eg, *R v Arnold* [1997] 4 All ER 1.

<sup>164</sup> *Jus tertii* is a defence to a claim for possession by establishing that a third party has a better right than the claimant. Its availability is highly restricted, and is not available in conversion where the defendant has derived the goods from the plaintiff: see, eg, *Jeffries v The Great Western Railway Co* (1856) 5 El & Bl 802; 119 ER 680; *Russell v Wilson* (1923) 33 CLR 538, 547 (Isaacs and Rich JJ); *The Anderson Group Pty Ltd v Tynan Motors Pty Ltd* (2006) 65 NSWLR 400, 413 (Young CJ in Eq).

holders are instead required to bring their own action to establish their greater right. As a result, the common law built a system of property dispute adjudication primarily based around rights of possession.<sup>165</sup> This is reflected in larceny.

Larceny recognises that the prior possessor (who need not be the owner) and the thief have property interests in the same property, but that as between them the prior possessor has better rights. It also considers a person who takes property from a thief without consent to be potentially liable for larceny. The taker is not permitted to raise the greater right of the owner as a bar to any prosecution of the stealing from the thief.<sup>166</sup> Such an approach is clearly based on acceptance of the doctrine of possessorial immunity; that is, the offence being a protection of public rather than private interests. In other words, as larceny was originally about protecting the King's peace, the courts were concerned with preventing violent or unnervingly surreptitious takings of property out of the possession of people — who actually owned the property was a private matter with which the courts were not concerned. Nevertheless, as we have seen, the myriad of statutory extensions to larceny were largely based on the protection of private interests, and protection in circumstances where no publicly unnerving takings without consent were apparent.

In such circumstances, the identity of the true owner increasingly became the critical issue, as it was accepted in many cases that the accused had lawful possession of the property under the doctrine of possessorial immunity. The development of larceny can thus be seen as creating circumscribed exceptions to the doctrine of relativity of title<sup>167</sup> based on either the form of the property or the relationship of the accused to the victim. Extensions were created for money received on account<sup>168</sup> (money normally passes in currency such that no issue of *jus tertii* arises), and extensions for misapplication of funds by employees,<sup>169</sup> trustees,<sup>170</sup> directors,<sup>171</sup> and so forth — all of whom owe fiduciary duties to the victim.

Since larceny has a public safety basis, there is a justification for considering the taking of property from the possession of another by the actual owner to be *prima facie* larceny. The 'defence' of claim of right can be utilised by an accused in these circumstances to show that what appears to be a dangerous and unlawful snatching of property from another is in fact justified by the accused's belief in their own private property right. The private property right must, however, be a

<sup>165</sup> See Tyler and Palmer, above n 133, 45–54; N E Palmer, 'The Nature and Elements of Bailment' in N E Palmer (ed), *Bailment* (2<sup>nd</sup> ed, 1991) 1, 101–4.

<sup>166</sup> The 'defence' of claim of right — which must be disproved by the prosecution if raised by the accused — is based on a subjective belief as to the possessory rights. It thus operates irrespective of any issues of *jus tertii*. Whether those property rights actually exist is irrelevant. Cf *R v Fuge* (2001) 123 A Crim R 310, 315 (Wood CJ at CL), where it was held that there was insufficient evidence to raise the defence as an issue.

<sup>167</sup> Since relativity of title is a common law doctrine, no account was taken of any equitable interests that the owner might have had over the possessor's interests.

<sup>168</sup> See, eg, *Crimes Act 1900* (NSW) s 178A.

<sup>169</sup> See, eg, *Crimes Act 1900* (NSW) ss 156–8.

<sup>170</sup> See, eg, *Crimes Act 1900* (NSW) s 172.

<sup>171</sup> See, eg, *Crimes Act 1900* (NSW) s 173.

present right to retake possession.<sup>172</sup> No other right can be great enough to dislodge the doctrine of possessorial immunity. By contrast, fraudulent conversion and fraud offences seek to uphold a more complex web of private property ownership.

Under the much broader approach of the theft offence, many more property interests are in play. An appropriation need not amount to a taking, and the property need not be one that is capable of possession. The property may be legally owned by the accused, but subject to equitable interests held by the victim. In such circumstances, the property interests protected range far beyond those of possession.

Consequently, while it is possible in larceny to justify an automatic protection of any possessor on the basis that it was protecting public safety, there is no such justification for automatic protection of different interests under theft. Equitable interests can be unclear and highly contestable.<sup>173</sup> Additionally, such interests often coexist with legal possessory interests, if indeed such interests attach to the property. In contrast to the position in larceny, default protection in theft of all interest holders cannot be justified by resorting to a doctrine of relativity of possessorial title — a doctrine based on the fact that only one person can hold that right. If all forms of property right are included, it is not possible to simply choose one clear ‘winner’ in a dispute. The conflicting rights do not cancel each other out and it is not possible to compare one form of right against another.

In a simple case of co-owners where the accused is in sole possession but owns only 80 per cent of the value of the property, a disposal of the property by the accused may well give rise to a civil damages claim by the holder of the other 20 per cent of the value of the property. However, it should not be *automatically* theft to so dispose of the property. For this to amount to larceny under the common law and statutory offences, proof of a fiduciary or trustee relationship would be required. None of this was considered by the CLRC. Therefore, on the face of the legislation, where there is any form of interference with the property rights of another, such an act is a basis for theft.<sup>174</sup> English courts have held that this even extends to consensual appropriations.<sup>175</sup>

The English courts have also refused to consider any reading down of the impact of the definition, and the doctrine of *jus tertii* cannot be relied on as a defence to a charge of theft. In *R v Meech*, it was held that 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 s 5(3).<sup>176</sup> Commentary on the decision has pointed out that there may be circumstances where property is received under an obligation that subsequently expires,

<sup>172</sup> Since such takings involve an act of legal self-help, the accused has presumptively resolved any relativity of title issues in their favour. If the right to take possession is not present at the time of the taking, larceny will have occurred; thus, if the possessor has any right greater than that of a bailee at will, larceny is likely to have occurred.

<sup>173</sup> See further Steel, ‘Issues with the Use of the Theft Offence to Protect Intangible Property’, above n 4.

<sup>174</sup> That is, the act falls within the meaning of an appropriation.

<sup>175</sup> See, eg, *R v Hinks* [2001] 2 AC 241.

<sup>176</sup> [1974] QB 549.

or is unenforceable. In such circumstances, the dealing with the property may be otherwise quite lawful, but still constitute theft under the current law.<sup>177</sup> *Jus tertii* is a doctrine that undercuts possessorial immunity; although it acts in other respects to protect the interests of third parties. While in *R v Meech*, possession was the key property right in question, it is not clear that *jus tertii* is inappropriate in disputes involving other property interests.

Interestingly, the impact of the continued labelling of any interference with another's property rights as theft is illustrated by the academic reaction to the two car repossession cases: *R v Meredith*<sup>178</sup> and *R v Turner [No 2]* ('*Turner*').<sup>179</sup> In both cases, the owner of a car surreptitiously retook possession of the car from another — in *R v Meredith*, from the police who had impounded it; in *Turner*, from a mechanic who had repaired it. Due to the way in which the cases were presented, both situations amounted to the possessors being bailees at will.<sup>180</sup> In *R v Meredith*, the judge ruled that no theft had occurred, whereas in *Turner*, the Court of Appeal upheld a jury verdict that theft had occurred:

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 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 then they need not bother about hire-purchase agreements. The only question was: was Mr Brown in fact in possession or control?<sup>181</sup>

Academic commentary sees the decision in *Turner* as 'absurd'<sup>182</sup> and 'difficult to justify'.<sup>183</sup> It would not have been absurd if the same decision was made in relation to a charge of larceny. Unless the owner could have established a belief in a claim of right, it would have amounted to a breach of the public peace and a potentially violent taking. In the environment of the *Theft Act*, where many non-possessory rights are also taken into account, the decision does seem absurdly simplistic. While justifiable on a straightforward reading of the definition, it avoids all of the necessary complexity of determining the web of property rights recognised by the *Theft Act*.

<sup>177</sup> Ormerod and Williams, above n 97, 93; Smith, above n 135, 113–14.

<sup>178</sup> (Unreported, Manchester Crown Court, Judge Da Cunha, 20 December 1972), noted in [1973] *Criminal Law Review* 253.

<sup>179</sup> [1971] 2 All ER 441.

<sup>180</sup> In *R v Meredith* (Unreported, Manchester Crown Court, Judge Da Cunha, 20 December 1972), the police had taken the car on the basis of a statutory power to do so, but the effect was similar to that of a bailee at will: see note in [1973] *Criminal Law Review* 253. In *Turner* [1971] 2 All ER 441, 442 (Lord Parker CJ), the Court directed the jury to disregard any issue of lien.

<sup>181</sup> *Turner* [1971] 2 All ER 441, 443.

<sup>182</sup> Simester and Sullivan, *Criminal Law Theory and Doctrine*, above n 132, 450.

<sup>183</sup> Ormerod, *Smith and Hogan Criminal Law*, above n 92, 676.

#### D *The Situation of Trusts and Trustees*

Finally, some mention should be made of the inclusion of misappropriation of trust property by trustees within the theft offence. By including equitable interests within the definition of proprietary rights and interests which may belong to another, s 5(1) includes the rights of beneficiaries in all express trusts. Section 5(2) ensures this also applies to discretionary and charitable trusts by deeming that trust property belongs to any and all beneficiaries of a trust, including beneficiaries of discretionary trusts.<sup>184</sup> This allows for the repeal of specific trustee offences, but also removes the distinctiveness of the form of wrongdoing corresponding to such actions. In NSW, which maintains separate trustee offences, the maximum penalty for such actions is 10 years' imprisonment — double that of larceny.<sup>185</sup> Significantly, such offences are described as forms of fraud as opposed to theft, which more accurately reflects the form of culpability involved.

Misappropriation by trustees is an awkward fit with theft. The trustee is considered by law to be the legal owner of the property, and as such have lawful possession. The nature of the relationship between trustee and beneficiary is complex. While beneficiaries have many rights that may be enforced through court action, trustees also have rights and discretion in relation to the disposition of the trust property. Accordingly, any inappropriate use of trust property by a trustee is not only not manifestly criminal,<sup>186</sup> but the legal effect of such action may depend on the egregiousness of the misuse. It is presumably due to this complexity that the NSW offence relating to the misappropriation of trust property by trustees requires approval of the Supreme Court or the Attorney-General before a prosecution can be commenced.<sup>187</sup> The clear implication of such a provision is that many wrongful acts by trustees should not be prosecuted under the criminal law, and that beneficiaries should instead be left to their civil remedies.

Breaches of trust may be more or less egregious based on several factors: the nature of the trust, the time of its creation and the attitude of the trustee to the trust. It seems undesirable to have one blunt theft offence which attempts to cover all dishonest breaches of trustee obligations in relation to trust property. Since the actions of a trustee in such situations are more akin to fraud than theft, pre-*Theft Act* prohibitions saw such behaviour as a species of fraud. It is suggested that this is the appropriate and convenient approach to take. This approach

<sup>184</sup> 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.

<sup>185</sup> See *Crimes Act 1900* (NSW) ss 164–78.

<sup>186</sup> It is conceded, however, that if the beneficiaries are aware of the trustee's misdeeds, there might well be violence. Such violence, however, would be likely to arise because of the very lack of a legal right of the beneficiaries to directly restrain the trustee.

<sup>187</sup> *Crimes Act 1900* (NSW) s 172.

also permits a more specific description of the sort of wrongdoing that is prohibited.

## VI CONCLUSION

This article has outlined the historical development of the meaning of ‘property belonging to another’ in larceny and theft. It has been argued that modern larceny, while doctrinally based on possession of tangible personal property, continues to contain within it the influence of an earlier defining principle — that of public safety. Public safety refers to a concern to prevent harm to the public from violent or potentially violent takings — an underpinning rationale that larceny shares with robbery, burglary and stealing from the person.

This prevention of violence principle explains why possessorial immunity and the criminalisation of only public acts were such important boundaries to the scope of early common law larceny — and why the *taking* of possession was such a defining element. By basing liability on interference with another’s possession, the common law created an easily observed phenomenon with a strongly defined boundary. The clarity of this boundary largely disappeared in practice as large numbers of statutory offences were added to the law, but in each case the offence was restricted to a particular type of act or actor, rather than constituting a general offence. It is therefore possible to still view larceny as an offence that applies only to public trespassory acts, and the statutory additions as limited incursions into the private realm justified on specific grounds.

In creating the *Theft Act*, the CLRC overlooked this historical distinction, and instead subverted the whole scheme by expanding the private sphere offence of fraudulent conversion into the basis for the theft offence. Consequently, theft is an offence that is theoretically based on private infringements of property interests. Any public nature of the act is incidental and unnecessary. It is thus no longer feasible to see the public–private divide as any meaningful boundary for the scope of theft.

Significantly, in using fraudulent conversion as the basis of theft, the CLRC also laid the foundations for a second metamorphosis of the offence — from one that protects property interests to one that protects any legal interest that is related to property, whether the nature of that interest is proprietary or not. While s 5(1) refers to possession or ‘any ... proprietary right or interest’ in defining ‘belonging to another’, s 5(3) has a potentially much broader reach in deeming any creation of a fiduciary duty in relation to property as amounting to that property ‘belonging to’ the beneficiary of that duty. This subsection explicitly makes the basis of the theft offence a breach of trust, rather than an interference with property rights. The property interest merely becomes the focal point of that trust.<sup>188</sup>

Another unintended consequence of removing a requirement that the victim be in possession of the property was to detach the basis of liability of theft from broader property law principles. The doctrine of possessorial immunity had

<sup>188</sup> Consequently, appropriation of the property need not amount to any interference with the property interests of the other. All the relevant property interests may be held by the accused.

ensured that the doctrine of relativity of title was adhered to — a crucial doctrine in a system of property law based on possession rather than ownership. While the metamorphosis of larceny as described by Fletcher meant that possessorial immunity ceased to be a definitive boundary to the scope of larceny, the requirement that the property be taken out of the possession of the victim — no matter how tenuous or constructive — meant that the victim was always the person who in civil property law would have the default best right to the property.<sup>189</sup> Consequently, there was good reason to refuse a claim of *jus tertii* to be made, as it would undermine this key aspect of the certainty with which the criminal law could assume that it was protecting the right person in the dispute.<sup>190</sup>

However, with the acceptance that property could belong to persons having an interest other than possession — and importantly that such interests could be less than that of a possessor — there is now no guarantee that the person who is cast as the victim in a prosecution for theft is in fact the person that deserves the protection of the criminal law. Cases such as *R v Meech* raise the distinct possibility that a third party's interests may well be the interests that the law should be focusing on. In such situations, the doctrine of *jus tertii* is necessary in some form to ensure justice.

If, however, theft is narrowed to apply only to tangible property, possession can again be used as the determinant of whether property belongs to another. Much of the difficulty in this area can be resolved by seeing theft and fraudulent conversion as separate offences (or as separate limbs of an overall offence)<sup>191</sup> — respectively, one relating to the taking of possession without consent, and the other a breach of trust related to property in the possession of the accused.<sup>192</sup>

As mentioned above, one reason that the CLRC may have overlooked the issues raised in this article was what Fletcher describes as a comparative lack of legislative imagination in terms of offence creation. As Fletcher has pointed out, there seemed to be a tendency to try and squeeze all new offences within the definition of larceny, rather than adopt an expansive view of offences based on breach of trust. Consequently, the embezzlement and fraud offences remained largely undeveloped.

In recent years, significant rethinking of the breadth of fraud offences has taken place, and many of the 'unprincipled' extensions to larceny can now be seen as being more appropriately characterised as fraud offences, so there is no need for a broad definition of theft to cover them. Instead there is now even

<sup>189</sup> In order to assert a greater right, the claimant would need to obtain a court ruling in their favour.

<sup>190</sup> That is, the doctrine of relativity of title meant that as between the victim in original possession of the property and the thief, the victim had a better property right.

<sup>191</sup> See, eg, *Criminal Code Act 1899* (Qld) s 390.

<sup>192</sup> Recognising that there is a separate conceptual basis for conversion type offences allows for a discussion of the nature of the trust or obligation that has to be breached in order to amount to a crime. It may well be that there is an appropriate place for enactment of offences where the victim consensually transfers property without imposing a trust, but where it is considered the transferee unconscionably exploits the vulnerability of the transferor (cf Bogg and Stanton-Ife, above n 101). Disaggregating theft not only makes this extension easier to justify, but also provides a clear environment in which to debate the boundaries of criminalisation of such behaviour. Similar issues may apply to mistake: see above n 126.

more justification for a continued, but simply expressed, distinction between a non-consensual taking of possession from another (theft) and a misuse of property in breach of obligations implicit in an earlier consensual taking of possession (fraudulent conversion).