

# THEFT

## INTRODUCTION

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Section 1(1) of the Theft Act 1968 (TA 1968) creates the offence of theft. It states:

“A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.”

Theft is triable either way. The maximum punishment that can be imposed where a defendant has been convicted of theft following trial on indictment, was reduced from ten years to seven years by s26 of the Criminal Justice Act 1991.

Whilst s1(1) creates the offence, ss 2-6 provide complete or partial definitions of the elements of theft. As s1(3) provides:

“The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for the purposes of this section).”

The *actus reus* of theft consists of (1) the appropriation of (2) property (3) belonging to another. The *mens rea* consists of the defendant acting (1) dishonestly, and (2) with the intention of permanently depriving the other of it.

## THE ACTUS REUS OF THEFT

### 1. APPROPRIATION

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The definition of “appropriation” is provided by s3(1) which states:

“Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as an owner.”

Thus although theft usually occurs when a person takes property belonging to somebody else, there are many other situations where it can arise. For example:

\* A lends a book to D. If D sells or gives the book to X, or destroys the book, D will have appropriated it, and may therefore be guilty of theft. Only A, the owner of the property, has the right to do those things and D would therefore be treating the book as if he owned it.

\* D who finds a book in the street, and later discovers that it belongs to his neighbour, A, decides to keep it, would also be within s3(1). D came by the property innocently and later assumes the rights of an owner.

Note that a temporary appropriation can amount to theft: see *Corcoran v Anderton* (1980) in Handout on Robbery.

#### **INNOCENT APPROPRIATION**

Some protection is offered to the *bona fide* (in good faith) purchaser by s3(2) which provides:

“Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor’s title, amount to theft of the property.”

Where therefore, A buys stolen property from D, unaware that it is stolen, and he gives value for it, he will not be guilty of theft if he later discovers the truth and decides to keep the property; neither will he incur any liability for handling stolen goods.

### ***APPROPRIATION BY CONSENT OR AUTHORISED ACTS***

The House of Lords have held that a person can appropriate property even where the owner consents to the taking of property. See:

*Lawrence v MPC* [1972] AC 626 which was, prior to *R v Gomez* [1993] (below) the main authority for this proposition.

The House of Lords have also made it plain that an assumption of any right of an owner will be an appropriation:

*R v Morris; Anderton v Burnside* [1984] AC 320.

Property can be appropriated by authorised acts if they are dishonest:

*R v Gomez* [1993] 1 All ER 1.

## **2. PROPERTY**

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Section 4(1) provides a general definition of property for the purposes of theft, where it states:

“Property” includes money and all other property, real or personal, including things in action and other intangible property.

### **GENERAL**

\* Things in action are rights which can only be enforced by taking legal action, as they have no physical existence. For example, a man owes £500 to a company. This debt is a chose in action. It exists in the sense that the company could actually sell it to somebody else, who would then have the right to collect the money from the man.

\* Other examples of intangible property are copyrights, trademarks and patents. However, confidential information has been held to fall outside the definition of property:

*Oxford v Moss* [1979] Crim LR 119.

### **LAND**

Section 4(2) provides that land cannot be stolen except in three particular circumstances:

(a) Where a person is dealing with land in a special capacity, for example as a trustee (and makes a dishonest appropriation).

(b) Where a person not in possession of the land severs something from it, for example crops or turf.

(c) Where a person in possession of the land as tenant appropriates a fixture or structure let with the land, for example by selling an outbuilding. (Note that in this situation it does not matter whether the object is actually removed from the land or not.)

### **PLANTS AND FLOWERS**

The question of the extent to which plants constitute property for the purposes of theft is provided for by s4(3) which states:

'A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose. For purposes of this subsection "mushroom" includes any fungus, and "plant" includes any shrub or tree.'

Simply stated, it is not theft to take mushrooms or flowers, fruit or foliage from a wild plant. It would however, be theft to take the whole plant, or to take anything for a commercial purpose. Thus it would be theft if mushrooms were picked in order to sell them later.

### **WILD ANIMALS**

As regards animals in the wild, they are referred to in s4(4) which provides:

"Wild creatures, tamed or untamed, shall be regarded as property, but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcass of any such creature unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in the course of reducing it into possession."

Thus, animals in zoos, safari parks and domestic pets can all be stolen, even if they are appropriated having escaped from captivity. A wild animal, whether live or dead, cannot be stolen unless it has already been taken into possession by somebody else. Note however, that there are other statutes which create specific criminal offences for poachers.

## **3. BELONGING TO ANOTHER**

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### **THE GENERAL RULE**

Section 5(1) provides an extended meaning for the phrase "belonging to another" where it states:

"property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest ..."

Clearly this section does not require that property should be owned by the person from whom it is appropriated; mere possession or control is enough. For example, suppose that A lends a book to B and B is showing it to C when D snatches the book from C's hands and makes off with it. Here D has stolen the book from C (who has control of it), and B (who has possession of it), and A (who also has a proprietary interest, ie ownership, in it).

Provided he has the necessary *mens rea*, a person can steal his own property from someone with a lesser interest:

*R v Turner (No 2)* [1971] 1 WLR 901.

### **OWNERLESS PROPERTY**

A person cannot steal property that is not owned by another at the time of the appropriation. Property which has at one time been owned may become ownerless by abandonment. But abandonment is not something to be lightly inferred - property is abandoned only when the owner is indifferent to any future appropriation of the property by others; property is not abandoned because the owner has lost it and has given up the search. Consider the following situations:

- (a) A man deliberately leaves his newspaper on a train and it is picked up by D who occupies the seat after him. The newspaper would not be regarded as property belonging to another as against D.
- (b) A wife loses her wedding ring and long since given up the search but she will not have abandoned it.

The vital distinction between the two situations is that in example (a), the owner intends to relinquish his rights of ownership, and if property is ownerless it cannot be stolen. One should be cautious however, before concluding that a person has relinquished his rights of ownership:

*Williams v Phillips* (1957) 41 Cr App R 5  
*R v Woodman* [1974] QB 758  
*R v (Adrian) Small* [1987] Crim LR 778.

### **PROPERTY SUBJECT TO A TRUST**

Property subject to a trust is regarded under s5(1) as belonging to the beneficiaries as well as to the trustees. Special provision for charitable trusts where there are no beneficiaries (in the legal sense of persons owning a beneficial interest in the trust property) is made under s5(2), the consequence of which is that if trustees hold property on trust for charitable purposes, the Attorney-General, as a person who, though not a beneficiary, has the right to enforce such a trust, is someone to whom the property belongs, and the trustees may be convicted of theft if they dishonestly appropriate it.

### **PROPERTY RECEIVED FOR A PARTICULAR PURPOSE**

Sometimes the recipient of property is obliged to deal with property in a particular way. Section 5(3) provides that it is theft if a person receives property under an obligation to deal with it in a certain way but instead uses it for his own purposes:

“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 defendant must be under a legal obligation to retain property or its proceeds in a separate fund. Further, the defendant must be aware that such an obligation exists. Whether an obligation exists or not, and if it does, the nature of the obligation, is to be determined by construing the express and implied terms of any contract between the parties:

*R v Hall* [1973] QB 496  
*R v Brewster* (1979) 69 Cr App R 375  
*Davidge v Bunnett* [1984] Crim LR 297.

Where a person receives money or other property for onward transmission to another there is clearly an obligation, to the person entrusted it for transmission, to retain and deal with it on its process in a particular way (to keep it or its equivalent separate and to hand it over):

*R v Wain* [1995] 2 Cr App R 660.

### **PROPERTY RECEIVED BY ANOTHER'S MISTAKE**

If a person is given property by mistake it will still be treated as belonging to the person who gave it (subject to some complex civil law rules as to whether there is a civil obligation to return the property or not). Section 5(4) states:

“Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or the value thereof, then to the extent of that obligation the property

or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded as an intention to deprive that person of the property or proceeds.”

Cases under this provision include:

*Attorney-General's Reference (No 1 of 1983)* [1985] QB 182  
*R v Shadrokh-Cigari* [1988] Crim LR 465  
*R v Stalham* [1993] Crim LR 310.

## **THE MENS REA OF THEFT**

An appropriation of property belonging to another amounts to theft if it is done (1) dishonestly, and (2) with the intention of permanently depriving the other of it.

### **1. DISHONESTY**

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Dishonesty is dealt with in s2 but it only provides a partial definition.

#### **DEFENCES**

Section 2(1) sets out the situations where as a matter of law a person is not dishonest:

“A person's appropriation of property belonging to another is not to be regarded as dishonest-

- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
- (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
- (c) ... if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.”

If there is evidence of a belief which is covered by s2(1), the judge must tell the jury that as a matter of law they must acquit the accused unless the prosecution disproves his alleged belief beyond reasonable doubt.

#### **OTHER CASES**

Two further subsections touch on the question of dishonesty:

A defendant can be dishonest where he does not act with a view to making a gain for himself or another. It is sufficient that he acts with a view to causing loss to the owner, this being the effect of s1(2):

“It is immaterial whether the appropriation is made with a view to gain or is made for the thief's own benefit.”

The other provision is s2(2) which states:

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

This subsection meets a possible argument that an appropriation cannot amount to theft by virtue only of the fact that the defendant is willing to pay for the property.

### **DISHONESTY NOT COVERED BY s2**

In cases where the defendant cannot avail himself of s2(1), and where there is nevertheless some debate as to whether or not his actions were dishonest, the matter should be left to the jury (or magistrates) who should apply the standard of ordinary decent people. In determining whether the prosecution has proved that the defendant was acting dishonestly, the Court of Appeal in **R v Ghosh** [1982] QB 1053 (a case involving s15 TA 1968) held that:

- (1) A jury (or magistrates) must decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter.
- (2) If it was dishonest by those standards, then the jury (or magistrates) must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. It is dishonest for the defendant to act in a way which he knows ordinary people would consider to be dishonest.

Here, the Court of Appeal added a second, subjective test to that laid down in *R v Feely* [1973] QB 530. In *R v Roberts* (1987) 84 Cr App R 117, the Court of Appeal ruled that this second point need only be put to the jury in those cases where the defendant raised the special plea that he did not think he was being dishonest by his own standards.

## **2. INTENTION TO PERMANENTLY DEPRIVE**

The defendant must have taken the property "with the intention of permanently depriving the other of it", although the owner does not have to be permanently deprived of his property. In the vast majority of situations the presence or absence of such a state of mind should be evident. The facts (the history of what the defendant did with the goods) will often have an important bearing on the proof of the defendant's intent. For example:

- \* If D was found respraying the car which he took from V without his permission, the jury is likely to favour the inference that D's intent was to deprive V permanently of it. If on the other hand, D had taken V's lawnmower without permission, and left it in full view of V's house after he had used it to mow his lawn, the jury is likely to favour the inference that it was not D's intention to deprive V permanently of it.

In every case it is for the jury to determine, on the evidence, whether the defendant did so intend, so that where the evidence as to the defendant's intent is circumstantial the judge will instruct the jury that they may infer the intent from evidence pointing to that conclusion. Note two particular circumstances:

Even long-term or indefinite borrowing will not amount to theft:

*R v Warner* (1970) 55 Cr App R 93.

It is not a defence to claim that money that has been taken would have been repaid:

*R v Velumyl* [1989] Crim LR 299.

## **3. SPECIAL FORMS OF BORROWING**

Section 6 provides that in certain circumstances, where a person disposes of or borrows property, that person is to be regarded as having had the intention of permanently depriving the other of it. Section 6 states:

"(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his

intention is to treat the thing as his own to dispose of regardless of the other's rights, and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for the purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights."

In *R v Lloyd* [1985] QB 829, (a case concerning a charge of conspiracy to steal) it was made clear that s6 should only be referred to in exceptional cases; for most purposes it would be unnecessary to go beyond s1(1). Reference should only be made to s6 where the defendant does not mean the other person permanently to lose the thing but has acted in a way which may fall within s6.

**Section 6(1)** deals with two separate situations where a defendant is deemed to intend to deprive the other permanently of the property:

(i) If his intention is to treat the thing as his own to dispose of regardless of the other's rights. See *R v Lavender* [1994] Crim LR 297.

(ii) Borrowing or lending for a period and in circumstances making it equivalent to an outright taking or disposal. For example, the use of a season ticket followed by its return to the owner.

Under **s6(2)** a person is to be treated as having an intention to permanently deprive the owner of his property if he parts with the property under a condition which he *may* not be able to perform. This is meant to provide for the case where a person takes another's property and pledges it with a pawnbroker without the owner's permission. Such a defendant will be deemed to have an intention to permanently deprive as it may be uncertain whether the defendant will be able to redeem the goods- the very fact that he has pawned them tends to show that he is lacking in funds.