DEVELOPMENTS IN THE LAW OF THEFT—APPROPRIATION AND CONSENT—IMPLICATIONS FOR THE CIVIL AND CRIMINAL LAW

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The difficulties posed by the House of Lords' decision in *Lawrence* v. *Commissioner of Police for the Metropolis*[1] continue to haunt the law of theft, almost twenty years after the case was reported. It had been considered by some academics that the later House of Lords' decision in *R.* v. *Morris, Anderton* v. *Burnside*[2] had pushed *Lawrence* almost into the realms of legal history, since it was apparent that the two decisions conflicted on certain important points. Although the House of Lords in *R.* v. *Morris* did not overrule *Lawrence,* their Lordships did make certain remarks which were open to the inference that *Lawrence* was now considered to be an embarrassment in its treatment of the element of "appropriation" in the law of theft. In the light of the Court of Appeal decision in *Dobson* v. *General Accident Assurance Corp Plc,*[3] however, a revival of the principals established in *Lawrence* appears likely—at least until the House of Lords is given the opportunity to resolve the conflict and to bring clarity back into this complex area of the criminal law.

The purpose of this article is to examine whether the Court of Appeal's decision in *Dobson* v. *General Accident Assurance Corp* can be supported in its preference for the principles established in *Lawrence* over and above those established in *R.* v. *Morris.* The implications of the Court of Appeal decision in *Dobson* for both the law of theft and for the civil law will also be discussed. However, it must be stressed at the outset that the case of *Dobson* was brought in the *Civil Division* of the Court of Appeal, since it

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[1] [1972] A.C. 626.

[2] [1984] A.C. 320; [1983] 3 All E.R. 288.

[3] [1989] 3 All E.R. 927.

involved an action against an insurance company for reimbursement under a policy in respect of an alleged theft. Any conclusions as to its effect on the law of theft must, therefore, necessarily be tentative at this time.

In the case of *Dobson*, the plaintiff had advertised a gold Rolex watch and diamond ring for sale. He received a telephone call from a stranger, who expressed interest in buying both items at the advertised price of £5,950. It was provisionally agreed between the parties that payment would be made by means of a cheque drawn on a building society in favour of the plaintiff. On the following day, the stranger visited the plaintiff; and, in exchange for the cheque, the plaintiff handed over to him both items. When the plaintiff tried to pay the cheque into his bank account, he was informed that the cheque, having previously been stolen, was worthless. The plaintiff therefore sought to be reimbursed for the loss of the watch and ring under his insurance policy with the defendant by alleging that both items had been stolen. The defendant insurance company, however, denied liability under the policy by alleging that the circumstances in which the plaintiff had lost both items did not amount to "theft" within the meaning of the policy. The plaintiff therefore commenced an action against the defendant insurance company, claiming to recover the value of the articles. The County Court allowed the plaintiff's claim; but the insurance company appealed to the Court of Appeal, Civil Division, on two grounds.

First, it was alleged by the appellant insurance company that the property in the articles had passed to the stranger when an agreement was reached over the telephone and that this preceded the alleged appropriation; so that, at the time of delivery, the items were no longer "property belonging to another" within the meaning of the Theft Act, 1968. Secondly, it was contended that, as the respondent had consented to the stranger taking both items, then no "appropriation", and hence no theft, had taken place.

The first argument was based on the relevant section of The Sale of Goods Act, 1979, dealing with "specific goods"; namely section 17, and section 18, rule 1.

Under section 17 of the 1979 Act, property in specific goods passes to the buyer:

"at such time as the parties . . . intend it to be transferred".

This intention is ascertained by having regard to:

"The terms of the contract, the conduct of the parties and the circumstances of the case".

Section 18, rule 1 then states that, unless a different intention is apparent (ascertained as above), property in specific goods passes when the contract is made.

It was alleged by the appellant insurance company that a contract was formed between the respondent and the stranger over the telephone on the day preceding collection and payment; and that under rule 1 of section 18, property therefore passed at that time. If, however, the appellant insurance company was wrong on that point, it was nevertheless alleged that property would have passed at the very latest on the following day, when an agreement was reached *prior* to the respondent handing over the items.

Lord Justice Parker, who gave the leading judgment of the Court of Appeal, disagreed with the appellant company on this point. He held that property was not intended to pass when the contract was made, but only when a *valid* building society cheque had been handed over. Even if he was wrong on that point, and property could have passed on the exchange of a false but believed genuine cheque, nevertheless Lord Justice Parker considered that this did not assist the appellant. He cited in support of this conclusion a passage taken from Viscount Dilhorne's judgment in *Lawrence*,[4] in which Viscount Dilhorne had dismissed the appellant counsel's contention that the victim's consent negatived the appropriation. Lord Justice Parker concluded that:

"This passage would in my view dispose of the argument that the articles ceased to belong to the plaintiff because the property passed on contract and that this preceded appropriation. If it were right, then the result would merely be that the *making*[5] of the contract constituted the appropriation. It was by that act that the rogue assumed the rights of an owner and at that time the property did belong to the plaintiff".[6]

Three points can be put in argument against the conclusions

[4] [1972] A.C. 626 at p. 632.

[5] My emphasis.

[6] [1989] 3 All E.R. 927 at p. 931, para. e.

reached by Lord Justice Parker in the above passage.

First of all, the use of civil law concepts to decide theft issues runs entirely counter to the warnings expressed by Lord Roskill in *R. v. Morris.*[7] In using sale of goods language, Lord Justice Parker ignores this warning, even though he later cites Lord Roskill as stating that *Dip Kaur* v. *Chief Constable for Hampshire*[8] was wrongly decided for this reason; and then cites the very passage in which Lord Roskill condemned the use of certain civil law concepts to decide issues of theft:

> "it is on any view wrong to introduce into this branch of the Criminal Law questions of whether particular contracts are void or voidable on the ground of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract. These difficult questions should so far as possible be confined to those fields of law to which they are immediately relevant and I do not regard them as relevant questions under the 1968 Act".[9]

Secondly, even if it can be accepted that civil law concepts are pertinent to questions raised by the law of theft, nevertheless sale of goods rules as to the passing of property should not be compared to the situation which arose in *Lawrence.* Lord Justice Parker, by making such a comparison in his citation from Viscount Dilhornes' speech in *Lawrence,* ignores the fact that *Lawrence* concerned the transfer of ownership in *money* in connection with a contract for the *provision of a service.*

Thirdly, Lord Justice Parker, in using the same citation from *Lawrence,* confuses the issue of consent (*i.e.* to money being taken from Mr. Occhi's wallet) with the first ground of appeal put forward by General Accident in *Dobson.* It was the *second* ground of appeal which was intended to deal with the issue of consent and its relationship to appropriation. If property in goods has passed under a contract of sale in accordance with the rules outlined in sections 17 and 18 of the Sale of Goods Act 1979, then, whether or not subsequent acts are correctly termed "appropriation", the goods have ceased to "belong to another". Lord Justice

[7] See [1983] 3 All E.R., page 294, para. h.
[8] [1981] 2 All E.R. 430; [1981] 1 W.L.R. 578.
[9] [1983] 3 All E.R. 288 at page 294, per Lord Roskill.

Parker's answer to this,—namely, that the making of the contract was itself the "appropriation",—is less than convincing:

> "It was by that act that the rogue assumed the rights of an owner . . .".[10]

Under Sale of Goods law, however, it could be argued that the rogue *was already the owner*—he had not *assumed* the rights of an owner. "Assumption" of the rights of an owner implies that the defendant is *acting as owner* without being the owner. If a defendant, by his actions, has become the owner under the civil law, then it is difficult to see how it can be argued that the very same actions are simultaneously an appropriation of the goods within the meaning of section 3(1) of the Theft Act 1968. Even if the contract of sale was voidable for the rogue's fraud, that contract still remained valid until rescinded for fraud by the other party. As the contract had not been rescinded for fraud, the rogue would have had a "voidable title" to the items of jewellery. If an innocent bona fide purchaser had subsequently bought both items from the rogue, that purchaser should have acquired a good title to the items under section 23 of the Sale of Goods Act 1979. But if Lord Justice Parker is correct in suggesting that the making of the contract was itself the appropriation, and that the rogue was guilty of theft at that moment, then the implications for the civil law are very serious. It would mean that section 23 of the Sale of Goods Act 1979 would cease to have any future practical role to play. This can be illustrated by comparing two similar cases which, if *Dobson* is correct, would now appear to be indistinguishable. In *Lewis* v. *Averay*,[11] a rogue obtained a car by means of a deception as to his identity, paying for the car by use of a worthless cheque. The contract of sale was held to be voidable for fraud, so that a bona fide purchaser of the vehicle would be protected under the Sale of Goods Act 1979, section 23. However, in the earlier case of *Ingram* v. *Little*,[12] a different result was arrived at. In that case, a rogue falsely represented himself to be a Mr. Hutchinson of Caterham, a real person who was not known to the plaintiffs. The rogue bought a car from the plaintiffs, paying by means of a

[10] [1989] 3 All E.R. 927 at p. 931, para. e. per Lord Justice Parker.
[11] [1971] 2 All E.R. 507.
[12] [1961] 1 Q.B. 31.

worthless cheque. The Court of Appeal held that the "Contract" between the plaintiff and the rogue was void for contractual mistake; so that Mr. Little was liable to the plaintiffs in the tort of conversion for having purchased the car from the rogue. Had the contract been merely voidable for fraud, then Mr. Little would have been protected by section 23 of the Sale of Goods Act 1979, since he would have acquired a good title to the car. If the goods in *Dobson's* case, however, were "stolen" within the meaning of the Theft Act 1968, then it would follow that the car in *Lewis* v. *Averay* should now be regarded as having been stolen, since the two cases cannot now be distinguished in principle. It would then equally follow that the contract in *Lewis* v. *Averay* would no longer be treated as merely voidable for fraud, with the result that the subsequent purchaser of the car would lose the protection afforded by section 23 of the Sale of Goods Act 1979. After the Court of Appeal decision in *Dobson,* the cases of *Lewis* v. *Averay* and *Ingram* v. *Little* can no longer be regarded as distinguishable: both cases would now involve a theft of the car, with the implication that section 23 of the Sale of Goods Act 1979 would apply to neither. This would leave Section 23 with little or no role to play in practice, resulting in serious implications for the bona fide purchaser of the goods.

It may also be added that Lord Justice Parker's reference to the issue of consent in *Lawrence* when addressing the first ground of appeal is unsatisfactory for another reason. In *Lawrence*, Mr. Occhi was hardly "consenting" to £6 being taken from his wallet; he was only consenting to the legal fare for the journey being taken from his wallet, and not to paying more than the legal fare. Bearing in mind his language difficulties and ignorance of London taxi fares, Mr. Occhi had assumed that £7 *was* the correct fare; but had he known the truth, he would almost certainly have objected to the extra amount of money being taken. It can therefore be argued that Mr. Occhi did not give *real consent* to the money being removed. This point was made by Lord Justice Bingham in *Dobson*:

> "I do not find it easy to reconcile this ruling of Viscount Dilhorne, which was as I understand central to the answer which the House of Lords gave to the certified question, with the reasoning of the House in *R.* v. *Morris.* Since, however,

> the House in *R.* v. *Morris* considered that there had plainly been an appropriation in *Lawrence's* case, this must (I think) have been because the Italian Student, although he had permitted or allowed his money to be taken, had not in truth consented to the taxi driver taking anything in excess of the correct fare".[13]

This attempted reconciliation of *Lawrence* with *Morris* has its own difficulties. Lord Justice Bingham's reasoning led to the conclusion that the respondent in *Dobson* "had not in truth consented to the rogue becoming owner without giving a *valid* draft drawn by the building society for the price", so that the appropriation occurred "when the rogue accepted delivery of the articles".[14] If it had been accepted that property in the two items passed at an earlier stage, when the contract was formed, then Lord Justice Bingham's conclusions would not render the rogue guilty of theft, since the goods would have ceased to "belong to another" before the appropriation occurred. Lord Justice Bingham, however, preferred to impute an intention on the part of both parties "that property in the watch and the ring should pass to the rogue on delivery of the goods to him and not before", and[15] that this was *also* the moment of appropriation, which, being simultaneous events, rendered the rogue guilty of theft.

In his efforts to reconcile *Lawrence* and *R.* v. *Morris,* Lord Justice Bingham's reasoning would render the defendant in *Eddy* v. *Niman*[16] guilty of theft. It could be argued that a supermarket which provides baskets for customer use, only consents to customers using those baskets if they intend to pay for the items which they place in them. It would therefore follow that a customer who objectively does not appear to go beyond the bounds of the supermarket's consent is still guilty of theft if he subjectively has the intention not to pay. The problems of proving such an intention would provide enormous difficulties for prosecutors; but at the same time it would also render the honest customer, who has left her purse on the bus or elsewhere, open to the risk of prosecution

[13] [1989] 3 All E.R. 927 at p. 937, para. f.
[14] [1989] 3 All E.R. 927 at p. 937, para. g.
[15] [1989] 3 All E.R. 927 at p. 937, para. j.
[16] [1981] 73 Cr.App.R. 237.

as well as great embarrassment. It may therefore be preferable to recognise that *Lawrence and R.* v. *Morris* are not reconcilable, and that a choice between them has, ultimately, to be made.

Both Lord Justice Parker and Bingham mentioned the criteria of a *valid* building society draft, though in slightly different contexts. Lord Justice Parker stated that *property* was intended to pass only when a *valid* building society cheque had been handed over, whilst Lord Justice Bingham spoke of the plaintiff having "permitted or allowed his property to be taken by the rogue" but that "he had not *in truth consented to the rogue becoming owner without a valid draft* drawn by the building society for the price". These statements carry the implication that the overlap between the offence of theft and that of obtaining property by deception, contrary to section 15 of the Theft Act 1968, is little short of 100%. The conclusion must now be reached that, whenever goods are purchased by means of a cheque or credit card transaction, property in those goods is intended to pass only if the means of payment is valid. If it is not, then the goods in question are "stolen", just as much as they are obtained by deception. However, the deception offence exists to deal precisely with those situations in which a person obtains goods by failing to disclose his dishonest intentions but where the circumstances are such that a representation of honest intentions is implicit. In these circumstances, the prosecution are now presented with the choice of charging with straight theft or with obtaining property by deception; which leaves little remaining scope for "pure" deception cases under section 15. There appears to be no real point, therefore, in retaining section 15 in its present form, if nearly all section 15 cases are simultaneously section 1 cases. Was it the intention of Parliament that this should be the outcome, when drafting both sections? If it were, then there would seem to be no point in having the two separate offences in the first place. If it were not, then the Courts have, through *Lawrence and Dobson,* clearly thwarted Parliamentary intentions.

The second argument put forward by the appellant concerned the question of the effect of the victim's consent on the element of "appropriation" in the definition of theft. The appellant argued that the definition of "appropriation" put forward by Lord Roskill in *R.* v. *Morris* implied that the victim's consent to the taking

negatived the appropriation. This contention, if accepted, would have led to the conclusion that the courts are finally ignoring the statement in *Lawrence* that consent is totally irrelevant to "appropriation". The apparent contradition between the two House of Lords' decisions in *Lawrence* and *R.* v. *Morris* on this point has proved a fruitful source for academic discussion ever since. In *R.* v. *Morris* two cases were joined on appeal to the House of Lords. In both cases, the appellants had switched price labels on goods in a supermarket, with the intention of getting those goods at the cheaper price. One of the appellants was successful in that venture before being arrested; the other was stopped at an earlier stage. Both appellants had been convicted of theft. On appeal, one issue for decision was whether the price-label switching involved an appropriation of the goods, since the facts disclosed the more obvious offence of obtaining property by deception, or attempting to do so.[17] Lord Roskill, who gave the leading judgment in the House of Lords, stated that "appropriation", in the context of section 3(1) of the Theft Act 1968:

> "involves not an act expressly or impliedly authorised by the owner but an act by way of adverse interference with or usurpation of those rights. When the honest shopper acts as I have just described, he or she is acting with the *IMPLIED AUTHORITY* of the owner of the supermarket . . . . . It is with the consent of the supermarket, *be that consent express or implied,* that the shopper does these acts . . . I do not think that s. 3(1) envisages any such act as an appropriation . . .".[18]

Although this statement was made in relation to a suggestion that the removal of an item from a supermarket shelf amounted to "appropriation", it is nevertheless clear that Lord Roskill was not confining his comments to such situations alone, but was making a general statement on the meaning of appropriation. It is equally clear that Lord Roskill uses the words "consent" and "authorised" interchangeably to mean precisely the same.

As to the decision in *Lawrence,* Lord Roskill stated that it had not been necessary in that case for their Lordships to consider the meaning of "appropriation" in any detail, since theft was plainly

[17] See section 15 of the Theft Act 1968.
[18] [1983] 3 All E.R. 288 at p. 293, paras. d to f. Emphasis supplied.

made out against the defendant, Lawrence, on the facts:

> "That there was in that case a dishonest appropriation was beyond question and the House did not have to consider the precise meaning of that word in s. 3(1)".[19]

It had been accepted by Lord Lane at the Court of Appeal stage in *R.* v. *Morris* that the mere removal of an item from a supermarket shelf amounted to an appropriation of the goods, even when not accompanied by price-label switching. Lord Roskill, however, disagreed with this when the case reached the House of Lords:

> "If one postulates an honest customer taking goods from a shelf to put in his or her trolley to take to the check-point there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket".[20]

Lord Roskill also commented on the decision in *R.* v. *McPherson*,[21] in which a woman was convicted of stealing bottles of whisky which she had concealed in her own shopping bag:

> " . . . it is a plain case of appropriation effected by the combination of the acts of removing the goods from the shelf *and concealing them in the bag*".[22]

In *Dobson*, however, Lord Justice Parker took issue with Lord Roskill on all these points.

As to the comment that the House of Lords did not need to consider the precise meaning of appropriation in *Lawrence,* Lord Justice Parker vehemently disagreed:

> "With respect, I find this comment hard to follow in the light of the first of the questions asked in *Lawrence's* case and the answer to it, the passage from Viscount Dilhorne's speech . . . the fact that it was specifically argued that 'Appropriates' is meant in a pejorative, rather than a neutral, sense in that the appropriation is against the will of the owner" . . . and finally that dishonesty was common ground. I would have supposed that *the* question in *Lawrence's* case was whether appropriation necessarily involved an absence of consent".[23]

[19] [1983] 3 All E.R. 288 at p. 292, para. h.
[20] [1983] 3 All E.R. 288 at p. 293, para. d.
[21] [1973] Cr.L.R. 191.
[22] [1983] 3 All E.R. 288 at p. 294, para. d. My emphasis.
[23] [1989] 3 All E.R. 927 at p. 931, para. h.

It has already been pointed out that, in *Lawrence*, real consent was hardly made out on the facts. Nevertheless, the above statement of Lord Justice Parker does serve to emphasise the conflict which exists between the two House of Lords' decisions. This is a matter which can only be resolved by the House of Lords itself; and this must surely result in the overruling of either *Lawrence* or *R.* v. *Morris*.

Having considered the facts of *R.* v. *Morris,* Lord Justice Parker turned to a consideration of whether the mere removal of an item from a supermarket shelf amounts to an appropriation. After reviewing the passage from *R.* v. *Morris,* cited earlier,[24] Lord Justice Parker concluded, first of all, that price label switching *could* involve an appropriation. He commented that in *R.* v. *Morris,* their Lordships had wrongly "run together" the two elements of "dishonesty" and "appropriation":

> "In that passage it appears to be envisaged that it will depend on the question whether the label switching was dishonest and coupled with the other elements of the offence of theft or was due to a perverted sense of humour. This, however, appears to run together the elements of dishonesty and appropriation, when it is clear from *Lawrence's* case that they are separate. That the two elements were indeed, at any rate to some extent, run together is plain from the fact that the answer to the certified question begins with the words "there is a dishonest appropriation."[25]

This passage raises three important questions in the law of theft:

(1) Can dishonesty and appropriation be kept entirely separate?
(2) Is price-label switching necessarily an appropriation of the goods?
(3) Is the mere removal of an item from a supermarket shelf, when unaccompanied by price-label switching, an appropriation of the goods?

[24] See note 18, *supra*.
[25] [1989] 3 All E.R. 927 at p. 933, paras. a to b.

1. Are the elements of "dishonesty" and "appropriation" entirely separable elements of theft?

It is clear from the Theft Act 1968, itself, that the two elements of "dishonesty" and "appropriation" were intended to be separate elements, since they deal with the *mens rea* and *actus reus* of theft respectively, and are dealt with by different sections of the Act. However, in practice, it is not always so easy to separate out these two elements as the Theft Act 1968 purports to do. One way of testing whether these two elements are always separable is to examine two different situations: one in which the action of the defendant is clearly authorised, and the other where it clearly is not. In the following discussion, the element of dishonesty will be referred to as the subjective element, and the alleged act of appropriation as the objective element.

The case of *Eddy* v. *Niman*[26] can be used to illustrate that the objective and subjective elements are sometimes separable in those situations in which the victim consents to the defendant's actions. This case was not cited in *Dobson;* but it is a good example of where consent negatived appropriation. In *Eddy* v. *Niman,* the defendant placed goods in a wire basket provided by the supermarket having already formed the dishonest intention of leaving the supermarket without paying for the items. He later changed his mind, and handed the goods to his accomplice before leaving the store empty handed. The defendant was not guilty of theft because there had been no appropriation of the goods. The defendant was doing precisely what the general public were authorised to do, namely, to remove items from the shelves and to place them in the baskets provided for customer use. The secret dishonest intention held by the defendant could not turn an otherwise objectively innocent act into an appropriation. Viewed objectively, the defendant had done nothing wrong. Viewed subjectively, however, the defendant's secret intention to steal could be argued to involve treating the goods as already his own and thus to amount to an assumption by him "of the rights of an owner" within section 3(1) of the Theft Act 1968. The decision in *Eddy* v. *Niman* suggests

[26] See note 16, *supra*.

that secret dishonest intentions are irrelevant if an act is objectively innocent by reason of the victim's consent, despite the decision in *Lawrence* that the victim's consent cannot negative the appropriation.

Eddy v. *Niman* was approved of by their Lordships in *R.* v. *Morris*; and this fact can be used to support the proposition that "dishonesty" and "appropriation" are separate and separable elements of theft. However, it can also be argued that the overriding factor in *Eddy* v. *Niman* was in itself the element of consent to the use of the supermarket's baskets. Where consent is absent, then dishonesty *may* be relevant to appropriation.

A similar case to *Eddy* v. *Niman* is that of *R.* v. *Skipp*,[27] in which the defendant, posing as a haulage contractor, obtained instructions to collect three consignments of food from three different places in London and then to deliver them to customers in Leicester. His intention all along was to steal the goods; but on a single count of theft, it was argued that there had been three separate appropriations occurring at different times. The Court of Appeal, however, held that the appropriation did not take place until all the loading was completed and the defendant had diverted the goods from their intended destination. Despite the defendant's dishonest intentions, he had done nothing which, viewed objectively, was wrong, since he was doing precisely what he had been instructed to do. By reason of the victim's consent, the defendant had not assumed the rights of an owner until the point of time when he deviated from the instructions given.

Both of the above-mentioned cases suggest that, where there is consent from the victim (whether that consent is express or implied, or takes the form of instructions), then secret subjective dishonest intentions cannot change an otherwise objectively innocent act into an "appropriation".

What, then, of the situation in which there manifestly is no consent on the part of the victim? Will dishonesty on the defendant's part be crucial in differentiating innocent acts from those which involve a theftous appropriation?

Two cases can be used to illustrate that dishonesty *cannot* always be ignored in such circumstances.

[27] [1975] Cr.L.R. 114.

In the first case, *R.* v. *McPherson*,[28] the defendant placed bottles of whisky into her own shopping bag whilst in a self-service store. It was quite apparent that the defendant had a dishonest intention; so that the sole question for decision was whether there had been an "appropriation" of the goods. The Court of Appeal held that there was such an appropriation when the goods were removed from the shelf with dishonest intent, even before the goods were concealed in the defendant's own shopping bag. It may be questioned whether the mere removal of an item from a shelf *does* amount to an appropriation (see later). But if *McPherson's* case was correctly decided, then it must follow that *either all* customers "appropriate" goods as soon as they pick them up, touch them or move them along the shelf, *or* that *dishonesty* turns such action into an appropriation. To suggest that the *honest* customer "appropriates" goods whenever he picks them up to read the label or to note the price, does seem pointless; and Lord Roskill clearly recognised this in the passage quoted earlier.[29] It would therefore appear that, in *R.* v. *McPherson,* the defendant's dishonest intention *was* the crucial factor in determining that she had appropriated the goods.

The second case which illustrates the complexities of the relationship between "dishonesty" and "appropriation" is that of *R.* v. *Morris* itself. In that case, Lord Roskill drew a distinction between a customer who switches price-labels on goods with no dishonest intent but with mischievous thoughts of perpetrating a practical joke, and the dishonest customer who intends to acquire the goods at the lower price indicated on the substitute label:

> "Further, if a shopper with some perverted sense of humour, intending only to create confusion and nothing more, both for the supermarket and other shoppers, switches labels, I do not think that that act of label-switching alone is without more an appropriation, though it is not difficult to envisage some cases of *dishonest* label switching which could be . . . In cases such as the present, it is in truth a combination of these actions, the removal from the shelf and the switching of the

[28] [1973] Cr.L.R. 191.
[29] See [1983] 3 All E.R. 288 at p. 293 and note 18.

> labels . . . these acts, therefore, amount to an appropriation".[30]

In the above passage, Lord Roskill clearly considers that the distinguishing feature of the two situations outlined is the element of dishonesty which is present in the latter case.

It can therefore be argued that, although dishonesty is not an essential ingredient of appropriation in *all* situations, it can be of crucial importance in some. The present author has already argued elsewhere that appropriation does import a mental elements for its presence, but that this is:

> "neither exclusively dishonesty nor exclusively intention to permanently deprive, although the presence of either may suffice to turn an innocent act into an appropriation".[31]

The Court of Appeal in *Dobson* is oversimplifying matters by suggesting that:

> "it is clear from *Lawrence's* case that they (*i.e.* dishonesty and appropriation) are separate".[32]

All that is "clear" from *Lawrence* is that consent was stated to be irrelevant to the issue of appropriation, though relevant to dishonesty. That is not the same as saying that "dishonesty" and "appropriation" are themselves entirely separate and separable elements of theft.

2. *Does the removal of an item from off a supermarket shelf, when accompanied by price-label switching amount to an "appropriation"?*

It is clear from the foregoing discussion that, according to Lord Roskill in *R.* v. *Morris,* the removal of an item from a supermarket shelf by a customer with dishonest intent *does* amount to an appropriation when it is accompanied by price-label switching. However, the practical joker, who has no such dishonest intention, does not appropriate the goods merely by switching price-labels. In *Dobson*, Lord Justice Parker disagreed with the above conclusions. There were two reasons for his doing so.

[30] [1983] 3 All E.R. 288 at page 293 paras g–h. My emphasis.
[31] Journal of Criminal Law, Volume 48, part 4, November 1984, pp. 395–396.
[32] *Per* Lord Justice Parker [1989] 3 All E.R. 927 at p. 933, para. a.

First of all, Lord Justice Parker considered that the distinguishing feature of *dishonesty* finds no support in *Lawrence's* case, which appears to reach the opposite conclusion:

> "In that passage it appears to be envisaged that it will depend on the question whether the label-switching was dishonest and coupled with the other elements of the offence of theft or was due to a perverted sense of humour. This, however, appears to run together the elements of dishonesty and appropriation, when it is clear from *Lawrence's* case that they are separate".[32a]

However, in *Lawrence* Viscount Dilhorne did not specifically say that "dishonesty" and "appropriation" could never be related. He had, instead, stated that:

> "Belief or the absence of belief that the owner had with such knowledge consented to the appropriation is relevant to the issue of dishonesty, not to the question whether or not there has been an appropriation. That may occur even though the owner has permitted or consented to the property being taken."[33]

The issue as to whether the appropriation turned on dishonesty did not directly arise; and there was ample evidence in that case of dishonesty. It cannot, therefore, be concluded from *Lawrence* that an objectively innocent act can never amount to an appropriation when it is combined with dishonesty; nor can it be concluded that an objectively innocent act *is* an appropriation, even when there is no such dishonesty.

Secondly, Lord Justice Parker considered that, on general principles, price-label switching would be a plain interference with, or usurpation of, an owner's rights:

> "It would be a trespass to goods and it would be usurping the owners' rights, for only he would have any right to do such an act and no one could contend that there was any implied consent or authority to a customer to do any such thing. There would thus be an appropriation".[34]

In this extract, Lord Justice Parker apparently concedes that

[32a] [1989] 3 All E.R. 927 at p. 933, para. a.
[33] [1971] 2 All E.R. 1253 at p. 1255 paras. d–e.
[34] [1989] 3 All E.R. 927 at p. 933, para. b.

consent on the part of a victim *would* negative the appropriation, because the action of the defendant would not, then, amount to a usurpation of or interference with the owner's rights.

It is therefore suggested that price-label switching *will* amount to an appropriation when accompanied by dishonest intentions of obtaining the goods at the lower price; but that the practical joker does not necessarily "appropriate" the goods, as he lacks the necessary mental element of dishonesty.

Although in the later case there would be no consent to the switching of price labels, nevertheless the lack of dishonesty on the practical joker's part could render the action of price-label switching "innocent" and not a theftous appropriation.

3. Is the mere removal of an item from a supermarket shelf an appropriation of the goods?

What, then, of the mere removal of an item from the supermarket shelf, unaccompanied by price-label switching? Can this amount to an appropriation? In *R.* v. *Morris,* Lord Lane had accepted, at the Court of Appeal stage, that such action did involve an appropriation, because the customer, in doing so, was assuming one of the rights of an owner—"The right to move the article from its position on the shelf to carry it to the checkout". The strongest argument in favour of this conclusion was the view taken in *Lawrence's* case; since the element of consent was stated in that case to be irrelevant to the issue of appropriation. In *R.* v. *Morris,* on appeal to the House of Lords, Lord Roskill, however, disagreed with Lord Lane's conclusion:

> "With the utmost respect, I cannot accept this statement as correct. If one postulates an honest customer taking goods from a shelf to put in his trolley to take to the checkpoint there to pay the proper price, I am unable to see that any of these actions involves any assumption by the shopper of the rights of the supermarket . . . It is with the consent of the owners of the supermarket be that consent express or implied, that the shopper does these acts . . . "[35]

[35] [1983] 3 All E.R. 288 at p. 293, paras. d–e.

At first glance, Lord Justice Parker, in *Dobson,* appears not to dispute this in those situations where there is express or implied consent:

> "The case of the customer who simply removes goods from the shelves is of course different because the basis on which the supermarket is run is that customers certainly have the consent of the owner to take them to the checkout point there to pay the proper price for them".[36]

However, Lord Justice Parker then compares the above situation with that of a shop where goods on display are to be taken from the shelves only by an attendant:

> "In such a case a customer who took from the shelves would clearly be usurping the right of the owner. Indeed he would be doing so if he did no more than move an item from one place on a shelf to another. The only difference appears to be that in the one case there is consent and in the other there is not. Since, however, it was held in *Lawrence's* case that consent is not relevant to appropriation there must, one would have supposed, be no difference between the two cases on that aspect of the offence".[37]

In this second extract, the implication is quite clear. The courts are now faced with a straight choice — *Morris* or *Lawrence.* If *R.* v. *Morris* is correct, then it must follow that the mere removal of an item from a shelf cannot amount to an appropriation, because of the element of consent. If, however, *Lawrence's* case is to be preferred, then the element of consent becomes irrelevant; and even the *honest* customer must "appropriate" goods when he picks them up from the shelf. An objectively innocent act, such as in *Eddy* v. *Niman,*[38] would therefore involve an appropriation, regardless of dishonesty, if Lord Justice Parker's preference for *Lawrence's* case were to be followed in the future. However, at the same time, Lord Justice Parker did approve of two other cases, both of which have been thought of by academics as consistent with *R.* v. *Morris,* namely *R.* v. *Skipp*[39] and *R.* v. *Fritschy.*[40]

[36] [1989] 3 All E.R. 927 at p. 933, paras. d to e.
[37] [1989] 3 All E.R. 927 at p. 933, paras. d to e.
[38] See note 16, *supra.*
[39] See note 27, *supra.*
[40] [1985] Cr.L.R. 745.

In *R.* v. *Skipp,* the defendant was held guilty of theft on a single count of theft, since it was considered that no appropriation took place until the goods in the lorry were diverted from their proper destination. In commenting on this case, Lord Justice Parker stated:

> "That case can in my view only be reconciled with *Lawrence's* case on the basis that there was much more than *mere consent* of the owner. There was *express authority*, indeed instruction to collect the goods. It could not therefore be said that the defendant was assuming any rights . . . "[41]

In *R.* v. *Fritschy*, the defendant was convicted of theft of krugerrands. He had been instructed by a purchaser, H, to collect the krugerrands in England and to take them to Switzerland. The defendant collected the krugerrands, but failed to hand them over in Switzerland, having had a dishonest intention from the outset. On appeal, his conviction for theft was quashed, since all the acts within the English jurisdiction had been expressly authorised. This decision was clearly based on that of the House of Lords in *R.* v. *Morris.*

In commenting on *R.* v. *Fritschy,* Lord Justice Parker stated, in *Dobson*, that:

> "Here as in *R.* v. *Skipp,* what the defendant did was expressly authorised, *i.e.* there was more than mere consent. On this basis the decision can be reconciled with both *Lawrence's* case and *R.* v. *Morris*".[42]

Lord Justice Parker is attempting to draw a distinction between "mere consent", which he sees as irrelevant to appropriation, and "express authority" which he suggests negatives appropriation. Can, however, such a distinction be justified? Even if it could, does it not create even more problems for the courts in the future? According to Lord Roskill in *R.* v. *Morris*, no such distinction is to be drawn. Lord Roskill clearly used the words "consent" and "authorisation" interchangeably. In his mind at least, they mean the same thing. Nor does Lord Roskill confine the suggestion of "if consent, then no appropriation" to cases of *express* consent or

[41] [1989] 3 All E.R. 927 at p. 934, paras. h–j.
[42] [1989] 3 All E.R. 927 at p. 935 paras. c–d.

authority.[43] As honest customers have the supermarket's consent to pick up items from the shelf, such action should not be treated as an appropriation of the goods.

Lord Justice Parker did admit in *Dobson* that he was not following *R.* v. *Morris*:

> "but in the light of the difficulties inherent in the decision, the very clear decision in *Lawrence's* case and the equally clear statement in *R.* v. *Morris* that the question whether a contract is void or voidable is irrelevant, I have been unable to reach any other conclusion".[44]

In the final analysis, the law of theft is left in a state of confusion. *Dobson's* case selects and relies upon certain aspects of the House of Lord's decision in *R.* v. *Morris,* whilst ignoring or disagreeing with others of equal importance. The decision of the Court of Appeal in *Dobson* can only lead to both confusion and further complexities in the civil law and in the criminal law of theft. If the House of Lords is given the opportunity in the near future, it should therefore overrule both *Dobson* and *Lawrence,* following its own approach in *R.* v. *Morris,* which has, at least, some degree of common sense on its side to commend it. If, however, *Dobson* is accepted as correct, then the implications for the law of theft and for the civil law are serious, and all for the sake of an insurance claim which may have left the customer happy, but has certainly left insurance companies pondering what to do next.

[43] See quote, note 18, *supra.*
[44] [1989] 3 All E.R. 927, 935, para. f.