PERMANENT BORROWING AND LENDING: A NEW VIEW OF SECTION 6 THEFT ACT 1968

*ALEX STEEL**

INTRODUCTION

The offence of theft[1] and the recently repealed offence of obtaining property by deception[2] require that the accused appropriate property with an intention to permanently deprive. When the Theft Bill 1968 was introduced into Parliament, no definition of an intention to permanently deprive was included, but a partial definition was added during the course of debate.[3] This is contained in section 6:

> *With the intention of permanently depriving the other of it*
> (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.

The meaning of section 6 has long been considered difficult to understand, due to the way in which the two limbs of section 6 (1) are linked.[4] The second limb defines a subset of borrowing and lending that can fall within section 6. The difficulty is in determining whether that subset falls within a broader concept set out in the first limb, or whether the use of the word "and" (rather than "but") to connect the two limbs means that all forms of borrowing and lending fall outside of the scope of first limb.

Commentators[5] had argued that the passage of the section through Parliament created the strong implication that the section was only meant to replicate the pre-1968 common law position of three extensions to the general requirement that there be an intention to permanently deprive. These extensions were the so-called ransom cases where the stolen property was sold back to the victim (generally through deception);[6]

* Senior Lecturer, Faculty of Law, University of New South Wales.

[1] Section 1 Theft Act 1968.

[2] Section 15 Theft Act 1968, repealed by the Fraud Act 2006.

[3] For the history of the sections see Spencer, "The Metamorphosis of Section 6 of the Theft Act", [1977] Crim LR 653.

[4] It was famously described by Spencer as a section that "sprouts obscurities at every phrase" (*op cit* at 653) a description adopted by the Court of Appeal in *R v Lloyd*, [1985] QB 829 at 834. As the Parliamentary debates make clear, much of the second limb was originally attached to the end of s 6(2) and moved to the end of s 6(1) immediately prior to the passing of the Bill. See Spencer, *op cit*, for a detailed discussion.

[5] See Spencer, *op cit*; Griew, *The Theft Act 1968 and 1978* (5th Edn, 1986, Sweet & Maxwell) at 2-85 ff; Smith, *The Law of Theft* (5th Edn, 1984, Butterworths), [127] –[132]; and Williams, *Textbook of Criminal Law* (2nd Edn, 1983, Stevens & Sons) at 714; Williams, "Temporary Appropriation Should be Theft", [1981] Crim LR 129.

[6] Despite the general acceptance that the ransom principle was a part of the common law, there seems to be little case law to support it: Spencer (*op cit*) footnotes two cases: *Hall*, (1849) 3 Cox CC 245, and *Peters*, (1843) 1 Car and Kir 245; 174 ER 795. ATH Smith suggests that *Spurgeon*, (1846) 2 Cox CC 102, is the only direct authority (*Property Offences* (1994, Sweet & Maxwell) at 225); while Glanville Williams ("Temporary Appropriation should be Theft", [1981] Crim LR 129 at 132) refers to a notorious taking of a Goya painting with a ransom for its return where the principle appears to have not applied (*Bunton*, *The Times* 11 November 1965); a case that ATH Smith considered the inspiration for the second half of s 6(1). For a modern Australian example and discussion of the cases see *Lowe v Hooker*, [1987] Tas R 153.

cases where the nature of the property was changed[7] or its value exhausted before its intended return;[8] and cases where the property was put at risk by putting it beyond the defendant's control, such as where the property had been pawned or used as security.[9] This approach was adopted in *Lloyd*[10] where the Court of Appeal held that the first limb of section 6(1) referred to ransom cases and the second limb to changed nature/exhausted value cases, a situation the court described as when "all its goodness or virtue has gone" [11]

This analysis appeared to read down the scope of the section in a significant way, although not all later cases followed the approach.[12] However, in *Fernandes*[13] the Court of Appeal held that the section was "not limited in its application to the illustrations given by Lord Lane CJ in *Lloyd* . . . Nor. . did Lord Lane suggest that it should be so limited". Instead, in *Fernandes*, the Court of Appeal stated that the correct approach to section 6(1) was:

> The critical notion, stated expressly in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights" The second limb of subsection (1), and also subsection (2), are merely specific illustrations of the application of that notion.[14]

However, the court in *Fernandes* did not attempt a detailed explanation of the operation of the section, and decisions on the section have been characterised by a lack of detailed discussion of the section. Making matters more difficult, courts have not always been referred to previous decisions on the section and the result is a confused and at time Delphic collection of judicial statements. This article attempts an analysis of all of the judicial statements in an attempt to see if an underlying approach can be gleaned and as a result suggests a new way of understanding the section.[15]

DIFFICULTIES WITH *FERNANDES* AND CHOSES IN ACTION

While *Fernandes* contains a strong statement that nothing in *Lloyd* is to be seen as limiting the scope of section 6, the reasoning in *Fernandes* itself is subject to significant difficulty. That is because *Fernandes* involved the appropriation of electronic funds and was decided prior to *Preddy*.[16] In *Preddy*, the House of Lords accepted that general property law concepts relating to the transfer of choses in action apply to the interpretation of the Theft Act. Specifically, it was held that in a "transfer" of a chose in action, the chose held by the transferee is a new and identical one to that "transferred", which is, in fact, destroyed as a result of the transaction. Consequently,

[7] *Richards*, (1844) 1 Car & Kir 532; 174 ER 925; *Smails*, (1957) WN (NSW) 150.

[8] *Beecham*, (1851) 5 Cox CC 181.

[9] *Medland*, (1851) 5 Cox CC 292; *Johnson* (1867) 6 SCR (NSW SR) 201 at 207. Such an intention eventually to return the property has also been removed as a defence under NSW law by s 118 *Crimes Act* 1900.

[10] [1985] QB 829 at 836.

[11] At 837. See also *Warner*, (1970) 63 Cr App R 79 at 97–8; *Easom* [1971] 2 QB 315, at 319 and *Cocks* (1976) 63 Cr App R 79.

[12] See *R v Bagshaw*, *The Times* 13 January 1988; [1988] Crim LR 321, (Transcript: Marten Walsh Cherer).

[13] [1996] 1 Cr App R 175.

[14] [1996] 1 Cr App R 175 at 188. Counsel for Fernandes sought to restrict the scope of the first limb to acts of attempted re-sale, relying on *Warner*, (1970) 63 Cr App R 79; *R v Lloyd*, [1985] QB 829 and *Duru*, [1974] 1 WLR 2 (at 186).

[15] It is recognised that at times the argument articulated might seem somewhat stretched, but this is an inevitable outcome of the wording of the section and the history of its interpretation. It is hoped that, while readers might not agree with all of the arguments advanced in this article, the attempt to provide an overall understanding of the section is of assistance in illuminating both the true breadth of the section and its difficulties of interpretation.

[16] *R v Preddy*, [1996] AC 815.

the chose held by the accused in a theft case is not the same as the one originally held by the victim and any "returned" chose would be a third distinct legal right. It is thus doctrinally impossible to not permanently deprive the victim of the chose in action. While section 6 refers to the intentions of the accused, it is very unlikely that an accused considers that he or she is replacing the exact chose that was taken,[17] and consequently section 6 can only apply to tangible property.[18] On this basis the decision in *Fernandes* cannot be correct on the facts.

Additionally, the explanation of the section essayed in *Fernandes* contains significant difficulties. In stating that the second limb and section 6(2) are merely illustrations of the first limb, the court appears to have overlooked the fact that the second limb of section 6(1) specifically states that a borrowing or a lending can only fall within the first limb "if, but only if" it "is for a period and in circumstances making it equivalent to an outright taking or disposal". Consequently, it is suggested in this article that those specific illustrations in fact act as a significant boundary to the practical scope of the first limb because the second limb acts to excise from the scope of section 6 any borrowing or lending that is not "equivalent to an outright taking or disposal"

Finally, the court in *Fernandes* stated that:

> We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss.[19]

There is some uncertainty as to whether the court in *Fernandes* applied the first or second limb of section 6(1) in coming to its decision. This article aruges that the facts of the case and the words used by the court best fall within the concept of lending in the second limb and thus this statement in *Fernandes* should be seen to apply to the second limb, not to the first limb. Consequently, they do not shed light on the scope of the first limb.

THE RELATIONSHIP BETWEEN SECTION 6 AND THE OTHER ELEMENTS OF THEFT

The modern form of theft requires an act of appropriation, which is now held by the courts to require only the assumption of any one property right of the owner.[20] However, as section 6 is predicated on the intention that the victim is not permanently deprived of the property and that the accused intends to treat the property as his or hers to dispose of, the property right appropriated must be one that is great enough to be characterised as a right of disposal, but not one of destruction. It is argued below that this must amount to the assertion of the rights of ownership. Combined with the fact that intangible property cannot be returned, this means that section 6 applies only to that subset of theft where the accused assumes the rights of ownership over tangible property.

The broad interpretation of appropriation also raises the question as to what additional intention section 6 refers. Appropriation includes within it an intention to

[17] This is particularly the case if the money has been invested in the meantime, and what is intended to be returned are the profits.

[18] In rare cases it may be arguable that the accused is not aware of the legal nature of choses in action and may have a belief that his or her actions will not amount to a temporary deprivation. In such cases the first limb s 6(1) might have a role to play.

[19] [1996] 1 Cr App R 175 at 188.

[20] *DPP v Gomez*, [1993] AC 442

deal with a property right of the victim in a manner that is analogous to a trespassory act. Such an intention can be described as an intention to deal with the property "regardless of the other's rights" In the light of this, the key aspect of the first limb of section 6 is the meaning of the intention to "treat the thing as his own to dispose of" as it is this element that is additional to the mental element of appropriation.

A conviction for theft also requires that the accused appropriate the property dishonestly. Under the test in *Ghosh*,[21] that requires that the accused be aware that his or her actions would be considered dishonest by ordinary people. In nearly all cases where section 6 applies, the accused will thus be acting dishonestly as section 6 requires that the accused intends to act "regardless of the other's rights", or to borrow or lend property in a way that amounts to "an outright taking or disposal" Both situations would be regarded by ordinary people as something that ought not to be done, and thus dishonest. Consequently, in circumstances where resort to section 6 is required, it is likely to be determinant of liability.

THE FIRST LIMB OF SECTION 6(1)

There are only two Court of Appeal decisions that discuss the scope of the first limb in any detail: *Coffey*[22] and *Cahill*.[23] There is some difficulty with reconciling the two decisions as *Coffey* is only partly reported[24] and not referred to in *Cahill* and neither decision is referred to in *Fernandes*. Two earlier Divisional Court decisions also shed light on the appropriate interpretation.

Coffey and Thompson

In *Coffey* the accused was in an unresolved dispute with the victim and had arranged for the purchase of equipment from the victim by means of a dud cheque in a false name. He was charged under Theft Act 1968, section 15. Coffey claimed that the equipment was useless to him and the only reason he had obtained it was to exert pressure on the victim to settle the dispute. It was unclear whether he intended to detain the goods until the resolution of the dispute or merely until negotiations had begun, and there was also no evidence as to what he intended to do if his purpose in detaining the equipment failed. As Coffey must have obtained the equipment with the knowledge that the strategy might fail, the court had to determine what the appropriate directions would be to enable a jury to return a verdict on either of two bases: that he intended to return the goods if his purpose failed, or that he intended to abandon the goods in such an event.[25] Both the trial judge and the Court of Appeal saw the situation as one falling within the first limb; that is, it was not considered to amount to a borrowing.[26]

It was argued by the prosecution that Coffey's actions fell within the first limb because the creation of a situation where the victim could only retrieve the property by

[21] [1982] QB 1053.

[22] *The Independent*, 2 February 1987, [1987] Crim LR 498, (Transcript: Marten Walsh Cherer).

[23] [1993] Crim LR 141, (Transcript: Marten Walsh Cherer)

[24] The report of the case in the Criminal Law Review extracts only that part of the judgment discussing the requisite degree of awareness of the accused.

[25] A third possibility, considered by the court, was that he was lying and meant to permanently deprive. This possibility did not require consideration of s 6(1).

[26] No reference to this approach is made in the judgment. Presumably a borrowing did not occur because the victim was induced to hand over all property rights. See the discussion below.

complying with Coffey's demands automatically amounted to "treating the thing as his own to dispose of" The court disagreed:

> There may well, we believe, be cases where this argument would be correct. For example, the "ransom" situation where the true owner has to pay for the return of his goods ... But this will not always be so. The words quoted ["his own to dispose of"] can be misleading unless it is clearly recognised that not every wrongful conversion is theft.
> In our judgment the analogy between the situation now under discussion and the case of ransom is imperfect, and it would have been an error for the Judge to have directed the jury that they were bound to convict on the assumed facts.[27]

Thus, the court accepted that section 6(1) includes, but is not limited to, the so-called ransom cases where the stolen property is sold back to the victim. In such cases the accused asserts a right of ownership against the victim and intends to deny the victim any property right to the item. *Coffey* however goes further than this and accepts that other situations might fall within the first limb. On the facts of *Coffey*, this includes a detention of goods with an intention that they finally return to the victim. Further *Coffey* also decides that the refusal to return the property unless a condition is fulfilled is not automatically within the section.

By way of contrast, in the earlier decision of *Thompson v Lodwick* ("*Thompson*")[28] the Divisional Court had adopted a suggestion by Sir John Smith that the limb referred to an intention to assert a better right to possession than the victim.[29] Thompson had taken the engagement ring of his victim because the victim's fiancé had not repaid a debt to Thompson's step-father. The court held that Thompson's behaviour fell within the first limb of section 6(1) because:

> No doubt the expectation was that the ring should go back to Miss Richards on the payment of the debt; but nevertheless ... his intention was that the ring should be retained inconsistent with her rights unless and until a certain sum of money should be paid and should only be returned to her if that was done.[30]

Even though the court accepted that Thompson intended to return the ring undamaged, the court appeared to hold that the intention to assert possession for a certain period of time was of itself sufficient to satisfy section 6. The Court of Appeal in *Coffey,* however, held that more is required to satisfy section 6. In many ways the facts of the two cases are the same, but, while the Divisional Court in *Thompson* was happy to conclude theft had occurred, in *Coffey*, the Court of Appeal saw the issue as more equivocal.

The principle enunciated in *Coffey* is that there is a range of wrongful assertions of proprietary rights to property. Some are so fundamental that they practically amount to an intention to permanently deprive. But others, although wrongful, are not sufficiently egregious to fall within section 6. This, of course, then leads to the question how egregious an interference with the owner's rights must be to fall within section 6. The court in *Coffey* held:

> ... the culpability of the appellant's act depended upon the quality of the intended detention, considered in all its aspects: including, in particular, the appellant's own

[27] Robert Goff LJ (Forbes J agreeing). Unpaginated transcript.

[28] QBD, (Crown Office List). CO/197/83, (Transcript: Marten Walsh Cherer).

[29] Smith, *Law of Theft*, (4th edition, 1979, Butterworths), in [126]-[127], at 67-68. Smith suggested that this was what lay at the heart of the common law ransom cases, although this is an broader way of expressing the ransom principle than the common law cases suggested because in *Hall*, one of the common law cases said to establish the ransom principle, the right asserted was described as one of ownership (*Hall* (1849) 3 Cox CC 245).

[30] Unpaginated transcript.

> assessment at the time as to the likelihood of Hodkinson coming to terms, and of the time for which the machinery would have to be retained.[31]

In addition to theft occurring if the intention is to assert ownership by selling the property back to the victim, *Coffey* also accepts that section 6 may also cover an intent by the accused to detain property temporarily in the hope of a condition being fulfilled, but to accept that, failing that condition being fulfilled, the owner has a better right to possession. Whether the behaviour of the accused is such as to amount to an "intention to treat the thing as his own to dispose of regardless of the other's rights" is to be determined by examining all relevant circumstances. In this case the key circumstance was the effluxion of time.

The judgment thus considers that section 6(1) operates not only in situations where the accused intends to make absolute demands – which if unsatisfied will result in the permanent loss of the property by the victim – but also in situations where property is only intended to be temporarily detained in the hope of a demand being satisfied and where there remains an intention to return the property irrespective of the outcome of the demand.

It also decides, by implication, that such situations fall outside of the scope of borrowing in the second limb. While no reason is given for this, it would seem that an intention eventually to return property cannot be borrowing if the reason for appropriation is to directly and deliberately inconvenience or deny possession to the victim. In both *Thompson* and *Coffey* (assuming an intention to keep the property beyond a demand from the victim) more than an unauthorised use of the property occurred. The direct communication between the accused and the victim was intended to assert a complete denial of the rights of the victim, an assertion of rights greater than that contemplated by unauthorised borrowing and amounting to an intention to permanently deprive at common law.

Cahill and Smith

The approach in *Coffey* was, however, not considered by the Court of Appeal in its decision in *Cahill.*[32] Cahill had been observed taking a bundle of newspapers from a package left for a newsagency. Cahill claimed he was drunk; had only picked up the papers at the insistence of his friend and that his friend had told him to pick them up and dump them on another friend's doorstep. The trial judge initially described the essence of section 6 as "an intention to treat property as one's own regardless of the rights of the true owner" without including the words "to dispose of" In response to a question from the jury, he added that the element was proved if the jury was satisfied that the accused:

> . . . took them intending to use the papers as their own – that is to say, do with them what they wanted, whether it was to sell them, throw them away or dump them on someone's doorstep, or whatever – then, if they had that intention – either of them – that is an intention permanently to deprive, for the purposes of the Theft Act.[33]

The Court of Appeal held that this omission of the words "dispose of" was critical and not cured by the re-direction. Potts J held:

> In particular counsel submits that to use the phrase "dump them on someone's door step" does not sufficiently come within the definition of the word "dispose".

[31] Unpaginated transcript.

[32] [1993] Crim LR 141, (Transcript: Marten Walsh Cherer).

[33] Unpaginated transcript.

> In this connection it is helpful to refer to Professor Smith's book, the *Law of Theft*, sixth edition. At pages 72 and 73 of that volume the learned author analyses section 6 of the Theft Act. On page 73 (paragraph 133) there is the following passage:
> "The attribution of an ordinary meaning to the language of s 6 presents some difficulties. It is submitted, however, that an intention merely to use the thing as one's own is not enough and that 'dispose of' is not used in the sense in which a general might 'dispose of' his forces but rather in the meaning given by the Shorter Oxford Dictionary: 'To deal with definitely; to get rid off; to get done with, finish. To make over by way of sale or bargain, sell."
> Looking at the whole of the original direction given by the learned recorder and the learned recorder's answer to the specific question posed by the jury, we are satisfied that no adequate direction was given as to the effect of the words "dispose of" in the context of section 6.[34]

Cahill appears to give a very restrictive meaning to the limb. When one combines the quotation from *The Law of Theft* with the re-directions said to be inadequate, *Cahill* seems to decide that an intention to be able to dispose of property must be an intention to deal with the property in such a way that all the accused's proprietary claims to the property are extinguished, such as in a complete sale. To leave property in the possession of another or to offer a gift that has not yet been accepted (either of which could be characterisations of "dumping them on someone's doorstep") on the reasoning in *Cahill* cannot constitute a disposal and thus such actions do not evince an "intention to treat the thing as his own to dispose of regardless of the other's rights" [35]

Sir John Smith, in a commentary on *Cahill,* reinforced the impression that *Cahill* was a restrictive reading of the section by commenting:

> The primary case which the draftsman had in mind was probably that where D takes P's property with the dishonest intention of selling it to P as if it were D's own property, which was larceny at common law: *Hall* (1849) 2 Cox CC 245. It should probably be confined to that and other cases where D intends "to usurp the entire dominion over the property" (*per* Parke B in *Holloway* (1849) 3 Cox CC 241) as where he sells or gives the property to a third party expecting that the owner will, in due course get it back.[36]

But, in so doing, he failed to mention the reasoning in *Coffey* and it also would seem that the decision was not drawn to the attention of the court in *Cahill.*

On the facts, there is a strong similarity between *Cahill* and the earlier Divisional Court decision in *Chief Constable of the Avon and Somerset Constabulary v Smith* ("*Smith*").[37] In *Smith* the four accused had broken into a car and removed two bags but claimed they had no intention to permanently deprive on the basis that one bag had been left in a lavatory and the other thrown into a hedge.[38] The Divisional Court disagreed, holding that there was evidence of an intention, at the time the bags were taken, to treat the briefcases as the accuseds' own, to dispose of regardless of the true owners' rights.

> [The] evidence of disposal was, in my judgment, evidence from which one might infer an intention within the terms of section 6(1) at the time of disposal and, having regard to

[34] Unpaginated transcript.

[35] Sir John Smith makes the point that the evidence was sufficient to enable conviction on the general grounds of an intention permanently to deprive without any need to consider s 6(1), [1993] Crim. L.R. 141 at 143.

[36] *Cahill,* (1993) Crim LR 141 at 143.

[37] QBD, (Crown Office List) CO/661/84, (Transcript: Marten Walsh Cherer).

[38] The accused argued that they had only taken them to see if there was anything worth stealing and that they should be acquitted on the basis of the reasoning in *R v Easom,* [1971] 2 QB 315. The court distinguished *Easom* on the basis that the bags had not been left where they had been found.

> considerations to time and distance, it was evidence from which one might also infer that the same intention existed at the time the articles were removed from the motor-car.[39]

What is important in this reasoning, in the light of the approach in *Cahill*, is that the Divisional Court's reasons emphasise that the acts of disposal are merely evidence from which the "intention to treat the thing as his own to dispose of regardless of the others' rights" is to be determined. It is also clear that the court considered that the act of leaving the bags behind constituted an act of disposal. The decision suggests that disposal is a concept that is less onerous to establish than that of abandonment or alienation. An intention to "dump" the property may be sufficient.

Thus, at face value, *Cahill* appears to be a direct overruling of the reasoning in *Smith*, in that there seems little to distinguish the intention to dump the newspapers from the leaving of the bags by Smith's group in the toilets and behind a hedge.

Reconciling Coffey and Cahill

The difficulty, then, is to determine whether *Cahill* actually had the effect of overruling *Coffey* and *Smith,* or whether the decisions can be read together. This can be done by considering whether the breadth of the quotation from *The Law of Theft* relied on by the Court of Appeal in *Cahill* is less than it seems by placing it into its original context. While definite acts that place the property out of the control of the accused are emphasised in the quoted passage from the *Law of Theft*, in another section of the work Sir John Smith argues that retention of property until a condition is fulfilled should also fall within the first limb[40] as accepted in *Thompson* and *Coffey*. Consequently, Sir John Smith must have considered that such actions as occurred in both *Thompson* and *Coffey* also fell within the scope of his idea of definite and final disposal.

It is suggested that the answer lies in an appreciation that "an intention to treat the property as his own to dispose of regardless of the other's rights" is a combination of a number of intentions. It can be easy to jump to a consideration of whether certain acts amount to a disposal of property when considering section 6(1). However, the element of theft that is being considered is an *intention* to permanently deprive. Thus no act other than one amounting to appropriation need have occurred and a conviction can be secured entirely on the basis of confession as to intent or on inferences drawn from the circumstances in which the appropriation occurred.

What section 6(1) does in expanding this element is to set out an alternative state of mind and this again does not require proof of any action. Importantly, the section does not require proof of any disposal, nor does it require proof of any intention to dispose. In fact, what is required is a more attenuated mental state. Section 6(1) requires proof that the accused intend to treat the property *as if* he or she had a right to dispose. The section thus contemplates that the accused has an intention to have a relationship to the property that is one that would be maintained by a person having a right to dispose.

Section 6(1) also begins with the proposition that the accused does not mean the victim "permanently to lose the thing itself" While the wording clearly includes the common law issues of loss of usefulness or virtue in the property,[41] the core pre-requisite for the application of the section is that the accused must not intend to

[39] Unpaginated transcript. McCullough J (with whom Robert Goff LJ agreed).

[40] *The Law of Theft*, (6th Edition, 1989, Butterworths) [136] and [137]. Para [136] in the 4th Edition had been relied on in *Thompson*.

[41] Discussed below.

permanently deprive. Consequently, the accused must therefore be either reckless as to the permanent deprivation or in fact be intending to return the property.

In such a context, it is not logically possible for a person to also intend to get rid of the property finally or to fully transfer it to a third person except in the very rare case that such a complete divestiture of proprietorial rights is accompanied by a positive belief that such a transaction will not permanently deprive the victim of the property.[42] *Cahill* must, therefore, only stand as authority for a description of the range of rights that the accused intends to assert he or she has over the property, but rights that the accused does not intend to exercise. In other words, the accused must intend to assert the right to sell, transfer or destroy but at the same time intend to act in a way that will not cause permanent deprivation to the victim.

Consequently, the phrase "to treat the thing as his own to dispose of regardless of the owner's rights" is equivalent to an assertion to the full bundle of rights comprising ownership; and this is what *Cahill* emphasises. However, the rights of ownership asserted are so asserted without any actual intention to exercise them in a way that would prevent the victim regaining possession of the property. In essence this means that the first limb deals with situations where the accused creates the impression that he or she will dispose of the property (whether by threats to do so, or by the nature of his or her dealing with the property), but where the accused contends that he or she never really meant so to act.

A comparison of the reasoning in *Thompson* and *Cahill* also highlights the degree of property right that needs to be asserted. *Thompson* follows Sir John Smith in deciding that an assertion of a better right to possession is sufficient to establish that the accused is "treating the property as one's own". But it is implicit in the court's reasoning that liability arose because, in addition, Thompson represented to the victim that he would choose when and if to return the property, or otherwise dispose of it. *Cahill* decides that this assertion of the right to be able so to dispose is critical. Similarly, the decision in *Coffey* can be explained on the basis that the uncertainty in the evidence as to when Coffey intended to return the property meant that it was uncertain whether his actions asserted a right to dispose of the property. If Coffey had intended to return the property as soon as the victim made contact with him and demanded its return, section 6 might not have applied. On the other hand, if Coffey had intended to detain the property despite demands until the dispute was resolved, section 6 would probably have been satisfied.

The importance of the requirement that there be an intent to create the impression that the property will be disposed of can be illustrated by the problems with the decision in *DPP v Lavender*.[43] In that case, the accused unlawfully relocated the front door of one council house to another council house which had a damaged door. The Divisional Court rejected the trial magistrates' reliance on "disposing" as requiring that the property be "got rid of" or sold and instead held that all that was required was that the accused "deal" with the property. The court further interpreted *Lloyd* as holding that such a dealing had to be *vis-à-vis* the victim. This led to the strange result that Lavender's intent was held to fall within section 6 even though he had not denied the council's ownership of the door and had returned it to the council's possession by re-attaching it to a council property.[44] The analysis above suggests that not all dealings

[42] An example of this is *Marshall*, [1998] 2 Cr App R 282, where the accused on-sold train tickets that were eventually captured by the ticket reading machines.

[43] Queen's Bench Division (Crown Office List), [1994] Crim LR 297; *The Times* 2 June 1993; *The Independent* 4 June 1993, CO/2779/92, (Transcript: John Larking), 20 May 1993.

[44] Somewhat strangely, the judgment makes no mention of the fact that the doors were fixtures and thus unable to be stolen without the aid of s 4(2) Theft Act. There are also meritless doctrinal difficulties with the doors existing as a form of

can amount to evidence of an intention to treat the property as his or hers to dispose of.[45] The actions must represent an intention to destroy or to transfer to a third party. These are the actions that go beyond appropriation and can be relied on to establish an intention to permanently deprive. It is suggested that in fact, Lavender should have been considered to have fallen within the borrowing limb of section 6.[46]

Returning, then, to the facts of *Cahill* and *Smith*, it seems that recourse to section 6 was necessary because of a defence argument that there was no positive intention to permanently deprive. As there could not have been an intention to return the property either, both cases are examples of recklessness as to the return of the victim's property. On the analysis in this article it is not necessary to decide if the actions in either case amounted to an actual disposal. All that it is necessary to determine is the accused's intentions. Acts of abandonment (whether legally effective or not) are acts normally only associated with ownership and consequently the acts of the accused in both cases could have been evidence of the assertion of the bundle of rights that included disposal. The difficult issue for the prosecution in both cases however, was to establish that there was a positive *intention* to assume the rights of ownership. The need to establish this separately from the issue of recklessness as to permanent deprivation of the victim would require careful direction by a trial judge.

APPLICATION OF THE FIRST LIMB TO EXHAUSTION OF VALUE AND CHANGE OF NATURE SITUATIONS

As mentioned above, the restrictive reading of section 6, now rejected by *Fernandes*, was that the first limb only applied to ransom cases and the second limb to exhaustion of value cases. It is argued below that the reasoning in *Lloyd* that borrowing requires proof of removal of all virtue in the property is misplaced and inappropriate. However, an intention to deal with property in such a way that its value is significantly diminished or exhausted may well constitute an intention that falls within the first clause. One complicating factor is the situation where all value in the property is exhausted. The common law cases on tickets decided that if a ticket is returned after its expiry then the total exhaustion of value meant that the victim had been permanently deprived of it,[47] and similar reasoning has been applied to cheques under the Theft Act.[48] But if so, it seems logically impossible for the accused's intention then also to fall within section 6, which is predicated on an intention not to permanently deprive. This must then mean that section 6 only has operation in those situations where the property is returned with some residual value or somewhat the worse for wear.

A contrary argument is that the use of the phrase "the thing itself" in section 6 is intended to mean the return of the property with its value exhausted. It may well be that, pragmatically, this is an approach that the courts find useful, but it is an approach that is only possible if the thing remains the same type of thing despite the exhaustion of value or change of nature. For example, in the New South Wales case of *Smails*,[49] the accused took railway sleepers and cut them in half to make the tent he was living

personal property prior to their severance and thus belonging to another (a point not covered by s 4(2)) and also with what might be seen as the destruction of the property when it was re-affixed and merged with the land.

[45] Similar criticisms can be made of the undefined use of the notion of dealing in *Chan Man Sin* [1988] 1 All ER 1 and *Fernandes*. Both are discussed below.

[46] This is discussed below.

[47] See *R v Beecham*, (1851) 5 Cox CC 181.

[48] See *eg*, *Duru*, [1974] 1 WLR 2; but note the rejection of aspects of the reasoning in *Preddy*.

[49] (1957) WN (NSW) 150.

in more comfortable. He intended to replace the cut sleepers. This was held to be larceny. The reasoning was that what were replaced were not in fact sleepers, which had a requisite size, but merely lumber. The court found that "to all intents and purposes they had ceased to exist and had been destroyed as railway sleepers just as much as if the appellant had cut them up and burnt them in the fire".[50] It would be stretching the meaning of the term to describe such lumber as "the thing itself", rather than "another thing".

The true role for section 6 is in situations where some residual use for the property might be argued by the accused. A good example is *DPP v SJ*[51] where the victim's headphones were snapped in half and then recklessly thrown to the ground by the accused. The parties agreed that dealing with property in such a way rendered it useless. On that basis the Divisional Court considered the case fell within the first limb of section 6 and the test in *Cahill*. It is suggested that the better analysis would have been that the headphones were severely damaged, but not irreparable. They were still headphones, but broken headphones. In these circumstances section 6 would operate to prevent an accused successfully arguing that he or she had intended to return the thing itself, albeit somewhat damaged. Such an intention amounts to treating the property as if it were one's own to dispose of because the intended act appears to be that of an owner. By intending to damage, the accused demonstrates an intention to behave in such a way that an observer would consider amounts to the exercise of a right of an owner to destruction or disposal.

Mention should also be made of the series of cases involving the dishonest negotiation of cheques and other negotiable instruments which consider the specious argument that the accused, in passing such an instrument, intends the document to be returned to the victim after negotiation. While such actions have been held to be theft without the need to rely on section 6,[52] suggestion has been made in passing that such actions also satisfy section 6(1).[53] It has been stated that negotiating a cheque or voucher falls within the first clause,[54] but no reasons have been articulated for such a conclusion.[55] There is some difficulty with these statements as, in practice, cheque forms and other documents tend not to be returned to the victim.[56] The argument also sees the chose in action as, in some way, an aspect of the paper and not as a separate property right. Given that the chose in action is destroyed in the negotiation, there is no need to rely on section 6 to prove an intention to permanently deprive.

DETERMINING THE STATE OF MIND OF THE ACCUSED

As the judgment in *Coffey* emphasises, the element is a mental one, not a physical one. Thus all discussion of what acts amount to a disposal takes place in the context that

[50] *Ibid.*

[51] [2002] EWHC 291; 2002 WL 45422 (QBD (Admin)).

[52] See *eg*, *Duru* [1974] 1 WLR 2; but note the rejection of aspects of the reasoning in *Preddy*.

[53] *Duru*, [1974] 1 WLR 2 at 8.

[54] *R v Downes*, (1983) 77 Cr App R 260; [1983] Crim LR 819. While the court in *Downes* did not elaborate on this; on the basis of the approach suggested below the negotiation of cheque cannot amount to a borrowing as the property is disposed of to third parties. Neither can it be a lending, as there is no intention that it be returned in the same state as it was given.

[55] Most recently, s 6(1) was applied in *R v Arnold*, [1997] 4 All ER 1. A number of cases were reviewed and the court concluded that there "was good reason for the application of s 6(1) if the accused intended the benefit in the document to be exhausted before its return"

[56] In Australia, for example, the courts accept that they are not: see *Parsons v R* (1999) 195 CLR 619. A similar point is made in D Ormerod and DW Williams, *Smith's Law of Theft*, (9th Ed, 2007, OUP) at 125.

those acts are not determinative of liability. What is determinative is the nature of the intention of the accused at the time of appropriation. How that is determined has been set out in *Coffey*:[57]

> How then should the jury have been directed? . . . In the present instance the learned Judge could usefully have illustrated the first part of section 6(1) by borrowing from the second part of the expression "equivalent to an outright taking or disposal" If they thought that the appellant might have intended to return the goods even if Hodkinson did not do what he wanted, they would not convict unless they were sure that he intended that the period of detention should be so long as to amount to an outright taking. And even if they did conclude that the appellant had in mind not to return the goods if Hodkinson failed to do what he wanted, they would still have to consider whether the appellant had regarded the likelihood of this happening as being such that, taken in the round, his intended conduct could be regarded as equivalent to an outright taking.[58]

In the circumstances of *Coffey*, a retention of property situation, the court considered that the question whether the accused had an "intention to treat the thing as his own to dispose of regardless of the other's rights" could be determined by examining how long the accused intended to keep the equipment. In such an examination there are two possible standards. One is to determine liability on the basis of what the accused thinks is the point in time at which retention amounts to an outright taking. The second is what objectively amounts to such a point in time, with a further issue as to who makes that assessment. While the court's suggested direction as to the first of the alternatives can be read as requiring a subjective approach, the suggestion that the jury be directed to assess whether the accused had considered whether "his intended conduct could be regarded as equivalent to an outright taking" appears to require an objective assessment.

Given that section 6(1) requires proof that the accused has a specific intention, the requirement that the accused assess his or her intention as ostensibly falling within the section requires jurors or magistrates to engage in a two-stage test similar to the test set out in *Ghosh*[59] for dishonesty.

Generalising the test from *Coffey*, the judgment appears to require the finders of fact to conclude that:

a) On an objective basis, the relationship the accused intended to have to the property can be described as treating it as his or hers to dispose of regardless of the rights of another
b) The accused was aware that this relationship might objectively be so described.

The basis on which the finder of fact assesses whether the relationship can be seen as falling within section 6(1) is not made clear, but in the light of the approach in *Ghosh* and in the absence of any explicit requirement of reasonableness, it is probably appropriate that the standard be that of the ordinary person.

The time at which the state of mind must exist is also important. The judgment in *Coffey* distinguished the so-called "conditional appropriation" cases, where the courts held that a putative thief who rifled through bags to see if anything was worth stealing did not commit theft until he or she decided to keep a particular item, despite the clear interference with the property of another the taking and opening of the bag represented.[60] They held that those prosecutions had fallen foul of the need to establish the intent to deprive at the time of the appropriation. Although not explicitly stated

[57] No other decision has discussed the test.

[58] Unpaginated transcript.

[59] [1982] QB 1053.

[60] See *Easom* [1971] 2 QB 315; *Husseyn* (1978) 67 Cr App R 131n.

in the judgment in *Coffey*, this reasoning requires that when one is assessing whether the accused has an awareness that the length of the detention might amount to an outright taking, that awareness has to be at the time of appropriation. Thus, if Coffey had optimistically thought the dispute would have been resolved in a week at the time of taking, it would seem that the fact that he still had the property some months later would not be relevant in assessing the period of the borrowing.

Summary

Common law cases and those under the Theft Act[61] decide that an intent to permanently deprive exists where property is returned that has had all of its usefulness or value exhausted, or where the nature of the property has changed. Section 6 is not required to establish liability in such cases, and there is a logical difficulty in so doing. That section 6 has operation beyond these situations is now clear from the decision in *Fernandes*.[62]

The scope of section 6 is however constrained by the requirement in the first limb that the accused does not intend ultimately (permanently) to deprive the victim of the property. Despite an overall intention to return the property (or recklessness as to the deprivation of the victim), the first limb of section 6 establishes liability if the intention of the accused is to behave in such a way as to create the impression to the victim or others that no such return will automatically eventuate and that the accused is likely to dispose of it, irrespective of the interests of the victim. Importantly, while there is no need for any such disposal to occur, or to be intended to occur, it is critical that such an eventuality appear to be intended by the accused. In both *Thompson* and *Coffey*, it was, therefore, not possible for the accused to claim that all that had occurred was a mere "non-theftuous" borrowing because, although both accused intended to return the property, the basis of the leverage they were hoping to apply to the victim was based on creating the impression that they would dispose of the property. They were intending to "treat" the property as if they were intending to dispose.

Expressing this more broadly, if an accused appropriates property in such a way that is unauthorised but does not amount to a direct repudiation to the victim of his or her rights, this may be a borrowing. But if the accused intends to have the victim understand that the appropriation amounts to a repudiation of the victim's rights, this cannot be a borrowing and falls within the first limb. This does not include deceptions as to the intentions of the accused towards third parties.

Deceptions of third parties as to the intentions in regard to the property

What if the accused intends no dealing or interference with the property of another, but wishes deceptively to suggest that he or she does, in order to defraud a third party? At common law, such actions were not considered to amount to larceny.[63] In *Chan Man-sin*,[64] a 1988 appeal to the Privy Council from Hong Kong, the forging of cheques was held to amount to an intention to permanently deprive the victim companies of their money under the Hong Kong equivalent of section 6(1). The accused argued that, as the victim's bank had no right to honour the cheques, any payment by the bank would not amount to any permanent deprivation of a chose in action of the victim. The Committee stated that even if the accused was aware of this, the accused's intentions

[61] *Eg Duru* [1974] 1 WLR 2.

[62] See also *DPP v SJ*.

[63] *R v Bloxham* (1944) 29 Cr App R 37.

[64] [1988] 1 All ER 1.

fell within section 6(1) because: "Quite clearly here the appellant was purporting to deal with the companies' property without regard to their rights."

No further elaboration was given, and it is suggested, with respect, that the Committee misconstrued section 6(1). There appears to be a significant slippage in this reasoning between theft and fraud; a slippage aided by the broad interpretation of appropriation. The accused was convicted of theft of the chose in action in the victim companies' bank account on the basis of an appropriation which the Committee held amounted to merely drawing, presenting and negotiating a cheque on the account. Assuming that the accused was aware that such actions would lead to a loss of money by the bank, but not by the victim company, there is, in fact, a belief and intention that no deprivation at all would be suffered by the victim. Section 6 requires that the accused intend that the victim not "permanently" lose the thing. Implicit in this is that the accused intend that the victim temporarily lose the thing (or be reckless as to the loss). In a fraud such as *Chan Man-sin* there is no evidence of any intention to appropriate anything of the company's that can be seen as amounting to any deprivation, even temporarily. Recklessness as to the loss is probably unlikely as the accused would be aware of the fact that the loss would be borne by the bank. Instead the aim was to appropriate the property of the bank through fraud.

This suggests that, although it might be the case that it is possible to appropriate a property interest without in anyway dealing with it, the requirement that there be some degree of deprivation of the victim as a result, even under section 6, means that fraudulent representations as to one's property interests cannot amount to theft.

SECTION 6(1): THE SECOND LIMB

While the intentions of the accused are at the centre of the enquiry in the first limb of section 6(1), by contrast, the second limb sets up a largely objective test for whether an intention to permanently deprive will be deemed to exist.[65] If the finder of fact determines that the activities of the accused amount to an outright taking or disposal, the property is deemed to have been treated as if it was the accused's to dispose of and a short-cut to liability is established.

Fernandes decides that the first limb governs the second limb and that borrowing and lending are merely examples of the operation of the first limb. However, the practical scope of the first limb is significantly restricted by the operation of the second limb because only those instances of borrowing or lending that are equivalent to an outright taking or disposal fall within the scope of the first limb. All other instances of borrowing and lending are excised from the scope of the first limb.

As ATH Smith makes clear,[66] the final phrase of the second limb of section 6(1) should be read as linking "an outright taking" to borrowing and a "disposal" to lending. Thus, the section sets up two possibilities: a borrowing for a period and in circumstances where it can be seen as amounting to an outright taking and a lending for a period and in circumstances that can be seen to amount to a disposal. Further, the meanings of borrowing and lending in section 6(1) are not the common ones. Instead they involve a loose colloquial use of the term by the accused, who claims that,

[65] That is, other than the intent to borrow, lend or pawn. Such intentions are however, generally alleged by the defence as an exculpating factor.

[66] ATH Smith, *op cit*, at 213.

despite appropriating the property without consent[67] and dishonestly, he or she intended to return the property to the victim or get it back from the lendee.[68]

The reference to borrowing appears to be a modified preservation of the common law rule against borrowing amounting to stealing.[69] The modification is that, in the light of the fact that many specious claims to have merely "borrowed" the property arise, the section imposes an objective test, rather than requiring the prosecution to disprove the accused's claim as to his or her intentions. For practical purposes, if a finder of fact determines that the length or circumstances of a borrowing or lending amounts to an outright taking or disposal, this satisfies the first limb of section 6(1) and the accused is deemed to have an intention to permanently deprive.[70]

While claims of mere borrowing had been a part of the common law offence of larceny, it seems the additional reference to lending is intended to deal with those circumstances of fraudulent misappropriation that the drafters of the Theft Act aimed to bring within the ambit of theft.[71] Thus, while borrowing relates to the unauthorised appropriation of the property from the control of the victim, lending relates to misuse of property by those otherwise lawfully in possession (such as bailees) and the provision in relation to lending could be less elegantly described as envisaging situations where the accused permits a borrowing by a third party.

It would seem that the relevant period of time that must elapse before the borrowing or lending can amount to an outright taking or disposal can be either the actual period of time elapsed, or the period of time for which the accused intended to borrow or lend the property. While the section is one that relates to the element of an intention to permanently deprive, and thus the intentions of the accused at the time of appropriation would normally be key (as they are for the first limb), the objective nature of the tests in the second limb would allow an assessment of an outright taking or disposal based on the actual lapse of time since the appropriation. It also suggests that an intention to take or borrow the property for an indefinite period of time would be strong evidence establishing an intention to permanently deprive under this section. However the elapsing of a period of time on its own is insufficient to establish liability.[72]

Somewhat surprisingly, there does not appear to have yet been any finding by the Divisional or Appeal Courts that upholds a finding of borrowing or lending under section 6(1). The only allegations of section 6(1) borrowing before the courts have been rejected, and no reliance has been placed on section 6(1) lending. This may be a result

[67] Cases such as *Hinks*, [2001] 2 AC 241, decide that appropriation can include lawful and consensual transfers of property, suggesting that situations of detinue might amount to theft. On the other hand, the requirement that the disposition be "regardless of the other's rights" might mean that in a situation of fraud or unconscionable transfers the "consent" of the victim might mean that s 6(1) is not applicable (see the reasoning of the Court of Appeal in *R v Clark* [2001] EWCA Crim 884; [2002] 1 Cr App R 14).

[68] As noted by Mustill LJ in *Coffey*.

[69] See *R v Phillips and Strong*, 2 East, Pl Cr Ch16, s 98 and *cf R v Holloway* (1948) 1 Den 370; 169 ER 285.

[70] The use of "may amount to so treating" in the second limb of s 6(1) suggests that it must *first* be established that the borrowing or lending amounts to an outright taking or disposal and *then subsequently* be determined whether this constitutes an intention to "treat the thing as his own to dispose of regardless of the other's rights" In relation to the need to prove the intention, what "may" result is an actual "treating of the property as his own . . ." rather than merely an intention to so treat the property. It seems extremely artificial to determine that the property was "treated as if it was his own . . ." and then examine whether the accused had the intention to do so. Consequently, it is assumed in this article that if the borrowing or lending is determined to amount to so treating the property, the finders of fact will also conclude that the accused also intended such a treating to occur. In relation to whether such an outright taking or disposal "may" amount to such a treating, it is also assumed in this article that any finder of fact who concludes an outright taking or disposal exists is highly unlikely to consider that this did not amount to an intention to treat the property as his or hers to dispose of regardless of the rights.

[71] Criminal Law Review Committee, *Eighth Report: Theft and Related Offences*, (Cmnd 2977) 1966 at [33].

[72] See *Warner* (1970) 63 Cr App R 79.

of the way in which decisions such as *Lloyd* had read down the section to require that the property lose all its "virtue"

Borrowing

In the absence of any judicial consideration of the meaning of borrowing in section 6, dictionary definitions must be resorted to. The Oxford English Dictionary[73] gives as the primary meaning of "borrow":

> I. To give security for, take on pledge.
>
> 1. trans. a. To take (a thing) on pledge or security given for its safe return; b. To take (a thing) on credit, on the understanding of returning it, or giving an equivalent; hence, to obtain or take the temporary use of (a thing recognized as being the property of another, to whom it is returnable). . .

This definition makes clear that the central notion of borrowing is the recognition on the part of the borrower that the property should be returned to the victim and that in taking the property (albeit, for section 6 purposes, without consent) the accused accepts a duty of care in relation to the property to ensure that it is returned undamaged.

This recognition is one that is subjectively held by the accused. It must therefore either be claimed by the accused or proved by the prosecution. It would also seem that it must be an intentional state of mind. If a person were to take property reckless as to whether he or she would preserve the property for eventual return to the victim, this state of mind would fall outside that required for borrowing. Consequently, an intention to take the property and return it, either entirely exhausted of value or changed in nature, is a rejection of such a duty of care and thus falls outside the scope of borrowing in section 6(1). On this basis, any exhaustion of value or change in nature will amount to an intention to deprive under section 1 without the need for recourse to section 6.[74]

However, this is not what *Lloyd* decides. In *Lloyd*, the accused were caught taking cinema films for short periods in order to make pirate copies. Lord Lane CJ held:

> This half of the subsection, we believe, is intended to make it clear that a mere borrowing is never enough to constitute the necessary guilty mind unless the intention is to return the 'thing' in such a changed state that it can truly be said that all its goodness or virtue has gone. . . . The goodness, the virtue, the practical value of the films to the owners has not gone out of the article. The film could still be projected to paying audiences . . .[75]

While the subsequent decision in *Fernandes* clearly decided that the section was not limited to the virtue analysis, it did not clearly state that the analysis was an incorrect way of determining the issue. But it seems that Lord Lane's approach ignores the clear words of the second limb. On His Lordship's analysis, time or circumstances are only relevant if they establish that virtue has gone out of the property and the focus is on the circumstances of the property's return, not the intended time for which the property will be taken or the circumstances in which is taken or held. However, it is clear that there is nothing in the section that limits the nature of the circumstances that may be

[73] (2nd ed 1989, OUP).

[74] See *Smith* at 218ff for elaboration of this argument. This was the approach preferred in *Downes* (1983) 77 Cr App R 260, 266.

[75] At 837.

relevant, nor that the circumstances must exist at the time of the return of the property.[76]

Other than *Lloyd*, there are two cases that discuss borrowing and the virtue analysis. The first is *Lavender*,[77] where the accused relocated doors belonging to a council. In holding that the second limb did not apply, the Divisional Court stated:

> We do not think the second limb of Section 6(1) applies to this case. It is difficult, as a matter of language, to describe the taking of a fixture or fitting from one property and fitting it to another belonging to the same owner without his knowledge or consent, as a borrowing and return. But even if it can be so described, the doors themselves would retain their essential quality ("goodness or virtue") as doors. The fact that in a more general sense they were more useful to the council fitted to 25 Royce Road than 37 Royce Road does not persuade us that this part of the subsection applies. The character of the property the subject of charge did not change as a result of what happened.[78]

On the virtue analysis, it would be near impossible to steal a door if the accused maintained an intention to return it at some point. Even if attached to his or her own property, the virtue of a door as method of closing a doorway can only be destroyed by the destruction of the door. Many years may pass and the virtue would remain intact. This suggests that, when one is considering the borrowing of a door, the usefulness of it as a door is not an appropriate basis on which to determine whether the borrowing amounts to an outright taking. Given that doors maintain their usefulness for long periods of time, the more appropriate perspective is to consider the impact the borrowing has on the victim. If the victim is forced to purchase a new door to replace the missing door, then, in the circumstances, the "borrowing" surely amounts to an outright taking.

The artificiality of the virtue analysis is also demonstrated in *Clinton v Cahill*,[79] an Irish Court of Appeal decision, in which the court considered whether a section 6 borrowing could apply to the unpaid use of heated water in a central heating system. The cooler, used water was returned through the pipes to the heating station and thus there was no intended permanent deprivation of the water. Accepting that the approach in *Lloyd* was correct, for Carswell LCJ the only uncertainty was whether all the virtue or substantially all of the virtue in the property had to be removed to amount to section 6(1) borrowing. Without attempting to resolve this issue, the court found that under either test sufficient virtue remained for no theft to have occurred because the returning water was still significantly warmer than the temperature of the water at the beginning of the heating process, and so less energy was expended returning it to the operating temperature.

This decision illustrates the very strange results the imposition of the virtue requirement into the otherwise clear wording represents. The court did not directly state what it understood this virtue to be, although it seems clear that the court considered that the virtue in the water was any heat greater than "stone cold" But, from a user's perspective, the water is essentially useless as it is not hot enough to warm a house. By being forced to concentrate on one aspect – heat – and see that as a virtue to be totally removed from the property, the reality of the situation was not fully considered.

[76] The relevant circumstances might well be the nature of the appropriation, such as a surreptitious appropriation designed to ensure that the victim was unable to ascertain who had "borrowed" the property, or a change in circumstances during the borrowing such as the accused discovering that the victim was about to move permanently overseas, thus making the possibility of returning the property much harder to achieve.

[77] [1994] Crim LR 297, *The Times* 2 June 1993, *The Independent* 4 June 1993, CO/2779/92, (Transcript: John Larking).

[78] Unpaginated transcript.

[79] (1998) Court of Appeal (Criminal Division) CARE 2595 (Transcript).

If one ignores the issue of virtue, it is clear that the accused had no intention to keep the water permanently and it is clear that the taking of the water was for a short period of time. Thus, on the wording of the section, the basis for deciding liability should have been to consider whether, despite these two exculpating factors, in the circumstances, it amounted to an outright taking. Those circumstances would have included not only the cost to the council of reheating the water and the fact that the accused had as a result avoided the need to expend any money on alternative heating sources, but also the fact that the cost was no cheaper than the cost of reheating water returned from paying users. By taking all these factors into account, the court could have come to a conclusion that avoided the artificiality of basing the decision solely on the ambient temperature of water in winter.

Contrary to these decisions, on the analysis of borrowing suggested above, the facts of *Lloyd*, *Lavender* and *Clinton v Cahill* are all instances of borrowing. In each case the property was taken out of the possession of the victim with an intent to return the goods undamaged. In each case, however, the degree of interference with the owner's rights that might amount to an outright taking should be assessed by an additional consideration of the period of time of possession and the circumstances in which the borrowing occurred.

While time is a mandated factor to consider, there is nothing in the section that limits the range of other relevant circumstances and, consequently, each case will depend on its own facts. Who is to make the determination of the factors which are relevant and how they are to be weighed is also unstated. It would seem that the question posed is one that is quintessentially for the finders of fact, with any relevant circumstance put to them by the parties.

It seems that in *Lloyd* the time that the property was out of the possession of the victim was too short to fall within section 6(1) in the light of the overall useful life of the film and the lack of any evidence that that particular period of time was of great significance to the victim. On the other hand, in *Clinton v Cahill,* the period of time was sufficiently long to require the victim to have to reheat the water and so, given the substantial change in the usefulness of the water, a further examination of the surrounding circumstances would be needed to determine whether the borrowing amounted to an outright taking. In *Lavender*, although the time was short, the circumstances were such that it was likely that the council would have considered the door to have been lost and would have thus incurred the expense of replacing it with a new one.

Lending

Exactly when a lending amounts to a disposal has not been discussed directly by the courts. There are no reported cases of an allegation of section 6 lending. The general consensus amongst commentators is that the lending is an act done by an accused otherwise authorised to have property and that the lendee is a third party.[80]

The Oxford English Dictionary gives the primary meaning of "lend" as:

> 1. a. trans. To grant the temporary possession of (a thing) on condition or in expectation of the return of the same or its equivalent.[81]

[80] See *eg*, D Ormerod, *Smith and Hogan Criminal Law* (11th Revised ed, 2005, LexisNexis) at 707. This also appears to have been the understanding of the trial judge in *R v Bagshaw*, as noted without adverse comment by the Court of Appeal (*The Times* 13 January 1988; [1988] Crim LR 321, (Transcript:Marten Walsh Cherer)).

[81] In the light of the law on fungibles, return of equivalence would not fall within the Theft Act concept. See *eg*, *R v Williams* [1953] 2 WLR 937.

Translated into legal terms this amounts to a bailment. The accused, who otherwise lawfully has possession of the property, must voluntarily pass possession to another on a temporary basis. The time that it is envisaged the lending will last; the nature of the use of the property by the third party and any consideration due for the lending are all factors that are to be considered in determining whether the lending amounts to a disposal.

There is one case, *Fernandes*, which, on the facts, appears to refer to lending although not identified as such by the court. Fernandes, a solicitor, had dishonestly arranged to have client funds invested with a firm of money lenders. If section 6(1) has any role to play in such scenarios at all,[82] the investing of funds with third parties would appear most easily to be described as a loan of money. Yet the trial judge directed the jury on the basis of the first limb of section 6(1) and the prosecution argued that, at best, it was an instance of borrowing.[83] Quite unhelpfully, Auld LJ for the Court of Appeal held:

> The critical notion, stated expressly in the first limb and incorporated by reference in the second, is whether a defendant intended "to treat the thing as his own to dispose of regardless of the other's rights" The second limb of subsection (1), and also subsection (2), are merely specific illustrations of the application of that notion. We consider that section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss.
>
> In the circumstances alleged here, an alleged dishonest disposal of someone else's money on an obviously insecure investment, we consider that the judge was justified in referring to section 6.[84]

On the facts, this was a lending and the description of the actions of the accused by the court as a disposal[85] of an investment while lawfully in possession of the property allow the judgment to be read as considering the actions to be a lending.[86]

In this light, the statement of the court that the section may apply to a person who deals with property knowing that he or she is risking its loss does not amount to any significant expansion of the scope of the section, but is merely an observation that the second limb can apply to persons who do not intend the victim to suffer loss.[87] While the assessment of whether a lending amounts to an disposal is an objective test on the same basis as the borrowing provision, the reference in *Fernandes* to the accused's awareness of the risk amounts to a judicial suggestion that one circumstance that is relevant to the objective assessment in lending cases is the degree of risk

[82] Electronic transfers of funds are also considered to be acts of extinguishment and creation (*R v Preddy*) so that the only basis on which s 6(1) could have applied would have been if there had been the possibility that Fernandes had erroneous beliefs as to the law in this area

[83] *R v Fernandes* [1996] 1 Cr App R 175 at 188.

[84] *Op cit* at 188.

[85] ATH Smith's suggestion that a lending must amount to a disposal was not available to the court in *R v Fernandes* [1996] 1 Cr App R 175 as *Property Offences* was not published until the following year. ATH Smith was similarly unaware of *Fernandes* as it had not been reported prior to the completion of the manuscript.

[86] The characterisation of the accused's act as a lending raises some difficulties with the reasoning of the court. If a transfer has occurred, and that transfer falls within the meaning of a lending, then s 6(1) requires that liability can be established "if and only if" the lending is for a period and in circumstances amounting to a disposal. If the transfer was alleged to amount to a disposal, the trial judge was required to explain to the jury that such an allegation could only be proved if the jury was satisfied of this on the basis of the period and circumstances. It is thus a misdirection to refer to the first limb of s 6(1) as a determination of what the accused's intention is can only be a basis of liability if the transfer was not a lending or borrowing.

[87] Whether the limb can apply to persons who lend property honestly believing there is no risk – when, objectively, there is – remains undetermined, although the tenor of the section suggests such beliefs would not exculpate. Such beliefs are separate from the question of dishonesty. One can dishonestly lend property with a belief that there is no risk.

involved in the loan. The higher the risk, the more likely that the loan amounts to a disposal.[88]

But this is only relevant to the objective circumstances to be determined by the finders of fact. The state of mind of the accused cannot be relevant to any determination whether the accused has an intention to treat the property as his or her own. This is because the section clearly states that so treating the property may amount to so treating it "if but only if" it is objectively a disposal.

In *Fernandes*, the money had been transferred into a speculative investment with a back-street lender whose financial accounts and evidence in court were highly suspect. This, combined with the fact that the investment involved a significant amount of money, had been done secretly, and in breach of a court order and the solicitor's fiduciary duties allowed a jury to conclude it was equivalent to an outright disposal.

SECTION 6(2)

It is also necessary briefly to refer to section 6(2). No reported decision has yet discussed its meaning. It seems however that the sub-section operates as a form of strict liability. Once a person parts with the possession of property in circumstances where there is no automatic right to regain possession, he or she is deemed to have had an intention to permanently deprive.

Sir John Smith and ATH Smith have suggested that a pledger falls outside section 6(2) if he or she has a certain belief that he or she can regain possession of the property.[89] This appears to be because they consider that the subsection merely states the form of intention that may satisfy the first limb of section 6(1) and their analysis seems linked to earlier understandings of a restricted meaning for the section. But this interpretation overlooks the deeming nature of the subsection. There is nothing in section 6(2) that refers to any belief on the part of the accused and, by contrast with the second limb of section 6(1), section 6(2) is "without prejudice" to the scope of section 6(1). There is no element of excision contained within it. On the arguments of Smith and Smith, a person with a mistaken belief that he or she can redeem the pawned property falls outside the scope of section 6(1), even though the act of pawning is clearly one that amounts to an intention to treat the property as if he or she had the right to dispose of it. Excising this would be to the prejudice of the generality of section 6(1).

It is suggested that such a belief is the very argument made by the hopeful pledger[90] that the section is designed to overcome. Even though the pledger may believe that he or she is able to perform the condition, there remains a chance that he or she may not be able to do so. The mere fact that he or she has exposed the owner's property to this risk is the basis for the liability. Section 6(2), thus, deems any dealing with property where a person loses complete control over it without authority to do so from the owner to be an act that is so intentionally or recklessly in disregard of the owner's rights that it should be automatically seen as an intent to deprive.

This means that the operation of the subsection is more severe than the second limb of section 6(1). There is no scope for a finder of fact to assess the length or risk of the

[88] The equation of risk with disposal by the court does, however, suggest that the statements in *Cahill* about disposal requiring that the property be "got rid of" may overstate what is required to establish that the loan was equivalent to a disposal.

[89] ATH Smith, *Property Offences* (Sweet & Maxwell, 1994) at 234. Sir John Smith's view is maintained by D Ormerod and HW Williams, *Smiths's Law of Theft* (9th ed, 2007, OUP) at 123–4.

[90] See *eg*, *R v Treblicock* (1858) Dears & Bell 453 and *cf R v Williams* [1953] 1 QB 660.

pawning activity. All instances are deemed to evidence an intention to permanently deprive.

CONCLUSION: THE RESIDUAL SCOPE OF THE FIRST LIMB

Section 6 is a deeming provision, deeming that certain intentions that fall short of an intention to permanently deprive will nevertheless satisfy that element of theft. In so deeming, section 6 provides two routes by which to establish liability. The first, contained in the first limb of section 6(1) provides a general principle of an "intention to treat the property as one's own to dispose of regardless of the other's rights" This requires proof of subjective intent on the part of the accused. The second route is to rely on the second limb of section 6(1) or section 6(2) to establish that the appropriation amounted to a borrowing, a lending or a pawning. If this is established, then the element is established largely on an *objective* basis, without the need for the prosecution to establish the actual intent of the accused.

This is linked to a logical order of inquiry. First, the lending and pawning provisions operate only in situations where an act that transfers the property to a third party has already occurred. Section 6 operates to control the inferences as to the accused's intention that can arise from those acts. To establish liability in these two instances, the prosecution must prove the act has occurred and then argue liability on a characterisation of that act. If neither of these acts has occurred and the accused claims to have merely borrowed the property, the key question is whether any acts inconsistent with a borrowing have occurred. This article suggests that the defining feature is whether the accused accepts a duty of care for the safe return of the property. If the accused has, or there is no evidence that the accused has not, liability can only be established if the borrowing is objectively equivalent to an outright taking.

Thus on the approach taken in this article, the section operates in the following way. Intention to permanently deprive is established if:

a) Pawning: the accused transfers property of the victim, without authority, to another, subject to a condition as to its return that is not in the control of the accused. This is automatically deemed to be an intention permanently to deprive irrespective of the actual intention or belief of the accused.
b) Borrowing: the accused appropriates property of the victim with the intention that it eventually be returned to the victim undamaged, but either the intended or the actual time and circumstances of the borrowing are objectively equivalent to an outright taking. All other forms of borrowing fall outside the section.
c) Lending: the accused, being in lawful control of the victim's property, lends it to another, and does not intend that the property is not to be ultimately returned to the victim, but nevertheless intends to lend it for a period or in circumstances that can objectively be seen to amount to a disposal of that property. All other forms of lending fall outside the section.

If the *acts* of the accused do not fall within these three scenarios, attention then turns to whether the *intentions* of the accused fall within the first limb. However, in relation to the first limb of section 6, the test to be applied is not linked to any act and it is the pure subjective intention that must be established.[91] No act is a pre-requisite for

[91] However, that intent appears to be currently based on a *Ghosh*-type community standard that is partly objective (*R v Ghosh* [1982] QB 1053).

inclusion or exclusion other than that there must not have been a lending, pawning[92] or borrowing.

Any intention to permanently transfer the property to a third person would generally amount to evidence of an intention permanently to deprive[93] and it has been argued that a similar result would exist if there was an intention to return the property destitute of value or changed in nature. In neither case is there a need to rely on section 6. When combined with the suggested meanings of borrowing and lending, this means that the residual scope of the first limb of section 6(1) is: where the accused appropriates property where the accused does not transfer property to any third person, and where the accused also:

a) fails to have both an intention to permanently deprive and an intention to preserve the property and return it to the victim or
b) has an intention to have the victim believe that the property will not be preserved and returned.

The current approach of reliance on the first limb of section 6(1) is misplaced and, in most cases, reliance should instead be placed on the borrowing, lending and pawning limbs. These aspects of the section involve more objective elements and should be easier for juries to apply. Importantly, a stronger emphasis on the borrowing and lending aspects of the section will provide a principled, if somewhat vague, boundary to takings that are not theft. The clear implication of section 6(1) is that most unauthorised borrowings and lendings are not theft, while all pawnings are theft. The first limb of section 6(1) – that the accused intended to treat the thing as his or hers to dispose of regardless of the other's rights – should only be relied on when no borrowing, lending or pawning of property occurs.

[92] This is in practical terms. There is nothing in s 6(2) that precludes situations of pawning from being assessed by the first clause, but it is an unnecessary and significantly more difficult route to liability.

[93] Unless, of course, the transfer was subject to a condition or expectation that the third party would return the property to the victim. In such circumstances it might be possible to see this as a borrowing, with the third party as an agent of the accused