# Consent after the House of Lords: Taking and leading astray the Law of Theft

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The objectives of the Criminal Law Revision Committee[1] when drafting the radical reforms proposed by the 1966 Theft Bill were described by a contemporary commentator[2] as being: '. . . to do away with the more embarrassing and restrictive technicalities of the existing law . . .'

In the same place it was observed that the Committee faced a choice between creating a specific definition of the various theft offences and their elements, or one whose generality would allow it to evolve to meet the challenges presented by ever more complex and sophisticated dishonest dealing. Megaw LJ, in delivering the judgment of the Court of Appeal in *Lawrence v Comr of Police for the Metropolis*[3] noted that the new s 1(1) offence under the 1968 Act comprised four elements: '(1) a dishonest (2) appropriation (3) of property belonging to another (4) with the intention of permanently depriving the other of it.'

The *actus reus* elements within (2) and (3) above were clearly intended to extend the boundaries of larceny which had become tamed by its over-complexity. The breadth of the definitional elements, coupled with the fact that certain of them, such as those offered in respect of 'dishonesty' and 'appropriation' were only intended to be partial, provides strong evidence that the Committee were eschewing the laboured specificity with which the law of stealing had become over-run under the Larceny Acts. Moreover, in omitting any reference to the question of consent within s 1(1) it may be further surmised that the Committee's priority was to create a readily comprehensible framework for the protection of property rights.

The integral elements of the *actus reus* of 'stealing', within s 1(1) of the Larceny Act 1916 were that it referred to the conduct of:

'A person . . . who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen . . .'

This paper focuses upon the question of whether the omission of a lack of consent requirement from the new definition of theft was deliberate (perhaps being considered superfluous) or inadvertent. In short, is the offence of theft committed when the defendant, with the required *mens*

1. 8th Report on Theft and Related Offences (1966) Cmnd 2977.
2. Hadden [1967] Crim LR 669.
3. [1970] 3 All ER 933 at 935. Endorsed by the House of Lords at [1971] 2 All ER 1253 at 1255.

*rea*, tricks his victim into consensually parting with his property? In essence all turns on two matters:

(i) what 'consent' is taken to include; and
(ii) if 'consent' is defined expansively, as most of the cases suggest, whether the key word in the new definition, 'appropriation',[4] is to be accorded a neutral meaning (to include consensual taking in this sense) or an aggressive one which would deny this result.[5]

These fundamental and seemingly elementary questions have spawned three House of Lords decisions, the latest of which,[6] with respect to their Lordships, whilst providing unequivocal support from the majority for the neutrality theory, has followed the pattern of the previous two decisions[7] in bringing little clarification to bear upon the subject. Furthermore, the thorny question of consent has also proved divisive to the harmony of the Civil and Criminal divisions of the Court of Appeal.[8]

As has been seen, the former law of stealing was in general clear: the taking and carrying away had to be without the consent of the owner. The clarity of the former law was compromised however by certain exceptions to this general rule. Most notable was the offence of larceny by trick to be found within s 1(2)(1)(a) of the Larceny Act 1916. Whilst this offence displayed the hall-marks of a deception offence[9] it was separated from it by the state of mind of the *victim* when parting with the property. If V's intent was to part only with *possession* of the property and if this was induced by D's false representation, D would be guilty of larceny by trick, provided D had the intent to steal at the time he took possession.[10] However, if D's falsehood induced V to part with the *property* in the goods the offence of obtaining by false pretences and not larceny was made out.[11]

It is worthy of note that in the light of the decision of the majority of the House of Lords in *Gomez* virtually all such conduct could today be charged either as theft or deception.[12] This aspect of the decision, it is submitted, is to be welcomed as being entirely in accord with the avowed

**4.** Noted by Professor Cross, very prophetically, in a contemporary commentary as being the word which '. . . is in many ways the most important in the whole new definition of theft.' [1966] Crim LR 415 at 417.
**5.** It is contended in the text at n 30, *infra*, that 'consent' must bear a narrow meaning, focusing upon the question of whether property rights have been interfered with.
**6.** *R v Gomez* [1993] 1 All ER 1.
**7.** *R v Lawrence* [1971] 2 All ER 1253 and *R v Morris and Anderton v Burnside* [1983] 3 All ER 288.
**8.** Cf *Dobson v General Accident Fire and Life Assurance plc* [1989] 3 All ER 927 and *R v Gomez* [1991] 3 All ER 394, CA, *infra*.
**9.** The separate deception offence owes its genesis to Fielding's Act of 1757 30 Geo 2, c 24, termed obtaining by false pretences which in 1916, was embraced by s 32 of the Larceny Act. Cf now s 15 of the Theft Act 1968.
**10.** *Dennant v Skinner and Collom* [1948] 2 KB 164.
**11.** *Heap v Motorists Advisory Agency Ltd* [1923] 1 KB 577 at 583 per Lush J. For an archetypal recent illustration of what would have formerly (jurisdictional problems aside) comprised the offence of larceny by trick see: *R v Atakpu* (1993) Times, 22 March.
**12.** See text at n 43, *infra*, and *R v Atakpu, supra*, n 11.

aim of the Criminal law Revision Committee to achieve a 'simpler and more effective system of law'.[13]

In *Lawrence*[14] the House of Lords, preferring 'appropriation' to be construed neutrally, ruled that the failure of the Committee to include a lack of consent requirement within the s 1(1) offence could not have been inadvertent and it followed therefore that theft could be established even where the victim consensually handed over the property which was the subject of the charge.

The facts concerned the arrival at Victoria Station of the unfortunate Mr Occhi, an Italian student who spoke very little English. He requested the appellant taxi driver to take him to Ladbroke Grove and was informed that the journey was long and would be very expensive. Occhi offered the appellant £1 but, his wallet still being open, allowed the appellant to take a further £6 from it. In fact the correct fare would have been 10s 6d. In affirming the appellant's conviction for the theft of £6, the House of Lord's unanimously determined that it was no defence for the appellant to argue that he had taken the additional money with Mr Occhi's consent. Viscount Dilhorne, in delivering the judgment of the House, stated:[15]

'I see no ground for concluding that the omission of the words "without the consent of the owner" was inadvertent and not deliberate . . . Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner's consent. That is no longer an ingredient of the offence.'

The law relating to this element of the *actus reus* appeared to be settled therefore, and it is perhaps unsurprising that Viscount Dilhorne, in a sanguine moment, enjoined that the 1968 Act had 'greatly simplified the law'.[16]

The *actus reus* elements of the theft offence were again dispatched to the House of Lords for clarification in the consolidated appeals of *R v Morris* and *Anderton v Burnside*.[17] Both prosecutions arose out of efforts by the appellants to obtain supermarket items at an under-value by exchanging price labels. In *Morris* the appellant was arrested after he had paid the lower price, in *Burnside*, at the check-out, prior to having done so. Both appellants argued that there had been no appropriation of the goods prior to reaching the check-out; Morris argued further that there could be no appropriation after the check-out had been passed as ownership in the goods had already passed to him.[18]

**13.** Commentators such as Giles and Uglow who make clear their opposition to any assimilation of the s 15 offence into s 1, fail to express any cogent reasons for their position: 'Appropriation and Manifest Criminality in Theft' 56 JCL 179.
**14.** [1971] 2 All ER 1253.
**15.** *Ibid* at 1255.
**16.** *Ibid* at 1254.
**17.** [1983] 3 All ER 288.
**18.** The civil law generally holds ownership to pass when payment is made: *Lacis v Cashmarts* [1969] 2 QB 400. Cf Lord Keith's reasoning in *Gomez* which would not allow this to frustrate a theft charge: see text at n 43, *infra*.

Lord Lane, in giving the judgment of the Court of Appeal, felt constrained by the decision in *Lawrence* to again construe the term 'appropriation' neutrally. Accordingly, he concluded that an appropriation occurred as soon as a customer took an item from a shelf with the intention of buying it. Applying Viscount Dilhorne's judgment it was no defence to argue that such conduct had the implied consent of the shop-owner: an appropriation under the 1968 Act did not connote any lack of consent, as had 'taking and carrying away' under the Larceny Act 1916. Moreover, it was not necessary to show that the appellant had assumed *all* the rights of the owner; the assumption of a singular right was enough[19] – the right of the shop-owner to remove his products from the shelves. Accordingly the Court of Appeal, applying *Lawrence*, determined that Morris had effected an appropriation even before he switched the price labels – when he removed the items from the shelf.

The House of Lords, whilst affirming the convictions of both Morris and Burnside, differed from the Court of Appeal as to the timing of the appropriations. Lord Roskill, delivering the judgment of the House, considered appropriation to be an 'aggressive' term[20] in stating:[21]

'In the context of s 3(1), the concept of appropriation in my view 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.'[22]

Accordingly, it was inapposite to apply the term to an honest shopper; no appropriation took place until the appellant had removed the items from the shelves *and* switched the labels.[23] Until this threshold had been reached the appellant remained within the terms of the shop-owner's implied consent. The term 'appropriation' did not therefore simply connote doing something which the proprietor could do, but went further, requiring an *interference* with the proprietor's rights.

The House of Lords' ruminations thus far may be summarised as follows: to constitute an appropriation an act done with the owner's *consent* will suffice (*Lawrence*) but it must be an act which interferes with the owner's rights, and must not be done with his *authority*. (*Morris*)[24]

It is unfortunate that their Lordships appear to have taken a term employed for its apparent ease of comprehension and have translated it

**19.** See also: *Anderton v Wish* [1980] Crim LR 319 per Roskill LJ.

**20.** Lord Lowry's description in *Gomez*. See n 62, *infra*.

**21.** *Supra*, n 17 at 293.

**22.** This definition is clearly in keeping with the views of the Criminal Law Revision Committee who at para 35 of their report observed that 'appropriation' was synonymous with 'fraudulent conversion', the new term being preferred for its clarity and lack of technicality.

**23.** Lord Keith has pointed out in *Gomez* that the singular act of switching the price labels is enough: see text at n 46, *infra*. This must be correct if the objective of the Theft Act is accepted as being to protect *interference* with property rights. Cf Giles and Uglow *op cit*, n 13 at 182.

**24.** It is acknowledged by Lords Keith and Lowry in *Gomez, supra* n 6, at 9 and 38, that no sensible distinction could be drawn between consent and authorisation and therefore the decisions could not be rationalised despite valiant efforts to the contrary by Parker LJ in *Dobson, infra* n 29 and O'Connor LJ in *R v Philippou* [1989] Crim LR 585.

into an esoteric term of legal art. Indeed, twenty-two years hence the courts have construed the legislation such that it appears inceasingly unworthy of Viscount Dilhorne's precipitous praise.

With respect the root cause of the dilemma must be laid at the door of Lord Roskill who, in guiding the law to this juncture, did so with only a cursory analysis of *Lawrence* and with no indication as to how the two cases could be reconciled or indeed whether he viewed them as in need of reconciliation. With great brevity his Lordship dismissed the earlier decision of the House of Lords by observing:[25]

'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).'[26]

Such reasoning is, with respect, far from convincing for Lord Roskill would have undoubtedly answered in the affirmative the certified question concerning the existence of a lack of consent requirement, which received a firm negative reply from Viscount Dilhorne in *Lawrence*. According to *Morris* the honest (and also dishonest)[27] shopper who selects items in a (self-service) supermarket, being within the umbrella of the shop-owner's consent does not, without more, commit one of the four elements of theft.[28]

However, salvation from this quagmire of burgeoning technicality may be at hand in the form of the steadying influence of the Civil Division of the Court of Appeal,[29] where the incisive reasoning displayed therein provides a platform for the future operation of the Theft Act which accords with the policy objectives of its authors in fostering a regime assiduous in the effective protection of property rights.

## Apparent Consent Versus Actual Consent

The key to reconciliation of the authorities, as recognised by the Court of Appeal in *Dobson v General Accident Fire and Life Assurance plc*[30] is to cut a path through the consent myth and to thereby focus, not on the dishonest means employed by D but rather upon the attendant result. By adopting this approach it is evident that *Lawrence* may be most accurately described as an 'apparent consent' case. It is axiomatic that in fact there was no consent by Occhi for the appellant to take more than the legally

**25.** *Supra* n 17 at 292.
**26.** Implicit in Lord Roskill's statement is the distinction between appropriation in its everyday sense and its technical, extended definition to be found in s 3(1) of the Theft Act 1968. Lord Roskill appears to be drawing from a treatise of Professor Glanville Williams who has himself asserted this distinction (*Textbook of Criminal Law* (1983, 2nd edn)).
**27.** See for example *Eddy v Niman* [1981] Crim LR 502.
**28.** Cf the judgment of Lord Keith in *Gomez*. See text at n 51, *infra*, according to whom an appropriation occurs as soon as the item is placed in the store's trolley.
**29.** *Dobson v General Accident Fire and Life Assurance plc* [1989] 3 All ER 927. Approved by the House of Lords in *Gomez, supra* n 6.
**30.** *Ibid.*

permitted fare. This much was recognised by Viscount Dilhorne when he observed:[31]

'The main contention of the appellant in this House and in the Court of Appeal was that Mr. Occhi had consented to the taking of the six pounds . . . In my opinion, the facts of this case . . . fall far short of establishing that Mr. Occhi had so consented.'

It is submitted that despite his Lordship's pre-occupation with the consent question the true basis of the decision in *Lawrence* is betrayed by the above *dictum*. No reasonable jury could conclude that there was in fact consent for the appellant to take what amounted to some fourteen times the legal fare for the journey. Whether V has taken the property in a clandestine manner or, more boldly, has fraudulently induced the owner to part with it voluntarily, the result is the same – V's property rights have been usurped and the means employed to achieve this end should be regarded as irrelevant. If the criminal law is to become overborne by a technical civil law debate as to whether (and when) title to property has passed, it will mark an unwelcome return to the intractable problems encountered under the Larceny Act, providing a stimulus to those seeking to expose other's property to the ravages of criminal dishonesty.[32]

It is strongly urged therefore that Viscount Dilhorne's analysis of the issue of consent was strictly *obiter*. In short, a consideration of consent was here, as in the next following cases, an unnecessary aside.

## The Apparent Consent Cases

In *Dobson*,[33] Mr Dobson had advertised his Rolex watch and a diamond ring for sale at the asking price of £5,000. A rogue responded to the advertisement and agreed to pay the asking price. It was agreed that payment should be by way of a building society cheque and upon being presented with the cheque the plaintiff handed over the items. It transpired that the building society cheque had been stolen and was therefore worthless. The plaintiff made a claim under his household insurance

**31.** *Supra* n 14 at 1254.

**32.** Giles and Uglow *op cit* n 13, at 181, n 16 apparently consider that such an approach is heretical in that it: 'devalues the whole distinction between consenting and non consenting victims'. Central to this paper is the premiss that there exists no value in retaining such a distinction. With respect, the authors have been distracted from the purpose of the Act by focusing upon the *means employed* by D rather than the *result* suffered by V. They also charge that the approach favoured herein is likely to lead to uncertainty, however once it is accepted that real consent in the present context must be considered rare this objection disappears. Where it does exist the issue is likely to turn upon dishonesty as the company fraud cases illustrate. A postulated case of real consent negativing, however, the *actus reus* of theft (but not the *mens rea*) is the following: D, being illiterate, enters a supermarket and sees products which are being offered to the public gratuitously for promotional reasons. Unaware of this he helps himself to the product believing he is acting unlawfully. He is not. This is due entirely to the factual presence of the proprietor's actual consent which negatives an appropriation.

**33.** *Supra* n 29.

policy which covered him, *inter alia*, for the *theft* of his belongings. The defendant insurers declined to meet the claim on the basis that in these circumstances there had been, in law, no theft, but only deception.[34] Seeking to apply *Morris* the defendants contended that there had been no appropriation on the present facts as the defendant had consensually handed over his property which negatived Lord Roskill's requirement of adverse interference.

The Court of Appeal however upheld the decision of the judge that the plaintiff's loss had been caused by theft. Parker LJ proceeded on the assumption that the plaintiff had consented to his property being taken. He accordingly applied *Lawrence* in determining that the presence of consent was irrelevant to the appropriation issue, but concluded, in deference to *Morris*, that the actions of the rogue amounted to: '. . . a plain interference with or usurpation of the plaintiff's rights.'[35]

Significantly, Parker LJ displayed a willingness to eschew strict principles of the civil law in observing:[36] '. . . I have no doubt that the property was not intended to pass in this case on contract but only in exchange for a valid building society cheque . . .' Whether this is a correct analysis of the law governing transfer of title is less important than the clear desire, inherent in the statement, to assert the criminal law in the protection of property rights from dishonest dealing.

Equally instructive is the judgment of Bingham LJ who, in expressly reserving for 'consent' the narrow definition herein advocated, was able to conclude that the present facts did amount to theft within s 1(1). The learned Lord Justice observed:[37]

'. . . On the facts of the present case . . . it can be said, by analogy with *Lawrence*'s case, that although the plaintiff permitted . . . his property to be taken by the rogue, he had not in truth consented to the rogue becoming owner without giving a valid draft . . .'

As with *Lawrence* itself by so defining consent the conclusion that an appropriation has occurred follows naturally thereby allowing the court to focus upon the interference with the victim's rights, plainly evident in each case.

The most recent example of 'apparent consent' is supplied by the facts of *R v Gomez*[38] where, with respect, it was the failure by the Court of Appeal to appreciate the crucial distinction between apparent and real consent which forced it into error. The decision of the House of Lords, regrettably, does little to redeem this error.

The instrument of the dishonest dealing was, once more, stolen building society cheques. The appellant, an employee at an electrical goods shop, being in league with B, persuaded the shop manager to accept 'B's' cheques as payment for electrical goods. The manager,

**34.** Section 24(4) of the Theft Act *infra* n 70 was , strangely, not argued.
**35.** *Supra* n 29 at 935.
**36.** *Ibid* at 930–931.
**37.** *Ibid* at 937.
**38.** [1991] 3 All ER 394, CA; [1993] 1 All ER 1, HL.

unaware that the cheques were worthless, agreed to accept them in exchange for goods valued in excess of £16,000 after the appellant had falsely represented to him that the bank had confirmed their validity.

Counsel for the appellant argued that since the manager had authorised the removal of the goods the presence of consent rebutted any conclusion that the rights of the shop-owner had been adversely interfered with and, according to *Morris*, there could therefore have been no appropriation.[39] This reasoning was accepted by the Court of Appeal who quashed the appellant's conviction. Lord Lane, the former Lord Chief Justice, in giving the judgment of the court concluded[40] that the transfer of the goods to the third party:

'. . . was with the consent and express authority of the owner and . . . accordingly there was no lack of authorisation and no appropriation.'

With respect, it appears plain that any appearance of consent must, in interpreting s 1(1), be considered to have been vitiated as in *Lawrence* and *Dobson*, due to the fraud which was instrumental in it being obtained. It is axiomatic that had the manager known the truth he would not have sanctioned the removal of the equipment. Accordingly, the policy of the statute requires that the presence of fraud operates to remove the issue of consent from the debate. In such circumstances the conduct of the appellant, no longer protected by the illusion of V's consent, is betrayed as amounting to the clearest evidence of adverse interference with the owner's rights.

Lord Lane's pious plea that the appropriate charge to bring on these facts was that of obtaining property by deception contrary to s 15(1) of the Theft Act 1968 is, with respect, no response to the allegation of theft. Indeed, the second certified question to prompt an emphatic 'no' from Viscount Dilhorne in *Lawrence* was whether the two offences were mutually exclusive.[41]

Some sympathy must be felt for Lord Lane, however, whose fidelity to *Lawrence* when *Morris* was before him in the Court of Appeal, resulted in the chastisement of Lord Roskill when the case reached the House of Lords. It is perhaps unsurprising therefore that Lord Lane was heard to utter[42] with some hint of resignation in *Gomez*:

'Suffice it to say that if there is a difference between the two decisions, that was not the view taken by their Lordships in *R v Morris* and that is the decision which we must follow.'

**39.** It is settled law that one who exceeds his authority may thereby commit an appropriation: *A-G of Hong Kong v Nai-Keung* [1988] Crim LR 125.
**40.** [1991] 3 All ER 394 at 400.
**41.** Lord Lane's suggestion is also contrary to the *dictum* of Lord Roskill in *Morris, supra* n 17 at 295 endorsed by Lord Keith in *Gomez, supra* n 6 at 12. Indeed it is conceded in the text *infra* at n 68 *et seq* that s 1 is now virtually co-extensive with s 15 but that such a development, in encouraging the efficacy of the Theft Act, is to be welcomed.
**42.** *Supra* n 40 at 398.

The majority of the House of Lords in *Gomez*[43] ruled however that once again Lord Lane's loyalties (this time to *Morris*) were misplaced. According to Lord Keith's leading judgment the presence of consent was not to be regarded as being inconsistent with the conclusion of an appropriation where the parting with the property had been induced by the defendant's deception. In his Lordship's view *Lawrence* itself was just such a case. Indeed, his *Lordship* continued, *Lawrence* made it plain that an appropriation did not invariably connote an act which adversely interfered with the owner's rights. Accordingly on this, and other matters,[44] Lord Roskill had been in error in *Morris*.

However, according to Lord Keith:[45]

'Lord Roskill was undoubtedly right when he said . . . that the assumption by the defendant of any of the rights of an owner could amount to an appropriation'.

Lord Roskill had been wrong however in suggesting that *both* the switching of a price label and the removal of the product from the shelf was required.[46] The application of the 'singular right theory' for Lord Keith was enough to conclude that the removal of a price label, without more, was an appropriation in law.

Regrettably whilst Lord Keith's application of the 'singular right theory' cannot be faulted,[47] the same cannot be said of his treatment of the consent issue. His Lordship reasoned that in such cases as *Lawrence* (and the present) where the victim's consent had been obtained fraudulently this fact would support, rather than deny, the existence of an appropriation. Lord Keith opined that whilst the term 'appropriation' included acts which were by way of adverse interference with the owner's rights that was not to say that:

'. . . no other act could amount to an appropriation and in particular that no act expressly or impliedly authorised by the owner could in any circumstances do so.'[48]

Lord Roskill had accordingly erred in concluding in *Morris* that the presence of authority negatived the finding of an appropriation as this was directly contrary to *Lawrence* which was to be regarded as 'authoritative and correct'.[49]

**43.** *Ibid.* Lords Keith, Slynn, Jauncey, and Browne-Wilkinson. Lord Lowry dissenting.
**44.** Most notably the furore surrounding Lord Roskill's example of a prankster who switches labels in jest, itself a fertile source of academic comment, has finally been laid to rest. Lord Roskill's view that the prankster had not thereby appropriated the property was exposed by Lord Keith (*supra* n 6 at 9) as being plainly wrong in that it conflated the issues of *actus reus* and *mens rea*.
**45.** *Ibid.*
**46.** *Ibid.*
**47.** Cf Giles and Uglow, *op cit* n 13 at 182.
**48.** *Supra* n 6 at 9.
**49.** *Supra* n 6 at 13. The Court of Appeal decisions in *R v Fritschy* [1985] Crim LR 745 and *R v Skipp* [1975] Crim LR 114 in applying the aggressive definition to appropriation, were incorrect and were overruled. *Supra* n 6 at 13. The same must be true of the decision in *R v Meech* [1973] 3 All ER 939 which was not discussed in *Gomez*.

It is to be observed that by failing to acknowledge that D's fraud vitiated V's consent for the purposes of the theft offence the majority's wide understanding of the term obfuscates the apparent/actual consent dichotomy and in so doing concludes that in *all* cases where consent exists an appropriation may arise.[50] The dangerous corollary of this technique is the emergent inability of the law to distinguish the culpable act of the dishonest thief from the innocent act of the honest invitee. Lord Roskill's insistence upon a lack of authorisation was precisely to ensure that the term 'appropriation' should not be applied to the conduct of the latter who was afforded the protection of the proprietor's implied consent. In so ruling it has been seen[51] that Lord Roskill worked a reversal of Lord Lane's judgment in the Court of Appeal: no appropriation was manifested by the conduct of simply taking an item from a shelf. In this it is strongly submitted that Lord Roskill was correct. However the following passage in Lord Keith's judgment in *Gomez* heralds an unwelcome return towards the extreme position adopted by Lord Lane. According to his Lordship:[52]

'There was much to be said in favour of the view that . . . the mere taking of the article from the shelf and putting it in a trolley . . . amounted to the assumption of one of the rights of the owner and hence (was) an appropriation.'

Lord Keith's justification for reaching this conclusion is that when a shopper places an item in his trolley he thereby obtains control of the article and at the same time deprives other customers of it. It is highly questionable however whether this, coupled with the fact that the activity is something which the proprietor himself can do, should be enough to convert an entirely innocent act into one which satisfies certain of the definitional elements of the theft offence. Whilst without proof of the required *mens rea* no offence of theft could be successfully prosecuted,[53] it is nevertheless anomalous that the invitee to a self-service store who does no more than that which he is being depended upon to do by the proprietor has, inescapably, committed all the elements of the *actus reus* of theft.

This startling, and it is suggested untenable, proposition is the inevitable corollary of failing to distinguish between apparent and actual consent. It is strongly submitted that such tortuous results would be readily avoided by recognition of the following principles:

(i) The *Lawrence* line of authority determines that where the facts illustrate the appearance of consent only, there will be no difficulty in identifying an appropriation where the requirements in (ii) below are

**50.** By including such early conduct within the *actus reus* of theft the House of Lords' decision will give rise to problems of jurisdiction where the fraudulent activity originates abroad: *Atakpu*, see n 11 *supra*. Cf *Fritchy supra* n 49.

**51.** See text at n 23 *supra*.

**52.** *Supra* n 6 at 9.

**53.** However the majority decision in *Gomez* would seem to effect a reversal of the decision in *Eddy v Niman Supra*, n 27, with the accused now guilty of theft on account of his dishonest intentions when he put the items in the store's basket.

satisfied. All cases where V has been induced to part with his property by D's fraud come within this category with any consent being thereby vitiated – beyond this, the issue of consent has no further relevance to the *actus reus*[54] – *Dobson v General Accident Fire and Life Assurance plc*;[55] and

(ii) An appropriation necessarily[56] connotes a usurpation of, and adverse interference with, the owner's rights and will therefore be accompanied by a lack of authority – Lord Roskill in *R v Morris*.[57]

The above formula provides for a continued finding of theft in *Lawrence, Dobson* and *Gomez* and at the same time ensures that the innocent shopper is isolated from the *actus reus* of theft. Beyond acceptance of the actual/apparent consent dichotomy the issue should be attributed no further significance in connection with the *actus reus* apart from recognising any actual consent (company law cases aside) to be inconsistent with a finding of an appropriation.[58]

A lone voice in the minority in *Gomez*, Lord Lowry, delivered a powerful dissenting speech in which demonstrable support for (ii) above may be found. However, his Lordship, together with the majority, was not prepared to cut a swathe through the consent myth in order to emphasise D's dishonest dealing. Instead, Lord Lowry's unwaivering theme was that the Theft Act 1968 had deliberately retained the separate identity of the theft and deception offences and that in the absence of the latter being charged the respondent had been correctly acquitted. Accordingly, *Lawrence* was regarded as being responsible for the untenable fusion of the two sections, with the consequent redundancy of section 15. This led his Lordship to urge[59] that Viscount Dilhorne's judgment be either considered *obiter*[60] or alternatively be formally overruled. According to his Lordship[61] in both *Lawrence* and the present case: 'it was the Crown's resort to section 1(1) (as opposed to s 15(1)) which alone gave rise to a legal problem.' Accordingly, Lord Roskill had been correct in *Morris* in construing 'appropriation' to require an act which was not authorised by the owner. In the words of Lord Lowry[62] 'appropriation' connoted an 'adverse unilateral, act done to the prejudice of the owner and without his authority'. This definition, in reflecting the views of the Criminal Law Revision Committee,[63] was considered by his Lordship to rule out any offence of 'consensual theft' with *Lawrence* and *Dobson* having been wrongly decided.

**54.** See n 74 *infra*.
**55.** *Supra* n 29.
**56.** Company fraud cases apart see text *infra* at n 73.
**57.** *Supra* n 17 endorsed by Lord Lowry in *Gomez*, see text *infra* at n 61.
**58.** See n 32 *supra*.
**59.** *Supra* n 6 at 38.
**60.** Emphasising Viscount Dilhorne's prefatory observation that the facts appeared to him to fall far short of establishing that Mr Occhi had in fact given his consent. See text *supra* at n 31.
**61.** *Supra* n 6 at 29.
**62.** *Ibid* at 22. Preferring his own 'less aggressive' definition for its greater portability throughout the Theft Act.
**63.** See n 22 *supra*.

**An assimilation of section 15 into section 1?**

It is apt to pause for a moment to consider whether Lord Lowry's fear that section 15 has been rendered otiose by the majority decision is well founded. Whilst the decision of the majority, together with the solution advocated in this paper, results in a considerable degree of overlap between the provisions, as observed by Lord Browne-Wilkinson in his judgment in *Gomez*,[64] this would not lead to section 15 becoming redundant. There seems to be at least two compelling reasons which may be cited in support of this conclusion:

(i) Section 4(2) of the Theft Act provides that in general land may not be the subject of a theft charge. However, whilst s 34(1) provides, *inter alia*, that s 4(1) should be of general application it has no such effect on s 4(2). Accordingly, if the owner of land is induced by a dishonest deception to part with it, theft charges cannot be brought, but there would seem to be nothing in the way of a s 15 charge.[65]
(ii) Since the coming into force of s 26 of the Criminal Justice Act 1991[66] whereby the maximum sentence for theft was reduced from ten to seven years, deception[67] has been the more serious of the two offences. Accordingly, in any case where the owner has been fraudulently induced into parting with his property the prosecution are put to their election as to whether to charge s 1 or s 15. In the light of the majority's decision in *Gomez* it is to be expected that the Crown will continue to manifest its preference for the s 1 offence in such circumstances. However, in a case which involves either property of high value, or land, the Crown would be well advised, or obligated, respectively, to rely upon s 15.

Moreover, it may be questioned whether Lord Lowry is correct in his premiss that the assimilation of s 15(1) into s 1(1) would be undesirable. It is worthy of note that the Criminal Law Revision Committee debated long and hard over the virtues of jettisoning the theft/deception dichotomy and apparently only narrowly decided against such reform.[68] Hadden has observed:[69]

'The continuing strict separation of the offences of larceny and of obtaining by false pretences was principally due to the importance at that time of maintaining the distinction between felony and misdemeanour, *for there was clearly no other compelling reason why to steal goods by*

**64.** Supra n 6 at 39.
**65.** This conclusion is made more compelling by the fact that s 4(1) which, supra, *does* apply to the deception offence, specifically provides that 'property' includes, *inter alia*, real property.
**66.** 1 October 1992.
**67.** Which offence, untouched by the Act, continues to attract a maximum sentence of ten years. It is betrayed in para 38 of the CLRC report that one reason put forward by the majority for the retention of the two separate offences was the view that deception was often to be regarded as a *less* heinous crime: 'a bogus beggar is regarded as a rogue but not as a thief, and so are his less petty counterparts'.
**68.** See para 38 of their report and *supra* n 67.
**69.** *Op cit* n 2 at 671.

*fraudulently inducing the owner to part with them voluntarily should be regarded differently from their secret removal. In either case the property is taken without the real consent of the owner.'* (Author's emphasis).

In respectfully adopting the above it is submitted that the majority of their Lordships in *Gomez* were correct in concluding that no cogent reason today exists to perpetuate a dichotomy which could only be mischievous to the avowed aims of the legislation.[70] In any case where apparent consent is in the air, the courts should not indulge the dishonest fraudster by allowing his utilisation of the civil law to render so rigid the Theft Act that he may evade its provisions.

It is apparent, therefore, that the fine distinctions which the former law of larceny drew between larceny by trick and obtaining by false pretences[71] have continued to abound under the Theft Act in decisions such as *Lawrence, Dobson and Gomez*[72] but will now disappear in the light of Lord Keith's judgment in *Gomez* with the result that judges and lawyers alike will be troubled less by that great anathema of the criminal law: the civil law.

## The Actual Consent Cases

The central premiss of this paper, that apparent consent is irrelevant to the finding of an appropriation, leaves open the question of how the courts are to deal with cases of actual consent. Whilst it has been acknowleged that such cases will be rare,[73] one category of case exists where actual consent is not only present but compatible with a finding of theft. This is in the context of the company fraud cases where the courts have rightly acknowledged that consent may play a prominent role, not upon the *actus reus* of theft but rather as an indicator of dishonesty.[74] Such cases represent the only discernible line of authority concerning theft from a victim who has given a real consent (the company), and are a direct result of the legal fiction underpinning the whole of company law holding that the company, and its human personification, the directors, are in law distinct entities.[75] It is submitted that only in this very special

**70.** Indeed s 24(4) of the Theft Act is opposed to rigid classifications providing that for the purposes of the Act goods obtained, *inter alia*, by *deception* are to be regarded as *stolen*.
**71.** See: *Heap v Motorists Advisory Agency Ltd, supra* n 11 and associated text.
**72.** See, for example, the judgments of Parker LJ in *Dobson supra* n 29 and Lord Lane in *Gomez supra* n 40 at 399–400. In this regard it is noteworthy that counsel for the insurers in the former case sought to distinguish *Lawrence* from their facts on the passing of possession/passing of property distinction. See text at n 9 *supra*.
**73.** See text *supra* at n 32.
**74.** Where real consent is genuinely believed by D to exist there can be no dishonesty: s 2(1)(b) of the Theft Act 1968. The bearing which consent may have upon dishonesty rather than appropriation was expressly acknowledged by Viscount Dilhorne in *Lawrence, supra* n 14 at 1255. See also the conclusion drawn by Lord Browne-Wilkinson in *Gomez, supra* n 6 at 40.
**75.** *Salomon v A Salomon & Co Ltd* [1897] AC 22.

circumstance will the presence of consent be consistent with a conclusion of an appropriation.[76]

The decision of the Court of Appeal in *R v Philippou*[77] is notable both for its elevation of the dishonesty issue and the ingenuity displayed in attempting to marry together the decisions in *Lawrence* and *Morris*.[78] Here the appellant and another, who were the sole directors of a company in London, used £369,000 of company funds to finance the purchase of a block of flats in Spain which were registered in the name of another company of which the appellant and his colleague were sole directors and shareholders. The directors were charged with the theft of a chose in action of the London company, (the debt owed by its bankers to it).

O'Connor LJ, delivering the judgment of the Court of Appeal, applied the following principles in attempting to reconcile the decisons of *Morris* and *Lawrence*[79] and arrive at the conclusion that the theft charges were made out:

(i) Whilst it could not be denied that the company had consented to the transfer of its funds to Spain, the issue of consent was irrelevant to the question of appropriation: *Lawrence* applied.
(ii) However, because the funds were being diverted from the London company and its share-holders, for the beneficial use of the directors in their capacity as share-holders of the Spanish company, the dishonest nature of the transaction was betrayed. Furthermore, applying *Morris* this dishonesty revealed the adverse interference with the company's interests which the transfer of the funds represented.

Accordingly, the Court of Appeal, in dismissing the appeal, concluded that there had been no consent of the company on which the appellant could rely. As there was a readily identifiable act of adverse interference, the issue of consent became irrelevant, with the reality of the appropriation being underscored.

Whilst no objection is here taken with the *result* in *Philippou* the Court of Appeal's apparent assimilation of its own facts with *Lawrence* does give rise to concern as once again, apparent and actual consent are confused. Ironically, it would seem that the preferable approach to be adopted in such cases is to apply the technique misapplied by their Lordships in *Gomez* in an apparent consent case and apply it to this paradigm actual consent case. Accordingly, despite the presence of the company's consent an appropriation will be identified because of the fraud on the company which the consent represents.

**76.** The majority decision in *Gomez* facilitates this conclusion in holding that in *any* case the presence of consent is consistent with an appropriation. Cf Lord Lowry who asserted (*supra* n 6 at 36) that in the company fraud cases there is no valid consent and accordingly *Morris* would be applied in order to identify the appropriation from the 'unilateral and non consensual' act of the director.
**77.** *Supra* n 24 approved in *Gomez* by Lords Lowry and Browne-Wilkinson.
**78.** Cf *R v Roffell* [1985] VR 511; and *R v McHugh and Tringham* (1988) Cr App R 385 (not referred to in *Philippou*, but disapproved in *Gomez*) where *Morris* was applied in each case to deny the existence of an appropriation due to the presence of consent.
**79.** Considered by Lord Lowry in *Gomez* (*supra* n 6 at 38) to be an exercise which was 'a complete waste of time'.

## Conclusion

The pragmatic solution to the consent issue herein advanced has as its chief attribute the fact that a firm grip is kept on reality. If V has been deceived into parting with his property in circumstances where, had he known the truth, it would not have been released, it seems fanciful to describe his conduct as being consensual. It is self-evident that the vast preponderance of theft cases will involve either clandestine conduct such as that witnessed in *Morris*, or the bolder conduct of the trickster evident in *Lawrence*, *Dobson* and *Gomez*. It is most regrettable that the House of Lords in *Gomez* chose to add fuel to the consent myth by continuing to distinguish the conduct of the clandestine thief from that of the trickster, being forced to place a strained construction on the meaning of appropriation as a result. It is hoped that this paper has made the case for assimilating the situations of the victims of both types of rogue and in the process has shown the cogent need to preserve the immunity of the innocent invitee from the *actus reus* of theft.

The solution herein advanced ensures that in the majority of cases (the *Philippou* line of authority aside) the term 'appropriation' has ascribed to it a similar meaning to that applied to the former terminology under the Larceny Act 1916 of ('without the consent of the owner') 'taking and carrying away'. At the same time, however, the fine technical distinctions with which the law of larceny had become beset requiring a consideration not only for whether consent existed, but if so, how far it extended, are mercifully avoided.

If 'appropriation' is given the meaning ascribed to it in *Morris* and 'consent' is pragmatically construed as in *Dobson*, the law of theft is reserved a meaning which accords with the expectations of the Criminal Law Revision Committee, whilst ensuring that the issue of consent is not attributed a level of significance which it does not merit. By exploding the consent myth the burgeoning complexities of the law are exorcised leaving the courts free to focus on the key question, namely have the victim's rights been adversely interfered with? Only thus can it be ensured that the Theft Act is extricated from the stifling influence of the civil law and that the process of liberation started in *Gomez* is nurtured so that theft is no more a hostage to the ghosts of the Larceny Act.