THEFT BY PERSONS REQUIRED TO ACCOUNT

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Introduction

Section 222 of the Crimes Act 1961, which governs the criminal liability of persons who receive property on terms requiring them to account, is a puzzlingly complex provision. The late Sir Francis Adams, the most scholarly critic of New Zealand criminal law, described it as being "perhaps the most difficult section of the (Crimes) Act".[1] The general purpose of the section can be gleaned readily enough; it is intended to render criminal the person (typically a stockbroker, solicitor or estate agent) who fraudulently misappropriates to his own use money and other property entrusted to him by another on whose behalf he acts. The section reads in part:[2]

> every one commits theft who, having received any money or valuable security or other thing whatsoever on terms requiring him to account for or pay it, or the proceeds of it, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security, or other thing received, fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid. . . .

This raises a large number of questions which it is the purpose of this article to examine. Chief amongst these are: in what circumstances does a person receive money on terms requiring him to account? What sort of behaviour is the section really aimed at preventing? It also raises questions about the relationship between this offence and simple theft.

Why should such long and complex legislation be necessary at all; why does the ordinary law of theft not suffice? History provides part of the answer to these last questions, and it can be dealt with first.

History

Commentators on New Zealand criminal law have had the good fortune to be able to look to the works of Sir James Stephen for an elucidation of the murky origins of their code. The gist of his explanation is as follows.[3] The common law of larcency, which was somewhat crude in conception, consisted of the trespassory taking and carrying away of another's chattels —it was originally an offence against possession, and continued to remain so even after the distinction between ownership and possession was clearly perceived. The common law did not recognise trusts or equitable interests as the subject matter of theft. As late as the middle of the nineteenth century, fraudulent breach of trust was no crime, probably on the simplistic basis that people should be expected to protect themselves by declining to trust the unreliable with their property. The increasing complexity of commercial society had long since made such unsophisticated principles incon-

[1] F. B. Adams, *Criminal Law and Practice in New Zealand*, 2nd ed. (1971), para. 1791, (hereinafter Adams). Unless otherwise stipulated subsequent statutory references are to the New Zealand Crimes Act 1961.

[2] An equally lengthy proviso is set out and discussed below, p.19.

[3] Stephen, 3 *History of the Criminal Law* p. 151ff.

venient and unjust. Gradually, legislative exceptions were grafted on to the rule requiring a trespassory taking so that legal protection was extended to ownership, beneficial as well as legal. This process was a cautiously pragmatic one which began first with the punishment of delinquent employees,[4] further accretions catching brokers, merchants, bankers, attorneys and other agents,[5] factors,[6] trustees under express trusts[7] and finally bailees who stole without breaking bulk.[8] All such persons initially acquire possession innocently, or at least with the consent of the owner, and were therefore outside the scope of the ordinary law of larcency, which punished only trespassory takings.

The Criminal Code Commissioners of 1879 whose Code became, in effect, the Criminal Code, 1893, proposed a great simplification of all this. They extended the subject matter of larcency from the possession of a physical thing to include the "special property or interest" in anything capable of being stolen. Henceforth, both possession and legal ownership were to be explicitly protected by the simple offence of theft. But the Commissioners did not go so far as to include equitable or beneficial ownership in the list of protected interests.[9] Instead, they proposed a group of offences now represented by sections 222, 223 and 224 of the Crimes Act 1961. The most important of these is the one set out earlier, section 222. The others deal with theft by persons having powers of attorney and by those holding proceeds under direction respectively. They share certain features in common with the main section, and are occasionally used to punish fraudulent agents who could equally well be prosecuted under section 222.

The Present Law

Section 222 creates two separate offences;[10] fraudulent conversion, and failure to account or pay. The offences have certain elements in common; both are committed fraudulently,[11] and both require that the relationship between the defendant/recipient of the property and his principal—the person from or on whose account the property is received—must be more than one of mere debtor and creditor.[12] That much is clear, if not particu-

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[4] (1799) 39 Geo 3, c.85. Enacted as a result of *Bazeley* (1799) 2 Leach 835, 168 E.R. 517.

[5] The Banker's Embezzlement Act 1812, 52 Geo 3, c.63, passed as a result of *Walsh* (1812) 4 Taunt 258, 128 E.R. 328; R+R 215, 168 E.R. 767.

[6] 7 & 8 Geo. 4, c.29, s.51.

[7] See now s.230. As Adams points out, this section is probably otiose given the wording of ss. 222, 223. Trustees were exempt from the law, since they could not be said to take fraudulently.

[8] (1857) 21 & 22 Vic. c.54.

[9] This has, in effect, been done by the Theft Act 1968 (U.K.), which has abolished all of the offences mentioned earlier in favour of a single offence of theft.

[10] *Walker* [1946] N.Z.L.R. 512; *Irvine* [1976] N.Z.L.R. 96.

[11] Considerations of space preclude an extended discussion of the mental element in the offence. Fraudulence is similar to dishonesty required by the Theft Act 1968 (U.K.), which is extensively dealt with in the leading English texts. See also G. F. Orchard, "The Meaning of 'Fraudulently' and the Definition of Theft" [1974] N.Z.L.J. 238. In *Coombridge* [1976] 2 N.Z.L.R. 381, it was held that it must be shown that the defendant appreciated that he was under a duty to account or pay.

[12] *Mead v The Queen* [1972] N.Z.L.R. 255, 261.

larly informative, since it provokes the question "how much more than debtor-creditor must the relationship be"? In the words of the section, when does a person receive property "on terms requiring him to account for or pay it"? The terms of the arrangement may be express, but they need not be, an obligation to account or pay may arise by operation of the civil law. The question just posed need never arise before the courts in a direct form. It is enough to dispose of a prosecution in any one case to know that the particular relationship is one to which the terms of section 222 apply. However, in *Leaming*,[13] Speight J. ventured to suggest an answer to the wider question in the following terms:

> Sir Francis Adams says that the essence of the offence under s.222 relies in a fiduciary element and submits at para. 1802 that the fiduciary element exists wherever equity would find either an express trust or a constructive trust and not otherwise.[14]

In the civil law, a corollary of the finding that a trust exists is that the beneficiary of the trust has an equitable proprietary right or interest in the property that is the subject of the trust.[15] Speight J. pointed out the relevance of this for the law of theft. Section 222 is, he said,

> a branch of [the definition of] theft and the underlying concept is that the property in the hands of the alleged thief is not his money but his principal's money which he has misapplied.

On this view, theft is an interference with property, and unless it can be said that as a matter of civil law the property belongs to someone other than the fraudulent agent, there can be no offence. There is, however, an opposing view, which was hinted at in *Scale*,[16] where the Court of Appeal was invited "to pin down the additional element required to bring a case within section 222"; the Court expressed itself in rather more cautious terms. It agreed that the essence of the offence involved a "fiduciary element" or the earmarking of the property in the hands of the defendant, but was reluctant to go so far as to say that a trust is required, preferring to leave that question open for further consideration. It would appear from this that the Court of Appeal might be prepared at some future time to entertain the possibility that there can be cases of theft even where is no interference with property rights. On this view, theft would be simply a form of dishonest conduct.

1. *The Fiduciary Element*

At least the authorities are agreed that there must be a fiduciary element to attract the operation of the section. There are certain standard business relationships that might be thought susceptible of final classification as fiduciary or otherwise. It might be thought that, for example, solicitors, stockbrokers, estate agents and travel agents all organise their businesses according to a routine pattern that is sufficiently commonplace to permit a final classification to be made. The cases show that this is not

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[13] [1975] 1 N.Z.L.R. 471 (see further below, at p.21).

[14] *Ibid.*, at p. 473.

[15] See Hanbury and Maudsley, *Modern Equity* (10th ed. 1976), p. 312.

[16] [1977] N.Z.L.R. 178.

so. A very common instance of a money advance is that of the banker and his customer. When a customer pays money into a bank account, the money no longer belongs to him. Property in the money passes to the bank,[17] and a contractual debt arises; the relationship is one of debtor and creditor. But even in so standard a situation as this, the classification cannot be a final one; it is open to the parties to agree by special arrangement on different terms by virtue of which the bank could become a trustee of a specific sum.[18]

More commonly, however, there is no express agreement between the parties, and it is then for the courts to decide what was the understanding on which the money was transferred. The critical question is; what was the parties' intention? What factors do the courts take into account when they undertake this reconstruction? When the relationship between the recipient of the money and his principal is analysed from the vantage point of the nature of the service being offered by the recipient; e.g. estate agency, stock broker; two factors in particular are seen to have a bearing on whether or not the relationship is a fiduciary one: (a) the common understanding and practice as to receipts of money in the business in question and (b) the impact of statutory or other regulation.

Another approach is to look at the character of the payment made to the recipient; e.g. mistaken overpayment, bailment, deposit, stake, illicit commission. This classification is done for the sake of convenience; what follows is not an attempt to be exhaustive, but is a search for any characteristics in these situations that attract the operation of the section.

(a) *The Common Business Understanding*

Travel agency deposits and fare receipts provide a good example of non fiduciary receipts. Generally speaking, a travel agent receives money, not on terms requiring him to pay or account, but with a collateral obligation to provide the travel ticket. How he pays for this is part of his own business affairs, and he may use the money received from the customers as he chooses.[19] This is illustrated by the English case of *Hall*,[20] where the appellant failed to provide air tickets as he had contracted to do, and exhausted the firm's trading account so that there was no prospect of any refunds being made. It was held that his conviction of theft must be quashed on the grounds that the evidence disclosed no more than a debtor-creditor relationship.

Each case must be examined separately; the parties can, by agreement, alter the usual understanding. Thus, in *Brownrigg*,[21] the defendant received money for the purpose of procuring cheap trips to England. His explanation for his failure to carry out this promise was that he did not secure enough interest from prospective travellers to enable him to make bulk bookings. He was convicted of fraudulently converting the money.

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[17] *Foley v. Hill* (1848) 2 H.L.C. 28, 9 E.R. 1002; *Davenport* [1954] 1 W.L.R. 569.

[18] *In City of Melbourne Bank; Ex parte City of Prahran* (1895) 21 V.L.R. 563.

[19] Unless, of course, he is dishonest from the outset, in which case he might be convicted of obtaining the fare by false pretences contrary to s.246. But it is difficult to establish dishonesty against the trader who claims to have been naively optimistic that his business would recover.

[20] [1973] Q.B. 126.

[21] [1933] N.Z.L.R. 1248.

The critical fact telling against him was that before the money was paid over to him, the defendant stated that the money would be kept in a trust account and he undertook that if the passage could not be obtained, he would refund the advances.

Professor Glanville Williams has suggested that the decision in *Hall* might have been different had the prosecution been able to show that the current business practice of honest travel agents was to keep fare bookings separate from the other funds used in the business.[22] In at least one case, the Courts appear to have denied the importance of this factor. In *Yule*,[23] a solicitor dissipated money that he had received from a client in payment of his bill of costs, part of which was payment by way of disbursement for counsel's fees. He paid the cheque into his own account as the Solicitors Account Rules effectively obliged him to do. However, he admitted in cross examination to acting dishonestly, and he acknowledged that he knew that the money was intended by both parties to be used to pay counsel's fees. At least, the defendant admitted in evidence that he was aware that the client's intention was that the money should be paid over.

The particulars charged the defendant with stealing money received for or on account of the client rather than specifying counsel as the victim of the theft, and it was only on appeal that the defendant's counsel took the point that there was no obligation generally for solicitors to pay counsel's fees from disbursements received, the payment of counsel's fees being "a matter of honour binding on the solicitor and on no one else". Counsel contended that, had he had the correct particulars, he would have cross examined several witnesses to establish what the practice as to settlement of counsel's fees actually was. The court refused to entertain this point, saying that in view of the jury's findings "nothing turns on the particular nature of the solicitor's obligation to pay counsel's fees".

It is suggested that, as a statement of principle, this is too broadly framed, and that it must be seen in the light of the jury's findings that both parties intended that the money should be used in a particular way. This altered the common understanding that the money received by a solicitor by way of disbursements is his own to deal with as he chooses, and which he cannot as a general rule be guilty of stealing.

The impact of common practice has recently been considered by the English Court of Appeal in *Brewster*,[24] in which the appellant, an insurance broker, was convicted of stealing premiums paid to him as agent. He acted under a contract, one term of which provided that he must account for the premiums within twenty one days of their receipt, and that the money received vested in the principals for whom he acted. In fact, he used the premiums for his own business purposes, and eventually lost thousands of pounds. It was accepted by the prosecution witnesses that, in the insurance world, agents were not expected to pass on the actual money or even proceeds of cheques that they were given. It was also agreed that the

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[22] Williams, *Textbook of Criminal Law*, 1978, p. 718.

[23] [1964] 1 Q.B. 5.

[24] (1979) 69 Cr. App. R. 375. See also *Scranton* (1920) 15 Cr. App. R. 104, 109, where the Court accepted that the express terms of a contract between the parties was overridden by the manner in which they customarily transacted their business affairs.

principals knew that their money was being used for the agent's own business purposes. Despite this, it was held that the convictions must stand. Whether the common practice was sufficient to divest the insurance companies of title was a question of intention, which was a jury matter. In fact, the appellant had pleaded guilty, thereby admitting dishonesty, and the Court saw no reason to interfere.

(b) *The Effect of Statute*

It might be asked whether, when a particular form of business is legally required to operate a separate banking or trust account on behalf of clients, a conversion of money received is theft *ipso facto*. For example, section 56 of the Real Estate Agents Act 1976, requires the estate agent to pay any money received in his capacity as such[25] either to "the person lawfully entitled thereto or in accordance with his written direction or, where he is in doubt about the question of entitlement, into his trust account". Pending payment, the money must be kept in a trust account, (section 55 (2)), and no money may be abstracted for the agent's own business purposes. Failure to comply with these obligations constitutes an offence, (section 55 (5));[26] this suggests that a conversion of the money is not necessarily theft, even assuming that the other elements of the offence can be proved. In all probability, however, it is also theft. At common law, where an estate agent receives a deposit from a would-be purchaser, it seems to be the law that he is under an obligation to keep the money in a separate fund, or at least under an obligation to retain an equivalent amount in a mixed fund.[27] The New Zealand Act merely removes any lingering doubts that this is the true legal position. Any attempt by an estate agent to contract out of the obligations imposed by the Act would be evidence of fraud *ab initio*, and might well give rise to a charge of obtaining by false pretences. But that does not preclude a conviction for a subsequent fraudulent conversion of the money thus obtained.

In *Yule*, Widgery J. stated that

> the fact that a particular sum is paid into a particular banking account, albeit pursuant to a statutory obligation, does not affect the right of persons interested in that sum or any duty of the solicitor either towards his client or towards third parties with regard to the disposal of that sum.[28]

What is the effect of the Law Practitioners Act 1955, section 71 of which obliges a solicitor to pay all money received for or on behalf of any client into a separate general or trust account in the absence of any direction as to payment by the person entitled? The bank account is in the solicitor's name (or the name of his firm), and when he withdraws money from the

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[25] A question governed by s.55.

[26] Punishable by a summary conviction with a fine of $500 (s.119(a) Real Estate Agent's Act 1976).

[27] Hayes (1976) 64 Cr.App.Rep. 82. *Parsons* [1964] Crim.L.R. 824. The law is stated tentatively because of *Potters v. Loppert* [1973] Ch. 399, which held that where money was received by a "stakeholder", the question whether or not it was to be held on trust was a matter depending upon the intention of the parties. *Cf.*, however, *Sorrell v. Finch* [1977] A.C. 728. See now the Estate Agents Act 1979 U.K., the effect of which is much the same as its New Zealand counterpart.

[28] [1964] 1 Q.B. 5.

account, it becomes his money. Further, it is not always clear who, if anybody, has a beneficial interest in the money paid out by the bank, since the money will not be taken out on behalf of any one particular client; in terms of the section, it may then be difficult to prove the terms on which the money was initially received. Does this preclude a conviction? The answer, it is suggested, is that it does not. If the solicitor exhausts the entire account, it could be said that he is in breach of his duties to all clients whose money he has paid into the account. But where he withdraws part only, without specifying in his own records to which of his clients' accounts he attributes the withdrawal, it is submitted that he could still be convicted of theft, it being a reasonable inference that any money paid by him into the trust account was received by him on terms attracting the operation of the section, in that he is required to account to somebody for it, even if that person cannot be identified.

2. *The Nature of the Payment*

(a) *Illicit Commissions*

It is settled law that the recipient of a bribe or secret commission must account to his employer or principal for any money or other property thus received. But this does not mean that the property belongs to the principal at the time of receipt. In the criminal law, such conduct is regulated by the Secret Commissions Act 1910 which makes the corrupt giving or acceptance of gifts an offence. But where an employee, using his employer's time and facilities actually pockets money received, his conduct looks like theft, and the fact that he has a duty to account can cause confusion. That it is not theft, however, is shewn by *Leaming*.[29] The appellant managed a second hand car sales business. Acting in collusion with a rival firm, he bought a car at a considerable over-value from the "rival", and accepted a back-hander from his collaborator. His conviction was quashed by Speight J. on the grounds that there was no fiduciary relationship between the employer and employee, and therefore no obligation to account for the bribes in the sense that section 222 uses that expression.

The employer/employee relationship does not necessarily preclude the existence of a fiduciary relation. Suppose that the employee uses his employer's profit-earning chattel, and keeps the resulting profits for himself. Under the predecessor of the section being considered, it was held that this was not embezzlement[30] because the employee received the money on his own account and not "on account of" the employer. But it is by no means clear that a similar result would be reached in New Zealand. A person in a fiduciary position who derives profit from the unauthorised use of another's property becomes a constructive trustee of the proceeds.[31] The question of whether or not a person is in a fiduciary position is extremely complex, and the courts have understandably never attempted to produce a comprehensive definition. Generally speaking, he is "someone who undertakes to act for or on behalf of another in some particular matter or matters".[32]

[29] [1975] 1 N.Z.L.R. 471. See also *Powell v. McCrae* [1979] Crim.L.R. 571.

[30] In *Cullum* (1873) L.R. 2 C.C.R. 28.

[31] See my "Constructive Trusts in the Law of Theft", [1977] Crim.L.R. 395 at 398, and J. C. Smith, "Theft, Conspiracy and Jurisdiction; Tarling's Case" [1979] Crim.L.R. 220, 225.

[32] See P. D. Finn, *Fiduciary Obligations* (1977 Sydney), at p. 201.

So long as that relationship can be established, it would seem that the section can apply to the misuse of profit earning chattels. There is, perhaps, greater difficulty where the employee does not use his employer's property, but simply takes advantage of his position to make a profit, since the authorities seem to establish that the profit is not impressed with a trust until after the court has so decreed,[33] and this would have been the position in *Leaming*. Whether the employee who makes a profit from the misuse of his employer's property commits theft must be seen as an open question.

(b) *Property Obtained by Mistake*

Where a person gets property as a result of another's mistake, the question whether he can be guilty of stealing it is exceedingly complicated. If ownership in the property does not pass (a question for the civil law), there is no real difficulty. Assuming that the transferor mistakenly consents to the transfer of possession ,there is no "taking" by the recipient's act of accepting possession, but a subsequent misappropriation of the property received does constitute theft.[34] When ownership passes, however, the general rule is that there can be no theft. If the transfer of ownership is secured by a description, there can be a conviction for obtaining by false pretences contrary to section 246. But merely to take advantage of a spontaneous mistake is not generally theft.

An attempt to circumvent this apparent lacuna[35] by the use of section 222 was made in *Scale*.[36] As a result of a computer error, the defendant received a cheque for $6,348.20 made out in favour of his company. Although he was aware of the mistake, he paid the cheque into his firm's account and used the proceeds for his own business purposes. He was charged with stealing the cheque, and alternatively with converting the money to his own use. The jury acquitted on the first count[37] but convicted on the second. On appeal, the conviction was quashed. There is some confusion in the judgment as to exactly what was alleged to have been stolen. The trial judge apparently directed on the footing that the cheque had been received by the appellant on terms requiring him to account for it; the Court considered that the mere receipt of a cheque imposed no such obligation. Instead, the second count was interpreted as referring to money in

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[33] Meagher, Gummow and Lehane, *Equity* (1975) at p. 128.

[34] Section 220(2).

[35] The criticism of this apparent anomaly, by Goddard C.J., in *Moynes* v *Coopper* [1956] 2 Q.B. 439, led the Home Secretary to refer the whole of the law of theft to the Criminal Law Revision Committee. The Subsequent Report (*Cmnd.* 2977) resulted in the Theft Act 1968, s.5(4) of which governs theft of property got by mistake. See generally G. F. Orchard, "The Borderland of Theft Revisited" [1973] N.Z.L.J. 110.

[36] [1977] 1 N.Z.L.R. 178. See also *Farrell* (1976) Current Law 84; Recent Law 118, where it was held that incorrect credit entries in the defendant's credit account were not caught by s.222, since they were not money or other payment. *Cf. Johnson* (1979) 42 C.C.C. 2d 249.

[37] It may be doubted that the trial judge was right to allow the first count to go to the jury in any event. Ownership of the cheque as a piece of paper must surely have passed to the defendant when the cheque was posted. As a *chose in action*, it is difficult to see that it was ever the property of anyone other than the defendant himself; in any event, a chose in action, not being an inanimate thing cannot be stolen, *Bennitt* [1961] N.Z.L.R. 452.

the bank, or the bank credit. This cannot be correct; a bank credit is a *chose in action* and as such cannot be stolen.[38] If the appellant was to have been convicted of stealing anything, it would have to have been the money received by drawing on the account, each drawing constituting a fresh transaction. But even here, there would be difficulty, since the money drawn would as a matter of civil law become the defendant's money to do with as he liked. In fact, the Court held that where money is paid by mistake, the common law obligation to repay does not carry with it any fiduciary element earmarking the property in the hands of the defendant. It was a purely debtor-creditor relationship, and that could not make it a liability "to account for or pay" within section 222.

What is the Protected Interest?

There remains quite considerable doubt whether or not section 222 is intended only to protect proprietary interests. In *Browning* (the travel agent case), the Court of Appeal asserted that the proper direction was that the jury should be told that if they were satisfied that the prospective traveller "did not intend to part with the property in the money to the prisoner" they could convict. This may have been a proper direction on the facts of the case, in that it puts a tricky legal point in simple terms, but in so far as it suggests that the section does not apply where ownership passes, it could be extremely misleading.[39] The whole point of the section is that the recipient of the money or other property becomes the legal owner of it, but in such a way that he is obliged to deal with it in accordance with the terms on which he received it, and the statement should be understood to mean that liability can arise only where the transferor does not intend to part with his entire proprietary interest, legal and equitable, in the property concerned. Since the travel agent had promised to hold the payment on trust, the inference against him was inevitable.

But the question remains; must the courts hold with Sir Francis Adams, that there is a trust before the section can apply? That is the issue that remains unresolved, and it is necessary to return to first principles.

The Problems of Principle[40]

The legal corollary of the existence of a trust is that there is a corresponding proprietary right or interest in the person in whose favour the trust is imposed. Where the defendant is convicted for acting in a way inconsistent with those rights, therefore, the justification for the intervention

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[38] *Bennitt* [1961] N.Z.L.R. 452. A cheque is, however, a "valuable security", and its proceeds (i.e. the resulting money) can be stolen. *Mead* [1962] N.Z.L.R. 255.

[39] A similar statement in relation to fraudulent conversions was made recently in the High Court of Australia by Gibbs J. in *Stephens* (1978) 21 A.L.R. 680. This cannot be correct. Indeed, it was argued with some plausibility by J. W .C. Turner that the offence could be connected *only* by persons who acquired ownership in the property before converting it. The view was decisively and, it is thought authoritatively, rejected by J. C. Smith, "The Scope of Fraudulent Conversion" [1961] Crim.L.R. 741.

[40] The attention of the reader is directed, in particular, to the works of Professor George P. Fletcher, "The Right Deed for the Wrong Reason" (1975) 23 U.C.L.A. Law Rev. 293 and "The Metamorphosis of Larceny" (1976) 89 Harv. L.R. 469 at 527ff. No apology is made, however, for drawing attention to their relevance to the problem under discussion.

of the criminal law is that it is operating to prevent interference with property. The point can be put in another way; if the civil law says that the property in question belongs exclusively to the person to whom it is given, and that no other person has any proprietary right or interest in it, why should the recipient be convicted even though he may behave in a fraudulent way? If the recipient has a right, as a matter of civil law, to treat the property entirely as his own, how can even the dishonest exercise of that right be criminal? Put at its sharpest, the question is whether the offence of theft exists to prevent interference with property, or whether it also operates to prohibit fraudulent conduct as such.

For the purposes of examination, it is possible to construct a situation in which there is no proprietary right or interest in anyone other than the recipient, but where the circumstances of receipt are such as to appear to call section 222 into play.[41] For example there is high authority for the proposition that none of the residuary legatees for whose benefit an estate is administered has any proprietary right or interest in it.[42] If the executor were to use the undistributed estate property on a round-the-world cruise, we would, unless otherwise advised, think him guilty of theft. His conduct looks like theft, an impression buttressed by reference to the wording of section 222. He receives the property on account of the beneficiaries and is under an obligation enforceable by them to administer it in accordance with the terms of the will. But given the state of the civil law, if a conviction were secured in these circumstances, it would be because section 222 operates as a deeming provision. It may well be that absconding executors who act fraudulently deserve to be treated as criminals; but the question is whether the law of theft is the proper way of dealing with them.[43]

The question is whether it should be open to a person charged with theft to show that his supposed victim had no proprietary right or interest in the property alleged to have been stolen, so that section 222 should have no operation.

The problem is not simply one of classification; there is a principle involved. "The object of the law of theft is to attach a penal sanction to certain violations of property rights; so (it may be urged) if there is no violation of property rights under the general (civil) law, there should be no theft."[44] This is very much the line taken by Speight J. in *Leaming* referred to earlier, and was the point on which the Court of Appeal was unwilling to commit itself in *Scale.* Underlying it is the view that

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[41] Since no New Zealand decision calls into question the principles enunciated in the text, the incompletely reported *Reisterer* [1962] N.Z.L.R. 1040 (for a fuller account of which see Adams, p. 480) apparently came close to offending, and none of the decisions since Sir Francis wrote have ignored his strictures.

[42] *Commissioner of Stamp Duties (Queensland) v. Livingstone* [1965] A.C. 674. See generally Hanbury and Maudsley, *op. cit.*, p. 126. Nor does the executor hold the property on trust. The rule may cause great practical inconvenience; see Flannery, "The Executor's Assent to the Trusts of the Will: A Reformative Approach" [1976] N.Z.L.J. 399.

[43] It will be recalled that breach of trust was not criminal until 1857: the trustee under an express trust was exempt from liability for fraudulent conversion (s.20(2) Larceny Act, 1916), although the executor would probably have fallen within the terms of that provision.

[44] Williams, [1977] Crim.L.R. at 138.

> the law of theft and associated offences assumes the existence of a body of civil rights and duties; it exists to protect these rights and it is the business of the criminal courts to protect them, not to change them.[45]

This suggests that the objectionable exercise of admitted civil law rights should not be proscribed by the criminal law, since this would involve a change in the civil law.

On the argument from principle, therefore, it would seem that the balance should be in favour of the view taken by those who advocate the imposition of liability only where equity would impose a trust.

The Proviso

The arguments from principle have a particular relevance when one considers the second half of section 222, which adds the proviso that

> if it is part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving it and the person to whom he is to account for or pay the same, and that such last-mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of the amount of the money or proceeds or any part thereof in that account shall be a sufficient accounting for the amount so entered; and in such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.

Sir Francis Adams has expressed the view that this provision "may be otiose".[46] All it purports to do is to exclude liability in cases where there is a fiduciary relationship; yet the proviso cannot apply unless the principal relies solely on the personal liability of the recipient.[47] These two are mutually exclusive.

There is, however, an alternative view which holds that the proviso will apply to impose liability even in cases where the relationship between the parties is purely that of debtor-creditor. On this view, the proviso is a type of false accounting provision. Convictions have been upheld in a number of African cases[48] on this footing. In the first of these, *Satisky*,[49] the defendant sold ostriches, kept the proceeds and then reported to his business partner that he had sold the birds for a smaller sum than he had actually received. The Court did not actually refer to the proviso, but concluded that a conviction could be entered where there were three elements present, an omission to pay the money received, an omission to enter this in the debtor and creditor account rendered to the principal and a fraudulent intention. It is difficult to resist the logic of this argument, although one might qualify it by saying that it appears to apply only where there is, in fact, an agreement between the parties that the recipient shall produce a debtor and creditor account. Given that, there is no reason why the proviso should not govern the whole of the section including the requirement that there should be a fiduciary obligation. It has the somewhat

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[45] J. C. Smith, "Civil Law Concepts in the Criminal Law" [1972] 31 C.L.J. 197, 219.

[46] Para. 1821.

[47] Citing *Kirk* (1901) 20 N.Z.L.R. 463, 471, 474 and *Houston* [1934] N.Z.L.R. supp. 177.

[48] I am grateful to Professor R. A. Caldwell for drawing my attention to these decisions.

[49] 1915 C.P.D. 574, followed in *Harlan* 1964 (4) S.A. 44.

curious effect of making false accounting theft, but there is in principle no objection to making the omission to account a criminal offence.[50]

The Overlap With Common Theft

When the New Zealand Parliament simplified the law by adopting the recommendations of the Royal Commissioners, the principal change in the law of theft was the creation of a new mode of stealing, *viz.* conversion of property innocently obtained. Ownership was, as a result, protected explicitly by the law of theft—hitherto, ownership had been protected by the extension of rules originally designed to protect possession. Henceforth, a person might be guilty of ordinary theft if, being in possession of property with the owner's approval[51] he acted in some way inconsistently with the owner's rights. Conversely (but exceptionally) an owner could be guilty of stealing his own property if he took or converted something capable of being stolen intending permanently to deprive any person having any special property or interest in the thing.[52]

There was scope for further legal refinement and reduction of the numbers of offences so that all forms of taking and conversion became simple theft.[53] The Criminal Code Act 1893 was not a consolidation of existing legislation but an entirely fresh Code. But the Commissioners did not pursue the distillation process so rigorously. In part, they were hampered by the restriction of the new offence of theft to things capable of being stolen.[54] Theft continued to be regarded as essentially an interference with physical objects rather than as a violation of property rights. Nevertheless, the continued existence of two different offences known generically as theft but whose penalties and constituent ingredients differ gives rise to considerable difficulties of overlap.

Are the Offences Mutually Exclusive?

The interrelationship between the two offences was considered in *Tennet*,[55] on appeal against conviction by a solicitor who had misapplied money and shares entrusted to him by clients. There was some evidence that he did not intend permanently to deprive the owners, and no evidence was called by the Crown to suggest that he had formed such an intent. Nor was there any direction to the jury on the point, the trial judge taking the view that that was not an element of the offence under section 222. The argument for the appellant was that since the section stipulated that "everyone commits theft who . . .", the offence created was simply a sub-species of theft, and should therefore require proof of full *mens rea.* The Court of

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[50] Where the recipient is an employee, a prosecution under s.253(b) would be more appropriate.

[51] Or in some cases without approval, as was the case with a finder, *Hare* (1910) 29 N.Z.L.R. 641, or a person who took when drunk and hence lacked the *mens rea* of larceny.

[52] A co-owner, also, could be guilty of theft for the first time. See now s.225.

[53] It has been said of the corresponding provision in the Theft Act 1968, s.5(3), that the provision is, in effect, otiose, since all cases falling within its terms are covered by the common theft provision. See Smith and Hogan, *Criminal Law,* 4th ed. p. 507.

[54] As defined in s.217.

[55] [1962] N.Z.L.R. 428.

Appeal disagreed, taking instead the view that each offence stood separately defined and independent, a view it reiterated ten years later in *Mead*,[56] so that no intent permanently to deprive was required.

It is difficult to take issue with this stance, however uncompromising, as a matter of statutory interpretation. But it does less than justice to some of the difficulties involved. The wording of section 222 seems apt, for example, to catch the bailee who converts what has been entrusted to him. If the item is of trivial value, he would be subject to no more than a minimal punishment if charged with common theft.[57] A prosecution under section 222 has, potentially at least, altogether more serious consequences. But is it correct that the bailee is caught by section 222? Sir Francis Adams thinks not,[58] because of the words "though not requiring him to deliver over in specie the identical money, valuable security or other thing received". A bailee, he argues, is required to hand back precisely what he has received,[59] and is therefore outside the scope of a section designed to deal with fraudulent trustees. Accepting for the moment that this correctly states the law, it should be pointed out that it has alarming consequences when considered in relation to bailments of money. If the recipient is a bailee only, he cannot be convicted under section 222, but he can be convicted of common theft. But if, as is usually the case, he becomes the full legal owner of the money handed over, he must be proceeded against under section 222. The person giving him the money has no "special property or interest" sufficient to sustain a charge of common theft, since equitable interests are not covered by that expression. The law governing the bailments of money and its attendant difficulties were explained by Jordan C. J. in *Ward*.[60]

> There may, of course, be a bailment of money. This occurs if it is handed to another person on the terms that he is to return or hand over the specific coins, notes or cheques which have been handed to him . . . or to apply the specific money handed over in the purchasing of commodities for the bailor . . . When the money is handed over by one person to another to be applied for a particular purpose, it is a question of fact whether it is intended that the very coins, notes or cheques shall be retained by the recipient until they are so applied and then applied in specie; or whether it is intended that the recipient shall, or may if he choose, become a debtor for the amount so received and assume an obligation to pay an equivalent amount for the prescribed purpose. In the former case, the specific money remains the property of the person who handed it over, until it is so applied.

It will be appreciated that the distinctions being drawn are fine ones, depending at least in part on facts that may not be fully known to the prosecutor when he is drawing the indictment (or information). In such cases,

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[56] [1972] N.Z.L.R. 255.

[57] See generally s.227 on the question of penalty.

[58] Adams, para. 1807. Cf. *Walker* [1946] N.Z.L.R. 512, at 519 where it appears to be assumed that theft by a bailee is caught by s.222.

[59] *South Australian Insurance Co. v. Randell* (1869) L.R. 3 P.C. 101.

[60] (1938) 38 S.R. (N.S.W.) 308, at 315. It is worth mentioning that if the transferee is handed a cheque which he is to pay into his bank account, he will not be a bailee of the cheque because he is not meant to return it or the sum obtained with it *in specie; Hastings* [1958] Crim.L.R. 128. The charge in such cases should be brought under s.222.

he should take the precaution of stating the charges in the alternative. Failing that, one might have supposed that if the two offences were indeed separate, as a matter of principle, no conviction could be entered if the wrong form of theft was alleged.

In fact, the courts seem to sanction prosecution practices bordering on the cavalier. In *Irvine*[61] for example, the defendant was apparently charged with an offence against section 227 (b) (ii), the sentencing provision, leaving the Crown to present its case on the basis of section 222 at the trial itself. Unlike English law,[62] the indictment need not state the section creating the offence charged, although it may do so and may thereby affect the sufficiency of the count.[63] That is, a description of the offence by statutory reference may provide the defendant with all the particulars he requires. But if the particulars of the count charge theft *simpliciter* and it is discovered that the more serious form of the offence has been committed, it is not open to a judge to sentence on the basis of the more serious offence.[64]

To conclude the point; simple theft and the offences created by section 222 are not mutually exclusive. But there may well be cases, of which bailments of money afford an example, where what looks like an offence of fraudulent conversion is in fact no more than theft, and prosecution under the wrong section might then lead to an unmeritorious aquittal.

Conclusion

Not all the difficulties created by section 222 have been explored in the course of this article. Discussion of the mental element, in particular, has been omitted, and there is scope for an examination of how the two offences created by section 222 differ.

It has been seen that at least some of the difficulties that used to surround section 222 have been settled. In particular, mistaken overpayments are not caught by its terms. But there remain a number of outstanding questions. In particular, we do not know whether or not illicit commissions are caught, and whether the circumstances must be such that equity would impose a trust on the money received.

How does the proviso operate, and what is the overlap between this offence and simple theft? All of these matters await resolution by the courts, which may have to bear in mind the principles underlying the criminal law protecting property.

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[61] [1976] N.Z.L.R. 96.

[62] Indictment Rules 1971, R.6(a).

[63] Section 329(5).

[64] *Kirk* (1901) 20 N.Z.L.R. 463; *Martin* [1941] N.Z.L.R. 361.