# Joshua Williams Memorial Essay Prize Winner 2000

# Criminal Law: Theft and Fraud

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## 1. Introduction

> ...criminal fraud generally consists in the dishonest obtaining of financial benefits at the expense of others, either surreptitiously or by means of a deception. Financial benefits come in various forms, and the appropriate head of criminal liability (if any) may depend on the type of benefit obtained as well as on the means employed to obtain it.[1]

Imagine a man on a Clapham omnibus being asked to consider two hypothetical situations. The first situation involves a fraudster who by a false pretence induces the victim to give her a briefcase containing $100,000 in cash. The second situation is exactly the same as the first, except that instead of a briefcase, the fraudster induces the victim to transfer a sum of $100 000 to the fraudster's bank account. Now imagine that the man were told that in the first situation, the fraudster is guilty of obtaining by false pretences, but in the second situation she is not. At that prospect, he would surely be very surprised, and dispute the soundness of such a difference in outcome, the only difference between them being the form of payment used. Were it suggested that one of the reasons (for there are two) why the fraudster gets off in the second situation is because the victim did not transfer any property to the fraudster, he would dismiss the suggestion without a second thought. Of course, he would argue, property has been transferred. The fraudster has obtained $100,000 from his victim; therefore it cannot be tenable that there has been no transfer of property.

But on this point the opinion of the ordinary and reasonable person and the view of the courts could not be more divergent. In the recent case of R *v Wilkinson*,[2] the Court of Appeal held that a person who induces the transfer of money from one bank account to another by a false pretence is not guilty of the offence of obtaining by false pretences. The court so held for two reasons. Firstly, the electronic transfer of funds from one person to another did not involve the a transfer of property. Secondly, the transfer of funds did not involve anything that could be considered "movable". As such, the defendant had not obtained "anything capable of being stolen" as required by the offence. Yet it is clear that had the transfer been made by cash, the offence would have been made out.

The Court of Appeal in *Wilkinson* borrowed heavily from the English decision of *R* v *Preddy*,[3] where the House of Lords held that an electronic transfer of money

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1 Arlidge & Parry, *Fraud* at para 3.02.

2 [1999] 1 NZLR 403.

3 [1996] AC 815.

did not involve the transfer of property, and thus the defendant could not be said to have obtained the property of another, as required by the (equivalent English) offence. Cheques fared no better. For the same reasons, the cheques obtained did not constitute obtaining the property of another. Thus, now that the reasoning in *Preddy* has been incorporated into the law of New Zealand via *Wilkinson*, a person might fortuitously escape liability for a charge of obtaining by false pretences merely because the transfer of funds is an automatic transfer between bank accounts, rather than the actual transfer of cash. Since most of today's transactions seldom involve cash, this is a grave state of affairs indeed.

This paper argues that despite the fact that the decision would surprise most people 'on the street', *Wilkinson* was decided correctly on its facts and that the arguments forwarded by Thomas J in his dissenting judgment, which would indeed accord with the intuitions of ordinary people, are out of line with legal banking theory. On the subject of cheques, this paper argues that while there is an alternative analysis of cheques that can satisfy the requirement that the victim's property must be obtained, it is unclear whether that alternative analysis satisfactorily elucidates the true nature of the victim's loss. The paper will then look at the particular sections in the Crimes Act 1961 and submit, firstly, that it was misleading and, secondly, unnecessary to the result for the Court of Appeal to put a gloss on section 217 by saying that the "property of any person" must be the "property of someone other than the accused". Finally, this paper will consider the two relevant legislative proposals. It is submitted that any legislative amendment needs to encompass a comprehensive re-think of Part X Crimes Act 1961, as problems are created rather than avoided by stop-gap measures.

## 2. The Cases

*R v Preddy*[4] concerned a common case of mortgage fraud. The appellants, in order to obtain mortgage advances, submitted applications containing false statements to building societies and lending institutions. On the strength of the false applications, sums were advanced to the appellants in the form of telegraphic or electronic transfer or by cheque. The appellants were convicted of obtaining "property belonging to another" by deception, contrary to section 15 Theft Act 1968 (UK). The House of Lords was asked to decide whether the debiting of a bank account and the corresponding crediting of another's bank account brought about by dishonest misrepresentation amounted to the obtaining of property within section 15.[5] Their Lordships answered in the negative for, as Lord Goff of Chieveley put it:[6]

> when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owned by a different bank to the defendant or his solicitor. In these circumstances, it is difficult to see how the

4 Idem.
5 Ibid at 829.
6 Ibid at 834.

> defendant thereby obtained *property belonging to another,* i.e. to the lending institution.
> . . .In truth the property which the defendant has obtained is the new chose in action constituted by the debt now owed to him by his bank, and represented by the credit entry in his own bank account. This did not come into existence until the debt *so* created was owed to him by his bank, and so never belonged to anyone else. True, it corresponded to the debit entered in the lending institution's bank account; but it does not follow that the property which the defendant acquired can be identified with the property which the lending institution lost when its account was debited. (Original emphasis)

Lord Goff was assuming that the lending institution's bank account is in credit for the purposes of the above analysis. But he pointed out that that may not be the case, and in that event further problems would be created, since "it is difficult to see how an increase in borrowing can constitute an extinction of a chose in action owned by the lending institution, or a reduction in borrowing can constitute the creation of a chose in action owned by the defendant."[7]

It might be argued that the defendant *attempted* to obtain the lender's property. Lord Goff seemed to think that Preddy had not attempted to obtain the property of another, as he said that the crucial question was whether "the defendant had obtained (or *attempted to obtain)* property"[8] belonging to another, which he answered in the negative. In doing so, Lord Goff seems to have held that since, on the facts, what Preddy had obtained was not the property of another, he was not attempting to obtain the property of another. This approach accords with New Zealand authority, although controversially so.[9]

The facts of R *v Wilkinson*[10] are very similar to those in *Preddy.* Wilkinson was a principal in a business partnership which traded in heavy machinery. In order to obtain monetary advances from various financial institutions, he made several fraudulent representations about the nature of the machinery that was to be used as security. The false representations included that the machinery was the partnership's property, that it had been independently valued, was free of encumbrances and in New Zealand at the time of the advances. As a result of these misrepresentations, Wilkinson obtained at least[11] $250,000 from the institutions.

Wilkinson was convicted at trial of obtaining sums of money by false pretences contrary to section 246(2), which provides:

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7 Ibid at 834-835. For a fuller discussion of these "further problems", see K Dawkins, "Criminal Law" [1999] 4 NZLR 415, 434-435.

8 Ibid at 834.

9 *R v Donnelly* [1970] 1 NZLR 980. This decision has been the subject of much academic criticism. Lord Goff's apparent approach would be consistent with the majority. The dissenting judgment of Haslam J merits study. If the reasoning in the judgment were applied here, if Preddy intended to obtain the property of another, and took steps that were more than merely preparation, then he would be guilty of an attempt. It would be immaterial that, unbeknownst to Preddy, what he was in fact trying to obtain was not the property of another.

10 Supra n2.

11 Count 10 alone alleged $250,000 was obtained.

> **Obtaining by false pretence—**
> (2) Every one who, with intent to defraud by any false pretence, either directly or through the medium of any contract obtained by the false pretence, obtains possession of or title to anything capable of being stolen, or procures anything capable of being stolen to be delivered to any person other than himself, is liable [to imprisonment...]

On appeal to the Court of Appeal, the section 246(2) convictions were quashed, the Court holding that the chose in action acquired by Wilkinson is not something "capable of being stolen". "Things capable of being stolen" is defined in section 217:

> **Things capable of being stolen—**
> Every inanimate thing whatsoever, and every thing growing out of the earth, which is the property of any person, and either is or may be made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

Thus, the section requires that in order for a thing to be capable of being stolen it must be the property of any person. and must be movable. The Court of Appeal held that the sums obtained by Wilkinson failed both these tests. The former test was held not to be satisfied, the Court adopting the reasoning from *R* v *Preddy*. The latter test was held not to be satisfied due to the orthodox New Zealand position on the theft of intangible property. It is clear that had Wilkinson obtained exactly the same sum as a cash payment, both requirements would have been met. Thus, liability under section 246(2) can turn on the form of the money transfer.

The accused in *Preddy* was charged under s15 of the Theft Act 1968 which expressly requires that the property obtained be the property *of another*. The section 217 limitation on section 246(2) does not expressly require this, and instead merely requires that the thing be the property of *any person*. This point was by no means missed by counsel for the Crown, who argued that *Preddy* should be distinguished on that basis. The Court of Appeal, however, rejected that argument and held that the section "requires that it must be the property of (*i.e.* owned by) a person. The person sensibly must be a person other than the offender." Having disposed of that argument, and once the transaction was converted into the language used in *Preddy*:[12]

> The relevant counts in the indictment allege that sums of money were obtained. In fact what happened was a debiting of one bank account and a corresponding crediting of another bank account.

It was a short step to hold that the accused had not obtained another's property:[13]

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12 *Wilkinson*, supra n2 at 407.
13 Ibid, at 408-409.

As Lord Jauncey of Tullichettle said in *Preddy* at p 841:

> In applying these words ['belonging to another'] to circumstances such as the present there falls to be drawn a crucial distinction between the creation and extinction of rights on the one hand and the transfer of rights on the other. It is only to the latter situation that the words apply.

Here there was no transfer of rights of property. The financier's right to receive the amount in question from its bank was exercised by a direction to credit the partnership bank account with that amount which, when effected, discharged the bank's obligation to the financier. What the appellant then obtained fraudulently was a new distinct right against the partnership bank which arose from a rearrangement between the banks of their own affairs. Despite the close interrelationship of the two steps in the process, we do not see how on a proper analysis it can he said that he obtained property of the financier.

### 3. Thomas J's Dissent

While Thomas J agreed with the majority on the movable requirement, he disagreed on the property of any person requirement. Thomas J thought that "[w]hile their Lordship's analysis may have a technical appeal, it neglects the substance of the transaction; the money began as the property of the lender and finished up as the property of the fraudulent respondent."[14] In Thomas J's opinion, the reasoning in *Preddy* is "inhibited by undue regard to the method or technicalities of the transfer process of the banks",[15] and "obscures the reality that both the debit and credit are merely entries by which the banks transferred the lender's money to the respondent."[16]

It should be noted that although Thomas J does not address the point he must have agreed with the majority that the property must be the property of someone other than the accused. If he did not agree with the majority on this point, Thomas J could have distinguished *Preddy* on the basis that the English requirements were different, while leaving the reasoning of the House of Lords intact.

There is initial appeal in this dissenting judgment. Thomas J, in concerning himself with the "substance of the transaction" rather than the "technicalities of the transfer process", preserves the common understanding of the transaction. Every person, whether in commerce or elsewhere, treats another who transfers funds into his bank account as having given him money. A bank will, except in the event of its insolvency, always make available to a customer the amount of money that she is owed. Thus, for all practical purposes that "money" is the customer's.

However, Lord Jauncey of Tullichettle explains why the approach cannot be sustained:[17]

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14 Idem.

15 Ibid at 412.

16 Idem. This phrase can be traced to Assafa Endeshaw's "Theft of Information Revisited: R v Preddy, R v Slade, R v Dhillon, HL" [1997] Journal of Business Law 187,189, which argues that the House of Lords in *Preddy* should have held that the lender's money was appropriated (s4 Theft Act 1968 (UK) defines "property" as including "money and all other property, real or personal, including things in action and other intangible property").

17 *Preddy*, supra n3 at 841.

> It would be tempting to say that the appellants by deception obtained money belonging to the lenders and therefore offences have been committed. That however would be to adopt a simplistic approach ignoring the nature of the precise transactions which are involved. I start with the proposition that the money in a bank account standing at credit does not belong to the account holder. He has merely a chose in action which is the right to demand payment of the relevant sum from the bank. *I use the word money for convenience but it is of course simply a sum entered into the books of the bank.* When a sum of money leaves A's account his chose in action quoad that sum is extinguished. When an equivalent sum is transferred to B's account there is created in B a fresh chose in action being the right to demand payment of that sum from his bank. (Emphasis added)

This must be correct. Since the relationship between a customer and a bank is a credit relationship, there is in actual fact no *money* in a bank account. The account holder has title not to money, but to a chose in action. Suppose that upon A lending money to B, a third party steals money from B. On that occurrence, A cannot assert that the thief stole his money. All he can do is enforce his chose in action against B, when B finds the money to repay. The thief has not taken anything of A's, for A still has what he always had — a right to be repaid. While A is entitled to be paid money, there is no money that B possesses over which A can assert control. B is entitled to do with the money what he will, so long as he repays the money when called upon to do so.

The situation is no different when B is a bank. A cannot assert that the "money" in his account was his, for there was only ever a credit entry. To hold that money given to a bank remains the property of the account holder is not tenable, for otherwise any subsequent lending by the bank of the money obtained from the customer would be acting in a manner inconsistent with the rights of the owner. The bank would have divested itself of the property of another.[18]

Thomas J's indictment against the judgment of the House of Lords is that, while it has technical appeal, it neglects the substance of the transaction. The converse charge might be laid against Thomas J's judgment: while it does have "substantial" appeal, it neglects the technicalities of the transaction. Unless we are going to throw out all the civil law concepts that underpin the banking relationship, Thomas J is wrong.

## 4. Cheques

The transfer problem in *Wilkinson* is not, as Thomas J suggests, a result of "advances in electronic and information technology...outflank[ing] the explicit wording of section 217",[19] for the problem is not merely limited to electronic transfers of funds. As Lord Goff points out, the same reasoning applies to cheques:[20]

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18 And thus that action might form the basis of a charge of theft under s220(1)(a) or (c).

19 *Wilkinson*, supra n2 at 412.

20 *Preddy*, supra n3 at 835.

> I start with the time when the cheque form is simply a piece of paper in the possession of the drawer. He makes out a cheque in favour of the payee, and delivers it to him. The cheque then constitutes a chose in action of the payee, which he can enforce against the drawer. At that time, therefore, the cheque constitutes 'property' of the payee within section 4(1) of the [Theft Act 1968]. Accordingly if the cheque is then obtained by deception by a third party from the payee, the third party may he guilty of obtaining property by deception contrary to section 15(1).
> But if the payee himself obtained the cheque from the drawer by deception, different considerations apply. That is because, when the payee so obtained the cheque, there was no chose in action belonging to the drawer which could be the subject of a charge of obtaining property by deception.

Thus, the *Preddy* problem is indicative of a wider difficulty; that of reconciling the law of banking and property with the criminal law.

Lord Goff analysed a cheque as a thing in action. One might think that the problem that the accused must obtain the property of another could be overcome by judging the paper that the cheque was written on the property that was obtained. The cheque paper clearly begins as the property of the victim, which the accused then obtains.[21] However, due to the fact that the victim can retrieve the cheque paper from the bank once it has been presented, there is a difficulty in asserting that the accused intended to deprive the victim of the cheque paper, as required by section 15.[22]

His Lordship said he was merely applying what was already decided in *R* v *Danger.*[23] In that case the defendant produced to the victim a bill of exchange, duly stamped, signed by himself as drawer and payable to himself, and by a false pretence induced the victim to accept the bill by signing it. The court held that the offence required that the thing obtained be the property of the victim. Since on the facts the victim never had any property in the document as security, nor in the paper on which the acceptance was written, the offence had not been committed.

On the basis of *Danger*, Lord Goff held that R *v Duru*[24] was wrongly decided. *Duru* involved defendants who obtained mortgage advances from a local authority as a result of submitting fraudulent mortgage applications. The advances were made by cheque, and the defendants were charged with five counts of obtaining property, namely, a cheque, by deception. The defendants argued that the prosecution had not established an intention permanently to deprive the local authority of property because the cheques would ultimately go back to, or become available to, the local authority. The English Court of Appeal held that the defendants did have the requisite intention. Megaw LJ, delivering the judgment of the court, said that a cheque was "a common instance

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21 The accused merely obtaining possession of the paper (as opposed to possession and property) is enough, as s.15(2) Theft Act 1968 provides that the offence is committed if a person obtains "ownership, possession or control" of the property.

22 *Preddy*, supra n3 at 836-837. The New Zealand provision (s 246(2)) has no such requirement.

23 (1857) 7 Cox CC 303.

24 [1974] 1 WLR 2.

of a 'thing in action'".[25] Thus, "that cheque; that piece of paper, in the sense of a piece of paper carrying with it the right to receive payment of a sum..." was the property obtained.[26] That being so, on presentation to the bank, the piece of paper changes its character completely. It is stamped to say that it is paid and ceases to be a thing in action. Therefore, the defendants intended permanently to deprive the council of the cheques in their substance as things in action.

Insofar as *Duru* analysed the cheques as things in action, the House of Lords in *Preddy* were correct to overrule it.[27] However, J.C. Smith argues that *Duru* (and, by implication, the hypothetical situation put forward by Lord Goff in *Preddy*)[28] might yet properly be the subject of an obtaining by deception charge if the cheque is thought of as a valuable security, rather than as a chose in action.[29] As he points out,[30] a cheque is not only (1) a piece of paper which (2) creates a thing in action, but is also (3) a valuable security.[31] According to Smith, the cheque, when signed, belongs to the victim. At that stage, the cheque is a valuable security. When it came back to the victim's bank, it would no longer be a valuable security. Therefore, the victim was permanently deprived not of the piece of paper, and not of any chose in action, but of the valuable security.

The law in New Zealand is amenable to such an analysis for two reasons. Firstly, the New Zealand offence has never expressly required that the defendant must intend to permanently deprive the owner of the thing.[32] Secondly, in New Zealand, the definition of "valuable security" in section 2 Crimes Act 1961 includes cheques.

However, notwithstanding that in New Zealand it might be possible to charge a person with obtaining the cheque as a valuable security, there is still a problem which must be overcome. There will arise circumstances where it is obvious that the real objection is not to the cheque as a valuable security being obtained, but to the sum of money that is actually obtained by way of the security. Such a circumstance arose in *R v Bennift*,[33] where the defendant fraudulently procured

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25 Ibid at 8.

26 Idem.

27 The *Preddy* analysis must apply. That is, the chose in action was never the property of the victim.

28 Supra, n20.

29 Smith, "Obtaining Cheques by Deception or Theft" [1997] Crim LR 396 at p404.

30 Ibid at 400.

31 Smith argues that cheques were considered valuable securities before the passing of the Theft Act 1968: ibid at 404. In New Zealand, the definition of "valuable security" in s2 Crimes Act 1961 includes cheques.

32 Section 246(2) has no requirement that the accused must intend permanently to deprive the owner of the thing obtained (compare s15(1) Theft Act 1968 (UK)). Thus, the paper could be obtained. However, in *R v Cox* [1923] NZLR 596, 601 it was assumed in the judgment of Hosking and Adams JJ that the offence of obtaining by false pretences requires an intention permanently to deprive. This gloss is questionable in the absence of statutory wording, and appears to be at odds with the judgment of Stout CJ, where *Garret* (1853) Dears 232; 169 ER 707 is cited for the proposition that the focus of the offence is what was obtained, rather than what some person was deprived of (*Cox*, p598). Furthermore, the assumption in Hosking and Adams JJ must be considered *obiter dictum*.

33 [1961] NZLR 452.

over-payment for work done. The defendant was always to obtain a cheque, yet, but for the false pretence, it was to be for a lessor amount. McGregor J held that, while the sum of money referred to in the indictment was not capable of being stolen,[34] the cheque itself was,[35] and the value of the cheque was held to be more than just the value of the paper it was written on.[36] Even though the thing obtained was merely a piece of paper, the paper obtained was a different piece of paper than would have been obtained had the false representation not been made.

The problem lies in the fact that even if the cheque obtained can be considered different to that which would have been obtained, it is difficult to see how the cheque paper as physical thing could be worth more because of the way in which ink marks are arranged on its face. Even though the argument is stronger when cheques are analysed as valuable securities because a different valuable security has been obtained, unless the value of a valuable security is more than the value of the paper it is written on, the problem is not avoided.

### 5. Statutory Interpretation and Obtaining One's Own Property

As already mentioned, the Court of Appeal in *Wilkinson* was unanimous in holding that "property of any person" in section 217 Crimes Act 1961 must be the property of someone other than the accused. In so holding, the Court applied a subjective analysis to section 217. On the Court's approach, the question was not whether it was capable of being stolen at all, but whether it was capable of being stolen by the accused. As a result, section 217 now proscribes not only those things that are capable of being stolen, but those things that are capable of being stolen by whom.

Is the court not confusing the two requirements, however? Section 217 sets out those things that are inherently capable of being stolen. It is solely concerned with the "can it be stolen?" question. Section 220 Crimes Act 1961 (theft defined) is the provision that deals with whether or not something has actually, or can actually, be stolen in particular circumstances. Section 220, therefore, is the section properly concerned with the "can he steal it?" or "was it stolen?" question. That is because the latter question bears on whether, on the actual facts of the case, the circumstances are such that the thing can be said to have been stolen. And whether or not something can be said to be stolen on the facts of the case should have no bearing on whether the thing is in any case capable of being stolen.

Moreover, does the subjective approach taken by the Court of Appeal in respect of section 217 mean that a similar argument can be made in respect of the movable issue? Section 217 provides that a thing must be movable in order for it to be capable of being stolen. The chief effect of that requirement is to exclude intangible property from the ambit of the law of theft. However, if section 217 is interpreted subjectively, there is an argument that a thing that is ordinarily movable, but that the defendant is not capable of moving, is not capable of being stolen by the defendant, because he or she cannot move it.[37]

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34 Ibid at 454. He so held because that 'money' was intangible.

35 Ibid at 456.

36 Ibid at 568.

37 The distinction between legal and factual impossibility is outside the ambit of this

Surely such an argument is wrong. The function of section 217 is to carve out and distinguish those things that are capable of being stolen from all other things.[38] And what are those things? Those things that bear the qualities of being both owned and movable. Whether or not one of those things provided for has been stolen is a question to be decided on the facts. So, assessed objectively, the mere fact that a thing is capable of being stolen does not mean that it is in fact stolen. Likewise, and relevantly, the mere fact that something was not stolen (or obtained) so as to amount to an offence on the facts does not mean that it was not capable of being stolen. To say that Wilkinson's chose in action is not capable of being stolen because it is not capable of being stolen *by him* is to confuse the "can it be stolen?" question with the "can *he* steal it?" question.

The rationale behind the *Wilkinson* gloss on section 217 must be that if that section does not require that the property be the property of someone other than the accused, then an owner could be charged with the theft of her own property. However, there is a short answer to this objection. In New Zealand, an owner can be charged with the theft of his or her own property. In fact, section 225 Crimes Act 1961 expressly provides for it:[39]

> **Theft by co-owner—**
> Theft may be committed —
> (a) By the *owner of anything capable of being stolen* against a person having a special property, or interest therein: or . . .

And a special property interest is wider than the marginal note suggests. Such an interest is not confined to co-owners but extends to persons with a possessory right to hold the thing against the owner.[40]

The offence of obtaining by false pretences can also be committed by the owner of the thing obtained. Such was the case in *R v Cox*,[41] where the defendant's car was in the possession of a firm of motor mechanics for repair. On the basis of a false representation to the partner in charge (that the defendant had arranged with the other partner for the delivery of the car to him without payment of the money), the car was returned to the defendant. A four bench Court of Appeal, including the Chief Justice (Speight CJ), held that, notwithstanding that the defendant had property in the car, he was guilty of obtaining by a false pretence. Husking J, delivering the judgment of himself and Adams J, said:[42]

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paper. The comparison is used merely to illustrate that subjective issues should be assessed in relation to whether the circumstances were such that it can be said theft could have been committed.

38 It has been suggested that the requirement that a thing be property in order for it to be stolen was because there were many things at the time of drafting that were nobody's property at all: Frank Quinn, "More Tinkering with Theft and Fraud" [1999] NZLJ 85, 86.

39 See also s.220(1)(a).

40 *R v Cox* [1923] NZLR 596; *Larkin v Brown* (1906) 8 GLR 654; *R v Redfearn* (unreported, 25/3/93 CA125/92).

41 *Cox*, supra n40.

42 Ibid at 599.

> There is, in my opinion, no rule or principle of the common law ... and nothing in the Crimes Act which requires one to hold that the general owner of goods cannot be guilty within the meaning of s.252 of obtaining goods by false pretences from a person who is in possession of them under a special right to retain the possession as against the general owner.

Due to the fact that in New Zealand property *can* be obtained or stolen by the owner, it was misleading of the Court of Appeal to hold (albeit with a proviso)[43] that for the purposes of section 217, "property" means the "property of another". Instead, the Court should have held that the owner of something cannot obtain that thing by false pretences unless another person has a special property interest in it. In other words, Wilkinson's conviction should have been excluded under section 246(2), not section 217 (on the "property of any person" question at least). While some may consider this splitting hairs, the suggested analysis retains a logical structure to the statutory provisions and is in line with *Cox*.

It should be pointed out that Cox concerned the issue of whether an owner could fraudulently obtain his own property. It is most interesting, then, that none of the judges in that case concerned themselves with the issue of whether the thing in question was capable of being stolen. The judgment refers to "goods" or "chattels". Clearly, goods or chattels are capable of being stolen, for they will be movable, and owned by a person. Thus, the Court of Appeal in *Cox* treats the issue of whether something is capable of being stolen objectively.

However, it is beyond doubt that *Wilkinson* was decided correctly on the facts. *Cox* affirms[44] that a person who has absolute ownership of a thing over which no other person has a special right or interest cannot steal that thing.[45] Since no person except Wilkinson had any property or interest in the chose in action, he could not steal or obtain it. Moreover, the judgment in *Wilkinson* expressly states that it is only concerned with the situation where there is no special interest.[46]

But no person other than Wilkinson could possibly have had any other property interest in the chose because it was not physical. And this leads us to an interesting point. If it is correct that section 217 should be assessed objectively, it is difficult to envisage a physical thing for which there was no possibility that it could be obtained or stolen by the owner. Circumstances might be such (namely, a possessory right to hold the thing against the owner) that would make it possible. Thus, in every case that the thing in question is physical, the thing is of such nature that it is capable of being stolen or obtained by the owner. Where the thing is not physical, it is not possible; but in that case, it is excluded by section 217 (*i.e.* is not movable) in any event.

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43 The Court restricted the finding that "property of any person" in s.217 means the "property of someone other than the defendant" to cases where no other person has a special interest: *Wilkinson*, supra n2 at 407-408.

44 *Cox*, supra n40 at 604 and 605.

45 And thus, by implication, cannot obtain that thing by false pretences either.

46 *Wilkinson*, supra n2 at 407-408.

## 6. The Way Forward

The case of *R v Wilkinson* showed that New Zealand's current laws of theft and fraud are inadequate to prohibit some forms of transfers. These transfers are not ingenious, cunning or undetectable; they are common, everyday transfers. The case has highlighted a major deficiency in our law. A person might fortuitously escape liability for a charge of obtaining by false pretences merely because the transfer of funds is an automatic transfer between bank accounts, rather than the actual transfer of cash. If the concerns of the man on the Clapham omnibus are to be allayed, it is clear that legislative intervention is required.

Two legislative solutions have been presented. The first has been put forward by the Law Commission, which suggests plugging the hole with an amendment to section 246(2). The second is the Crimes Amendment Bill (No.6) 1999. This bill adopts a more comprehensive approach, seeking to amend Part X of the Crimes Act altogether.

The New Zealand Law Commission's solution to the problem uncovered in *Wilkinson* is a makeshift amendment to section 246(2), by including language from section 229A. The present ambit of the section would be widened to capture a person who "obtains for himself or for any other person any other privilege, benefit, pecuniary advantage or valuable consideration".[47]

The new section would certainly be wide enough to capture the transfer in *Wilkinson*. Wilkinson would have obtained for another person (the partnership) a pecuniary advantage or benefit by a false pretence. But while it would solve the "property of another" problem encountered in *Wilkinson*, it would not affect the law of theft. As a result, intangible property would still not be capable of being stolen. Thus, where a person, without authorisation but yet also without deception, transferred money from another's account into her own, she would not be guilty of either theft or obtaining a pecuniary advantage under even this new proposed section. Further, it is unclear whether the words "benefit" or "privilege" are wide enough to cover the obtaining of a service.

Any change to the law needs to be more comprehensively thought out. Makeshift legislative amendments are likely to prove unsatisfactory. It is worth noting that the problem in *Preddy* itself arose from legislative indecision and ad hoc amendments.[48]

The Crimes Amendment Bill (No.6) 1999 is a much more comprehensive document. The bill substantially implements the Crimes Bill 1989, and the recommendations made by the 1991 report on that bill by the Crimes Consultative Committee (the Casey report), with some changes and additional amendments "to take account of more recent developments in technology and case law."[49] However, it has been suggested that the new bill has not taken close enough account of the recent developments in technology.[50] If so, the Crimes Bill 1989 must be rejected, and the amendment of Part X of the Crimes Act considered anew.

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47 *Dishonestly procuring valuable benefits*, Law Commission Report 51.

48 *Preddy*, supra n3 at 830-833.

49 Explanatory note to the Crimes Bill Amendment (no.6) 1999, p2.

50 K Dawkins, "Criminal Law" [1999] 4 NZLR 415.

Even if the Crimes Amendment Bill (No. 6) 1999 is not fit for the purpose, it is submitted that a complete overhaul of Part X of the Crimes Act 1961 is necessary, and the Bill signifies a step in the right direction. Any change to the law should be comprehensive rather than merely an attempt to plug gaps in the law as they appear. A "stop-gap" approach would neglect the real problem, the want of a comprehensive amendment to Part X of the Crimes Act, an old code well past its use-by date.