

Property Offences: Larceny

1. Elements

S 117 of the *Crimes Act 1900* stipulates penalty

Definition and elements taken from Wilson and Dawson JJ, *Ilich*:

Actus Reus	Mens Rea
1. Taking and carrying away	1. Intention to permanently deprive at the time of taking
2. Property	2. Without a belief in a claim of right
3. Belonging to another	3. Fraudulently (dishonestly)
4. Without consent	
AR & MR coinciding	

2. Summary

Legal burden: **BRD** on prosecution (*Woolmington v DPP*)

Elements: *Illich* v R (1987) HCA per Wilson and Dawson JJ:

Actus Reus	Mens Rea
<p>1. Taking and carrying away (<i>Croton; Lapiet</i>)</p> <p>2. Property capable of being stolen (<i>White; Perry</i>)</p> <p>3. Property is in possession of person other than D (<i>Potitsck</i>)</p> <p>4. Taking done without consent of owner</p> <p>Vitiated consent per <i>Illich</i>:</p> <ul style="list-style-type: none"> ▪ Mistake to identity (<i>Middleton</i>) ▪ Mistake to the identity of what was handed over (<i>Ashwell</i>) ▪ Where an excess quantity of goods is delivered, ownership of the excess has not passed to the receiver. (<i>Russell v Smith, Illich</i>) 	<p>1. Taken with intention to permanently deprive the owner (<i>Holloway</i>)</p> <ul style="list-style-type: none"> ▪ Intention to return is itself not a sufficient defence per s 118 ▪ Appropriation/Conversion (<i>R v Foster</i>) without making sufficient enquiries to find the owner (<i>MacDonald</i>) <p>2. Without claim of right to property (<i>R v Lopatta, R v Fuge</i>)</p> <p>3. Taken fraudulently i.e. dishonestly (Objective test - standard of an ordinary decent person per <i>Peters v R</i>)</p>
TEMPORAL COINCIDENCE	

S 117 of the *Crimes Act 1900*

Whosoever commits larceny, or any indictable offence by this Act made punishable like

Terminology Box

Mutual mistake is made when neither party at the time of the incident realises that a mistake has been made, and then later when the accused realises they have gained from the mistake, they form a dishonest intention. Issue therefore with coincidence in relation to **actus reus**.

Unilateral mistake is made when the accused realises immediately that the other party has made a mistake and from that point forms the dishonest intention to take advantage of it. Issue with coincidence in relation to **mens rea**.

larceny, shall, except in the cases hereinafter otherwise provided for, be liable to imprisonment for five years.

R v Middleton

Unilateral Mistake; The mistake vitiated (negated) the consent.

Facts: The defendant went to the post office and requested to withdraw 10 shillings from his account. The post office clerk, under a mistake, gave the defendant 8 pounds +, believing him to be someone else by mistake. At trial, was found guilty.

Held: The mistake was held to be a **unilateral mistake**, as the accused realised immediately that the other party had made a mistake and from that point, formed the dishonest intention to take advantage of it. The court, by an 11-4 majority held that the defendant was guilty of larceny by mistake because at the time of obtaining the money, he knew he wasn't entitled to it. The clerk consented to handing over the money, but he did not have the authority to hand over the amount more than was necessary. Because he knew of the mistake, this vitiated the consent of the clerk. The specific mistake was mistake as to **identity of person**.

R v Potisk (1973)

Unilateral mistake.

Mistaken consent is still consent

V consented so not larceny.

Facts: Teller mistakenly applied conversion wrongly and paid greater sum. Accused realised at home.

Held: Ownership passed with possession as currency is a fungible. Mere intention without asportation was not considered sufficient. In this case, D was mistakenly given too much money in a currency exchange transaction. Bray CJ held: *"the mere formation of a mental resolve to appropriate the thing, not manifested in any overt act, could not change an original innocent possession into a larcenous one."*

R v Ashwell

Mutual Mistake

Facts: Two men exchanged money in the dark. One man wanted to borrow one shilling, and the other handed him a coin, which they both believed to be a shilling. Once the defendant got into light, he realised that the victim had actually given him a sovereign. He repaid his debt of one shilling and kept the balance.

Held: This was held to be larceny because of a continuous trespass. The specific mistake was to **identity of the thing delivered**.

Illich:

Mutual mistake.

Facts: D overpaid by employer. D didn't return excess, putting it aside to decide what to do with it.

HC held that the mistaken payment had not prevented the property passing to D: the consent was not induced by fraud and the mistake was not fundamental.

D could not be charged with fraudulent conversion either b/c D cannot take/convert something already in his possession

CASES

Anic, Stylianou and Suleyman

P 972 *Brown et al.*

Facts: Ds convicted of burglary with intent to steal and assault with intent to rob
Broke into house in mistaken belief it contained cannabis

Appealed on grounds that it is not possible to steal property from a person who has it in their possession unlawfully

Outcome: A person can be convicted for stealing prohibited drugs

Astor v Hayes

D believed bag to be his BUT he took bag AND its contents → no evidence he intended to return the contents and his belief in a legal claim of right was insufficient to negate his dishonesty

R v Bailey

D takes car and uses all petrol

Change in property must be substantial, not that which occur from normal use

Thus D charged with stealing the petrol

Croton v R (1967) 117 CLR 326

P 971 of *Brown et al.*

Property must be taken without the consent of person in possession.

Facts: D husband secretly withdrew money from joint account and put it somewhere else.

Held: D not guilty. Bank transferred money voluntarily. Wife never possessed the money.

R v Davies (1970) VR 27

Facts: D bought car, car was stolen. D didn't know but found out and still kept it

Held: D had consent of person in possession.

R v Duru

Ds charged with obtaining cheques from local council by deception

A component was the intention to permanently deprive

Ds argued they lacked this intention, because when the cheques were cashed they could be returned to the council via the council bank

Their conviction was upheld b/c the council was to be deprived of the cheques in substance

Ellis v Lawson (1987) 33 A Crim R 69

Constructive possession.

Facts: Shop assistant w/ physical custody gave radio to friend w/o consent of employer.

Held: D guilty - owner remained in constructive possession of goods and didn't consent.

Foster

P 977 *Brown et al.*

D took friend's gun intending to show to parents, and to return it same day. On appeal against conviction for larceny, a new trial was ordered

Fuge

P 983 *Brown et al.*

Hayes v Fries (1988) 49 SASR 184

There can be no theft of property that is truly abandoned, or is not owned by anyone.

Hibbert v McKiernan (1948) 2 KB 142

Owner needn't be aware that they are in possession

Facts: D collected golf balls off course and sold them to golfers. He was warned to stop.

Held: Club exercised sufficient control + intent to control balls. D didn't have better right.

Kennison v Daire (1986) 64 ALR 17

Facts: D closed account but used car to withdraw \$200 from an offline ATM.

Held: Bank didn't consent. ATM programming doesn't equate to consent. Facilitation doesn't amount to consent.

Lapier

an attempt was made to steal an earring which became entangled in the owner's hair
this was held to be sufficient asportation

Martin v Puttick (1968) 1 QB 82

Facilitation doesn't equal consent.

Facts: D stole chops in shopping bag, paid for other items. Manager arrested her after she left.

Held: D handing over bags didn't amount to possession - he retained constructive possession.

Parsons v R

HC found D had intended to deprive V of a cheque permanently b/c once cheques were cashed, they were 'spent and deprived of those characteristics which led or significantly contributed to their classification as property'

Riley (1853)

Continuing trespass

Where the original taking amounts to trespass a subsequent intention to appropriate will render the taker guilty of larceny.

Facts: D placed 5 black lambs in neighbour's field which had 10 in it. He accidentally took 1 extra.

Held: D guilty. MacDonald (1983): If D picks up with intention of finding owner, taking isn't trespassory. ALSO → where a fundamental mistake has been made and D only subsequently becomes aware of the errors and decides to keep the property, it will be necessary to apply the Riley principle: once a fundamental error has been established, so that the consent is vitiated, the original taking will be trespassory. Under the Riley principle, this original trespassory taking will extend unless and until D forms the necessary MR.

These fundamental errors (Illich: identity of the person/identity of the thing/excess quantity of goods) will not apply to cases where the mistake has resulted in excess money being handed over

Thurborn (1849)

Fraudulent intent must've existed at the time of taking.

Facts: D found banknote on highway thought no possibility of finding owner. Was informed of owner but kept it.

Held: D was in lawful possession when he learned identity so couldn't commit larceny.

R v Turvey (1946) 2 All ER 60

Facts: D planned on stealing from boss. Employee informed boss. Boss let him do it to catch him.

Held: D didn't carry goods away without consent of the owner because the owner was willing that he should have the goods.

Wallis v Lane

D was delivery man, making delivery to employer's client. A box was damaged and opened, D took two bicycle toe clips from inside and left them hidden in the truck's tray while delivering the rest of the boxes to the customer. D apprehended while still delivering

Weatherstone

Pp 979 and 981 *Brown et al.*

welding rods were used by council employer to repair a fence, found guilty of larceny because the welding rods would have melted → court found "*the property of the owner of the rods would be terminated by their destruction in that they would cease to exist as rods...the rods were taken from the true owner with the intention of permanently depriving him of those rods*"

3. Long Version

D could be charged with larceny under **S 117** of the *Crimes Act 1900*. The legislation only stipulates the penalty. THUS, we turn to the case of *Illich* for the definition and elements. In this case Wilson and Dawson JJ stated:

At common law, larceny is committed by 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 with intent, at the time of such taking, permanently to deprive the owner thereof.

P must prove all elements of the offence **BRD** (*Woolmington v DPP*).

From this definition in *Illich*, the **ACTUS REUS** of the offence are that D

- **took and carried away**
 - There must be **asportation** (physical removal of the property said to be stolen)

- In *Wallis v Lane*, it was held that “any movement of goods with an intent to steal them is sufficient to constitute asportation... it is sufficient asportation if there is removal of the property from the spot where it was originally placed with intent to steal.”
- In *Lapier*, an attempt was made to steal an earring which became entangled in the owner’s hair, this was held to be sufficient asportation.
- In *Potisk*, it was held mere intention without asportation was not sufficient. In this case, D was mistakenly given too much money in a currency exchange transaction. Bray CJ held: “the mere formation of a mental resolve to appropriate the thing, not manifested in any overt act, **could not change an original innocent possession into a larcenous one.**”
- *R v Thomas*: there must be a positive act on the part of D and mere passive retention of the property is not sufficient
- **property capable of being stolen**
 - ‘Larceny is restricted to **chattels**; that is, tangible moveable property’ (*Brown et al* p 967.)
 - must be tangible/physical (*R v White*) → CHOSE IN POSSESSION
 - Rights to intangible property = CHOSE IN ACTION and cannot be stolen → *Crimes Act* has filled this gap with **s 134**: specific offence of stealing a valuable security
 - must be of some value, slightest value will suffice (*R v Perry*; *R v Morris*)
 - must be moveable, owing to the requirement of asportation, therefore it is not possible to steal land (*R v Young*)
 - Fixtures (things attached to the land) cannot be stolen (*Billing v Pill*)
 - only the slightest substantiality is necessary (e.g. gas from a pipe) (*White*)
 - P does not have to prove precise objects stolen, it is possible to charge D for stealing a portion of a larger whole (*Russell v Smith*)
 - Property must have an owner (*R v MacDonald*)
 - Abandoned property (owner intentionally gives up interest in property) cannot be stolen (*Donoghue v Coombe*).
 - S 4 CA defines property
 - [for more specifics, see pg.165 of Crofts]

- which belonged to another and

- POSSESSION: a person has in his or her possession whatever is, to his or her knowledge, physically in his or her custody or under his or her physical control (*DPP v Brooks*)
- *Actual Possession* is where one has present physical custody of the property or has the property in such a place that he or she alone has the right to place his or her hands upon it and take custody of it (*Moors v Burker*) → A person has actual possession of property if the person intends to possess the property and has some degree of physical control over the property at some stage
- Awareness of property by possessor is not necessary (*Hibbert v McKiernan*)
- *Constructive Possession*: the person does not have actual possession, but has a legal right to assume possession when he or she wishes to do so → an employer constructively possesses possession held by employee (*Ellis v Lawson; Williams v Phillips*)
- CONTROL: A person is in control of property ‘where he alone has the exclusive right or power to place his hands on it, and so have the manual custody when he wishes’ (*Moors V Burke*) → in control of the property rather in possession of it
- OWNERSHIP: Property can be stolen from an owner who is not in possession or control of property, demonstrated in cases of finding (*R v Flood*)

- without the consent of the owner /person in possession

- For an offence of larceny to be committed, the taking of the property must amount to a trespass (*Ellis v Lawson*).
- In other words, the property must be taken without the consent of the person in possession of it (*R v Croton*)
- It is not going against the will of the owner, but without the will of the owner (*Middleton*)
- Trespass is defined as an unprivileged interference with a possession of another person, and trespassory taking occurs when property is taken against the will of the person in possession (*R v Davies*)
- Facilitating the taking away does not amount to consent (*Kennison v Daire*)
→ D closed bank account, used old card to withdraw \$200 from ATM,

convicted of larceny, HC stated ‘the bank consented to the withdrawal...only if the cardholder had an account that was valid. It would be quite unreal to infer that the bank consented to the withdrawal by a cardholder whose account had been closed’

- More examples of facilitating: p 169 of *Crofts*
- Consent can be vitiated if it is given due to threats/intimidation (*R v Lovell*)
- Consent due to fraud is covered by the offence of fraud → *s 192E*
- Consent due to mistake is an unresolved legal issue, but if a case arises, both *Potisk* and *Illich* must be applied
- Mutual mistake = neither party at the time realises a mistake has been made and later when D realises they have benefited from the mistake they form a dishonest intention
- Unilateral mistake = D immediately realises other party has made a mistake and from that point forms the dishonest intention to take advantage of it
- According to *Potisk*, mistaken consent is consent, an element of AR is missing, larceny not committed
- According to *Illich*, obtaining property through mistaken consent does not amount to larceny unless V has made a fundamental mistake as to the
 - identity of the person
 - identity of the thing or
 - excess quantity of goods
- *Riley* states that if D becomes aware of V’s fundamental error and retains the property, consent is vitiated (this solves the missing MR element)
- **BUT for fungibles, consent owing to mistake is not vitiated - i.e. fundamental errors will not be applied where the mistake has resulted in excess money being handed over**

From the definition in *Illich*, the MENS REA of the offence are that, **at the time of taking**, D acted

- with the **intention** of permanently depriving the owner
 - At the time of taking D must intend to permanently deprive the owner of the property (*R v Foster*). In this case, D took friend’s gun intending to show to parents, and to return it same day. On appeal against conviction for larceny, a new trial was ordered

- Conditional return: Where D has used the property for his or her own benefit, with the intention to eventually return the property, this intention is not enough to acquit D of larceny, even if the intention is reasonable (*s 118; Foster*)
- Altered condition: if D intends to return the property to the owner but its condition is substantially altered/reduced value, D can be charged with larceny: *R v Duru; see also Parsons v R and R v Bailey*
- Exhausting the virtue of the property, e.g. using a concert ticket → the court will find an intent to permanently deprive (*Beecham*)
- Changing the nature of the property can also amount to permanent deprivation (*Weatherstone*). In that case, welding rods were used by council employer to repair a fence, found guilty of larceny because the welding rods would have melted → court found “*the property of the owner of the rods would be terminated by their destruction in that they would cease to exist as rods...the rods were taken from the true owner with the intention of permanently depriving him of those rods*”
- **Fungibles** = interchangeable objects (money, eggs, sugar) → see pp 175-176 of *Crofts*
 - *R v Cockburn*: if D takes money from the till and intends to return it the next day, and has a reasonable expectation of doing so, he can be charged with larceny b/c D intends to permanently deprive the owner of those particular notes, intending only to return money of equal value
 - *R v Foster*: if D had taken an antique chair with the intention of returning the chair the next day, then the focus would be on whether or no D ‘appropriated’ the chair
- without a claim of right made in good faith (belief in claim of right)
 - MR not present if person has genuine belief he or she is asserting a lawful claim to the property
 - Belief can arise from a mistake of law or fact
 - If a belief arises from a mistake of law, this mistake can negative a larceny charge if it stopped D from forming the necessary MR for the offence (*R v Lopatta*)

- It does not have to be a reasonable belief (*Lopatta*)
- *Lopatta*: D took 20 drums of oil (\$5000 worth) from former employee because he believed this amount was owed to him. P has to prove BRD the possibility of A honestly believing his claim of right at the time he took the property. HELD: the mistake does not have to be reasonable, there just has to be an honest belief → an honest claim of right negates the MR of intention to defraud
- BUT...a moral right is not enough to negative a charge of larceny (*Harris v Harrison*)
- D cannot take more than he or she believes herself/himself to be entitled to (*Astor v Hayes*)
- D need only have a belief in a legal right to the property, not a belief in the legal right to employ a means in question to recover it: *R v Love*; *R v Langham*
- fraudulently/dishonestly
 - Fraudulently and dishonestly can be used interchangeably (*Glenister; Macleod*)
 - If D has a belief in a legal claim of right D is NOT acting fraudulently (*Love*)
 - In *Peters* it was held by the HC that the approach in the English case of *Feely* represents the Australian CL meaning of dishonest.
 - In *Feely*, it was held that dishonest should be decided by jurors according to “the standards of ordinary decent people” → in other words, it has an everyday meaning that does not need to be explained to jurors, and it has a moral basis
 - *Ghosh*: in *Peters* the further requirement derived from *Ghosh* that D must have realised the act was dishonest by those standards was REJECTED
 - *Peters*: HC held that the approach in *Feely* represents the CL meaning of dishonesty
 - It is undecided as to which test is more appropriate for determining fraudulence
 - Dishonesty = defined in s 4B as ‘dishonest according to the standards of ordinary people’

- Not clear yet if this applies to CL requirement of fraudulent in the offence of larceny

Borrowing is not larceny, but legislation provides liability in some cases:

S 154A: taking a conveyance without consent of owner

S 154C: taking a motor vehicle without the consent of the owner or lawful possessor in circumstances where the defendant assaults a person in order to do so, or drives off with the person in the vehicle

THERE MUST BE TEMPORAL COINCIDENCE BETWEEN THE AR AND THE MR.

D must have fraudulent intent at the time of taking (*R v Thurbon*)

Riley provides the doctrine of 'continuing trespass', which covers situations in which D acquires property innocently, but later forms the intent to permanently deprive the owner of said property. If the original taking is trespassory, the fraudulent intention which follows will ground a charge of larceny.