

Re-Positioning the Law of Theft in View of Recent Developments in ICTS – The Case of South Africa*

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Abstract

This article examines the impact of information and communication technologies (ICTs) on the development of the principles of theft. The Roman and South African law of theft forms the basis of such a study. This investigation is made against the background principle that the law of theft has to do with the traditional forms of property, for example corporeals and incorporeals. Therefore, it is enquired whether the non-traditional forms of property, for example information or data is or can be regarded as property that is capable of being stolen for legal purposes or not.

Keywords

ICTs; World Wide Web; codes; architecture; hardware; software; information; data.

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1 Introduction

In recent times, society has witnessed the rapid development of information and communication technologies.¹ Generally, the term "technology" is used with reference to how the hardware of a system, machine or mechanism functions,² or with regard to other aspects of operations which do not involve human agency, such as software.³ Examples of such information technology (ICT) are the Internet⁴ and the World Wide Web.⁵ ICTs are a conglomeration of different infrastructures. These are codes, architectures, hardware or software. They facilitate communication by or between users.⁶ They also enable computers to locate other computers, to communicate with one another and to transmit and receive data. The word "data" refers to the electronic representation of information⁷ in any form,⁸ which means that it can be represented manually or automatically.

ICTs influence the behaviour of people and consequently that of society.⁹ Governments, private institutions, businesses and computer users rely on these ICTs to interact with one another and sometimes to do business online. Sometimes this influence is so unreal that its effects were in the past only imagined in science fiction. This is the case because the activities that are carried out by means of these technologies are not particularly comparable to those that are known to an offline society. Consequently, ICTs facilitate the creation of a new society. In

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¹ Hereinafter referred to as ICTs.

² Grüber *Technology* 20.

³ Restivo *Science, Technology and Society* XIX.

⁴ In terms of s 1 of the Electronic Communications and Transactions Act 25 of 2002 (hereinafter referred to as the ECT Act) the Internet is "the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions thereof".

⁵ Hereinafter referred to as the Web or WWW. The Web is an "information browsing framework that allows a user to locate and access information stored on a remote computer and to follow references from one computer to related information on another computer". S 1 of the ECT Act.

⁶ Lee and Lee "Mobile Commerce and National IT Infrastructure" 352.

⁷ The term "information" denotes any "piece of news with a meaning for the recipient; its assimilation usually causes a change within the recipient". See Sieber "Emergence of Information Law" 10-11.

⁸ Section 1 of the ECT Act.

⁹ See Erlank *Property in Virtual Worlds*; Jankowich 2005 *BUJSTL*.

technological terms, this society is referred to as the information society. An information society is a kind of online society where "low-cost information and data storage and transmission technologies are in general use".¹⁰ It is characterised by a "high level of information intensity in the everyday lives of most citizens, in most organisations and workplaces, by the use of common or compatible technology for a wide range of personal, social, educational or business activities".¹¹

In this paper the impact that ICTs have on the principles of theft is examined. This discussion is undertaken having in mind the fact that the law of theft protects property and has previously been entirely concerned with traditional forms of property. This notion of property relates to that in relation to which a physical *contrectatio* is possible. In this respect it is argued that for theft to exist a surreptitious carrying away or *auferre* of a thing with fraudulent intention should exist.¹² Having regard to the aforesaid, it is argued that the question regarding whether or not certain incorporeals, for example data, could be stolen is not answered. More specifically, is data property that is capable of being stolen for legal purposes? With a view to investigating this question, a distinction is made between corporeal and incorporeal property. This difference assists in determining whether or not data is property. If it is found that data is not property within the context of the law of theft, an enquiry is then made on whether or not the principles of the law of theft can be adapted in order to accommodate the importance of data to an information society. The Roman and South African law approaches to theft are examined for this purpose. The basis for this scrutiny is to trace the developments of the law relating to theft and to establish if this body of law is capable of being expanded in order to respond to prevailing societal needs. Thereafter, a summary of the facts and the way forward in relation to the position of data in the law of theft is provided.

2 Corporeal and incorporeal property

2.1 Corporeal property

Corporeal property is the original category of things that were recognised as property in early Rome.¹³ It includes all the tangible things that can be

¹⁰ Soete *Building the European Information Society* 11.

¹¹ Durrani *Information and Liberation* 256.

¹² Du Plessis *Borkowski's Textbook on Roman Law* 338.

¹³ Thomas *Institutes of Justinian* 73.

nature be touched.¹⁴ Moreover, it encompasses property which is perceptible through the senses.¹⁵ In classical Roman law, the examples of *res corporales* included things such as land, a slave, a garment, gold or silver.¹⁶

The question regarding the corporeal nature of a thing depends on its being capable of conveyance.¹⁷ It is inquired whether or not the thing is a *res in commercio*.¹⁸ Conveyance should be understood according to what the notion meant to a Roman lawyer. In Roman law, conveyance depended on whether the property was *res Mancipi* – that is, property in terms of which the Roman *paterfamilias* had control and management on behalf of the household – or *res nec Mancipi* – examples are: stipendiary and tributary land and wild beasts.¹⁹ In the case of *res Mancipi* the conveyance of ownership in property was a process and not an incident. It was carried out by means of a solemn act and this act was known as *Mancipatio* (and later on as *in jure cessio*).²⁰ *Mancipatio* was a sort of emblematical sale or *imaginaria venditio*.²¹ In the case of *res nec Mancipi*, a conveyance of ownership in property was, if these things were *res corporales*, effected by *traditio* – that is delivery.²²

Ownership or *dominium* is an essential concept in the study of the Roman law of property. It is distinguished from the notion of possession, being the physical control of property (*corpus*), with the intention (*animus*) of excluding all others in society.²³ It denotes "absolute lordship over a thing".²⁴ The term "absolute" can be interpreted to mean two different things. Firstly, it could mean that an owner is allowed, subject to negligible limitations in terms of the law, to do with his or her property as he or she

¹⁴ Sandars *Institutes of Justinian* 194-195.

¹⁵ Moussourakis *Fundamentals of Roman Private Law* 121.

¹⁶ Moussourakis *Fundamentals of Roman Private Law* 121.

¹⁷ Kaser *Roman Private Law* 80.

¹⁸ Kaser *Roman Private Law* 80.

¹⁹ Diósdí *Ownership* 20.

²⁰ Sohm *Institutes* 305-306. The period in which *Mancipatio* was adapted to mean a conveyance of ownership of property *in jure cessio* is not known by Roman law jurists. However, it is acknowledged that the adaptation indeed took place sometime in the history of Roman law. See De Zulueta *Institutes of Gaius* 57.

²¹ Gai.I.119.

²² Gai.II.19.

²³ Keenan *English Law* 211.

²⁴ Declareuil *Rome* 158.

pleases.²⁵ Secondly, it could suggest that "apart from the owner ... nobody else can be the owner".²⁶

The recognition of property as corporeal also appears in South Africa, where corporeal property again refers to physical objects.²⁷ These are objects that are part of a tangible reality.²⁸ A tangible reality can be interpreted to mean an object which is "perceptible through sight and touch".²⁹ The object must occupy some space. It must also be capable of being sensed by means of any of the five traditional senses.³⁰ These objects may be movables such as a horse, furniture, a motorbike, an oxygen cylinder or a ship, or immovables such as landed property or fruit that is still hanging on a tree.³¹

It is important to note that the current description of corporeal property has been severely attacked in the recent past.³² The argument is that a reliance on the tangibility of an object as one of the criteria for determining its corporeality is problematic.³³ It particularly leads or could lead to objects, for example, various gases, that naturally are excluded in the description of corporeal property being regarded as *res corporales*.³⁴ With reference to gases, it is submitted that although they cannot be touched, they can be "perceived by some of the external factors".³⁵ Furthermore, there are others who state that the exclusion of natural forces and/or energies, for example gravity, heat, sound and electricity from the description of corporeal property is an ancient formulation of the concept of property.³⁶ It fails to respond to modern developments. Furthermore, it disregards the fact that some of these objects are so analogous to

²⁵ Van der Walt and Kleyn "Duplex Dominium" 213.

²⁶ Van der Walt and Kleyn "Duplex Dominium" 213.

²⁷ It is argued that a distinction has to be made between objects in the conventional sense and objects in a legal sense. Conventionally, all objects are property. However, objects for juridical purposes must establish a legal relationship before they can be said to be property. See Oosthuizen *Law of Property* 3. In other words, they must be such that a person will be able to "acquire and hold a right". See Van der Walt and Pienaar *Law of Property* 2nd ed 11.

²⁸ Van der Walt and Pienaar *Law of Property* 3rd ed 14.

²⁹ Maasdorp *Institutes of South Africa* 1.

³⁰ Van der Walt and Pienaar *Law of Property* 3rd ed 14.

³¹ Van der Walt and Pienaar *Law of Property* 3rd ed 14.

³² See in general Kleyn, Boraine and Du Plessis *Silberberg and Schoeman's The Law of Property*.

³³ Kleyn, Boraine and Du Plessis *Silberberg and Schoeman's The Law of Property* 30.

³⁴ Kleyn, Boraine and Du Plessis *Silberberg and Schoeman's The Law of Property* 30.

³⁵ Kleyn, Boraine and Du Plessis *Silberberg and Schoeman's The Law of Property* 30.

³⁶ Van der Merwe *Law of Things* 13.

traditional corporeal property that they should be regarded as having corporeal existence.³⁷

2.2 *Incorporeal property*

Traditionally, uncertainty existed regarding whether or not property rights exist or should exist in respect of incorporeal things.³⁸ This was the case because it was deemed to be legally illogical to define property as an object of a right and then submit that a right is also the object of a right.³⁹ Despite this uncertainty, it was soon realised that property rights should generally not be limited to tangible and physical objects only. The cases of *S v Kotze*⁴⁰ and *Cooper v Boyes*⁴¹ can be mentioned as examples. These cases evidence a move towards recognising the existence of property rights to incorporeal objects. By so doing, they re-affirm the idea that property rights are or should not be limited to tangible things.

S v Kotze dealt with money which is held or kept by a bank on behalf of person (an account holder) in a bank account. The court conceded to the fact that an account holder does not necessarily own such money. However, this does not mean that he or she is not a person with a special property or interest in it. Consequently, this interest, the court stated, is relevant and sufficient to an inquiry regarding whether or not property rights to the money is possible. In *Cooper v Boyes* the facts were briefly that a testator (Jack Marshall Cooper) executed a will in terms of which he bequeathed one half of the residue of his estate to his son (Cooper). The residue comprised of particular shares and cash assets amounting to R357 034.13. The court had to decide, amongst other things, whether or not the shares could, given the fact that they generate an interest to a shareholder (in this case, Cooper),⁴² be regarded as property.⁴³ The court concluded that shares are incorporeal movable property and cannot be compared to corporeal property such as cash money.⁴⁴ However, they sometimes generate interest or value to an owner or shareholder.⁴⁵

³⁷ See in general *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W).

³⁸ *Ex Parte Eloff* 1953 1 SA 617 (T) 617.

³⁹ *Ex Parte Eloff* 1953 1 SA 617 (T) 617.

⁴⁰ *S v Kotze* 1961 1 SA 118 (SCA).

⁴¹ *Cooper v Boyes* 1994 4 SA 521 (CPD).

⁴² *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 288H; *Borland's Trustee v Steel Brothers & Co Ltd* 1901 1 Ch 279 288.

⁴³ *Cooper v Boyes* 1994 4 SA 521 (CPD) 523D.

⁴⁴ *Cooper v Boyes* 1994 4 SA 521 (CPD) 535B-C.

⁴⁵ *Cooper v Boyes* 1994 4 SA 521 (CPD) 535B-C.

Accordingly, this interest gives an owner a reasonable expectation that it will be recognised as property in terms of the law of property.⁴⁶

The cases mentioned above demonstrate a departure from the established principle that property rights exist only in relation to corporeal property. More specifically, it is shown that property rights to certain incorporeals are also possible. Incorporeal property is an "artificial or fictitious" object.⁴⁷ Such objects are neither visible nor tangible.⁴⁸ They are incapable of physical possession.⁴⁹ These include objects where there is neither factual control nor *corpus* nor an intention to possess or *animus possidendi*.⁵⁰ The most obvious examples of incorporeal property are a right and duty.⁵¹ However, incorporeal property in the form of rights and duties operates as objects of limited real rights.⁵²

Despite the discussion of corporeals and incorporeals above it is submitted that a problem arises in cases where data is appropriated without lawful consent. Consequently, it is necessary to ask whether or not it is legally possible to appropriate data. If the answer is in the negative, is it then possible to develop the principles of theft in such a manner that data can be recognised as being capable of being stolen? In order to respond to these questions, the Roman, English and South African law of theft are investigated. This selection is important to this paper. More specifically, it signifies the influence that the Roman law principle of *contrectatio* and the English law principle of "appropriation" have had on the South African law of theft.

3 Roman law

3.1 Background

In Roman law the term *furtum* is used as the equivalent of the word "theft". The word *furtum* originated in the Latin expression *furvus*.⁵³ In English the phrase *furvus* denotes dusky, swarthy, dark or darkness.⁵⁴ From this it is said that *furtum* is associated with the method or methods that are used to

⁴⁶ *Cooper v Boyes* 1994 4 SA 521 (CPD) 535F.

⁴⁷ *Maasdorp Institutes of South Africa* 1.

⁴⁸ *Maasdorp Institutes of South Africa* 1.

⁴⁹ *Nathan Common Law of South Africa* 310-311.

⁵⁰ Van der Merwe "Law of Property" 203-204.

⁵¹ *Oosthuizen Law of Property* 9.

⁵² See the criticism regarding the corporeality of such things in *Oosthuizen Law of Property* 4.

⁵³ *Colquhoun Roman Civil Law* 206.

⁵⁴ *Valpy Etymological Dictionary* 169.

perpetrate theft. In particular, Labeo argues that *furtum* is committed *quod clam et obscuro fiat et plerumque nocte*, that is, it is committed surreptitiously, in the dark or at night.⁵⁵

In Classical Rome *furtum* was regarded as a private wrong or delict. Accordingly, it was a fraction of the four (4) pillars of delicts that formed the basis of the Roman law of obligations.⁵⁶ The others were *iniuria* (for example, *convicium*, *adtemptata puditia* and *ne quid infamandi causa fiat*); damage to property (excluding violence), and *rapina* or violent damage to property.⁵⁷ Collectively, the delicts were referred to as the *crimen*.⁵⁸ The Roman law of *furtum* is influenced by two (2) contrasting periods. These ages are termed the classical and the post-classical periods. An examination of *furtum* in the classical period is symbolised by the concept *inter alia* of the Law of the Twelve Tables and the Digest. However, a post-classical revision of the concept of *furtum* is characterised by the acceptance of the Institutes of Justinian.

3.2 Classical

In classical Roman law, *furtum* was described as the *contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel usus eius possessionisve quod lege naturali prohibitum est admittere*.⁵⁹ In English this means the "dishonest handling of a thing (or property) in order to make gain either out of the thing (or property) itself or else out of the use or possession thereof. From such conduct natural law commands us to abstain".⁶⁰ This description represents the original description of *furtum* known to classical Romans.⁶¹ It also represents one of the "finer definition(s)" of *furtum* recognised in classical Roman times.⁶²

Furtum has at least four (4) constituent parts or elements. The components are touching or handling (*contrectatio*); fraud (*rei fraudulosa*); the making of gain (*lucri faciendi gratia*); and the use or possession (*ipsius rei vel usus eius possessionisve*) of property.

3.2.1 Contrectatio

⁵⁵ Digest XLVII.2.

⁵⁶ Watson *Western Private Law* 124.

⁵⁷ Robinson 1998 *J Leg Hist* 246-249.

⁵⁸ Smith and Anthon *Greek and Roman Antiquities* 463.

⁵⁹ Digest XLVII.2.3.

⁶⁰ Jolowicz *Digest XLVII.2 De Furtis* 1-2.

⁶¹ Watson *Roman Private Law*.

⁶² Watson *Roman Private Law* 269.

Contrectatio is sometimes referred to as *adtrectatio*.⁶³ Zimmerman states that *contrectatio* means a "touching, handling, fondling, pawing or interfering with" property.⁶⁴ However, this view is challenged by some academics.⁶⁵ Consequently, it is argued that *contrectatio* encompasses a meddling with the property. Meddling is any dishonest taking and carrying away of property.⁶⁶ Again, the association of *contrectatio* with meddling is questioned. More specifically, it is submitted that the view regarding the meddling with the property is not founded on and does not represent the traditional Roman law description of *furtum*. The incidence of "meddling" as opposed to "touching" and "handling" is the result of the influence of the English common-law approach to theft.

Despite these contending views, it is agreed that *contrectatio* denotes a "handling or touching" of property. However, it is not clear whether a handling or touching of the whole or part of the property is sufficient or not. Paulus argues that liability should result as if the *contrectatio* was in respect of the whole property.⁶⁷ In this instance, a touching or handling of a part or portion of property can be equated to the touching or handling of the entire property. However, Ulpian submits that *contrectatio* should be limited to only the part of the property which is or was touched and/or handled.⁶⁸

3.2.2 *Rei fraudulosa*

Scott provides meaning to the classical Roman law perspective of the notion of "fraud" by referring to Paulus' Book I.VIII.I. According to Scott, fraud takes place "when one (thing) is done, and another (thing) is presented".⁶⁹ Therefore, there should be an unacceptable or dishonest conduct which accompanies the *contrectatio*. This should amount to an "unlawful or fraudulent" touching or handling of the property.⁷⁰ The *contrectatio* must be *invito domino*. Wicked intention or *dolus malus* must be present. This *dolus malus* relates to an intention to commit *furtum*. In other words, *contrectatio* must be committed with the necessary fraudulent intention.⁷¹ Consent to the touching or handling of the property excludes

⁶³ Gellius *Noctes* 11.18.20.22.23.

⁶⁴ Zimmerman *Law of Obligations* 924-925.

⁶⁵ Buckland *Text-Book of Roman Law* 557.

⁶⁶ Buckland *Text-Book of Roman Law* 557.

⁶⁷ Digest 47.2.21.

⁶⁸ Honoré *Justinian's Digest* 138; Duff 1954 *CLJ* 87.

⁶⁹ Scott *Civil Law* 262.

⁷⁰ Burdick *Principles of Roman Law* 487.

⁷¹ Gaius III.197.

the fraudulent intention.⁷² Furthermore, *furtum* does not arise in cases where a person breaks into a house with the intention of injuring the owner of a house, and thereafter another person enters the house, which is still broken into, with the intention of touching or handling property belonging to the owner.⁷³ However, *furtum* arises if a person recognises that what he or she commits is theft.⁷⁴ Thus, "some object on which the guilty mind can operate" must be or have been present.

3.2.3 *Lucri faciendi gratia*

Lucri faciendi gratia was not originally incorporated into the Roman law of the Twelve Tables. Particular traces of *lucri faciendi gratia* initially appeared in Gellius' *Noctes Atticae*.⁷⁵ It was from the *Noctes Atticae* that a passage which resembles *lucri faciendi gratia* was borrowed. The passage reads *Qui alienum iacens lucri faciendi causa sustulit, furti obstringitur....*, that is, a person who "silently carries off another's property for the sake of gain is guilty of theft".⁷⁶ Consequent to this development, the Digest followed more or less the particular wording contained in the *Noctes Atticae*. More specifically, it affirms that: *Qui alienum quid iacens lucri faciendi causa sustulit furti obstringitur, sive scit cuius sit sive ignoravit; nihil enim ad furtum minuendum facit quod cuius sit ignoret.*⁷⁷ This means that a touching or handling of another person's (the owner's) property amounts to *furtum*.⁷⁸ This responsibility is also extended to situations where the property is found lying about by an owner.

Lucri faciendi gratia implies a benefit, increase or satisfaction. The benefit, increase or satisfaction is not restricted to a financial or pecuniary profit. Therefore, it is not determined by the presence of financial or monetary loss or reward.

3.2.4 *Ipsius rei vel usus eius possessionisve*

The *ipsius* element reveals three separate categories of *furtum*.⁷⁹ These groupings are *furtum rei*, *furtum usus* and *furtum possessionis*.⁸⁰ To begin with, *furtum rei* denotes the actual stealing of property (*furtum rei ipsius*).

⁷² Frazel 2005 *Am J Phil* 366-367.

⁷³ Digest XLVII.2.54.

⁷⁴ Rolfe *Attic Nights of Aulus Gellius* 349.

⁷⁵ Watson *Western Private Law* 271.

⁷⁶ Gellius *Noctes* XI.XVIII.XXI.

⁷⁷ Digest XLVII.2.54.4.

⁷⁸ Digest XLVII.2.54.4.

⁷⁹ See in general Matthaeus *De Criminibus*; Voet *Commentarius ad Pandectas*.

⁸⁰ Watson 1960 *Tijds Rgeschied* 202-203.

In this instance, a physical touching and handling, that is, *contrectatio*, of property suffices. Secondly, *furtum usus* basically means "theft of use".⁸¹ It particularly occurs in cases where property is used unlawfully or improperly, or property is obtained without the consent of the owner, or property is obtained from an owner for an unambiguous purpose and the use of it was beyond the limits imposed by an owner.⁸² Thirdly, *furtum possessionis* connotes theft of possession. It is in line with the principle that *furtum* can be committed against a person who has an interest in the property. These persons include *bona fide* or legitimate possessors of property.

3.3 *Post-classical*

The Institutes describe *furtum* as *contrectatio rei fraudulosa vel ipsius rei vel etiam usus eius possessionisve: quod lege naturali prohibitum est admittere* (Institutes, IV.1.1.).⁸³ This means "a fraudulent and deceitful appropriation of property in its entirety, for purposes of either making use of property or of attaining possession over property".⁸⁴ The fact that an appropriation must be or must have been in respect of the entire property is, it is submitted, elementary. In particular, the inclusion of the notion "in its entirety" remedies the uncertainty regarding whether or not the *contrectatio* should be in respect of the part or whole of the property. Furthermore, the definition as contained in the Institutes requires that a wrong must exist or must have existed. In other words, *contrectatio* must be against the law (that is, fraudulent) and intentional.⁸⁵ Mackenzie particularly favours the description of *furtum* contained in the Institutes.⁸⁶ Mackenzie describes *furtum* as the "felonious taking or carrying away of property of another" in order to make a profit. He also argues that the touching or handling must have been made with the intention of stealing property.⁸⁷ Therefore, *furtum* should be deemed to have been committed in circumstances where a person touches or handles property without the lawful and required consent (Institutes, IV.1.6.).⁸⁸

⁸¹ Adeley *et al* *World Dictionary of Foreign Expressions* 152.

⁸² *R v Olivier* 1921 TPD 120.

⁸³ Institutes IV.1.1.

⁸⁴ Sohm *Institutes* 417.

⁸⁵ Howes and Davis *Elements of Roman Law* 2016. See also Descheemaeker *Division of Wrongs* 3.

⁸⁶ MacKenzie *Studies in Roman Law* 230.

⁸⁷ MacKenzie *Studies in Roman Law* 230.

⁸⁸ Institutes IV.1.6.

The Institutes evidently depart from the classical concept of *furtum*. Firstly, they omit the element of *lucri faciendi gratia* from its definition. There are some who support this exclusion. They submit that there is no basis for including *lucri faciendi gratia* in the definition of *furtum*. There are also those who condemn the exclusion. In particular, they submit that the definition by the Institutes relies on a non-classical formulation of the meaning of *furtum*. Secondly, the Institutes add another element to *furtum*. This is referred to as the *ipsius rei vel etiam usus eius possessionisve*. The addition is labelled as *prima facie* outlandish. It is specifically strange and bizarre also insofar as it suggests that a "touching or handling of the use or possession" of property is possible.

4 English law

4.1 Background

The English law of theft has undergone a number of changes and modifications over the years. For example, early England simply recognised violent and forceful appropriations and/or dispossessions of property as theft. For the purpose of understanding the law of theft in England, the concepts "appropriation" and "property" should be examined. The term "appropriate" was regarded as having a meaning similar to that of "conversion".⁸⁹ However, due to its vague and misleading nature, the concept "conversion" fell into disuse and was later abandoned. Nowadays, the term "appropriate" implies any assumption by a person of the rights of an owner (that is, a person having possession or control of or over property or anything capable of being stolen,⁹⁰ whether or not such a person keeps or deals with the property as an owner.⁹¹ Conversely, property excluded land, roofs and particular portions of buildings. In some cases, title deeds were regarded as incapable of being stolen. For a proper comprehension of the notion of property, two periods need to be borne in mind. These are the eras before and after 1968. The *Larceny Act* represents the period before 1968 and the *Theft Act* symbolises the era after 1968. Before 1968, for purposes of the law of theft in England property included real and personal property, money (for example coins), debts, legacies, deeds and instruments relating to the title or right to property.⁹² Accordingly, incorporeal or intangible properties were not expressly mentioned. However, it is conceded that section 46(1) of the

⁸⁹ Griew *Theft Acts* 42.

⁹⁰ Section 1(2)(iii) of the *Larceny Act* of 1916 (the *Larceny Act*).

⁹¹ Section 3(1) of the *Theft Act* of 1968 (the *Theft Act*).

⁹² Section 46(1) of the *Larceny Act*.

Larceny Act was capable of being interpreted broadly.⁹³ Such an interpretation led or could lead to that section's being read to mean that property also encompassed incorporeal things.⁹⁴ Nevertheless, it is evident that after 1968 property also encompassed incorporeal or intangible things.⁹⁵ The aforementioned were referred to as a debt, a right under a trust, an obligation which was created by the law, and property which is capable of enforcement, such as credit or a benefit.⁹⁶

This traditional or strict formulation - forceful appropriations and/or dispossessions of property – has since been altered. This change was compelled by the necessity to establish a more relaxed and less forceful description of theft. Consequently, the capacity of the English criminal law was developed to include non-violent and non-forceful appropriations or dispossessions of property.⁹⁷ Following this, a distinction was made between robbery and theft. Robbery was an aggravated theft as it involved violence.⁹⁸ It was then treated as an open and less dishonourable offence than theft.⁹⁹ However, theft included a "fraudulent meddling" with another's private property.¹⁰⁰ This occurs in circumstances where property which belongs to another is appropriated surreptitiously (or stealthily)¹⁰¹ and in a dishonourable manner.¹⁰² Dishonesty exists or is deemed to exist if the possession of property is obtained by a trick, intimidation, or it was known or could be established that an owner did not consent or could not have consented to the obtaining.¹⁰³

It is noteworthy that two wrongs constitute theft in England. These are larceny¹⁰⁴ and receiving stolen property.¹⁰⁵ In this chapter the principles of

⁹³ Loubser *Theft of Money* 58.

⁹⁴ Loubser *Theft of Money* 58.

⁹⁵ Section 4(1) of the *Theft Act*.

⁹⁶ Griew *Theft Acts* 19. Also see Plucknett *Common Law* 46; Brickey 1980 *Vand L Rev* 1102.

⁹⁷ Dressler *Understanding Criminal Law* 545.

⁹⁸ Pollock and Maitland *History of English Law* 493-495.

⁹⁹ McLynn *Crime and Punishment* 90.

¹⁰⁰ Bentham *Of the Limits* 127-128.

¹⁰¹ McLynn *Crime and Punishment* 90.

¹⁰² Pollock and Maitland *History of English Law* 493-494. Also see s 1(5) of the *Theft Act*.

¹⁰³ Section 2(1)(a)-(c) of the *Larceny Act*.

¹⁰⁴ Within the English common law crime of larceny are found embezzlement and larceny by false pretences. Embezzlement is particularly a "statutory refinement of the common-law crime of larceny". It consists, amongst other things, of a deceitful appropriation of property which is under the custody and control of another person. See s 17-19 of the *Larceny Act*. However, larceny by false pretences amounts to the dishonest obtaining of the possession of property. See Stephen *Criminal Law* 259.

¹⁰⁵ Scheb *Criminal Law* 168.

larceny are discussed. These principles are distinguished from those that are related to the crime of receiving stolen properties.¹⁰⁶ Larceny is concerned with the actual stealing or theft of property.¹⁰⁷ Receiving stolen property relates to the incidents that follow the fact of stealing. In this instance, a person must knowingly receive the possession and control of property.¹⁰⁸ This receiving and control must subsequently be intended to permanently deprive the other of such property'.¹⁰⁹

4.2 Larceny

Various occurrences have had an influence on the development of the English law of larceny. These include developments in agriculture and industrialisation.¹¹⁰ Because of these advances the reach of the law of larceny had to be expanded. It was particularly hoped that this expansion would be able to regulate emerging and existing developments in society. Some label this evolution as a phenomenon which represents the impressions of past or historical "accidents".¹¹¹ More specifically, they argue that it led to the overall law of larceny's being encumbered with a jumble of inchoate rules. These rules required that incoherent and disjointed systems of legal theories should be introduced.¹¹²

The English principles of theft lack a single and accurate description of larceny. There are those who describe larceny as the *contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino, cujus rei illa fuerit*.¹¹³ In this instance, a physical and actual removal of property is essential.¹¹⁴ The removal is or should be made with the intention of permanently depriving the other person of his or her property.¹¹⁵ Others describe larceny as the act of:

(Dealing), from any motive whatever (or whatsoever), unlawfully and without claim of right with anything capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting

¹⁰⁶ Turner *Russell on Crime* 884.

¹⁰⁷ Section 1(1) of the *Theft Act*.

¹⁰⁸ Section 33(1) of the *Theft Act*.

¹⁰⁹ Section 33(1) of the *Theft Act*.

¹¹⁰ Hall *Theft, Law and Society* 14-33; Fletcher *Rethinking Criminal Law* 59-60; Fletcher 1976 *Harv L Rev* 469-471.

¹¹¹ *Commonwealth v Ryan* 1892 155 Mass 523, 30 NE 364 364-365.

¹¹² Fletcher 1976 *Harv L Rev* 472.

¹¹³ Bracton *Laws and Customs* 428. See also Reeves *History of English Law* 41.

¹¹⁴ Kiralfy *English Law and Its Institutions* 368.

¹¹⁵ Kiralfy *English Law and Its Institutions* 368.

that thing to the use of any person other than the general or special owner thereof.¹¹⁶

There are also those who argue *inter alia* that larceny is a "felonious intent" which excludes any claim or colour of right. This view initially appeared in an early English case of *R v Holloway*.¹¹⁷ The argument is that in order for larceny to arise at common law there must be a taking and carrying away of property; the taking or carrying away of property must be or have been trespassory in nature, that is it must amount to a meddling; the meddling must be against the will of the other person (owner), and the meddling must be or have been made with a felonious intent.¹¹⁸

4.2.1 *Trespassory taking and carrying away*

In England the trespassory taking of property is referred to as "caption" and the trespassory carrying away of property is known as "asportation".¹¹⁹ Caption is the actual or physical capturing of property. It entails a substantial taking or "severance" of property from the possession of an owner or a lawful possessor. In addition, it denotes an existence of control of or over property. Asportation implies the physical carrying away of property.¹²⁰ The carrying away of property does not need to be distant.¹²¹ In other words, asportation is presumed to arise in cases where:

(Every part) of it (the property) is moved from that specific portion of space which it occupied before it was moved ... and when it is severed from any person or thing to which it was attached in such a manner that the taker has, for however short a time, complete control of it.¹²²

Consequently, even a carrying away of property to a distance of "hair's breadth" suffices.¹²³ By way of illustration, asportation must follow the taking of property. For example, larceny does not arise and/or is not deemed to arise in cases where a thief is found guilty of caption but not for asportation.¹²⁴ By reason of the aforementioned, both the caption and asportation must be alleged and proved independently.¹²⁵

¹¹⁶ Stephen *Criminal Law* 254. Also see Scheb *Criminal Law* 169.

¹¹⁷ See *R v Holloway* 1 Den CC 370.

¹¹⁸ *R v Ashwell* 16 QBD 190; *R v Lawrence* 1970 3 All ER 933 935.

¹¹⁹ Kiralfy *English Law and Its Institutions* 368; Dressler *Understanding Criminal Law* 546.

¹²⁰ Hall *Criminal Law* 138-139.

¹²¹ Singer and La Fond *Criminal Law* 273-274.

¹²² Stephen *Criminal Law* 246.

¹²³ Hall *Criminal Law* 259.

¹²⁴ Scurlock 1948 *Temple LQ* 12.

¹²⁵ Scurlock 1948 *Temple LQ* 12.

It is conceded that the inclusion of caption and asportation represents the original and traditional concept of the English law of larceny.¹²⁶ In particular, medieval England described larceny by reference to the discernible or observable fact of the taking and carrying away of property.¹²⁷ Consequently, a presence or absence of deceit (deceitful behaviour) was irrelevant in determining whether or not larceny had arisen in each case. In other words, caption and asportation were adequate in order to establish the existence of larceny.¹²⁸

The notion of "trespass" appeared during the middle of the thirteenth century.¹²⁹ Trespass is abstracted from the action *trespass de bonis asportatis*. *Trespass de bonis asportatis* is the right of recourse for the "wrongful taking and carrying away" of property and/or certain chattels. Within the framework of larceny, *trespass de bonis asportatis* means that both the caption and the asportation must take place in cases where there is no claim of right.¹³⁰ Accordingly, an innocent caption and asportation which is made in good faith does not qualify as larceny.¹³¹ The trespassory nature of the caption and asportation is deduced from the (wrongful or unlawful) manner in which the property is acquired.¹³² The fact that the caption and asportation have the effect of depriving a possessor of possession demonstrates the existence of the trespassory taking and carrying away.¹³³ This view is followed particularly by Pollock and Maitland.¹³⁴ They state that larceny involves "a violation of possession; it is an offence against a possessor and therefore can never be committed by a possessor".¹³⁵

Given the aforementioned, an objective or purposeful inquisition or investigation is undertaken. The aforementioned investigation assists in establishing whether or not there is a caption and asportation; the caption

¹²⁶ James *English Law* 199.

¹²⁷ James *English Law* 199.

¹²⁸ Dressler *Understanding Criminal Law* 546.

¹²⁹ Scurlock 1948 *Temple LQ* 13.

¹³⁰ *Regina v Williams* 1953 1 QB 660 665-666.

¹³¹ *Regina v Williams* 1953 1 QB 660 665-666. The methods within which an innocent and a *bona fide* taking and carrying away of property can be made are listed in s 2(1) of the *Theft Act*.

¹³² Scheb *Criminal Law* 169.

¹³³ Brody and Acker *Criminal Law* 305. For further interesting reading on the study regarding the deprivation of the possessor of possession of the property see in general, *R v Hudson* 1943 1 KB 458.

¹³⁴ Pollock and Maitland *History of English Law* 497.

¹³⁵ Pollock and Maitland *History of English Law* 497.

and asportation deprive the owner of ownership of the property, and the caption and asportation are contrary to the wishes of an owner.¹³⁶

4.2.2 *Absence of consent or invito domino*

Originally, uncertainty existed regarding the relevance or importance of *invito domino* to the English law of larceny. However, it appears that an examination of *invito domino* in Roman law might have motivated its adoption in England. It can be deduced from the works of Bracton that *invito domino* is essential to the English law of larceny.¹³⁷ In particular, he relates the concept of *invito illo domino* to his definition of larceny.¹³⁸ Therefore, it is argued that Bracton's insistence on *invito domino* influenced the addition of this notion as one of the elements of larceny. *Invito domino* relates to the mental state of mind or *mens rea* of a thief at the time that larceny is committed. It has its basis in the fact that both the caption and asportation must be such that the owner or lawful possessor could not have consented or could not be or have been expected to consent to the caption and asportation.

The position relating to *invito domino* seems to have changed after 1968. More specifically, section 1 of the *Theft Act* excludes the fact that the caption and asportation must be without the consent of the owner or a lawful possessor. This omission is particularly welcomed by some English courts. The most notable case is *R v Lawrence*.¹³⁹ In particular, the exclusion of *invito domino* in section 1 of the *Theft Act* is said to be deliberate rather than inadvertent.¹⁴⁰ Accordingly, it is noted that the presence or absence of consent is simply relevant to the question regarding whether or not there was a dishonest appropriation of property.¹⁴¹ The requisite dishonesty cannot be inferred and/or implied from the existence of consent to the caption and asportation.¹⁴²

4.2.3 *Animus furandi*

Common-law jurists hold differing views in relation to the significance of *animus furandi* to the English law of larceny. Plucknett argues that the early English law of larceny did not rely on intention in order to ascertain if

¹³⁶ Fletcher *Rethinking Criminal Law* 5-6.

¹³⁷ Bracton *Laws and Customs* 424.

¹³⁸ Bracton *Laws and Customs* 424.

¹³⁹ See in general *R v Lawrence* 1970 3 All ER 933. Also see *Lawrence v Commissioner of the Police for the Metropolis* 1971 2 All ER 1253.

¹⁴⁰ *R v Lawrence* 1970 3 All ER 933 935-936.

¹⁴¹ *R v Lawrence* 1970 3 All ER 933 936.

¹⁴² *R v Lawrence* 1970 3 All ER 933 935.

there had been theft or not.¹⁴³ Consequently, the presence or absence of *animus* was insignificant.¹⁴⁴ However, Fletcher and Blackstone provide that *animus furandi* is fundamental to the English law of larceny,¹⁴⁵ but disagree as to the nature and content of the required *animus furandi*. Blackstone submits that *animus furandi* serves or can serve as the replacement of the Roman law principle of *lucri causa faciendi* (for the sake of profit or gain).¹⁴⁶ In particular, the acquiring of property "for the sake of gain" is, according to Blackstone, tantamount to the obtaining of property "feloniously".¹⁴⁷ However, Fletcher opposes the idea that *animus furandi* could be equated to *lucri causa faciendi*.¹⁴⁸ Fletcher particularly advocates that the intention to appropriate property is sufficient to attract liability for larceny.¹⁴⁹ Subsequently, the appropriation must be accompanied by an intention to steal¹⁵⁰ or, as sometimes declared elsewhere, "an intent to deprive the owner permanently of his or her property".¹⁵¹ This intention must be present at the time that the property is taken or carried away.¹⁵² Consequently, a person (a thief) who takes or carries away the property must:

(know when) he (or she) takes (and carries away) it (the property) that it is the property of another person, and he (or she) must take (and carry away) deliberately, not by mistake, and with an intention to deprive the person from whom it is taken of the property in it.¹⁵³

From the discussion above it is established that the English law of larceny emphasises a permanent deprivation as opposed to a temporary or intermittent deprivation of property.¹⁵⁴ This deprivation does not apply to things that cannot be physically captured and asported, such as data.¹⁵⁵ Similarly, permanent deprivation is not extended to properties that cannot be or are incapable of being owned, such as the sky or the water in the seas.

¹⁴³ Plucknett *Common Law* 447.

¹⁴⁴ Plucknett *Common Law* 447.

¹⁴⁵ See in general Blackstone *Commentaries*. Also see Fletcher *Rethinking Criminal Law* 6; Bracton *Laws and Customs* 231-232.

¹⁴⁶ Rapalje 1892 *Crim L Mag & Rep* 706.

¹⁴⁷ Rapalje 1892 *Crim L Mag & Rep* 706.

¹⁴⁸ Fletcher *Rethinking Criminal Law* 7.

¹⁴⁹ Fletcher *Rethinking Criminal Law* 7.

¹⁵⁰ Section 1(1) of the *Larceny Act*, s (1) of the *Theft Act*.

¹⁵¹ Section 1(1) of the *Larceny Act* read with s 1(1) of the *Theft Act*.

¹⁵² Griew *Theft Acts* 11.

¹⁵³ *R v Hudson* 1943 1 KB 458.

¹⁵⁴ Brickey 1980 *Vand L Rev* 1109.

¹⁵⁵ *Oxford v Moss* 1979 68 Cr App R 183 184-186.

5 South African law

5.1 Background

The South African law of theft is founded on a mixed and/or hybrid legal system.¹⁵⁶ Its principles are a combination of the Roman (as influenced by the Dutch legal system) and English legal systems. The Roman-Dutch and English legal systems were transplanted to the Cape of Good Hope during 1652 and 1795 respectively.¹⁵⁷ Therefore, a study of the principles of theft in South Africa is generally partly Roman-Dutch and partly English. These principles have evolved over the years and were adapted in a number of ways to accommodate new forms of challenges.

In the section below the developments of the principles of theft in South Africa are examined. Accordingly, different nomenclatures that represent their development are distinguished. These are referred to as the traditional and adapted revisions of theft.

5.2 Traditional description

The traditional approach to theft in South Africa is that it amounts to an unauthorised *contrectatio* with the intention to steal property which is capable of being stolen.¹⁵⁸ The Roman law approach to *contrectatio*, that is the touching or handling, is thus retained. The *contrectatio* must be or must have been illegal or wrongful. An intention to steal, that is *animus furandi*, demonstrates whether or not it is unlawful or wrongful.¹⁵⁹ The *animus* must evidence an "evil intent" or "*kwaad voornemen*" on the part of a thief.¹⁶⁰ Different types of property are distinguished for the purposes of studying theft in South Africa. Some are absolutely incapable of being stolen, whereas others are relatively incapable of being stolen. The examples of the former are immovable properties, incorporeal properties, for example an idea or design, and properties that are common to all, for example air, water of the sea, and public streams. The examples of the latter are things that are not owned but can be owned (*res nullius*), one's own property (*res sua*) and wild animals.

¹⁵⁶ MacQueen "Two Toms and the Ideology for Scots Law" 55. Also see Sinatambou "Approach of Mixed Legal Systems" 271.

¹⁵⁷ Burchell "Criminal Law" 447.

¹⁵⁸ Anders and Ellson *Criminal Law* 264-265. Also see Maré "Public Law" 1125.

¹⁵⁹ Lansdown, Hoal and Lansdown *Gardiner and Lansdown: South African Criminal Law* 1661.

¹⁶⁰ *R v Sibiyi* 1955 4 All SA 312 (A) 418.

The traditional formulation of theft has been followed by some courts in South Africa. One example is the case of *R v Larforte*.¹⁶¹ The facts were briefly that the accused broke into another person's (Dr. Abdurahman's) garage. He then took the latter's motor car. He drove the car around Cape Town. While still driving, he bumped it into a lamp post and caused damage to it. He then abandoned the car a couple of streets away from Dr. Abdurahman's garage. In making a decision, the court stated that theft encompasses, amongst other things, an intention to terminate the owner's enjoyment of his or her right to ownership. Accordingly, an intention to suspend the owner's enjoyment of his or her right to ownership is inadequate.¹⁶²

It is argued that the traditional description of theft is problematic in a number of respects. Firstly, the fact that the requisite *contrectatio* implies a tangible or physical control of or over property is a challenge. In particular, it demonstrates a total disregard of the fact that other non-traditional forms of property, for example data, are naturally incapable of being physically touched or handled. Consequently it fails to recognise that a *contrectatio* in respect of this property can also be carried out in circumstances where the actual or physical assumption of control is absent. Secondly, it fails to regulate and/or deal with cases where the *contrectatio* is temporary. One such case is *R v Dier*.¹⁶³ The Dier case dealt with an appeal from a decision of the Magistrate's Court. In this case Dier wished to cross a particular river (the Kowie River). In order to carry out his objective, Dier needed to board a boat. While still deciding on the next step to take, Dier saw that there were ferryboats that were moored at the edge of the river. He therefore untied one of those boats and duly crossed the Kowie River.¹⁶⁴ One of the ferryboats was subsequently found damaged the following morning. Therefore, the question was, amongst others, whether or not the taking of the ferryboat, although it was not permanent, could be prosecuted under the crime of theft.¹⁶⁵ The court answered this question in the affirmative. In particular, Smith J held that:

I do not intend by anything ... to lay down that - if a man takes away anything belonging to another and applies it to his own purposes, and then abandons it with a reckless disregard as to whether it is destroyed or not, and it is (so)

¹⁶¹ *R v Larforte* 1922 CPD 487 543.

¹⁶² *R v Larforte* 1922 CPD 487 543.

¹⁶³ *R v Dier* 1883-1884)3 EDC 436 437.

¹⁶⁴ *R v Dier* 1883-1884)3 EDC 436 437.

¹⁶⁵ *R v Dier* 1883-1884)3 EDC 436 437.

destroyed – such an act is not criminal. On the contrary, I am of the opinion that a man so acting can clearly be found guilty of theft.¹⁶⁶

In this case the fact that theft should be committed with the necessary intention to derive a benefit or gain was omitted. Smith J argued that only a fraudulent taking is necessary. The fraudulent taking is commonly equated with the notion of *contractatio fraudulosa*.¹⁶⁷ The presence or not of *contractatio fraudulosa* requires an enquiry to be made regarding whether or not the requisite intention to deprive an owner of the property exists. If it exists, *contractatio fraudulosa* is inferred from the manner in which the property is dealt with after the taking.¹⁶⁸ Consequently, a person who "fraudulently appropriates" another's property and deprives the owner of property is generally liable for theft.¹⁶⁹

The case of *R v Olivier*¹⁷⁰ also exposed the fallacies that are associated with the traditional description. In this case the accused, Olivier, and various others took property (being a motor vehicle) belonging to another person. They used this property for their purposes and thereafter carelessly abandoned it. The court per Wessels JP stated that it would be an injustice to the innocent party, that is, the owner or lawful possessor, if:

(Our law) were otherwise for then it would be no offence for a person who is a stranger to me to take my motor car out of the garage and drive it to Cape Town, leave it at a garage there with as much petrol as it contained, and then write to me that he is off to America and that he only took my car for the temporary purpose of getting to Table Bay in order to catch the boat.¹⁷¹

Accordingly, the court developed the element related to "fraud". It stated that *contractatio fraudulosa* depends, or at least should depend, on the existence of an intention to deprive. The requisite intention is deduced from the act itself, that is the fraudulent appropriation and the subsequent reckless dealing with the property. This is the case because not only is the thing required to be taken without the consent of the owner, but also that "the taker should have intended to terminate the owner's enjoyment of his (or her) rights".¹⁷² This requisite "intention" may be inferred from various

¹⁶⁶ *R v Dier* 1883-1884)3 EDC 436 437.

¹⁶⁷ *R v Lessing* 1907 21 EDC 220 222. See also *R v Makogo* 1915 TPD 516 518.

¹⁶⁸ *R v Lessing* 1907 21 EDC 220 222.

¹⁶⁹ *R v Fortuin* 1880-1884 1 Buch AC 290 299.

¹⁷⁰ *R v Olivier* 1921 TPD 120 125.

¹⁷¹ *R v Olivier* 1921 TPD 120 125.

¹⁷² *R v Mtshali* 1960 4 All SA 156 (N) 158.

factors, especially those that are related to the reckless dealing with the property.¹⁷³

5.3 Adapted description

Recently the law of theft in South Africa has been developed. These growths have consequently led to the acceptance of appropriation, an English principle, rather than *contrectatio*, when a study is made of the principles of the law of theft. Snyman provides justification for the move from *contrectatio* to appropriation in South Africa.¹⁷⁴ He states the following:

Contrectatio might have been a satisfactory criterion centuries ago when the economy was relatively primitive and primarily based on agriculture. In today's world with its much more complicated economic structure, it is far better to use the more abstract concept of appropriation to describe the act of theft than the term *contrectatio*, unless one discards the original meaning of the latter term and uses it merely as a technical *erudite-sounding* word to describe the act of theft.¹⁷⁵

Appropriation is here used to mean the intention to deprive the owner of the benefits of ownership. It is simply the assumption of control of or over the property of another person. This control does not necessarily translate into a touching or handling of property. It is equated with the gaining of possession of or meddling with property.¹⁷⁶

The meaning and importance of that which is enunciated by Snyman above can be deduced by examining the cases pertaining to the appropriation of certain intangible property. These are fully captured in, amongst others, the cases of *S v Kotze*,¹⁷⁷ *S v Mintoor*,¹⁷⁸ *Nissan South Africa (Pty) Limited v Marnitz (stand 1 at 6 Aeroport (Pty) Limited intervening)*¹⁷⁹ and *S v Ndebele*.¹⁸⁰ These cases acknowledge the impact that recent developments have made on the principles of theft. Of particular importance for the purposes of this paper is the traditional Roman law element of *contrectatio*. It has already been stated that this element requires that a physical touching or handling of property capable of being stolen be made. Within the South African context, *contrectatio* is

¹⁷³ *R v Mtshali* 1960 4 All SA 156 (N) 158.

¹⁷⁴ See the definition of theft in Snyman *Criminal Law* 483.

¹⁷⁵ Snyman *Criminal Law* 487.

¹⁷⁶ Snyman *Criminal Law* 488-489. See also *S v M* 1982 1 SA 309 (O) 312C-D.

¹⁷⁷ *S v Kotze* 1961 1 SA 118 (SCA).

¹⁷⁸ *S v Mintoor* 1996 1 SASV 514 (K) (hereinafter the *Mintoor* case).

¹⁷⁹ *Nissan South Africa (Pty) Limited v Marnitz (Stand 1 at 6 Aeroport (Pty) Limited Intervening)* 2005 1 SA 441 (SCA).

¹⁸⁰ *S v Ndebele* 2012 1 SACR 245 (GSJ) (hereinafter the *Ndebele* case).

interpreted to mean the assumption, touching or handling of the property of another.

The *Ndebele* case is significant to this paper. It criticises the decision of the court in the *Mintoor* case.¹⁸¹ In the *Mintoor* case the court had to decide whether electricity could be a subject of theft or not. In responding to this question the court reiterated the view that things which do not have corporeal existence are incapable of being stolen.¹⁸² Consequently, it was stated that electricity is energy and that energy is incapable of being stolen.¹⁸³ Following this line of reasoning the court in the *Ndebele* case held that the *Mintoor* case disregarded existing authority and failed to consider the existing developments in the law of theft.¹⁸⁴ The facts in the *Ndebele* case were briefly that the accused (Ndebele and others) faced a number of charges regarding *inter alia* the theft of vending machines and electricity belonging to Eskom. The position regarding the theft of the machines was easy to determine. These were tangible objects or property and a *contractatio* in relation to them was established. The most difficult question was whether or not electricity is capable of being stolen. In other words, is *contractatio* of or over electricity possible? Following the decision in the *Mintoor* case, it was submitted on behalf of the accused that electricity "could not be stolen".¹⁸⁵ In other words, a *contractatio* in respect of electricity is impossible either in fact or the law.

Before it could comment on this, the court referred to a number of previous court decisions (for example, *S v Kotze*, *S v Mintoor*, *Nissan South Africa (Pty) Limited v Marnitz (stand 1 at 6 Aeroport (Pty) Limited intervening)* and *S v Harper*¹⁸⁶) and surmised that:

It appeared to me that there was a more than slight possibility (which would be more conveniently decided at the end of the case) that electricity is in fact capable of theft and that the law had already been advanced by judgements relating, in particular, to theft of incorporeals.¹⁸⁷

Consequently, the court examined the meaning and importance of *contractatio* for the purposes of the law of theft in South Africa. It acknowledged that according to Roman-Dutch law only corporeal or

¹⁸¹ *Ndebele* case 255.

¹⁸² Williams *Textbook of Criminal Law* 736.

¹⁸³ *Mintoor* case 515.

¹⁸⁴ *Ndebele* case 255.

¹⁸⁵ *Mintoor* case 248.

¹⁸⁶ 1981 2 SA 638 (D).

¹⁸⁷ *Ndebele* case 248.

movable things are capable of being stolen.¹⁸⁸ Therefore, the property stolen must be "...*'n selfstandige deel van die stoflike natuur*".¹⁸⁹ In other words, the thing must belong to the owner or form part of the latter's estate.¹⁹⁰ However, it applied *S v Harper* (where it was said that an incorporeal is capable of being stolen)¹⁹¹ and held that *contrectatio* is or should not only be constituted by the physical touching or handling of property. It is or should also be constituted by an appropriation of a "characteristic which attaches to a thing and by depriving the owner of that characteristic".¹⁹² This is the case because if it were to be held that:

Electricity is incapable of being stolen, then anyone would be entitled without permission of the owner to attach a load to his batteries and deplete the energy within them, thereby rendering the batteries useless. Yet nothing will have been stolen. Nothing physically has been taken from the battery; however, its characteristics have changed.¹⁹³

In view of the aforementioned, the court concluded that electricity can, despite the fact that it amounts only to energy and is incorporeal property, be the object of theft.¹⁹⁴

In addition to this, two occurrences are identified that mark the expansion of the principles of theft beyond their traditional format. These are the legislative and judicial interventions. The legislative intervention came in the form of the *Game Theft Act*¹⁹⁵ and the *Copyright Act*,¹⁹⁶ among others.¹⁹⁷ These acts particularly acknowledge that there is a change in modern legal thinking regarding the proper understanding of theft. The *Game Theft Act* accepts that *contrectatio fraudulosa* can be carried out to property which traditionally was regarded as being incapable of being stolen. Such property includes wild animals.¹⁹⁸ In this respect, the *Game Theft Act* protects the rights that the owners have over this property.¹⁹⁹ The *Copyright Act* protects the intellectual property of a person. This is the products of a person's mind, such as the ideas.²⁰⁰ The *Copyright Act*

¹⁸⁸ Milton *Criminal Law and Procedure* 600.

¹⁸⁹ See Snyman *Strafreg* 493.

¹⁹⁰ Snyman *Criminal Law* 483.

¹⁹¹ *S v Harper* 1981 2 SA 638 (D) 664.

¹⁹² *Ndebele* case 254-255.

¹⁹³ *Ndebele* case 256.

¹⁹⁴ *Ndebele* case 254-255.

¹⁹⁵ 105 of 1991.

¹⁹⁶ 98 of 1978.

¹⁹⁷ It is acknowledged that the legislative interventions are not limited to the ones stated above. Also see the *Electricity Act* 41 of 1987.

¹⁹⁸ Section 3(a) of the *Game Theft Act* 105 of 1991.

¹⁹⁹ Section 1(a) of the *Game Theft Act* 105 of 1991.

²⁰⁰ Visser *et al Mercantile and Company Law* 707-709.

particularly forbids others from wrongfully appropriating or interfering with this property.²⁰¹

Furthermore, the courts have also read the principles of theft to mean that appropriation can be undertaken in respect of other intangible or incorporeal objects. An example is the case of *S v Graham*.²⁰² In this case, company (A) was on the verge of being liquidated. During this period, A received a cheque amounting to thirty-seven thousand one hundred and fifty three rand eighty eight cents (R 7 153.88). It was later established that the cheque had been erroneously sent to A. A Managing Director of A (Graham) was aware of the mistake. However, Graham paid and/or caused the cheque to be paid to the overdrawn bank account of A. Graham thought that A would recover from its debts and thereafter be in a position to repay the money. However, A was finally wound up. At the time of its winding up only a portion of the money was repaid. Graham was charged in his personal capacity with the theft of the cheque and/or the sum of money paid to A.²⁰³ The question was whether the paying of the cheque into A's account amounted to theft or not.²⁰⁴ The court conceded to the fact that traditionally theft amounts to a physical and actual appropriation of property. In this respect, tangible and corporeal objects, save where these are expressly or impliedly excluded, constitute the aforesaid property. However, the court stated that the principles of theft are founded on a "living system". This system is flexible and adaptable. In addition, this flexibility enables the system to be in touch with current realities and to be able to respond to existing societal conditions.²⁰⁵ Consequently, the court concluded that money is capable of being stolen even in cases where it is represented by entries in books of accounts, such as credits.²⁰⁶

Having examined the developments described above, it is now possible to investigate the position of data in the law of theft. The importance of doing so is drawn from the fact that data has now become a "public good".²⁰⁷ Private and public institutions, governments, businesses and individuals expend time, effort and money to gather information.²⁰⁸ Following these

²⁰¹ See in general ch 2 of the *Copyright Act* 98 of 1978.

²⁰² See *S v Graham* 1975 3 All SA 572 (A).

²⁰³ *S v Graham* 1975 3 All SA 572 (A) 572-575.

²⁰⁴ *S v Graham* 1975 3 All SA 572 (A) 572-575.

²⁰⁵ *S v Graham* 1975 3 All SA 572 (A) 578.

²⁰⁶ See *R v Herholdt* 1957 3 All SA 105 (A). Also see *R v Stanbridge* 1959 3 All SA 218 (C).

²⁰⁷ Elkin-Koren and Salzberger *Law, Economics and Cyberspace* 49-50.

²⁰⁸ *Regina v Stewart* 149 DLR (3d) 583 595; Weinrib 1988 *UTLJ* 117.

efforts, they then (reasonably) believe that they have real rights in or over this information.²⁰⁹ Furthermore, information or other data can be used in order to prevent other crimes, for example, money laundering and terrorism or terrorist financing.²¹⁰

6 ICT and its effects

Recent ICTs have had an effect on the traditional principles of *furtum* or theft. For example, the law of theft deals with the *contrectatio* of property. Although there was doubt in Classical Rome on whether *contrectatio* should be in respect of the whole or part of the property, post-classical Roman law agreed that it must be in relation to the entire property. The *contrectatio* has to be made with the aim of deriving a benefit. This benefit is not limited only to pecuniary income. It must be made with the necessary intention, that is, *dolus malus* or *invito domino*. *Animus furandi* should accompany the touching or handling. In South Africa this *animus* must relate to an intention to deprive the owner of the property of the benefits of ownership. The aforementioned standpoint seems to be similarly adopted in England. For example, it is required that there should be a permanent deprivation of property. In other words, there has to be caption and asportation. This then excludes a deprivation which on the facts appears to be temporary.²¹¹ The deprivation has to be effected over property which is capable of being stolen. It does not extend to objects or things that cannot be physically or actually captured and carried away, such as data.²¹²

The emergence of ICTs particularly exposes the setbacks in the study of *furtum* or theft. An example is a case where data is accessed from a source (a document or a computer) without the consent of the owner. Data is generally incorporeal or intangible property.²¹³ However, this recognition does not necessarily imply that the existing principles of theft regard it as being capable of being stolen. This was accepted in one of the famous English cases of *Oxford v Moss*. The facts in this case were briefly that: The defendant (Moss) was a student in the Faculty of Engineering at the University of London. It was alleged that the defendant dishonestly took physical possession of certain confidential information. The information

²⁰⁹ *Regina v Stewart* 149 DLR (3d) 583 598. See also *Thomas Marshall (Exports) Ltd v Guinle* 1978 3 All ER 193 209-10; Samuelson 1991 *Comm ACM* 15.

²¹⁰ See for example the *Financial Intelligence Centre Act* 38 of 2001, the *Proceeds of Crime Act* 76 of 1996, and the *Drugs and Drugs Trafficking Act* 120 of 1992.

²¹¹ Brickey 1980 *Vand L Rev* 1109.

²¹² *Oxford v Moss* 1979 68 Cr App R 183 184-186.

²¹³ *S v Graham* 1975 3 All SA 572 (A) 229.

was contained in examination questions for a Civil Engineering examination.²¹⁴ The question before the court was whether or not Moss stole the information which was contained in those question papers. It was contended on behalf of Moss that he did not intend to deprive the university or the senate permanently of the exam paper. He simply wished to memorise the questions in order to prepare for the exams. The court, per Smith J, conceded that the defendant's conduct amounted to cheating. Given this dishonesty, society condemns or should condemn such conduct.²¹⁵ However, the court concluded that the information, and not the exam question paper, was not property for the purposes of the law of theft. Consequently, the defendant was incapable of taking such information from the plaintiff.²¹⁶

The court in *Oxford v Moss* strictly applied the principles of *furtum* or theft. It relied on the fact that data cannot be touched or handled and that it can be accessed and/or made available to different users without actually or physically dispossessing the lawful owner or possessor. However, this conclusion is inconsistent with recent societal developments. These developments have resulted in the emergence of contemporary wrongs. An example is electronic or e-crimes such as phishing, computer cracking, distributed denial of service attacks, and man-in-the-middle attacks. E-crimes are crimes involving computers.²¹⁷ They include a dishonest conduct or act which is associated with the mechanical processing or transmission of data.²¹⁸ In this instance, a complete dispossession of data is not a requirement. It may be appropriated even though a person (or owner) still possesses the original thereof. Also, the presence of an intention to appropriate is immaterial. However, its presence could assist in establishing the substance of e-crimes.²¹⁹

The position described above does not appear to have been adequately addressed by Chapter XIII of the ECT Act. This Chapter specifically deals with "cybercrimes" as opposed to the theft of information online. Simply, it prohibits the actions of a person who, after taking note of any data, becomes aware of the fact that he or she is not authorised to access, intercept or interfere with that data and, despite this awareness, still

²¹⁴ *Oxford v Moss* 1979 68 Cr App R 183 184-185.

²¹⁵ *Oxford v Moss* 1979 68 Cr App R 183 184-185.

²¹⁶ *Oxford v Moss* 1979 68 Cr App R 183 184-185.

²¹⁷ Franklin *Computer Crime* 7.

²¹⁸ Franklin *Computer Crime* 7-13.

²¹⁹ Van Der Merwe *Communication Technology Law* 61.

continues to access, intercept or interfere with that data.²²⁰ From this, Chapter XIII of the ECT Act has to be distinguished from sections 107 and 108 of the Ghanaian *Electronic Transactions Act*.²²¹ On the one hand, section 107 of the Act regulates the theft or stealing of information online. It states that theft arises in situations where anything²²² is "done using an electronic processing or procuring procedure system whether or not the appropriation was by use of an electronic processing procedure".²²³ This is the case even in circumstances where the medium used in the theft was, in whole or in part, an electronic record.²²⁴ On the other hand, section 108 of the *Transactions Act* covers the unlawful appropriation of information online. It provides that appropriation applies to "anything whether or not the moving, taking, obtaining, carrying away or dealing is by means of an electronic processing or procuring procedure in part or in whole."²²⁵

In view of the above, it is submitted that the Ndebele case remains the closest step taken by South Africa towards recognising that non-traditional forms of property such as data are also capable of being stolen. This case states that theft of *res incorporeal* is possible in South Africa. More specifically, it regards *contrectatio* as amounting to an appropriation of the special characteristics which are attached to the property and the consequent deprivation of ownership. However, the Ndebele case still leaves open the question relating to whether or not data is capable of being stolen.

7 Conclusion

The fundamental premise of the law of theft both in Roman and South African law of theft is that there must be a *contrectatio* of or over property. This entails an assumption of control of or over the property of another. The object of *contrectatio* must thus be to permanently deprive the other person or owner of the benefits of property. Also, it must be made with the necessary *animus*, that is the *animus furandi*.²²⁶ Although this approach seems to have been subsequently reformed, the current position is that a

²²⁰ See s 85 read with ss 86 and 87 of the ECT Act.

²²¹ 772 of 2008, hereinafter referred to as the *Transactions Act*.

²²² Section 108(2) of the *Transactions Act* defines a thing for the purposes of a cyber offence as including "any electronic related matter which results in the loss of property, identity, electronic payment medium, information, electronic record and any related matter whether tangible or intangible wherever located on any network if the accused is subject to prosecution under this Act".

²²³ Section 107(a) of the *Transactions Act*.

²²⁴ Section 107(b) of the *Transactions Act*.

²²⁵ Section 108(1) of the *Transactions Act*.

²²⁶ *R v Sibiyi* 1955 4 All SA 312 (A) 418.

contrectatio over property must still exist. Given the fact that data cannot be touched or handled, *contrectatio* in respect of this property is therefore impossible. This position is not sufficiently addressed by the English law notion of appropriation. In particular, appropriation requires that there should be a definite or actual meddling with the property of another before theft can be deemed to arise. This meddling must give rise to a physical taking and carrying away of property. In these circumstances, the caption and asportation must be *invito domino*.

It is observed that the law of theft is founded on a living system of rules or principles. This system is flexible and adaptable. It is particularly in touch with current societal realities. In Rome the classical formulation of *furtum* was in part deviated from during the post-classical study of *furtum*. Similarly, the description of theft in both England and South Africa was adapted in order to accommodate novel developments. The most important of these were commerce, industry and agriculture. These alterations resulted in the existence of new forms of property which were conventionally regarded as wholly or partially incapable of being stolen or being included into the category of property capable of theft.²²⁷ However, these developments in the law of theft fail to adequately respond to the question of whether or not it is legally possible to steal data. This conclusion is drawn from the fact that the existing principles of theft continue to perpetuate the view that theft amounts to an actual or physical assumption of control of property. In other words, theft amounts to the deprivation of the rights of ownership over property. Consequently, it is not recognised that an appropriation of data does not necessarily result in the actual taking and carrying away of that data. More specifically, data is appropriated in situations where there is wrongful interference with the owner's rights of use and enjoyment of the said data. This interference can sometimes arise in situations where the owner is dispossessed of only the part or a copy of the data.

With this in mind, it is proposed that a change in thinking is necessary. This shift should be in line with current developments, especially those that are compelled by the emergence of novel forms of technology. This does not necessarily entail that the principles of theft need be developed. It simply affirms that data may be appropriated, albeit differently from the traditional methods. Therefore, a *contrectatio* in respect of this property ought to be concentrated on the appropriation of its characteristics, namely, the sensitivities of a computer user, and the eventual deprivation

²²⁷ Snyman *Criminal Law* 487.

thereof. If, indeed, it becomes necessary to expand the principles of theft so as to address these recent developments, it is recommended that the reasoning in the case of *S v Graham* should be followed. Accordingly, any change or alteration to the principles of theft should be minimal. In particular, the change ought to be brought about in a manner which retains the essential elements of theft.

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Financial Intelligence Centre Act 38 of 2001

Game Theft Act 105 of 1991

Larceny Act of 1916 (England)

Proceeds of Crime Act 76 of 1996

Theft Act of 1968 (England)

List of Abbreviations

Am J Phil	American Journal of Philosophy
BUJSTL	Boston University Journal of Science and Technology Law
CLJ	Cambridge Law Journal
Comm ACM	Communications of the Association of Computing Machinery
Crim L Mag & Rep	Criminal Law Magazine and Reporter
ECT	Electronic Communications and Transactions
ECT Act	Electronic Communications and Transactions Act 25 of 2002
Harv L Rev	Harvard Law Review
ICTs	Information and Communication Technologies
J Leg Hist	Journal of Legal History
Temple LQ	Temple Law Quarterly
Tijds Rgeschied	Tijdschrift voor Rechtsgeschiedenis
UTLJ	University of Toronto Law Journal
Vand L Rev	Vanderbilt Law Review
WWW	World Wide Web

