

Making off

I would be grateful for an opportunity to reply to Prof. Smith's criticism ([1982] Crim LR 612) of my view that a debtor whose bad cheque is accepted in payment does not 'make off' within the meaning of section 3 of the Theft Act 1978.

First may I offer as a draftsman an articulation of exactly what I consider 'making off' (as used in section 3) to mean? This can conveniently be expressed in the form of an additional subsection, as follows-

'(2A) For the purposes of this section, a person 'makes off' where he departs without the creditor's consent from the spot where payment is required or expected from him; and in this connection-

(a) the creditor's consent is to be treated as effective notwithstanding that it was induced by deception;

(b) the creditor's consent to the fetching by a person of the means of payment is not to be treated as consent to his departure.'

In my submission the concept of 'making off' is entirely concerned with D's physical movements at the time, coupled with the creditor's actual acquiescence (or otherwise) in those movements.

Section 3 is directed only to the well-known case of the bilker, whose offence is that he aims to disappear without trace when payment on the spot is expected of him and his identity is unknown. If D comes to an arrangement with the creditor whereby the creditor agrees to take D's cheque and is then content to see D walk away and not come back the situation is different. It is not bilking, even though the creditor's consent is obtained by a deception about the genuineness of D's cheque. If D's conduct is punishable under the Theft Act 1978 it is by virtue of section 2(1)(b) and not section 3.

It will be seen that my articulation (which I would stress is intended exactly to represent the existing law) takes care of Professor Smith's case of the taxi passenger who obtains the driver's consent to go into the house to get the fare but then disappears. Clearly the driver's consent does not extend to the disappearance.

There is a final point that in my submission clinches the matter. Two things can happen after payment on the spot. The payer can move away *or the payee can move away*. Deception by the payer in obtaining the payee's consent to their parting can take precisely the same form in either case. But only in the former case can the payer possibly be said to 'make off'. D persuades his taxi driver to accept a bad cheque. The taxi then drives away, as taxis do when the driver thinks he has been paid. D stands on the pavement and watches it out of sight. What prosecutor would dare argue that D had 'made off'?

Professor Smith says it is unfortunate that there is no clear answer to this question. In my submission there is a clear answer. It needs to be worked out, but it is as clear as can be expected from the kind of compressed drafting our system seems to require.

See the reference to this letter in Law Commission Consultation Paper 139, par 1.24.