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The Carrier's Case (1473)

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*The Carrier's Case*¹ remains an authority in certain parts of the common law world, the oldest authority cited in a recent work on Anglo-American theft law.² James Fitzjames Stephen described the case as 'the most curious case relating to theft' in medieval law.³ It remains, in the words of one writer, an 'enigma', indeed the first enigma, in the common law of larceny.⁴

The medieval law of larceny was a criminal law counterpart to trespass to goods. Like its private law counterpart, it required a trespassory taking of possession of a chattel. For the taking to be trespassory, it had to be performed with force and

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¹ *The Carrier's Case; Anon v Sheriff of London* (1473) YB Pasch 13 Edw IV, fo 9, pl 5; SS vol 64, 30-34. Citations will be taken from the Selden Society report, based on British Library Additional MS 37493, a manuscript associated with the early-sixteenth century lawyer Robert Chaloner. This report contains more detail than the vulgate Yearbook report.

² S Green, *Thirteen Ways to Steal a Bicycle: theft law in the information age* (Cambridge MA, Harvard University Press, 2012) 11. New South Wales, for example, retains the common law of larceny, while several states in the USA have not adopted the Model Penal Code and retain a law of larceny which is at least partly common law.

³ J Fitzjames Stephen, *A History of the Criminal Law of England*, vol 3 (London, Macmillan & Co, 1883) 139.

⁴ GP Fletcher, 'The Metamorphosis of Larceny' (1975-76) 89 *Harvard Law Review* 469-530 at 481.

arms, which necessarily meant that the taker obtained possession without the consent of the prior holder.⁵ This position was clear in the late-twelfth century, in the book known as *Glanvill*.⁶ In private law, the limitations on trespass to goods were remedied by the availability of the action of detinue. For larceny, non-trespassory takings of possession were simply not criminal.⁷

The Carrier's Case is the first known case in which the limitations of larceny were an issue, a mere three centuries after the writing of *Glanvill*. It was well-established in medieval law that if a person obtained possession of goods from the owner lawfully, but subsequently took those goods for himself, this could not be larceny. As *Glanvill* notes, '[c]learly he is not guilty of theft, because he initially had possession from the owner',⁸ a position echoed into the fifteenth century.⁹ In 1473, this changed. A bailee of a package, who had legitimately obtained possession of it from the owner, opened the package and removed the contents, taking them for himself. The judges held that this amounted to larceny, departing from the well-established common law rule.

The extension of larceny in *The Carrier's Case* was the start of a very long trend, the attempt to use larceny as a wider theft offence. The trend continued into

⁵ In practice 'force and arms' seems to have been a very low threshold, see DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 41.

⁶ GDG Hall (ed), *The treatise on the laws and customs of the realm of England commonly called Glanvill* (London, Thomas Nelson and Sons, 1965) 128.

⁷ See JH Baker, *Introduction to English Legal History*, 4th edn (London, Butterworths LexisNexis, 2002) 533-534.

⁸ Hall, *Glanvill* 128.

⁹ Eg (1429) YB Trin 7 Hen VI, fo 42, pl 8.

the 1950s, but was subject to considerable criticism from the nineteenth century.¹⁰ *The Carrier's Case* was consequently one of the cases on which reformers focused their attention when advocating reform of the law of theft away from the technicalities and distinctions of the law of larceny.¹¹ From that perspective, *The Carrier's Case* was the first landmark on the journey to the Canadian Criminal Code, the Theft Act 1968 and the US Model Penal Code.

The Carrier's Case was clearly important. It was the first of a series of cases and debates in the late-medieval and early modern period, 'related to the concept of theft' itself.¹² Did English law criminalise only physical violations of possession, or a wider range of interferences with property? After the decision we see the courts grappling with other arguable exceptions to the basic law of larceny, such as servants entrusted with goods.¹³ The case itself was frequently cited, although for some writers, the report of *The Carrier's Case* was useful for the discussions it contained, as much as the decision.¹⁴

But *The Carrier's Case* itself remains problematic. James Fitzjames Stephen described the reasoning as an 'obscure distinction resting on no definite principle'.¹⁵

¹⁰ JE Hall Williams, 'Reform of the law of Larceny: An Urgent Task' (1958) 21 *MLR* 43, 44, referring to *Russell v Smith* [1957] 3 WLR 515 (QB).

¹¹ Green, *Thirteen Ways* 16-18, noting 'breaking bulk' from *The Carrier's Case* as a particular issue at 17.

¹² JH Baker, *The Oxford History of the Laws of England, vol. VI, 1483-1558* (Oxford, Oxford University Press, 2003) 566-7.

¹³ Baker, *Oxford History* 566-70.

¹⁴ The case is cited in seven of the eight paragraphs discussing various circumstances in which larceny can be committed by F Pulton, *De Pace Regis et Regni* (London, Company of Stationers, 1609) fos 129-132.

¹⁵ Stephen, *History* 140.

For George Fletcher in the 1970s, it remained an 'enigma'. But the legal enigma is wrapped in factual mystery and itself conceals a riddle.

I. The Mystery: The Facts

Like many medieval cases, the facts outlined in the reports of the case are sparse. A carrier agreed to carry a bale of woad to Southampton for a foreign merchant. The carrier took the bale elsewhere and opened it, taking the woad. That woad was ultimately seized by the Sheriff of London as 'waif'. Waif was goods which had been stolen, but were abandoned by the thief, and could then be seized for the Crown.¹⁶ Woad was essential to the English wool and cloth industries, a valuable product second in value only to wine in the imports to Southampton,¹⁷ and one which sometimes constituted almost the entire cargo of ships.¹⁸ The merchant, unsurprisingly, sought to have this property restored.

That summary leaves plenty of gaps, and reconstructing the case is difficult due to an absence of evidence. Firstly, it is not clear how the case came into being. No records of the London sheriffs survive from the relevant period. The first stage of proceedings reported occurred in the Star Chamber, which in 1473 was not a court distinct from the King's Council.¹⁹ The report in fact describes the case as being

¹⁶ J Rastell, *An exposition of certaine difficult and obscure words, and termes of the lawes of this realme* (London, Richard Tottel, 1579) fos 195-196.

¹⁷ S Thrupp, 'The Grocers of London, A Study of Distributive Trade' in E Power and MM Postan (eds), *Studies in English Trade in the Fifteenth Century* (London, George Routledge & Sons, 1933) 290.

¹⁸ A Ruddock, *Italian Merchants and Shipping in Southampton, 1270-1600* (Southampton, University College, 1951) 214, referring to a Genoese carrack which arrived in December 1470.

¹⁹ Baker, *Introduction* 118.

'[b]efore the King's Council in the Star Chamber', probably indicating that the case started not as litigation, but as a petition directly to the monarch which was then referred to the Council.²⁰ Such a suspicion is corroborated by the brief mention in the report of the lawfulness of proceedings before the Council in relation to the merchandise of aliens.²¹ No records survive of any petition. After the initial proceedings in Council sitting in the Star Chamber, a second stage of discussion occurred between the common law judges in the Exchequer Chamber. In the fifteenth century the Exchequer Chamber was simply a venue for informal discussions between the judges, rather than the statutory court it subsequently became.²² Consequently the latter stage of the case left no trace in the records of the common-law courts.

John Scurlock seems to have assumed that the carrier in the case was a 'sea captain'.²³ None of the reports make this clear, but it is highly probable. Woad was

²⁰ *Carrier's Case* (n 1) 30.

²¹ *Carrier's Case* (n 1) 32. There are hints in the report that the Lord Chancellor, Robert Stillington, the Bishop of Bath and Wells, regarded the case as a Chancery one (*Carrier's Case* (n 1) 32), perhaps associated with his promotion of Chancery as a court for merchants (M Beilby, 'The Profits of Expertise: The Rise of the Civil Lawyers and Chancery Equity' in M Hicks (ed), *Profit, Piety and the Professions in Later Medieval England* (Gloucester, Alan Sutton, 1990) 78-83). There is no bill surviving in the relevant Chancery records (the C1 files), although these records are not entirely reliable in the early-1470s (P Tucker, 'The Early History of the Court of Chancery: A Comparative Study' (2000) 115 *English Historical Review* 791, 798). The discussion of the lawfulness of proceedings in the Council is the best evidence that the case was seen not as one for a distinct court of Chancery, but for the Council more generally.

²² Baker, *Introduction*, 140.

²³ J Scurlock, 'The Element of Trespass in Larceny at Common Law' (1948-49) 22 *Temple Law Quarterly* 12, 15.

imported to Southampton from the Mediterranean, evidently by ship, and then circulated around the country either by coastal vessels or by road.²⁴ English woad production was virtually non-existent until the late-sixteenth century, so any carriage of woad to Southampton, as the reports describe, would have been from overseas. The carrier being a ship's captain raises some interesting speculation about why the woad was not delivered in Southampton as agreed but was found in London. Did the ship put in at an alternative port, or was the relevant bale simply not off-loaded in Southampton as it should have been? The latter seems more likely, simply as I have found nothing to suggest that an entire ship and its cargo went missing. The case was, in other words, one of barratry, fraud by the master of the ship.²⁵ Such fraudulent activity was not unknown in the affairs of Italian merchants in Southampton. A Venetian notary recorded an investigation into such fraud in 1472, in a case in which the entire cargo of a Venetian vessel was unloaded contrary to the ship's charter party.²⁶

The merchant who sought restitution of his goods was probably the intended recipient of the woad, rather than the original shipper. The report refers to the merchant as an alien who has 'come here under a safe conduct', indicating that he was present in England.²⁷ It was not usual for exporters to England to accompany their goods. Surviving fifteenth century material shows that London importers of

²⁴ An example of the use of coastal vessels is in Ruddock, *Italian Merchants* 103. The Overland Trade Project at the University of Winchester has produced an excellent resource for the export of commodities from Southampton by land at www.overlandtrade.org.

²⁵ For an early example of the language of barratry, which refers to the idea of breaking bulk, see G Malynes, *Consuetudo, vel Lex Mercatoria, or the Ancient Law-Merchant* (London, Adam Islip, 1622) 155.

²⁶ Ruddock, *Italian Merchants* 113.

²⁷ *Carrier's Case* (n 1) 32.

woad via Southampton authorised a local agent to collect the goods and then handle the local arrangements and onward travel to the final destination in England.²⁸

The woad probably arrived in England on a vessel managed by Genoese merchants,²⁹ who imported large quantities of woad via Southampton. In 1460 alone, the Genoese imported over 1100 bales and more than 15000 balets of woad into Southampton, while in 1470 a single Genoese carrack arrived carrying 5721 balets.³⁰ Southampton also had a Genoese population who acted as agents for the larger community in London.³¹ That London colony was under consular control, a Genoese government official who adjudicated disputes between members of the Genoese community and also acted as a spokesman and representative of the Genoese in their dealings with the English authorities.³² It may have been easier for an aggrieved merchant to petition the King through such a figure than as an individual. It seems likely that the merchant in *The Carrier's Case* was a Genoese merchant in London.

The mercantile transaction here would have been problematic for the common law courts. The carrier would have entered into a contract with the woad exporter to ship his goods, and the exporter would have entered into a separate

²⁸ Ruddock, *Italian Merchants* 103.

²⁹ The ships themselves were not necessarily Genoese. London records show goods being imported and exported in the names of Genoese merchants on ships from Spain and Portugal (HS Cobb (ed), *The overseas trade of London: Exchequer customs accounts*, London Record Society 27 (London, London Record Society, 1990) xli-xlii). Florentine merchants also imported woad to England, but the Florentine fleet to England in 1472-3 did not have any woad on board (ME Mallett, 'Anglo-Florentine Commercial Relations 1465-91' (1962) 15 *Economic History Review* (NS) 250, 256).

³⁰ Ruddock, *Italian Merchants* 81-2 and 214.

³¹ Ruddock, *Italian Merchants* 103 and 214.

³² Ruddock, *Italian Merchants* 133.

arrangement with the merchant in London, the merchant claiming restitution in the case itself, to transfer title to the woad. An agent of the London merchant would then have been authorised to collect the woad in Southampton.

The carrier therefore had no contractual relationship with the merchant claiming the woad in England. The carriage contract would have been made overseas. Any contract between the exporting and importing merchants was also probably not made in England. Any contract made overseas would have been, at best, a matter for the Admiralty, not the common law courts.³³ The absence of a contractual relationship between the merchant claiming the goods and the carrier would also prevent the merchant bringing contractual claims for the carrier's actions. Such an absence of contractual remedies may well be important in explaining the decision in the case.

II. The Riddle: Why Decide the Case in this Way?

Difficulties in identifying a clear legal basis for the finding of felony in *The Carrier's Case* have led writers to suggest that the decision was ultimately one of policy. Plucknett attributed the decision in *The Carrier's Case* to it being 'politically expedient to punish the carrier for larceny', despite the prosecution of the carrier not being in issue in the case.³⁴ Fitzjames Stephen linked the finding of felony with a policy objective of favouring merchants.³⁵ As Fletcher observed, such arguments fail on the

³³ The fifteenth century history of the Admiralty remains obscure and there are very limited records (MJ Prichard and DEC Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, Selden Society 103 (London, Selden Society, 1993) xxxiii). It is not clear that the Admiralty did exercise jurisdiction over such contracts in the 1470s.

³⁴ TFT Plucknett, *A Concise History of the Common Law*, 5th edn (London, Butterworths, 1956) 449.

³⁵ Stephen, *History* 139.

simple basis that the finding of felony in *The Carrier's Case* was not in merchants' favour.³⁶ By holding that the carrier had committed larceny, the judges justified the sheriff's seizure of the merchant's goods as waif, hardly something merchants would have wanted.

Nevertheless, according to the report, the judges then asserted that 'the goods cannot be claimed as waif'. Because the merchant had been granted safe conduct by the King, the King could not then claim the goods on the basis that one of the King's subjects had breached that safe conduct. This would contradict the King's promise.³⁷ Had the judges simply wished to protect merchants, the easiest solution would have been to find that there was no felony on the facts, a position which several of them argued strongly during argument. Merchants would have been left with limited private law remedies, but would at least not have risked the seizure of their goods under the royal prerogative. Instead, the judges took a convoluted route to reach a position which had the same effect. Any explanation for the judges' position has to take account of the tortuous course taken to reach the final outcome in the case; not just the finding of felony, but the immediate amelioration of the consequences of that finding.

Fifteenth century judges do seem to have regarded the King's safe conduct as legally relevant on several occasions, perhaps explaining its role in the case.³⁸ A related concern may have arisen from a note at the end of the reports of *The Carrier's Case*, where it is observed that the Sheriff of London who had claimed the woad as

³⁶ Fletcher, 'Metamorphosis' 484.

³⁷ *Carrier's Case* (n 1) 34. Safe conduct was routinely granted to merchants and was a special guarantee of the King's personal protection of the person and property of merchants. For examples of such grants, see K Kim, *Aliens in Medieval Law: The origins of modern citizenship* (Cambridge, Cambridge University Press, 2000) 25-29.

³⁸ E.g. (1486) YB Hil 1 Hen VII, fo 10, pl 10.

waif was also claiming a prescriptive right for London to retain that property for itself, rather than on behalf of the King. It was this claim that the judges denied due to the safe conduct granted by the King.³⁹ Given that the London sheriffs were chosen by senior members of London's commercial community,⁴⁰ and that anti-Italian violence in the 1450s may have been deliberately orchestrated by London merchants against competitors, it is less surprising to see the claim to waif being blocked.⁴¹ However, it would again have been more direct simply to have denied the existence of the felony.

A final possibility lies in jurisdictional concerns. It was claimed in the Star Chamber that the case should be heard before the common law courts.⁴² The Lord Chancellor's response was clear: a felony had been committed (contrary to the views of some of the judges), but the Chancery could provide some relief from the consequences of that for the victim's property.⁴³ The Chancellor was not a common lawyer. In fact, Bishop Robert Stillington was a trained civilian, graduating DCL in June 1443.⁴⁴ Stillington's position raised the possibility of a non-common lawyer adjudicating on the commission of common law felonies. The common law courts began to resist such decisions just before *The Carrier's Case*. The common law judges saw the civilian courts as encroaching upon their exclusive jurisdiction and the first known prohibition to the civilian-staffed church courts on this point was issued in

³⁹ *Carrier's Case* (n 1) 34.

⁴⁰ P Tucker, *Law Courts and Lawyers in the City of London, 1300-1550* (Cambridge, Cambridge University Press, 2007) 44.

⁴¹ JL Bolton, 'The City and the Crown, 1456-61' (1986) 12 *London Journal* 11.

⁴² *Carrier's Case* (n 1) 32.

⁴³ *Carrier's Case* (n 1) 31 and 32.

⁴⁴ M Hicks, 'Stillington, Robert' in HCG Matthews and B Harrison, *The Oxford Dictionary of National Biography*, vol 52 (Oxford, Oxford University Press, 2004).

1472.⁴⁵ A concern with non-common law adjudication of common law felonies could explain the finding of felony in *The Carrier's Case*. By showing the Chancellor that they agreed with his view of the facts as amounting to a felony, but then explaining that the sheriff was not entitled to the merchant's goods, the judges may have made it more difficult for the Chancellor to assert a need for intervention by the Chancery.⁴⁶

The Chancellor may still have been able to assert a need for equitable intervention. He raised a traditional justification for merchants proceeding outside the normal legal system: merchants needed speedy justice and could not be expected to know the nuances of the English legal system, using this as a justification for Chancery jurisdiction.⁴⁷ Such a concern was an accepted basis for an alternative to common law process.⁴⁸ According to the report, the judges in *The Carrier's Case* observed that a foreign merchant should 'sue to the King' in the event of goods being taken as waif, thereby also removing this basis for Chancery jurisdiction.⁴⁹

Nevertheless, this jurisdictional explanation seems unlikely to have been determinative. The problem of jurisdiction would have been obvious in the initial

⁴⁵ *Tanner v Cornyssh* (1472), an unreported prohibition related to an accusation of theft cited in Baker, *Introduction* 438 fn 15.

⁴⁶ Unlike the church courts, it is not clear that the common law courts had any mechanism easily to restrain the Chancery, a point which became clear in the early-seventeenth century when the common law courts and the Chancery clashed. The common law courts used prohibitions, praemunire and habeas corpus, all with questionable efficacy (JH Baker, 'The Common Lawyers and the Chancery: 1616' in John Baker, *Collected Papers on English Legal History*, vol 1 (Cambridge, Cambridge University Press, 2013)).

⁴⁷ *Carrier's Case* (n 1) 32.

⁴⁸ See Kim, *Aliens in Medieval Law* 29-31 and 37-8 for various medieval English examples.

⁴⁹ *Carrier's Case* (n 1) 34.

hearing in the Star Chamber, but the majority of the judges were still opposed to the finding of felony at the outset of the Exchequer Chamber proceedings. Had the judges been especially concerned about jurisdiction, they would have been more receptive to treating the case as felony from the outset. The sensible conclusion is that the case was actually decided on the basis of the judges' views of the law.

III. The Enigma: The Legal Basis For The Decision

It is difficult to identify any clear legal basis for the decision in *The Carrier's Case*. Various positions were presented by judges and barristers. The matter is further complicated by the nature of the proceedings in *The Carrier's Case*, which were in two distinct stages. The first was a hearing in the Star Chamber, before the King's Council, where the Lord Chancellor, some judges and even apprentices spoke.⁵⁰ The second stage was a set of discussions in the Exchequer Chamber. It was only after this second debate that the judges described the facts as amounting to larceny. This difficulty perhaps explains the analyses of *The Carrier's Case* in the sixteenth and seventeenth century printed books of the common law. Edward Coke and Matthew Hale, for example, do not even try to explain the outcome in the case at all. They note the facts as amounting to larceny, but, unlike other unusual fact patterns, go no further.⁵¹

What justifications for finding a felony were presented in *The Carrier's Case*? The most fully developed set of arguments related to the bailee's possession, but another strand stressed the absence of any relevant bailment at all.

A. Possession and the Bailee

⁵⁰ Huse was Attorney General at the time, Molyneux and Vavasour were apprentices.

⁵¹ 3 Co Inst 107; 1 Hale PC 504-5.

The dominant argument presented in favour of felony was based upon the bailee's possession being either unlawful, or having come to an end. This approach was crucially dependent upon the private law rules of bailment and possession and consequently became somewhat technical.

In the Exchequer Chamber, Nedeham J argued that 'where a man has possession and it is determined, it may be felony'.⁵² This position does address the possession issue, but Nedeham never explains whether the possession of the carrier actually was determined at any point. Finally, Nedeham presented two scenarios in which someone appears to have possession of property, but actually does not, and hence could be convicted of larceny for taking the goods: a tavern patron taking his drinking cup away and a servant taking his owner's goods with which he had been entrusted. Presumably the purpose of these last two examples was to show the effect of an absence of possession in the bailee.

Laken J built upon Nedeham's arguments, distinguishing 'between a bailment of goods and a bargain to take and to carry'.⁵³ According to Laken, in a mere bailment situation a bailee obtains possession simply from taking physical control, but in the situation of a bargain to carry, the carrier only obtains lawful possession 'if he takes them to carry...but if he takes them with other intent than to carry them, so that he does not carry out the purpose, it seems that it shall quite well be said to be felony.' The element of contract in the context of *The Carrier's Case* is made central here. It is only if possession is taken with intention to perform the contract that the possession is lawful possession. If the possession was not lawful, then the carrier

⁵² *Carrier's Case* (n 1) 33. Stephen seems to accept the approach of determining the bailment as the ratio of the case (Stephen, *History* 139).

⁵³ *Carrier's Case* (n 1) 33.

would be in the position of a servant or tavern patron as set out by Nedeham, someone with physical control but no possession. Any inappropriate taking of the goods, such as the delivery to somewhere other than specified in *The Carrier's Case* would then amount to felony.

The same approach had been suggested by the barristers Molyneux and Vavasour in the Star Chamber. Vavasour expressly distinguished between a bailment and a bargain, describing the case here as 'better than a bailment' due to the bargain.⁵⁴ Molyneux, perhaps revealing the underlying basis of the arguments of both Nedeham and Laken, argued generally that something 'done lawfully may be said to be felony or trespass according to the intent and the circumstances, to wit, if he who committed the act does not carry out the purpose for which he took the goods'.⁵⁵ For Molyneux, this was a general principle which explained the case about tavern patrons and a rule that if a person distrained another's goods (a lawful seizure of goods, typically for rent arrears) but then acted in a manner not authorised in the law of distraint, 'this is now wrong, and yet at the start the taking was good'.⁵⁶ As Molyneux put it, once an individual acted unlawfully with the property, 'then everything is wrong'. A subsequent unlawful act rendered the initial taking wrongful *ab initio*. This may explain Nedeham's point about possession being determined. From Molyneux's perspective, once an unlawful act was performed, then the bailee's possession came to an end.

For Laken, and perhaps also Nedeham, the crime of larceny in *The Carrier's Case* required analysis of two distinct moments. The first was the taking of physical control – the carrier needed to have the intention not to perform the contract for the

⁵⁴ *Carrier's Case* (n 1) 31.

⁵⁵ *Carrier's Case* (n 1) 31.

⁵⁶ *Carrier's Case* (n 1) 31.

possession not to be lawful. The second was the time when the carrier actually took the goods for himself. At that point the carrier would need to satisfy all the requirements for larceny. Molyneux and Vavasour in the Star Chamber were less concerned with this temporal distinction. For Molyneux, later unlawful actions rendered the earlier possession unlawful, while Vavasour explained that, the carrier's subsequent taking of the property for himself 'proves that he took them as a felon and with other intent than to carry them'.⁵⁷

This approach also had some support in subsequent literature. In his *Plees del Coron*, William Staunford observed that if the initial taking of possession is lawful, then a subsequent taking is not felonious, citing *The Carrier's Case*. A little later, Staunford then gives the facts of the case, without citation, observing that in such a situation there is felony, '(tr) because he had more than a bailment, that is a bargain, so that he took them by the bargain, and not by the delivery', taking them by his own wrong.⁵⁸ Staunford seems to have taken Laken's position, an approach which was also adopted by Ferdinando Pulton in 1609, although Pulton specified that any 'evill intent' had to arise only after the initial taking of possession.⁵⁹

However, despite the approach focusing on the bailee either never having had possession, or that possession coming to end, being numerically dominant in both the Star Chamber and Exchequer Chamber proceedings, it was not widely accepted. Bryan CJ rejected the distinction between bailment and bargain as 'all one' and

⁵⁷ *Carrier's Case* (n 1) 31.

⁵⁸ W Staunford, *Les Plees del Coron* (London, Richard Tottel, 1557) fo 25.

⁵⁹ Pulton, *De Pace* fos 129-129v. Pulton also provided a further rationale for the decision, based upon the fact that 'the propertie of these goods did always remaine in the first owner', a point taken from Huse AG in the Star Chamber proceedings (*Carrier's Case* (n 1) 31, on which see below, n 76). The use of two different explanations for the case suggests Pulton was not certain what the ratio was.

stated several times in the proceedings that receiving by bailment precluded the possession subsequently becoming unlawful.⁶⁰ In the Star Chamber, Choke J also rejected the idea that a bailee could be said to take possession unlawfully.⁶¹ Furthermore, in the immediate aftermath of *The Carrier's Case*, an anonymous reader in the Inns of Court in the 1470s referred to the case, but for the proposition that an initially lawful act, such as taking possession, cannot subsequently become unlawful.⁶² While not a direct response to Laken's remarks, the view echoes that of Bryan CJ. Thomas Marow's widely circulated and influential 1503 reading was more explicit on this point. According to Marow, if a defendant were given someone's goods to look after, '(tr) and he took them as a felon with felonious intent, yet this intent in this case does not make it felony', outright rejecting the views of Molyneux and Vavasour.⁶³

B. No Bailment of the Stolen Goods

⁶⁰ *Carrier's Case* (n 1) 33, 30 and 31.

⁶¹ *Carrier's Case* (n 1) 31-2. The presence of the bailment must have been decisive for Choke, as he himself made Molyneux's point about distraint in a case the previous year ((1472) YB Pasch 12 Edw IV, fo 8, pl 20).

⁶² Cambridge University Library MS Ee.5.22, fo 148. Readings were one of the main forms of education in the medieval and early-modern Inns of Court and readings provide some of the best evidence of sustained doctrinal exposition and discussion for the period, especially for criminal law (JH Baker, 'The Inns of Court and Legal Doctrine' in Baker, *Collected Papers* vol 1, 359-361).

⁶³ Putnam, *Early Treatises* 375. For subsequent references to Marow's reading, see JH Baker, *Readers and Readings in the Inns of Court and Chancery*, Selden Society Supplementary Series 13 (London, Selden Society, 2000) 73 and BH Putnam, *Early Treatises on the Practice of the Justices of the Peace in the Fifteenth and Sixteenth Centuries* (New York, Octagon Books, 1974) 209-220.

The alternative explanation for a finding of felony in *The Carrier's Case* was that presented by Choke J. Choke's approach largely disregarded the nuances of private law, accepting that a bailee cannot be said to take the bailed goods feloniously. Instead, Choke explained in the Star Chamber that the carrier committed felony in this case

for here the things which were in the bale were not given to him, but the bales as chose entire were delivered...in which case if he had given away the bales or sold them, it would not be felony, but when he broke open and took out of it what was inside, he did this without warrant⁶⁴

The carrier had been given only the bale and the bailment therefore covered the receptacle. But the felony here was only in relation to the contents, which had not expressly been bailed to the carrier. Such a position was adopted by William Lambarde in his handbook for Justices of the Peace, *Eirenarcha*, in 1581. Lambarde, referring both to woad and an example of a barrel of wine which Choke had used, notes that 'it may be saide, that neyther the verie Woad, nor the Wine were delivered hym in that kinde'.⁶⁵

Choke's position has the advantage of simplicity and consequently concision. The position taken by Nedeham and Laken required a criminal trial judge to explain the nuances of the law of possession to a jury. Choke's approach more or less removed any need for such explanations to be presented to the jury, while still respecting the rules of private law. As all the judges were potentially criminal trial judges in the assize system, and consequently might need to explain possession to the jury, and given the brevity of criminal trials, those were considerable benefits.⁶⁶

⁶⁴ *Carrier's Case* (n 1) 32.

⁶⁵ W Lambarde, *Eirenarcha* (London, Richard Tottel, 1581) 225-6.

⁶⁶ It has been estimated that trials at the assizes typically lasted no more than thirty minutes in the late-sixteenth and seventeenth centuries (JS Cockburn, *Calendar of Assize Records: Home*

However, while this explains the attractions of Choke's position, it does not in itself explain why Choke considered there to be a felony at all. Bryan CJ's position similarly avoided this problem, simply by denying any possibility of a felony, thereby keeping the case from any jury.

C. The Enigma

None of the arguments presented in the case come close to being identified as being decisive for the majority of the judges. There is also what appears to be a textual difficulty with the surviving reports of the debate in the Exchequer Chamber and its aftermath, just at the point which appears to be decisive in the discussion. The report begins with an acknowledgement that 'all except Nedeham held that where goods are given to a man he cannot take them feloniously'. There are then speeches by Nedeham J and Laken J which seem to support a finding a felony on the facts, before Bryan CJ distinguishes Laken's argument and reaffirms his consistently held position that there must be a felonious taking of possession, which was not so on the facts. This is followed by the word '*vide*' and a mention of a case described as from 1311 or 1312, but whose facts match those of *Rattlesdene v Grunestone* from 1317.⁶⁷ This case concerned a sale of a barrel of wine, where the vendor retained possession of the barrel after the sale. The vendor was subsequently sued for trespass to goods, for breaking open the barrel, taking out part of the wine and replacing it with water.⁶⁸ It is noted in *The Carrier's Case* that 'because' the vendor had possession of the barrel, the claim was challenged, but the writ was held good. This case seems to

Circuit Indictments Elizabeth I and James I, Introduction (1985, HMSO, London) 110), although Cockburn notes that the assize system came under considerable pressure in the Elizabethan period, so medieval trials may have been longer.

⁶⁷ *Rattlesdene v Grunestone* (1317) YB 10 Edw II, SS vol 55 140-1.

⁶⁸ Ibbetson notes, plausibly, that the presented facts conceal a shipping accident (Ibbetson, *Historical Introduction* 44).

contradict the position taken by Bryan CJ.⁶⁹ After this, the report states 'then the justices made report to the Chancellor that it was felony', with no further explanation.

The reference to *Rattlesdene v Grunestone* appears decisive. That case shows that someone in lawful possession could commit trespass to goods, overcoming the key difficulty in *The Carrier's Case*, and the report then shows the judges deciding that the facts of that case amounted to felony. The difficulty lies in the role *Rattlesdene v Grunestone* actually played in judges' decision. Given that *Rattlesdene* contradicted the point which Bryan CJ had just been making, and had consistently made throughout the proceedings in *The Carrier's Case*, it seems improbable that Bryan himself mentioned the case, but no other speaker is identified. There seem to be two possible explanations.

The first is simply that the surviving reports omit the name of the person who referred to *Rattlesdene*. The case was cited by someone in the Exchequer Chamber, perhaps as a deliberate response to Bryan's immediately preceding citation of cases, and this convinced the judges that trespass could be so committed and therefore larceny. On this interpretation, the reference to *Rattlesdene* was the determining intervention in the debate. However, this analysis suffers from two weaknesses. Firstly, it gives the appearance of a strong adherence to precedent, something which is not a common feature of reasoning in the fifteenth century.⁷⁰ Secondly, the language of '*vide*' preceding the reference to the case looks more like an authorial insertion than simply an alternative to the name of a speaker. The second explanation for the inclusion of *Rattlesdene* is that it was added to the report of the

⁶⁹ *Carrier's Case* (n 1) 33-34.

⁷⁰ Baker, *Oxford History* 488.

case by the author of the report or even by a subsequent reader. If this latter explanation is correct, then *Rattlesdene* could not have been decisive in the case.

This leaves the enigma of the case intact and the basis of the decision unknown. It is clear that the report includes a large gap. If the insertion of *Rattlesdene v Grunestone* is removed, what remains is two judges arguing for a felony having been committed, Bryan CJ's denial of a felony, and the judges then reporting to the Chancellor that a felony had been committed. The report of the Exchequer Chamber proceedings itself makes clear that it is incomplete, referring to the case as argued 'before the justices', but no arguments other than those of (some) of the judges are reported.⁷¹ It is clear that the report of the Exchequer Chamber proceedings, at least, is not a complete record of the case.

Explaining the decision in *The Carrier's Case* consequently requires an exercise of historical imagination, suggesting plausible explanations to fill the significant gap in the sources. The remainder of this section of the chapter considers possible explanations for the decision in *The Carrier's Case* to find that the facts amounted to larceny.

D. Developments in Criminal law

i. Larceny and Packages

The approach of Choke may have been influenced by the case of William Wody from 1470.⁷² Wody was indicted for larceny of six sealed boxes containing charters of title

⁷¹ *Carrier's Case* (n 1) 32-3.

⁷² *R v Wody* (1470) YB Mich 49 Hen VI, fo 14, pl 9 (King's Bench) and 10 (Exchequer Chamber); SS vol 47, 124-6.

to land. It was ultimately held that Wody had committed no felony. Most of the discussion concerns the charters, arguing that they had the character of land, which could not be stolen. None of the judges discuss the boxes themselves. Nedeham J made it clear that the discussion concerned the 'charters within the boxes', although a barrister, Sulyard, argued that the boxes could not be stolen as they were of the same nature as the charters. Arguably, the case shows that the judges, including Choke, distinguished between a package and its contents before *The Carrier's Case*, albeit that in *Wody* the peculiar nature of the contents affected the nature of the package too. Alternatively, *Wody* may have encouraged a certain pragmatism, as a thief of documents of title to medieval England's most valuable asset could not be prosecuted. The position taken by Choke in *The Carrier's Case* would have provided a means to prosecute Wody successfully. Instead of prosecuting for theft of the box and contents, Wody could have been indicted for theft of the boxes, to which a value could have been attached.⁷³

ii. A Different Conceptual Framework⁷⁴

The discussion so far has been focused on *The Carrier's Case* within the confines of the law of larceny and it is this approach which has been the basis of most of the criticism of the case. However, there is some evidence in the case of analysis from an alternative perspective, a different conceptual framework, one which regarded the case not as one of larceny, but as theft. This shifted the focus in the case away from the technical requirements of larceny and trespass. While larceny indictments used

⁷³ The report is not clear, but it seems likely that the indictment against Wody would not have included the relevant information to enable such a case to proceed.

⁷⁴ The language of 'frameworks' comes from DJ Ibbetson, 'What is Legal History a History of?' in A Lewis and M Lobban (eds), *Law and History*, Current Legal Issues 6 (Oxford, Oxford University Press, 2004).

the language of theft, they also required a taking of the goods with force and arms.⁷⁵ The idea of theft advanced in *The Carrier's Case* and subsequent discussions did not.

The alternative is most obvious in Huse AG's remarks in the Star Chamber. According to Huse, '[i]t is felony to claim the goods feloniously without cause from the party with intent to defraud him to whom the property belongs, *animo furandi*. And here, notwithstanding the bailment as above, the property remains in him who made the bailment'.⁷⁶

There are a few key elements to Huse's argument. The first is the absence of any discussion of the technical requirements of the offence of larceny, most notably possession and taking of possession. Instead there is a broader focus on whether someone has any 'property' in the woad and simply a 'claiming' of the goods as criminal. Huse seems to think that the offence is about interfering with another's property, and so the rights that remain in a bailor will be sufficient for inappropriate acts by a bailee to be criminal. The second is the focus on the wrongdoer's intention, particularly the '*animo furandi*'.⁷⁷

The Latin phrase suggests a probable source for Huse's views: the civil law.⁷⁸ The likely route for this influence is the definition of theft (*furtum*) in the thirteenth

⁷⁵ 1 Hale PC 504.

⁷⁶ *Carrier's Case* (n 1) 31.

⁷⁷ It is tempting to see this as the explanation for the focus on intention in the views of various other common lawyers in the case too.

⁷⁸ Explaining the similarity between Huse's views and those of the civilian-trained Lord Chancellor, although it is notable that the Chancellor expressed himself in a manner that would not have been alien to a common lawyer. The Chancellor is reported as saying that '[f]elony is according to the intent', similar to the statement by Fairfax Sjt in (1466) YB Mich 6 Edw IV, fo 7, pl 18, that '(tr) felony is malice aforethought'.

century book known as *Bracton*, which was drawn from civilian sources. Although *Bracton* is little cited in the medieval period, there is evidence that it was used in legal education in the Inns of Court, in relation to criminal law.⁷⁹ *Bracton* does not discuss larceny, but only theft, defined as ‘the fraudulent mishandling of another’s property without the owner’s consent, with the intention of stealing, for without the *animus furandi*, it is not committed’.⁸⁰ This definition contains both of the key elements in Huse’s argument: the importance of intention and the focus on another’s ‘property’, rather than possession. The definition in *Bracton* also addresses an issue to which Huse does not refer, that the carrier in *The Carrier’s Case* did not take possession illegitimately. As *Bracton’s* definition refers merely to handling, it encompasses such inappropriate actions by the bailee.

The competing frameworks for analysing the case, as one of larceny or of theft, may explain other lawyers’ attitudes towards it. The anonymous reader of the 1470s and Thomas Marow both focused on the general requirements of larceny.⁸¹ The reader referred to *The Carrier’s Case* to express views like those of Bryan CJ, while Marow did not even refer to it. By contrast, lawyers in the sixteenth century seem to have been more content to incorporate breaking bulk into their discussion of larceny. A shift in the predominant framework for analysing larceny may well be behind this. An approach based on *Bracton* became popular in the sixteenth century, just as *Bracton* seems to have become a more common reference in matters of criminal law.⁸² In the 1520s, the reader Francis Mountford not only expressly cited

⁷⁹ JH Baker, ‘Roman Law at the Third University of England’ in Baker, *Collected Papers* vol 1, 368-9.

⁸⁰ SE Thorne (ed and trans), *Bracton on the Laws and Customs of England* vol 2 (Cambridge MA, Harvard University Press, 1968) 425.

⁸¹ See above, nn 62-63.

⁸² For the importance of *Bracton* to early-modern lawyers in relation to criminal law more generally, see I Williams, ‘A medieval book and early-modern law: *Bracton’s* authority and

Bracton's definition of theft, but also described the offence as one of '*furtum*', never using the language of larceny.⁸³ William Staunford took the definition of theft in *Bracton* as his definition of larceny in his influential *Plees del Coron*, the starting point for the printed canon on criminal law.⁸⁴ The surviving sources suggest that, echoing Staunford, the theft framework was dominant through the sixteenth and seventeenth centuries, featuring in the influential works of Coke and Hale.⁸⁵

E. Developments in private law

Theft law is widely considered to be about protecting private property rights, with such rights being creations of positive law.⁸⁶ The dominant medieval position, exemplified in the work of Thomas Aquinas, similarly linked theft to the private law of property.⁸⁷ The private law of personal property in England changed in the second half of the fifteenth century. In relation to *The Carrier's Case*, these changes suggest some degree of cross-fertilisation between the law of theft and private law actions in relation to personal property.

application in the common law c.1550-1640' (2011) 79 *Tijdschrift voor Rechtsgeschiedenis* 47, 62, 64-5 and 70-77.

⁸³ British Library Hargrave MS 87, fo 177v.

⁸⁴ Staunford, *Plees* fo 24.

⁸⁵ 3 Co Inst 107 and 1 Hale PC 504, both using *Bracton*.

⁸⁶ Theft as protecting private law rights underlies much of the criticism of *R v Hinks* [2001] 2 AC 241 (HL), such as AP Simester and J Beatson, 'Stealing one's own property' (1999) 115 *LQR* 372. Not all modern writers agree. Green suggests that while the law of theft is related to private property law, it is also related to an extra-legal (or 'pre-legal') concept of property (*Thirteen Ways* 93-95).

⁸⁷ T Aquinas, *Summa Theologiae*, vol 38 (Marcus Lefébure ed, Cambridge, Cambridge University Press, 2006) 69 (2a2ae. 66, 2) and 75 (2a2ae. 66, 5).

Most significant is the development of the action which came to be known as conversion, a form of trespass on the case writ. As a trespass on the case writ (otherwise known as an action on the case), conversion writs did not have a prescribed form. Trespass on the case writs had to include an allegation of a wrong (a 'trespass'), and plaintiffs could then elaborate on the precise facts of their case. No allegation of the use of force and arms was required. This meant that trespass on the case claims could redress non-forcible wrongdoing such as defamation or deceit.⁸⁸ In the personal property context, the absence of any requirement to allege force and arms meant that an initial taking of possession by consent would not preclude a claim in conversion. The early history of conversion has not yet been fully explored, particularly in the records of the common law courts, but there is enough evidence to indicate the possibility of influence on the judges in *The Carrier's Case* from private law actions.

It seems clear that some lawyers, at least, did relate conversion and larceny to one another. Most obviously, the report of *The Carrier's Case* summarises the facts as the carrier having 'broke open the bales and took the goods contained in the same feloniously *and converted them to his own use, and concealed them*' (emphasis added).⁸⁹ While the language of converting property to one's use is not unusual in the fifteenth century yearbooks,⁹⁰ given the developments in conversion and the association with larceny to be discussed below, it should not be ignored.

Thomas Marow seems to have been influenced in his exposition of the law of larceny by the tort of conversion. In his 1503 reading, Marow discussed a set of facts

⁸⁸ Baker, *Introduction* 61-63.

⁸⁹ *Carrier's Case* (n 1) 30. The association between conversion and theft remains in Canada, in language like that in *The Carrier's Case*, where the *actus reus* of theft is defined in terms of conversion to the thief's own use (Canadian Criminal Code, RSC 1985, c C-46, s 322(1)).

⁹⁰ Eg (1431) YB Mich 10 Hen VI, fo 5b, pl 19.

which look like *specificatio*, the making of a new thing from property belonging to another:

(tr) if a man delivers goods to another to look after safely, and the bailee changes the fashion of the goods, as he may with plate or similar, in this case if the bailor afterwards takes them with felonious intent, this is felony, and yet the goods were his property, but the property was changed⁹¹

In the context of a reading, an educational exercise, this could just be seen as a teacher using an example to make a point. However, *specificatio* was a topic which was being discussed in private law cases of conversion in the later fifteenth century, and it seems plausible to suggest that Marow was influenced by the questions being raised in that context.⁹²

The same sort of influence may also be visible on the facts of *The Carrier's Case* itself. While the case is the first example of breaking bulk known in the law of larceny, there is a report of a claim in conversion in relation to breaking bulk two decades earlier.⁹³ Furthermore, around 1500, claims for breaking bulk seem to have been the most common claim in conversion, albeit not frequently reported.⁹⁴ Breaking bulk was not adequately remedied by detinue, as in detinue a defendant could return the damaged receptacle and avoid any liability in damages. Nor was it remedied by trespass to the goods with the force and arms. As the receptacle had been given to the tortfeasor as a bailee, that consent contradicted any claim based

⁹¹ Putnam, *Early Treatises* 376.

⁹² See (1479) YB Hil 18 Edw IV, fo 23, pl 5 and (1490) YB Hil 5 Hen VII, fo 15, pl 6, both discussed in AWB Simpson, 'The Introduction of the Action on the Case for Conversion' (1959) 75 *LQR* 364, 372-375.

⁹³ *Anon* (1453) Harvard Law School MS 156 (unfoliated, under Mich 32 Hen VI) cited by Baker, *Oxford History* 801 n.1 and Baker, *Introduction* 396 n.98. This case has never been printed or reproduced on film and seems to have been unknown to Simpson.

⁹⁴ Baker, *Oxford History* 802.

upon force and arms. An action on the case for conversion was therefore clearly appropriate.

The availability of conversion may have highlighted that an approach to larceny focused on the availability of trespass with force and arms was inadequate. There were clear gaps in the law, and these gaps were being remedied in private law, but not criminal law. The question then would be whether the extension of remedies in private law should be mirrored in criminal law. From this perspective, one motivation in *The Carrier's Case* may in fact have been to try and maintain alignment between criminal law and private law, without entering into sustained discussion of possession, with all the difficulties that might cause in a criminal trial. This may have been especially pertinent given the claim was really one for restoration of property from the sheriff.

Some corroboration of the influence of contemporary debates in private law is found in the competing approaches of different judges. In *The Carrier's Case*, Bryan CJ stated that the merchant should use the writ of detinue.⁹⁵ From then on, Bryan stressed the requirement of a taking *vi et armis*, which was also a requirement of claims in trespass to goods. For Bryan, *The Carrier's Case* was therefore part of a world in which there were two actions related to personal property, one of which could lead to criminal liability. The relationship between detinue and conversion was an issue in the 1470s, and it might be that some of the judges saw *The Carrier's*

⁹⁵ It is not clear from the report whether Bryan meant that detinue should be used against the carrier, or against the Sheriff of London. Detinue would not have been available against the carrier, as the detinue writ required that the defendant detained the plaintiff's property. In *The Carrier's Case*, the property was not in the hands of the carrier, but those of the Sheriff of London, against whom detinue *sur trover* may have been available.

Case as part of the ongoing debate.⁹⁶ The different attitudes of Bryan CJ and Choke J in *The Carrier's Case* can also be seen in other cases in the 1470s. *Rilston v Holbek* began in 1472, both in detinue and as an action on the case for damage to goods by a sub-bailee, the claim being brought by the executors of the bailor. All of the judges, including Choke, are reported as in favour of liability in the action on the case, except for Bryan CJ, and the case was undecided for three years.⁹⁷ Bryan CJ's remarks in the printed report about privity to the initial bailment suggest that he considered the appropriate remedy to be detinue on a bailment, rather than an action on the case. In a 1479 claim Bryan insisted on detinue while Choke considered conversion to be available.⁹⁸

Developments in conversion may also have blurred Bryan CJ's clear emphasis on trespass with force and arms. Bryan CJ sought to maintain a rigid distinction

⁹⁶ See generally, Simpson, 'Introduction' 366-370. There is a risk in assuming too much consistency in late-fifteenth century judges' views over time. David Seipp notes that the judges do not seem to have been consistent in their approaches to corporations (D Seipp, 'Formalism and realism in fifteenth-century English law: Bodies corporate and bodies natural' in P Brand and J Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge, Cambridge University Press, 2012) 49-50). However, there does seem to be some degree of consistency in relation to personal property matters.

⁹⁷ *Rilston v Holbek* (1472) YB Mich 12 Edw IV, fo 13, pl 9. The record is in JH Baker, *Baker and Milsom: Sources of English Legal History: Private Law to 1750*, 2nd edn (Oxford, Oxford University Press, 2010) 576-7.

⁹⁸ (1479) YB Hil 18 Edw IV, fo 23, pl 5. David Seipp has suggested that the remarks attributed to Choke J in the report are those of Catesby sjt, and vice versa, presumably on the basis that Catesby's reported remarks refer to Catesby in the third person in a hypothetical case (www.bu.edu/phpbin/lawyearbooks/display.php?id=20619). However, the parallel in the disagreement between Choke and Bryan suggests the remarks are accurately attributed to Choke.

between two writs related to personal property: detinue and trespass with force and arms. But this model of personal property law was breaking down. The introduction of conversion meant that there were now three writs, with the place and role of conversion uncertain. Furthermore, conversion writs often looked similar to trespass with force and arms writs. *Rilston v Holbek*, although not about breaking bulk, included allegations of force. The defendant's denial of the 'force and wrong' in that case is the same as is seen in records for cases begun using writs of trespass with force and arms, suggesting a blurring between actions on the case relating to goods and trespass with force and arms.⁹⁹ In the early-sixteenth century, conversion claims for breaking bulk sometimes included an allegation of force and arms, despite the claims not using the traditional trespass writs.¹⁰⁰ Conversion writs which included an allegation of force and arms may have looked very similar to trespass with force and arms writs. They included a wrong (a trespass) and an allegation of force and arms, the aspects of the tort of trespass which were also elements in the crime of larceny. The foundation of Bryan's reasoning, a clear distinction between two writs, was being eroded by the existence and form of conversion writs.

Bringing these possibilities together, the issues and debates in *The Carrier's Case*, as well as elsewhere, suggest parallels between contemporary discussions in larceny and conversion. Such parallels may provide an explanation as to why many of the judges considered the facts in the case to amount to felony – the law had come to recognise breaking bulk as a wrong, one which was sometimes described as being committed in a manner which would allow criminal liability in larceny.

⁹⁹ Baker, *Sources* 576-7. For an example in a trespass with force and arms writ, see the record of *Rattlesdene v Grunestone* (Baker, *Sources* 341).

¹⁰⁰ Baker, *Oxford History* 802 fn 11 has examples from 1506-1530. The relevant work has not been completed in the fifteenth century records.

These developments in the private law of property would integrate well with an analysis of the facts in *The Carrier's Case* on the *Bracton* model discussed above. Changes in the private law remedies for infringements of personal property made it clear that interferences other than taking or retaining possession could be remedied by the common law, something which analysis of the case through the lens of *Bracton* encouraged on the criminal law side. Two unrelated developments pushed in the same direction – for the law of theft to encompass more than merely the wrongful taking of possession.

IV. Concluding Remarks

The Carrier's Case is a landmark case in the law of larceny, with all the significance that holds for the modern law of theft. Like many landmarks, its significance is perhaps more evident from a distance; the references to the case in its immediate aftermath suggest lawyers did not support the decision and the alignment between private law and criminal law which existed in *The Carrier's Case* did not last. A focus on larceny as the taking away of goods, rather than an interference with property, reappeared in the eighteenth century.¹⁰¹ From then on, the competing frameworks through which the facts of the case could be viewed continued to be in competition into the twentieth century. The tension between them was a source for dissatisfaction with the law of larceny, especially as the law developed more in line with the idea of theft, but within the form of larceny. It was only with the Theft Act 1968, and similar legislation elsewhere in the common law world, that the constraints of larceny were removed. More generally, and positively, *The Carrier's Case* shows that the common law of crime did not develop solely through 'shabby

¹⁰¹ 1 Hawk PC 89 and 4 Bl Comm 230. Hawkins expressly noted the contrast with the civil law in his discussion.

expedients' as Milsom has claimed, but was influenced by wider legal developments and legal scholarship.¹⁰²

¹⁰² SFC Milsom, *Historical Foundations of the Common Law* 2nd edn (London, Butterworths, 1981) 403.