THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 43-1992)

REPORT

ON

THE LAW RELATING TO DISHONESTY

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty two Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp363-367.

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NOTE

This Report was submitted on 28th September 1992 to the Attorney General, Mr. Harold A. Whelehan, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the results of an examination of and research in relation to the law relating to Dishonesty which was carried out by the Commission at the request of the former Attorney General, Mr. John Rogers, S.C., together with the proposals for reform which the Commission was requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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PART I: THE PRESENT LAW

CHAPTER 1: INTRODUCTION

1.1 On the 6th March, 1987, the then Attorney General, Mr John Rogers SC, requested the Law Reform Commission to formulate proposals for the reform of the law in a number of areas. These included the law relating to certain criminal offences, including in particular the laws relating to dishonesty, malicious damage and offences against the person, and matters having a direct bearing on the criminal law. The Commission has already reported on receiving stolen goods, rape, malicious damage, child sexual abuse, sexual offences against the mentally handicapped, the confiscation of the proceeds of crime, the indexation of fines and oaths and affirmations. A Discussion Paper on non-fatal offences against the person has been circulated.

1.2 We began by preparing a Discussion Paper on the subject of Dishonesty which set out the existing law and the difficulties to which it appeared to give rise, examined the law in other jurisdictions, set out the policy considerations which appeared to arise and made provisional recommendations for alterations in the law in a number of areas. This Discussion Paper was circulated among a number of persons and bodies having particular expertise in this area, including judges, barristers, solicitors, academics, accountants, financial institutions, the Irish Bankers' Federation, the Director of Public Prosecutions' Office, the Department of Justice and the Gardai. As a result, the Commission received a number of detailed and helpful commentaries in writing on the Discussion Paper and, in addition, a meeting was held at the Commission's Offices in September 1991, at which there was a large attendance of those interested. We are most grateful to all who assisted us in these ways. A list of those who sent us submissions is to be found in Appendix A.

1.3 We have since reviewed the entire subject in the light of these consultations. The present Report contains our final recommendations for reform of the law.

1.4 In this Part we examine the present law relating to offences of misappropriation. The law is a somewhat unhappy amalgam of judicial[1] and statutory contributions over the centuries, revealing a curious reluctance on the part of the courts or the legislature to address the basic policy issues underlying the several specific offences.

1.5 We shall consider the offences separately. It is as well to record at the outset that they cannot properly be understood in isolation: to a large extent one offence grew out of another. This historical process has left the law in an asymmetrical state, with overlaps between offences and gaps where clearly dishonest conduct falls outside the criminal sanction.

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1 In *Hehir*, [1895] 2 IR 709, at 722 (Cr Cas Res), Gibson J noted that the law of larceny, as developed by the courts,

> "abounds ... in arbitrary exceptions and intangible distinctions, without any clear foundation in principle or common sense".

CHAPTER 2: LARCENY[1]

2.1 Section 1 of the *Larceny Act, 1916* provides as follows:

"For the purposes of this Act -

(1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof: provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner:

(2) (i) the expression "takes" includes obtaining the possession -

(a) by any trick;

(b) by intimidation;

(c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained;

(d) by finding, where at the time of the finding the

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1 See generally *McCutcheon, passim, Russell*, vol 2, chs 51-65, 70-79, *O Siochain*, chs 11, 13, 23, *Kenny*, chs XIII-XVII, XIX-XX, *Smith & Hogan* (1st ed), 344-482, *Anon, The Law of Stealing*, 95 Ir LT & Sol J 201, 207 (1961).

finder believes that the owner can be discovered by taking reasonable steps;

(ii) the expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached;

(iii) the expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen:

(3) Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen:

Provided that -

(a) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof; and

(b) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase."

As we shall see, this is far from the whole story,[2] but at least it starts us on the way.

The Thing Stolen must be "Capable of Being Stolen"

2.2 The expression "anything capable of being stolen" codifies the common law rules on the subject. "Briefly stated, the thing must be tangible, moveable, of value and the property of somebody."[3]

(i) The thing must be tangible

A thing may be tangible, however slight its density. Thus, gas,[4] when contained,

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2 It is noteworthy that the section defines stealing, not larceny, but "this did not purport to make any change in the common law of larceny as it was then understood to be": *Kenny*, para 222.

3 *McCutcheon*, para 41.

4 *White*, Dears, 203, 169 ER 696 (1853), *Firth*, LR 1 CCR 172 (1869).

may be stolen; similarly water[5]; so also, in principle, may electricity.[6]

(ii) The thing must be the subject of human ownership

2.3 Some things are not the subject of human ownership at all, and thus cannot be stolen. These include human corpses,[7] at all events before they have undergone natural or artificial changes.

One cannot be guilty of "theft of or from the environment", by misappropriating air or sea-water, for example; where such phenomena have been collected and contained in some way by humans, however, it seems that they may be stolen.[8] Thus one may be convicted of larceny of water supplied by a water company to consumers, and standing in the company's pipes.[9]

Derelict things, having no owner, cannot be the subject of larceny.[10] Whether or not goods have been abandoned is sometimes a more difficult question than might at first appear.

2.4 The law distinguishes between animals *mansuetae naturae* and those *ferae naturae* so far as they may be the subject of larceny. Animals in the former category may be stolen,[11] as may their produce (such as their wool or eggs). Animals in the latter category, by and large, are not the subject of larceny, unless they have come under human control.

Control may be found to exist where the wild animals have been tamed, for example, or caught[12] or in cases where they are so young that they cannot escape from the landowner's control.[13]

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5 *Kenny*, para 262.

6 *Scotting and Raslke*, [1957] Crim L Rev 241 (a very briefly reported decision involving larceny of electricity consumed by the making of a series of telephone calls without payment). The *Larceny Act, 1916*, section 10 (reenacting the *Larceny Act, 1861*, section 23) provides that "[e]very person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity" is to be guilty of felony and or conviction liable to be punished as in the case of simple larceny. By virtue of *The Electricity (Supply) (Amendment) Act, 1942*, section 6(1), an offence under section 10 of the 1916 Act may be prosecuted summarily: see further *McCutcheon*, para 62. As to *mens rea*, whether "maliciously" should be treated as an alternative to "fraudulently" is not clear: cf *McCutcheon*, para 63; such an interpretation could result in indefensible anomalies: *id.* A provision analogous to section 10 is the *Postal and Telecommunications Services Act, 1983*, section 99. In England, in the controversial decision of *Low v Blease*, [1975] Crim L Rev 513 the Queen's Bench Divisional Court held that making telephone calls without payment did not constitute theft under English *Theft Act, 1968*, as the electricity could not be described as "property" within the meaning of section 4 of the Act and the defendant's action did not amount to "appropriation". The inclusion of a specific provision (section 13) dealing with the abstraction of electricity and the fact that such a small use of electricity, if held to amount to theft, would transform a trespasser into a burglar, doubtless weighed with the Court.

7 *Sharpe*, Dears & Bell 160 (1857) "It is a common law misdemeanour to remove a corpse from a burial ground". *McCutcheon*, para 42, fn 71.

8 *Id.*

9 *Ferens v O'Brien*, 11 QBD 21 (1883).

10 *Kenny*, para 263, *Peters*, 1 C & K 245 at 247, 174 ER 795, at 795 (1843).

11 This was not the position at common law, where domestic animals such as dogs and cats were not the subject of larceny. Section 21 of the *Larceny Act, 1861* made the theft of domestic animals a summary offence; section 18 specifically provided for the theft of dogs. Section 5 of the *Larceny Act, 1916* prohibits the theft or unlawful possession of dogs after a previous summary conviction for such an offence (under section 18 of the 1861 Act) and the corrupt taking of rewards for recovering stolen dogs.

12 Cf *Clinton*, IR 4 CL 6, at 14 (Cr Cas Res, *per* Whiteside, CJ 1869).

13 Cf *id*, *Kenny*, para 264.

Where animals e.g. hens and ducks, are not closely confined but nonetheless, after being free to wander, have the habit of returning to a particular place, they may be the subject of larceny.[14]

2.5 It should be noted that statute has intervened[15] to make criminal the taking of certain such animals, including deer,[16] hares or rabbits in warrens at night,[17] and fish from waters on land adjoining or belonging to dwellinghouses.[18]

Section 1(3)(b) of the 1916 Act provides that the carcase of a creature wild by nature and not reduced into possession while living is not capable of being stolen by the person who has killed the creature, unless after killing it he has abandoned possession of the carcase. A similar provision[19] applies to the larceny of things severed from the realty. We will examine the notion of abandoning possession in these two contexts presently.

(iii) The thing must have an owner

2.6 The thing stolen must have an owner.[20] Ownership here is broadly construed, extending to the degree of possession sufficient to warrant a claim in trespass.[21] It appears that, notwithstanding the "wide and vague words"[22] of section 1(2)(iii) of the 1916 Act, this minimum requirement is still part of the law.[23]

(iv) The thing must neither be realty nor savour of realty

2.7 Land has never been the subject of larceny. However, section 8(1) makes it punishable as in simple larceny to steal (or, with intent to steal, to rip, cut, sever or break):

> "(a) any glass or woodwork belonging to any building; or
>
> (b) any metal or utensil or fixture, fixed in or to any building; or
>
> (c) anything made of metal fixed in any land being private property, or as a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or

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14 *Kenny*, para 265.
15 *Kenny*, para 266.
16 *Larceny Act 1861*, section 12-16.
17 *Id*, section 17.
18 *Id*, section 24.
19 Section 1(3)(a).
20 *Kenny*, para 261.
21 *Id*, *Smith*, 2 Den 449, 169 ER 576 (1852), *Townley*, LR 1 CCR 315 (1870), *Immer*, 13 Cr App Rep 22 (1917).
22 *Kenny*, para 261.
23 *Id.* The requirement is a necessary, but not sufficient, element of the *actus reus* of theft. Thus, wild animals in their natural state are not the subjects of larceny, even though the landowner or his surrogates may have sufficient property in them *ratione soli* to maintain an action for trespass or conversion for interference with them: cf *Case of Swans*, 7 Co Rep 15b, at 17b, 77 ER 435, at 438 (1592).

ornament, or in any burial ground."[24]

Moreover, section 11 deals with the larceny of ore from mines; this constitutes felony with a maximum term of imprisonment of two years.

Section 1(3)(a) provides that things adhering to the realty may be stolen after severance therefrom, provided that (save as specified in sections 8 and 11):

> "anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof."[25]

A similar provision,[26] as we have seen, applies to the larceny of the carcase of an animal *ferae naturae*.

Title Deeds

2.8 Legal fictions got in the way of common-sense in relation to the larceny of title-deeds. Since they were "identified", with the land, they were not larcenable.[27] Section 7(1) of the 1916 Act abolished this exemption, making the theft of these documents a felony carrying a maximum penalty of five years' penal servitude.

Documents Relating to Choses in Action

2.9 At common law there was an "artificial principle"[28] that the documentary evidence of a right was identified with the right itself, so that, "if the subject of the right could not be stolen then equally the document could not be stolen".[29] On this basis, documents or instruments evidencing the right to a chose in action - such as promissory notes - were not larcenable.[30] Other justifications for this rule were that the documents were either "of no intrinsic value"[31] or of indeterminate value, such that it was not possible to say whether or not they were worth more than the 12d - which marked the boundary between

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24 The theft of trees and shrubs, and of plants, roots or vegetable production in gardens, orchards, pleasure grounds, nursery grounds, hothouses, greenhouses or conservatories is similarly made a felony under sections 8(2) and (3).

25 In *Billing v Pill*, [1954] 1 QB 70, it was held that an army hut which was bolted to a concrete base was not attached to the realty, for the purposes of section 1(3)(a). Lord Goddard, CJ succeeded in interpreting the words "attached to or forming part of the realty" as meaning "attached so as to form part". It seemed to him "odd" that a thing could be attached to the realty and yet not form part of the realty. For critical analysis, see Smith, *Stealing a Hut*, [1955] Crim L Rev 404. Cf *Skujins*, [1956] Crim L Rev 266. See also the, apparently, conflicting English and Irish decisions in *Townley* IR ICCR 315 (1871), and *Foley*, 26 LR IR 299 (Cr Cas Res, 1889) and the Commentary in *McCutcheon*, para 43.

26 Section 1(3)(b).

27 See *Kenny*, para 275.

28 *Id*, para 276.

29 *Id.*

30 *Id.*

31 *Murtagh*, 1 Cr & Dix CC 355, at 357 (Doherty, CJ, 1840).

petty and grand larceny.[32]

2.10 Statutes have long since modified the position. Section 6 of the *Larceny Act, 1916* provides that the larceny of a will, codicil or other testamentary instrument, either of a deed or of a living person, is a felony, punishable by penal servitude for life. And section 7 deals (as we have seen) with the larceny of documents of title to land. It also prohibits the larceny of judicial records and documents and other official papers and documents.

Moreover, sections 27 to 30 of the *Larceny Act, 1861* punish the destruction, obliteration or cancellation for a fraudulent purpose, of documents of title, choses in action, wills and records.

(v) The thing must have some value

2.11 If a thing taken lacks any value it cannot be the subject of theft. For the purpose of the law of larceny, "only economic value (and not, for example, sentimental or artistic value) is taken into account".[33]

This judicial approach has greatly facilitated prosecutors over the years; they have been able to obtain convictions for dishonest conduct largely falling outside the scope of the offences against property by framing indictments for the larceny of items of infinitesimally small value, such as the paper of cancelled bank notes[34] and of a worthless cheque.[35]

It may perhaps be noted here that it is not a good defence to a charge of larceny that the accused left by way of exchange something of a value equal to, or in excess of, the value of the thing taken. The only defence open to the accused would be a possible lack of *mens rea*, either because he believed that the owner consented or because he believed he had a legal right to take the thing.[36]

Taking and Asportation

2.12 Section 1(1) of the 1916 Act, as we have seen, provides that a person steals who "... takes and carries away ..." the stolen item; and section 1(2)(ii) provides that the expression "carries away" includes "any removal of anything from the place where it occupies ...". There are thus two essential elements in this aspect of the *actus reus*: taking and asportation.

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32 Cf *Kenny*, paras 275, 296, In *Lanauze* 11 ILR 407 (QB, 1847), see also *Watts*, Dears 326, 169, ER 747 (1854), *Crone*, Jebb Cr & Pr 47 (1825) (bank notes), *Murtagh*, 1 Cr & Dix CC 355, at 357 (Doherty CJ, 1840) (promissory note).

33 *Kenny*, para 269. See *Edwards* 13 Cox 384 (CCA, 1877), *Morris*, 9 C & P 349, *Clarence*, 22 QBD 23, at 52 (Cr Cas Res, 1888), *Bingley*, 5 C & P 602, 172 ER 1118 (1833).

34 *Clark*, R & R 181, 168 ER 749 (1810).

35 *Perry*, I C & K 725, 174 ER 1008 (1845).

36 *Kenny*, para 282.

The taking constitutes a trespass to the article stolen.[37] As regards the asportation, the courts have not required that the extent of the distance be substantial.[38]

Possession

2.13 Larceny has always been conceived as an offence against possession.[39] This approach is reflected in section 1(2)(iii) of the 1916 legislation, which defines "owner" as including "any ... person having possession or control of, or a special property in", anything capable of being stolen.

The notion of possession in larceny is far from simple. The courts have developed refined distinctions between "physical" and "legal" possession: larceny is committed against those with legal rather than merely physical possession. These distinctions can best be understood as reflecting robust policy decisions rather than as giving effect to any deep theoretical structure.

As *Kenny* notes:

> "[q]uite early, ... the desire of property owners to enjoy the protection which the fierce sanctions of the criminal law of felony could give them against the dishonesty of their servants or guests led the judges to create the artificial doctrine of 'legal' ... possession as distinguished from actual

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37 Cf *McMahon & Binchy*, 535, *Gahan v Maingay*, Ridg Lap & Scho 62 (1793), *Conway v Archdall*, 1 Bat 182 (1826), *Sligo Corporation v Gilbride*, [1929] IR 351 (Sup Ct,) *Whelan v Madigan*, [1978] ILRM 136 (High Ct, Kenny, J), *Cooney v Cooney*, 54 ILTR 60 (Gordon, J, 1920).

38 See *Coslet*, 1 Leach 236, 168 ER 220 (1782), *Cherry*, 1 Leach 236, n(a), 168 ER 221 (1781), cf *Lapier* 1 Leach 321, 168 ER 263 (1784) where the defendant was held rightly convicted of robbery for pulling an ear-ring from a woman's ear, the ear-ring later being found among the curls of her hair. 'The Judges were all of opinion that it was a sufficient taking from a person to constitute robbery; for it being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant ....' In *Mills*, 1 Frewen 153 (CAA, 21 October 1955), the applicant had been charged and convicted under section 2 with simple larceny from a shopper. A prosecution witness gave evidence that she had seen the appellant's left hand withdrawing the victim's purse right out of her bag. She told the victim, who, on checking, found that the purse was in the bag but that the bag was open. The Court of Criminal Appeal took the view that, if the witness's evidence were accepted in its entirety, it clearly established the offence of larceny from the person under section 14, and that accordingly, on previous authority, the conviction should be set aside. Counsel for the prosecution contended that the jury were not bound to accept the witness's observation as infallible; and might reasonably have considered that, while accepting her as a truthful witness, she might have been mistaken in her observation as to the degree of asportation that had taken place. Moreover, nobody's attention appeared to have been directed to the importance of the degree of asportation and the jury had received no instruction with regard to the matter. The Court of Criminal Appeal did not accept this line of argument. Davitt P (for the Court) said (at p55):

> "It seems to us that if they had been properly instructed upon the point they might well, and indeed in all probability would, have accepted [the witness]'s evidence as to the purse having been withdrawn completely from the bag. If they did they must have acquitted the accused of simple larceny. The failure adequately to instruct the jury may have resulted in the accused being deprived of a reasonable chance of acquittal. In these circumstances we are of opinion that the conviction cannot stand."

See also *Simson*, Kel 31, 84 ER 1068 (1664) (defendant took plate out of a trunk and laid it on the floor, but was apprehended before he carried it away; held (unanimously) that such removal amounted to larceny). Cf *Taylor*, [1911] 1 KB 674. In *Keating* [1989] ILRM 561, Lynch J held that, where a person takes goods from a supermarket shelves with fraudulent intent permanently to deprive their owner of them, the proposition that the supermarket owner must be assumed to consent to that person's possession of the goods so long as he or she remains on the supermarket premises was 'quite untenable in law or in fact'.

39 *Kenny*, para 227. See also Edwards, *Possession and Larceny*, [1950] Current Legal Prob 127.

physical control. Under this fiction the owner was treated as retaining 'legal' possession notwithstanding that he allowed the actual physical control of the thing to pass into the hands of his servant or of his guest."[40]

(i) Servants' possession

2.14 It is worth noting briefly how servants gradually become enmeshed in criminal liability for disposing of their masters' goods. The doctrine of the master's legal possession initially extended only to the control by the servant of the article *while still on the master's land or premises*.[41] Moreover, prior to statutory clarification[42] in 1542, it appeared doubtful whether a servant could be guilty of theft, even *within* the master's premises, where the article had been expressly committed to his charge.[43]

Gradually, however, the scope of the servant's legal possession was constricted until finally the rule became that the servant never had legal possession of his master's property which he controlled by virtue of his position as servant. To this there was an exception: property given to the servant by a third party to pass on to his employer was regarded as conferring legal possession on the servant.[44]

(ii) Delivery of goods for a temporary, special or limited purpose[45]

2.15 A series of cases has held that the owner of an article retains legal possession where he parts company with it briefly in circumstances where he would reasonably assume that the person exerting temporary control over the article would hand it back virtually immediately. It is very difficult to construct a convincing principled rationale for treating this kind of case differently from one of bailment or trust.

(iii) Bailees' possession

2.16 The general rule originally was that a bailee who misappropriated the property entrusted to him was not guilty of larceny, since he had taken the property into his possession and carried it away with the consent of the owner.[46]

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40 *Kenny*, para 228.

41 *Id*, para 229.

42 33 Hen VIII, c 5 (1542). The English equivalent, 21 Hen c 7, had been enacted thirteen years previously.

43 *Kenny*, para 229.

44 *Kenny*, para 229. Legislation in England in 1799 (6 & 7 Geo 5, c 50, s 17) (an equivalent Act applying to Ireland in 1811 (51 Geo *III*, c 38) made misappropriation by a servant of property thus reaching him the offence of embezzlement: cf *infra*, p99). Edwards, *op cit*, at 134 notes that "Stephen in his *History of the Criminal Law*, Vol 3, at p152, suggests that the reason for this gap in the criminal law [before the 1799 legislation] was the excessive severity with which a mere debtor could be treated. In the case of a servant, his master could arrest him on mesne process and having got judgment, imprison him for an indefinite time or till payment".

45 See *McCutcheon*, para 36, *Chisser*, T Raym 275 (1678), see also *Williams*, 6 Car & P 390, 172 ER 1289 (1834) (change for half-crown passed to defendant on reasonable but erroneous belief, induced by defendant, that defendant would give the half-crown to the person who passed the change to defendant; held: defendant guilty of larceny for appropriating the change), *Thompson*, Le & Ca 225, 169 ER 1373 (1862), *Brennan*, 1 Cr & Dix, CC 560 (1840), *Colhoun*, 2 Cr & Dix Circ R 57 (1840).

46 *Kenny*, para 231.

Later the notion of "breaking bulk" emerged: if the bailee broke into the "unit of property"[47] entrusted to him, he was considered to have brought the bailment to an end and thereby lost possession of the property. Any subsequent asportation by the "former" bailee would thus constitute larceny.[48]

Kenny puts it bluntly:

> "In truth the new rule was arbitrary and rested on no sound principle at all."[49]

Statute[50] intervened in 1857 and, as we have seen, the "absurd reasoning of the common law invention"[51] has no place in the *Larceny Act, 1916*, the proviso to section 1(1) of which is to the effect that a person may be guilty of stealing something notwithstanding that he has lawful possession of it if, being a bailee (or part owner) of it, he fraudulently converts it to his own use or the use of any person other than the owner.

Who Is a Bailee?

2.17 We must now consider the question as to how and when a bailment is created. The essence of the concept is that of delivery of goods on a condition or trust that they are to be restored to the transferor or according to his directions as soon as the purpose for which the goods are delivered has been achieved.[52] It is not necessary that the bailment be supported by a valid, enforceable contract.[53]

Cases not usually amounting to a bailment include the receipt of purchase money by an auctioneer from a purchaser or of rent by a land-agent from a tenant. Where the recipient is a clerk or servant of his principal - a bus conductor or shop assistant, and he is required to hand over to his employers all money received in the course of employment, he may be liable either for embezzlement (where the money is appropriated before it passes into the employer's possession) or larceny at any time thereafter. Where no such duty exists, he may be charged with fraudulent conversion.[54]

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47 *Id*, para 233.

48 *The Carrier's Case*, YB Pasch 13 Edw 4 Pl 5 (1473), 64 Selden Society 30 (1948), *Kenny*, para 232, fn 5, Stephen, *A History of the Criminal Law of England*, vol 3, 139-140 (1883). The question has arisen in relation to possession of drugs: see Duncan, *Drug Offences and Strict Liability*, 104 ILT & Sol J 161, 171, 181, 187, 198, 207 (1970). More generally see *Leigh*, 32-36.

49 *Kenny*, para 233.

50 *Punishment of Frauds Act 1857*.

51 *Kenny*, para 233.

52 *Id*, para 244.

53 See *McDonald*, 15 QBD 323 (1885), *Clegg*, IR 3 CL 166 (Cr Cas Res, 1869), *Buckall*, Le & Ca 371, 169 ER 1436 (1864), *De Banks*, 13 QBD 29 (Cr Cas Res, 1894), *Aden*, 12 Cox 512 (1873).

54 See *Kenny*, paras 242-3.

Conversion By Bailee Constitutes Larceny

2.18 It will be recalled that the proviso to section 1(1) of the *Larceny Act, 1916* (reproducing with modifications section 4 of the *Punishment of Frauds Act, 1857*) provides that a person may be guilty of stealing something as a bailee (or part owner) if he "fraudulently converts the same to his own use or the use of any person other than the owner". In *Rogers v Arnott*,[55] the English Queen's Bench Division held that the attempted larceny of a tape-recorder by a bailee amounted to fraudulent conversion and that thus the defendant had been rightly acquitted of attempted larceny since he was guilty of the complete offence of larceny. Donovan J (with whom Lord Parker CJ and Davies J concurred) rejected the argument that there had been no fraudulent conversion because the owner had been deprived of nothing "and, as in the case of the civil tort of conversion, some detriment to the owner is essential to the commission of the wrong".[56] Donovan J said:

> "I think that the proposition is doubtful and the analogy is in any event misleading. Conversion *per se* has been defined in a civil action as an act intentionally done inconsistent with the owner's right ... The analogy is misleading because no civil action is possible unless the true owner has suffered damage; but this is not so in the case of a criminal prosecution for fraudulent conversion. One cannot therefore, determine for the purpose of the criminal law whether there has been a conversion simply by asking whether the true owner has suffered damage. He might indeed recover the article intact, but this would not of itself prevent a prosecution of the dishonest bailee."[57]

2.19 Donovan J approved of Turner's view, expressed in *Kenny* and *Russell*, both of which works Turner edited. *Kenny*[58] had stated:

> "Exactly what constitutes the 'conversion' which involves the bailee in the guilt of stealing, has not been authoritatively stated. The prisoner must have possession of the goods, otherwise he would not be bailee, and then, as it would seem, any conduct on his part which shows that he assumes either the full title of ownership in the goods, or asserts a right to pass the full title of ownership, will amount to such conversion as will render him guilty of stealing them within the statute."

And in *Russell*[59] the author had this to say:

> "It is unfortunate that the term 'conversion' does not appear to have been given a precise definition either judicially or in the text-books. But for the purposes of the law of larceny it is submitted that it is necessary that the offender should have possession of the goods, and that when

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55 [1960] 2 All ER 417.
56 *Id*, at 418-419.
57 *Id*, at 419.
58 16th ed, para 245. See also the 19th ed, para 245.
59 16th ed, p1095.

possession has been obtained any setting up by the offender of a full title to the property in himself, adverse to that of the owner, if done without a *bona fide* claim of right will render him guilty of larceny."

Larceny by a Trick

2.20 If a misappropriation by a bailee amounted to "breaking bulk", the courts had no hesitation in characterising this as larceny. But cases could occur where the bailee had clearly acted dishonestly but had not "broken bulk". In *Pear*,[60] in 1779, the defendant had hired a horse in London, giving an address to the livery-stable-keeper beforehand and saying that he would ride the horse to a destination in Surrey and return the horse by 8 p.m. In fact he sold the horse that day; the jury found that at the time of the hiring, he had no intention of going to Surrey and that at this time he had intended to sell the horse. The Judges of the Court for Crown Cases Reserved "differed greatly in opinion".[61] The majority thought that the question as to the original intention of the prisoner in hiring the horse had been properly left to the jury; and as they had found that his view in so doing was fraudulent, "the parting with the property had not changed the nature of the possession, but that it remained unaltered in the [owner] at the time of the conversion; and that the prisoner was therefore guilty of felony".[62]

2.21 It seems clear that *Pear* can be understood properly only if it is regarded as involving a naked policy determination, indefensible in terms of civil law notions of contract where they impinge on the issue. In *Du Jardin v Beadman Bros Ltd*,[63] in 1952, Sellers J accepted and adopted *Russell's* views on *Pear*, which, Sellers J noted, had been "so clearly expressed and so well supported by authority and argument".[64] *Russell*[65] had stated:

> "The argument on which the case of *R v Pear* was decided was that the fraudulent intention of the transferee at the inception of the transaction in some way negatived in law the consent of the owner to do what he in fact did, namely, to put the horse in the hands of Pear so as to make him bailee of it. If this doctrine were sound there is no logical escape from the conclusion that the existence of the like fraudulent intention ought to have the same effect, so as to negative the consent of the owner, when the transaction is not one of purported bailment involving the transfer of possession merely, but when the transaction is, for example, one of the purported sale, involving the transfer of the ownership of the chattel .... The decision of the judges in *Pear's case* that the deceit which eliminated the consent which the owner intended to give when he regarded himself as parting with merely the possession

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60 1 Leach 212, 168 ER 208 (1779). See Lowe, *Larceny by a Trick and Contract*, [1957] Crim L Rev 28, 96.
61 1 Leach, at 213, 168 ER, at 209.
62 *Id*, at 213-214, and 209, respectively.
63 [1952] 2 All ER 160 (QB Div, Sellers, J).
64 *Id*, at 163.
65 *Russell on Crime*, 10th ed, vol 2, pp1087-1089.

of his chattel would not have the same effect when he regarded himself as parting with something greater, namely, the ownership of it, was firmly maintained by subsequent courts in a multitude of cases .... The doctrine of the *Pear case* was anomalous, but it was highly important since it did much to expand the common law of larceny to meet a social need. It was widely applied, and the special offence which it covered came to be known as 'larceny by a trick', an inapt name which has caused a good deal of confusion in later law."[66]

2.22 Following the 1857 legislation, there was no longer any need for the prosecution to try to show that the defendant had the intention from the beginning of misappropriating the article coming under his control.

In the meantime *Pear's case* proved an effective authority for prosecuting as larceny several fraudulent schemes such as ring dropping, whereby a ring was "discovered" by a cheat close to the intended victim; the cheat would manage to convince the victim that the ring was valuable and that they both should share in its value if only the victim would give the cheat some security in return for being given the ring to dispose of.[67]

The requirement that from the beginning of the bailment, the bailee should have the intention to steal was emphasised in the Irish case of *Rogers*.[68] The defendant was convicted of larceny where he had ordered a suit of clothes from a draper and took the draper to an inn in order (as he claimed) to obtain the money for the suit from the defendant's brother, who he said was there. Having taken the draper to a room upstairs, the person left the room, ostensibly to locate his brother. He never returned. He was later found some distance away, with the suit under his arm.

Crampton J, in charging the jury,[69] stressed that the question they had to try was whether, from his conduct, they could:

> "necessarily arrive at the conclusion that [the defendant] had this fraudulent intention in his mind at the time he ordered the suit. For, if he ordered it to be cut with the expectation of being able, or with the intention, to pay for it, this indictment cannot be sustained".[70]

2.23 In *Buckmaster*,[71] in 1887, a welshing bookmaker was held guilty of

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66 *Russell* had gone on to express the following conclusion (at p1102).

> "By the decision in *Pear's case* a new crime was created which was purely arbitrary and did not rest upon principle."

67 See *Patch*, 1 Leach 238, 168 ER 221 (1782), *Moore*, 1 Leach 314, 168 ER 260 (1784). See also *Watson*,2 Leach 640, 168 ER 422 (1793), and *Hollis*, 12 QBD 23 (Cr Cas Res, 1883). Cf *Rodway*, 9 C & P 784, 173 ER 1052 (1841), criticised by *Kenny*, para 235.

68 IR Cir Rep 284 (Crampton J and Jury, 1841).

69 *Id*, at 284-285.

70 *Id*, at 285.

71 20 QBD 182 (Cr Cas Res, 1887).

larceny in spite of the fact that the person who had placed the bet with him had intended to part finally with the coins he had handed over to the bookmaker. If this person had intended to pass property, rather than mere possession, in the coins, the relevant offence would have been false pretences[72] rather than larceny.

Lord Coleridge CJ was of opinion that the conviction ought to be affirmed for two reasons. First, a parting with the property in goods could be effected only by contract; here "there was nothing in the shape of a contract by which the property could pass, for if the prosecutor meant to part with the money, it was on the terms that the prisoner should do something with it, that is, should return the money to the prosecutor if the horse won. But the prisoner did not do so, and never intended to do so".[73] Secondly, the Chief Justice considered that:

> "the prosecutor deposited the money with the prisoner, not intending to part with the property, for he was to have his money back in a certain event, whereas the prisoner when he received the money never intended to give it back in any event. It is true that the prosecutor would have been satisfied if he had received back, not the identical coins which he deposited, but other coins of equal value, but that does not show that he meant to part with his right to the money. In my opinion the evidence clearly shows that he meant to do nothing of the kind."[74]

2.24 *Kenny* is strongly critical of the decision. He notes that the English Court for Crown Cases reserved:

> "took a strange view of the evidence and in effect held as a fact that when a man on a race-course made a bet with a bookmaker and handed over in cash the amount of his bet, receiving in return the usual betting card, he did not part with his ownership of the coins but merely deposited them by way of bailment with the bookmaker; notwithstanding that in his evidence the prosecutor had made it plain that he never expected or desired to have back the same particular coins which he had handed to the bookmaker."[75]

The better approach to the problem of the welshing bookmaker today may be to treat the case as one of fraudulent conversion rather than larceny.[76]

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72 The 1857 legislation (in contrast to section 44(3) of the *Larceny Act, 1916*) did not make it possible to convict for false pretences where the sole charge was for larceny: *cf Kenny*, para 236.

73 20 QBD, at 185.

74 *Id*, at 186.

75 *Kenny*, para 236. *Kenny* notes that:

> "it was not clear on the evidence that Buckmaster *at the time the money was first handed to him* (an essential element in the *Pear* doctrine of larceny by a trick) intended to welsh; an intention to do so can seldom arise until the bookmaker finds that his commitments are such that if a particular horse wins he will not have enough money to pay those who backed it."

Perhaps this understates the extent to which Buckmaster was willing to welsh; the intention to do so may well have been present, subject perhaps, to a willingness to pay up if it turned out that he had enough to pay all backers.

76 See *Kenny*, para 236.

treat the case as one of fraudulent conversion rather than larceny.[76]

Consent

2.25 As has been mentioned, section 1(1) of the *Larceny Act, 1916* provides that, to commit larceny, the defendant must have taken and carried away the thing that is stolen.

The concept of consent is a difficult one in this context. The courts have attempted to do two things at the same time: to discern the presence or absence of actual psychological willingness as a matter of fact, on the part of the owner that the thing be taken, and to develop what might be called the legal notion of "constructive consent", whereby the limits of the owner's consent are determined by legal factors which do not ultimately involve reference to the owner's actual psychological state. Thus, on the latter approach, an owner may be held not to have consented to a taking when in fact the owner never had any view, one way or the other, as to the limits of the consent he was giving to the taking of the item.

The relationship between these two approaches will be examined presently. First it is desirable to consider the issue of consent in four specific contexts: obtaining possession by a trick, intimidation, mistake and larceny by finding.

(i) Obtaining possession by a trick

2.26 As we have seen, section 1(2)(i) of the 1916 Act provides that the expression "takes" includes obtaining the possession by any trick. The requirement in section 1(1) that the taking be without the owner's consent continues to apply. The crucial distinction here drawn by the courts is between consent to transfer *the ownership* in the goods which, if induced by a trick, may render the wrongdoer guilty of obtaining the goods by false pretences,[77] and consent to transfer *possession* in them, which, if similarly induced, may render the wrongdoer guilty of larceny.[78]

As the contract cases[79] dealing with fraud as to personalty show, it can be far

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76 See *Kenny*, para 238.

77 Cf section 32 of the 1916 Act. See also *Caslin*, [1961] 1 All ER 246 (CCA, 1960), and *Anderson v Ryan*, [1967] IR 34 (High Ct, Henchy J).

78 Cf *Sutton*, [1966] 1 All ER 571 (CCA).

79 See *Clark*, 139-140 *Cheshire, Fifoot & Furmston*, 241-245. Cf *Kenny*, para 248, interpreting *Cundy v Lindsay*, 3 App Cas 459 (1878) as necessarily involving Blenkarn's guilt of the offence of larceny. The decision has, however, not met with universal acclaim: see *Clark* 139, *Cheshire, Fifoot & Furmston*, 242. So far as the judges in the case addressed Blenkiron's position at common law, their comments are less than fully enlightening.

Lord Cairns LC noted that Blenkarn "was acting here just in the same way as if he had forged the signature of Blenkarn & Co, the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to and intended for, not himself, but the firm of Blenkarn & Co" 3 App Cas, at 465. Lord Hatherley referred (*id*, at 468) to *Higgins v Burton*, 26 LJ (Ex) 342, where, in relation to a somewhat differently structured fraud, Pollock CB had said: "There was no sale at all, but a mere obtaining of goods by false pretences; the property, therefore, did not pass out of the plaintiffs".

from easy to say whether the owner intended to pass ownership to the wrongdoer: he may in one sense have "intended to contract with" the wrongdoer, as the physical entity across the counter, but in another sense, he may have "intended to contract with" the individual the wrongdoer pretended to be, especially where that individual possessed a characteristic (such as wealth or a skill) not shared by the wrongdoer.

2.27 A more straightforward case of larceny by a trick is where a wrongdoer, by "ringing the changes", or other similar scheme confuses the owner into handing over property.

Although from the owner's actions he may seem to be consenting to transfer of the ownership of the property, closer examination of the facts shows that this is not the case.[80] The borderline between larceny and false pretences is difficult to draw in certain instances. Some courts have adopted a robust approach and have upheld the conviction of the defendant for larceny; others have examined the issue more analytically and found that the facts justify false pretences rather than larceny. What the courts have yet to do is provide a coherent analytic rationale for finding of larceny in this type of case.

An example of the above approach is *Hollis*.[81] The defendants by a series of tricks fraudulently induced a barmaid to pay over money to them. The essence of the fraud was that they succeeded in convincing her that she had merely given change out of a half-sovereign for a small purchase, while in fact she finished up handing over the change plus a half-sovereign. Their convictions for larceny were affirmed.

Lord Coleridge LCJ (Denman, Hawkins, Williams and Mathew JJ concurring) reduced the issue to very simple terms:

> "I cannot see if a person goes into a place and fraudulently, by a series of tricks, obtains possession of property from another which that other has no intention of parting with, how the offence can fail to be larceny. It is clearly stealing ...."[82]

2.28 In contrast in *Williams*,[83] the defendant, a customer in a shop, had pretended to place two shillings in the till when in fact he only placed a shilling there. The shop assistant, believing that two shillings had gone in, gave him change of that amount. The defendant was acquitted. Martin B during argument, observed that the shop assistant appeared "to have laid the money

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80 Cf *Kenny*, para 249.

81 12 QBD 25 (Cr Cas Res, 1883).

82 *Id*, at 26. In the Irish case of *Roper*, 1 Cr & Dix CC 185 (1832), the defendant was indicted for stealing a half-crown piece from the prosecutor and also for uttering a base half-crown piece to the prosecutor. Both charges arose out of the same transaction, "which is commonly known by the name of 'ringing the changes'": *id*, at 85. The defendant was convicted of both charges, to the surprise of the prosecution authorities, who had neither expected nor wished that he be convicted of the second charge. Smith B after mentioning the matter to another judge, permitted the prosecution authorities to enter a *nolle prosequi* afterwards.

83 7 Cox 355 (1857).

down upon the counter for the prisoner to take up; that amounts to a parting with the property in it, and there cannot be a conviction for larceny".[84] He also said:

> "The case against the prisoner here is, that he pretended that he had returned the whole of the money, when in reality he had returned one shilling. He cannot, therefore, be convicted upon the indictment, though it might be otherwise if he had been indicted for obtaining the shilling by false pretences."[85]

So also in *Thomas*,[86] the defendant and another man had been drinking together in a beer house. The landlady was unable to give change for the man's sovereign; the defendant offered to go out and get change. The man gave him the sovereign. The defendant left and later misappropriated it.

The defendant was acquitted. Coleridge J having conferred with Gurney B said:

> "It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think, that there was not a sufficient trespass to constitute a larceny."[87]

2.29 A person may be guilty of larceny by a trick, not only where he induces another to part with the possession of goods in a state of psychological confusion but also where he interferes with a vending machine so as to release from it a product which quite clearly the owner would not have intended the machine to disgorge in such circumstances. As *Kenny*[88] observes:

> "The property is plainly taken *invito domino* just as completely as if the machine had been broken open, or unlocked by a skeleton key, since the owner has indicated that he only consents to pass the ownership of the contents of his machine if the correct money is first put into it".

In *Hands*[89] the defendant used a brass disc, the size and shape of a penny, to obtain a cigarette from a cigarette vending machine. On the fact of the box there were two inscriptions, one stating: "Only pennies, not halfpennies", the other stating: To obtain [a ....] cigarette place a penny in the box, and push the knob as far as it will go".

The English Court of Crown Cases Reserved affirmed the conviction for larceny.

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84 *Id*, at 356.
85 *Id*, at 357.
86 9 Car & P 741, 173, ER 1033 (1841).
87 *Id*, at 742, and 1034, respectively.
88 Cf *Kenny*, para 249.
89 16 Cox 188 (Cr Cas Res, 1887).

It appeared to Lord Coleridge, CJ (Pollock B, Stephen, Mathew and Wills, JJ concurring) that

> "in a case of th[is] class .... there clearly was larceny. The means by which the cigarette was made to come out of the box were fraudulent, and the cigarette so made to come out was appropriated."[90]

We will examine later in this paper the question whether this principle extends to the abstraction of materials from computers.

(ii) Larceny by intimidation

2.30 Section 1(2)(i)(b) of the *Larceny Act, 1916*, as we have seen, extends the expression "takes" to obtaining possession by intimidation. This reflects the previous law.

In *Lovell*,[91] a travelling grinder, given six knives to grind, demanded of the woman who owned the knives that she pay over four times the going rate. When she refused, he "assumed a menacing attitude, kneeling on one knee, and threatened [her], saying, 'You had better pay me, or it will be the worse for you'; and 'I will make you pay'."[92] The woman "was frightened, and in consequence of her fears gave the sum demanded".[93]

The English Court for Crown Cases Reserved upheld the conviction for larceny, considering that *McGrath*[94] was "conclusive" of the matter".[95]

(iii) Larceny by obtaining under mistake of owner

2.31 Section 1(2)(i)(c) of the *Larceny Act, 1916*, as we have seen, provides that the expression "takes" includes obtaining the possession "under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained".

This provision is "the child of"[96] the difficult decision of *Middleton*[97] in 1873, where the English Court for Crown Cases Reserved held that defendant who had received a payment from a Post Office clerk of an amount higher than that to which he was entitled, was guilty of larceny. The clerk had consulted the wrong letter of advice and the defendant was aware of the error. The Court was of opinion that the clerk had passed possession rather than ownership of the money either because he had no authority to pass ownership or because, if he had such authority, this mistake meant that he had not consented to do so.

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90 *Id*, at 190.
91 8 QBD 185 (Cr Cas Res, 1881).
92 *Id*, at 186.
93 *Id.*
94 (1869) ICCR 205.
95 8 QBD, at 186.
96 *Smith & Hogan*, 1st ed, 354.
97 LR 2 CCR 38 (1873).

The decision has been widely criticised. As *Kenny* observes:

> "What was overlooked by most of the judges who affirmed the conviction was that the clerk made no mistake whatever as to the transfer of the money: he was quite well aware of what he was doing. His mistake related to his *reason* for doing it".[98]

2.32 There is some uncertainty as to the nature of the mistake which falls within the scope of section 1(2)(i)(c). A mistake can of course range from one as to the person to one as to the nature, quality or value of the property. On one view *Middleton* can be interpreted as involving a mistake as to identity;[99] on another, it might be considered a case of mistake as to the amount of money to be paid.[100] *Smith & Hogan* contend that, save where the person mistakenly transfers ownership of the goods, "the kind of mistake is irrelevant".[101] *Kenny*, who, as we have seen, criticises *Middleton* on the basis that the clerk's mistake "related to his *reason* for doing"[102] what he did, goes on to state:

> "This can hardly be the kind of mistake contemplated by the Act, for if it were so, then difficulties would arise in distinguishing the felony of larceny under section 1 from the misdemeanour of obtaining by false pretences under section 32; it would also make it a felony for a skilled collector of antiques to purchase an object which an ignorant owner had consented to sell at a price below its real value".[103]

In *Moynes v Cooper*,[104] an employee, having received an advance on his wages, later was paid the full amount of his wages by the wages clerk, in ignorance of the advance. When he received these wages from the clerk, the employee was not aware of the error, but he later opened the packet containing the wages, discovered the error, and kept the contents.

The Queen's Bench Division held that the employee should not have been convicted of larceny.

Lord Goddard, delivering the judgment of the majority, noted that the 1916 Act "was not intended to alter the law and had not done so. Section 1(2)(i)...(c) affirms the common law that the taker must have *animus furandi* at the time when he takes the property. The defendant had no such *animus* at the relevant time".[105]

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98 *Kenny*, para 252.
99 *Smith & Hogan*, 354.
100 *Id.*
101 *Id.*
102 *Kenny*, para 252.
103 *Id.*
104 [1956] 1 QB 439.
105 *Id*, at 444-445.

(iv) Larceny by finding

2.33 As we have seen, section 1(2)(i)(d) provides that the expression "takes" includes obtaining the possession "by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps". This provision is unhappily drafted. As *Kenny* points out, "it uses the word 'finding' as meaning 'taking after having found'".[106] This is because "[a] man 'finds' a thing when he discovers exactly where it is, even though he does not move or even touch it, still less 'take and carry it away'".[107] Moreover, the provision deals with the easy case of when a person will clearly be guilty rather than seeking to remove the cloud of uncertainty surrounding the question of when obtaining property some time after the finding should constitute larceny.[108]

Consent of the Owner Implied when Lost Goods are Found[109]

2.34 It has for long been accepted[110] that an honest finder does not commit trespass to the goods found, while he is preserving them for the owner. This absence from liability may be based on the presumed consent of the owner;[111] as well as the fact that the finder does not intend to deprive the owner of the goods.

The mental state of the finder is of cardinal significance. Thus, the test is not whether in fact the owner could easily be found but rather whether the finder, at the time of the finding, believed that he could be so found.[112]

In *Deaves*[113] in 1869, the Irish Court of Criminal Appeal, by a 4-3 majority, quashed the conviction of the defendant whose young daughter had given her six sovereigns she had found on a street in Cork city. The defendant had counted the sovereigns and told a companion that she would give the companion a treat of porter. She later went with the child to where the child had found the money and there found another half sovereign and a bag. The owner of the property, a poor woman, was met by a friend of the defendant about two hours later, lamenting the loss of the sovereigns. The friend told this to the defendant, and told her where she believed the owner lived, but the defendant told her friend to mind her own business. The next day she gave her half a sovereign of the money for herself.

2.35 Although the Court was narrowly divided as to the inferences to be

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106 *Kenny*, para 253. (It seems that some such word as "immediately" should be inserted between "taking" and "after" in *Kenny's* suggested interpretation).

107 *Id*, fn 1.

108 *Id*, para 253. See also Turner, *Two Cases of Larceny*, ch 19 of L Radzinowicz & JWC Turner, eds, *The Modern Approach to Criminal Law*, at 372-373 (1945).

109 See *Kenny*, para 253.

110 Cf *Kenny*, para 253, citing (1467) YB 7 Edw IV, 3, pl 9, (*per* Nedham J); *Isaack v Clark*, (1615) 2 Bulstr 306, at 312, 80 ER 1143, at 1148 (*per* Coke CJ).

111 Cf *Kenny*, para 253.

112 *Knight*, 12 Cox 102 (1871) (especially Pigott B and Lush J's judgments). See also *Thurborn*, 1 Den 387, at 389, 169 ER 293, at 293-294 (1848), *Preston*, 2 Den 353, 169 ER 535 (1851).

113 11 Cox 227 (1869).

drawn from the facts, there was no disagreement as to the relevant legal principles. Whiteside CJ for the majority said:

> "the rule that every larceny must include a trespass has never been controverted, and, as I think there was no trespass in taking these sovereigns, the prisoner ought not to have been found guilty of larceny .... There is nothing to show that at the time the child brought in the money the prisoner knew the property had an owner, or, at all events, to show that she was under the impression that the owner could be found."[114]

Fitzgerald J, dissenting, thought that there was:

> "quite enough evidence to show that the prisoner believed that the owner of the money could be found. Her first act was to conceal the amount and to buy the silence of those who knew that she had gotten the money. *Glyde* is no authority to quash this conviction, inasmuch as there was no evidence in that case to show belief on the prisoner's part that the owner of the money could be found, while the smallness of the amount raised the presumption of abandonment. In this case all the three ingredients spoken of by Wightman J, in *Moore* are present."[115]

It is worth noting that O'Brien J, for the majority, while feeling constrained by authority, including *Thurborn*,[116] to quash the conviction, expressed the view that "[t]he legislature ought to interfere, as it has already done in the case of bailees".[117]

This is an interesting point, worth highlighting, as it shows that, at all events by 1869, the courts looked to the legislature to improve the law so as to make the law coincide with accepted moral norms. This would suggest that by then the days of bending legal rules to secure convictions were coming to an end.[118]

As we have seen, section 1(2)(i) of the *Larceny Act, 1916* provides that the expression "takes" includes obtaining the possession:

> "by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps."

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114 *Id*, at 230.
115 *Id.*
116 *Supra.*
117 11 Cox, at 230.
118 In the light of Whiteside, CJ's remarks regarding the relationship between trespass and larceny, it is helpful to record Kenny's statement that:

> '... there can be no larceny without trespass but there can be trespass without larceny (even when committed *animo furandi*; e.g. where the wrongdoer unsuccessfully uses force to detach a bicycle which is chained to the railing of a house, or a watch from the chain which attaches it to its owner's clothing). Furthermore, an owner of land has a 'qualified property' (*propter impotentiam*) in such creatures *ferae naturae* as are too young to fly or run away, and may maintain a civil action of trespass against anyone who without his permission takes them off the land, although such taking is not larceny.' *Kenny*, para 253.

The Property of Husband and Wife

2.36 In several respects, the common law adopted the metaphor of the convergence into one legal person of husband and wife.[119] Thus, for example, the crime of conspiracy could not be committed by husband and wife alone[120]; nor did the publication of a defamatory statement by one spouse to the other constitute actionable defamation.[121] As *Kenny* notes:

> "This principle harmonised well with the old doctrine of the common law that the goods and chattels of a married woman belonged to her husband and were held to be equally in the possession of both. From this developed the rule that an appropriation of his goods by her would not constitute a larceny."[122]

As an exception to this rule, a person with whom the wife committed adultery could be convicted of larceny where he assisted her in taking goods from the husband.[123]

2.37 Section 9 of the *Married Women's Status Act, 1957* provides as follows:

> "(1) Subject to subsection (3), every married woman shall have in her own name against all persons whomsoever, including her husband, the same remedies and redress by way of criminal proceedings for the protection and security of her property as if she were unmarried.
>
> (2) Subject to subsection (3), a husband shall have against his wife the same remedies and redress by way of criminal proceedings for the protection of his property as if she were not his wife.
>
> (3) No criminal proceedings concerning any property claimed by one spouse (in this subsection referred to as the claimant) shall, by virtue of subsection (1) or subsection (2), be taken by the claimant against the other spouse while they are living together, nor, while they are living apart, concerning any act done while living together by the other spouse, unless such property was wrongfully taken by the other spouse when leaving or deserting or about to leave or desert the claimant.
>
> (4) In any criminal proceedings to which this section relates brought against one spouse, the other spouse may, notwithstanding anything to the contrary in any enactment or rule of law, be called as a witness either for the prosecution or defence and without the consent of the person charged.

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119 See Williams, *The Legal Unity of Husband and Wife*, 10 Modern L Rev 16 (1947).
120 *Kenny*, para 450; cf Glover, *Conspiracy as Between Husband and Wife*, 9 Family L 181 (1979).
121 Cf *McDonald*, 141.
122 *Kenny*, para 254. See also *Harrison*, 1 Leach 47, 168 ER 126 (1756).
123 See Featherstone, *Dears* 369, 169 ER 764 (1854), *Thompson*, 2 Cr & Dix CC 491 (1842).

(5) In any indictment or process grounding criminal proceedings in relation to the property of a married woman, it shall be sufficient to allege the property to be her property."

As we have noted in our *Report on Receiving Stolen Property*,[124] the English Court of Criminal Appeal construed[125] an equivalent statutory provision as meaning, not simply that a spouse falling within its scope could not be prosecuted, but that no crime was committed by that spouse. Thus the person receiving goods which would have been stolen goods save for that provision was held not guilty of the offence of receiving since they were not stolen goods. The decision is in some respects a technical one, and there is always the possibility that an Irish court would come to a different conclusion in the light of a consent-based analysis.

It should perhaps be noted here that, in *Walsh*[126] in 1981 the Supreme Court held that the presumption of marital coercion was inconsistent with the Constitution. Thus the old law[127] on the subject of marital coercion and larceny has been rendered redundant.

Mens Rea

2.38 The *mens rea* of the offence of larceny has given rise to some difficulty. As we have seen, three elements are involved: the taking and carrying away must be done (i) fraudulently, (ii) without a claim of right made in good faith, and (iii) with the intent, at the time of the taking, permanently to deprive the owner of the thing stolen. Each of these elements requires separate examination.

(i) "Fraudulently"[128]

2.39 Until recently the courts did not trouble themselves with the question whether the defendant's conduct had been fraudulent. It may have seemed beyond argument that a person who took another's property without claim or right, intending to deprive him of it permanently, could not be considered to have been acting other than fraudulently.

At one time it was considered that larceny would be committed only where the defendant took the item for the purpose of personal gain to himself.[129] This seems to have been the result of a loose statement by Blackstone,[130] to the effect that the taking and carrying away:

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124 LRC 23-1987, para 34.
125 In *Creamer*, [1919] 1 KB 564.
126 [1981] IR 412 (Sup Ct).
127 See *Connolly and Hughes*, Cr & Dix Ab Not Cas 280 (1838), *Collins*, IR Circ Rep 138 (1841); see also the cases cited in LRC No. 23-1987, p54, fn 125.
128 See Lowe, *The Fraudulent Intent in Larceny*, [1956] Crim L Rev 78, Smith, *The Fraudulent Intent in Larceny: Another View*, [1956] Crim L Rev 238.
129 *Kenny*, para 283.
130 Blackstone, *Commentaries on the Laws of England* vol 4, ch 17, s1 (p232) (17th ed, by E Christian, 1830).

"must also be felonious; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*".

2.40 In *Cabbage*[131] in 1815, a different approach gained prominence. The defendant, convicted of larceny, had taken away a gelding and destroyed it to protect a friend who had already been charged with larceny, "the object being that the horse might not contribute to furnish evidence against"[132] the friend. The majority of the Court for Crown Cases Reserved upheld the conviction. Six[133]

> "held it not essential to constitute the offence of larceny, that the taking should be *lucri causa*; they thought a taking fraudulently, with an intent wholly to deprive the owner of the property sufficient; but some of the six learned judges thought that in this case the object of protecting [the defendant's friend] by the destruction of this animal might be deemed a benefit or *lucri causa*."[134]

Five judges[135] thought the conviction wrong. Their reasons are not stated in the report.

Kenny explains that:

> "[t]he argument was still used, however, especially for cases occurring from time to time in which a servant was prosecuted for larceny of his master's fodder, which, contrary to the master's orders, he took to give to the master's own horses which he thought needed more fodder than the master allowed them. To harmonise the law with public opinion on these cases the legislature in 1863 intervened by a statute[136] which provided in effect that such conduct should only be a petty offence, with power to the justices to dismiss the charge, even if proved, without proceeding to conviction. After this enactment the doctrine with regard to *lucrum* became obsolete, and since it does not appear either directly or by implication in the *Larceny Act, 1916*, it must be taken not to be the law now, even if indeed it ever had been."[137]

2.41 In *Williams*,[138] in 1953, the English Court of Criminal Appeal sought to inject meaning into the word "fraudulently" in section 1(1) of the 1916 Act. Lord Goddard CJ said:

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131 Russ and Ry 292, 168 ER 809 (1815).

132 Cf *Richards*, 1 C & K 532, at 533, 174 ER 925, at 926 (*per* Richards, counsel for the prosecution (1844).

133 Richards, B, Bayley & Chambre, JJ, Thomson, CB, Gibbs, CJ and Lord Ellenborough.

134 Russ & Ry, at 293, 168 ER, at 809-820. In *O'Donnell*, 2 Ir Jur NS 210, at 212 (Ct of Crim App 1857) counsel for the Crown cited *Cabbage* "as an authority to show that, to constitute larceny, the taking need not necessarily be *lucri causa*". The matter was not addressed in the judgment.

135 Dallas, Le Blanc & Heath, JJ, and Wood and Graham, BB.

136 *Misappropriation by Servants Act, 1863*. This Act applied to England only.

137 *Kenny*, para 283.

138 [1953] 1 QB 660 (CCA).

> "The court thinks that the word 'fraudulently' does add, and is intended to add, something to the words 'without a claim of right' and that it means (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. The person who takes the property must know when he takes it that it is the property of another person, and he must take it deliberately, not by mistake, and with an intention to deprive the person from whom it is taken, of the property in it. A very simple illustration would be that of a person who picked up a suitcase at a railway station believing that it was his. There, the taking is under a mistake and he is not taking it fraudulently. Of course, if he knows that it is not his own, as is the case with those people who haunt the railway stations for the purpose of stealing suitcases, then it is larceny; but if a person, although he is not setting up a claim of right against someone else, takes away a suitcase in the mistaken belief that it is his own,[139] he is not acting fraudulently. We think that the word 'fraudulently' in section 1 must mean that the taking is done intentionally, under no mistake and with knowledge that the thing taken is the property of another person."[140]

Kenny was not won over by this analysis:

> "[i]t is ... respectfully submitted that if this is the meaning to be given to 'fraudulently', the word is unnecessary, and therefore superfluous. For the later words of the definition in section 1, 'with intent, at the time of such taking, permanently to deprive the owner thereof', plainly show the necessity for proof of intention, while the same words are quite sufficient to indicate that the taker must act 'with knowledge that the thing taken is the property of another person'; moreover if a taker honestly thinks that it is his own property which he is taking or thinks that he has the consent (whether express or implied) of the owner, even then the omission of 'fraudulently' would not injuriously affect him since he would still have the defence of 'claim of right made in good faith'."[141]

In a supporting footnote, *Kenny*[142] states:

> "It would also be inadmissible to argue that 'fraudulently' carries the meaning of 'deceit', since an element of deceit is not a legal *requirement* for larceny; it would, for example, be absurd to suggest that a man who openly snatches up my bag and runs off with it is not a thief."

2.42 In *Halloway*,[143] Parke B suggested that the phrase "wrongful and fraudulent" in East's *Pleas of the Crown* "probably means 'without claim of right'".

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139 *Sed quaere*: in such a case there is surely an implicit claim of right.
140 [1953] 1 QB, at 666.
141 *Kenny*, para 280.
142 *Id*, para 280, fn 5.
143 3 Cox 241, at 244 (Cr Cas Res, 1849).

Once the latter element is specifically mentioned in section 1 of the 1916 Act *in conjunction* with "fraudulently" this may indicate either (a) that Parke B's explanation was not correct; (b) that it was correct but is no longer correct since the passage of the 1916 Act; or (c) that it was, and still remains, correct, in which case the inclusion of "fraudulently" may be considered surplusage.

2.43 In *Wallace*,[144] a fifteen year old boy was indicted for stealing a jacket, vest and trousers, the property of the guardians of the Newtownards Union. He had been admitted into the workhouse as a pauper. At the time of his admission his own clothes had been taken from him and the articles of clothing in question given to him by the workhouse officer. After spending about a fortnight as an inmate, he had applied to the guardians for his discharge and the restoration of his own clothes. They had refused, alleging that he was too young to be discharged. Shortly afterwards the defendant had surreptiously left the workhouse, wearing the clothes supplied there to him.

Brady CB directed an acquittal, stating:

> "The guardians had no right to detain the prisoner, or to keep his clothes, contrary to his wishes; and it seems a harsh proceeding to indict him for a felony, because, having vainly sought the restoration of his clothes, he quitted the workhouse in the clothing which the guardians compelled him to wear."[145]

This statement offers no clear conceptual basis for the directed acquittal. The reference to harshness may suggest that the Chief Baron proceeded *ex misericordia* but his unqualified statement that the guardians had had no right to act as they had done implies a more principled justification. We can only speculate as to what that should be: perhaps necessity,[146] the lack of fraudulent conduct on the part of the defendant or (more weakly) a claim of right.

(ii) Claim of right

2.44 Section 1(1) of the *Larceny Act, 1916*, as we have seen, provides that a person is guilty of larceny only where he takes the item "without a claim of right made in good faith". It has from the earliest of times been accepted that an honest belief by the defendant that he has the right to take the item affords him

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144 3 Cr & Dix CC 120 (Brady CB and Jury, 1843).

145 *Id*, at 121.

146 In the law of tort, it is generally accepted that to confine a person by taking their clothes, leaving them with the option of walking naked out of the area of confinement, should constitute false imprisonment. The victim of this type of conduct would seem entitled to plead necessity in availing himself of the opportunity to wear clothes supplied by the defendant. The Court in *Wallace* did not address the question whether the defendant had intended permanently to deprive the guardians of the clothes in which he made his escape.

a defence even where this belief is unreasonable.[147]

Kenny gives the following instances of a successful *bona fide* claim of right:

> "(1) Where something is seized by a landlord in a distress for rent under a mistaken idea that some rent is due, or in ignorance that the article seized is one which is privileged by law from being distrained on.
>
> (2) Where corn is taken by a gleaner, honestly and openly, in a locality where gleaning is customary, although not lawful.
>
> (3) Where the taker believes that the other has abandoned the thing; or that what he is taking is his own property; or that it is something which he has a right to take, whether as an equivalent of his own property or with a view to mere temporary detention (e.g. by lieu)."[148]

The fact that the defendant acted openly may afford support to his defence based on a *bona fide* claim of right.[149]

Where the defendant believed that he was entitled as partially-unpaid vendor of a horse, to fetch it back, he was held to have been improperly convicted.[150]

2.45 *Winstanley v Caravan*[151] is a troublesome decision. Prosecutions were brought against two workmen for the larceny of several pairs of unfinished boots, worth £3.10.0, the property of their employer Mr Winstanley. They had pawned the goods entrusted to him. It was argued on their behalf that their conduct amounted to a breach of contract only, in that their employer held in respect of each of the defendants an indemnity from a Guarantee Society, to an amount of £10 for work and materials entrusted by him to the defendants.

Mr Barton, who tried the case, held that the proper approach was for the defendants to be prosecuted for the summary offence[152] of unlawful disposition of an employer's work or materials of a value not exceeding £5. He made it clear, however, that he saw no objection to a conviction by reason of the existence of the indemnity. It is worth recording in full his observations on this issue:

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147 *Kenny*, para 281. See also *Bernhard*, [1938] 2 KB 264, approved in *Grey*, [1944] IR 326 (CCA) (a decision on fraudulent conversion) and in *O'Loughlin*, [1979] IR 85 (CCA, 1978) (a decision on larceny). In both *Grey* and *O'Loughlin* the Court of Criminal Appeal rejected the proposition that the fact that a claim is not well founded in law or in fact should deprive the defendant of the defence of claim of right made in good faith. In both cases the Court held that the honesty of the belief sufficed. In neither is it expressly stated that an honest but unreasonable belief is sufficient but this is consistent with both and may be considered implicit in the generality of the reference to the honesty of the belief.

148 *Kenny*, para 281 (footnote references omitted).

149 Cf *Curtiss*, 18 Cr App Rep 174 (CCA, 1925).

150 *Clay*, 3 Cr App Rep 92 (1909).

151 8 ILTR & Sol J 639 (Dublin Metrop Police Ct, 1874).

152 Under 25 & 26 Vict, c50, s7.

> "The question raised is an important one, because of the prevalence in Dublin of a trade's custom of guarantees such as these, and of the existence of much doubt and confusion as to their legal effect. I found from the evidence that the impression existed widely among operatives that the effect of such an indemnity is to leave them free to pawn, or otherwise dispose of their employers' property entrusted to them, provided its value be within the limit of £10 - the sum prescribed by the Society's guarantee. I am clear that the form of indemnity proved in this case creates no conflict whatever between civil and criminal proceedings, and that if a larceny had been committed and proved, an indictment would lie. In fact a printed notice at the foot of the Society's form of Indemnity seems to have been framed with a view to anticipate such objection as I have heard raised, and also with a distinct reference to the observations of Tindal, CJ, in *Kier v Leenan*, 9 QB, 236, a leading modern authority on the compromise of offences."[153]

The case makes no reference to the question of a claim of right, though it is difficult to see why it should not be relevant in view of "the existence of much doubt and confusion" as to the legal effect of inducements and the impression which "existed widely among operatives" that they were free to pawn goods (as the defendants had done) if covered by such an indemnity.

(iii) The intent permanently to deprive the owner of the thing stolen

2.46 The requirement in section 1(1) of the 1916 Act that the accused should intend permanently to deprive the owner of the thing taken, reflects the common law as it had developed in the nineteenth century.[154]

In *Cabbage*[155] in 1815, six of the judges "thought a taking fraudulently, *with an intent wholly to deprive the owner of the property* sufficient". Yet in a decision thirty four years later, the slow development of the law on this matter is apparent.

In *Holloway*,[156] the defendant had moved certain dressed skins from one place to another in a tannery where he was employed the (unsuccessful) aim being to mislead his employer into paying him for work on the skins which he had not done. The English Court for Crown Cases Reserved reversed his conviction for larceny.

Lord Denman CJ said:

> "If I thought the question was open upon the authorities, I must say that a great deal might be urged in support of the proposition, that these

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153 8 ILT & Sol J, at 639.
154 *Kenny*, para 284.
155 Russ & Ry 292, at 293, 168 ER 809, at 809 (1815) (emphasis added).
156 3 Cox 241 (Cr Cas Res, 1849).

facts show a larceny to have been committed; because the owner is deprived of his property for sometime, and the probability is that the interest distinguishing the case from larceny may be altered. The case which I put, of borrowing a horse for a year, without the owner's consent, with intent to ride it through England and then return it, shows this. But if we say that borrowing alone would constitute larceny, we are met by similar cases the other way. With regard to the definition of larceny, we have of late years said that there must be an intention to deprive the owner permanently of his property, which was not the intention in this case. We are not disposed to encourage nice distinctions in the criminal law, yet it is an odd sort of excuse to say to the owner, 'I did pretend to cheat you in fact, and to cheat my fellow workmen afterwards'. This, however, is not an act which is not punishable; for if it is not a misdemeanour, which at the first sight it appears to be, it is an act done towards counselling that misdemeanour. We must abide by former decisions, and hold that a conviction for larceny cannot in this case be supported."[157]

Parke J was of the same opinion:

"We are bound by the authorities to say that this is not larceny. There is no clear definition of larceny applicable to every case: but the definitions that have been given, as explained by subsequent decisions, are sufficient for this case. The definition in East's Pleas of the Crown is on the whole the best; but it requires explanation, for what is the meaning of the phrase 'wrongful and fraudulent'? It probably means 'without claim or right'. All the cases, however, show that, if the intent was not at the moment of taking to usurp the entire dominion over the property, and make it the taker's own, there was no larceny. If, therefore, a man takes the horse of another with intent to ride it to a distance, and not return it, but quit possession of it, he is not guilty of larceny. So in *Webb*,[158] in which the intent was to get a higher reward for work from the owner of the property. If the intent must be to usurp the entire dominion over the property, and to deprive the owner wholly of it, I think that that essential part of the offence is not found in this case."[159]

Coltman J said:

"We must not look so much to definitions, which it is impossible *a priori* so to frame that they shall include every case, as to the cases in which the ingredients that are necessary to constitute the offence are stated. If we look at the cases which have been decided, we shall find that in this case one necessary ingredient, the intent to deprive entirely and

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157 *Id*, at 244.
158 1 Moo CC 431, 168 ER 1332 (1835).
159 3 Cox, at 244.

permanently, is wanting."[160]

2.47 This principle was accepted in the Irish decision of *Breen*,[161] in 1843, where the defendant who found an envelope containing cheques and a bank note dallied in returning it to their owner in the hope of getting a reward, writing an anonymous letter to the owner stating that a person had found the envelope. Brady CB thought that, if the jury believed that the defendant found the letter and kept it with such a hope, they should acquit, but that if he had taken (rather than found) the envelope with the same intent, or for the purpose of extorting money from the holder, they should convict. (The jury acquitted the defendant).

If this case suggests that a person is not guilty of a crime who *takes* property with the intention of returning it to the owner whether or not the owner pays a "reward", but with the intention of trying to induce him to pay such "reward", then the case would appear to be contrary to the present law.

2.48 Even in cases where the defendant has not the moral status of a finder, the courts will be reluctant to characterise as larceny the holding on to property with the intention of abstracting a reward for its return.

Where a person, wrongfully takes something and sells it to another, it is clear that he will be guilty of larceny even though that other may in turn sell or give it back to the true owner. *Kenny* comments that:

> "Although it may not be so easy to appreciate it at first sight, the same result follows, and for the same reason, if X, having taken the thing, forthwith deceives the owner into thinking that the article was a different one which did not already belong to him, and thereby induces him to buy it."[162]

In *Beecham*,[163] a railway porter was charged with the larceny of two railway tickets. It was argued on his behalf that, even if he had taken the tickets with a view to their use, he must have intended that they should be returned to the railway company at the end of the journey (as would be the case in the normal course of business), and that there thus had been no such absolute taking away without an intention of restoration as was necessary to constitute a felony. Patteson J responded that in his opinion, it was a question for the jury to say whether the defendant had taken the tickets "with an intention to convert them to his own use and defraud the company of them".[164] In charging the jury he

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160 *Id. Holloway* was approved in *Poole*, Dears & Bell 345, 169 ER 1034 (1857). Contrast the facts of *Richards*, 1 C & K 532, 174 ER 925 (1844), where a somewhat similar scheme involved the melting down of the employer's property at a loss greater than the value added to the product processed by the defendant; the case was left to the jury, who convicted of larceny. It seems clear that, even if the value to the employer's had been enhanced, the defendant should still have been convicted since he had deprived his employer of property which he returned to the employer only by a subterfuge. Cf *Kenny*, para 286.

161 3 Cr & Dix, CC 30 (Brady CB and jury, 1843); also reported, less fully, *sub nom Burn*, Ir Cir Rep 773.

162 *Kenny*, para 286 (footnote references omitted).

163 5 Cox 181 (Oxford Circuit, Patheson J, and jury, 1851).

164 *Id*, at 182.

is reported as having told them:

> "that if the prisoner took the tickets with intent to use them for his own purposes, whether to give to friends, or to sell them, or to travel by means of them, it would not be the less larceny though they were to be ultimately returned to the company at the end of the journey."[165]

The jury acquitted.

The case is difficult to interpret. On one view Patheson J could be considered to have dispensed with the requirement that there be an intention to deprive the owner of the goods permanently. The stress on the alleged conversion of the tickets to the defendant's own use suggests that this, rather than such an intention, was perceived to afford the relevant test. On another view, Patteson J may be considered to be offering a particular solution - perhaps policy-based - to the problem of the *furtum usus*.

It is interesting that Patteson J engaged in no metaphysics. Contrast this to the judicial handling of the theft of cheques. *Kenny*[166] states that a distinction:

> "must be made between a completely inscribed cheque and the material paper of the cheque form, which paper passes through the hands of the bankers concerned back into the possession of the drawer."

Statutory Modifications

2.49 From what has been said above it will be clear that it is not larceny to take another person's car and drive away in it unless one has the intention of depriving him of it permanently. Joyriders are thus not normally guilty of larceny.[167] Statute has, however, intervened. Section 12 of the *Road Traffic Act, 1961*, as amended by section 65 of the *Road Traffic Act, 1968* and section 3 of the *Road Traffic (Amendment) Act, 1984*, deals with the position. A person must not "use or take possession of" a mechanically propelled vehicle without the consent of its owner or other lawful authority.[168] Where possession of a vehicle has thus been taken, a person who knows of the taking is not to allow himself to be carried in or on it without the consent of its owner or other lawful authority.[169] A similar offence applies in respect of the use or taking possession of a pedal cycle without its owner's consent.[170]

It is a good defence to a charge for any of these offences for the defendant to show that, when he did the act alleged to constitute the offence, he believed on

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165 *Id*, at 182-183.

166 *Kenny*, para 284.

167 Cf *Addis*, 1 Cox 78 (1844), *McCutcheon*, para 46. In *Crump*, 1 Car & P 658, 171 ER 1357 (1825), the defendant, a thief who had taken a horse for use as a get-away, was acquitted of larceny of the horse.

168 Section 65 of the *Road Traffic Act, 1968*, substituting a new subsection (1) for the original subsection (1) of section 112 of the *Road Traffic Act, 1961*.

169 *Id*. See generally *Piersa*, section 4.10.

170 Section 65(3) of the 1961 Act.

reasonable grounds that he had lawful authority for doing that act.[171]

"At the Time of Such Taking"[172]

2.50 As we have seen, section 1(1) of the *Larceny Act, 1916* requires that the intent permanently to deprive the owner of the thing stolen must exist "at the time of" the taking.[173] This requirement is in harmony with the approach of the courts in older cases. Thus the finder of property which he believed at the time of the finding to have no traceable owner and who later found out who owned the property but then resolved to keep it was not guilty of larceny for having succumbed to this temptation.

Difficulties - verbal, conceptual and by way of policy - arose in cases where a person acquired property in circumstances where the physical reception of the property preceded by some time his mental appreciation that he had actually done so. The matter was complicated where the recipient knew from the outset that he had received *something*, but was initially mistaken as to its nature, qualities or value. Locked in the definition of larceny is troublesome linguistic question of whether it can properly be said that a person "takes" property (i) at the time when he physically receives it, in ignorance of its existence, true nature or qualities or (ii) at the time when he actually becomes aware of its existence, true nature or qualities. Neither option is totally satisfactory, since the notion of taking is premised in ordinary linguistic usage on a temporal coincidence between physical acquisition and mental appreciation of what is being acquired.

The definition of larceny as involving "taking" thus proved to be inadequate, not because it let guilty men go free but because it failed even to address the question of the criminality of a particular range of dishonest conduct.

2.51 Courts were conscious of the policy implications of holding in such cases, either that the "taking" was at the time of physical acquisition or that it was at (or shortly after) the time the recipient became aware of the true position. The former holding would exempt the recipient since it would mean that at the time he took the property he had no fraudulent intention; the latter holding would make him guilty of larceny. The former solution suffered from the difficulty that it involved ascribing to an individual an act of "taking" where he had, and could have had, no such intention at the time of physical acquisition. The latter ascribed the act of "taking" to what was essentially a mental act - it was thus described as a case of larceny, not by finding, but by finding out.

The courts struggled with the issue, the leading cases involving fundamental divisions among the judges.

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171 *Id*, section 112(5).

172 See generally Carter, *Knowledge, Ignorance and Animus Furandi*, [1959] Crim L Rev 613, Cross, *Russell v Smith Reconsidered*, [1958] Crim L Rev 529, *Anon, The Intent in Larceny*, 87 Ir LT & Sol J 1, 11 (1953).

173 See *McGowan*, 1 Cr & Dix, CC 162, fn (6) (1824), *Anon, Id*, 162, *Breen*, 3 Cr & Dix, CC 30, at 32-33 (Brady CB and jury, 1843) (reported, less fully, *sub nom Burn*, Ir Cir Rep 773), *Shea*, 1 Ir Jur NS 244 (1854) *Moynes v Coopper*, [1956] 1 QB 439. Cf *Beard*, Jebb Cr & Pr Cas 9 (1822).

As a threshold to our analysis we must first mention the distinct case of appropriation following conduct which amounted to a trespass to the owner's property.

2.52 In *Riley*,[174] the defendant had left 29 lambs overnight in another person's field, with that person's permission, at the price of one penny per head. Early the following morning, he removed, as he believed, the 29 lambs, but later an intended purchaser, with whom he was negotiating to sell the flock, pointed out that it comprised 30 lambs. Realising that he must have innocently misappropriated a lamb belonging to another party, the defendant resolved immediately to dispose of the lamb to the intended purchaser, who thereupon bought the 30 lambs.

The English Court for Crown Cases Reserved held unanimously that the defendant had properly been convicted of larceny of the lamb. Pollock CB accepted that it might "reasonably be said not to be a violation of any social duty" for a man who finds a lost article to take it home for the purpose of finding out the true owner"; if he does this honestly in the first instance, and afterwards, though he may have discovered the true owner, is seduced into appropriating it to his own use, he is not guilty of larceny, though he does wrong".[175] In all the cases where the courts had excused a subsequent misappropriation the original possession had not been wrongful:

> "But in the case now before the Court, *the prisoner's possession of the lamb was from the beginning wrongful*. Here the taking of the lamb from the field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates it to his own use. The distinction between the cases is this: if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel, *animo furandi*, it is larceny."[176]

Parke B said:

> "The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along, just as at common law, a trespass begun in one country continued in another, and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he

174 Dears, at 157, 169 ER, at 677 (1853).
175 *Id.*
176 Dears, at 158, 169 ER, at 678.

entertains a felonious intent that becomes a felonious trespass."[177]

Riley has been applied in the later English decision of *Ruse v Read*[178] where the defendant who took a bicycle when too drunk to have the *mens rea* to steal, having sobered up and discovered that it was not his own, took steps indicating a clear intention to appropriate it. Australian decisions are in substantial accord.[179]

In Ireland, *Riley* was referred to in *Hehir*[180] without complaint.

2.53 We now must consider the cases that do not involve an initial trespass. Judicial analysis has been complicated by the intrusion of the notion of legal possession into the discussion of what constitutes "taking". In *Cartwright v Green*[181] and *Merry v Green*,[182] the principle had been accepted that one could not possess something of whose existence one was unaware.

The English Court for Crown Cases Reserved addressed the issue in *Ashwell*,[183] in 1885. The defendant asked a drinking companion in a public house for a shilling, saying that he would repay him the following morning. The companion agreed, and, putting his hand in his pocket, pulled out what both of them believed to be a shilling. Shortly afterwards the defendant discovered that it was in fact a sovereign; he thereupon fraudulently appropriated it to his own use. He was convicted of larceny of the sovereign. The judges of Court for Crown Cases Reserved were equally divided, so the conviction stood.

2.54 In *Flowers*[184] a year later the same Court distinguished *Ashwell*. The defendant, who had on opening the bag containing his wages discovered that he had been underpaid. Having taken the money from the bag, he returned the empty bag to his employer's cashier's clerk and asked for the balance due to him. The clerk gave him the money due, together with a bag which he believed to be the defendant's bag but which was in fact that of another employee. It contained money which the defendant later appropriated. The case stated by the Recorder

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177 *Id.* Whether Riley was in fact guilty of trespass has been doubted. *McCutcheon*, para 17, has observed that:

> "to constitute a continuing trespass the initial taking must be wrongful, in the sense of its being wilful or negligent. But in *Riley* it could only be said with a long stretch of the imagination that the taking was negligent, much less wilful. Rather the accused's taking of the sheep was inadvertent and should have been regarded as innocent."

In contrast *Fleming* (5th ed), 75 states:

> "One who misappropriates another's property (as by ... taking his sheep and driving it off to market) does not escape responsibility because he believes that the property is his own."

It may be asked whether a man who takes 30 rather than 29 sheep out of a field is in any real sense aware that he has taken the thirtieth sheep.

178 [1949] 1 All ER 398 (KB Div, Div Ct). See also *Kindon*, 41 Cr App Rep 208 (1957).

179 Cf *Howard*, (3rd ed), 173-176.

180 [1895] 2 IR 709.

181 2 Leach 952, 168 ER 574 (1802).

182 7 M & W 623, 151 ER 916 (1841).

183 16 QBD 190 (Cr Cas Res 1885).

184 16 QBD 613 (1886).

did not make clear how much time elapsed between the transfer of the bag and its subsequent fraudulent appropriation but it appears from the evidence that it was very short.[185] The question for the Court, on the basis of the jury's findings, was whether such a subsequent appropriation could constitute larceny, the jury not having found affirmatively that the defendant had the *animus furandi* at the time of the receipt of the bag.

The Court held that the conviction should be affirmed on the basis that there was a clear distinction between it and *Ashwell*.

Kenny is not alone among commentators in challenging Lord Coleridge's statement that there was "a most substantial difference" between the two cases. He states:

> "It is plain that the facts in *Flower's Case* were more unfavourable to the prisoner than the facts in *R v Ashwell* were to Ashwell ....
>
> [T]he undoubted difference of fact between the two cases did not justify [Lord Coleridge's] conclusion; for if Ashwell was guilty then *a fortiori* Flowers should also have been convicted."[186]

2.55 If the English Court for Crown Cases Reserved revealed uncertainty and internal divisions on the question of initially "innocent" taking, the Irish Court for Crown Cases Reserved experienced no less difficulty. In *Hehir*,[187] in 1895, an employer gave his employee what both of them believed to be two pound notes and nine shillings. In fact one of the notes was a ten pound note. There was evidence that the employee, some considerable time after receiving this note, discovered its true value and fraudulently appropriated it to his own use. The question reserved by Palles CB for the Court was whether he ought to have directed a verdict of acquittal by reason of the prisoner's not having had the *animus furandi* when his employer handed him the ten pound note. The majority[188] of the Irish Court for Crown Cases Reserved held that the employee's conviction should be quashed.

Larceny from the Person

2.56 Section 14 of the *Larceny Act, 1976* provides that the offence of larceny from the person is punishable by penal servitude not exceeding fourteen years.[189]

In the Court of Criminal Appeal decision of *Mills*,[190] in 1955, Davitt P, for the

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185 *Id*, at 645.
186 *Kenny*, para 293.
187 [1895] 2 IR 709 (Cr Cas Res), noted with approval by *Anon*, 29 Ir LT & Sol J 323 (1895).
188 Sir Peter O'Brien LCJ, Palles CB, O'Brien, Andrews and Johnson, JJ; Murphy, Holmes, Gibson and Madden JJ dissenting.
189 See *Mills*, 1 Frewen 153, at 155 (CCA, 21 October 1955, *per* Davitt P, for the Court).
190 *Supra*.

Court, said that he considered it clear from the authorities that:

> "to constitute the offence of larceny from the person there must be a complete reparation or severance of the article from the owner's person. It seems to us that no distinction can be drawn between the act of stealing an article from a person's pocket and stealing it from a lady's handbag, which she is carrying on her arm at the time; and that where the thief succeeds in abstracting the article completely from the handbag there is a complete severance and an asportation sufficient to constitute the offence of larceny from the person."[191]

Punishment

2.57 Formerly, the law distinguished between "petty" and "grand" larceny.[192] Where the thing stolen was worth no more than twelve pence, the offence was merely that of "petty" larceny, which, though a felony, was not a capital offence. "Grand" larceny, of things of a higher value, was for centuries a capital offence, though the full rigour of the law was moderated by benevolent fictions as to the value in specific cases, as well as the rules of "benefit of clergy".[193]

Echoes of the distinction between "petty" and "grand" larceny may be found in the present discussion between "simple" and "aggravated" larceny. Section 2 of the *Larceny Act, 1916*, as we have noted, specifies that certain conduct "shall be larceny and a felony", punishable with penal servitude for up to five years. In *Bryant*,[194] however, it was said that:

> "[t]he first thing to be noted is that section 2 ... does not create an offence. Larceny was always an offence at common law. Section 2 ... is ... solely concerned with punishment .... If a person is charged with simple larceny, he is charged with a common law offence and not an offence against a particular statute."

The 1916 legislation prescribes several enhanced penalties for different cases of aggravated larcenies.

2.58 Larceny from a dwelling house of any chattel, money or valuable security is a felony with a penalty of up to fourteen years' penal servitude if the property has a value of at least five pounds or the thief by any menace or threat puts any person in the dwelling-house in bodily fear.[195] The same maximum penalty attaches to the larceny of goods from ships, barges or boats, from docks, wharves

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191 1 Frewen, at 155.

192 See *Kenny*, para 296.

193 See *Kenny*, paras 55, 296.

194 [1955] 1 WLR715, at 717 (Cts - Martial Appeal Case, *per* Lord Goddard CJ).In *Cassidy* [1990] ILRM 30, Gannon J (rejecting what Davitt J had said in *Mills*, *supra*, on this point) observed that, "[i]f the offence does not fall under the other sections of the Act it can be punished under s2, but it does not follow that, if it does fall under one of the other sections, ... it cannot be punished under s2".

195 Section 13.

or quays and from vessels in distress, wrecked, stranded or cast on shore.[196]

2.59 Larceny from the person warrants up to fourteen years' penal servitude.[197] Robbery - an assault with intent to rob - carries a maximum penalty of life imprisonment.[198]

2.60 Larceny by a clerk or servant,[199] or a person employed in the public service[200] carries a maximum penalty of fourteen years, "owing to the opportunities of dishonesty which are necessarily placed within the reach of all persons thus employed, and to the breach of confidence which is involved in taking advantage of them".[201] Postal employees who steal a postal packet in the course of transmission by post face a penalty of penal servitude for life if the packet contains "any chattel, money or valuable security" and penal servitude for a term of up to seven years in all other cases.[202]

2.61 Section 12 prescribes a penalty of penal servitude for life for theft from the mail by persons, whether or not postal employees. It provides as follows:

> "Every person who -
>
> (1) steals a mail bag; or
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> (2) steals from a mail bag, post office, officer of the Post Office, or mail, any postal packet in course of transmission by post; or
>
> (3) steals any chattel, money or valuable security out of a postal packet in course of transmission by post; or
>
> (4) stops a mail with intent to rob the mail;
>
> shall be guilty of felony and on conviction thereof liable to penal servitude for life."

2.62 Larceny of a will, codicil or other testamentary instrument, either of a dead or of a living person, carries a penalty of penal servitude for life.[203] Larceny of goods in the process of manufacture warrants a maximum penalty of fourteen years' penal servitude.[204] Larceny of a horse, cattle or sheep warrants the same penalty.[205]

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196 Section 15. See *McCutcheon*, para 70.
197 Section 14. Cf *Mills, supra.*
198 Section 23 (as inserted by the *Criminal Law (Jurisdiction) Act, 1976, section 5): see McCutcheon*, paras 91-97.
199 Section 17(1).
200 Section 17(2).
201 *Kenny*, para 301.
202 Section 18 as amended by the *Postal and Telecommunications Services Act, 1983*, section 8(1) and Fourth Schedule. See also the *Post Office Act, 1908*, section 55.
203 Section 6.
204 Section 9. See *McCutcheon*, para 61.
205 Section 3. See *McCutcheon*, para 57.

2.63 The 1861 and 1916 Acts contain a wide range of what *Kenny* calls "quasi-larcenies,"[206] involving the appropriation of movables which fell outside the old law of larceny, such as certain animals and plants.

206 *Kenny*, para 303.

CHAPTER 3: EMBEZZLEMENT

3.1 An employee who misappropriates goods placed in his possession *before* they come into his employer's possession is not guilty of larceny. This was clearly stated in *Bazeley*[1] in 1799. A statute[2] enacted later that year made such misappropriation ("embezzlement") an offence.

Section 17 of the *Larceny Act, 1916* now provides as follows:

> "Every person who:
>
> (1) being a clerk or servant or person employed in the capacity of a clerk or servant -
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> ...
>
> (b) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name of or on the account of his master or employer
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> ...
>
> shall be guilty of felony ...".[3]

Who is a "Clerk or Servant"?

3.2 The criminal law, like tort law,[4] distinguishes between a "servant"[5] and

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1 2 Leach 835, 168 ER 517 (1799).

2 39 Geo III, c 85. A similar Act was passed in relation to Ireland twelve years later: 51 Geo III, c 38.

3 See generally *McCutcheon*, paras 72-78.

4 See *McMahon & Binchy*, 753-755. The criteria adopted in tort cases were applied in the income tax case of *O Coindealbhain (Inspector of Taxes) v Mooney*, High Ct, Blayney J, 21 April 1988 (Rev 1988 No. 83R).

an "independent contractor".[6] The master-servant relationship involves a much greater degree of control by the master of the servant's work than does a contract for services with an independent contractor. The master "can tell [the servant] not only what to do but also how to do it".[7]

The courts traditionally have had regard to such as the following:

(a) the master's power of selection of his servant;

(b) the payment of wages or other remuneration;

(c) the master's right of control of the method of doing the work; and

(d) the master's right of suspension or dismissal.[8]

In *Negus*[9] in 1873, Bovill CJ said:

> "What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the *orders* of his employer or as to be under his employer's *control* ... Where there is a salary , that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveller ... But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to show that it is not necessary that there should be a payment by salary - for commission will do - nor that the whole time should be employed, nor that the employment should be permanent, for it may be only occasional, or in a single instance - if, at the time, the prisoner is engaged as servant."

And Blackburn J said:

> "The test is very much this, *viz.*, whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control."[10]

3.3 More recently, in cases of tort and other employment, less emphasis has

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5 This term embraces "clerk".

6 Fraudulent breaches of trust by independent contractors are dealt with by the *Larceny Act, 1916*, sections 20 and 22.

7 *Kenny, para* 319.

8 *Short v J & W Henderson Ltd*, 62 Times LR 427, at 429 (H I (Sc), *per* Lord Thankerton, 1946). Cf *Murphy*, 1 ICLR 91 (CCA, 1850).

9 LR 2 CCR 34, at 36 (1873).

10 *Id*, at 37. See also *Hall*, 13 Cox CC 49 (CCA 1875).

been placed on the control test. "Thus, factors such as the form of remuneration, the payment of tax and social insurance, the risk of profit and loss and the ownership of equipment and materials have been taken into account. It can be expected that the criminal law will likewise broaden its definition of who is a clerk or servant."[11] Although there is no necessary coincidence of social policies as between tort law and criminal law so far as the definition of "servant" is concerned, it seems that the courts in criminal cases are content to take their lead from torts cases. Thus, in the Court of Criminal Appeal decision of *Warren,*[12] in 1944, Gavan Duffy J referred to a decision[13] in *tort* law as to whether a rate collector was a servant of the local authority, and observed:

> "The decision has stood for twenty years and it cannot in a criminal cause, be treated as not representing the appropriate law in force, if upon examination the considerations which impressed the court are found to be relevant ..."

Whether courts in prosecutions for embezzlement would today favour the same approach may be debated. Certainly the decision of *Moynihan v Moynihan*[14] has given pause for thought.

There the Supreme Court held that a mother was vicariously liable, as head of the household, for the negligence of her daughter in the provision of hospitality for other members of the family who visited the mother's home. Walsh, J noted that:

> " ... the necessary element of control was vested in the defendant and the daughter ... was in the *de facto* service of her mother for the purpose of the act in which she was alleged to be negligent."[15]

3.4 Now it is clear that a person may be guilty of embezzlement even in the absence of a contract of service. In *Faulkes*,[16] where a son was convicted of embezzling from his father, Cockburn CJ said:

> "It is true that the relation of clerk or servant is generally founded on contract, but the relation may exist at will only. The evidence is that the prisoner did perform all those things which a clerk or servant might have done, and although he might have refused to go on doing them, yet so long as he continued to perform them he did them in the capacity of a clerk or servant to his father."

It is worth noting also Pollock B's statement that:

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11 *McCutcheon*, para 74.
12 [1945] IR 24, at 29 (CCA 1944).
13 *O'Neill v Drohan*, [1914] 2 IR 495.
14 [1975] IR 192 (Sup Ct), analysed by *McMahon & Binchy*, 748-751.
15 [1975] IR at 198. Henchy J delivered a strongly dissenting judgment.
16 13 Cox CC 63, at 66 (CCA 1875).

> "[t]he statute contemplates ... something beyond the mere relationship of clerk or servant to another, and includes the case where, *de facto*, a person is employed in doing the work ordinarily done by a clerk or servant."[17]

These judicial observations may seem in close harmony with *Moynihan*, but it must surely be the case that, in a prosecution for embezzlement, the Court should not too readily characterise as a *de facto* service relationship one that has received this characterisation in tort litigation. It would be naive to view *Moynihan* as having been decided in a policy vacuum; similarly the findings of a *de facto* service relationship between brother and sister in the context of proceedings for seduction[18] must also be regarded as serving policy goals which have no necessary counterpart in prosecutions for embezzlement.

3.5 The requirement that the servant or clerk should receive property "for or on account of" his master has not yet been analysed in any recent Irish case dealing with embezzlement.[19] In *Lawless*,[20] where the appellant had been acquitted of embezzlement but convicted of fraudulent conversion, the Court of Criminal Appeal was content to rely on an English decision[21] dealing with embezzlement when determining the meaning of this phrase. In the context of fraudulent conversion, it was subsequently decided in *Cowan*,[22] approving the English decision in *Grubb*,[23] that a person may be entrusted with property "for or on account of" another person notwithstanding that the property is not delivered to him directly by the owner and that the owner does not know of his existence and has no intention of entrusting the property to him because his receipt of the property gives rise to a duty or obligation to account for it to such other person. It seems safe to predict that, in prosecutions for embezzlement as well as fraudulent conversion, the approach favoured in *Cowan* will prevail.

3.6 The mere failure to account for or the inaccurate recording of, transactions involving the receipt of property by a servant for or on his master's account does not constitute embezzlement, though it may amount to an offence under section 2 of the *Falsification of Accounts Act, 1875*.[24] However, such a

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17 *Id.* See also *id*, at 66-67 (*per* Bramwell B) and at 67 (*per* Mellor J).

18 Cf, e.g., *Murray v Fitzgerald*, [1906] 2 IR 254 (CA), where the brother of a seduced girl was held entitled to sue even though he was at least ten years her junior and though she had an interest in the farm on which they and another brother worked. Holmes LJ, dissenting, contended (at 271) that:

> 'no one could suggest that [the plaintiff] was *in loco parentis* to a sister, ten or thirteen years older than himself, who managed the money of the family ... and who was, as she said in her evidence, the head of the house.'

The notion of a parent's entitlement to the services of his or her adult child is one that has for long been criticised: see, e.g., *Anon, Loss of Services in Actions for Seduction*, 11 Ir LT & Sol J 339, at 339 (1877).

19 In *Horrigan*, Jebb & Bourke, App iii (1841), a servant who, in breach of his instructions, sold his master's cattle at a fair, instead of merely driving them there and keeping them until his master came and sold them, was held to have been improperly convicted of embezzling the proceeds. The report merely states the holding of the judges and the argument of counsel.

20 [1930] IR 247 (CCA 1929).

21 *Gale*, 2 QBD 141 (1876).

22 98 ILTR 47 (Sup Ct 1958, aff'g CCA 1957).

23 [1915] 2 KB 683.

24 Cf *infra*, para 5.18 *et seq*, Chapter 30.

failure may warrant an inference of an intent to defraud the master, in which case a conviction for embezzlement may be sustained.[25] As to the meaning of "fraudulently", in relation to embezzlement, it seems that a claim of right is inconsistent with fraud in this context.

The Court of Criminal Appeal so held in *Grey*,[26] in relation to a prosecution for fraudulent conversion. In view of the similar language in sections 17(1)(6) and 20(1), and in view of O'Byrne J's judgment[27] in *Grey*, it may be argued that the logic of the holding in *Grey* applies also to the context of embezzlement.[28]

3.7 As regards proof of the offence, it appears that this may be satisfied by evidence of false entries and general deficiencies in the books, where the jury can properly infer that the defendant must have embezzled the missing amounts.[29] No Irish case dealing with embezzlement has yet decided whether a general deficiency count is permissible in cases where it is impossible to split up an aggregate sum and to trace individual items.[30] The English decision of *Tomlin*[31] has held that this solution is permissible; and the Irish decision of *Singer*[32] is an authority in favour of this approach in a prosecution for fraudulent conversion.

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25 See *Lynch*, 6 Cox CC (Dublin Commission Court, Green Street, 1854), *Hodgson*, 3 Car & P 422, 172 ER 484 (1828).

26 [1944] IR 326 (CCA).

27 Cf *id* at 331-332.

28 See *McCutcheon*, para 75.

29 See *Gleeson*, 64 ILTR 225 (CCA 1919); see also *Dalton*, CCA 11 October 1960 (No 25 of 1960), 1 Frewen 199 (prosecution under section 17(1)(a) of the 1916 Act); and see *McCutcheon* para 77.

30 *McCutcheon*, para 77.

31 [1954] 2 All ER 272, critically analysed in *Russell*, vol 2, 1092-1095.

32 CCA 23 June 1961 (No 39 of 1960), 1 Frewen 214. See further *McCutcheon*, para 78.

CHAPTER 4: FALSE PRETENCES

4.1 Section 32 of the *Larceny Act, 1916* provides that a person is guilty of a misdemeanour when, by any false pretence,

> (1) "with intent to defraud, [he] obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or
>
> (2) with intent to defraud or injure any other person, [he] fraudulently causes or induces any other person -
>
> (a) to execute, make, accept, endorse, or destroy the whole or any part valuable security; or
>
> (b) to write, impress, or affix his name or the name of any other person, or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security ..."[1]

In the Court of Criminal Appeal decision of *Bristow (No. 2)*,[2] O Dalaigh CJ summarised the ingredients of the offence succinctly. To establish an obtaining of money by false pretences, the prosecution had to establish:

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1 See *McCutcheon*, paras 143-151, *Anon, False Pretences*, 90 Ir LT & Sol J 41 (1956).

2 CCA 27 March 1962, at p2.

"(i) that the accused obtained money,[3] (ii) that he did so by means of a *false* pretence, (iii) that the injured party was induced by the pretence to part with his money, (iv) that this pretence was as to an existing fact, (v) that the pretence was false to the knowledge of the accused, (vi) and was made with intent to defraud."

The Right Obtained

4.2 *Kenny*[4] states:

> "For the purposes of section 32 the word 'obtains' means that the offender has induced the prosecutor to transfer not merely the article itself but also the full ownership of the article. It may well be that the prosecutor contemplated that the recipient would be retaining the thing for his own use and benefit: this, however, is not essential, and it will be enough that the recipient obtains the power to pass the ownership to someone else if he does not wish to take it for himself."

It is necessary to stress the distinction here drawn between the owner's intention to pass property in the goods (in which case the prosecution should be for false pretences) and his intention merely to pass possession (in which case the prosecution should be for larceny). Deciding which was the owner's intention may be very difficult in some cases. The owner may have no sophisticated understanding of the difference between ownership and possession; even if he does, he may genuinely be uncertain as to what his precise intention was in the circumstances of the case.

The Subject Matter

4.3 It is not entirely certain what the words "chattel, money or valuable security" embrace. There is some authority for the view that they should be read subject to the implied qualification that they must also be capable of being stolen.[5] It is interesting to note that section 10 of the *Criminal Justice Act, 1952*, which in substance reenacts section 32 of the 1916 Act, uses the expression "anything capable of being stolen" rather than "chattel, money or valuable security".

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3 The offence extends to the obtaining of a wide range of other property: cf *infra*, pp110-111.

4 *Kenny*, para 342.

5 Cf *Robinson*, Bell CC 34 169 ER 1156, *Kenny*, para 342. But see *Smith & Hogan*, 1st ed, 359, who observe that:

> "[t]he real motivation of this decision, however, appears to have been that the court considered a sentence of seven years' penal servitude a monstrous punishment for obtaining two dogs by false pretences when he could have been fined only had he stolen them. This situation is hardly likely to arise now and *Robinson* would not stand in the way of giving 'chattel' its ordinary meaning".

Lord Campbell CJ's remarks (Bell CC at 38, 169 ER, at 1158) afford the basis for *Smith & Hogan's* observation.

What Constitutes A Pretence

4.4 A pretence involves human conduct where there is an untrue communication. The conduct usually is any language, written or spoken; but this is not essential, once a communicative dimension may be discerned. Thus, for a man in Oxford to wear a cap and gown was considered capable of amounting to a representation on his part that he was a student at the University.[6]

In *Finkel v Levine*[7] in 1951, the defendants had been involved in a transaction whereby counterfeit dollar bills were given by one of them to a third party in exchange for sterling at a price of six pence per dollar above the normal exchange rate. At the time there was in force an Emergency Regulation forbidding the sale of dollars between private persons. They were convicted of conspiring together to obtain money by false pretences, and of obtaining that money by false pretences.

In their appeals, the defendants argued that there had been no evidence that either of them had ever made any false statement as to a matter of fact in relation to the dollar bills and that therefore neither had made any false pretence. Moreover, they argued, there was no evidence that they knew the bills were counterfeit or that the third party had parted with his money as a result of the misrepresentation alleged. This argument was rejected by the Court of Criminal Appeal.

Maguire CJ (for the Court) said:

> "It is quite true that there was no evidence of any statement being made by either accused to [the third party] that the dollar bills were genuine. There is, however, evidence that both accused at the first meeting ... took part with [the third party] in a discussion in the course of which the price of dollars w[as] fixed at £27.10.0 *per* $100, and that that price was 6^{d} *per* dollar above the normal exchange rate. The jury were quite entitled to conclude that no one in their senses would either agree to pay or expect to receive full face value and more for counterfeit money, and it seems to the Court that there was quite sufficient evidence from which the jury could conclude that the accused by their conduct, if not in so many words, represented that the bills were genuine. The representation was carried to the logical conclusion the following Saturday when Finkel handed over to [the third party] the forty five spurious bills in exchange for £962.10.0 in cash. A person who, without making verbal representation, presents a counterfeit coin or bank note to be genuine and is guilty of obtaining the change by false pretences

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6 *Barnard*, 7 C & P 784, 173 ER 342 (1837). In fact the man falsely asserted that he belonged to Magdalen College; but Bolland, B, summing up, observed (at 784 and 342, respectively):

> "If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university ...".

7 CCA, 31 July 1951 (Nos 34 & 35 of 1951), 1 Frewen 123.

though, where the coin or note is of the currency of the State he would usually be charged with the offence of uttering rather with the offence of obtaining money by false pretences. It is unnecessary to refer to the many cases which show that the mere presentation of a note purporting to be genuine and worth its face value but which is in fact worthless may be a representation that it is genuine and value for what [it] purports to be."[8]

It was the opinion of the Court that, if the Emergency Regulation had not been in operation, there would have been "ample evidence to justify the jury in concluding that all the ingredients necessary to constitute the charge of false pretences were present and particularly to establish guilty knowledge."[9]

The False Pretence Must Be One Of Past Or Present Fact

4.5 The false pretence must be one of past or present fact.[10] Much judicial attention has concentrated on false promises. The courts[11] have held that a false promise should not involve the promisor in liability for obtaining money by false pretences. Why should this be? In one sense, of course, a false promise necessarily contains a false representation of fact, namely, that the promiser intends to keep his promise. But the courts regard a promise as being of a different order to an ordinary representation of fact.

Several reasons may be suggested for this approach. An extension of the offence to all cases of fraudulent breach of promise would cast the shadow of criminal law too far over the law of contract. All statements about the future should be treated with caution, especially statements relating to intention. Moreover, a promise is a "speech act": one generally does not enter into a mutually binding promise without doing so by communication; yet a promise is a human act of a different moral order to a factual representation. Breach of a promise should not necessarily be treated in the same way as an untrue factual representation, even if the promisee shares with the party to whom a representation has been made the experience of disappointed reliance. Whereas the latter can say "I relied on the truth of the what I was told", the former can say "I relied on the moral integrity of the promisor that he would keep his promise".

4.6 In *Murphy*[12] in 1876, the defendant had obtained two separate

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8 1 Frewen, at 128.

9 *Id* at 129.

10 Professor Smith, writing after the offence of obtaining property by false pretences had been replaced in England by offences of deception, stated:

> "In the old law of false pretences the books unanimously stated that the misrepresentation must be as to a matter of fact. They then went on to contrast representation of fact with representation of opinion or intention. No discussion is to be found of representations of law and no authority is cited to show that a misrepresentation of law would not have been a sufficient false pretence. Indeed there appears to be no authority to that effect. On the other hand there is no authority to show that a misrepresentation of law was enough." *Smith*, para 175 (footnote references omitted).

11 Cf *Dent*, [1955] 2 QB 590, *Jones*, 33 Cr App Rep 11 (1948).

12 IR 10 CL 508 (Ct of Cr Cas Res 1876).

quantities of goods by sending in the post half notes in payment for one of these quantities from one merchant and by sending the corresponding halves to the other merchant for the other quantity.[13] Her counsel argued unsuccessfully that the indictment could not be maintained as the false pretence was not one of fact but merely a promise to send the other halves. The case was left to the jury, who convicted.

Lawson J reserved the case for the Court for Crown Cases Reserved. Counsel for the defendant contended first that the sending was merely a promise to pay for the goods on delivery. Palles CB was unimpressed, asking:

> "How could the prisoner keep that promise, when she had parted with the other half-notes?"[14]

Counsel replied that the promise had not been to pay by sending *the second half notes*, but "to pay in some manner, and the half notes were sent merely to a security for the observance of the promise".[15] To this O'Brien, J rejoined:

> "But the prisoner had sent the corresponding half notes away, and the jury might reasonably infer that the representation was to send the second half notes; and that was a false representation, and the one upon which the goods were in fact obtained."[16]

Counsel then sought to argue that the sending of the money was "not a false pretence [but] merely a security".[17] It was quite possible that the prisoner had made a mistake in sending the half notes. The evidence was "at most ... consistent with the innocence of the prisoner.[18] Keogh, J conceded that "[t]hat might be, but for evidence which appeared from the cross-examination of one of the merchants who had said that the defendant had told him she had sent the half notes corresponding to those he had reserved to some one else".[19]

Morris CJ stated that the Court was unanimously of the opinion that the conviction should be affirmed.

4.7 In *Cloran*[20] in 1870, the defendant had induced a debtor languishing in the Four Courts Marshalsea to part with a promissory note for £60 in reliance on his assurance that he would apply this sum to secure her release. He later claimed that he had destroyed the note but in fact he had passed it to a bank for his own benefit.

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13 Two further counts charged the defendant with the same type of offence in relation to two other persons, *id* at 509.

14 *Id* at 510.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 4 ILT & Sol J 690 (Commission of Oyer and Terminer, Pigot CB and City jury, 1870).

Counsel for the defendant argued that there was no case to go to the jury, since "there was nothing but a promise to get the amount of a promissory note, and that was merely a promise in the future, and not within the measuring of the statute".[21] There was no evidence of a false pretence, as it was impossible to provide that the defendant was unable to advance £60 when he procured the note.

Counsel for the prosecution contended that "the statement made by the [defendant] that he was at the time in a state of power to do a certain thing, or if from the tenor of his conversation it was fair to infer that the idea of his existing power was created in the mind of [the debtor] ..., taken in connexion with the promise made to procure a sum of money was sufficient evidence to support the indictment as to the pretences; and that the fact of the defendant procuring the note under the circumstances, and passing same to the bank for his benefit, while he wrote a note stating he had destroyed it, was in the absence of any evidence adduced by the [defendant] to rebut same, *prima facie* evidence of the inability of the [defendant] to perform that which he represented he was able to do"[22].[23]

Pigot CB said:

> "The only point on which there could be any doubt is as to the question of the falsity of the pretence, but I am of opinion that there is sufficient evidence to go to the jury of the falsehood of the pretences made by the [defendant]".[24]

The jury convicted. Pigot, CB had "no doubt whatever"[25] on his mind that would justify him in volunteering a reservation of the question to the Court of Criminal Appeal.

The False Pretence must Induce the Transfer of Ownership

4.8 The false pretence must have induced the change of ownership; it need not have been the only factor provided it was a material one.[26] The fact that the victim is credulous or careless is not a reason for acquittal.[27]

In *Carty & Carty*,[28] the defendants were convicted of (i) conspiracy to defraud by a false representation that one of them was then entitled to sell and deliver a greyhound bitch named New Doll, and (ii) obtaining money by falsely pretending that one of them was thus entitled.

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21 *Id* at 691.
22 Citing *Giles*, 34 LJMC 50.
23 4 ILT & Sol J at 691.
24 *Id.*
25 *Id.*
26 *West*, Dears & B 575, 169 ER 1126 (1858).
27 *Kenny*, para 349.
28 CCA (unreported) (37-1956).

Counsel for the defendants on appeal submitted that the judge should have told the jury that the name of the animal was of no real consequence and that, if they believed that the person who sought to buy the greyhound promised by the defendants would in fact have accepted any 1952 greyhound bitch that had run 550 yards in 31.05 seconds, they should acquit. The Court of Criminal Appeal was not receptive to this argument for two reasons. First, there was evidence that the defendants had mentioned the animal's name to the purchaser on several occasions. Second, the animal they actually preferred had not complied with the qualifications as to age, time and distance.

The Court did, however, accept that:

> "[i]f the facts had shown that the Cartys had arrived in London and had offered a 1952 greyhound bitch that had in fact run 550 yards in 31.05 seconds, and that was not named 'New Doll' there would be grounds for complaint."[29]

4.9 This raises the interesting issue of misrepresentation as to identity as opposed to quality or qualities. Here the only information important to the prospective purchaser appears to have related to age, time and distance; the name of the bitch appears to have been irrelevant. It is true that there was indeed an animal named New Doll, owned by another person, which one of the defendants tried unsuccessfully to buy after agreeing the sale. But the judgment gives no clear support for the inference that the prospective purchaser was aware of the existence of that animal, so that there is no reason to believe that it played any part in his deliberations as to whether to buy.

The Court appears, correctly, to have accepted that a misrepresentation as to what it calls "name" *need not* give rise to liability. It is only where the name carries with it connotations that may affect the deliberation of a prospective purchaser (or other victim) that it will be of relevance.[30]

Direction to Jury need not refer Expressly to Requirement of Inducement where Evidence is Clear

4.10 In *Bristow (No 2),*[31] in a prosecution for false pretences arising out of the giving of a cheque that bounced, the trial judge did not in express terms tell the jury that the injured party must have been induced by the representation to part with his money. The Court of Criminal Appeal held that, on the facts of the case:

> "There was no room for doubt that the parties who paid money to the [defendant] did so because they thought they were receiving good and

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29 Pp 6-7 of judgment.

30 Cf *Gilmore & Cunningham*, 85 ILTR 99 (1950), analysed by *McCutcheon*, para 145. See also *White*, IR 10 CL 523 (QB 1876).

31 CCA 27 March 1962 (unreported).

valid cheques. The matter was so clear as not to require statement."[32]

Proof of the Falsity of the Pretence

4.11 The indictment must specify the pretence alleged and it is that pretence which must be shown to be false.

This principle was endorsed in *Kelleher*,[33] although its application to the facts of the case is not easy to understand. The Court for Crown Cases Reserved held bad an indictment for obtaining money by false pretences where it stated that the defendant knowingly and designedly falsely pretended that he was another person who had money deposited in the Cork Savings Bank, and who had a book of his bank with a statement of his account in it, which book he presented to the cashier of the Bank when representing himself to be that other person, by means of which false pretence he obtained £10 of the other person's money, with intent to defraud, whereas in truth he was not that person, nor had he any authority to present the book for the purpose of drawing out money; neither had he any authority from the other person to draw money from the bank.

May CJ, for the Court said:

> "It is clearly established that an indictment for obtaining money by false pretences should state the pretence, and should negative the truth of the matter so pretended with precision, so as to inform the prisoner with certainty of the charge made against him.
>
> The indictment does not contain any allegation that the prisoner pretended that he was the person named in the Bank book, nor that he pretended he had any authority from Goulding to present the book or to draw money from the Bank; and having omitted to allege any such pretences as having been made by the prisoner, the indictment proceeds to negative the truth.
>
> The indictment does not negative the truth of averments which the prisoner is alleged to have made, but of others which he is not alleged to have made."[34]

The difficulty in this case is that the indictment *did* allege that the defendant had pretended that he was the person named in the Bank book: it stated "... which said book he the said Michael Kelleher presented to the said EJ Julian at the time he represented himself to be the said James Goulding by means of which said false pretence he, the said Michael Kelleher, did there and then obtain from the said ... [etc]". It is possible that the view of the Court was that, although the indictment stated the prisoner pretended he was X, who, as a matter of fact, was

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32 P3 of O Dalaigh, CJ's judgment.
33 2 LR Ir 11 (Ct for Cr Cas Res 1877).
34 *Id* at 14.

the owner of the book, it did not state expressly that he pretended to be the owner of the book. This seems a very narrow a distinction to draw.

Intent to Defraud

4.12 An intent to defraud "may of course be inferred from the facts of the case".[35] In *Sullivan*,[36] where the defendant, a midwife charged with attempting to obtain money by false pretences, had submitted false reports of provision of service, the Supreme Court by a majority[37] held that this "amounted to *prima facie* evidence that her actions in this regard were consistent only with an intent to defraud, subject however to her establishing that she had good reason for having the cases attended by other midwives".[38]

In *Shanahan*,[39] the defendant paid for two tractors with a cheque which he knew would be met only if a cheque from a third party was lodged beforehand to his account. The latter cheque was dishonoured, and the cheque for the tractor accordingly bounced. When interviewed by a member of the Garda Siochana, the defendant intimated that he had stopped the cheque because of a dispute with the vendors arising from the non-delivery of documents associated with the tractor. He did indeed have such a dispute, since the tractor had not received customs clearance, but, as has been mentioned, the reason the cheque for the tractor bounced was because of the absence of sufficient funds in the defendant's account.

The defendant's appeal against conviction for false pretences was successful, the Court of Criminal Appeal ordering a new trial. Counsel for the defendant conceded that, where the prosecution established the issuing of a cheque and the complete absence of funds or of any permitted overdraft facility to meet it, this would discharge the onus of establishing a fraudulent intent as a *prima facie* proof. He argued unsuccessfully that there was in this case a further onus of proof on the prosecution in establishing a *prima facie* case to prove the circumstances of the dishonouring of the cheque issued to the defendant by the third party and the fact that the defendant was aware of its worthlessness when he issued his own cheque.

In rejecting this submission, the Court of Criminal Appeal expressed the view that the Guard's evidence constituted *prima facie* evidence of the fraudulent intent necessary to convict. However, it is worth recording O'Higgins CJ's statement that:

> "[t]he Court accepts the general submission that in a case where the

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35 *Bristow*, CCA 7 November 1961 (No 17 of 1961), 1 Frewen 249, at 251 (*per* O Dalaigh CJ). See also *Bristow (No 2)*, CCA 27 March 1962, at p4 of O Dalaigh CJ's judgment. For a comparative study, see Doherty, *The Mens Rea of Fraud*, 25 Crim LQ 348 (1983).

36 [1964] IR 169.

37 O Dalaigh CJ and Walsh J; Lavery J dissenting.

38 [1964] IR, at 195 (*per* Walsh, J).

39 CCA 11 December 1978 (No 19 of 1978), 1 Frewen 417.

crime charged is that of obtaining money or goods by false pretences and where the false pretence is the issuing of a cheque which is not met, the onus remains upon the prosecution at all times to establish beyond a reasonable doubt that at the time of the issuing of the cheque the accused was aware that it was not likely to be met out of the account upon which it was drawn."[40]

As *McCutcheon*[41] notes, "[a]lthough proof of the accused's knowledge of the falsity of the representation supports a *prima facie* case of intent to defraud, such proof is not always sufficient."

4.13 In *Thompson alias Morrison*[42] in 1960, the defendant was convicted of obtaining a car by false pretences and of conspiracy with another to defraud the owner of the car by obtaining it from him by false pretences. He had obtained the car on 3rd February in exchange for a cheque dated the following day. There was only £10 in his account at the time of the sale. His secret intention (he later claimed in his unsworn statement from the dock) was to meet this cheque by lodging the proceeds to be derived from a quick sale of the car to another dealer. As matters worked out (he claimed), he was unable to reach those dealers in time, so his colleague sold it at a small loss to a third party who gave a cheque for it which the defendant lodged to his account and which would (with the £10) have afforded sufficient funds to meet the cheque given to the car owner the previous night. Unfortunately for the defendant, the third party dishonoured his cheque, resulting in the dishonouring of the original cheque.

The Court of Criminal Appeal quashed both convictions and ordered a new trial on both counts. This was because the direction of the trial judge, which had laid particular emphasis on the drawing of the cheque, "could well have masked the other ingredient, namely the intent to defraud by reason of the false pretence, without which there could not be a conviction".[43]

Walsh J for the Court, addressed the issue of false pretences, in a most important passage:

> "The act of drawing the cheque clearly implied at least three statements about the present. Firstly, that the applicant had an account at the Bank, which was the case. Secondly, that he had authority to draw on it for £135, which authority he had not in fact; and thirdly that the cheque, as drawn, was a valid order for the payment of £135 in that the state of affairs then existing was such that in the ordinary course of events the cheque would be duly honoured on or after the 4th February. It did not imply that the applicant had £135 in the bank on the 3rd of February or that the cheque would be met on or after the 4th February

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40 *Id* at 49.
41 *McCutcheon*, para 150.
42 CCA 13 October 1960 (No 21 of 1960), 1 Frewen 201.
43 *Id* at 207 (*per* Walsh J for the Court).

when presented. If the jury accepted that by reason of his expectation of a quick sale of the car the applicant believed when he gave the cheque that he would, in the ordinary course of events, be in a position to lodge sufficient in the account to meet the cheque when presented, they should have acquitted the applicant. In our view the learned trial judge did not sufficiently distinguish for the jury the question of this belief in the mind of the applicant of the time he drew the cheque from the other question of belief namely, as to his authority to draw a cheque for that amount at that time. That being so we are not satisfied that the jury could be said to be free from confusion on the distinction between the falsity of the pretence and the intent to defraud. For that reason the conviction on this count should be quashed and a new trial directed".[44]

As regards the role of the trial judge in guiding the jury, in *Bristow*,[45] O Dalaigh CJ observed:

> "There may be cases where a judge, in explaining the nature of the offence created by section 32(1) ... can properly dispense with an express statement to the jury that they should, before convicting, be satisfied, *inter alia*, that the accused's representation was made with intent to defraud. But to omit such a statement is a perilous course ...."

Punishment

4.14 Although obtaining by false pretences is a misdemeanour, the maximum punishment for the offence - five years imprisonment[46] - is as severe as for simple larceny.[47]

Larceny and False Pretences Distinguished

4.15 The conceptual difference between the offences of larceny and false pretences is clear, but in practice the evidence in some case may be far from plain as to whether the victim intended to pass ownership or possession. Formerly, this could result in guilty defendants being acquitted since it was not possible to join felonies and misdemeanours in the same indictment.[48]

These difficulties are addressed by section 44 of the *Larceny Act, 1916,* subsections (3) and (4) of which provide as follows:

> "(3) If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to

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44 *Id.* In accord is *Kenny*, para 346. As to prosecutions for false pretences in relation to cheques, see further *Skelly*, [1935] IR 604 (CCA 1934), *McCutcheon*, para 147.

45 CCA 7 November 1961 (No 17 of 1961), 1 Frewen 249, at 252.

46 *Larceny Act, 1916*, section 32. As to the power of the Court to fine the offender, see section 37(5)(a).

47 *Id* section 2.

48 *Kenny*, para 335.

obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly.

(4) If on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences it is proved that the defendant stole the property in question, he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences."

Kenny warns that:

> "in every such case as is envisaged by the above statutory provisions the evidence must, at the trial, clearly establish which of the two crimes has in fact been committed. If the indictment is for attempted larceny the accused cannot, under section 44(3), be convicted of attempting to obtain by false pretences".[49]

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49 *Id.*

CHAPTER 5: FRAUDULENT CONVERSION AND FALSE ACCOUNTING

1. Fraudulent Conversion

5.1 The common law did not impose a criminal sanction on servants who acquired full ownership in money or goods in circumstances where it was their plain duty to pass them over to their master. An action for breach of trust might indeed be available, or perhaps a restitutionary remedy such as the quasi-contractual claim for money had and received; but the common law was slow to characterise a breach of trust as a criminal offence.[1] *Kenny* notes that "[s]till less did it attach any criminal liability to acts done by one whose fiduciary duty was less well defined than that of a recognized trustee".[2] Various enactments in the nineteenth century provided some degree of criminal sanction against these types of breach of trust; but it was not until the *Larceny Act, 1901* that wide-ranging liability was prescribed. The matter is now dealt with by section 20 of the *Larceny Act, 1916*,[3] which (re-enacting section 1 of the 1901 Act) provides as follows:

> "(1) Every person who -
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> (i) being entrusted either solely or jointly with any other person with any power of attorney for the sale or transfer of any property, fraudulently sells, transfers or otherwise converts the property or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was seen entrusted; or

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1 See *Kenny*, para 324
2 *Id.*
3 See generally *McCutcheon*, paras 80-89.

(ii) being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit or for any use or purposes other than the use or purposes of such body corporate or public company, and of the property of such body corporate or public company;[4] or

(iii) being authorised to receive money to arise from the sale of any annuities or securities purchased, or transferred under the provisions of Part V of the Municipal Corporation Act, 1882, or under any Act repealed by that Act, or under the Municipal Corporation Mortgages, & c Act, 1860, or any dividends thereon, or any other such money as is referred to in the said Acts, appropriates the same otherwise than as directed by the said Acts or by the Local Government Board or the Treasury (as the case may be) in pursuance thereof; or

(iv) (a) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or

(b) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof;

shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding seven years.

(2) Nothing in paragraph (iv) of subsection (1) of this section shall apply to or affect any trustee under any express trust created by a deed or will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage."

5.2 Fraudulent conversion must be distinguished from obtaining money by false pretences:

"In the case of fraudulent conversion the fiduciary element is the

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4 Cf *Grey*, [1944] IR 326 (CCA).

essential basis of the offence, and the entrustment is a genuine entrustment in which the fiduciary ownership has been lawfully obtained but which, so to speak, subsequently goes wrong. The term 'conversion' of itself indicates this. Where the fiduciary ownership has been obtained by a false pretence made with intent to defraud there is no such genuine entrustment and the case falls within section 32 of the Larceny Act, 1916 and is excluded from section 20."[5]

5.3 There is a major disagreement among the commentators as to whether section 20(1)(iv) should be interpreted as extending, not only to cases where ownership is passed, but also to cases where something less is transferred. In favour of the broad interpretation, Smith[6] argues that section 20(1)(iv) embraces conduct amounting to larceny by a bailee,[7] larceny by a clerk or servant[8] and embezzlement.[9]

The language of the provision itself contains no limitation; the cases[10] give some support for the wide interpretation and the historical argument[11] relating to the aims of the *Larceny Act, 1916*, in Smith's view, presents no difficulty. As against this, Turner is of the view that, in order to satisfy section 20(1)(iv), it is necessary to establish that the defendant received the *ownership* of the property he fraudulently converted.[12] Section 20 as a whole deals with cases in all of which "the offender stands in a special relation to the property, such that, apart from the provisions of this section, he could not be criminally prosecuted for misapplying it."[13] To read section 20(1)(iv) as in part duplicating other clear provisions in the 1916 Act would involve an absurdity.[14]

The matter has not yet been resolved finally by an Irish court. O Dalaigh J's reference in *Singer*[15] to "fiduciary ownership" suggests support for Turner's view - an interpretation enhanced by his reference immediately afterwards to Turner's "admirabl[e] summar[y]"[16] of the history of the offence in *Kenny's Outlines of Criminal Law.*[17] As against this, O Dalaigh J was addressing the narrow

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5 *Singer*, CCA 23 June 1961 (No 39 of 1960), 1 Frewen 214, at 227. In *Reilly*, [1937] IR 118 the Court of Criminal Appeal, having regard to the view it took of the case, had held that it was not necessary to decide the legal question whether counts of false pretences and fraudulent conversion were alternative and inconsistent. The evidence given in support of the counts of false pretence was "open to criticism as not being sufficient in law to support the convictions on these counts" (*Id*, at 123), but the Court was satisfied that the evidence in support of the counts for fraudulent conversion amply justified the convictions of these counts which the Court let stand.

6 Smith, *The Scope of Fraudulent Conversion*, [1961] Crim L Rev 741, 797. See also *Smith & Hogan*, 430-432 (1st ed, 1965).

7 *Larceny Act, 1916*, section 1(1).

8 *Id* section 17(1)(a).

9 *Id* section 17(1)(b).

10 Cf *Grubb*, [1915] 2 KB 683, *Williams*, [1953] 1 QB 660, at 663 and *Davenport*, [1954] 1 All ER 602. See *Williams & Weinberg*, 233, fn 60.

11 Cf Smith, *op cit*, at 743 ff.

12 *Russell*, vol 2, 1116.

13 *Id* 1115.

14 *Id* 1114.

15 Frewen at 227.

16 *Id.*

17 A small difficulty arises from the fact that O Dalaigh J is reported as having cited pages 311 to 317 of the 18th edition of *Kenny*. In fact these pages do not deal with the subject; but pages 331 to 338 do (page 338 dealing with the topic of fraudulent trustees, which might reasonably be considered severable from the matters raised in *Singer*).

question of the relationship between fraudulent conversion and false pretences, so it would seem wrong to place much weight on this endorsement of Kenny's view. It is interesting to note that the Court of Criminal Appeal delivered judgment in *Singer* on 23 June 1961, five months before the first part of Smith's celebrated attack[18] on Kenny's views was published.

5.4 It should also be noted that a passage from the Court of Appeal's decision in *Reynolds*,[19] quoted presently, could, on one view, be interpreted as implying that a conviction for fraudulent conversion may be sustained even where it is not clear that the accused obtained ownership of the money or property. The judgment can perhaps be better understood as going no further than warning that an undue concentration on the precise moment at which possession or ownership passed may deflect the jury from the more important task of determining whether the property was received for and on account of another; yet the reference to the passing of possession, without a clear statement that ownership must also pass, may be considered to give some support to Smith's view.

Section 20(1)(4)(a) deals with two different cases: entrustment of property for retaining in safe custody (in paragraph (a)) and receiving of property "for or on account of" any other person (in paragraph (6)).

In *Reynolds*, the Court of Criminal Appeal was not receptive to the argument that section 20(1)(iv)(a) referred to two separate offences of an essentially different nature, depending on whether the property was entrusted for safe custody or otherwise. Maguire CJ said:

> "This Court does not accept this interpretation of section 20(1)(4)(a), though not so deciding the point, being of opinion ... that 'entrusting for safe custody' does not fit the circumstances of this case."

5.5 As regards section 20(1)(iv)(b), Hanna J, in the Court of Criminal Appeal decision of *Lawless*,[20] in 1930, said:

> "The sub-section ... may be fairly described as a drag-net clause. The words used are of the widest description. The section refers to the receipt of 'any property for or on account of any other person'. The Court is of opinion that the question as to whether the property or possession in the strictly legal sense has passed at any particular moment of time either to the accused or any other person (a question sometimes arising in charges of embezzlement or larceny at common law) is not under this section the test as to whether the property had been received for or on account of any other person. It may in many cases be quite irrelevant. Neither is it the test that the person who pays the money

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18 [1961] Crim L Rev 741.
19 CCA, 6 June 1958 (No 5 of 1958), 1 Frewen 184, at 189.
20 [1930] IR 247, at 258-259 (Ct of Cr App).

intends to, or is found to, pay it to the accused, or is not aware of any right on the part of any one else to it. The test is whether in addition to fraudulent intent and *mens rea*, on the evidence before the jury, the accused receives it for or on account of any other person ...."

5.6 As a preliminary to consideration of the important but difficult decision of *Heald*,[21] it may be useful to note the following passage from *Kenny*:[22]

> "It is clear that a man may be 'entrusted' with property, within the meaning of the section, even though the owner has not delivered it to him directly, and even though the owner did not know of his existence; it is enough that he has obtained or assumed the ownership of another person's property in circumstances whereby he in fact becomes entrusted with it for a known purpose.[23] In like manner a man can receive property 'for or an account of any other person even though the person who transfers the property to him has no knowledge of the individual on whose account he receives it, or has no interest in knowing what may be the recipient's duty to do with the property. For example, a payment to a motor taxicab driver (which may include a gratuity to him) passes into his ownership, because, unlike an omnibus conductor, he is not provided by his employers with a wallet into which he must put all takings, but can do what he likes with the cash paid to him by his passengers, being merely required in due course to account properly to them in accordance with the record of the taxi-meter. In most cases the passenger who pays him neither knows nor cares whether the driver is in fact not the owner of the cab. Yet if the driver is in fact not the owner of the cab, nor the hirer of it, then he commits fraudulent conversion of such sums as he dishonestly fails to account for and to pay to his employers".[24]

5.7 In *Heald*,[25] the defendant was a matron and effectively the manager of a convalescent home run by an order of nuns. She had a very wide discretion in relation to the collection of fees from the patients and its expenditure. She received lump sum payments from two prospective patients, which she represented to them would entitle them to be patients in the home for their respective lives. In fact, this payment had, to her knowledge, been discontinued. She applied the money to her own purposes. She was charged with fraudulent conversion and larceny, and was convicted on the first charge.

The Court of Criminal Appeal quashed her conviction. The Court thought it necessary for the prosecution to have shown that the applicant had in fact authority to receive this money on behalf of the nuns. Maguire CJ for the Court

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21 [1954] IR 58 (CCA 1953).
22 *Kenny*, para 329.
23 Citing *Grubb*, [1915] 2 KB 683.
24 Citing *Solomons*, [1909] 2 KB 980 and *Messer* 82 LJKB 913 (1913).
25 [1954] IR 58 (CCA 1953).

said:

> "At the trial, Mr Clarke [for the applicant] raised the point which he has so strenuously urged here that there was no evidence that the money was received on account of the nuns. The Judge ruled against him. He has persuaded this Court that his submission was correct. On his submission that it must be shown that in fact the applicant had authority to receive this money on behalf of the nuns, this Court accepts the law to be as stated by Hanna J. giving the judgment of the Court in *Attorney-General v Lawless*.[26]
>
> In our opinion the earlier passages cited by Mr D'Arcy [for the State] do not take away from the effect of this passage. In the opinion of this Court it must be shown that the applicant had authority to receive the money on behalf of the nuns before she can be convicted of the offence of fraudulent conversion."[27]

Now it is of course true that a person may be obliged to receive property for or on account of another even where the donor of the property is unaware of that obligation. But it does not necessarily follow that a person who receives property for a specific purpose, clearly understood and specified (expressly or impliedly) by the donor may not be convicted of an offence under section 20(1)(iv)(b) by reason merely of the fact that the recipient had not been given authority to receive property for this purpose by those whom the donor intended to benefit.

5.8 Before examining the fate of *Heald* in the Supreme Court decision of *Cowan*[28] in 1958, it is worth noting briefly an unreported decision of the Court of Criminal Appeal, delivered the same year as *Cowan*.

In *Kavanagh*,[29] the defendant was convicted of fraudulent conversion of £300 entrusted to him. The charge of larceny of this sum by a trick was struck out. The Court of Criminal Appeal affirmed the conviction. The defendant was an agent of the Royal Liver Society. He accepted £300 from one Fiore Macari as a payment to secure the purchase of a house through the Society. He returned the money to Mr Macari and obtained instead a cheque for the same sum from Mrs Macari. He used the cheque to discharge a liability arising under an entirely independent transaction. Thereafter, over a period of several months, he failed either to return the money or to secure a house for the Macaris.

Counsel for the defendant, on appeal, argued that, if the defendant was guilty of any offence, it was that of larceny as a bailee rather than fraudulent conversion. He argued that an innocent obtaining of the property alleged to have been converted was a prerequisite of the offence of fraudulent conversion, and that,

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26 [1930] IR 247, at 258-259. The passage was already been quoted, *supra*, p91.
27 [1954] IR at 61-62.
28 98 ILTR 47 (Sup Ct 1958).
29 CCA unreported (43-57) (1958).

since the defendant had no authority from the Society or otherwise, to accept the money as a deposit, and was dishonest from the start, there was therefore no entrusting of the money and consequently no subsequent fraudulent conversion. The Court rejected this argument:

> "Whatever validity such a submission might have in certain circumstances it is quite incompatible with the circumstances of this case and the entire conduct of the defence and the trial".[30]

The line of defence had been that Mr Macari had trusted the defendant as a business adviser as well as an agent and that it was on this basis that he had paid him the £300 as a deposit. In the opinion of the Court:

> "all the evidence in this case fits, like a glove, the wording of the section and the particular wording of the charge in this case namely that the sum of £300 was entrusted to the [defendant] by Macari in order that he the [defendant] might apply it as a deposit for the purchase of a house for Macari. The only suggestion of a false pretence in connection with the payment of the money is the evidence of Mr Macari where he says that when the [defendant] returned the £300 to have it substituted by a cheque the [defendant] told him the reason was because the Society wanted a cheque and not cash. Whilst this might furnish evidence of a false pretence it cannot be put further than that and, indeed, this substitution of a cheque for cash was relied on by [counsel for the defendant] in his address to the jury as indicative of honest conduct of the applicant on that occasion."[31]

The judgment went on:

> "It could not be contended, and was not seriously contended that, if the sum of £300 was entrusted to the [defendant] within the terms of the Section, there was not evidence upon which the jury could properly find that it was (*sic*) been fraudulently converted. The [defendant]'s inaction from the end of June when the loan was sanctioned by the Society, his evasion and excuses during this period until his promise to the [Macaris'] solicitor on 1 September to repay the amount on 3 September, his failure to do so and his sending, on 20 September, of what might be regarded as a worthless cheque coupled with his own assertion that he was at all times solvent - all taken together lead to a reasonable conclusion that at some time prior to 20 September 1956 he had fraudulently converted to his own use the sum of £300 entrusted to him by Mr Macari."[32]

5.9 We now turn to examine the Supreme Court decision of *Cowan*.[33] In

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30 P4 of draft judgment.
31 *Id* pp5-6.
32 *Id* p6.
33 98 ILTR 47 (Sup Ct 1958).

that case a solicitor was held to have received money on his client's account even though his client, in signing a bank draft, was not aware that this action made it possible for the solicitor to cash or lodge to his credit the sum for which it was drawn. The essence of the defendant's defence was that since the client had been "tricked" into endorsing the draft which enabled him to collect the sum due, it could not be said that this sum had been received "for or on account" of the client.

The Court of Appeal rejected this argument. Maguire CJ delivering the judgment of the Court, noted that the facts in *Heald* were "very different" from those in *Cowan*. He considered that the use in *Heald* of the words "*had* authority to receive" the money:

> "must be read in the light of the facts of th[at] case. The money was not owing to the nuns. There was consequently no liability on the two ladies to pay it to them or to anybody else, consequently they could not be said to have in any way authorised the accused or anybody else to receive it. In this case there was clearly an obligation on the [defendant] to pay or account for the sum represented by the bank draft to his client .... In this case every step taken towards making the moneys in Court available to [the client] up to and including the obtaining of the bank draft was undertaken with the full approval and authority of [the client]. He says that he did not know that the [defendant] intended to obtain and did receive a sum represented by the bank draft. This Court is of opinion, however, that even though he did not know that his action in signing the bank draft made it possible for the [defendant] to cash or lodge to his credit the sum for which it was drawn the jury were entitled on the evidence for the prosecution as a whole, to hold that the [defendant], when he received the money, did so on his client's account."[34]

The Chief Justice quoted from Lord Reading CJ's judgment in *Grubb*:[35]

> "In the opinion of this Court a person may be entrusted with property, or may receive it for or on account of another person, within the meaning of this section,[36] notwithstanding that the property is not delivered to him directly by the owner and that in fact the owner does not know of his existence and has no intention of entrusting the property to him."

5.10 On further appeal to the Supreme Court, Lavery J said that *Heald* was "clearly distinguishable".[37] He referred[38] appropriately to the words of Maguire CJ in the Court of Criminal Appeal. Lavery J stressed the notion of an implied authority to collect, based on the relationship of solicitor and client, as

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34 *Id* at 50.
35 [1915] 2 KB 683, at 689 (CCA).
36 Section 1 of the *Larceny Act, 1901*, re-enacted as section 20(1)(iv) of the *Larceny Act, 1916*.
37 *Id* at 53.
38 *Id*.

well as on the client's statement that he had relied on his solicitor to act in his interests and to protect him:

> "It is clear that if a person pays money to another to be accounted for to a third person even without the knowledge of such third person the amount paid is received for and on account of such person. It is by no means unusual for clients to sign documents presented to them by their solicitor which they do not understand but are prepared to sign because of the trust they repose in their solicitor. It is a startling proposition that where this is done and money is obtained by the solicitor on such a signature such money is not received by the solicitor for and on account of the client. In my opinion, this is not the law."[39]

O'Daly J confined *Heald* more clearly into its special facts:

> "It seems to me that whether or not the receipt of the money by an accused person was for or on account of another must always be a question of fact. If the owner of the money has authorised another to receive it, it would be difficult to conceive how the receipt could be otherwise than for or on account of the owner. On the other hand, where the owner had not authorised its receipt it does not necessarily follow that the receipt will not be for him or on his account. The absence of authority to receive, taken with other circumstances, may indeed point in that direction and in that direction only. The circumstances of cases will differ, and I do not see that any better more useful general test can be laid down than that stated by Mr Justice Hanna in delivering the judgment of the court of Criminal Appeal in *Lawless's Case,*[40] *viz*, was the money received by the accused under circumstances which imposed on him a definitely binding legal obligation arising from contract or otherwise to pay it over or account for it to a third person".[41]

O'Daly J noted that it had been submitted that *Heald* laid it down that there could not be a receipt of property for or on account of another (within section 20(1)(iv)(b)) unless it was shown that the accused had authority to receive the property for or on account of that other. He could:

> "not agree that the case lays down any such general proposition. The judgment of the Court in *Heald's Case* accepts *Lawless's Case* as correctly stating the law and the observation of the court with regard to the authority of the accused to receive the money is, as I read it, related to the special facts of the case there being examined".[42]

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39 *Id* at 52-53.
40 [1930] IR 247.
41 98 ILTR at 56.
42 *Id.*

Later in his judgment, O'Daly J engaged in a more direct onslaught on *Heald*. Noting that the Court of Criminal Appeal in *Heald* had apparently not been referred in argument to *Grubb*, he started:

> "I regard *Heald's Case* as deciding little more than that on the facts of that particular case the [defendant] was not guilty of the offence of fraudulent conversion, and this would seem to be the view that commended itself to the Court of Criminal Appeal in this case. But if, as submitted by counsel for the appellant, *Heald's* Case is to be read as laying down the principle that, in every case, it must be shown that the person charged had authority to receive the money in question on behalf of the person for or on whose account it was received, before such person can be convicted of the offence of fraudulent conversion, in my opinion the decision goes too far. In my opinion the passage quoted by the Chief Justice in the judgment of the Court of Appeal in this case, from the judgment of Lord Reading, CJ, in *Grubb's* Case is a correct statement of the law, and I would add to it that a person receives property for or on account of another person when he receives it in such circumstances as to give rise to a duty or obligation to account for it to such other person".[43]

5.11 In view of Cowan's treatment of *Heald*, and especially O Daly J's judgment, it would seem very difficult to place reliance on *Heald*, save as a precedent dealing with its very special facts. Even in this context, it is hard to see how a prosecution should fail (assuming that the case were not to be viewed as one essentially of false pretences) in the light of the language of section 20(1)(iv)(a) - as opposed to section 20(1)(iv)(b), which was invoked in *Heald* (and Cowan); section 20(1)(iv)(a) deals with a case where a person is entrusted with property in order that "he may ... apply ... for any purpose or to any person, the property or any part thereof or any proceeds thereof". This language surely would apply to the facts of *Heald*, without any need to enter into the more complicated question of whether, under section 20(1)(iv)(b), a person may be held to have received property "for or on account of" one who has given him no such authorization.

5.12 The questions of fraudulent conversion can arise in relation to money entrusted to a company. The Court of Criminal Appeal addressed the subject in *Singer*.[44] The defendant had been charged with fraudulent conversion (among other charges), the indictment stating that, being a director of Shanahan's Stamps Auctions Ltd, he had been entrusted with money by members of the public for the purchase and sale of stamps and the return of this money with any profit thereon and had fraudulently converted it to the use and benefit of the company. His defence, in part, was that no money had been entrusted to him, and that whatever there was of entrustment was to the company.

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43 *Id* at 58. See also the discussion of the unreported decision of the Court of Criminal Appeal in *Fitzgibbon*, 25 March 1958, by *Anon, Fraudulent Conversion: A Modern Crime, Part I*, 93 Ir LT & Sol J 17, at 18 (1959).

44 CCA 23 June 1961 (No 39 of 1960), 1 Frewen 214.

O Dalaigh CJ for the Court of Criminal Appeal noted that in *Grubb*,[45] it had been:

> "laid down that the words 'being entrusted' of the Larceny Act, 1901, s1 must not be read as being limited to the amount of the delivery of the property of the owner but may cover any subsequent period during which the person becomes entrusted with the property and if a company is used by the directions of an accused as the instrument to enable him in the nature of the company to become possessed of the property and by means of the company to convert it fraudulently either to his own use or benefit or the company's, he would be guilty of an offence under the statute".[46]

The Court of Criminal Appeal accepted "the principle of Grubb's case".[47] It noted that the jury's attention ought to have been directed to the material question of fact to warrant a conviction on this basis, namely, whether the defendant had had such control of the affairs of the company as to have in fact become entrusted with the money, although it had normally been delivered to the company or paid into its banking account. This had not been done.

5.13 Fraudulent conversion may of course be proved in a straight- forward case by showing a specific act of misappropriation on the part of the defendant, but circumstantial evidence may suffice.[48]

In *Murphy*,[49] Davitt P (for the Court) said:

> "In this case there is no direct evidence of any specific acts of misappropriation. In cases of this kind there seldom is, and the prosecution have to rely upon circumstantial evidence. The evidence which is usually relied on is to the effect that the accused was bound to pay, or to account for, the money on a certain date, or when required by a person invested with any proper authority, and that he failed to do so. Any set of circumstances which makes the inference inevitable that a fraudulent conversion has taken place is, however, sufficient to sustain a conviction."

5.14 A "general deficiency" count may be permitted "where it is impossible for the prosecution to trace specific items or to split the aggregate sum into identifiable amounts".[50]

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45 *Supra.*

46 1 Frewen, at 225.

47 *Id.*

48 *McCutcheon*, para 86.

49 CCA No 35 of 1947, 6 June 1947, 1 Frewen 85 at 87. See also *A* [1941] Ir Jur Rep 55, at 57 (Circuit Ct, Judge Davitt).

50 *McCutcheon*, para 86, citing *Singer*, 1 Frewen 214, 229, *Balls*, LR 1 CCR 328 (1871) *Lawson*, [1952] 1 All ER 804.

In *Singer*,[51] the defendant was charged with (*inter alia*) fraudulent conversion of a sum in excess of £700,000. The amount was calculated on the basis of the deficiency in the company's assets when it had gone into liquidation.

O Dalaigh CJ (for the Court of Criminal Appeal) considered that there has been "a serious" 'overlap' in the charges". The "general deficiency" count had "recharged" the fraudulent conversion of sums of money which were the subject of specific charges under subsequent counts. The very presence on the indictment of these subsequent counts was enough to demonstrate that what the prosecution had done, in the case of the "general deficiency" count, was:

> "to lump together, among other things, a great number of alleged conversions which occurred in the payment of 'profits' to identifiable persons on identifiable occasions. There may indeed be circumstances such as in *Balls' Case*[52] when a general deficiency count should be permitted. Such circumstances are entirely absent here. The applicant has had the results of a balance sheet for $10^1/_2$ months trading placed against him as a specific charge. He cannot reasonably be asked to meet a charge in that form unless the law is to be altered and criminal trials are to be conducted before examiners in chancery."[53]

Mens Rea

5.15 On the question of *mens rea*, it is clear that an "honest" belief in legal entitlement to act as one did is a ground for acquittal, even where this claim to entitlement to act thus is not founded in law or in fact.[54] Whether a person should be acquitted in any other circumstances of honest belief or conduct is not entirely clear. In *Grey*,[55] O'Byrne J delivering the judgment of the Court of Criminal Appeal said that fraud under section 20, as under various other sections of the 1916 Act, was:

> "the outstanding and characteristic element of the various crimes dealt with by that code. Apart altogether from the Act, the terms "fraud" and "fraudulent" are in common and extensive use in our civil and criminal law. It would be difficult, if not impossible, to define "fraud" in such a way as to provide for every case in which the term may be used and I do not propose to attempt to do so. It normally refers to something dishonest and morally wrong, particularly the acquisition of pecuniary or material benefits by unfair means."

This clearly suggests that the notion of "fraud" is not identical to the notion of an absence of an honest claim of right: if matters were that simple, the judge would surely have said so rather than refer to the difficulty, if not impossibility, of

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51 CCA 23 June 1961 (No 39 of 1960), 1 Frewen 214.
52 LR 1 CCR 328.
53 *Op cit* at 229-230.
54 Cf *Grey*, [1944] IR 326, at 333 (CCA *per* O'Byrne J for the Court), *Bernhard*, [1938] 2 KB 264.
55 [1944] IR at 331-332.

defining fraud in such a way as to provide for every case in which the term is used. However, O'Byrne J's subsequent express endorsement as "a correct statement of the law"[56] of the test set out in *Bernhard*[57] suggests that the absence of fraud should be restricted to an honest claim of right. As against the latter view, it may be argued that, on the facts of *Grey*, the defence was essentially one of an honest claim of right so the Court may have considered that it had no reason to address the issue of the absence of fraud outside this context.

Fraudulent Trustees

5.16 Fraudulent trustees under express trusts created by deeds or wills are excluded from the scope of section 20(1)(iv) by section 20(2). In view of the precise definition of "trustee" contained in section 46(1) of the Act, it seems that fraudulent conversion by a trustee under an express trust, even though created in writing,[58] nonetheless falls within the scope of section 20(1)(iv), provided the writing is not contained in a deed or will. Section 21 deals with fraudulent conversion by trustees or express trusts in writing and provides for the same maximum penalty as for an offence under section 20. The sanction of the Director of Public Prosecutions is required for a prosecution under section 21.[59] Another and more controversial limitation to prosecution under this section is that no prosecution may be commenced by any person who has taken any civil proceedings against the trustee, without the sanction also of the court or judges before whom such civil proceedings have been had or are pending. The scope of this proviso seems intolerably wide. It could, on a literal interpretation, prevent a person from initiating a prosecution against a trustee under the section by reason of having sued the trustee for injuries caused by the trustee's dog ten years' previously. Even if the proviso were interpreted as relating to civil proceedings for breach of trust, taken within no more than a short period before the intended prosecution, a constitutional issue could arise.

The idea behind the proviso is presumably to force the beneficiary to decide between pursuing the matter civilly or criminally. If he takes the former option, the criminal courts should not have to be troubled by the matter. The idea that society's interest in prosecutions for criminal breach of trust is so tentative may be doubted. Moreover, there may be objection to a provision which thus inhibits the entitlement to litigate for victims of such crimes.

Factors and Agents

5.17 Finally, in this context, it should be noted that section 22 of the Act makes it an offence, with the same maximum penalty as under sections 20 and

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56 *Id* at 333.

57 *Supra.*

58 Although section 46(1) defines a trustee as "a trustee on some express trust created by some deed, will, or instrument in writing ..." (emphasis added), this does not, in conjunction with section 20(2), have the same effect of removing trustees from the scope of section 20(1)(iv), since the section 20(1)(4) speaks merely of one "entrusted ... with property", and section 20(2) excludes from the scope of section 20(1)(iv) only trustees of express trusts "created by a deed or will".

59 See proviso (a) to section 21, and the *Prosecution of Offenders Act, 1974*, section 3(1).

21 for a factor or agent, in violation of good faith, to obtain an advance on the property of the principal.

2. *False Accounting*

5.18 In 1875, a measure generally known as Lope's Act, came into effect, designed to provide a penalty for dishonest clerks where the evidence of embezzlement or larceny was too thin. The *Falsification of Accounts Act, 1875* makes it an offence for a clerk or servant wilfully and with intent to defraud, to alter or make a false entry in or omit a material particular from any account of his master.[60] As Kenny observes:

> "An indictment for this offence of false accounting is often useful where a clerk to whom a customer has paid money is suspected of misappropriating it, but no more can be actually proved than that he has never credited the customer with the amount. If, however, his books show correctly the sum which he ought to have in hand, the fact of his not really having that amount ready to hand over does not render the entry a 'false' one within this statute."[61]

5.19 In *Foley*,[62] the defendant was the secretary and treasurer of a union, in charge of all receipts and payments. He made false entries of payments to a doctor. He was charged with fifty four counts of larceny as a servant and of making false entries.

The Court of Criminal Appeal upheld his conviction. It appeared to the Court that:

> "there was before the jury uncontradicted evidence that the accused had made the alleged 27 false entries in a book over which he had complete control and for the accuracy of which he was responsible, and that those entries were made with a knowledge of their falsity."[63]

On the question of intention to defraud, counsel for the accused submitted that the trial judge had failed adequately to direct the jury on the meaning of "intention to defraud". The Court rejected this submission as follows:

> "It may well be questioned whether any specific direction was necessary on this point as the words, when applied to the facts of this case, are self explanatory. It was not suggested that the entries were not false; nor could it be suggested that if the particular entries were made with a knowledge of their falsity an inference of intent to defraud would not reasonably be drawn as the evidence of [the doctor] that he did not

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60 *Id.*
61 *Id.*
62 17 May 1950 (26-1950).
63 *Id.*

receive the money was not challenged. The only defence open would be that all the 27 entries were made in circumstances in which the accused did not know of their falsity. But as his was the hand whose duty it was both to make the entry and to pay the money such a suggestion is one which could not be entertained by any reasonable jury. We think that when the learned judge directed the jury that mere falsity of entries was not sufficient to constitute the crime but that they must be satisfied there was an intent to defraud then his direction in the circumstances of this case, though short, was adequate."

CHAPTER 6: FORGERY, COUNTERFEITING AND RELATED MATTERS

Forgery

6.1 The criminal law on forgery traces its origins to the *lex Cornelia de falsis* sponsored by Sulla in 81 BC.[1] This law was concerned primarily with falsification of testamentary dispositions, the seals of other instruments and their attestation. It was only later that juristic interpretation extended the scope of the law to instruments of a public character:

> "Julius Caesar, breaking with the republican rule against the public display of the images of living men, caused coins to be struck bearing his head, and this practice was followed by the Emperors who developed the policy of self-protection by the exaltation of their persons to the height of divinity (or quasi-divinity after the official adoption of Christianity). In accordance with this policy there appeared enactments making it criminal to belittle their images by tampering with or counterfeiting their coinage. Thus treason, coinage offences, and forgery came to be intermingled. It seems to have been due to this situation that early English law closely linked coinage offences, falsification of Royal seals, and treason."[2]

6.2 Gradually the net was cast wider. A statute in 1562 made it an offence to forge any "false deed, charter, or writing sealed, court roll or the will of any person or persons in writing"[3] and "any obligation, or bill obligation, acquittance, release or discharge of any debt, account, action, suit, demand or other thing

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1 See Turner, *"Documents" in the Law of Forgery*, 32 Va L Rev 939, at 941 (1946).

2 *Id.*

3 28 Eliz c 3, section 1. The penalty extended to pillory, cutting the convicted person's ears off, slitting his nostrils and searing them with a hot iron, "so as they may remain for a perpetual note and mark of his falsehood". The profits of his lands for life were forfeited to the Queen; a sentence of life imprisonment was to be imposed; and the injured party was entitled to double costs and damages.

personal".[4] It appears from Coke,[4] however, that in all cases save testaments, documents under seal were envisaged. By 1727,[5] the courts were willing to interpret the 1562 statute as being premised on the recognition that the forging of an unsealed writing was already indictable as a forgery at common law.

Hawkins, writing half a century later, was more circumspect, limiting the crime to "falsely and fraudulently making or altering any matter of record; or any other authentic matter of a public nature, as a parish register, or any deed or will".[6] He went on to note that for other writings of "an inferior nature",[7] the counterfeiting of them was "not properly forgery".[8] He ventured, tentatively, to explain this distinction on the basis that:

> "the former is in itself criminal, whether any third person be actually injured thereby or not, but that the latter is no crime, unless some one receive a prejudice from it."[9]

Turner has commented:

> "Here we have the first pronouncement of a distinction between a group of documents of so important a public character that the crime is complete when they are forged, irrespective of there being any intention to defraud any person thereby, and another group in which the prosecution cannot succeed unless they can prove that there was such an intention."[10]

6.3 The *Forgery Act, 1861* dealt with the matter in some detail. It has been largely (but not completely) overtaken by the *Forgery Act, 1913*, which remains the most important piece of legislation on the subject, supplemented by other statutory provisions dealing with forgery in specific contexts. Section 1 of the 1913 Act provides, in subsections (1) and (2), as follows:

> "(1) For the purpose of this Act, forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Act the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.
>
> (2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or

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4 Coke, *Institutes*, vol 3, 169ff (6th ed, 1680). See Turner, *supra*, at 943-944.
5 *Ward*, 2 Ld Raym 1461, 92 ER (KB, 1727). See Turner, *supra*, at 944.
6 Hawkins, *Pleas of the Crown*, 263 (8th ed, 1824).
7 *Id*, at 266.
8 *Id*.
9 *Id*.
10 Turner, *supra*, at 945.

by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false:-

(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein;

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person;

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it."

These provisions give rise to a number of questions, which we should examine in turn.

What is a Document?

6.4 The first question concerns the meaning of the term "document". The word replaces "writing" which appeared in early decisions and commentaries.[11] The 1913 Act nowhere defines "document".

The commentators are not in agreement as to how that term should be understood. Debate has taken place against the background of the "difficult"[12] decisions of the English Court for Crown Cases Reserved in *Closs*[13] and *Smith*.[14] In *Closs*, the Court held that the defendant who had put the name of a well-known painter on a painting which was not in fact the work of that painter was not guilty of forgery. Cockburn CJ said:

> "A forgery must be of some document or writing; and this was merely a mark put upon the painting with a view to identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his."[15]

6.5 In *Smith*, the defendant sold baking powder in printed wrappers, which were identical in every respect with a far more well-known competitor's wrappers, save that they omitted the warning written on the competitor's wrappers, reminding the public that no wrapper without the competitor's

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11 Cf Turner, *supra*, at 947.
12 English Law Commissions WP No. 26, *Criminal Law: Forgery*, para 18 (1970).
13 Dears & B 460, 169 ER 1082 (1857).
14 Dears & B 566, 169 ER 1122 (1858).
15 Dears & B, at 466, 169 ER at 1084.

signature was genuine.[16] The Court for Crown Cases Reserved quashed a conviction for forgery.

Pollock CB said:

> "The defendant may have been guilty of obtaining money by false pretences; of that there can be no doubt; but the real offence here was the inclosing the false powder in the false wrapper. The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery, nor could the man who printed them be indicted. The real offence is the issuing them with the fraudulent matter in them. I waited in vain to hear [counsel for the prosecution] shew that these wrappers came within the principle of documents which might be the subject of forgery at common law. Speaking for myself, I doubt very much whether these papers are within that principle. They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things together as alike which are essentially different. It might as well be said, that if one tradesman used brown paper for his wrappers, and another tradesman had his brown paper wrappers made in the same way, he could be accused of forging the brown paper".[17]

Bramwell B, concurring, said:

> "Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other - the one asserts what the other does - the one is as true as the other, but one gets improperly used ...."[18]

6.6 As we have noted, the commentators have proposed radically differing interpretation of the notion of a "document". One view, favoured by Professor Glanville Williams,[19] and receiving the support of *Smith & Hogan*[20] is that a document that has utility (functional or aesthetic)[21] apart from the fact that it conveys information or records a promise does not fall within the scope of the term "document" for the purposes of forgery. The test is not entirely satisfactory, as *Smith & Hogan* acknowledge:

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16 The defendant engaged in a similar but even more extensive deception with regard to egg powder wrappers. Here, in the absence of any warning on the competitor's wrappers, the two sets of wrappers were *identical*.

17 Dears & B, at 573-574, 169 ER at 1125-1126.

18 *Id*, at 575 and 1126, respectively.

19 Williams, *What is a Document?*, 11 Modern L Rev 150, at 160 (1948).

20 *Smith & Hogan*, 1st ed 469.

21 Cf Williams, *op cit*, at 160.

"For one thing it would mean, presumably, that if [the innocent competitor in *Smith*] had packed the baking powder in tins on which were glued labels carrying the same information as the wrappers, the labels would be documents, and could be forged since they now have no utility apart from carrying information".[22]

A modification of this approach, favoured by *Smith & Hogan* and Williams, would require not merely that the writing lack independent utility but that it be an instrument as well:

"Although 'instrument' might be thought to spawn just as many difficulties as 'document' the word is of some help in carrying the idea of a document which is made for the purpose of creating or modifying or terminating a right. A wrapper or a label would not usually be considered an instrument in this sense but a certificate testifying to the authenticity of a painting, or to a man's competency to drive a vehicle or even a football pools coupon would be considered instruments."[23]

6.7 Turner (who edited *Kenny* and *Russell*) favoured a more philosophical approach. In his view:

"a document is writing in any form, on any material, which communicates to some person or persons a human statement, whether of fact or fiction."[24]

He went on to argue as follows:

"Writing is human speech expressed in a more permanent form than sound, and reaching the mind of the person to whom it is addressed by another sense than that of hearing. Therefore a document is a human statement, that is to say, a message proceeding or purporting to proceed from the human mind. Accordingly a merely mechanical register such as the 'reading' on a thermometer or a weighing machine or a gas meter is not a subject for a crime of forgery. Secondly the writing must convey the same message of the spoken word to all persons able to read it. Accordingly a drawing or a painting, as works of art, are not documents since such effect as they may create in the mind of the onlooker is emotional and will not necessarily be the same to all who view them. Of course symbols in picture form may be used as a code and then they are a writing, just as are the words written in the recognized shapes of the ordinary alphabets. Thirdly, it is immaterial on what base or how the writing is made; it may be painted or limned on anything capable of retaining the colour or marks; it may be carved into stone or embossed

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22 *Op cit*, at 469.
23 *Id* (footnote references omitted).
24 *Kenny*, para 380.

in paper; it may be transient or lasting."[25]

This passage gives rise to several points of discussion. First, the reference to writing as "human speech expressed in a more permanent form than sound" needs clarification. If something is written, it may never have actually been spoken: the writing may represent the result of thinking with no intermediate spoken dimension. What Turner doubtless intends is that the written matter have been *capable of being spoken*. This raises a philosophical question. It is not the case that all meaningful modes or contents of communication are capable of being spoken: an effigy,[26] for example, may involve a communication in relation to which speech ("this suggests that the person depicted is a murderer") can of necessity be no more than an interpretation. Similarly, certain non-verbal emanations - hissing,[27] booing,[28] or gesturing for example - may have proportional import.

6.8 The notion of writing as being "a more permanent form than sound" requires reconsideration in the light of technological advances in regard to video-recorders and tape recorders. In this context it is worth noting Turner's observations, published in 1946:

> "At the present day we are perhaps at the beginning of the development of writing in the air by means of smoke emitted from aeroplanes. From what has been said it will be observed that it is irrelevant what base for a writing is adopted so long as it is adequately durable, and further that it is irrelevant what means are adopted to mark that base so long as the marks can convey the required record to the reader. Before the use of parchment or paper was devised, writing had to be made on such substances as wood, stone or metal. It is plain, therefore, that there is nothing in the nature or purpose of writing itself to require any particular medium and that the desired idea can be, as it were, embalmed in any available material."[29]

Turner's requirement that a document should be a message "proceeding or purporting to proceed from the human mind" requires consideration. It is, as we have seen, the basis for his assertion that "[a]ccordingly a merely mechanical register such as the 'reading' on a therometer or a weighing machine or a gas meter is not the subject for the crime of forgery". Turner expands on this argument as follows:

> "The reading of a meter is not a message from the maker of the meter. It would, for example, be absurd to maintain that when a watch made by 'X & Co' stopped through not having been wound up, or that when it became out of adjustment and so gained or lost, the direction of the

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25 *Id.*
26 Cf *Monson v Tussauds*, [1894] 1 QB 671 (CA).
27 Cf *Gregory v Duke of Brunswick*, 6 M & Gr 953, 134 ER 1178 (1843).
28 *Id.*
29 Turner, *supra*, at 950.

hands was a statement by 'X & Co' that, when it left our hands, it was in good order."[30]

6.9 Central to this line of argument is the *temporal variability* of the readings rather than the fact that they are produced by a "merely mechanical" register. If a machine is designed to make a once-off reading rather than to record a sequence of readings over time, there seems no doubt but that the once-off reading could be the subject of forgery despite the mechanical process involved. But is it not also arguable that a *later* reading in a sequence of readings is capable of being forged? If a public electronic thermometer attached to the front of a bank or shop records the temperature at street level, why should it not be possible to designate as forgery the manipulation of the electronic system so that a false record is obtained?

Turner, presents a curious argument in support of the thesis that a drawing or painting is not a document. This is, he says, because the writing must convey the same message of the spoken word to all persons able to read it, and drawings or paintings, as works of art create an emotional effect in the mind of the onlooker, which will not necessarily be the same to all who view them. In Turner's view, a signature on a painting (as distinct from the painting itself) can constitute a document, contrary to the view of the Court for Crown Cases Reserved in *Closs*.[31]

6.10 Section 2(1) of the 1913 Act makes it a felony punishable with penal servitude for life to forge with intent to defraud wills, codicils and other testamentary documents, deeds, bonds, or bank notes. Section 2(2) makes it a felony punishable with penal servitude for up to fourteen years to forge, again with intent to defraud, valuable securities, documents of title to lands or goods, powers of attorney in relation to stocks or shares, entries in books or registers which constitute evidence of title to any such shares or dividends, policies of insurance, charter-parties, documents relating to Government annuities, certificates of the revenue authorities and related documents.

6.11 Section 3 makes it a felony to forge any of the official documents listed in the section, with intent to deceive or defraud. It grades the penalty in accordance with the level of importance of the document in question. These documents include birth, marriage and death certificates and official court documents.

6.12 Section 4(1) makes the forgery of other documents with intent to defraud[32] a misdemeanour. Section 4(2) provides that the forgery of any public document, which is not otherwise made a felony, is to be a felony, if committed with intent to defraud or deceive.

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30 *Supra* at 385, fn 1.

31 *Supra.*

32 Note that an intent to *deceive* does not suffice. This preserves the position at common law, first articulated by Hawkins: cf *supra*, pp144-145.

6.13 Section 5 deals with the forgery, with intent to defraud or deceive, of certain seals and dies.

Typical Instances of Forgery

6.14 *Smith & Hogan*[33] helpfully describe typical instances of forgery:

> "The most common is where the document, or some material part thereof, purports to be made by, or with the authority of, one who did not make it or authorise its making. It is forgery, then, where D, without authority, signs P's name to a cheque, or where D, without authority, alters the amount payable on the cheque, or where D, given a signed blank cheque, enters an amount higher than he is authorised to enter as payable on the cheque.
>
> It is forgery for D to sign a document in his own name intending to pass his signature off as the signature of another person, real or fictitious. It is also forgery where D procures P, who is unaware of D's fraud, to sign his own name, D intending to pass off P's signature as that of another person of the same name."

The Meaning of "Defraud" and "Deceive"

6.15 In an English case[34] dealing with the meaning of the expressions "defraud" and "deceive" (in a context other than that relating to forgery), Buckley J said (*obiter*):

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Commenting on this statement, *Kenny*[35] notes that it has been:

> "much quoted in relation to cases of forgery but it has not always been interpreted in accordance with the laws of logic. The careful reader will see that the definition proper of 'defraud' is wholly contained in the words, 'to defraud is to deprive by deceit'. The words which follow merely indicate the general class in which the defrauding is placed, namely, the causing of injuries; and the judge's statement goes on to give an even wider classification by indicating that defrauding is in that genus of conduct which deceitfully induces a course of action. It would,

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33 *Op cit*, at 474 (footnote references omitted).
34 *In re London and Globe Finance Corporation*, [1903] 1 Ch 728, at 732-733.
35 *Kenny*, para 377.

however, be a logical error of an elementary kind[36] to reverse such a statement and to say 'deceitfully to induce a course of action is to defraud'. It is obvious that the genus contains many other species besides defrauding; for example to make a false statement which causes a man to touch something which gives him a painful electric shock would be by deceit to induce a course of action, but it would not be 'to deprive' him of anything."

6.16 In *Welham v DPP*,[37] in 1960, the House of Lords addressed the issue, affirming the conviction of a man in the motor trade who had witnessed forged hire-purchase agreements on which finance companies had advanced his firm money, his defence being that he thought the agreements had been designed to mislead the authorities into believing that the finance companies had complied with necessary credit restrictions. He was considered to have uttered the document with the intention to defraud the authorities since he had intended to induce them to act in a manner in which they would not have done had he not acted deceitfully.

It appears that honesty and a claim of right made in good faith will defeat an allegation of intent to defraud.[38]

Forgery and False Pretences Distinguished

6.17 Forgery must be distinguished from the offence of false pretences. In forgery it matters not that the intended victim was not defrauded, nor that the intention was to obtain something from the victim to which the forger was entitled.[39] Forgery involves engaging in specified conduct with an intent to defraud or deceive, as the case may be. The prosecution do not have to show that such intent related to any particular person.[40]

Under section 55(1) of the *Central Bank Act, 1942*, a person who makes or carries to be made, or uses for any purpose whatsoever, or utters a document purporting to be or in any way resembling or so nearly resembling as to be calculated to deceive, a bank note or part of a banknote, is guilty of an offence. Section 55(4) which made the appearance of a person's name on any such document *prima facie* evidence that he made such document or caused it to be made, was repeated by section 4 of the *Central Bank Act, 1989*.

Uttering

6.18 Section 6(1) of the 1913 Act penalises the "uttering of a forged document, seal or die to the same extent as if the utterer had himself forged the item. A person utters such a forged item when:

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36 Identified by *Kenny*, para 377, fn 5 as an 'illegitimate antistrophe'.
37 [1961] AC 103. (HL (Eng), 1960).
38 *Smith & Hogan*, (1st ed), 476, citing *Forbes*, 7 C & P 224, 173 ER 99 (1835) and *Parker*, 74 JP 208 (1910).
39 Cf *Barrow*, (1884) CCC Sess Pap c, 641, cited by *Kenny*, para 394.
40 *Kenny*, para 394.

"knowing the same to be forged and with either of the intents necessary to constitute the offence of forging [it, he] uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off the [item]."[41]

Smith & Hogan[42] note that section 6(1)

> "is widely phrased and covers virtually any use by D of the forged document, seal or die ... But merely to possess a forgery is not to utter it, nor is it enough to show that D knowingly benefited from the use of a forgery by another; to utter a forgery D must himself put it off to another. Once he has reached the stage D is guilty of uttering whether the deception is successful or not".

6.19 Section 7 of the 1913 Act makes it an offence for a person, with intent to defraud, to demand, receive or obtain or to cause to be delivered to another person, any property, (a) under, upon or by virtue of any forged instrument, knowing it to be forged, or (b) under, upon or by virtue of any probate or letters of administration, knowing the will, testament, codicil or testamentary writing on which the probate or letters of administration had been obtained to have been obtained by any false oath, affirmation or affidavit.

The use in this section of the word "instrument" rather than "document" might suggest a term of narrower import, but the case law does not support this interpretation. In *Riley*[43] a telegram making a bet with a bookmaker, which the defendant, a post office clerk, had falsely indicated had been handed in before the race had been run, was viewed as an *"instrument of contract"*.[44]

Wills J could see "nothing in the nature of such a section"[45] which should make it necessary or desirable to restrict the application of the word 'instrument' to writings of a formal character".[46]

He thought that it was "meant to include writings of every description if false and known to be false by the person who makes use of them for the purpose indicated".[47]

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41 Section 6(2). See *Finkel & Levine*, CCA, 31 July 1951 (Nos 34 & 35 of 1951), 1 Frewen 123, at 128 (*per* Maguire, CJ for the Court). It is immaterial where the document seal or die was forged: section 6(3). It appears that the posting of a letter containing a forged document within the State constitutes an uttering under section 6 even though the letter may be addressed to an intended victim abroad: Cf *Board of Trade v Owen*, [1957] AC 602 (HL (Eng)).

42 1st ed 477 (important modifications in footnotes here omitted).

43 [1896] 1 QB 309 (interpreting section 38 of the *Forgery Act, 1861*, which was reenacted by section 7 of the 1913 Act).

44 [1896] 1 QB at 315 (*per* Hawkins J). See also *Howse*, 7 Cr App Rep 103 (1912), *Cade*, [1914] 2 KB 209. *Smith & Hogan* (1st ed), 478, note that "[t]he draftsmen used 'instrument' because it was used in the provision ... which was replaced by s7; there was no suggestion it meant anything other than document (citing *Reports of Committees* (1913), Vol 6 pp 104, 105).

45 i.e. section 38 of the *Forgery Act, 1861*, the equivalent of section 7 of the 1913 Act.

46 [1896] 1 QB at 321.

47 *Id.*

6.20 The possession of forged documents, seals or dies is not always contrary to the criminal law: only the knowing possession of certain of such items[48] without lawful authority or excuse[49] constitutes an offence under section 8. Section 9 penalises the making, use or knowingly having in one's custody or possession paper such as is used for making a bank note (and other defined paper) or implements of forgery.

It seems that it would not be a lawful excuse to possess a forged bank note as a curio:[50] the judicial attitude in a prosecution under a similar legislative provision[51] in respect of a fictitious stamp was hostile to an interpretation indulgent to the eccentricities of collectors.[52]

Other Statutory Provisions Relating to Forgery

6.21 The forgery or alteration wilfully and without due authority of a telegram or the uttering of a telegram knowing it to be forged or thus altered, or the transmission by telegraph as a telegram or uttering as a telegram of any message or communication knowing it not to be a telegram, whether or not there is an intent to defraud is a misdemeanour.[53]

Counterfeiting and Related Matters

6.22 Counterfeiting is an offence under the *Coinage Offences Act, 1861*, as amended. Section 2 prohibits falsely making or counterfeiting coin resembling or passing for current gold or silver coin. Gilding, silvering, washing, casing over or colouring coin is made an offence under section 3, where the intent is to make them pass for silver or gold coin. The same section prohibits colouring or altering *genuine* copper coin with the intent to make them pass for a gold or silver coin. Impairing, diminishing or lightening gold or silver coin with the intent that they pass as current coin is an offence under section 4.

6.23 The unlawful possession of filings or clippings of gold or silver coin, knowing them to have been produced or obtained by impairing, diminishing or lightening any current gold or silver coin is an offence under section 5. Buying, selling, receiving, or paying (or related activities) of counterfeited gold or silver coins for a lower value than its denomination is an offence under section 6. Importing and exporting counterfeit coin are offences under section 7 and 8, respectively. Uttering false or counterfeit coin knowing them to be false or

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48 These are forged bank notes (section 8(1)) and the following: forged dies for the marking of gold or silver plate or wares, or any ware or gold, silver or base metal bearing the impression of any forged dies; forged stamps or dies as defined by the *Stamp Duties Management Act, 1891*, forged wrappers or labels provided by or under the authority of the Inland Revenue or Customs and Excise commissioners (Section 8(2)), and forged stamps or dies, resembling or intended to resemble those of the local authority for the purposes of the *Local Stamp Act, 1869* (section 8(3)).

49 Proof of which, according to the express language of the statute, lies on the accused.

50 *Smith & Hogan* (1st ed), 479.

51 *Post Office (Protection) Act, 1884*, section 7.

52 *Dickens v Gill*, [1896] 2 QB 310.

53 *Post Office (Publication) Act, 1884*, section 11, as amended by the *Postal and Telecommunications Services Act, 1983*, section 8 and Fourth Schedule.

counterfeit is an offence under section 9. Section 10 penalises more severely uttering accompanied by possession of other counterfeit coins or followed within ten days by a further uttering. Uttering as current gold or silver coin that is not such, with intent to defraud, is an offence under section 13. Counterfeiting and uttering copper coin are dealt with by sections 14 and 15.

6.24 Defacing is an offence under section 16. Uttering such coin is an offence under section 17. Counterfeiting foreign coin and related offences are dealt with by sections 18 to 23. Knowingly possessing, making or mending any coining tools without lawful authority is an offence under section 24.

6.25 The *Decimal Currency Act, 1969* contains a number of relevant provisions. Section 22 provides that four specified Acts[54] are to have effect in accordance with new provisions:[55]

1. The *Coinage Offences Act, 1861* is to apply to coins issued under the repealed enactments or the *Decimal Currency Act, 1969* and for the purposes of such application -

   (a) the references, in section 1 of the 1861 Act, to coin or any particular class of coin lawfully current by virtue of any proclamation or otherwise in any part of Her Majesty's Dominions are to be construed as including references to coins lawfully current in the State,

   (b) the references in section 1 of the 1861 Act to silver coin shall be construed as including references to nickel coin, cupro-nickel coin and coin provided under section 6 of the *Coinage Act, 1950* or section 4 of the *Decimal Currency Act, 1969.*

2. Section 42 of the *Customs Consolidation Act, 1876* is to have effect as if the following articles were added to the Table of Prohibitions and Restrictions Inwards in that section -

   (a) counterfeits of coins issued under the repealed enactments or the *Decimal Currency Act, 1969,*

   (b) any coins or money purporting to be coins issued under the *Coinage Act, 1926* but not being of the standard weight or not being of the standard fineness prescribed by the *Coinage Act, 1926,* as amended by the *Emergency Powers (No. 140) Order 1942* or by the *Central Bank Act, 1942,*

   (c) any coins or money purporting to be provided under section 5

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54 Set out in column (2) of the Second Schedule.
55 Set out in column (3) of the Second Schedule.

or 6 of the *Coinage Act, 1950* and not being of the standard weight or not being of the standard composition prescribed by the said section 5 or 6 (as the case may be),

(d) any coins or money purporting to be coins provided under section 3 or 4 of the *Decimal Currency Act, 1969* and not being of the standard weight or not being of the standard composition prescribed by the said section 3 or 4 (as the case may be).

3. Section 2 of the *Revenue Act, 1889* is to apply to imitations of coins issued under the repealed enactments or the *Decimal Currency Act, 1969*, and for the purposes of such application the reference in subsection (4) of that section to coins lawfully current by virtue of a proclamation or otherwise in any part of Her Majesty's Dominions shall be construed as including a reference to coins lawfully current in the State.

4. In section 10 of the *Currency Act, 1927*, the reference to the Coinage Act is to be construed as a reference to the *Coinage Act, 1950* or the *Decimal Currency Act, 1969.*

6.26 Section 14 of the 1969 Act (as amended by section 127 of the *Central Bank Act, 1989*) provides as follows -

"(1) Except coins issued under this Act, no piece of metal or mixed metal of any value whatsoever shall be made or issued in the State as a coin or a token for money or as purporting that the holder thereof is entitled to demand any value denoted thereon.

(2) Subsection (1) of this section does not apply to the issue by the Central Bank, before the repeal of the *[Coinage] Act ... 1950* effected by section 23(2) of the *Decimal Currency Act, 1969*, of coins provided under that Act or of coins provided, before the passing of the *[Coinage] Act ... 1950*, under the *Coinage Act, 1926*, or that Act as amended by the Emergency Powers (No. 140) Order 1942, or by sections 58 and 60 of the *Central Bank Act, 1942.*

(3) Every person who makes or issues any piece of metal or mixed metal in contravention of subsection (1) of this section shall be guilty of an offence and shall be liable -

(a) on summary conviction to a fine not exceeding £1,000, or at the discretion of the court to imprisonment for a term not exceeding one year or to both such fine and such imprisonment, or

(b) on conviction on indictment to a fine not exceeding £5,000 or at the discretion of the court to imprisonment for a term not exceeding two years to both such fine

and such imprisonment."

CHAPTER 7: CHEATS PUNISHABLE AT COMMON LAW

7.1 At common law, several types of cheats and frauds affecting the public welfare and causing an actual prejudice are indictable.[1] *Gabett,* summarising the position, considers it:

> "a fair result of the cases ... that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or deceive or injure the public in general; or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private, which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also, or else be founded in conspiracy or forgery."[2]

7.2 The boundary between deceits of only a private nature and those with a sufficient public dimension to render a fraudulent person guilty of an offence at common law has not been drawn with a great deal of clarity. A leading case is *Wheatley*.[3] There, a brewer was charged with delivering only sixteen gallons of "a certain malt liquor commonly called amber" to a customer, while charging him on the basis that he had delivered eighteen gallons, with intent to defraud, "to the evil example of others in the like case offending" and against the peace of the Sovereign. This conduct was held not to amount to an indictable offence. Lord Mansfield CJ said:

> "[T]hat the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right

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1 See *Russell*, vol 2, 1155-1165, *Gabbett*, vol 1, 199-206, *Kenny*, ch 16.
2 *Gabbett*, vol 1, 205. See also *Russell*, vol 2, 1161-1162.
3 2 Burr 1125, 97 ER 746 (1761).

in the nature of the thing: because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.

The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this.

Those cases are much more than mere private injuries: they are public offences. But here, it is a mere private imposition or deception: no false weights or measures are used; no false tokens given; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance, he may bring his action.

The selling an unsound horse, as and for a sound one, is not indictable: the buyer should be more upon his guard."[4]

7.3 This emphasis on the victim's carelessness as a reason for preventing the charge from being sustainable is perhaps difficult to justify, though it is supported by respected commentators.[5] Russell offers a possible rationale: "it can hardly be supposed that a cheat which is open to the detection of any man of common prudence will much affect the public".[6]

Four principal types of cheats have been dealt with in the cases: (1) those against public justice; (2) those relating to false weights, measures and tokens; and (3) the provision of unwholesome food; and (4) frauds on the revenue authorities.

(1) Cheats Against Public Justice

7.4 Cheats against public justice include "[f]alse statements which tend to pervert, hinder or discredit the operation of public justice, such as the performance of judicial acts without authority, or conduct aimed at misleading

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4 2 Burr, at 1127-1128, 97 ER at 748.
5 Cf Hawkins, *Pleas of the Crown*, vol 1 319 (8th ed, 1824).
6 *Russell*, vol 2, 1164.

a judicial tribunal".[7]

In *Onealy v Newell*[8] in 1807, Lord Ellenborough CJ said that "he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment".

(2) Cheats Relating to False Weights, Measures and Tokens

7.5 As Mansfied CJ's judgment in *Wheatley*[9] indicates, cheats involving the use of false weights and measures are indictable at common law. The fraudulent use of private tokens, does not fall within the scope of the offence.[10]

(3) Cheats in the Provision of Unwholesome Food

7.6 The sale of unwholesome food is an indictable offence. Although generally categorised as falling under the heading of common law cheats, it is clear from the willingness[11] of the courts to impose an objective test of negligence (on account of the public health considerations), there is no real requirement that the defendant should actually have intended to cheat the public or any particular victim.

(4) Frauds on the Revenue Authorities

7.7 Courts in Northern Ireland[12] and England[13] have held that it is an offence at common law to defraud the revenue authorities. In the Northern Ireland decision of "*J*",[14] Andrews LJ said:

> "In my opinion, it is a common law offence to defraud the King of his revenue. It has always been a misdeamour to make a false statement for the purpose of depriving the King of any part of his revenue; and making deliberately a false return for the purpose of defrauding the revenue is, merely, what I may call a modern illustration of that principle. It is an offence under the common law, quite apart from any created by Act of Parliament."

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7 *Kenny*, para 337. The type of conduct here envisaged lends itself to categorisation under separate headings, in which the element of cheating may have little, or no, significance in the definition of the offence. It is useful here to recall Lord MacDermott LCJ's observation in *Bailey*, [1956] NI 15, at 24 (CCA) that "[t]he catalogue of common law offences relating to conduct which harms or tends to harm the public interest is very extensive, and the classification of these offences by text-writers, as might be expected from the nature of the subject, has been somewhat arbitrary ...".

8 8 East 364, at 365, 103 ER 382, at 383 (1807).

9 *Supra*.

10 Cf *Lara*, 6 TR 565 101 ER 706 (1796).

11 Cf *Dixon* 3 M & S 12, ER 516 (1814). In *Treeve*, 2 East PC 821, at 822 (1796), a more subjective test had been articulated: "The giving of any person unwholesome victuals not fit for man to eat, *lucri causa*, or from malice to deceit" was held "undoubtedly in itself" to be an indictable offence. The severance of *lucri causa* from "malice or deceit" is worth noting. See further *Gabbett*, vol 1, 201-203.

12 "*J*", [1933] NI 73 (Belfast City Commission, Andrews LJ, 1931), noted in 75 LJ 297 (1933).

13 *Bradbury & Edlin*, Hampshire Assizes, Bray J, 8 July 1920, reported [1956] 2 KB 262, affirmed [1921] 1 KB 562 (CCA 1920) *Hudson*, [1956] 2 QB 252 (CCA).

14 [1933] NI at 78.

It may be that the courts will prove willing to range beyond revenue offences to embrace within the common law offence of cheat "all such acts or attempts as tend to the prejudice of the community".[15] Certainly Andrews LJ showed no fear of recognising such a principle.[16] And in *Hudson*,[17] Lord Goddard CJ appeared willing to bring within the offence any false representation "used to defraud the Sovereign, because that is a fraud on the public. The Crown and the public are really synonymous terms".

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15 *Higgins*, 2 East 5, at 21, 102 ER 269, (*per* Lawrence J, 1801).

16 Cf [1933] NI at 77.

17 [1956] 2 QB at 259. See also *id*, at 261-262.

CHAPTER 8: OTHER OFFENCES INVOLVING FRAUD

8.1 In this chapter we examine briefly other offences involving fraud.[1] These include bribery and corruption, corrupt rewards, obtaining credit by fraud, fortune-telling, cheating at gaming, false personation, frauds by bankrupts and arranging debtors, and other statutory frauds.

1. Bribery and Corruption[2]

8.2 Bribery is a misdemeanour at common law. It consists in "the unlawful offering or receiving any gift, to or by any public officer, or person having a public trust to discharge".[3] By "unlawful" it is to be understood that the gift be offered with a view to produce a corrupt exercise of duty or trust, by the officer or other person; or received by him with a corrupt intention of violating his duty or trust".[4]

As regards the offering or receiving, it is not necessary that the gift should actually be given or secured.[5] It is enough that a promise to make the gift has been given.[6]

Thus, the accused will be guilty even where the other party rejects[7] the offer or otherwise fails to do what the intending briber wishes.[8] In *Vaughan*[9] in 1769,

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1 See *Kenny*, ch 19.
2 See *id*, para 371, *Hayes*, 107-110, *Russell*, vol 1, ch 26.
3 Hayes, *107*.
4 *Id* 108.
5 *Id*.
6 Cf *Plympton*, 2 Ld Raym 1377 92 ER 397 (1724).
7 4 Burr 2491 98 ER 306 (1769).
8 In *Sulston v Norton*, 3 Burr 1235, at 1237, 97 ER 807, at 808 (1761), Lord Mansfield, referring to the prohibition on bribery and corruption in regard to parliamentary elections, contained in section 7 of 2 Geo 2, c 24 said: "the offence was completely committed by the corrupter, whether the other party shall perform his promise or break it".

Lord Mansfield said:

> "Wherever it is a crime to take, it is a crime to give: they are reciprocal. And in many cases, especially in bribery at elections to Parliament, the attempt is a crime: it is complete on his side who offers it.
>
> If a party offers a bribe to a judge, meaning to corrupt him in a case pending before him; and the judge taketh it not; yet this is an offence punishable by law, in the party that offers it.[10] So also a promise of money to a corporator, to vote for a mayor of a corporation; as in *Plympton*.[11] And so also must be an offer to bribe a Privy Counsellor, to advise the King".[12]

It appears immaterial whether or not the party had in fact a right to vote, provided "the corrupter thought he had, and the party claimed it".[13]

Devices to give a legal colour to what is in fact a bribe will have no efficacy.[14] The notion of a "public officer" embraces the holder of an office of the State,[15] a public department, a judge, and the holder of ministerial, municipal or parochial office.[16] It would appear that members of Parliament (or members of the Oireachtas) are not included. Bribery of members of a jury constitutes the offence of embracery.[17]

8.3 Corruption in municipal affairs is governed by a series of statutes: the *Public Bodies Corrupt Practices Act, 1889,* the *Prevention of Corruption Act, 1906*[18] and the *Prevention of Corruption Act, 1916.* Bribery and corrupt practices in elections is governed by Part I of *Prevention of Electoral Abuses Act, 1923*, as amended by the *Electoral Act, 1963.*[19]

2. *Corrupt Rewards*

8.4 Section 34 of the *Larceny Act, 1916* makes it an offence for a person corruptly to take "any money or reward, directly or indirectly, under pretence or upon account of helping any person to recover any property which has, under circumstances which amount to felony or misdemeanour, been stolen or obtained in any way whatsoever, or received", unless he has used "all due diligence" to

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9 *Supra.*
10 Citing 3 Inst 147.
11 2 Ld Raym 1377, 92 ER 397 (1724).
12 4 Burr at 2500-2511, 98 ER at 311.
13 *Hayes*, 108.
14 Cf *Sulston v Norton*, 3 Burr 1235, 97 ER 807 (1761) (promissory note linked to voting in a particular way), *Allen v Hearn*, 1 Term Rep 56, at 59 99 ER 969, at 971 (*per* Lord Mansfield, 1785).
15 *Vaughan*, 4 Burr 2494, ER 308 (1769).
16 *Russell*, vol 1, 381.
17 Cf *Id* 357-358, *Hayes*, 108-109, *O Siochain*, 250.
18 See *Crew, Bribes*, Part II.
19 Personation is dealt with by section 3 of the 1923 Act, which has been amended by section 1 of the *Prevention of Electoral Abuses Act, 1982.* See also the *Electoral (Amendment) (No 2) Act, 1986*, section 20, *Casey*, 98.

cause the offender to be brought to trial.[20]

In *O'Donnell*[21] in 1857, the defendant was charged with having feloniously and corruptly received money from the owner of a mare that had been stolen on account of helping him to recover the mare, without causing the apprehension of the thief, contrary to 9 Geo 4, C 51, section 51. The matter arose out of a dispute between the defendant and the prosecutor from the sale of a farm.

Counsel for the defendant argued that there was no evidence of the commission of a felony:

> "The Act was done in pursuance of a practice common among the lower orders in Co Donegal, called a "Glen Swilly decree", that is to say, a man who considers himself aggrieved by another seizes his goods and detains them until satisfaction is made. The common law of England ought not be strained to restrain the common law of Donegal, however impolitic that may be."[22]

This argument found no favour with the court.

3. Obtaining Credit by Fraud

8.5 Part II of the *Debtors Act (Ireland) 1872* deals with the punishment of debtors. Most of its provisions deal with conduct relating to bankruptcy and insolvency. However, of general importance is section 13(1) which provides that it is a misdemeanour subject to a maximum penalty of a year's imprisonment for a person "in incurring any debt or liability" to obtain credit under false pretences "or by means of any other fraud".

This provision catches some cases of dishonesty not falling within section 32 of the *Larceny Act, 1916*,[23] as, for example, where a man orders (and consumes) a meal in a restaurant when he does not have the means to pay for it.[24] In such circumstances, the man is not guilty under section 32 because his false representation relates to an intention as to the future.

In *Leon*,[25] the English Court of Criminal Appeal held that wagering debts void under gaming legislation[26] did not fall within the scope of section 13 of the English *Debtors Act, 1869*, which is the same as section 13 of the 1872 Act. The Court examined the purpose of the 1869 legislation and came to the conclusion

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20 See also section 5(3) of the Act making it an offence to take money "under pretence or upon account of aiding any person" to recover a stolen dog or a dog which is in the possession of any person who is not its owner. Cf *McCutcheon*, paras 58, 162. Under section 102 of the *Larceny Act, 1861*, advertising a purported reward for the return of stolen property, on the basis that no question will be asked, involves the forfeiture of £50.

21 2 Ir Jur NS 210 (1857).

22 *Id* at 212.

23 *Supra*, ch 4.

24 *Jones*, [1898] 1 QB 119.

25 [1945] 1 All ER 14 (CCA 1944).

26 *Gaming Act, 1845*.

that wagering debts were not part of the mischief it sought to control. Singleton J (for the Court) said:

> "It is difficult to think that betting transactions were contemplated by the legislature within the framework of the *Debtors Act, 1869*. One cannot envisage imprisonment for a gambling debt or bankruptcy arising directly from such a debt, for the legislature 24 years earlier had said in the *Gaming Act, 1845* s18, that any such contract was null and void. It is to be remembered that no credit was given when the arrangement was made; it was no more than an agreement to accept bets if made up to a certain limit, and again no credit was given when a bet was placed and accepted; it was only when the fancied horse lost that a so-called debt arose and the credit was given. In our view losses so incurred are not debts within the meaning of the *Debtors Act, 1869*, s13, and we have come to this conclusion upon an examination of the Act itself and of its scope".[27]

8.6 The meaning of "credit" obtained "in incurring any debt or liability" has given rise to some controversy. In England, in *Ingram*[28] the Court of Criminal Appeal interpreted the term in equivalent English legislation as:

> "cover[ing] the case where credit is obtained in incurring any liability not only money but money's worth. Money's worth may consist of commodities or services ...".

In the later, and much-criticised,[29] decision of *Fisher v Raven*[30], however, the House of Lords favoured a narrow interpretation. Lord Dilhorne LC,[31] commented that he:

> "did not think that it follows that, because of the wide meaning to be given to the word 'liability' a wider meaning than credit in respect of the payment of money is to be given to the words 'obtained credit'. To commit an offence against the section credit has to be obtained and in its ordinary significance, in my view, the expression 'obtained credit' connotes *the obtaining of credit in respect of the payment of money and no more.* To constitute the offence there must be the obtaining of credit in particular circumstances, namely, in incurring a debt or liability and by particular methods, namely, under false pretences or by means or by any other fraud. I do not think that the fact that the definition of 'liability' shows that there may be a wide variety of circumstances in which the offence can be committed is any ground for interpreting the words 'obtained credit' more widely than their natural significance

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27 [1945] 1 All ER at 17-18.
28 40 Cr App Rep 115, at 119 (CCA 1956).
29 See *Kenny*, 649 ff *Anon, Obtaining Credit by Fraud - Part 2* 93 Ir L T & Sol J 71, at 72 (1964).
30 [1963] 2 All ER 389 (HL (Eng)), analysed with approval by Elliott, *Obtaining Credit by Fraud*, 72 LQ Rev 548, at 553-555 (1956).
31 Lords Evershed, Morris, Hodson and Devlin concurring.

imports".[32]

8.7 As regards *mens rea*, it seems clear from the language of section 13 that the defendant must have had the fraudulent intent at the time he incurred the debt or liability. Thus, a person who intended to pay for a meal when he ordered it in a restaurant but changed his mind after he had consumed it could not be convicted under section 13.[33]

8.8 As the "restaurant" cases show, the period of credit need not be a long one. Thus, in *Jones*,[34] the English Court for Crown Cases Reserved upheld the conviction of a man who ordered a meal[35] when (as it turned out) he had only halfpenny in his possession. The Court was satisfied that he had thus obtained credit:

> "The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied but he did neither; he furnished the goods under circumstances which passed the possession and property in them, relying on the readiness and ability of the defendant to pay. It does not seem to matter that the period of credit was a short period; he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think, therefore, that credit was obtained."[36]

8.9 A person may be convicted of the offence under section 13(1) even though his fraudulent conduct falls short of false pretences. Thus, in *Jones*,[37] the defendant was held not guilty of false pretences because he had done nothing other than order the meal: "no inquiry was made of him, and no statement was made by him".[38] The Court for Crown Cases Reserved considered that he had nonetheless been rightly convicted under section 13(1), since he knew that the goods had been supplied, not on personal knowledge, but on the understanding that the "ordinary custom"[39] - to pay directly after the goods had been consumed - would be observed.

4. Fortune Telling

8.10 Section 4 of the *Vagrancy Act, 1824* punishes the telling of fortunes "to deceive or impose upon" any person. We have already referred to this provision in our *Report on Vagrancy and Related Offences*[40] where we recommended that

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32 [1963] 2 All ER at 393 - 394 (emphasis added).
33 Cf the English decision of *Ray*, [1974] AC (HL (Eng), 1973), interpreting section 16(1) of the *Theft Act, 1968*, critically analysed by Smith, [1974] Crim L Rev 181.
34 [1898] 1 QB 119 (Ct for Cr Cas Res, 1897).
35 Consisting of six ounces of mutton, three ounces of bread and a pint of sherry.
36 *Id* at 124-125.
37 [1898] 1 QB 119 (Ct for Cr Cas Res 1897).
38 *Id* at 124.
39 *Id* at 125.
40 LRC 11-1985.

the offence of fortune telling under that section should be abolished.[41]

5. Cheating at Gaming

8.11 Section 11 of the *Gaming and Lotteries Act, 1956* provides that every person who by any fraud or cheat in promoting or operating or assisting in promoting or operating in providing facilities for any game or in acting as banker for those who play or in playing at, or in wagering on the event of, any game, sport, pastime or exercise wins from any other person or causes or procures any person to win from another anything capable of being stolen is to be deemed guilty of obtaining that thing from that other person by a false pretence, with intent to defraud, within the meaning of section 10 of the *Criminal Justice Act, 1951*, and on conviction punished accordingly.

8.12 This section differs in some important respects from section 17 of the *Gaming Act, 1845*, the 1845 Act being repealed by the 1956 Act. Section 17 caught only cheating *during play*. Fraudulent conduct designed to induce play, or preliminary to play, fell outside its scope. Indeed, it may be argued that section 11 of the 1956 Act, while catching the fraudulent promotion and operation of games, does not clearly attach a criminal sanction to cheating by a participant during play where that participant was neither the promoter nor organiser of the game. That person would perhaps be guilty of false pretences without the assistance of section 11.

6. False Personation

8.13 At common law, fraudulent personation can amount to a cheat. Where it is part of a larger fraudulent scheme, it can, of course, render persons who engage in the personation and their associates guilty of a substantive offence, such as larceny by a trick or obtaining money by false pretences, or of an attempt to commit such an offence, or for conspiracy to defraud.

Section 1 of the *False Personation Act, 1874* makes it a felony, punishable by imprisonment for life, "falsely and deceitfully" to personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation or any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property. This legislation was enacted in response to the famous *Tichborne*[42] case.[43]

Several other statutes deal with personation in specific contexts, such as voting.[44]

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41 *Id* chapter 5.
42 *Castro*, LR 9 QB 350 (1874). See further *Kenny*, paras 368, 513.
43 See *Russell*, vol 2, 1303.
44 Cf *supra*, p107.

7. *Fraud by Bankrupts and Arranging Debtors*

8.14 Part VII of the *Bankruptcy Act, 1988* creates several offences that may be committed by bankrupts and arranging debtors and other debtors who act with the intent of defrauding their creditors. Some of these offences were originally contained in the *Irish Bankrupt and Insolvent Act, 1857*, the *Bankruptcy (Ireland) Amendment Act, 1872* and the *Companies Act, 1963* but others are entirely new. Thus, a bankrupt who fails to disclose to the Official Assignee after-acquired property,[45] or a bankrupt or arranging debtor who obtains credit of at least £500 without informing the creditor of his status[46] or who engages in trade or business under another name without disclosing to those with whom he enters into business transactions the name under which he was adjudicated or granted protection will be guilty of an offence.[47]

8.15 The central provisions of the 1988 Act are sections 123(1) and (3). Section 123(1) provides that it is an offence where a bankrupt or arranging debtor:

> "(a) fails to disclose to the Court, or to the Official Assignee or to such person or persons as the Court from time to time directs, all his property and how and to whom and for what consideration and when he disposed of any part thereof, except such part as had been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, or
>
> (b) fails to deliver up to the Official Assignee, or as he or the Court directs, all such part of his property as is in his possession or under his control, and which he is required by law to deliver up, or
>
> (c) fails to deliver up to the Official Assignee, or as he or the Court directs, all books and papers in his possession or under his control relating to his estate and which he is required by law to deliver up, or
>
> (d) conceals any part of his property to the value of £500 or upwards, or conceals any debt due to or from him, or
>
> (e) fraudulently removes any part of his property to the value of £500 or upwards, or
>
> (f) fails to file or deliver a statement of affairs as required by section 19(c)[48] or makes any material omission in any

45 Section 127 of the 1988 Act.
46 Section 129.
47 *Id.*
48 Which specifies the duties of the bankrupt relating to the Official Assignee.

statement relating to his affairs, or

(g) knowing or believing that a false debt has been proved by any person under the bankruptcy or arrangement, fails for the period of a month to inform the Official Assignee thereof, or

(h) prevents the production of any book or paper affecting or relating to his estate, or

(i) conceals, destroys, mutilates or falsifies or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to his estate, or

(j) makes or is privy to the making of any false entry in any book or paper affecting or relating to his estate, or

(k) fraudulently parts with, alters or make any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to his estate, or

(l) attempt to account for any part of his property by fictitious losses or expense, or

(m) obtains, by any fraud or false representation, any property on credit, or

(n) obtains, under the false pretence of carrying on business and, if a trader, of dealing in the ordinary way of his trade, any property on credit, or

(o) pawns, pledges or disposes of any property which he has obtained on credit, unless, in the case of a trader, such pawning, pledging or disposing is in the ordinary way of his trade, or

(p) is guilty of any fraud or false representation for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to its affairs or the bankruptcy or arrangement".

8.16 It is a good defence[49] to a charge under any of paragraphs (a) to (d), (f), (n) and (o) if the accused proves that he had no intent to defraud - the onus being on him to do so. Equally, it is a good defence[50] to a charge under any of paragraphs (h), (i) and (j) that the defendant had no intent to conceal the state of his affairs or to defeat the law - the onus again being on the defendant.

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49 Section 123(2).
50 *Id.*

8.17 A person other than a bankrupt or arranging debtor will commit an offence if he does any of the acts mentioned in paragraphs (e), (i), (j), (k), (l), (m), (n), or (o), with intent to defraud his creditors.[51] Here, the onus is on the prosecution to prove the necessary intent, save in cases where the act is done within twelve months before the debtor is adjudicated or granted an order of protection, in which case it is to be presumed until the contrary is proved that the act was done with intent to defraud creditors.[52]

8. Commercial Statutory Frauds

8.18 Several statutes include provisions prohibiting fraudulent conduct in specific contexts. Thus, for example, section 242 of the *Companies Act, 1990* makes it an offence for a person in purported compliance with any provision of the Companies Acts, to answer a question, provide an explanation, make a statement or produce any return, report, certificate, balance sheet or other document false in a material particular, knowing it to be false or reckless in that regard. Section 63 of the *Trade Marks Act, 1963* makes it an offence (*inter alia*) to make or cause to be made a false entry in the register, or a writing falsely purporting to be a copy of an entry, knowing it to be false; and section 64 penalises false representations of trade marks as registered. Section 65 renders criminal the unauthorised user of State badges, emblems and flags in such a manner as to be likely to lead to the belief that the person using them is duly authorised to do so; the offence thus does not require any ulterior intent to defraud or even immediate intent to mislead anyone as to the status or entitlement of the person using them.

8.19 On occasion a statute provides for a non-criminal remedy for false representation. Thus, section 54 of the *Copyright Act, 1963* prohibits the false attribution of authorships to a literary, dramatic, musical or artistic work; subsection (8) provides that this is not to be enforceable by any criminal proceedings but instead that contravention is to be actionable by the victim as a breach of statutory duty.

8.20 The *Merchandise Marks Act,s 1887, 1931* and *1970* and the *Consumer Information Act, 1978* contain several offences relating to false representations and related types of dishonesty in business. Thus, section 2 of the 1887 Act (as amended by the 1978 Act) makes it an offence in the course of any trade, business or profession, to apply any false trade description to goods. "Trade description" is widely defined by section 2(1) of the 1978 Act; and the expression "false trade description" contained in section 3 of the 1887 Act as amended by section 2(2) of the 1978 Act embraces a description that is false or misleading to a material degree. In a prosecution for an offence under section 2(1) of the 1887 Act in relation to the application to goods of a false representation or the causing of such an application to be made, it is not a defence for the defendant merely to prove that he acted without intent to defraud - as it had been until

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51 Section 123(3)(a).

52 Section 123(3)(b). See further Irene Lynch's Annotation to the Act, ICLSA, General Note to section 123.

1978. However, section 22 of the 1978 Act provides a narrower defence:

> a defendant will escape liability where he proves:
>
> (a) that the commission of the offence was due to a mistake or the reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and
>
> (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any other person under his control.[53]

8.21 This defence applies to proceedings for an offence under section 2(1) or 2(2) of the 1887 Act. Section 2(2) deals (*inter alia*), not with a person who *applies* a false trade description to goods, but rather to one who *sells* goods to which a false trade description is applied. The new defence operates in place[54] of the defences contained in paragraphs (a) to (c) of section 2(2) as originally drafted.[55]

8.22 Section 6 of the 1978 Act penalises the making of false[56] statements, knowingly or recklessly,[57] in the course or for the purposes of a trade, business or profession, as to the provision of any services, accommodation or facilities. Section 7 penalises false or misleading indications of prices or charges; section 8 captures advertisements in relation to the supply of goods, services or facilities, where the advertisements are likely to mislead and thereby cause loss, damage or injury to members of the public to a material degree.

8.23 Other consumer-related statutes contain similar controls. The *Packaged Goods (Quantity Control) Act, 1980*, imposes duties[58] carrying criminal sanction[59] on packers and importers as regards the quantity of goods included in packages, and the marking of packages. Section 12 of the *Hallmarking Act, 1981* prohibits (subject to certain specified defences) the addition, alteration or repair of an article bearing an approved hallmark, save in accordance with the written consent of the assay master.

9. Postal and Telecommunications Offences

8.24 Sections 12, 18 and 33(2) of the *Larceny Act, 1916* prescribe offences relating to the post. Section 12 deals (*inter alia*) with theft of, or from, a mail

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53 Section 22(1) of the 1978 Act.

54 Cf section 3(2) of the 1978 Act.

55 Unless a defendant could invoke any of these paragraphs, he could not be acquitted by reason of his lack of fraudulent intent: cf *Thwaites & Co v M'Evilly* [1904] 1 IR 310 (CA).

56 That is, false to be a material degree: section 6(4).

57 A statement made regardless of whether it is true or false is deemed to be made recklessly, unless the person making it had adequate reason for believing that it was true: section 6(2).

58 Cf sections 9-11 of the Act.

59 Cf section 17 of the Act.

bag and the theft of "any chattel, money or valuable security" out of a postal packet in the course of transmission by post. Section 18 makes it a specific offence for an officer of the Post Office to steal or embezzle a postal packet in course of transmission. Section 33(2) deals with receiving any mail bag, or any postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof amounts of a felony under the *Post Office Act, 1908* or the *Larceny Act, 1916* itself.

These offences reproduce similar provisions in the 1908[60] Act. They were included in the 1916 Act so that the latter Act "m[ight] present a complete code of indictable offences in the nature of larceny".[61]

8.25 Some of the misdemeanours proscribed by the 1908 Act remain; thus it is an offence fraudulently to retain a mail bag or postal packet[62] or, being a mail carrier, to be guilty of carelessness, negligence or misconduct.[63]

8.26 As well as these misdemeanours, the 1908 Act proscribes certain felonies, the issuing of money orders with fraudulent intent[64] and the forgery and stealing of money orders.[65]

The 1908 Act also prohibits the imitation of post office, stamps, envelopes, forms and marks[66] the making, selling or other dealing in fictitious stamps[67] and the maintenance of any bogus post office or letter box.[68]

8.27 Section 13(1) of the *Post Office (Amendment) Act, 1951*[69] prohibits the sending of any message which the sender knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person.

8.28 Section 84(1) of the *Postal and Telecommunications Services Act, 1983*

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60 Cf section 50 (stealing mail bag or postal packet), section 52 (receiving stolen mail bag) and section 55 (stealing, embezzlement, destruction by an officer of the Post Office of a postal packet).

61 *Russell*, 1132.

62 Sections 53 of the 1908 Act.

63 *Id* section 57. It should be noted that summary proceedings brought under the 1908 Act (as amended) in relation to any function of the An Post or Bord Telecom Eireann, respectively, may be brought and prosecuted by the company in question: *Postal and Telecommunications Services Act, 1983*, section 5(4) and (5).

64 Section 58.

65 Section 59, which provides as follows:

> "(1) A money order shall be deemed to be an order for the payment of money and a valuable security within the meaning of this Act and of the *Forgery Act, 1861*, and of any other law relating to forgery or stealing which is for the time being in force in any part of the British Isles.
>
> (2) If any person, with intent to defraud obliterates, adds to, or alters any such lines or words on a money order as would, in the case of a cheque, by a crossing of that cheque, or knowingly offers, returns, or disposes of any money order with *such* fraudulent obliteration, addition, or alteration, he shall be guilty of felony, and be liable to the like punishment as if the order were a cheque.

66 Section 64, as amended by the *Post Office (Amendment) Act, 1951*, section 14.

67 Section 65, as amended by the *Postal and Telecommunications Services Act, 1983*, section 7 and Third Schedule.

68 Section 66, as amended by section 12(3) of the 1951 Act, as amended by the *Postal and Telecommunications Service Act, 1983*, section 8 and Fourth Schedule.

69 As amended by the *Postal and Telecommunications Services Act, 1983*, section 4(1).

provides as follows:

> "A person who:
>
> (a) opens or attempts to open a postal packet addressed to another person or delays or detains any such postal packet or does anything to prevent its due delivery or authorises, suffers or permits another person (who is not the person to whom the postal packet is addressed) to do so, or
>
> (b) discloses the existence or contents of any such postal packet, or
>
> (c) uses for any purposes any information obtained from any such postal packet, or
>
> (d) tampers with any such postal packet,
>
> without the agreement of the person to whom the postal packet is addressed shall be guilty of an offence".

This subsection does not apply to persons acting under a power conferred on An Post by section 83 of the Act to open or otherwise interfere with postal packets, or by Ministerial direction made in the national or international interest, under section 110, or persons acting "under other lawful authority".[70]

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70 Section 84(2).

CHAPTER 9: OFFENCES RELATING TO COMPUTERS

9.1 In this chapter we examine the criminal law in relation to misconduct connected with computers. We will commence by examining the position in the context of statutory and common law principles enacted or developed in times before computer technology had been created.

1. The Use of a Computer to Obtain Property Dishonestly

9.2 A person may use a computer as a means of obtaining property dishonestly. Under existing legal principles this will usually render him liable to prosecution - for larceny,[1] false pretences or forgery for example.

(i) *Larceny*

9.3 In the Australian decision of *Kennison v Daire*,[2] the defendant, who had closed his account with a bank and withdrawn the balance of his funds, later used his cash card in one of its automatic teller machines which at the time was "off line" and did not have access to full information regarding his account. The machine was programmed in such circumstances to pay out up to 200 dollars if the card was inserted and the appropriate identification number entered. Accepting that the defendant had acted fraudulently with an intention permanently to deprive the bank of the money, the question arose as to whether the bank should on these facts be considered to have consented to its withdrawal. The Court thought not:

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1 Cf the English Law Commission's Working Paper No. 110, *Computer Misuse*, para 3.4 (1988); George, *Contemporary Legislation Governing Computer Crimes*, 21 Crim L Bull 389, at 392 (1982), Tapper, *'Computer Crime': Scotch Mist?*, [1987] Crim L Rev 3, at 13.

2 64 ALR 17 (1986). See Temby & McElwaine, *Technocrime - An Australian Overview*, 11 Crim L J 245, at 247-248 (1987).

> "The fact that the bank programmed the machine in a way that facilitated the commission of a fraud by a person holding a card did not mean that the bank consented to the withdrawal of money by a person who had no account with the bank. It is not suggested that any person, having the authority of the bank to consent to the particular transaction, did so. The machine could not give the bank's consent in fact and there is no principle in law that requires it to be treated as though it were a person with authority to decide and consent. The proper inference to be drawn from the facts is that the bank consented to the withdrawal of up to 200 dollars by a card holder who presented his card and supplied his personal identification number, only if the card holder had an account which was current. It would be quite unreal to infer that the bank consented to the withdrawal by a card holder whose account had been closed."[3]

Whether the same outcome should apply where the account remained open but lacked sufficient funds is not clear. Commentators have suggested that "the indication is that larceny would still be committed".[4]

(ii) *False Pretences*

9.4 It is not clear whether the offence of obtaining money by false pretences can be committed where the pretence is carried out on an "unsuspecting" machine, such as a computer. The Scottish Law Commission concluded[5] that, under Scots law the concept of false pretence was probably sufficiently flexible to catch this type of case. In *State v Hamm*,[6] a defendant who used another's bank card and personal identification number to obtain money from an automated teller machine was held to have made "false representations" by his conduct, to the effect that he had authority to use the card and number as he had done.

(iii) *Forgery*

9.5 It is possible that a prosecution for forgery may lie where a person alters computer input to increase the figure on a cheque payable to him or her for example. There is American authority in support of such a charge,[7] and a commentator has observed that "[t]his analogy should hold true in all instances where a person has altered the computer's operations, at either the input o[r] programming stages, to create a false writing".[8]

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3 64 ALR, at 18.

4 Temby & McElwaine, *op cit*, at 248, who note that the point was left open in *Kennison v Daire*, but who cite *Hands*, 16 Cox CC 188 (1887), considered *supra*, "which supports the view that larceny is committed": *id*, at 248, fn 9.

5 Scottish Law Commission, Consultative Memorandum No. 68, *Computer Crime*, paras 3.8-3.9 (1986).

6 569 SW 2d 289 (Mo App, 1978). See George, *Contemporary Legislation Governing Computer Crimes*, 21 Crim L Bull 385, at 393-394 (1982). See also the unreported Queensland decision of *Baxter*, CA No. 67 of 1987 cited by Wasik, *Law Reform Proposals on Computer Misuse*, [1989] Crim L Rev 257, at 259.

7 *United States v Langston*, 41 CMR 1013 (ACMR 1970). But cf *United States v Jones*, 553 F 2d 351, at 351 (4th Cir, 1977).

8 Stevens, *Identifying and Charging Computer Crimes in the Military*, 110 Mil L Rev 59, at 80 - 81 (1985).

2. Hacking[9]

9.6 We must now consider the practice of "hacking", where a person by intrusion[10] derives an unauthorised use of computer time or services. The notion of "hacking":

> "encompasses a wide range of computer-assisted activities -some legal, others criminal, and many unethical. It is an emotionally laden topic. To the business and the law enforcement communities, the hacker is a trespasser and a thief. To the news media and avid computer fans the hacker is a modern-day joy rider, roaming the electronic highways."[11]

9.7 Hacking may be achieved from long range, by means of the telecommunications system, for example.[12]

It appears that:

> "[t]he tools of the hacker can be quite simple. All that is needed is a personal computer and a device[13] which enables the hacker to gain access to the public telecommunications network. Once a hacker has gained access to the network then all that needs to be done is to access individual computers by breaking their security codes. That may be by a simple password or a set of numbers or some combination. That can be obtained either through underground electronic bulletin boards or by programmes designed to break into the computers of others."[14]

(i) *Abstraction of Electricity*

9.8 Section 10 of the *Larceny Act, 1916* makes it an offence fraudulently to abstract electricity. A prosecution based on a somewhat similar provision in Hong Kong was successful. In *Siu Tak-Chee*,[15] an unreported case in 1984, the Magistrate convicted a hacker on a charge of abstracting electricity worth less than one-eight of a Hong Kong cent. "In view of the small amount of electricity abstracted, the Magistrate discharged the defendant unconditionally and ordered that no conviction be recorded, adding that the prosecution should never have been brought. Newspaper headlines following this decision included 'The hacker case that proved the law to be an ass'."[16]

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9 See Temby & McElwaine, *op cit*, at 249-251, the Scottish Law Commission's *Report on Computer Crime*, paras. 2.7-2.9 (Scot Law Com No. 106, 1987), the English Law Commission's WP No. 110, paras 3.13-3.29 (1988), Tapper, *"Computer Crime": Scotch Mist?* [1987] Crim L Rev 4, at 19-21, Wasik, *op cit*, at 259ff.

10 Later we examine the case of a person who, in breach of the terms of his or her employment, obtains an unauthorised use of computer time or services.

11 A Bequal, *Technocrimes*, 30 (1987), cited by Temby & McElwaine, *op cit*, at 249. See also Stevens, *Identifying and Charging Computer Crimes in the Military*, 110 Mil L Rev 59, at 71-72 (1985).

12 See Temby & McElwaine, *op cit*, at 249.

13 This is known as a 'modem'; "it alters the signals emitted from the personal computer and makes them compatible with the signals required for the telecommunications system": *id*, at 249, fn 17.

14 *Id*, at 249-250.

15 August 1984, cited and discussed by the Law Reform Commission of Tasmania in their Report No. 47, *Computer Misuse*, p23 (1986).

16 Law Reform Commission of Tasmania's Report No. 47, p23.

Clearly a prosecution for abstraction of electricity was a tangential strategy for dealing with the problem of hacking.[17]

(ii) *Malicious Damage*

9.9 It seems clear that merely obtaining unauthorised access to a computer, or information consequent on such access, will not constitute the offence of malicious damage. In the English case of *Cox v Riley*,[18] the Divisional Court held that the erasure of a program for a printed circuit card used to operate a computerised saw could constitute "criminal damage" under the *Criminal Damage Act, 1971*, since the card was useless without the programme stored on it and reprogramming it would require "time and effort of a more than minimal nature".[19] Although the program was intangible and thus fell outside the definition of "property" under section 10 of the 1971 Act, the English Law Commission point out that:

> "so long as the defendant is charged with causing damage to some tangible part of the computer's hardware on which the information is stored - such as a 'floppy disk', or magnetic tape - then, it seems clear, he can be convicted of damage to that hardware if he deletes or alters a program."[20]

(iii) The *Criminal Damage Act, 1991*

9.10 Ultimately, the Oireachtas chose the Criminal Damage 'route' to address hacking in Ireland and provided for it in the *Criminal Damage Act, 1991*. The definition of "damage" in section 1 includes, in relation to data:

> "(i) to add to, alter, corrupt, erase or move to another storage medium or to a different location in the storage medium in which they are kept (whether or not property other than data is damaged thereby), or
>
> (ii) to do any act that contributes towards causing such addition, alteration, corruption, erasure or movement.

Section 5 provides

> "(1) A person who without lawful excuse operates a computer:
>
> (a) within the State with intent to access any data kept either within or outside the State, or

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17 Cf The English Law Commission WP No. 110, para 3.25 (1988). See also Temby & McElwaine, *op cit*, at 251, who note that the penalty for this offence bears no relationship to the unauthorised access. "What has occurred is that confidential information has been viewed by an unauthorised person, and it seems silly to charge ... abstracting electricity. The harm done is entirely different".

18 83 Cr App Rep 54 (1986).

19 *Id*, at 56. See the English Law Commission's WP No. 110, para 3.36

20 English Law Commission WP No. 110, para 3.37.

(b) outside the State with intent to access any data within the State,

shall, whether or not he accesses any data, be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or imprisonment for a term not exceeding 3 months or both.

(2) *Subsection (1)* applies whether or not the person intended to access any particular data or any particular category of data or data kept by any particular person.

3. Interception of Communications

9.11 The interception of telecommunications messages is an offence under section 98 of the *Postal and Telecommunications Services Act, 1983.*

9.12 Section 9 of the *Broadcasting Act, 1990* goes somewhat further:

"(1) No person, other than a duly authorised officer of the Minister, shall, in relation to a service provided by a licensee or a service provider-

(a) intercept the service,

(b) suffer or permit or do any thing that enables such interception by any person,

(c) possess, manufacture, assemble, import, supply, or offer to supply, any equipment which is designed or adapted to be used for the purpose of enabling such interception by any person, or

(d) publish information with the intention of assisting or enabling any person to intercept such a service.

(2) No person shall-

(a) knowingly install or attempt to instal or maintain any equipment which is capable of being used or designed or adapted to be used for the purpose of enabling such interception by any person, or

(b) wilfully damage or attempt to damage a system or part of a system operated by a licensee or service provider.

(3) A person who contravenes any provision of *subsection* (1) or (2) shall be guilty of an offence.

(4) In this section "intercept" in relation to a service means receive, view, listen to, record by any means or acquire the substance or purport of the service or part thereof supplied by a licensee or service provider without the agreement of the licensee or service provider.

4. Theft of Information

(i) Unauthorised Copying of Data or Software

9.13 The two principal ways in which unauthorised copying of data or software may occur are (i) the temporary physical removal of tapes or disks in order to copy data from them, and (ii) the electronic copying of data or software.[21] In the absence of Irish cases dealing with the subject, we have only decisions from other common law jurisdictions to offer some guidance on how our courts may resolve the issues that arise. Most of these decisions involve an important element of statutory interpretation. Therefore, they are somewhat less helpful than cases dealing with issues of principle arising at common law.

(ii) Temporary Removal

9.14 As a general principle, the temporary removal of property, without the intention of permanently depriving its owners of it, does not constitute larceny.[22] However, a recent English decision[23] has held that a temporary deprivation amounts to permanent deprivation if the intention is "to return the 'thing' in such a changed state that it can truly be said that all its goodness or virtue is gone".[24] There is, of course, no guarantee that an Irish court would take an identical view of the issue, but it is clear that the willingness to return stolen property in a valueless condition should not exempt the defendant from conviction for larceny.

9.15 In *Lloyd,* the English Court of Appeal (Criminal Division) held that the temporary removal of films for copying onto a master video tape, with the intention of enabling "private" copies to be sold would not amount to theft as the films remained unharmed, with their value undiminished, even though the removal "grossly and adversely" prejudiced the commercial interests of the owners of the copyright of the films. The English Law Commission take the view that:

> "applying this reasoning for the temporary borrowing of a disk on which a computer programme is stored, such conduct would seldom amount to theft because if the computer program is returned, it is unlikely that the copying of the program will have removed all the virtue from it. The original would be usable and, unless the copier had flooded the market

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21 See the English Law Commission WP No. 110, para 3.41 (1988), Temby & McElwaine, *op cit*, at 251-251, and the Scottish Law Commission's *Report on Computer Crime*, paras 2.12-2.17 (Scot Law Com No. 106, 1987).

22 Cf *supra*, pp53-56.

23 *Lloyd*, [1985] QB 829, at 836 (*per* Lord Lane, CJ).

24 *Id*, at 836 (*per* Lord Lane, CJ).

with so many copies that it was no longer possible to sell the program at all, the program would retain some, albeit reduced, commercial value."[25]

Whether an Irish court would adopt such a strict view may be debated.

(iii) *Unauthorised Copying*

9.16 Two questions arise here: first, whether information can be the subject of larceny, and second, whether, assuming that it can, the unauthorised copying of it without physical removal constitutes an offence. As regards the first question, courts in other common law countries[26] have taken differing views attributable in part to different statutory definitions of "property".

9.17 In England, it has been held that confidential information is not property for the purposes of theft.[27] In Scotland, it has been held that the dishonest exploitation of confidential information belonging to another is not a crime.[28] In Canada, however, the Ontario Court of Appeal, by a majority, held[29] that confidential information can constitute the subject-matter of theft. The Supreme Court of Canada has recently reversed the decision.[30] Decisions in the United States are conflicting.[31]

9.18 Assuming for the purposes of discussion that information can be the subject of larceny, the next question is whether the unauthorised copying of it without physical removal constitutes an offence. Normally, such copying would not, since there could scarcely be said to be a "taking" and "carrying away" of the information, which still remains available to the owner. Nor would it be easy to say that the transgressor has an intention permanently to deprive the owner of the information he owns. In this respect the English Law Commission has noted that:

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25 English Law Commission's WP No. 110, para 3.44 (1988).

26 See generally the English Law Commission's WP No. 110, paras 3.56-3.47, the Scottish Law Commission's *Report on Computer Crime*, paras 2.23-2.14 (1987), Temby & McElwaine, op cit, at 251-252, Stevens, *Identifying and Charging Computer Crimes in the Military*, 110 Mil L Rev 59, at 77-78 (1985), George, *Contemporary Legislation Governing Computer Crimes* 21 Crim L Bull 385, at 394, 404-407 (1982), Wagner, *Comment, The Challenge of Computer-Crime Legislation: How Should New York Respond?* 33 Buffalo L Rev 777, at 787-790 (1984), Guthrie, *Annotation: Computer Programs as Property Subject to Theft*, 18 ALR 3d 1121 (1966), Tapper, *op cit*, at 13-16, Ottaviano, *Computer Crime*, [1985] 1 DEA - J of L & Technol 163, at 164-168, Moskoff, *The Theft of Thoughts: The Realities of 1984*, 27 Crim L Q 226 (1984), Webber, *Computer Crime or Jay-walking on the Electronic Highway*, 26 Crim L Q 217, at 231-233 (1984), Hammond, *Quantum Physics, Econometric Models and Property Rights to Information*, 27 McGill L J 47 (1981), Hammond, *Note: Electronic Crime in Canadian Courts*, 6 Oxford J of Legal Studies 145 (1986), Hammond, *Theft of Information*, 100 LQ Rev [252] (1984), Wasik, *Following in American Footsteps? Computer Crime Developments in Great Britain and Canada*, 14 N Kentucky L Rev 249, at 253, 260-261 (1987), Menelly, *Prosecuting Computer-Related Crime in the United States, Canada, and England: New Laws for Old Offences?*, 8 Boston College Int'l & Comp L Rev 551, at 554-560, 568-569, 571-574 (1985).

27 *Oxford v Moss*, 68 Cr App Rep 183 (Div Ct, 1978), analysed by Smith, [1978] Crim L Rev 120.

28 *Grant v Allan*, 1987 SCCR 402. Neither the Lord Justice-Clerk (Ross) nor Lord Wylie found *Oxford v Moss* or *Stewart* of assistance.

29 *Stewart*, 149 DLR (3d) 583 (1983). See Wasik, *op cit*, at 253, Mennally, *op cit*, at 571-572, Webber, *op cit*, at 232-233, Moskoff, *op cit*, at 229-233, Hammond, *Note: Electronic Crime in Canadian Courts*, 6 Oxford J of Legal Studies 145, at 147-150 (1986).

30 See Wasik, *Law Reform Proposals on Computer Misuse*, [1989] Crim L Rev 257, at 270.

31 See Ottaviano, *op cit*, at 164-168, Stevens, *op cit*, at 77-78, Wagner, *op cit*, at 787-790.

"[u]sually, the owner of the information will retain that knowledge even if someone else obtains it. Circumstances might exist where such an intention was to be found, such as where the copier erased the original information after having made the copy, or where all the value of the information has gone, but in general this would not be the case."[32]

(iv) The Data Protection Act, 1988

9.19 The *Data Protection Act, 1988* is of some limited relevance to the subject of computer crime. The Act gives effect to the 1981 Strasbourg Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data. First, it is necessary to note some crucial definitions. "Data" means information in a form that can be processed.[33] "Processing" means performing automatically logical or arithmetical operations or data; it includes (a) extracting any information constituting the data, and (b) in relation to a data processor,[34] the use by a data controller[35] of data equipment in the possession of the data processor and any other services provided by him for a data controller.[36] "Personal data" means data relating to a living individual who can be identified either from the data or from the data in conjunction with other information in the possession of the data controller.[37] And a "data subject" is an individual who is the subject of personal data.[38]

9.20 Section 2 of the Act deals with the collection, processing, keeping, use and disclosure of personal data. A data controller is required to comply with a number of provisions, including the following:

1. the data to be processed fairly;

2. they are to be accurate and, where necessary, kept up to date;

3. data are to be kept only for one or more specific and lawful purposes; they are not to be used or disclosed in any manner inconsistent with that purpose or those purposes; they are to be adequate, relevant and not excessive in relation to that purpose or those purposes, and are not to be kept for longer than is necessary for that purpose or those purposes; and

4. appropriate security measures are to be taken against unauthorised access to, or alteration, disclosure or destruction of, the data and against their accidental loss or destruction.

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32 English Law Commission's WP No. 110, para 3.47 (1988).
33 Section 1(1).
34 That is, a person who processes personal data on behalf of a data controller; the term does not include an employee of a data controller who processes such data in the course of his employment.
35 That is, a person who, either alone or with others, controls the contents and use of personal data: *Id.*
36 Id.
37 *Id.*
38 *Id.* For an excellent detailed analysis of the criminal offences prescribed by the Act, see Robert Clark, *Data Protection Law in Ireland*, 125-131 (1990).

A data processor must comply with this latter requirement as to security measures, as respects personal data processed by him.

9.21 Section 21 prohibits the disclosure of personal data by a data processor or any employee or agent of his, without the prior authority of the data controller on behalf of whom the data are processed. Section 22 makes it an offence for a person who obtains access to personal data (or any information constituting that data) without the prior authority of the data controller or data processor by whom the data are kept, to disclose the data (or information) to another person.

9.22 We need not here concern ourselves with some of the main provisions of the Act: the entitlement of an individual to find out whether personal data is being kept in relation to him[39] and, if so, his right of access to it.[40] Nor need we consider the restrictions on this right of access,[41] and the entitlement to disclose personal data in certain cases.[42] Our primary concern relates to the unauthorised access to personal data.

9.23 Section 16 provides for the establishment and maintenance of a register of certain specified data controllers and data processors. Section 19 spells out some important effects of registration. A data controller to whom this section applies is not to keep personal data unless there is for the time being an entry in the register in respect of him.[43] A data controller in respect of whom there is an entry in the register is under the following five negative obligations:

1. He is not to keep personal data of any description other than that specified in the entry;

2. he is not to keep or use personal data for a purpose other than the purpose or purposes described in the entry;

3. if the source from which such data (and any information intended for inclusion in such data) are obtained is required to be described in the entry, he is not to obtain such data or information from a source that is not so discussed;

4. he is not to disclose such data to a person who is not described in the entry;[44] and

5. he is not to transfer such data, directly or indirectly, to a place outside the State other than one named or described in the entry.[45]

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39 Section 3.
40 Section 4.
41 Section 5.
42 Section 8.
43 Section 19(1).
44 Other than a person to whom disclosure is permitted by section 8 (which refers to such cases as those involving the safeguarding of the security of the State, the prevention, detection or investigation of offences, the prevention of injury to the health of a person, and the order of a court).
45 Section 19(2).

9.24 An employee or agent (who is not a data processor) of such a data controller is subject to similar restrictions;[46] and a data-processor to whom section 16 applies is not to process data unless there is for the time being an entry in the register in respect of him.[47] It is a strict liability offence for a data controller or data processor to contravene the provisions requiring him not to keep or process personal data unless he is registered[48]; moreover, a data controller who knowingly contravenes any of the five requirements set out above[49] or an employee or agent who *knowingly* breaches the similar requirements applying to him[50] is guilty of an offence.[51]

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46 Section 19(3).
47 Section 19(4).
48 Section 19(6).
49 Section 19(2).
50 Section 19(3).
51 Section 19(6).

CHAPTER 10: CONSPIRACY TO DEFRAUD

10.1 The offence of conspiracy to defraud is of somewhat uncertain dimensions in Irish law.

In England, the House of Lords in *Scott*[1] defined the offence broadly, so as to dispense with any requirement that the fraud involve deception. Viscount Dilhorne[2] was of the opinion that it was:

> "clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injury some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."[3]

Lord Diplock said:

> "Where the intended victim of a 'conspiracy to defraud' is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough."[4]

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1 [1975] AC 819. See the English Law Commission's WP No. 104, *Criminal Law: Conspiracy to Defraud*, Part 11 (1-87).

2 With whose speech the other members of the Court agreed.

3 [1975] AC, at 840.

4 *Id*, at 841.

Where the intended victim was a person performing *public* duties, Lord Diplock considered it:

> "sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone."[5]

10.2 Whether an Irish court would be disposed to define the offence so broadly may be doubted. The constitutional requirement of specificity in formulating offences[6] might well be considered inconsistent with such an uncertain statement of the scope of conspiracy to defraud.[7]

In *White*[8] in 1876, an indictment charged the defendant with conspiracy with others, and "wickedly devising and intending to defraud and cheat divers of Her Majesty's subjects not then ascertained", to wit, all who should apply for and negotiate, for a loan with them, and, "by divers false pretence and subtle means and devices, to cheat and defraud of sundry large sums of money divers of Her Majesty's subjects not then ascertained, to wit, all such of Her Majesty's liege subjects as should or might at any time afterwards apply to or negotiate with the person so conspiring for a loan or loans of money".

A writ of error brought by the defendant against conviction was successful. Whiteside CJ did:

> "not think this is a defective averment, but it is an absolute omission of an important averment; for there is no averment that the goods taken were the property of the person from whom they were taken. It is one thing to cure an imperfect averment, but another to supply an omission."[9]

And Fitzgerald J said:

> "Is that indictment sufficient after verdict? In my opinion it is not. It is so vague that it conveys no specific idea of the offence imputed to the Defendant. It is not even alleged that the Defendant and his supposed confederates were, or professed to be, engaged in any common pursuit, such as money-lenders, bill-discounters, bankers, or agents to procure loans of money; nor are any means stated or described by which the objects of the confederates were to be achieved, so as to give the Defendant some information of the charge against him.

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5 *Id.*

6 Cf *Forde*, 269-273; see also *King v AG*, [1981] IR 233 (Sup Ct, 1980, aff'g High Ct, McWilliam,J, 1978).

7 Cf the English Law Commission's WP No. 104, para 8.3, stating the argument that "[t]he uncertain boundaries of the offence mean that it offers insufficient guidance as to what can or cannot lawfully be done". See also *id*, para 5.8.

8 IR 10 CL 523 (QB, 1876).

9 *Id*, at 534.

It would seem to me to be very dangerous if a conviction could be sustained on an indictment so very general and so unspecific ...."

10.3 The Courts have frequently stated that conspiracy should not be charged when the evidence relied upon to establish it is the evidence of substantive offences also laid in the same indictment. In *Singer*,[10] O Dalaigh CJ noted that:

> "This course is not merely undesirable but is one fraught with danger in a case such as this, where the type of fraud alleged in the conspiracy differs fundamentally from the type of fraud alleged in the substantive offences charged."[11]

10.4 Apart from that very reasonable restriction, the offence of conspiracy still plays an important role in our criminal law. In a recent extradition case, the Chief Justice observed that ... "(I)t would be the very negation of an adequate criminal jurisdiction and an absurdity if a person joining in a criminal act being either a conspiracy or a joint venture could escape responsibility by reason of the fact that he has committed no overt act within the jurisdiction."[12]

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10 CCA, 23 June 1961 (No. 39 of 1960, 1 Frewen 214).
11 *Id* at 229.
12 Ellis v O'Dea [1991] ILRM at p372.

CHAPTER 11: BLACKMAIL

11.1 There is no offence of "blackmail" in our law. The term is colloquial rather than legal. Sections 29 to 31 of the *Larceny Act, 1916* prescribe three offences commonly referred to as "blackmail".[1] Section 29 provides as follows:

> "(1) Every person who -
>
> (i) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing;
>
> (ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person;
>
> (iii) with intent to extort or gain any property or valuable thing from any person accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime;
>
> shall be guilty of felony, and on conviction thereof liable to penal

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1 See generally *McCutcheon*, 92-104, Campbell, *The Anomalies of Blackmail*, 55 LQ Rev 382 (1939), Winder, *The Development of Blackmail*, 5 Modern L Rev 21 (1941), Williams, *Blackmail*, [1954] Crim L Rev 79, Goodhart, *Blackmail and Consideration in Contracts* LQ Rev 437 (1928), Hogan, *Blackmail: Another View*, [1966] Crim L Rev 474.

servitude for life ....

(2) Every person who with intent to defraud or injure any other person -

(a) by any unlawful violence to or restraint of the person of another, or

(b) by accusing or threatening to accuse any person (whether living or dead) of any such crime or of any felony,

compels or induces any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix the name of any person, company, firm or co-partnership, or the seal of any body corporate, company or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of felony and on conviction thereof liable to penal servitude for life.

(3) This section applies to any crime punishable with death, or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal.

(4) For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person.

11.2 Section 30 provides:

"Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years."

11.3 Finally, section 31 provides as follows:

"Every person who with intent -

(a) to extort any valuable thing from any person, or

(b) to induce any person to confer or procure for any person any appointment or office of profit or trust,

(1) publishes or threatens to publish any libel upon any other person (whether living or dead); or

(2) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead);

shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment, with or without hard labour, for any term not exceeding two years."

11.4 As may be seen, there is "considerable duplication"[2] between these three sections.

Smith & Hogan note that:

> "One trouble has been that the piecemeal legislation creating a proliferation of offences has never been adequately rationalised; faced with a burdensome inheritance the draftsmen of the Act chose to devise it unimproved. Another springs from a shift in social mores. In more robust times physical pressure was regarded as more dangerous than psychological pressure, but now the latter is seen as the more insidious. Few pause to inform the authorities where they are threatened with violence: many hesitate where they are threatened with disclosure of sexual deviation. But the provision, s31, which most aptly provides for the latter kind of case carries a punishment which is generally considered inadequate for the offence, and so, by judicial interpretation, it has been brought within the machinery of ss29 and 30. The result is that there is now no sharp division between the offences and frequently the same facts will constitute an offence under more than one section."[3]

11.5 Section 29(1)(i) is the most wide-ranging offence. It requires, as we have seen, that the defendant utter a letter or writing *demanding* of any person *with menaces*, and *without any reasonable or probable cause*, any profits or valuable thing. There may, of course, be an implied demand: thus it is not necessary to show words in the imperative mood.[4] The notion of menaces originally appears to have been limited to the threats of physical injury to the person or property,[5] but over the years it has been extended to such threats as exposing secrets[6] or publishing attacks on a company in a newspaper, which would have the effect of reducing the market price of the shares.[7] In *Thorne v Motor Trade Association*,[8]

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2 Williams, *op cit*, at 81.
3 *Smith & Hogan* (1st ed), 440.
4 Cf *Robinson* 2 Leach 749, 168 ER 475 (1796).
5 Cf Winder, *op cit*, *Smith & Hogan*, (1st ed), 441.
6 *Tomlinson*, [1895] 1 QB 706.
7 *Boyle & Merchant*, [1914] 3 KB 339.

Lord Wright went so far as to express the view that:

> "the word 'menace' is to be literally construed, and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed."

11.6 The real difficulty in the blackmail offences[9] is to discern the true meaning of "reasonable and probable cause" or, more particularly, its absence. In *Thorne v Motor Trade Association*,[10] Lord Wright found it difficult to give a precise meaning to "probable" as distinct from "reasonable"; he assumed that it added nothing to the latter term. But even if the enquiry is reduced to what is, or is not, a reasonable cause, the problem is not alleviated.

11.7 Unfortunately matters have been complicated by a disagreement half a century ago between the English Court of Appeal and the English Court of Criminal Appeal as to the reasonableness of demands made by trade associations in relation to the payment of money to abstain from putting a trader's name on a stop list. We need not here rehearse the minutiae of these cases.[11] We can simply quote *Smith & Hogan's* insightful observation that:

> "the cardinal problem is ... to draw the line between demands for property which are legitimate and demands which amount to blackmail... [T]here appears to be no formula better than that [the defendant]'s demand might be reasonable in the circumstances - however lame this may sound".[12]

The actual content which *Smith & Hogan* suggest should be attributed to this test may not meet with universal support. They consider that where a demand of money is made as the price of refraining from exposing the victim's sexual misconduct, on "almost every occasion"[13] this will constitute blackmail, but that it is possible to envisage realistic circumstances in which it would not. Where the person making the demand was proposing to publish her memoirs, she was lawfully at liberty to do so although the consequence would be to ruin the victim, and she was equally lawfully entitled, as an alternative to this, to adopt a course more lenient to [the victim], by selling the memoirs to him.[14] But if she demanded a price that was extravagant having regard to their commercial value, this might be "quite another matter".[15]

11.8 *Smith & Hogan* are of the view that the considerations governing this type

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8 [1937] AC 797, at 817.

9 It might be considered that, in the absence of this expression in section 31, the offence there prescribed would be committed even where there was reasonable and probable cause. As we shall see, such a possible interpretation has been doubted by *McCutcheon*, para 142.

10 *Supra.*

11 *Denyer*, [1926] 2 KB 258, *Hardie & Lane Ltd v Chilton*, [1928] 2 KB 306, *Thorne v Motor Trade Association*, [1937] AC 797.

12 *Smith & Hogan* (1st ed), 443-444.

13 *Id*, 444.

14 *Id.*

15 *Id.*

of case cannot necessarily be applied to other cases:

> "Suppose, for instance, that D proposes to build a supermarket on a site so near to P's small shop as will in all probability drive P out of business. So long as D intends to build the supermarket, and the threat is not a sham for the purpose of obtaining money from P, he has a liberty to do so and also a liberty to demand money from P as the price of refraining. Clearly it is not blackmail for D to ask a reasonable (a fair valuation of the loss to D involved) sum as the price of refraining, but it seems equally clear, unlike the memoirs case and the stop list case, that D's demand does not become blackmail because he demands a wholly unreasonable sum. The entrepreneur has his victim every bit as much at his mercy as the demirep has hers but the ethics of the two situations are not quite the same, and in each case it is necessary to have regard both to law and social usage."[16]

11.9 This discussion serves to remind us of the parallel case of the tort of conspiracy, where the question of motive is predominant. The proprietors of a large business may take steps which they know will result in the commercial extinction of certain rivals. They may nonetheless go ahead provided their motive (or predominant motive) is pure.[17] It is well to recall Lord Wright's candid admission in *Crofter Harris Tweed Co Ltd v Veitch*,[18] that it is practically impossible "to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom". A similar uncertainty attaches to the reasonableness of a demand in blackmail offences. It seems that the test applied by the courts is objective, but intuitive criteria rather than something more tangible continue to determine the outcome of the prosecutions.

11.10 Section 30 differs from section 29(1)(i) in requiring that the defendant demand, rather than utter a letter containing a demand. it is not clear whether a demand, like an uttering, can occur unilaterally or whether receipt of the demand by the intended victim is a necessary ingredient. In England, the former view has the support of the House of Lords in relation to section 21 in the *Theft Act, 1968* which also refers to a "demand".[19] In Ireland, in the absence of clear judicial authority, *McCutcheon* argues in favour of the latter view:

> "Unlike the *Theft Act, 1968* the *Larceny Act, 1916* employs two phrases, namely 'utters' and 'demands'. It must be assumed that the legislature had different meanings in mind when it employed those terms and to hold that a demand need not be received would be to confuse it with an uttering. Moreover, the [House of Lords] decision ... was narrow and, the interpretation of 'demand' was arrived at in an almost perfunctory

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16 *Id*, 444-445.
17 Cf *McMahon & Binchy*, 574-579.
18 [1942] AC 435, at 472. See also *Vegelahn v Gunter*, 44 NE 1077, at 1080 (NY, *per* Holmes, J, 1896).
19 *Treacy*, [1971] AC 537.

manner".[20]

11.11 The question whether the threat must actually operate on the mind of the intended victim is also unresolved.[21] There is much to be said in favour of such a requirement. One inhibition is the English decision of *Moran*,[22] in which it was held that it is impossible to be guilty of an attempt to demand with menaces. That decision has, however, been widely criticised, and may well not impress the Irish courts:[23]

> "This would allow [them] to hold that to constitute a menace the threat must have affected the prosecutor whilst ensuring that an accused could be convicted of an attempt where he committed a sufficiently proximate act which falls short of operating on the mind of the prosecutor".[24]

11.12 As regards section 31, it appears that while it is the only provision dealing with cases involving an intent to induce a person to confer an appointment, "otherwise facts which would constitute an offence under this section will almost invariably also constitute an offence under s29(1) or s30".[25] While section 31 does not expressly require a demand, *Smith & Hogan* consider it "clear that conduct could constitute blackmail under this section only if it amounted to a demand".[26] Noting that section 31, unlike section 29(1)(i), does not contain an express requirement that there be an absence of reasonable and probable cause, *McCutcheon* comments:

> "Were the section to be construed literally that omission would make the offence one of strict liability. Given the relatively light punishment which the offence attracts and its connection with libel the courts might adopt a strict interpretation. On the other hand, what scant authority there is on the matter suggests that the existence of a reasonable and probable cause, will absolve the accused ... [T]he likely effect of these decisions is to imply a defence of reasonable and probable cause into the section. However, the omission of express words to that effect might be held to impose a burden of proof on the accused".[27]

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20 *McCutcheon*, para 136.
21 Cf *Id*, paras 138-140.
22 36 Cr App Rep 10 (1952).
23 *McCutcheon*, para 140.
24 *Id.* (footnote reference omitted).
25 *Smith & Hogan* (1st ed), 453.
26 *Id.*
27 *McCutcheon*, para 142 (footnote references omitted).

CHAPTER 12: ROBBERY

12.1 A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.[1] A person guilty of robbery or of an assault with intent to rob, is liable on conviction on indictment to imprisonment for life.[2]

12.2 The requirement that the accused steal is of some importance. It means that, in the absence of larceny, there is no robbery, though the accused may of course be guilty of an aggravated larceny and, in some circumstances, attempted robbery. So if the goods are not capable of being stolen,[3] or if there be no completed taking,[4] or if the accused establishes a claim of right in respect of the taking, as opposed to the means of taking the goods,[5] he will not be guilty of robbery.

12.3 The requirement of the use of (or putting in fear of being subjected to) "force" replaces the former requirement of "violence". Professor Smith (speaking of an identically drafted English provision) observes that:

> "[t]he difference, if any, between the words is an elusive one, it is probable that 'force' is a slightly wider term. Thus it might be argued that simply to hold a person down is not violence but it certainly involves the use of force against the person. Force denotes any exercise of physical strength against another whereas violence seems to signify a

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1 Section 5 of the *Criminal Law (Jurisdiction) Act, 1976*, inserting a new section 23 into the *Larceny Act, 1916*. See *McCutcheon*, paras 91-97.

2 *Id.*

3 *Phipoe*, 2 Leach 673, 168 ER 438 (1795), *Edwards*, 6 C & P 518, 172 ER 1346 (1834).

4 Cf *Farrell*, 1 Leach 322n 168 ER 264 (1787).

5 *Skivington*, [1968] 1 QB 166.

dynamic exercise of strength as by striking a blow."[6]

In England, consistently with the present judicial reluctance to give conceptual depth to the language of the *Theft Act, 1968*, the parameters of "force" are deemed a matter for jury determination, based on their "common sense and knowledge of the world".[7] Whether Irish courts would favour the same approach is not clear.

12.4 Differing in an important respect from the former law, the present section requires that the use of (or seeking to put in fear of being subjected to) force must occur "immediately before or at the time of doing so", but not at any time thereafter. Thus, clearly an effective threat to use force in an hour's time if an intended victim does not hand over property will not be robbery (though it may well be blackmail). Whether one minute's delay would be immediate would presumably be a jury question.[8] There is no reason to believe that the notion of immediacy depends on the particular context in which the alleged robbery takes place. Threats by letter or telephone raise particular issues. Professor Smith contends that "... there can be no robbery or attempted robbery by letter or telephone, except in the most unlikely circumstances - for example, D telephones P that if P does not hand over certain property to E (D's innocent agent who has called at P's house) D will detonate an explosive charge under P's house".[9]

12.5 It is surely correct that a telephoned threat is capable (albeit in rare circumstances) of falling within the scope of the section; but what of a threat by letter, where the threat again promises harm to the recipient of the communication immediately after he has received the communication unless he hands over property to an innocent agent? No doubt the circumstances in which such a case could arise are considerably less likely than those of telephoned threats, but the issue of principle remains. On one view, such a written threat falls within the scope of the section. Although the letter was written at some time other than "immediately before or at the time of" the theft, it does not offend language to say that the letter-writer in inducing a handover of property has, immediately before the theft, put his victim in fear of being then and there subjected to force.

Similar considerations, perhaps, apply to the case of a thief whose letter does not in fact put the reader, on reading it, in fear of being then and there subjected to force. The notion that the thief, having sent the letter, continues to seek to put his intended victim in such fear seems not unreasonable.[10]

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6 *Smith*, para 143.

7 *Dawson and James*, 64 Cr App Rep 170, at 172 (1976). See also *Clouden*, [1987] Crim L Rev 56.

8 *McCutcheon*, para 95.

9 *Smith*, para 147.

10 It is worth considering whether a person who sent such a letter, and who thereafter forgot about it, or repented for having done so, *before* the victim read it should be considered to be seeking to put the victim in fear of being then and there subjected to force. The answer would seem to be that he should not. If this is so, then liability for sending such letters in cases of such subsequent forgetfulness or repentance would depend on the contingent element of whether the (originally intended) victim was or was not in fact put in such fear. The issue is one that is most unlikely to arise in practice, since it can only be in the most exceptional cases in which such a defendant could be guilty of larceny, which is a necessary element in the offence of robbery.

12.6 Where force is used *after* the time of stealing, it does not appear capable of transforming the theft retrospectively into robbery, even where the prosecution can show that the defendant had from the outset the intention of using force at that time. This raises the important question as to the duration of "the time of" stealing. English cases[11] under the equivalent provision in the *Theft Act, 1968* are unhelpful on this question, since theft is there defined as an "appropriation" of property, in contrast to the elements of taking and carrying away required by section 1(1) of the *Larceny Act, 1916*. On one view, since sufficient taking and carrying away for commission of the offence of larceny may involve movement of a momentary duration and almost infinitesimal proportions, the crime should be considered as being over at any time after this momentary period. Thus, the use of force any time thereafter should be regarded as subsequent to, rather than at the time of, the larceny. On another, and surely more convincing view, the exact relevant words of the statute may be considered to embrace the use or threat of force during the time when it may be said that the defendant is doing the act of stealing. Thus, a person who hauls a mailbag over a post office counter no doubt has already done sufficient to be judged guilty of larceny but it would be an abuse of ordinary language to say that he does not continue to engage in the act of larceny when he drags it from the counter towards the door. Where the cutoff point should be may be a proper subject of debate; but the point is that that debate is not foreclosed merely by showing that the force occurred at some point after the earliest at which the defendant could successfully be charged with larceny.

12.7 Under former law, the courts distinguished between force used against a person, which was considered an element in the offence of robbery, and force used primarily against the item intended to be stolen, which was not. In England, the current judicial view is that these distinctions should be subsumed under the question of fact, to be determined by the jury.[12] Whether this fully reflects the statutory langauge or the intentions of the Criminal Law Revision Committee[13] may be debated. In Ireland, the issue is still open.

12.8 The requirement of *mens rea* in the offence is not clear. Although the draft section proposed by the Criminal Law Revision Committee included the word "wilfully",[14] this was not included in section 8(1) of the *Theft Act, 1968*, nor in our 1976 Act. Commentators[15] are agreed that *mens rea* should be implied. Thus, *McCutcheon* suggests that:

> "where the accused uses force to take goods but is unaware that the force would be directed against a person it is not robbery. Equally, where the accused's conduct is such that it has put a person in fear it would have to be established that the accused intended, or possibly

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11 Cf, e.g., *Hale*, 68 Cr App Rep 415 (1978).
12 Cf *Clouden*, [1987] Crim L Rev 56, *McCutcheon*, para 92.
13 Cf the Eighth Report, para 65.
14 Section 7(1) of the draft Bill: *Id* p102.
15 *Smith*, para 148, *McCutcheon*, para 97.

foresaw, that his conduct would have this effect."[16]

12.9 The requirement in the section that the putting or seeking to put in fear be "in order to" steal almost certainly ensures that an unintended and unforeseen putting in fear does not fall within the scope of the offence. Even without these words, the general reluctance of courts to interpret penal legislation as excluding *mens rea* would probably have brought about the same interpretation.

12.10 It should be noted that the section does not reach a case where a person is put in fear that *someone else* will then and there be subjected to force. Such a case, however, may amount to blackmail in some cases.

16 *McCutcheon*, para 97.

PART II: PROPOSALS FOR REFORM OF THE SUBSTANTIVE LAW

CHAPTER 13: THE COMMISSIONS OBJECTIVES

13.1 In this Report, we will seek to achieve "a simplification and modernisation of the law" within the terms of s1 of the Law Reform Commission Act, 1975, such as was effected by the legislature following our Report on Malicious Damage.[1] The basic law of larceny and fraud is adequate for most prosecutions and we would wish, while retaining what is tried and tested at the moment, to build a modern structure on a secure foundation. We do not wish to recommend the introduction of fundamental changes or new concepts where this can be avoided. A different situation faced us when we reported on Receiving Stolen Property,[2] as the basic law, with particular regard to the state of mind which had to be proved, was inadequate for *any* receiving prosecution.

13.2 Our law of larceny and fraud today is the same as it was in pre-*Theft Act (1968)* England. The state of evolution of the law in England at that time is well described by *Smith* as follows:

> "In one way or another most varieties of dishonest appropriation of the property of another were brought within the ambit of the criminal law and, with one or two exceptions, the gaps through which the dishonest might slip were narrow and did not present a serious problem. But this was at the price of tolerating an immensely and unnecessarily complicated structure, full of difficult distinctions of a purely technical character and bristling with traps for the judges, magistrates, prosecutors and police who had to administer the law."[3]

13.3 The English Criminal Law Revision Committee (hereinafter the CLRC)

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1 LRC No. 26 (1988).
2 LRC No. 23 (1987).
3 JC Smith, *The Law of Theft* 5th Ed (1984), para 2.

in their 8th Report were "strongly of the opinion that the time has come for a new law of theft and related offences based on a fundamental reconsideration of the principles underlying this branch of the law ...".[4] They allowed that "there is room for difference of opinion on the desirability of preserving in whole or in part the basic concepts underlying some of the existing offences. In particular, two members would have preferred to keep the present definition of stealing (though not the multiplicity of separate offences of stealing) in a modified form and with additions in respect of cases of dishonesty for which it fails to provide".[5] We would be sympathetic to the approach of these two (unnamed) members.

13.4 As with our Reports on Receiving and Malicious Damage, our discussion of comparative law will be largely concerned with the law in England. The Model Penal Code of the American Law Institute has again been very instructive and the Commentary thereon an invaluable, lucid guide to good reform. The law in New Zealand, based on Sir James Stephen's Criminal Code and recently revised again in a new Bill,[6] and the most recent revision of the relevant law in Australia, for the Australian Capital Territory,[7] were found to be particularly instructive.

A Realistic Approach

13.5 At the time of writing, the *Larceny Act, 1990* is law. The Government did not implement all the Commission's recommendations on Receiving in the legislation. In our 11th Annual Report[8], we analyse the differences in approach in some detail. Essentially the Larceny Act reproduces the Theft Act formulation of the law, with certain variations in the *mens rea* requirement which bring the Act closer to the Commission's recommendations. The Theft Act definition of the *actus reus* of "handling" is reproduced. Among the reasons given to the Dail and Seanad for rejecting the Commission's preferred formula of "recklessness" as the appropriate *mens rea* for the offence, were (a) that recklessness was not in use for that purpose in any other country and (b) that the provision in the Bill drew on English legislation which had proved itself to be reasonably satisfactory over the course of 20 years of practical use. We do not believe that the fact that something has not been tried is a reason for not trying it and as it happens, the recent New Zealand Crimes Bill 1989 has adopted, in s197(1), a knowledge or recklessness formula for *mens rea*. Unlike the Theft Act, the Bill had the additional feature of defining "believing" as including "thinking that the property was probably stolen property".[9]

13.6 As we said in our Report on Receiving[10], subject to Constitutional and

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4 Criminal Law Revision Committee's 8th Report, para 7.
5 *Id.*
6 Crimes Bill, 1989.
7 The Australian Capital Territory Crimes (Amendment) Ordinance (No.4) of 1985.
8 LRC Eleventh Report (1989) Pl 7448, para 23.
9 Section 33(2)(b) of the 1916 Act as inserted by s3 of the 1990 Act.
10 LRC *op cit* para 106.

other considerations peculiar to this jurisdiction and to the laws being effective and reasonable, it is desirable, particularly in the context of extradition, that our laws correspond closely with the laws in Northern Ireland and England. However, we do not consider it unreasonable to learn from English experience. We would not recommend the introduction of laws which the CLRC and Parliament would, very probably, no longer recommend. One commentator, DW Elliott, as long ago as 1982, said that Parliamentary reform of the Theft Act "daily grows less unlikely because of difficulties about the meaning of appropriation".[11] For example, in para 108 of the Report on Receiving, the Commission recites *English* criticism of the drafting of s22, with particular reference to the unnecessarily large number of ways in which the offence could be committed. The original draft is, nonetheless, perpetuated in the *Larceny Act, 1990*.

13.7 History would suggest that the legislature is inclined to adopt the English model when reforming the criminal law. Indeed, we recommended doing so in the context of Malicious Damage. As much of the Theft Act has worked well, worse could be done but why not do better if we can, particularly in areas where the English themselves would introduce changes in the light of 20 years' experience?

Options for the General Approach

13.8 In the Discussion Paper, we canvassed several possible broad approaches which seemed to us worthy of consideration. These were:

(1) To make no change.

(2) To adopt the English Theft Acts of 1968 and 1978.

(3) To adopt the approach of the American Law Institute in the Model Penal Code.

(4) To adopt the approach in the New Zealand Crimes Bill 1989.

(5) To adopt the approach in the Australian Capital Territory.

13.9 While a range of options was available for each particular issue, the approach in the Australian Capital Territory was the general strategy which most appealed to us when we sent out our Discussion Paper. We will now re-examine these approaches in turn.

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11 DW Elliott, *Dishonesty in Theft: A Dispensable Concept* [1982] Crim L Rev 402.

CHAPTER 14: NO CHANGE

14.1 The first option is, of course, to do nothing. This has its attractions. Larceny and fraud are among the bread and butter offences in the criminal law. The law presents few problems in 90% of cases. Problems arise only when a case falls somewhere between larceny and receiving, between false pretences and obtaining credit by fraud, between larceny by a bailee and fraudulent conversion and in any instance of larceny by a trick. These problems can be solved with much thought while time elapses and justice is delayed. Time is also Garda-time, court-time, prosecution-time. Occassionally, the wrong charges are preferred.

14.2 Writing, in 1967, about the Report of the Criminal Law Revision Committee, Roy Stuart commented:

> "The Report speaks of the 'difficulty and complexity' of the present law and of its 'failure to deal with certain kinds of dishonesty which ought certainly to be punishable'. Few would dispute this diagnosis entirely. Parts of the present law are undoubtedly difficult and complex. There are some cases where dishonesty goes unpunished or where, if it has been punished, at the cost of augmenting the difficulties and complexities. The field is soggy with fictions; and there has been some resultant inconsistency both among different parts of the law, and between the criminal and civil law which share some of the key terminology. Yet the system is patently workable; the cases of dishonesty unpunished (on the law's account anyway) are few; and the difficulties and complexities of a sort to irk chiefly lawyers.
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> The definitional changes are not the only changes proposed; yet none of the changes proposed will, it seems to me, with the possible exception of those proposed in clause 12(8), make much difference to the actual administration of the law or to the number of those subject to it. To

> rope in a few finders whose acquisitiveness kindles slowly will hardly make any big change, except to the number of articles written by academic lawyers. I cannot believe that any new types of dishonesty will be made punishable which are both widespread and important; nor indeed that any public sense of injustice at the anomalies of the present law rankles."[1]

If the law can be simplified and modernised and time can be saved, why not do so?

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1 Stuart, *Law Reform and the Law of Theft*, 30 Modern L Rev 609, at 612-613 (1967).

CHAPTER 15: THE THEFT ACT APPROACH

15.1 The second option is to adopt the Theft Acts as they stand.

A. BACKGROUND TO THE THEFT ACTS

Origins

15.2 As *Kenny* points out,[1] the first comprehensive definition of theft for English law was given by Bracton who borrowed it, with some modification, from Roman Law. It is "*Contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino cuius res illa fuerit*" (The fraudulent handling of another man's thing, without his agreement and with the intention of stealing it). "The Latin word *fraudulenta* had a wide meaning in Roman Law and covered dishonest dealing of many subtle kinds involving deceit and trickery; but in the days when our common law crimes were first defined the economic relations of men were simple and the main need of society was for legal protection against crimes of physical force rather than against deceit".[2] "There can, we think, be little doubt that the 'taking and carrying away' upon which our later law insists had been from the first the very core of the English idea of theft".[3] The crime of theft or larceny began as a trespass *'vi et armis'* and the purpose was no more than to punish such dishonest dealing as took the violent and unmistakable form of a change of possession.

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1 Kenny's *Outline of the Criminal Law*, (19th ed by JW Turner, 1958), para 220.
2 *Id.*
3 *Id*, citing *Pollock and Maitland* ii, 498.

Consolidation

15.3 The *Larceny Acts of 1861* and *1916* were essentially consolidations of a law based on taking or trespass, on interference with possession. Because of this emphasis on trespass, various accretions were introduced to deal with what was essentially conversion or usurpation of ownership in cases where possession had been already obtained. Examples are larceny by a bailee, larceny by a trick, embezzlement and fraudulent conversion. We have examined these crimes, all part of the law in Ireland today, in the earlier part of this paper.

In essence, the *Theft Act, 1968* introduced a new definition of theft which replaced the former requirement of "taking" by one of appropriation, defined so that a person *in possession* could steal the property, and brought the former offences of larceny, embezzlement and fraudulent conversion together as one offence.

Problems Foreseen

15.4 Again, Stuart, writing about the draft Bill in 1967, showed prophetic perception and foresight:

> "There is evidently a case for starting again as the Committee recommends. But the case can be exaggerated. To say, as the Committee does, that the trouble is all basically due to theft being a violation of possession rather than of ownership is a little misleading. In the first place, this complaint has nothing to do with any objection to the concept of possession as such; it would have been quite possible to insist (although the Committee does not do so) that the thief must at some time possess the property dishonestly. In the second place, the connection between the defects in the law and the fact that theft is a form of trespass is often indirect: many of the difficulties are difficulties about the definition of accretions to the theft-trespass structure rather than difficulties generated directly by the structure itself. There is nothing in the Report to show that a reconsideration of the accretions rather than of the structure would not have been equally possible. Two members of the Committee were apparently inclined to prefer this approach, which is also the approach adopted in the Model Penal Code. And the danger of an over-simplified diagnosis is that the Committee's proposals may seem to acquire undue merit merely from not being based on a violation of possession."[4]

While Stuart welcomed much of the simplification achieved, he noted that, while most, if not all, of the changes could have been achieved without the radical redefinition of concepts, some of the redefinition undertaken could have been more fundamental; for instance, there was no reason why a dishonest appropriation of the rights of an owner (theft) should not include such an

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4 *Op cit*, at 815.

appropriation by way of acquiring ownership (obtaining by deception).

15.5 We agree, aided by hindsight. There are grounds for considering that appropriation was inadequately defined. We query whether the word "dishonesty" should have been used at all or used without being defined. We think it was a mistake to leave the interpretation of the legislation to the "ordinary" man in the street.

Maintaining Settled Law

15.6 When one "pitches" legislation at the Bench, that does not mean that one uses obscure language. It simply means that one uses terms whose meaning is well settled *in law*; terms that are tried and tested in Court, that are trouble-free and have pedigree. When one uses a new term, one defines it clearly and thoroughly, preferably by using 'old' terminology. Why waste all the time and effort taken in so many cases to settle certain concepts and terms only to discard them? We have no doubt, the CLRC and Parliament could have achieved their objective using tried and trusted words like "fraudulently" or "convert" or phrases like "a claim of right made in good faith". It is not difficult to explain these words to a jury. It happens every day.

Again, Stuart writes:

> "The Committee was asked to consider what alterations in the law were necessary to provide a "simpler and more effective" theft law. But no one would advocate complexity as such, nor ineffectiveness. The Report fails to define the aims of reform sharply enough: it is as if they were self-evident, which of course they are not. The American Law Institute's proposals, for example, are in some respects quite different. Nor is the subject one, apparently, to which factual evidence, except as to past judicial interpretation of the law, is relevant. Fundamental reconsideration, if any, was clearly confined to a small range of the possible issues."[5]

People in general are "wise" to what they can and cannot do with the property of others and the reforms we propose are not going to make them any more or less "wise".

B. NEW CONCEPTS

(i) Appropriation

15.7 The CLRC were "strongly of opinion"[6] that larceny, embezzlement and fraudulent conversion should be replaced by a single new offence of theft. They

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5 *Id*, at 613.

6 Eighth Report, para. 32.

said:

> "The important element of them all is undoubtedly the dishonest appropriation of another person's property - the treating of 'tuum' as 'meum'; and we think it not only logical, but right in principle, to make this the central element of the offence. In doing so the law would concentrate on what the accused dishonestly achieved or attempted to achieve and not on the means - taking or otherwise - which he used in order to do so."[7]

15.8 The Committee proposed a partial definition of "appropriates", designed primarily to indicate that this was "the familiar concept of conversion".[8] Clause 3(1) of their Draft Bill provided that:

> "Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."[9]

15.9 The implications of this new definition for the old offences are worth noting. The Committee explained that:

> "The idea of dishonest appropriation which underlies the new offence of theft corresponds ... to the idea in the words 'fraudulently converts to his own use or benefit, or the use or benefit or any other person' in the definition of fraudulent conversion under 1916 s20(1)(iv). The new offence will in fact consist of the present offence of fraudulent conversion without the requirement that the offender should, at the time of the conversion, be in possession of the property either in the circumstances mentioned in s20(1)(iv) or at all.
>
> With the removal of this requirement the offence will extend to ordinary stealing by taking property from another's possession. The effect will be as if fraudulent conversion were widened to include the whole of larceny and embezzlement; the new offence will indeed include conduct which may not be criminal under the present law such as the dishonest appropriation by a parent of things taken and brought home by a child under the age of criminal responsibility.[10]
>
> The expression 'dishonestly appropriates' in clause 1(1) means the same as 'fraudulently converts to his own use or benefit, or the use or benefit of any other person' in 1916 s20(1)(iv); but the former expression is shorter and we hope, clearer. There is an argument for keeping the

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7 *Id*, para. 34.

8 *Id*. Cf *Griew*, para 2-48, who argues that "the word 'conversion', though long used both in criminal law and in the law of tort, does not represent a single concept of settled meaning.

9 Section 3(1) of the *Theft Act, 1968* includes these words.

10 Citing *Walters v Lunt*, 35 Cr App Rep 94 (1951).

word 'converts' because it is well understood. But it is a lawyers' word, and those not used to legal language might naturally think that it meant changing something or exchanging property for other property. 'Appropriates' seems altogether a better word.

The offence will also cover cases of dishonest retention or disposal after an innocent acquisition .... This result is probably implicit in the concept of appropriation (or 'conversion'); but it is made explicit by the provision in clause 3(1) that a person's assumption of the rights of an owner 'includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner'. It seems natural to regard dishonestly keeping or dealing with the property as theft (as it is now in the case of bailees). This has the advantage that the cases referred to will be brought within the single concept of dishonest appropriation. If taking were to be kept as the basis of the offence, it would be necessary to create a separate offence of dishonest retention or disposal in order to deal with these cases."[11]

15.10 It seemed to the Committee natural to refer to the act of stealing in ordinary cases as "appropriation". It was not a new word to use in this connection. Rather was it based on Stephen's suggested definition of theft.[12]

"To steal is unlawfully, and with intent to defraud, by taking, by embezzlement, by obtaining by false pretences, or in any other manner whatever to appropriate to the use of any person any property whatever real or personal in possession or in action, so as to deprive any other person of the advantage of any beneficial interest at law or in equity, which he may have therein."

The concept of "appropriation" is uncertain in its scope. If "any assumption by a person of the rights of an owner" amounts to an "appropriation", the question as to when such assumption has occurred is of cardinal importance (not least to the defendant), though the requirement[13] that the dishonest appropriation be accompanied by the intention of permanently depriving the owner of the appropriated item might be said to mitigate some of the force of this criticism.

15.11 As regards the Committee's view that the concept of appropriation is the same as that of conversion, the tort of conversion is not an entirely happy precedent. The question of when an interference with another's property amounts to an assumption of the rights of owner can involve fine distinctions.[14]

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11 Eighth Report, paras 35-36. A special exception regarding appropriation after *bona fide* purchase, on discovery that the seller has no title (*id*, para 37) is not of present relevance.

12 Stephen, *General View of the Criminal Law*, 129 (1863) ed.

13 Cf The English *Theft Act, 1968*, section 1(1).

14 Cf *McMahon & Binchy*, 534-538. In fact, cases under the *Theft Act, 1968* have diverged from a strict identification of appropriation with conversion: cf *Grlew*, para 2-49, *Bonner*, [1970] 2 All ER 97. See also *Rogers v Arnott*, [1960] 2 QB 244, a decision dealing with a prosecution for larceny as a bailee under the former law: cf the proviso to section 1(1) of the *Larceny Act, 1916* ("fraudulently converts").

A legitimate issue for discussion can relate to whether, for example, defacing another's book (i) always (ii) never or (iii) sometimes amounts to appropriation. On one view it always should, since only an owner has the right to do what he likes with his property. On another view it never should, since such an act ought to be regarded as essentially hostile to, rather than assertive of, an owner's rights. Moreover, it might be considered better for this type of action to be dealt with separately from theft, as constituting the offence of criminal damage.[15] As regards the view that such defacing may sometimes amount to appropriation, it might be argued that where it consisted of the kinds of marks an owner would be expected to put on a book - underlining, for example, or marginal notes - it should amount to appropriation, whereas conduct essentially hostile to the right of ownership - tearing pages in two, pouring red ink over the text, for example - should be treated, not as theft, but as criminal damage. Whether this distinction could be meaningfully applied in practice may be debated.

Experience in Practice

15.12 It is useful in this context to enquire as to how the notion of appropriation has worked out in practice under England's *Theft Act, 1968*. The experience is less than fully satisfactory. Griew notes that.

> "the explanation of 'appropriates' provided by the statute has caused more puzzlement than enlightenment; and ... the cases, as they have accumulated, have repeatedly suggested that rationalisation and consistency do not have high priority as judicial objectives in this context."[16]

Another danger with the notion of appropriation is that it blurs the distinction between attempt and commission. Elliott says:

> "[I]t is strongly arguable that some of the offences go too far in the direction of incorporating conduct better left to the ancillary law of attempt. Under the *Theft Act, 1968*, dishonest appropriation of another's property is the essence of theft. In the *Model Penal Code* the basic mode of theft involves the 'exercise of unlawful control over' the property of another. What was sought by the draftsman in both cases were concepts of sufficient generality to avoid the need for a string of conduct verbs: 'Taking', 'retaining', 'disposing' and the like. The ultimate issue [is] whether the behaviour of the actor constituted a negation or usurpation of the owner's dominion. But loss of precision in the definition of the parent offence lends uncertainly to the already vague boundaries of the law of attempt. And especially so where the possibility of describing D's conduct as an act of appropriation or of exercise of control depends on the assessment of his intentions in

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15 As we have proposed in our *Report on Criminal Damage* (LRC 1988).

16 *Griew*, para 2-47.

acting."[17]

Elliott quotes from *Griew*[18] as follows:

> "Although an appropriation and an intention of depriving P are separate elements in the definition of theft ... it is clear that the very existence of the former will often depend upon the existence of the latter."

Consent

15.13 A central conceptual difficulty with appropriation concerns its relationship with the notion of consent. Is it possible to appropriate another's property dishonestly with his consent? The English courts have experienced considerable problems when attempting to answer this question.[19] Underlying the conceptual analysis is of course a troublesome policy issue: in what circumstances should a person who exercises control over another's property with the consent of that other be said to have appropriated it criminally where the consent either (a) has been given in ignorance of some fact which, if known, would have meant that the consent would have been refused, or (b) is implied by conduct and context rather than expressly articulated? Complicating the analysis further, it must be remembered that one cannot generally appropriate what is already one's own property. Thus, if one obtains and consumes a meal in a restaurant with the intention of paying but thereafter changes one's mind, one cannot be considered to have appropriated the food, and therefore cannot be guilty of theft.

15.14 In England, there is considerable debate as to the extent to which the notion of appropriation should have application to cases where the owner intends to transfer ownership to the other party, however fraudulent the other party may have been in inducing this transfer. The Criminal Law Revision Committee intended that their proposed offence of deception, but not theft, should embrace cases where the defendant acquired the entire proprietary interest in the property; but the Courts have interpreted the *Theft Act, 1968* differently.

The issue is far from academic: modern modes of consumer sale, especially in supermarkets, can give rise to difficult problems. The vendor is willing to allow prospective purchasers handle products, put them in trolleys, move them around the store and return them to the shelves or even abandon them elsewhere, provided they pay for the products before they leave the store. While some stores make it difficult to leave without having passed through the checkout, others are more casual. In some stores prospective purchasers may find it difficult to know where they are meant to pay for the goods, and may have to engage in extended search before finding a sales point with a sales assistant apparently ready to transact business on behalf of the store.

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17 Elliott, *Theft and Related Problems - England, Australia and the USA Compared*, 26 Int & Comp LQ 110, at 113-114 (1977).

18 2nd ed, 1974, para 2-25.

19 Contrast *Lawrence*, [1972] AC 626 with *Morris*, [1983] 3 All ER 288; and see *Smith*, paras 30-40.

The policy of some stores of assisting purchasers remove the goods they have brought to their car has tended to blur the moment at which the sale may be considered to have been finally consummated. Moreover, the liberal policy of some stores in accepting back goods purchased and in giving a cash refund (or exchange of goods) with no enquiry as to why the purchaser has changed his or her mind may have contributed to a feeling of lack of finality about sales transactions.

Some Cases: A. Irish Cases

15.15 In Morrissey,[20] an Irish case, a customer in a supermarket having been given meat at the meat counter, put it in his shoulder-bag and left the supermarket without presenting it and paying for it at the check-out. It was held by Gannon J following the English case of *Martin v Puttick*,[21] that, in the absence of evidence to the contrary, the only necessary inference from the giving of the meat to the defendant was that he was required to show the meat and pay the price before leaving and that he had accpeted it with this knowledge. It followed that, in the absence of evidence to the contrary, the only necessary inference was that upon his leaving the shop without his disclosing his possession of the meat and without paying for it, the defendant at the time of leaving, if not at the time of receiving the meat, had the intention of depriving the owner of it and that he had obtained it fraudulently and without the consent of the owner.

15.16 In Keating,[22] another Irish case, the respondent, with others took dresses and suits from the rails in a store, rolled them up, put them in a bag and having passed four check-out points without paying was making for the exit when approached by a security guard. He dropped the bag. It was held by Lynch J that where, on the evidence, the conduct of the accused shows a fraudulent intention which is not susceptible of a plausible explanation then the offence of larceny has been committed even before the accused leaves the shop premises.

B. English Cases

(a) The facts

15.17 In *Lawrence*,[23] an Italian newly arrived in London gave £1 to a taxi driver for a fare which in fact came to 10s3d. The taxi driver said £1 was not enough and without any objection from the Italian, took a further £6 from his wallet.

In *Morris*,[24] a person took goods from the shelf in a self-service store and substituted a label showing a lower price for the original label.

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20 [1982] ILRM 487.
21 [1989] ILRM 561.
22 [1968] 1 QB 82.
23 [1972] AC 626.
24 [1983] 3 All ER 288.

In *Kaur*,[25] a customer took a pair of shoes, each marked with a different price when she came upon them, to a supermarket cashier hoping to buy them at the lower price which she knew to be the wrong price.

In *Philippou*,[26] the appellant and his partner, the sole directors and shareholders of a company, drew money from the company to buy a block of flats in Spain which was put into a Spanish company of which they were also the sole directors and shareholders.

In *Dobson v General Accident Fire and Life Assurance Corp plc*[27] the plaintiff advertised a watch and ring for sale and agreed on the telephone to sell them to a person for an agreed price to be paid by means of a building society cheque. The person subsequently called, collected the watch and ring and gave in exchange a building society cheque for the agreed price which bounced. The Plaintiff claimed the value of the articles from the defendant insurance company on the basis that his policy covered theft.

In *Gomez*[28], the appellant who was the assistant manager of a store, in concert with a customer induced the manager to accept stolen cheques for goods, representing them to be as good as cash.

15.18 In considering the English cases is always important to remember that appropriation *simpliciter* is not theft. Only *dishonest* appropriation of property *belonging to another* is theft.

(b) The Decisions

15.19 In *Lawrence*, it was decided that the taxi driver was guilty both of theft and of obtaining by deception i.e. that there could be dishonest appropriation when the victim consented to part with the property.

15.20 In *Morris*, the Court of Appeal held that the very act of removing an article from a supermarket shelf, an act to which the owner consented, was an assumption of the rights of the owner and an appropriation. It was theft because of the dishonest intention of the remover. The House of Lords held that this was incorrect and that for a theft there had to be an act which was *unauthorised* e.g. like switching the price tags. It was also held to be irrelevant and no defence that property passed under a voidable contract. In *Lawrence*, it had been expressly decided that there could be appropriation with consent and that the old Larceny Act phrase "without the consent of the owner" was *not* to be read into s1(1) of the Theft Act. Was *Morris* overruling *Lawrence* on this point? No Law Lord in either case suggested that fraud or deception might vitiate consent.

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25 [1981] 2 All ER 430.
26 [1989] Crim L Rev 585.
27 [1989] 3 All ER 927.
28 [1991] 4 All ER 394.

15.21 *Kaur* was decided before *Lawrence* and the accused was acquitted by the Divisional Court. In that case the store had mixed up its own labels and the accused had knowingly taken advantage of the situation but had neither done anything illegal or unauthorised "off her own bat" nor engaged in any deception. Unfortunately, Lord Roskill in *Morris* said "he was disposed to agree that" *Kaur* had been wrongly decided, presumably on the basis that the knowing presentation of wrongly labelled goods constituted theft. Lord Lane in *Morris* also repented his judgment in *Kaur*. Glanville Williams writes- "Lord Lane's own wise remark in *Kaur* that 'the court should be astute not to find theft where it would be straining the language' had ceased to seem convincing to him."[29]

15.22 The decisions in *Philippou* and *Dobson* represent a swing back to the *Lawrence* doctrine. In *Philippou*, it was held, rather doubtfully in the context of theft, that the directors had appropriated from the company notwithstanding the fact that no absence of consent could be proved. The Court of Appeal followed *Lawrence* and said it was "obvious" that the House of Lords in *Morris* was not inserting into the definition of theft the words "without the consent of the owner".

15.23 *Dobson*, a decision of the Civil Division of the Court of Appeal, reconciles *Lawrence* and *Morris* as best it can. The Court held (1) that the property in the watch and ring was not intended to pass before a valid building society cheque was given to the plaintiff. The time of delivery was also the time of the appropriation and accordingly, the watch and ring were the property of another (the plaintiff) at the time they were appropriated. (2) For the purposes of s1(1) of the 1968 Act appropriation could occur even if the owner consented to the property being taken. It was irrelevant (*Morris*) that the property might have passed with a voidable title. There was a plain interference with or usurpation of the plaintiff's rights. It made no difference that an offence under s15 was also committed. Lord Justice Bingham decided "Just as it is enough to satisfy s15 that the goods belong to the victim up to the time of obtaining, so it is enough for the plaintiff that the watch and ring belonged to him up to the time of appropriation."

15.24 One might have hoped that the Dobson and Philippon decisions were the start of a more comprehensible trend but the Court of Appeal in *Gomez* decided they could not follow the lead of their colleagues on the Civil Court in Dobson. They felt constrained, not without communicating a sense of discomfort, to apply the Morris decision and quashed the appellants conviction for theft, remarking that he should have been charged with obtaining by deception. As *Griew* says - "The law is in truth in an appalling condition because of the incoherence of the cases".[30]

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29 Glanville Williams, *Textbook of Criminal Law* (2nd Ed) 819.

30 *Griew*, p53.

The Struggle for Reconciliation

15.25 Against a changing economic background, the courts have been struggling to adapt concepts (such as taking, appropriation, the passing of property and express and implied consent) so as to ensure that the conduct of dishonest persons in stores falls within the scope of the law of theft and related offences. At times the judicial resolution of the problem has been less than fully convincing. Inevitably the question of the *mens rea* of the accused has been allowed to seep into the analysis of the *actus reus*. Thus, for example, in *Morris*[31] where the question was whether switching a cheaper label for the label attached constituted theft of the dearer product, Lord Roskill observed that, while such unauthorised switching may be an appropriation, it is not always such:

> "[I]f a shopper with some perverted sense of humour, intending only to create confusion and nothing more, both for the supermarket and for other shoppers, switches labels, I do not think that the act of label-switching alone is without more an appropriation, though it is not difficult to envisage some cases of dishonest label-switching which could be."

15.26 On one view, it may be argued that it is better to treat all dishonest conduct occurring before the conventional "moment of sale" - at the checkout in most grocery stores - as constituting a crime of attempt rather than the completed crime of theft. An advantage of this approach is that it gives effect to the policy of the store in allowing, if not a *locus poenitentiae*, at least an opportunity to change one's mind before committing oneself finally to purchase any product. Moreover, in ordinary parlance, some might find it unconvincing to say of a label-switcher or a person who has put a product in his own bag rather than that supplied by the supermarket that he has already stolen the item. We would not agree. Whatever about the reasoning, we think the ultimate decisions in *Lawrence, Morris, Kaur and Dobson* and in the Irish cases of *Morrissey* and *Keating* were correct and that, once appropriation is defined so as to include obtaining by fraud, it will be clear when an unlawful appropriation has taken place, however effected.

15.27 Professor Smith would not agree. In the comment on *Philippou* he says:

> "*Morris*, whatever its flaws, did seem to offer an escape from the old weary round of cases adopting whatever meaning of theft would lead to the conviction of the particular dishonest defendant before the court, with obviously disastrous effects on the consistency and clarity of the law. The criminal law has suffered from this approach for at least 150 years. It was the primary reason why the law of larceny in 1968 was in such a mess and it continued after the Theft Act. *Meech*,[32] *Skipp*[33]

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31 [1983] 3 All ER at 293. Cf *Smith*, para 34.
32 [1973] 3 All ER 939.
33 [1975] Crim L Rev 114.

and *Hircock*[34] were all cases where the *Morris* interpretation was necessary to uphold a conviction. *Lawrence*, or so it was thought, required the opposite interpretation in order to convict. The present case suggests we may be falling back into the bad old ways. If it goes higher, *please*, House of Lords, stick to principle and do not pretend that the irreconcilable can be reconciled."[35]

(ii) Dishonesty

15.28 The Theft Act substituted a test of "dishonesty" for the Larceny Act requirement that the act must have been done "fraudulently", "without a claim of right made in good faith". This was done on the recommendation of the CLRC who wanted to substitute a familiar concept, a word easy to understand, for lawyers' words like "fraudulently". Dishonesty in not explicitly defined but a list of instances of "honesty" is given instead.

15.29 "2. "*Dishonestly*"

(1) A person's appropriation of property belonging to another is not to be regarded as dishonest -

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property."

As a result of this use of ordinary language undefined, there has been as Elliott[36] says a "string" of appellate decisions on the meaning of dishonesty since 1968. The judges, "unable to leave the subject alone" had made "a rod for their own backs".[37]

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34 [1979] Crim L Rev 184.
35 [1989] Crim L Rev 588.
36 Elliott, *Dishonesty in Theft: A Dispensable Concept*, [1982] Crim LR 395.
37 *Id.*

The Standard to be Applied

15.30 The judges started by treating the concept as one of law to be interpreted by the Court but by 1973, in *Feely*[38] it was decided that "jurors when deciding whether an appropriation was dishonest... should apply the current standards of ordinary decent folk".[39]

Out of this doctrine began to grow "an unwelcome excrescence"[40] i.e. that the defendant's own judgment of the honesty of his conduct was the operative one. Finally, in *Ghosh*,[41] it was decided that for a finding of dishonesty there should be affirmative answers to two questions:

(1) Was what was done dishonest according to the ordinary standards of reasonable and honest people?

(2) Must the accused have realised that what he was doing was dishonest according to those standards?

Both *Feely* and *Ghosh* assume that ordinary decent people will readily agree on standards.

Do the ordinary standards of decent people include making allowances for the subjective perceptions of the accused? Is this not a decent quality? After *Ghosh*, the accused can no longer set his own standards but the test is still subjective in that it depends on what the *accused* perceived ordinary standards to be. The test does not depend on any perception of what is in fact *lawful*.

Salvo

15.31 This subjective and 'amateur' approach to dishonesty sustained a withering attack from the majority of the Supreme Court in Victoria in *Salvo*.[42] The judgment preceded that in *Ghosh* and the fire was directed, in particular, at the *Feely* judgement. Much of the judgement of Fulager J in that case is peculiarly relevant, salutary and instructive to anyone contemplating reform of the Larceny Act. The Victorian legislation had reproduced the Theft Act provisions with few variations and it was intended, as we would intend to recommend, that a number of old common law offences, including larceny should be replaced by a new and short code. Fulager J in *Salvo* agrees with a comment on the new Victorian code which says that "its deceptively simple language conceals a host of difficulties"[43] and says "this commonly occurs when it is attempted to deal with coherent common law principles of substantial complexity by substituting a very compendious code. It was said in England that the legislation there, by the Theft Act, 'intended to sweep away all the learning which over the centuries had

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38 [1973] Q.B. 530.
39 *Id* at p537.
40 Elliott *op cit*, at 397.
41 [1982] QB 1053.
42 [1980] VR 401.
43 Editorial Comment in (1974) 9 MULR at p498.

gathered round the common law concept of larceny,' but I cannot myself accept that either it or the Victorian legislature had so pointlessly destructive an intention".[44]

The CLRC recommendation to replace "fraudulently and without a claim of right made in good faith" with "dishonesty" on the basis that "dishonesty is something which laymen can easily recognise when they see it" is identified by Fulager J as the "*fons et origo malorum*".[45] He quotes Blackstone with approval when he warned against the notion that a judge in a court of law should decide each case in the way that *he* thinks morally right or just, without founding his decisions on known legal principles: " The liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law and leave the decision of every question entirely in the breast of the judge. And law without equity though hard and disagreeable is much more desirable for the public good than equity without law which would make every judge a legislator and introduce most infinite confusion."[46]

15.32 We agree. To by-pass the judge and leave the definition of fundamental legal concepts to the jury would be an unwarranted exercise in misguided populism. There must be as many different potential definitions of dishonesty as there are differences in age, social status, nationality, moral outlook and nature. Various such as "being at variance with straightforward or honourable dealing", "incurring moral obloquy" or the familiar, "without claim of right" usually arise in discussion. There is no guarantee either that judges will agree on a definition. The law must be clearly defined for the judges who will in turn, define it for juries. *Griew* sums up the practical objections to the post-Theft Act evolution of the law in England as follows:

> "*Feely* and *Ghosh*, ... provide two bases upon which it may be worth a defendant's while to take his chance with a jury. he may advance a 'state of mind' which would before *Feely* have offered no defence at all. Or he may claim not to have realised that others would condemn his actions. Such claims must multiply and lengthen trials; and it must be in the interests of some defendants to introduce as much evidence as possible on the dishonesty issue in order to obfuscate it. The consequences in terms of expense and of increased difficulty for the jury, not to speak of the danger of unsatisfactory outcomes, are surely enough in themselves to raise serious doubts about the present state of the law."[47]

15.33 As Fulager J says, "it is contrary to the most fundamental tenets and traditions of the common law and of the English judicial system itself that the judges of the courts of law should set themselves up or allow themselves to be

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44 *Salvo* at p424.
45 *Id*, at p429.
46 Blackstone's *Commentaries*, Book 1, p62.
47 *Griew*, para 2.112, footnote references omitted.

set up as the judges of morals or of moral standards. The public respect for the Courts, upon which the Courts' authority and existence ultimately depend is held *because* they decide cases according to known legal principles. It is equally important that the principles applied be legal principles and known principles. Feelings and intuitions as to what constitutes dishonesty and even as to what dishonesty means must vary greatly from jury to jury and from judge to judge and from magistrate to magistrate".[48]

15.34 Most commentators agree that it was a mistake to introduce dishonesty undefined, and consign it to the jury for definition. All are agreed that the essential ingredient to be maintained is that contained in the Larceny Act, namely the requirement that the act be "without a claim of right made in good faith". It is also agreed that "fraudulently" in the Larceny Act added nothing to the basic definition not covered by the former phrase. Indeed to quote from the title of DW Elliott's article on the topic, dishonesty is a "dispensable concept",[49] once one has in place a claim of right provision. We provisionally recommended the preservation of the claim of legal right test in the Discussion Paper.

The Elliott Formula

15.35 However, commentators also suggest that a simple claim of right provision on its own needs to be alleviated in case it is too "hard and disagreeable" to use Blackstone's words.

Elliott suggests that having dropped "dishonesty" and provided for a claim of right, the following formula should be used:

> "No appropriation of property belonging to another which is not detrimental to the interests of the other in a significant practical way shall amount to theft of the property."[50]

Thus short-term borrowings of money where there is *no doubt* the money will be replaced by other money before the money is missed would not be captured. Only actions causing practical detriment or significant risk to proprietary interest would be captured.

The judge should advise the jury both what amounts to a claim of right and to significant detriment. It would be inadvisable to leave the definition of these concepts to a jury.

There may be a fear that leaving the concept of significant detriment at large may afford too tempting an avenue of 'escape' to a court or even to a jury properly charged looking for a 'way out' in an awkward case. In a perfect world, this concept would come to be defined as the lowest form of minor offence. We are

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48 *R v Salvo supra* at 430.
49 [1982] Crim L Rev 395.
50 *Id* at 410.

surviving without it and with prosecutorial discretion at the moment.

In our Discussion Paper, we provisionally recommended the adoption of the Elliott formula.

Consultation

15.36 Consultation revealed significant opposition to this option. After further reflection we have concluded that it would not be advisable to adopt it. Two difficulties in particular may be noted. First the concept of significant detriment is so lacking in specificity as to give rise to doubts about its constitutionality. "Significance" is a most uncertain measure. It is, moreover, *contextual*: what is significant for a poor victim may have no significance for a rich one. Secondly, there would appear to be dangers in defining an offence so strikingly in terms of the contingent effects of the accused's conduct. Troublesome questions of *mens rea* would have to be confronted in relation to cases where the accused had no reason to know that the appropriation would be detrimental to the interests of the victim in a significant practical way. Accordingly we do not propose that this limitation be incorporated into the legislation.

15.37 Our proposal that dishonesty be defined in terms of the absence of a claim of legal right received general support, but some criticism. It was suggested that the parameters of dishonesty are not identical with those of a claim of legal right: not every act done without such a claim is *necessarily* dishonest, nor, it might also be observed, does the presence of such a claim inevitably render the act an honest one.

15.38 We accept that dishonesty and the absence of a claim of legal right are not identical, but we nonetheless continue to see merit in the definitional strategy which we proposed. In any prosecution for theft, the jury will necessarily address, in its deliberations, the question of the relevance of dishonesty to the guilt of the accused. Under present law, they must convict the accused if he had not a claim of legal right, regardless of the question of his honesty or dishonesty. This is the effect of judicial interpretation of the "fraudulently", in section 1 of the *Larceny Act, 1916*. Under our proposal, the legislative provision will confront the question in direct language, and make it clear to the jury that it is not permissible to acquit the accused where it is satisfied beyond reasonable doubt that he appropriated the property without a claim of legal right.

15.39 *Accordingly, we recommend that dishonesty should be defined in terms of the absence of a claim of legal right.*

CHAPTER 16: THE LAW IN NEW ZEALAND

16.1 In New Zealand, Sir James Stephen's Draft Code is at present embodied in the *Crimes Act, 1961.* In a letter to the Criminal Law Review in 1982, Frank X Quin, Legal Adviser to the New Zealand Police, pointed out that, although the law of theft in New Zealand was far from perfect, the fact that it concentrated on proprietary interests and maintained integrity by recognising and applying the civil law of property placed the law on a "reasonably clear and workable footing" and that any new law of theft in New Zealand ought not to be "a slavish adherence to the English lead" in the light of experience of the *Theft Act, 1968.*[1] As set out by Quin, the following were the fundamental reforms achieved by Stephen -

(1) An extension of liability for "common theft" beyond a trespassory taking so as to include a conversion of a thing innocently acquired. By s220 (1) of the Crimes Act, 1961, "theft or stealing is the act of fraudulently ... taking, or fraudulently ... converting to the use of any person ... anything capable of being stolen" with the requisite intent.

(2) An exclusion from the definition of theft of the common law's larceny by a trick. Thus s220 (2) provides that "... the term 'taking' does not include obtaining property in or possession of anything with the consent of the person from whom it was obtained, although that consent may have been induced by a false pretence; but a subsequent conversion of anything of which *possession only* is so obtained may be theft." (Emphasis added).

(3) An extension of the crime of obtaining by false pretences to embrace

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1 [1982] Crim L Rev 388.

conduct hitherto dealt with as larceny by a trick. Thus by s246 (2) of the Act, obtaining by false pretences is committed by the person who, with intent to defraud, "obtains possession of or title to anything capable of being stolen..." etc.

16.2 So, apart from larceny by a trick, all larceny and embezzlement become fraudulent conversion and obtaining by false pretences "takes over" larceny by a trick.

16.3 Stephen advocated the abolition of the distinction between larceny, embezzlement and obtaining by false pretences:

> "The technicalities on this subject appear to me to be altogether superfluous and I think they might be easily dispensed with by re-defining the offence of theft, or even by removing the distinction between theft, embezzlement and false pretences."[2]

As Quin says:

> "One suspects however that he tempered reformatory zeal with a pragmatic perception of an ingrained resistance to change, and strove to achieve a workable compromise."[3]

Theft

16.4 In the *Crimes Bill 1989* recently introduced in New Zealand, we now find the following definition of theft itself.

> "*Theft or stealing* - (1) Theft or stealing is the act of -
>
> (a) Dishonestly taking any property; or
>
> (b) Dishonestly assuming any right of ownership of any property after obtaining possession or control of the property in whatever manner, -
>
> with intent to deprive any owner permanently of that property or being reckless whether or not the act deprives any owner permanently of the property.
>
> (2) In this section the term "taking" does not include obtaining property in, or possession or control of, any thing with the consent of the person from whom it is obtained through a false pretence.
>
> (3) Where theft is committed by a taking, the offence is committed

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2 Stephen, *A Digest of the Criminal Law* 6th Ed, Note XI, p432.
3 Quin, *op cit*, at 389.

when the offender moves the property or causes it to be moved.

Theft by failure to account - (1) Every person commits theft who, having received or been put in possession of any property on terms or in circumstances that the person knows require him or her to account to any other person for the property or for the whole or any part of the proceeds arising from the property, -

(a) Dishonestly assumes any right of ownership of the property; or

(b) Dishonestly fails to account to that other person as so required.

(2) This section applies whether or not the person was required to deliver over *in specie* the property received or put into his or her possession.

(3) It is a question of law whether the circumstances were such as to require the person to account to any other person for the property received or put into his or her possession or for the whole or any part of the proceeds arising from the property."

16.5 Property, ownership and dishonesty are defined. Section 176 defines "property" as including "all things, animate or inanimate, in which any person has any interest or over which any person has any claim; and also includes money and things in action."

16.6 As regards matters of ownership, section 177 provides as follows:

"(1) For the purposes of this Part of this Act, a person is to be regarded as the owner of any property that is stolen if, at the time of the theft, that person has -

(a) Possession or control of the property; or

(b) Any interest in the property; or

(c) The right to take possession or control of the property.

(2) An owner of any property may be guilty of theft against another owner of that property.

(3) A person may be guilty of theft against his or her spouse even though they are living together."

16.7 Section 178 addresses the meaning of dishonesty as follows:

"For the purposes of this Part of this Act, a person dishonestly does any act or dishonestly omits to do any act in each of the following circumstances:

(a) In respect of any act or omission requiring the authority of any other person and for which that authority has not in fact been given, where he or she -

(i) Knows that no such authority has been given; or

(ii) Does not believe that any such authority has been given, -

(b) In respect of any act or omission requiring the authority of any person and for which that authority has in fact been given, where he or she knows or suspects that the authority has been obtained through any deception:

(c) In respect of any act or omission, or the continuation of any state of affairs, requiring the authority of any other person to whom he or she owes a fiduciary duty and for which that authority has in fact been given, where he or she has, in breach of that duty, knowingly or recklessly failed to disclose to that other person any material particular that might have caused that other person to refuse to give or to revoke that authority:

(d) In respect of any representation or statement that is false in any material particular, whether made orally or in writing, where he or she -

(i) Knows the statement or representation is false in that material particular; or

(ii) Does not believe the statement or representation is true in that material particular; or

(iii) Is reckless as to whether the statement or representation is true or false in that material particular."

An Improvement?

16.8 What has the Bill achieved? In the explanatory notes, it is acknowledged that the change from "fraudulently" to "dishonesty", fully defined, is "not significant in that the New Zealand courts tend to use the words

interchangeably".[4] The new definition seeks to disallow a defence based on a subjective view of what is right or wrong, a commendable objective which the claim of right provision in the Larceny Act continues effectively to achieve while affording an "escape" in proper cases. Other amendments seek to simplify the present law. It is to be noted that in s179, the essence of theft is a dishonest taking or keeping of property intending to deprive the owner permanently of it *or being reckless* whether or not he is so deprived.

16.9 S180 seems unnecessarily to preserve an embezzlement/fraudulent conversion offence.

16.10 It is to be noted also that obtaining by fraud has to be specifically excluded from theft, a definition under which it naturally falls.

Fraud

16.11 The fraud offence is:

> "*Obtaining by false pretence* - (1) Every person is guilty of obtaining by false pretence who, by any false pretence, -
>
> (a) Obtains any property, or any privilege, benefit, service, pecuniary advantage, or valuable consideration, directly or indirectly for himself or herself or for any other person; or
>
> (b) In incurring any debt or liability, obtains credit; or
>
> (c) Induces any other person to deliver over, execute, make, accept, endorse, or alter any document or thing capable of being used to derive a pecuniary advantage.
>
> (2) In this section "false pretence" means any words or conduct intended to deceive any person or in respect of which the person using the words or engaging in the conduct is reckless whether the words or conduct deceive any person or not."

It is to be noted that,

(a) The words "false pretence" are retained;

(b) The obtaining of property, services, pecuniary advantage or anything else advantageous is rolled into one paragraph;

(c) The old form of obtaining credit by fraud is found in s192(1)(b).

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4 Explanatory notes on *Crimes Bill 1990*, pXXII citing *R v Cambridge* [1976] 2 NZLR 381; *R v Williams* [1985] 1 NZLR 294.

CHAPTER 17: THE AUSTRALIAN APPROACH

17.1 *Australian Capital Territory Crimes (Amendment) Ordinance (No. 4) of 1985*, hereinafter referred to as "the Ordinance", was part of the ongoing review of the criminal laws of the Territory and contains a comprehensive review of all the property related offences in the *Crimes Act, 1900* (NSW) in its application to the Australian Capital Territory (*Crimes Act, 1900*).

17.2 The Explanatory Statement which accompanied the ordinance said that its purpose was:

> "to simplify the laws relating to larceny and associated offences enabling the Courts to focus attention on the basic question of honesty or dishonesty instead of on technical questions such as a precise legal analysis of the manner in which property came into the hands of the accused. It is designed to reflect the commercial realities of the 20th century."[1]

17.3 While the Ordinance is based on the English Theft Acts and the *Victorian Crimes (Theft) Act of 1973*, based in its turn on the English legislation, it made certain "departures" from that legislation. It took account of recent decisions, in particular the decision in *Lawrence* adapted in Australia by Gobbo J in *Heddick v Dike*.[2] As a result, the offences of theft and obtaining by deception are merged in the definition of appropriation found in s96(1):

> "(1) For the purposes of this Part, a person shall be taken to have appropriated property if:

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1 ACT Ordinance, Explanatory Statement (No.44 of 1985) p1.
2 (1981) 3 A Crim R 139.

(a) he or she obtains by deception the ownership, possession or control of the property for herself or himself or for any other person; or

(b) he or she adversely interferes with or usurps any of the rights of an owner of the property."

17.4 Stealing is defined in s94:

"For the purposes of this Part, a person shall be taken to steal if he or she dishonestly appropriates property belonging to another person with the intention of permanently depriving that other person of that property."

The Explanatory Statement says that "as simplification is one of the aims of the reforms it is not considered desirable to have two overlapping offences".[3]

The use of "adversely interfere" and "usurps" in 96(1)(b) rather than "assumption", used in the Theft Act is to be noted. The legislators obviously did not confine their research to the *Lawrence* decision.

17.5 We were rather surprised to note that the Australian Capital Territory Ordinance maintained the Theft Act approach to dishonesty. Section 96 provides in part:

"(3) For the purposes of this Part, a person may be taken to dishonestly appropriate property belonging to another person notwithstanding that the first-mentioned person is willing to pay for the property.

(4) For the purposes of this Part, the appropriation by a person of property belonging to another person shall not be regarded as dishonest if:

(a) he or she appropriates the property in the belief that he or she has a lawful right to deprive the other person of the property on behalf of himself or herself or of a third person;

(b) he or she appropriates the property in the belief that the appropriation will not thereby cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property;

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3 *Op cit* p3.

(c) he or she appropriates the property in the belief that the other person would consent to the appropriation if the other person knew of it and of the circumstances in which it was done; or

(d) in the case of property other than property held by the person as trustee or personal representative - he or she appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(5) Where a person acting in good faith believes himself or herself to be acquiring a right or interest in property that is or purports to be transferred for value to him or her, no later adverse interference with or usurpation of the rights in the property by the person shall, by reason of any defect in the title of the transferor, be taken to be a dishonest appropriation of the property."

We note the *Elliott*-type formula in section 96(4)(b).

17.6 The Ordinance adopts the concept of "community standard":

> "In this Ordinance, the word "dishonestly" connotes a community standard consciously understood and consciously departed from. It is used in a special sense and hence a judge must direct the jury as to what it must find before it is satisfied as to the accused's dishonesty on the particular circumstances of the case. If the accused's conduct did not amount to dishonesty by community standards then he is entitled to be acquitted. The accused's belief as to dishonesty only becomes relevant if by community standards his conduct could be regarded as dishonesty.
>
> Finally, if the belief of the accused is in issue the Crown must negative the exculpatory belief on the criminal standard of proof "beyond reasonable doubt".[4]

Salvo cannot have passed unknown over the legislators' heads. They must have preferred not to follow it.

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4 ACT Ordinance, Explanatory Statement *op cit* p8.

CHAPTER 18: LARCENY AS EXERCISING UNLAWFUL CONTROL OVER PROPERTY (THE MODEL PENAL CODE)

18.1 We now must consider whether the notion of "unlawful" control would be preferable to "unlawful appropriation". This approach is favoured by the American Law Institute. Section 223.2 of the *Model Penal Code* provides in part that a person is guilty of theft if he "unlawfully takes, or exercises unlawful control over", movable property of another "with purpose to deprive him thereof". A comment supporting section 223.2 explains:

> "This description of the behaviour constituting theft of the larceny-embezzlement type replaces the common-law larceny requirements of 'caption' and 'asportation'. 'Caption', or taking occurred when the actor secured dominion over the property of another; an 'asportation', or carrying away of the other's property. Also replaced by the Model Code formulation are the many terms added by legislation - e.g., 'steal', 'take', 'remove', 'carry away', 'receive', 'secrete', 'conceal', 'withhold', 'retain' 'fail or refuse to pay', 'appropriate',[1] 'convert', 'embezzle', 'misapply', 'sell', 'convey', 'transfer', 'dispose', 'pledge', 'use', 'purloin', and the like. Most of these terms do no more than illustrate various means of exercising unlawful control. Some of the terms, such as 'steal' and 'embezzle', do not define the acts necessary to constitute a crime but depend for their meaning upon reference to pre-existing law.
>
> The common-law larceny requirement of physical seizure and movement were satisfied by a slight change in position of the object of the theft. If the defendant's behaviour fell somewhat short of these requirements, as where a pickpocket grasped but had not yet moved the victim's purse, he was guilty of attempt only. Since larceny was generally a felony and

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1 This rejection of the concept finding favour in England's *Theft Act, 1968* is worth noting.

attempt a misdemeanour, important differences in procedure and punishment turned on the criminologically insignificant fact of slight movement of the object of the theft. Under section 5.01 of the Model Code, and in modern criminal law generally, differences in penal consequences between attempt and completed crime are minimized, so that it becomes less important where the line is drawn between them. It is clear, moreover, that similar penalties for the attempt and the completed offence make obsolete any reference to the concept of 'asportation'; the same penal consequences follow whether or not 'asportation' has occurred."[2]

18.2 The comment goes on to explain that the abandonment of the requirement of asportation:

> "does not eliminate the necessity of defining the point at which the offence of theft is completed. The words 'unlawfully takes' have been chosen to cover the assumption of physical possession or control without consent or authority, which, as noted, includes the typical common-law category of larceny. The language 'exercise unlawful control' applies at the moment the custodian of property begins to use it in a manner beyond his authority and this includes the typical embezzlement situation. The word 'unlawful' in each instance implies the lack of consent or authority and specifically the absence of any defence under section 2.11, section 223.1(3), or Article 3. These concepts accurately describe the kind of conduct that should be treated as theft, as well as the objectives which should support conviction for attempt. They are simple, which has importance in the context of jury trials, and they are flexible, which is important in their application to the diversity of situations that arise in a modern economy.
>
> Traditionally, larceny required a trespassory taking, whereas embezzlement involved a misappropriation by one in lawful possession. This distinction is no longer significant under the formulation in subsection (1). The typical charge under the Model Code provision should specify that the actor unlawfully took or exercised unlawful control over the property of another with the requisite purpose, thus making the method of exercising control relevant only to the extent that it sheds light on the authority of the actor to behave as he did. Apart from the requirement of a purpose to deprive another of his property, the critical inquiry is thus twofold: whether the actor had control of the property no matter how he got it, and whether the actor's acquisition or use of the property was authorized."[3]

18.3 Some may see considerable merit in the notion of exercising "unlawful control" over movable property. It may be considered a good deal more concrete

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2 *Model Penal Code and Commentaries*, p164.
3 *Id*, pp165-166.

in its connotations than the notion of "appropriation". As against this, it could perhaps be argued that this concreteness is more apparent than real. The fact that there can be cases where a defendant exercises *physical* control over such property may encourage the perception of the entire concept as being concrete rather than abstract. Yet once one moves from physical control, does the scope of the concept, perhaps, become uncertain.?

18.4 We think not. The concept of non-physical control presented us with no conceptual problem when we reported on Receiving Stolen Goods and we would not consider any overlap with the offence of handling a problem. We will include the concept of exercising control in our recommended definition of appropriation in due course.

CHAPTER 19: INTENTION PERMANENTLY TO DEPRIVE

19.1 We now must consider whether, as a general proposition, the offence of theft should require an intention permanently to deprive the owner of the property that has been taken or otherwise appropriated.[1] As we have seen, this is an element of the offence of larceny under present law.

19.2 One approach to reform would be to make, at least, the more serious cases of temporary deprivation constitute the offence of larceny or, perhaps, a separate offence with an identical or virtually identical penalty. As the English Criminal Law Revision Committee observed:

> "There is certainly a case for making temporary deprivation punishable in circumstances in which it may involve dishonesty comparable with that involved in theft and may cause serious loss or hardship. The taker gets the benefit of the property without payment, and the owner is correspondingly deprived. The property may be lost or damaged, or it may be useless to the owner by the time it is returned."[2]

19.3 The Committee did not accept this argument, however, being of the view that an intention to return the property, even after a long time, "makes the conduct essentially different from stealing".[3] We query this. In the more serious cases, the taker virtually treats the property as his own, the essence of theft.

19.4 The Committee went on to make a second objection to the proposed

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1 In England, the question whether temporary deprivation should be criminal 'attracted more attention than any other issue, both in and out of Parliament,' during the passage of the *Theft Act, 1968*: *Smith*, para 265.

2 Eighth Report, para 56. The Committee also noted the argument that if, as they proposed, the general offence of deception covered cases of temporary deprivation, theft should similarly do so.

3 Eighth Report, para 56. See also the strong case made by Williams, *Temporary Appropriation Should Be Theft*, [1981] Crim L Rev 129.

change, which in our view, again, lacks substantial force. They were concerned lest:

> "[q]uarrelling neighbours and families would be able to threaten one another with prosecution. Students and young people sharing accommodation who might be tempted to borrow one another's property in disregard of a prohibition by the owner would be in danger of acquiring a criminal record. Further, it would be difficult for the police to avoid being involved in wasteful and undesirable investigations into alleged offences which had no social importance. It would be difficult to see how the provision could be framed in a way which would satisfactorily exclude trivial cases and meet these objections."[4]

19.5 We are not greatly impressed by this argument, since many offences - *including larceny* - range from the trivial to the serious. In general the victims of trivial criminal conduct do not pursue the matter with the Gardai. In cases where they do, they are surely entitled to do so. Any idea that certain categories of relationship, such as families, students or young people sharing accommodation should not receive the full protection of the law must be rejected. So also must the view that, because of a perceived inappropriateness of an extended offence of larceny applying with full force to these relationships, the change should not on that account be made.

19.6 In the United States, the penal codes in a number of states include within the concept of intent to deprive "a withholding under such circumstances that the economic or utilitarian benefits of ownership are lost".[5] Thus, a person who borrows without authorisation property that has only a limited useful life may be guilty of theft:

> "Even if the thief intends to return such property at some future time, the owner may suffer substantial loss as the property depreciates while it is being withheld from him. Because the consequences to the owner may therefore be the same as if the property had been permanently appropriated these codes treat such a misappropriation as theft."[6]

19.7 Under England's *Theft Act, 1968* a similar notion may be discerned in section 6(1), which provides that a borrowing or lending of a thing may amount to treating it as one's own, and thus be deemed to fulfil the requisite intention of permanently depriving the owner of the thing,[7] "if, but only if the borrowing or lending of it is for a period and in circumstances making it equivalent to an outright taking or disposal". Although the drafting may not be the happiest, it

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4 *Eighth Report*, para 56.

5 TAH & JIR, Note: *Reforming the Law of Acquisitive Offences*, 59 Va L Rev 1326, at 1336 (1973).

6 *Id.* Article 223.0(1) of the *Model Penal Code* defines "deprive" as meaning "(a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it".

7 Cf *Smith*, para 133.

seems clear that this provision extends *[inter alia]* to borrowings "where the taker intends not to return the thing until the virtue is gone out of it. D takes P's dry battery, intending to return it to P when it is exhausted; or P's season ticket, intending to return it to P when the season is over".[8]

19.8 Professor Smith addresses the situation where the virtue has been *very nearly, but not entirely*, eliminated from the borrowed property:

> "D takes P's season ticket for Nottingham Forest's matches intending to return it to him in time for the last match of the season. Is this an 'outright taking so as to amount to theft of the ticket? If it is, is it theft if D intends to return the ticket in time for two matches? - or three, four, five or six - where should the time be drawn? The difficulty of drawing a line suggests that it should not be theft of the ticket unless D intends to keep it until it has lost *all* its virtue.[9]
>
> This means, of course, that if D takes P's car and keeps it for ten years, he will not be guilty of theft if, when, as he intended all along, he returns it to P, it is still a roadworthy vehicle, though the proportion of its original value which it retains is very small. If it can no longer be described as a car, but as scrap metal, then, if D intended to return it in this state, he has stolen it."[10]

The reference in section 6(1) to lending, in Smith's view, "appears to contemplate the situation where D is in possession or control of the property and he lends it to another. If D knows that .... when P gets the property back again, the virtue will have gone out of it, this is equivalent to an outright disposal".[11]

A Recklessness Test as to Permanent Deprivation

19.9 It may be difficult for the prosecution in some cases to show an intent permanently to deprive the owner of the property. The defendant may have behaved with supreme indifference with regard to the owner's interests. Would there therefore be merit in framing the *mens rea* requirement of theft in terms of recklessness as to whether or not the owner is permanently deprived of the property? The argument against this approach is that while anti-social conduct falling short of an intention permanently to deprive may well be worthy of criminal sanction, it ought not to be characterised as sufficient *mens rea* for the offence of theft, which historically has required an intent permanently to deprive. Perhaps this is a less strong objection than might first appear. As we have seen, it was not until the nineteenth century that this requirement was clearly

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8 *Id.*

9 Smith, para 135, fn 1, points out that the difficulty 'might satisfactorily be overcome in this case by holding that the right to see each match is a separate thing in action, of which P is permanently deprived once that match is over' (citing *Chan Wai Lam v R*, [1981] Crim L R 497). Of course, this solution would not be available for many other cases of very considerable, but not complete, exhaustion of the borrowed thing's virtue. If a season ticket covered Cup matches, much virtue could ebb from it at an early stage!

10 *Smith*, para 135.

11 *Id*, para 136.

articulated by the courts. We are satisfied that the *mens rea* for the intent to deprive could be extended to accommodate recklessness.

19.10 Section 179, the theft or stealing offence in the New Zealand Crimes Bill, incorporates the intent permanently to deprive and provides, in addition, for "being reckless whether or not the act deprives any owner permanently of the property".

Mens Rea Test expressed in Negative Terms

19.11 Another approach would express the *mens rea* test on this issue in negative terms: the defendant who had taken property without the consent of the owner would be liable if he had a "lack of purpose to return the property with reasonable promptitude and in substantially unimpaired condition".[12] Under this approach the onus would be on the defendant to establish the existence of such a purpose.[13] Whether this would be just to the defendant is a matter for consideration. Furthermore, it has been suggested that if this formulation were actually applied:

> "a jury might well infer the requisite specific intent to deprive the owner of the property where the actor had only been negligent in caring for property in his possession or in failing to return it promptly."[14]

Penalising Specific Instances of Temporary Deprivation

19.12 We must now consider whether the better approach would be for the law to penalise temporary deprivation of a specific, defined number of types. As we have seen our law already provides that the temporary taking of a motor vehicle is an offence. In England section 12 of the *Theft Act, 1968* introduced a broader offence, applying to the taking of "any conveyance" (save a pedal cycle)[15] for the use of the defendant or of another. Thus the taking of yachts, boats and aircraft falls within its scope. The CLRC, which proposed this extension, noted that tampering with yachts and boats was:

> "common in some places, and in several recent instances valuable yachts have been taken out to sea, sometimes by unskilled young people who have risked losing their lives as well as the yacht."[16]

19.13 The Committee were of opinion that:

> "it would be salutary to bring the taking of conveyances in general within

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12 Proposed Michigan Revised Criminal Code, s3205, Comment at 226 (Final Draft, 1967), cited by TAH & JIR, *Note: Reforming the Law of Acquisitive Offences*, 59 Va L Rev 1326, at 1337 (1973).

13 If under this formulation doubts arise as to whether an onus shift is involved, the problem could of course be resolved by a clearer draft.

14 TAH & JIR, *op cit*, at 1337.

15 The taking of pedal cycles is made a summary offence by section 12(5).

16 Eighth Report, para 83.

the criminal law. In the case of conveyances other than pedal cycles we see no reason why the existing offence of taking and driving away a motor vehicle should not be applied (with the necessary adaptation of the notion of driving away) or why the maximum penalties should be different. Although there is no practical problem at present with aircraft, there might be one in future; in any event there seems no need to exclude aircraft from the offence."[17]

Theft from Galleries etc.

19.14 An example of temporary deprivation which led to the building of a complex legal edifice concerned the taking of articles kept in churches, art galleries, museums and other places open to the public.[18] In England, after a series of such takings, in particular that of Goya's portrait of the Duke of Wellington from the National Gallery, the Criminal Law Revision Committee came to the conclusion that the situation was serious enough to warrant the creation of a special offence.[19]

19.15 The Committee analysed the issue as follows:

> "Churches, art galleries, museums and other places open to the public may contain articles of the greatest importance and value, many of them irreplaceable. They cannot always be protected as well as in private premises and, if removed, may easily be lost or damaged. Against this it can be argued that, serious cases of the kind are rare and .... that offenders are more eccentric than genuinely criminal. Before the Goya case few people would have said that there was an evil unprovided for and serious enough to require the creation of a new offence: and there are objections to extending the criminal law because of isolated occurrences. There may also be the danger that the taker will be less likely to return the property eventually if he is liable to punishment for having removed it."[20]

19.16 Section 11 of the *Theft Act, 1968* which gave effect to the Committee's recommendations. It provides as follows:

> "(1) Subject to subsections (2) and (3) below, where the public have access to a building in order to view the building or part of it, or a collection or part of a collection housed in it, any person who without lawful authority removes from the building or its grounds the whole or part of any article displayed or kept for display to the public in the building or that part of it or in its

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17 *Id*, para 84.

18 See the English Criminal Law Revision Committee's Eighth Report, para 57.

19 The Committee decided not to include a provision in the Bill, because they feared that, the matter being one requiring consultation, this might delay the completion of their Report. In fact the Government dealt with the matter in section 11 of the *Theft Act, 1968*.

20 Eighth Report, para 57.

grounds shall be guilty of an offence.

For this purpose "collection" includes a collection got together for a temporary purpose, but references in this section to a collection do not apply to a collection made or exhibited for the purpose of affecting sales or other commercial dealings.

(2) It is immaterial for purposes of subsection (1) above, that the public's access to a building is limited to a particular period or particular occasion; but where anything removed from a building or its grounds is there otherwise than as forming part of, or being on loan for exhibition with, a collection intended for permanent exhibition to the public, the person removing it does not thereby commit an offence under this section unless he removes it on a day, when the public have access to the building as mentioned in subsection (1) above.

(3) A person does not commit an offence under this section if he believes that he has lawful authority for the removal of the thing in question or that he would have it if the person entitled to give it knew of the removal and the circumstances of it.

(4) A person guilty of an offence under this section shall, on conviction on indictment, be liable to imprisonment for a term not exceeding five years."

19.17 The section is drafted in such a way as to exclude:

> "not only commercial art galleries but also shops, salerooms and exhibitions for advertising purposes. Had it not been for this limitation, it is obvious that the scope of the section would have been immensely wider than is necessary to deal with the narrow class of cases at which the provision is aimed."[21]

19.18 Where the public are admitted to view a building then anything displayed in it is protected by section 11:

> "Where a cathedral is open to the public to view and D removes an article which is displayed there, it is immaterial whether a collection is

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21 *Smith*, para 275. Professor Smith goes on to point out that a particular collection "may be protected if the conditions of the section are satisfied, even though it is housed in a sale room, as where Christies' gave an exhibition in their sale room of articles which had been purchased from them and were lent by public galleries all over the world". *Id.*

displayed or not."[22]

19.19 But an article in a cathedral or church is not considered to be "displayed" if it is placed there solely for devotional purposes.[23]

19.20 Rather than resort to legislation like s11, Professor Williams has argued[24] that temporary appropriation should be theft. He argues that:

(a) in several legal systems this rule has been applied: Roman law had the notion of *furtum usus*, the Indian Penal Code[25] has covered dishonest temporary takings since its inception;

(b) increasingly, the value of articles lies in their use; an owner deprived of the use of an article will be put to trouble and perhaps unnecessary expense. Those who take property, even temporarily, may do so from motives of revenge, spite, extortion, dishonesty or profit; they may put the property at risk or return it in an impaired condition. This is not the kind of conduct which in his view should be exempt from criminal sanction;

(c) the taker may not know when he takes the property whether he will return it, recklessness is not captured;

(d) it makes it impossible to steal information;

(e) persons who take goods and hold them to ransom may not be caught;

(f) while it is an offence in England to make off temporarily with a cart, it is not an offence to make off with a horse.

19.21 In Canada, the Law Reform Commission of Canada have proposed that an intention to deprive the owner temporarily of his interest in property should suffice. The merits of this approach have been doubted by Professor Leigh, who invites reconsideration for these reasons:

> "First, most of these cases do not seem serious enough to justify being treated as theft, still after all, regarded as a serious offence. Second, the requirement of only temporary deprivation makes the problem of

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22 *Smith*, para 273. Presumably churches generally would be considered open to the public 'to view', in that an entrant with such an intent would scarcely be characterised as a trespasser. But unlike the cathedrals of our metropolis, which quite clearly cater for viewing tourists, it might be difficult to perceive this purpose in a small country parish church, where the overwhelming majority of entrants will neither be intended to, nor actually, have the aim of 'viewing' the church building. Moreover, most if not all, of the articles will have been placed in the church for devotional purpose.

23 *Id* para 268, citing *Barr*, [1978] Crim L Rev 244.

24 Williams, *Temporary Appropriation Should Be Theft*, [1981] Crim L Rev 129.

25 Cf section 378 of the Code.

> encapsulating the notion of dishonesty in the [Criminal] Code even harder than it would otherwise be. Third, it produces major problems when dealing with joy-riding, the essence of which is also temporary deprivation. The result [of *La France*[26]] is ... either to narrow joy-riding to the unrealistic case where the actor intends to return the vehicle, or to admit a wide and undesirable measure of police and prosecutorial discretion in the choice of charges. The difference between a conviction for theft [and] the lesser offence may turn on the way in which the actor responded to the police."[27]

19.22 We would be persuaded by Professor Williams. As to the trivia argument he says:

> "The argument about trivial cases is frequently used to oppose extensions of the law, but it is never conclusive in itself, because practically every offence covers *some* trivial matters. If an offence is needed to deal with serious misconduct, that is sufficient to justify it. Even the present law could be abused by prosecuting for trivial thefts, but in practice a sensible discretion is generally exercised. The Canadian experience bears our the view that a law of *furtum usus* is unlikely to be used oppressively".[28]

19.23 As recently as 1984, the unauthorised taking of motor vehicles was made an indictable offence carrying a maximum penalty of 5 years imprisonment.[29] Since that time, it is fair to say that heavier sentences are being imposed for "borrowing" cars than for the average larceny of other property making the distinction somewhat unreal. What better time to remove the old requirement than the time when the old law of larceny is being replaced by a new law of appropriation? The alternative would involve complicated drafting, such as is found in the provisions relating to removal of objects from galleries in the Theft Act, and the necessity of creating a special offence for theft of information rather than a simple extension of the definition of property.

19.24 *Accordingly, we recommend the removal of the requirement to prove an intent to deprive the owner permanently of property in offences of dishonesty.*

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26 [1975] 2 SCR 201.
27 Leigh, *Approaches to the Reform of the Law of Theft*, 29 Cahiers de Droit, 469, at 483-484 (1988).
28 Williams, *op cit*, p138.
29 *Road Traffic (Amendment) Act, 1984.*

CHAPTER 20: WHAT TYPE OF PROPERTY SHOULD BE CAPABLE OF BEING STOLEN?

20.1 We now must consider what type of property should be capable of being stolen. The issue raises difficult questions of policy. Inevitably, boundaries between larcenability and non-larcenability can appear somewhat arbitrary. The present law certainly involves some controversial line-drawing.

(a) Land

20.2 At present, as we have seen, the general rule is that nothing attached to or forming part of the realty is capable of being stolen.[1] However, it is possible to steal fixtures, growing things, and ore from mines.[2] Land can not be embezzled but it can be fraudulently converted under section 20(1)(iv) of the *Larceny Act, 1916*.[3]

20.3 The English Criminal Law Revision Committee, in their *Eighth Report*, listed the arguments for and against making land the subject of theft in general:

> "The arguments in favour of making land the subject of theft in general appear to be these:
>
> (i) Stealing by moving a boundary, for example, is a real problem, especially in crowded housing estates. It is as dishonest as stealing ordinary property, and it can cause considerable loss. Rectification may be difficult and expensive after boundaries and buildings have been erected. To make the misappropriation stealing would be salutary.

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1 *Larceny Act, 1916*, section 1(3).
2 Cf *id*, sections 8 and 10.
3 See further the English Criminal Law Revision Committee's Eighth Report, para 41.

(ii) It is right in principle, and in accordance with the scheme of the Bill, to draw no distinction between land and other property in this respect.

The contrary arguments seem to be these:

(i) Stealing land by encroachment is not so widespread or socially evil that the civil remedies are insufficient.

(ii) It might be too severe to make a tenant guilty of theft if, for example, he sold waste material such as earth or rubble after making alterations in the garden.

(iii) In other legal systems misappropriation of land is, in general at least, not treated as theft. The reason is perhaps that land cannot be taken away.

(iv) A squatter may get a good title in civil law after occupation for twelve years .... It would be anomalous that he should remain in theory guilty of theft for ever afterwards, however unlikely he would be to be prosecuted or, if convicted, given more than a nominal sentence. The anomaly is so great that it would seem necessary to provide that a squatter should not be liable to prosecution once he had acquired a good title. (This question hardly arises with a tenant holding over, because he would be unlikely to have the requisite intention of depriving the owner permanently).

(v) Criminal liability might involve difficult - albeit rare - questions of title to land which could not easily be decided by the criminal court."[4]

20.4 The Committee considered these arguments to be finely balanced. They favoured a compromise by which land should be the subject of stealing in only certain cases, not including moving boundaries or squatting. These exceptional cases were:

(i) dishonest appropriation by trustees or other persons in a position to sell or dispose of the land of another or anything forming part of it;

(ii) dishonest appropriation by persons not in possession, for example by removing soil;

(iii) dishonest appropriation by tenants of fixtures to be used with the land.

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4 *Id*, paras 42-43.

20.5 Section 4(2) of the *Theft Act, 1968* gives effect to these recommendations. It provides as follows:

> "A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say -
>
> (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or
>
> (b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or
>
> (c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.
>
> For purposes of this subsection 'land' does not include incorporeal hereditaments; 'tenancy' means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and 'let' shall be construed accordingly."

20.6 Professor Smith notes that:

> "The following acts, which would not (or may not) have been larceny under the old law, are theft under the new:
>
> D enters upon land in the possession of P and (i) demolishes a brick wall and carries away the bricks; (ii) removes a stone statue fixed in the land; (iii) digs sand from a sand pit and takes it away; (iv) cuts grass growing on the land and at once loads it onto a cart to drive away; (v) takes away P's farm gate."[5]

Professor Smith identifies[6] a *lacuna* in section 4(2)(c): it fails to catch the conduct of a person in possession of land *other than a tenant.* Thus a licensee in possession of land would not be guilty of theft if he dishonestly appropriated fixtures or dug sand or ore from the land.[7]

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5 *Smith*, para 90.
6 *Id*, para 92.
7 *Id.*

20.7 The definition of "property" in the Australian Capital Territory Ordinance is less elaborate:

> ""Property" means any real or personal property and includes:
>
> (a) a chose in action and any other intangible property, other than an incorporeal hereditament;
>
> (b) a wild animal that is tamed or ordinarily kept in captivity; and
>
> (c) a wild animal that is not tamed nor ordinarily kept in captivity but that is:
>
> (i) reduced into the possession of a person who has not lost or abandoned that possession; or
>
> (ii) in the course of being reduced into the possession of a person."

20.8 The definition in the New Zealand Crimes Bill is briefer still:

> ""Property" includes all things, animate or inanimate, in which any person has any interest or over which any person has any claim; and also includes money and things in action."

20.9 In the United States, most jurisdictions include land as the subject of theft,[8] though a few limit its larcenability to cases where it has been severed or disposed of by means of false pretences.

20.10 Section 223.2 of the *Model Penal Code* makes a distinction between movable and immovable property as follows:

> "*(1) Movable Property.* A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property[9] of another with purpose to deprive him thereof.
>
> *(2) Immovable Property.* A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto."

20.11 The comment supporting this provision states that:

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8 Cf the American Law Institute's *Model Penal Code and Commentaries*, pp167-168.

9 Section 223.0 defines "movable property" as "property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby have no physical location". "Immovable property" is defined (*id*) as "all other property". Thus anything located on real property, such as crops, timber or oil, which can be removed and converted to the use of one who is not entitled to do so is movable property: *Id*, p172.

"Despite the judgment that real property is appropriately included within the concept of 'property', a definition of theft should not be so broad as to include unlawful use or occupancy of land. The immobility and virtual indestructibility of real estate makes unlawful occupancy of land a relatively minor harm for which civil remedies supplemented by mild criminal sanctions for trespass should be adequate.

Thus, even though a squatter may acquire title to land by exercising adverse control for the prescriptive period, he is not a thief within section 223.2. He would be excluded from subsection (1) because that section applies only to "movable" property ....

Similarly, subsection (1) does not apply to landlord-tenant relations. Relations between a landlord and a tenant are so minutely regulated and constitute such a delicate socio-political problem that it would be wrong to introduce the possibility of a theft prosecution for unauthorized occupancy by a tenant or improper eviction by a landlord. Again, the limitation of subsection (1) to 'movable' property assures that this result will not occur and leaves to other sources of law the remedies that should be provided for such conduct.

Subsection (2) makes it clear, however, that a trustee, guardian, or other person empowered to dispose of 'immovable' property of others subjects himself to theft liability if he misappropriates the property, i.e., if 'he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto'. There may well be situations in which civil remedies are ineffective to deal with such conduct, as in the case of a transfer or encumbrance which is made by the holder of legal title to a good-faith purchaser. Such a transfer would convey an effective interest as against beneficial owners. Quite apart from the possibility that civil remedies may be inadequate, it seems clear that criminal liability for theft is appropriate in cases where a person seeks to benefit himself or another through the illegitimate transfer of interests in real property. There is little to distinguish such cases from any other attempt to secure economic benefit at the expense of another."[10]

20.12 The general similarity of approach between the English Criminal Law Revision Committee and the *Model Penal Code* is worth noting.

20.13 The Law Reform Commission of Canada's proposals, in clauses 1(2) and

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10 *Op cit*, pp172-173. The *Model Penal Code's* approach to the theft of land has received support. Two commentators (TAH & JIR, *Note: Reforming the Law of Acquisition Offences*, 59 Va L Rev 1326, at 1328 (1973)) have said with regard to Article 223.2:

> "This distinction appears sound, since it limits liability for theft to situations in which the thief has clearly and meaningfully violated the property interests of the landowner. At the same time, the criminal law does not become involved in disputes that are more easily settled in civil actions."

13(1) of their Report entitled *Recodifying Criminal Law*, published in 1986, make no distinction between real and personal property for the purposes of the offence of theft. Professor Leigh has observed that:

> "the Canadian proposals have the great advantage that any dishonest transfer can be brought within theft. One would not, for example, have to worry about the status of the transferor or the precise nature of any authorisation upon which he might rely.
>
> On the other hand, there is no recognition of the reason which led the American Law Institute to reject a general assimilation of movable and immovable property, that is, the undesirability of including unlawful use of occupancy of land, perhaps by an overholding tenant, within theft ....
>
> The problem is surely potentially more difficult in Canada where, as the proposals now stand, intent to deprive temporarily will suffice for theft. Any temporary dispossession of my neighbour from any part of his property would, seemingly, fall within the theoretical ambit of theft, squatters would become thieves, and the police would be called upon to intervene in situations of social unrest to which the civil law seems better adapted."[11]

20.14 In the Irish context it is worth noting that, before 1957, the expiration of the limitation period (of six years) merely barred a right of action for conversion and detinue, and did not divest the owner of the chattel or his title to it. Thus, if he could recover it otherwise than by action, he was entitled to do so. Furthermore, any further conversion or wrongful detention of the chattel by a third person entitled the owner to sue in respect of it, his action running from the time of the subsequent wrongful act.

20.15 Section 12 of the *Statute of Limitations 1957* has changed the position on both these points. Now, the owner's title to the chattel is extinguished after the expiry of the relevant limitation period, unless he has in the meantime recovered possession of it.[12] Moreover, where a chattel has been converted or wrongfully detained, and before the owner recovers possession of it a further conversion or wrongful detention takes place, no action may be brought in respect of this subsequent tort after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention.[13]

20.16 The position can thus arise under Irish law at present that a person may be convicted of stealing what has, through the effluxion of time, become his own property. This must be borne in mind when deciding what is the appropriate weight to be given to the argument that land should not be the subject of theft because ownership in it may eventually pass to the transgressor through adverse

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11 Leigh, *Approaches to the Reform of the Law of Theft*, 29 Cahiers de Dr 469, at 488 (1988).

12 Section 12(2). The provision is subject to section 26, which deals with chattels held in trust.

13 *Id*, section 12(1) (also subject to section 26).

possession.

20.17 As a general rule, we consider it better legislative practice to have the seriousness or "offensiveness" of an act determined by the nature of the act itself rather than by the identity or position of the actor. For this reason, we do not consider it appropriate or necessary to make special provision for appropriation by trustees or personal representatives, as has been done in s4(2)a of the *Theft Act, 1968.*

20.18 *Subject to that, we would recommend the introduction of legislation, similar to that in s4(2) of the Theft Act, providing that land can be stolen, except in certain circumstances, and excluding the provision in s4(2)(a) relating to trustees.*

(b) Flora and Other Growing Things

20.19 The next question we must consider is whether such things as trees, plants, flowers, fruit and foliage should be the subject of theft. The English Criminal Law Revision Committee were clearly of the view that, *if cultivated*, they should; but they considered that there was "a difficult question"[14] about things growing wild:

> "On the one hand a person should not ordinarily be guilty of theft by picking wild flowers and the like. On the other hand it may be right that this should be theft in some cases. Examples are cutting holly at Christmas to sell and perhaps picking sloes which the owner of the land wants to keep in order to make sloe gin or picking wild flowers which he is anxious to preserve for their beauty or rarity."[15]

20.20 The Committee considered but rejected the option of providing that things growing wild should in no case be the subject of theft. It seemed to them:

> "right that (for example) picking another person's holly to sell should be theft. This is an offence of dishonesty and it can be profitable."[16]

20.21 But the Committee were also opposed to letting the law of theft apply in all cases. They acknowledged that, in trivial cases, the defence of absence of dishonesty might be raised and that landowners and prosecuting authorities would presumably be sensible enough to prosecute only in the exceptional cases where this would be reasonable. Moreover, such cases would usually be tried summarily and only a mild punishment would be imposed. Nevertheless they considered that "a provision could reasonably be criticised which made it even technically theft in all cases to pick wild flowers against the will of the owner".[17] Accordingly, they proposed a compromise. A person should not be guilty of

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14 Eighth Report, para 46.
15 *Id.*
16 *Id*, para 47.
17 *Id.*

theft by picking mushrooms or flowers, fruit or foliage growing wild unless he did so for reward or for sale or another commercial purpose. As regards flowers, fruit and foliage, this exemption would apply only where the person managed to accomplish his purpose without injury to the growth of the plant.

20.22 This latter requirement is not included in section 4(3) of the *Theft Act, 1968*, which provides as follows:

> "A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.
>
> For purpose of this subsection 'mushroom' includes any fungus, and 'plant' includes any shrub or tree."

20.23 One can readily appreciate the advantages of this general approach. There is something offensive to one's sense of justice in making the picking of wild flowers against the will of the landowner constitute the *actus reus* of theft, however unlikely a prosecution might be. Section 4(3) contains a rational limitation which is relatively easy to understand and apply.[18]

20.24 As against this it is worth recording *Smith & Hogan's* view that:

> "[t]he whole matter might have been left to the common sense of the prosecutor who would hardly institute proceedings where the appropriation was trivial. Of course this would leave the aggrieved landowner free to take proceedings in such trivial cases, but generally under the criminal law the person aggrieved is free to take proceedings in the most trivial case and this does not apparently lead to any serious abuse."[19]

On balance, we would recommend the adoption of the provision in s4(3) of the Theft Act, 1968 relating to the Theft of flora and growing things.

(c) Tame Animals

20.25 As we have seen,[20] at common law some domestic animals were not the subject of theft. Section 21 of the *Larceny Act, 1861* made the theft of domestic animals a summary offence, and provisions in that Act and the *Larceny Act, 1961* deal specifically with the theft of certain domestic animals.

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18 There is admittedly a small element of disagreement among the commentators as to whether a single, isolated, case of appropriation with the intention of sale should fall within the scope of the sub-section, since it may not necessarily be considered to amount to a "commercial" purpose, "the wording of the subsection requir[ing] that sale, as well as other purposes, be 'commercial'": *Smith*, para 97. Professor Williams, *op cit*, 683, fn 1 (1st ed) queries this interpretation, enquiring whether the wording of the subsection "does not imply that every sale is to be taken to be commercial". We favour Professor Williams's interpretation. 78.

19 *Smith and Hogan*, 508.

20 *Supra*, p5.

It may be argued that the law should not treat domestic animals in this distinct manner, and that instead the theft of animals should be treated simply as part of the law of theft in general. The present approach may be considered difficult to justify and to contain unnecessary complexities. In appropriate cases, where the theft is a minor one, it can be disposed of summarily; it may well be that the theft of most domestic animals will usually warrant such treatment, but it may be argued that there is nothing distinctive about them which would justify this approach.

(d) Wild Animals

20.26 As we have seen,[21] under present law wild animals at liberty, having no owner, are not the subject of larceny. A poacher is guilty of larceny only where, having killed the wild animal, he abandons possession of it on the land and later takes it away. We must now consider the argument that poaching should be made the offence of theft in any case where the poacher takes a wild creature, whether dead or alive, with the intention of permanently depriving the person entitled to the sporting rights in the creature.

20.27 The English Criminal Law Revision Committee made a detailed examination of the issue. A principal argument in favour of making poaching theft was that:

> "[s]porting rights may be valuable. Some farmers spend money and labour on improving the shooting on their land with a view to the income. It is therefore both logical and correct in policy that these rights should be protected from dishonest violation in the same way as rights to other profits of the land. Fishery rights, in particular, may be owned by modest anglers' clubs which cannot afford to pay keepers to protect their rights from local poachers."[22]

20.28 While it would be unwise to ignore the historical background and community attitudes or the continuing potency in certain areas of the symbols of absentee landlordism, the pressure to abolish ground rents being one example, we agree with the English Criminal Law Revision Committee that "[n]owadays a good deal of poaching is done on a large scale and for purely commercial purposes. Poaching should therefore be treated as an offence of dishonesty".[23] The same position now prevails in Ireland. Some formidable arguments (apart from those already mentioned) must be considered. It may be contended that wild animals are not generally the subject of theft with good reason: whether they have an owner may be regarded as largely a matter of chance. The present offences in regard to poaching and related matters have not received widespread criticism on the basis of their leniency. To require the Gardai to take an active role in detecting or preventing the theft of fish and other wild animals would

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21 *Supra*, pp5-6.
22 Eighth Report, para 50.
23 *Id.*

involve them in an area of little social significance, with a potential for aggravating communal disharmony.

20.29 The English Criminal Law Revision Committee came to the conclusion[24] that it would involve too great a departure from the existing law to make poaching in general constitute theft; they were impressed by the fact that in the law of no other country of which they aware were wild animals the subject of theft; moreover, the greatly increased maximum penalty for theft (of ten years' imprisonment) seemed inappropriate. However, the Committee considered that, as in the case of flora and other growing things,[25] the taking of a wild creature for commercial purposes (as well as for reward) should constitute theft; they proposed the abolition of the rule contained in section 1(3), proviso (b) of the *Larceny Act, 1916*, on the basis that "[t]o distinguish this case would be quite illogical".[26]

20.30 Section 4(4) of the *Theft Act, 1968* provides as follows:

> "Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession."

We recommend the adoption of such a provision.

(e) Theft of Choses in Action, and Information

(i) Choses in Action

20.31 We now must consider whether choses in action should be the subject of theft. A *chose in action* is "property which does not exist in a physical state but which may be vindicated by a legal action".[27] Thus, a debt or a company share or a copyright or trade mark is a *chose in action*.[28] With regard to cheques, Professor Smith has written:

> "The thing in action represented by [the] cheque can never, it is submitted, be stolen from the drawer because it consists in a right to sue the drawer and the drawer cannot sue himself so he can never "own" the right to do so; but there is another thing in action which does belong to the drawer and which can be stolen from him and that is his credit balance or right to overdraw at his bank. In *Chan Man Sin* [1988] Crim

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24 *Id*, para 52.
25 Cf *supra*, pp7 *et seq*.
26 Eighth Report, para 52.
27 *Smith*, para 104.
28 *Id*.

LR 319, PC, a company accountant who drew forged cheques on the company's account was convicted of stealing the things in action represented by the company's credit balance and its contractual right to overdraw."[29]

20.32 Glanville Williams writes that the thief who steals a cheque:

> "can be charged with stealing the cheque as a piece of paper (of the value of £x) from the drawer (the person who has the bank account) or other person from whose possession the thing was taken. On conviction the thief can be punished according to circumstances, and if he has cashed the cheque that is of course an important circumstance.
>
> Alternatively, if he has cashed the cheque (whether at a bank or by obtaining cash for it from someone else) he can be convicted either of stealing the cash or of obtaining it by deception."[30]

20.33 In England, section 4(1) of the *Theft Act, 1968* defines "property" as including "things in action and other intangible property". The American Law Institute's *Model Penal Code*, in Article 223.0(6), defines property as meaning:

> "anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth ...."

20.34 The opportunity for the theft of *choses in action* is not very great in practice, and "the great majority of [the cases] will be [ones] of misappropriation by trustees, personal representatives and others".[31] The usefulness of the provision is also limited by the necessity to prove an intention permanently to deprive the owner of his intangible property. While Griew, for example, is of opinion that the Theft Act permits one to charge for larceny of the share certificates, he advises that in "obvious" cases, such as infringement of a trade mark or copyright, the assumption of an owners right to use a mark or reproduce the work subject to copyright, any prosecution for theft would founder because of the necessity to prove the intent permanently to deprive as only the exclusiveness of possession would have been sabotaged.[32] This problem would disappear if our recommendation to dispense with this proof were followed.

20.35 *We recommend that property be defined to include choses in action.*

(ii) Information

20.36 A potential for a vastly wider range of liability is raised by the possibility

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29 Commentary on *R v Davis* [1988] Crim L Rev 762 at 765.
30 *Williams*, (2nd Ed) 757.
31 *Id.*
32 *Griew*, para 2-82.

of another intangible asset, information, being regarded as a proper subject of theft. As we have mentioned in chapter 2, courts in other common law jurisdictions are divided on this question. In England the view was taken that the acquisition and copying of confidential information is not theft.[33] In Canada, however, a different view was taken in *Stewart*,[34] where the majority of the Ontario Court of Appeal held that the copying of a confidential list of hotel employees fell within the definition of theft under the Canadian Criminal Code. (The Supreme Court of Canada subseqently reversed the Ontario Court of Appeal).

20.37 In favour of the view that information should be the subject of theft it may be argued that in contemporary society such an intangible asset has far greater prominence than formerly. The expansion of computers and of the means of telecommunication has given a huge value to information, especially secret information. For the law of larceny to exclude the theft of information may be perceived as being behind the times.

20.38 Against this, it may be argued that to impose the criminal sanction of theft on the improper acquisition and dissemination of information would be socially undesirable. One commentator has observed that:

> "The need to maintain the free and open transmission of ideas and information is the cornerstone of the western liberal tradition, and should be viewed as the overriding norm. Departures, or suggested departures, from this norm should be rigorously scrutinised and granted only in compelling cases, and then only in sufficient but no more than sufficient terms."
>
> It may be, for instance, that a good case can be made out on economic grounds for improved civil remedies against misappropriation of trade secrets or other commercially valuable information of an intangible nature. Such an approach would add a third tier of statutory rights alongside patents and copyright. However, even where legal protection is, for reasons which are thought to be good and sufficient, extended to this kind of 'information', such exceptions to the general principle may still have to be defeasible where there is an overriding 'right to know' in the public. These principles will probably have to be applied to a wide variety of fact situations with complex public policy assessments being made in each case as to the likely social and economic costs entailed in granting or withholding protection. Information entitlement statutes may well become the industrial, health and welfare statutes of the future. The criminal law is too blunt an instrument for this task. It does not offer a 'quick fix' for the kinds of issues at stake. The solution to information issues lies in traditional legal methodology: the evolution and articulation of sound principles and their systemic, painstaking

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33 *Oxford v Moss*, [1979] Crim L Rev 119.
34 149 DLR (3d) 583 (1983).

application on a situation by situation basis."[34]

20.39 Apart from the possible context of computer "hacking", which we discuss later[35] it may be argued that no clear social need has been shown for extending the criminal law of theft into the area of information misappropriation. At present, our civil law affords a wide range of protection, including statutes dealing with copyright, trade marks and data protection. The common law remedies of passing off[36] and breach of confidence[37] also range widely. It may be that these should be extended still further, but whether a criminal sanction in lieu or in addition is called for may be debated.

20.40 A similar problem has arisen in respect of the "pirating" of films or of television or other 'exclusive' signals. The actual film or signal is "left behind" but the owner or distributor loses the fee for access to the film or signal, properly due to him for his investment in making, disseminating or distributing the film or signal.

20.41 This problem used to arise in the area of telecommunications e.g. where telephone calls were made without authority. The prosecution used to resort to charges of larceny of electricity or latterly, (and successfully) of common law cheat, to address this mischief. Finally, the problem was specifically addressed in the *Postal and Telecommunications Services Act, 1983*. S99 of the that Act provides:-

> "(1) A person who wilfully causes the company to suffer loss in respect of any rental, fee or charge properly payable for the use of the telecommunications system or any part of the system or who by any false statement or misrepresentation or otherwise with intent to defraud avoids or attempts to avoid payment of any such rental, fee or charge shall be guilty of an offence.
>
> (2) A person who connects or causes to be connected any apparatus or device to, or places or causes to be placed any apparatus or device in association or conjunction with, the telecommunications system operated by the company or any part of the system the effect of which might result in the provision by the company of a service to any person without payment of the appropriate rental, fee or charge shall be guilty of an offence.

20.42 The legislature has addressed this problem in s9 of the *Broadcasting Act, 1990* by creating an offence of "interception of service".

> "(1) No person, other than a duly authorised officer of the

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34 Hammond, *Theft of Information*, 100 LQ Rev 252, at 263-264 (1984). (Footnote reference omitted).
35 *Infra*, Chapter 29.
36 See *McMahon & Binchy*, ch 31.
37 See *Keane*, ch 30.

Minister, shall, in relation to a service provided by a licensee or a service provider -

(a) intercept the service,

(b) suffer or permit or to any other thing that enables such interception by any person,

(c) possess, manufacture, assemble, import, supply, or offer to supply, any equipment which is designed or adapted to be used for the purpose of enabling such interception by any person, or

(d) publish information with the intention of assisting or enabling any person to intercept such a service.

(2) No person shall -

(a) knowingly instal or attempt to instal or maintain any equipment which is capable of being used or designed or adapted to be used for the purpose of enabling such interception by any person, or

(b) wilfully damage or attempt to damage a system or part of a system operated by a licensee or service provider.

(3) A person who contravenes any provision of subsection (1) or (2) shall be guilty of an offence.

(4) In this section "intercept" in relation to a service means receive, view, listen to, record by any means or acquire the substance or purport of the service or part thereof supplied by a licensee or service provider without the agreement of the licensee or service provider."

20.43 The civil law relating to abuse of confidence is evolving rapidly.

"The equitable doctrine of confidentiality has developed significantly in recent years in Ireland, along with other common law countries, but it must not be thought that the doctrine itself is in any sense novel. ... the willingness of equity to intervene in a case where one party was abusing the confidence placed in him by another was well established in the first half of the last century.

But it has been given renewed vigour in modern times by the growth of the 'information economy', the greatly enhanced value of 'intellectual property' and the inadequacy, in some areas, of the law of copyright, patents and trade marks in protecting such property from unjust exploitation. Thus, in the leading modern Irish case of *House of Spring*

Gardens Ltd and others v Point Blank Ltd and others,[38] the fact that the plaintiffs were entitled to protection for infringement of copyright and had also registered patent applications in respect of the subject matter of the proceedings did not prevent them from obtaining equitable relief under the doctrine of abuse of confidence.

The doctrine ... has not been confined to commercial law, but the extent to which it enables governments to protect themselves against alleged breaches of confidentiality by their own officials has given rise to controversy in some highly publicised cases in Ireland and other jurisdictions in recent times. Moreover, developments in the law of confidentiality in what might be called the public domain, and particularly where the topic of telephone tapping and various forms of technological information gathering are involved, have raised constitutional questions as to the extent to which a right of privacy exists in our law and if so the manner in which it may be protected."[39]

20.44 Lawyers may well consider that the ability to obtain an injunction and damages is a sufficient sanction to keep abuse in check, better tailored to the particular mischief. But the criminal law of dishonesty already supplements and reinforces the civil law of trespass, fraud and deceit. It may well be that abuse of confidence e.g. by employees who are no marks for damages, may become in the future a highly popular activity requiring criminal sanction and a criminal deterrent. If a person's physical property is protected by the criminal law, why not his intellectual property? Each has value. The unlawful acquisition of either gives rise to economic loss.

20.45 If it is accepted that the criminal law should protect intellectual property, perhaps the law of theft or unlawful appropriation as such is not the best weapon to use. As the English Law Commission say:

"4.41 Information, particularly confidential information, will often be regarded as a valuable commodity. Information of one kind or another is frequently bought and sold. A right to confidential information is similar in some respects to a proprietary right and occasionally the courts have referred to such information as being "property"[40]; and for certain specific purposes the courts have treated it as such.[41] Nevertheless information does not fit easily into the traditional concepts of either tangible or intangible objects, and its nature is such as to place it in a category of its own, distinct from that of property. It is perhaps not surprising that the Divisional Court should have established that for the purpose of section 4(1) of the Theft Act, 1968, information of itself is not intangible "property", so that a charge against a student of stealing

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38 [1984] IR 611.

39 *Keane*, 345. Certain footnote references omitted.

40 Citing as an example *Boardman v Phipps* [1967] AC 46.

41 In *Re Keene* [1922] 2 Ch 475 (CA), for instance, it was held that a secret formula relating to certain proprietary articles passed to its owner's trustee in bankruptcy.

confidential information contained in the proof copy of an examination paper was misconceived.[42] (Had he removed the examination paper with the intention of keeping it permanently, he would of course have been liable to be found guilty of theft of the paper).

4.42 Although in law dishonestly obtaining information of itself cannot be charged as theft or obtaining property by deception, the criminal law does offer a degree of protection against such conduct under a variety of other headings. One such heading, it would seem, may be conspiracy to defraud.[43] ....

4.43 Obtaining information by deception may constitute the offence of obtaining services by deception under section 1 of the Theft Act, 1978, since to give information is to confer a benefit on the person who seeks it. However, a serious limitation arises because in order to constitute the offence, the benefit (the information) must have been supplied on the understanding that it has been or will be paid for. Since the offence does not apply to the obtaining of information not supplied for payment, it will not cover, for example, the case of the industrial spy who acquires secret information from a company by deception of one of its employees. Nor will section 1 apply where the information is obtained by making unauthorised access to another's computer because of the principle that, as the law stands at present, a machine cannot be "deceived". Copying certain types of information may be a breach of copyright and to sell the copy may be an offence under section 21 of the Copyright Act, 1956. An offence of corruption under section 1 of the Prevention of Corruption Act, 1906 might be charged, if information is obtained by inducing an employee or other agent to disclose it in return for a reward. If the receipt of the bribe is proved, both the employee and the person seeking the information are liable to be convicted. Finally, the Official Secrets Act, 1911 contains provisions to protect certain information held by the Government from unauthorised abstraction and disclosure.

4.44 The offences mentioned above are each capable of being used to deal with particular situations involving the dishonest acquisition of information. None of them, however, deals with the problem of "stealing" valuable information generally. .... It is possible therefore, that a gap in the law may arise here."[44]

20.46 In our view it is wrong to resort to a charge of stealing an exam paper when the actual mischief to be addressed is acquisition of knowledge of the questions, to charge larceny of electricity when the mischief is unauthorised use of a computer or in any of these cases, to seek out an agreement and charge

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42 Citing *Oxford v Moss* (1978) 68 Cr App R 183.

43 Referring to *Ardidge & Parry*, para 3.12.

44 Working Paper No. 104 *Criminal Law, Conspiracy to Defraud* pps54 to 56, certain footnote references omitted.

conspiracy to defraud, the last refuge of a prosecutor.

20.47 The New Zealand Crimes Bill contains an offence of "Taking, obtaining or copying trade secrets" and provides, in s185 that -

> "Every person is liable to imprisonment for 5 years who, with intent to obtain for himself or herself or for any other person any pecuniary advantage, -
>
> (a) Dishonestly takes, obtains, or copies (whether by a photographic process or otherwise) any document or any model or other depiction of any thing or process; or
>
> (b) Dishonestly takes or obtains any copy (whether produced by a photographic process or otherwise) of any document or of any model or other depiction of any things or process, -
>
> believing that the document, thing, or process is of commercial value."

This section is fine in itself but we consider it better to approach the issue by dealing with the definition of property.

20.48 Section 1 of the Criminal Evidence Act, 1992, has provided us with the following definitions:

> "information" includes any representation of fact, whether in words or otherwise;
>
> "information in non-legible form" includes information on microfilm, microfiche, magnetic tape or disk.

20.49 *We recommend that property, in the context of dishonesty, be defined to include intellectual property protected by the equitable doctrine of confidentiality, the personal data defined in and protected by the Data Protection Act, 1988 or other valuable, confidential information. Official secrets, such as would be valuable in*

the context of espionage, would be protected.[45]

20.50 This recommendation would be difficult to effect in the context of having to prove an intention permanently to deprive as one does not permanently deprive a person of information. The recommendation to dispense with this proof facilitates this recommendation.

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45 The Calcutt Committee have recently recommended that:

1. The following acts should be criminal offences in England and Wales:

   a. entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication;

   b. placing a surveillance device on private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication; and

   c. taking a photograph, or recording the voice, of an individual who is on private property, without his consent, with a view to its publication and with intent that the individual shall be identifiable.

   (paragraph 6.33)

2. It should be a defence to any of these proposed offences that the act was done:

   a. for the purpose of preventing, detecting or exposing the commission of any crime, or other seriously anti-social conduct; or

   b. for the protection of public health or safety; or

   c. under any lawful authority.

CHAPTER 21: THEFT OF PROPERTY LOST, MISLAID OR DELIVERED BY MISTAKE

21.1 We now must consider the best way to deal with the misappropriation of property lost, mislaid or delivered by mistake. Under present law, as we have seen, criminal liability does not attach where the finder or recipient does not have the requisite *mens rea* at the time of the finding or receipt of the property; but, as we have also seen, difficulties can arise where the physical acquisition of the property comes some time before a consciousness on the part of the recipient of the true nature or value of the property.

Before addressing the policy issue directly, it may be useful to contrast two approaches to the subject, one involving a broad statement of principle, the other a minute disposition of several specific modes of conduct.

A. The Approach Based on a Broad Statement of Principle

21.2 The *Model Penal Code* adopts an approach involving a broad statement of principle. Article 223.5 provides as follows:

> "A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it."

Noting the troublesome cases of *Middleton*[1] and *Ashwell*[2] the supporting comment states that Article 223.5:

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1 LR 2 CCR 38 (1873). See para 2.31 *supra*.

2 16 QB 190 (1885). See para 2.53 *supra*.

"eliminates the largely irrelevant issue of whether the owner remains in 'possession' of lost or mislaid property. It seems obvious that the guilt of a taker of 'found' property should not turn on whether the owner intentionally put the property where it was found. The gist of the offense is not a putative wrong in the actor's method of acquisition of the property but a purposeful appropriation without taking reasonable steps to restore the article to the owner."[3]

21.3 The Comment also notes that it was necessary to *limit* the reach of Article 223.5, so as to avoid impinging on certain types of tolerated sharp trading. For example, it was not proposed to punish the purchase of another's property at a bargain price on a mere showing that the buyer had been aware that the seller was misinformed regarding the value of what he sold. The language of Article 223.5 was accordingly limited to situations where the mistake was as to "the nature or amount of" the property or the identity of the recipient.

One may, perhaps, register a note of caution as to the scope of the word "nature" here. Cases[4] on contract law suggest that mistakes as to the "nature" of property transferred can involve just the type of sharp trading which the framers of the *Model Penal Code* seek to exclude.

The supporting Comment accepts that it could be argued that the conduct covered by Article 223.5 is adequately reached by Article 223.2(1), relating to one who "exercises unlawful control over" property of another "with purpose to deprive him thereof".[5] It argues, however, that the advantage of explicit coverage is that:

"conceptual difficulties with applying traditional larceny or embezzlement law to these situations can unmistakingly be discarded .... [T]raditional theft law generally has reached such conduct only by manipulation of antecedent concepts. There is every reason to continue at the same time posing the analytic subtleties that traditional law required."[6]

21.4 On the question of the accused's *mens rea*, the Comment states that:

"[t]he search for an initial fraudulent intent appears to be largely fictional, and in any event, poses the wrong question. The realistic objective in this area is not to prevent initial appropriation but to compel subsequent acts to restore to the owner. The section therefore permits conviction even where the original taking was honest in the sense that the actor then intended to restore; if he subsequently changes his mind and determines to keep the property, he will then be guilty of

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3 *Model Penal Code and Commentaries*, p225.
4 Cf *Keane*, paras 17.11-17.14, *Clark*, ch 10, *Anson*, 260-263.
5 *Model Penal Code and Commentaries*, p227.
6 *Id.*

theft. Similarly, the section bars conviction where the finder acts with reasonable promptness to restore the property, even though he may have entertained a purpose to deprive at the time he acquired the property or at some other time during his possession. Section 223.5 thus focuses on the operative event of a purpose to deprive accompanied by the failure to take reasonable measures to restore."[7]

The latter part of this passage gives rise to difficulty. The idea that a theftous intent should be capable of retrospective inoculation by a subsequent change of mind and restoration of the property "with reasonable promptness" raises the possibility of conduct constituting a crime subsequently being rendered non-criminal - a notion bristling with conceptual and policy problems. This is so unless it can be said *a priori* that a person *cannot ever* fail "to take reasonable measures to restore the property" until the passage of a certain period of time (which constitutes that within which the person "acts with reasonable promptness").

21.5 This brings us to the more general question of whether the notion of failing to take "reasonable measures" to restore the property is sufficiently certain to constitute the test of criminality. On the face of it, it arguably is not. The tentative draft of Article 223.5 did contain a provision elaborating the concept as follows:

> "In determining what are reasonable measures, account shall be taken of the following factors, among others: the nature and value of the property, the expense and value of the property, the expense and inconvenience of the restoration measures, and the reasonable expectation of compensation to the finder for expense and inconvenience borne by him. The following, among others, are reasonable measures which he believes would be more likely to result in restoration:
>
> (a) compliance with procedure prescribed by laws relating to the preservation and restoration of lost property;
>
> (b) delivery of the property to law officers for restoration to the owner; or
>
> (c) delivery of the property to the occupant of the premises or operator of the vehicle where the property was found for restoration to the owner."[8]

This elaboration was deleted in the final version "to simplify the language of the section but not to make a change in the general sense of what is meant by

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7 *Id*, p228. Contrast Article 376 of the Greek *Penal Code*, making it an offence for the finder of property to fail to report the finding to the owner or a public authority within fourteen days.

8 *Model Penal Code*, Article 206.5 (Tentative Draft 2, at 82-83 (1954)).

"reasonable measures".[9]

21.6 While the Comment concedes that it could be argued that the more elaborate language of the tentative draft should have been provided for the guidance of judges or to settle as a matter of law the sufficiency of certain steps which the finder may take to restore the property, it takes solace in the fact that no recent statutory revision of criminal codes in the United States had spelt out in such detail what constitutes "reasonable measures". Only North Dakota had required that the measures be "readily available" as well as "reasonable". In its final form, Article 223.5 could constitute too vague a definition of the central element of a crime.

B. The Approach Involving a Minute Disposition of Several Specific Modes of Conduct

21.7 The English *Theft Act, 1968* favours an approach involving a far greater degree of specifity than in the *Model Penal Code*. Section 3(1) provides that any assumption by a person of the rights of an owner amounts to an appropriation, "and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner". S5(4) provides as follows:

> **5.4** "Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds."

21.8 It is generally agreed that the obligation to make restoration referred to in 5(4) is an obligation in civil law. Glanville Williams points out that the "fiction" created by s5(4) can only apply to money in that there is no obligation to restore other property obtained by mistake until the contract is avoided by the mistaken person. S5(4), he says, should therefore have been confined by the draftsman to "money" and not to property.[10] This is advanced as a further reason why the decision in *Kaur*[11] is considered correct as it related to a pair of shoes, not to money.

21.9 A moral obligation is different from a legal obligation . *Gilks*[12] was convicted of theft when, to his knowledge, he was mistakenly paid winnings by a book-maker on a horse he had not backed. There is general agreement that this was an incorrect decision. As the gaming transaction was unenforceable,

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9 *Model Penal Code and Commentaries*, p229.
10 Williams, *Theft and Voidable Title* [1981] Crim L Rev 666 at 676.
11 *Kaur v Chief Constable of Hampshire* [1981] 1 WLR 578. *Supra* para 15.17 *et seq.*
12 [1972] 3 All ER 280.

there was therefore no obligation to repay and there had been no deception on Gilks's part.

21.10 S5(4) is clearly designed to deal with the problem created by cases such as *Ashwell,*[13] *Middleton*[14] and *Moynes v Cooper.*[15] As we noted when examining obtaining by deception, this gives rise to difficulty for those who regard appropriation as inconsistent with acquisition of ownership. Since it covers a case where P, the owner, by mistake has parted with his entire proprietary interest in the property,

> "nothing that D does with it can be done without his authority or be a usurpation of or interference with P's rights,[16] since he has none. Unless s5(4) is to be wholly ineffective, this must be one instance where the normal conditions for appropriation are inapplicable. Since P's proprietary interest is fictional, the appropriation of it must also be to some extent a fiction. The fiction is that P has not parted with his proprietary interest and, if he had not parted with it, he would not have consented to D's assuming his rights."[17]

21.11 As to policy, the question arises as to whether the Theft Act has cast the

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13 16 QBD 190 (1885).

14 LR 2 CCR 38 (1873).

15 [1956] 1 QB 439.

16 Cf *Morris*, [1983] 3 All ER 288.

17 *Smith*, para 81. At a Criminal Law Review Conference in 1989, Professor Smith summarised recent decisions on payments by mistake as follows:

> '(i) Where a payment is made under a mistake of fact, the payer retains an equitable proprietary interest in it: *Chase Manhattan Bank NA v Israel-British Bank (London)* [1981] Ch 105 (Ch D, Goulding J); therefore the payment is property belonging to payer and may be stolen by payee: *Shadrokh-Cigari* [1988] Crim LR 465 - no need to rely on s5(4).
>
> (ii) Where P by mistake (whether or not induced by deception) draws a cheque or draft in favour of D, D cannot steal (or obtain by deception) the thing in action represented by the cheque or draft, because it is not and never can be property belonging to P: *Shadrokh-Cigari*; but the *instrument* when made belongs to the drawer and continues to belong in equity to him when delivered by mistake; and so may be stolen from him.
>
> (iii) Where D is sent a cheque by mistake and dishonestly appropriates it he may be convicted of stealing *money* if he dishonestly obtains cash for it but not if he endorses it, e.g., to pay his rent; though (*obiter*) he may then be convicted of stealing the cheque: *Davis* [1988] Crim LR 762.
>
> (iv) Where by mistake D is sent two cheques instead of one and appropriates both it is immaterial that it is not possible to identify one cheque as that sent by mistake - no different from an overpayment in cash: *Davis* [1988] Crim LR 762. What if D cashed one cheque and endorsed the other? No proof that he stole cash - he did not steal both and it cannot be proved that he stole the cashed cheque. But he certainly stole a cheque. [What about the decision in *Tsang Ping-nam* (1982) 74 Cr App R 139, PC, that it is not enough to prove that D committed a crime either on occasion (a) or on occasion (b)?]
>
> (v) Could Davis have been convicted of stealing the thing in action constituted by P's bank balance or right to overdraw? No problem of identifying the property stolen, though the occasion of the theft may still be in doubt. The only objection seems to be that the cheque was cashed or endorsed with the authority and consent of the owner - but that may be irrelevant: *Philippou* and *Dobson*.'
>
> Many difficulties disappear once appropriation includes acquisition of ownership.

net too widely. Recipients of property under *any* common mistake[18] would probably be criminally liable if, on discovering the true facts they resolved not to make restoration. As Professor Smith observes:

> "Whether such cases are wisely brought within the net of theft is questionable .... The difficulty is eventually, one of making a thief of a particular kind of debtor when debtors generally cannot steal. And it can involve the criminal law in some of the finest distinctions drawn in the civil law."[19]

21.12 S179 1(b) of the New Zealand Crimes Bill provides that theft includes "dishonestly assuming any right of ownership of any property after obtaining possession or control of the property in whatever manner".

21.13 S96(2) of the Australian Capital Territory Ordinance provides that "a person who has come by any property (whether innocently or not) without stealing it shall be taken to have adversely interfered with or usurped the rights of an owner of property ... if he or she later keeps or deals with it as the owner".

The Policy Issue

21.14 We now must address the policy issue underlying this question. Should a finder or recipient of property under a mistake be guilty of theft? Is appropriation in such a case the same, morally and legally speaking, as an appropriation where the *mens rea* preceded the taking?

On one view it is quite different. There is an important distinction, it may be argued, between setting out to steal, on the one hand, and giving in to temptation to hold onto something which comes into one's possession innocently, on the other. On another view, however, there is no moral significance in this distinction. Life includes a wide range of temptations, some of which can be very pressing. It is true that where property is, as it were, thrust on a person by mistake, that person may find it hard to resist the temptation to hold onto it; but the temptation to steal in other specific contexts can be equally pressing.

21.15 Perhaps there is an underlying element of a distinction between misfeasance and nonfeasance here, where the failure to return goods is regarded as merely a sin of omission.[20] The difficulty with this analogy is that a person cannot be convicted for the mere failure to return the goods: a positive resolve not to do so is necessary. Nevertheless, a mental resolve is somewhat less tangible than an externally measurable action and may tend to be regarded as something "less than" such action.

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18 Cf the well-known cases of *Norwich Union, Fire Insurance Society Ltd v Price*, [1934] AC 455, *Cooper v Phibbs*, LR 2 HL 149 (1867) and *Bell v Lever Brothers Ltd*, [1932] AC 161.

19 Cf *Smith*, para 82.

20 As to analogous problems in the civil law, cf Burnett, *Conversion by an Involuntary Bailee*, 76 LQ Rev 364 (1960); see also the *Sale of Goods and Supply of Services Act, 1980*, section 47.

21.16 Another reason for hesitating before making finders and recipients of property by mistake guilty of theft is that in many cases the owner has been guilty of some carelessness in losing the property[21] or in transferring it by mistake. Historically the law has been in some respects slow to impose the full criminal sanction upon those who profit from the carelessness of others.

21.17 One possible *via media* would impose a *lesser* criminal sanction in cases of appropriation by finders and recipients of property by mistake. A difficulty with this approach is that it would seem necessary to distinguish between different types of case. For example, where the recipient of the property had in any respect, by action or omission, consciously induced the mistake, there would seem no reason for treating him more leniently. More generally, it may be objected that there is no need to preclude a lesser offence: the judge can always have due regard for extenuating circumstances when sentencing the transgressor.

21.18 One must not forget that it is already the offence of larceny under s1(2)(c) of the *Larceny Act, 1916* to obtain possession of property with contemporaneous knowledge of the owner's mistake. The Theft Act simply extends the offence to circumstances where knowledge of the mistake is subsequent to the obtaining of possession and the property is retained notwithstanding this knowledge. Given the existing law, this is not an unreasonable extension of liability.[22]

21.19 *We recommend the adoption of a provision similar to that in s5(4) of the Theft Act, to the effect that it shall be an offence to retain property obtained by mistake where there is an obligation, in civil law, to restore it.*

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21 Again, the civil law presents some interesting comparisons: see Goldring, *The Negligence of the Plaintiff in Conversion*, 11 Melbourne UL Rev 91 (1977); see also the *Civil Liability Act, 1961*, section 34(2)(d), and *McMahon & Binchy*, 543.

22 Roy Stuart points out that in larceny by mistake, larceny by a trick and obtaining by false pretences the accused obtains property (whether ownership or not) as a result of a mistake on the part of the owner. If he were not mistaken any pretences made would have been irrelevant. Clause 5(4) of the Bill, now s5(4) of the *Theft Act, 1968*, makes every case of obtaining by mistake theft, therefore all cases of obtaining by false pretences must be theft.

CHAPTER 22: HUSBAND AND WIFE

22.1 What limitations, if any, should apply to the definition and prosecution of the offence of theft[1] by one spouse from the other? Several possible strategies have to be considered.

In our discussion of the issue we think it reasonable to proceed on the basis that, where the spouses no longer are living together, the ordinary rules of theft should continue to apply.[2] We also consider that these ordinary rules should continue to apply where one spouse takes (or otherwise steals) property when leaving or deserting or about to leave or desert the other spouse.[3] So far as we are aware, there has been no suggestion that the liability imposed by the existing law to this effect has given rise to any difficulty in practice. Nor have we any objection to it in principle. Our discussion, therefore, will centre on whether the ordinary rules of theft should be further extended.

22.2 The first strategy for change would remove the present restrictions completely: one spouse would be capable of theft from the other, just as he or she would be from any person. In favour of this approach it may be argued that theft is no less serious or socially significant by reason of being committed against one's spouse. From the standpoint of the victim, relieving the transgressor from liability for theft or account of his or her marital status relative to the victim could well offend against the Constitution.[4] Even within the family unit, the present law involves anomalies as between husband and wife and parent and

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1 For present purposes we use this term in its consolidated sense.

2 Cf the *Married Women's Status Act, 1957*, section 9(3).

3 Cf *Id.*

4 Cf *Murphy v AG*, [1982] IR 241 (Sup Ct), *DPP v T*, unreported CCA 27th July 1988. The Commission, in its *Report on Rape*, LRC 24, 1988, recommended that the exemption afforded a husband from prosecution for raping his wife be abolished. This is provided for in s5 of the *Criminal Law (Rape) (Amendment) Act, 1990.*

child or as between in-laws.[5]

22.3 Against this, it may be argued that theft law is prudent and just in standing back a little (though not too far) from the inter-spousal relationship. The boundary lines as to spousal proprietal interests are notoriously blurred. Questions of consent to the appropriation of property can be complicated and uncertain. Moreover even where a spouse engages in petty theft -taking a pound note out of his or her partner's coat, for example - society may consider it an unwise policy to adjudge the transgressor a thief, and may prefer to leave this personal weakness to be dealt with by less strict means.

22.4 A possible compromise, proposed by Article 223.1(4) of the *Model Penal Code* is that it should be:

> "no defense that [the] theft was from the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together."[6]

If this were to be acceptable, the definition of "household chattels" found in such legislation as the *Family Home Protection Act, 1976* and the *Judicial Separation and Family Law Reform Act, 1989* might prove useful.

22.5 A legislative prescription of a specific maximum monetary value for these chattels would, of course, remove much of the uncertainty[7] but this would be a somewhat crude solution, in failing to distinguish between the respective economic resources of different families. An item worth £300 may well be trivial for one couple but considered a small fortune by another couple. Setting the figure closer to the true test of triviality for the first couple would deprive the poorer husband or wife of legal protection in cases of theft by his or her partner. Bringing the figure closer to the test relevant to the second couple would tend to expose more affluent couples to the intrusion of the law in cases where, for them, the item in question was clearly of trivial value.

22.6 Another approach, which has, broadly speaking, been adopted in England,[8] would extend the ordinary rules of theft to all cases of theft by one spouse from another, by providing that proceedings are not to be instituted (save in cases where the spouses are not living together[9]) except by or with the consent of the Director of Public Prosecutions who would thus have a supervisory

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5 Many civil law jurisdictions remove or reduce this anomaly by extending the range of exemptions to lineals and affines. Cf, e.g., the French *Penal Code*, article 380, the German *Penal Code*, section 247(2), the Greek *Penal Code*, article 378.

6 For consideration of the policy issues, see the *Model Penal Code and Commentaries*, pp161-162.

7 The problem of accurately assessing the value of old furniture, other household effects and jewellery, for example should not be understated. If criminal liability were to depend on this issue, it is easy to envisage frequent "battles of experts" between valuers, in the courts.

8 *Theft Act 1968*, section 30(4).

9 The English Act (section 30(4), proviso (a)(ii)) limits this proviso to cases where the spouse by virtue of any judicial decree or order, are under no obligation to cohabit.

function which may be expected to be exercised with sensitivity and commonsense. The advantage with this approach is that it is not possible for legislation to prescribe in advance the kind of case where humanitarian or other considerations should prevail against prosecuting a spouse from stealing from another. We have already mentioned the case of a spouse fraudulently taking a pound out of the other spouse's coat pocket. This may be considered to be just the kind of case in which the exercise of professional discretion by the Director of Public Prosecutions would be a desirable pre-condition of prosecution.

22.7 As against this, it may be argued that for the legislature to take this step would involve a refusal to face the difficult issues at stake. Of course the Director of Public Prosecutions will be able to discharge this function, if thrust upon him by the legislature, but in doing so he would inevitably be called on to make, not merely humanitarian decisions, but also, on occasion value-judgments as to the propriety of the criminal law's extending to certain types of interspousal theft.[10]

22.8 On balance, *we would recommend the enactment of a provision, similar to that in s30(4) of the Theft Act, to the effect that one spouse may be prosecuted for stealing from the other spouse but only by or with the consent of the DPP.*

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10 This may be particularly so in relation to the failure by one spouse to hand over money which he or she has agreed to give to the other. If a man gambles away all his wages on the way home from work and tells his wife he was mugged, so that she does not receive £80 to which she had (let us assume) a legal entitlement, the Director of Public Prosecutions would have to decide whether this type of conduct was a proper matter for prosecution. It is interesting to note the new discretion conferred by the *Criminal Law (Rape) (Amendment) Act, 1990* on the Director of Public Prosecutions in respect of interspousal rape.

CHAPTER 23: FRAUD

23.1 An offence of unlawful appropriation can be drafted in such a way as to ensure that all obtainings by fraud or deception will be theft. Whether or not an offence of dishonesty is recommended which would include appropriation by fraud or a distinct offence of obtaining by fraud is maintained, it will be necessary to examine and define what we mean by fraud or deception. We will first consider possible changes to the offence as it stands in Ireland, then the history and development of offences of deception in the English Theft Acts.

Obtaining by False Pretences

1. The Case for No Change

23.2 It may be argued that no change should be made to the present law. In contrast with the offence of larceny, which is the product of many centuries of judicial manipulation and distortion of its central concepts, the offence of obtaining property by false pretences is a good deal more straightforward, with much greater conceptual integrity.

Furthermore, the limitations in the scope of this offence represent considered legislative decisions as to how far the criminal law should penalise deceitful behaviour. Much of commercial life consists of a battle of wits, involving competition between people based on differing assessments of risk. Such assessments in turn are based on differing pools of information. It is only a limited range of business relationships which proceeds on the *uberrima fides* principle. While there may of course be debate as to whether s32 of the *Larceny Act, 1916* (or s10 of the *Criminal Justice Act, 1951*) goes far enough, it is not a compelling argument merely to point to the limits of criminality prescribed by the sections and to characterise these limits as deficiencies in the law. It must be

asked whether dishonest men and women are evading prosecution by reason of the inadequacies of the section. Certainly there has been little public disquiet with present laws, save, perhaps, in the area of fraudulent promises. Even on this issue, as we shall mention, the present limits are based on a defensible rationale.

23.3 The experience in England has been less than happy. Moreover, changes in technology have caused problems for the amended law which would not have been so serious had the amendments not been made. Thus, certain fraudulent conduct in relation to computers may more easily be charged as obtaining money by false pretences than as the offence of deception, since the latter may be considered to require proof that *a person* (rather than a machine) was actually deceived.

2. Changing "False Pretence" to "Deception"

23.4 Assuming that some changes in the present offence are desirable we consider first whether the expression "false pretence" should be replaced by "deception". This change is made in the American Law Institute's *Model Penal Code*, in Article 223.3. It has also been made in England. There the Criminal Law Revision Committee were of the view that the word "deception" had "the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived, whereas 'false pretence' makes one think of what exactly the offender did in order to deceive. 'Deception' seems also more apt in relation to deception by conduct."[1]

The element of impersonal communication in business transactions has greatly increased over the twenty-three years since the Criminal Law Revision Committee published its report. People transact a growing number of their daily commercial transactions with machines. To speak of deceiving a machine in a statute involves a metaphorical use of language which may result in the acquittal of a dishonest person who would be convicted under a test of "false pretences". As the English Law Commission observed in 1987:

> "It seems reasonably clear on the authorities that the element of 'deception' in the offences of deception in the Theft Acts involves the inducing of a state of mind in another person. For this reason 'deception' of a machine, by dishonestly misusing or tampering with it, would not be sufficient on its own to amount to a deception for the purposes of these offences."[2]

23.5 As regards the Criminal Law Revision Committee's reasons for suggesting the change to "deception", it may be argued that neither is compelling. Concentration on "what exactly the offender did in order to deceive", rather than on the effect produced on the mind of the person deceived, may be no bad thing. It centres on the defendant's conduct, which is the essence of the offence, rather

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1 *Eighth Report*, para 87.

2 English Law Commission, WP No. 104, *Criminal Law: Conspiracy to Defraud*, para 4.9 (1987).

than on its efficacy, which is of course a necessary element in this offence (and most others) but which is secondary to, and dependent upon, the issue of the defendant's conduct. It may be debated whether "deception" is a more apt expression in relation to deception by conduct. The reason why such conduct is criminal is because, when analysed, it may be seen to contain an implied representation. If it lacks this element, the conduct, after, as before, the enactment of the *Theft Act, 1968*, will not, on one view, constitute an offence of this category. Using the expression "false pretence" may be considered to bring out this element into the open, and facilitate the jury's analysis. Why not simply use the word "fraud"?

It is difficult to express a strong opinion on one side or the other but, on balance, as we will be proposing the extension of the scope of the fraud offence, recommending the adoption of certain Theft Act offences and the creation of distinct offences relating to machines and computers, we recommend using the expression "deception" rather than "false pretences". Above all, use of the word "deception" has given rise to no problem, of which we are aware, in practice and the expression has taken root in several other jurisdictions.

3. The Ingredients of Deception or Fraud

23.6 For convenience, the expressions, "fraud", "false pretences" and "deception" will be interchangeable in the discussion which follows.

Perhaps the best way of bringing the policy issues to the fore is to quote Article 223.3 of the *Model Penal Code*:

> "A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:
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> (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or
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> (2) prevents another from acquiring information which would affect his judgment of a transaction; or
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> (3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or
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> (4) fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of

official record.

> The term 'deceive' does not however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed."

Several aspects of policy are highlighted by this provision, which need separate consideration.

A. Representations of Law

23.7 As may be seen, section 223.3 characterises as deception the creation or reinforcement of a false impression as to law. Section 15(4) of England's *Theft Act, 1968* favours the same approach. Professor Smith states that

> "[c]ertainly it seems desirable that misrepresentations of law should be within the terms of the Act. Consider the following cases:
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> (i) D and P are reading a legal document and D deliberately misrepresents its legal effect. This would seem to be misrepresentation of law since the construction of documents is a question of law. If D does so with the object of leading P to pay money for the release of that right, this would seem to amount to obtaining by deception.
>
> (ii) P and his wife, D, have entered into a separation agreement whereby P covenanted to pay D an annual sum free of any deduction whatever. D, knowing that the true legal construction of the document is to the contrary, represents to P that this prevents P from deducting income tax. This is a misrepresentation of law and it would seem that D is guilty of obtaining the money (or at least that portion of it which represents the tax which ought to have been deducted) by deception."[3]

23.8 In the United States, the Comment supporting Article 223.3 explains why this provision embraces misstatements of law:

> "There are conflicting precedents on criminal liability for obtaining property by false representations as to relevant law. Liability has been denied on the ground that everyone is 'presumed' to know the law and that 'ordinary vigilance' would disclose the truth.[4] It is not clear why contributory negligence of the victim should be significant when he is tricked by legal misrepresentation, while it is irrelevant for other

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3 *Smith*, para 175.

4 Citing, *inter alia*, Stiefel, *Note, Criminal Law: False Pretences: Misrepresentation of Law*, 15 Cornell LQ 464 (1930).

misrepresentations. The presumption of knowledge referred to is a way of stating that an offender cannot escape criminal liability by pleading ignorance of the scope or meaning of the criminal law or its applicability to the facts and circumstances of his conduct; it is an extraordinary misapplication of this fictional concept to use it to relieve an offender who did know the law and consciously misrepresented it in order to achieve personal gain at the expense of another. Even courts that exclude misrepresentations of law concede that the rule may be otherwise when a relation of trust and confidence is involved, or when foreign law is the subject of the deception, or when a misrepresentation of fact can be found implicit in the statement of a legal conclusion as when the actor states that he has done certain things which have the described legal consequence. Paragraph (1) renders such refinements unnecessary. Instead, liability is imposed whenever a defendant obtains property by a knowing misstatement of the law. Of course, a legal opinion as well as other statements in the course of bargaining, might be made with the understanding that the opposite party is not taking such utterances at face value or that it is an honest statement of opinion which is to be checked if it is to be believed. In such cases, there would be a defense on the ground that the actor did not purposely create a false impression".[5]

23.9 One factor worth noting is that, in civil law, misrepresentations of law are treated more leniently than misrepresentations of fact. It might be considered odd that a particular misrepresentation of law might have no vitiating effect on a contract in civil law but nonetheless render the person making it liable to severe criminal sanction.

We recommend that a misrepresentation of law should give rise to criminal liability.

B. Misrepresentation of Opinion

23.10 We now must consider whether a misrepresentation of opinion should fall within the scope of the offence. The position historically in both England and the United States is that, although a number of courts have dismissed prosecutions, stating that misrepresentations of "mere" opinion do not fall within the offence of false pretences, when examined closely most involve instances of "puffing", (in today's terminology, "hyping") on which courts normally cast an indulgent eye. The *Theft Act, 1968* in England left the law in a curious state of uncertainty on this point. While misstatements of opinion would today be likely to be considered no less dishonest than those of other facts, the fact that the Act expressly removed the limitation regarding representations as to intention but said nothing as to misrepresentations of opinion might suggest that it intended to let the previous, albeit somewhat dubious, exemption for misrepresentations of opinions continue to have vitality.[6]

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5 *Model Penal Code and Commentaries*, vol II, 192-193 (certain footnote references omitted).

6 See *Smith*, para 181.

23.11 These developments in other jurisdictions, one way or the other, do not affect the issue of principle. The argument against making misrepresentations of opinion criminal is that they are essentially subjective. The listener, who can never know with certainty the mind of the speaker, should take care with all such assertions. If he chooses to believe them, his faith may be touching, but it should not generate criminal liability on the part of the speaker.

23.12 The argument in favour of making such misrepresentations criminal is that while opinions may, of course, vary from person to person and to that extent are subjective, there is nothing subjective about the assertion by a person that, as a matter of fact, he holds a particular opinion. He can lie about this as he can about any other fact. The question whether his listener ought not to have relied on his assertion raises the general issue of the extent to which the criminal law should protect people from their own folly - a matter to which we shall return in due course.

23.13 A further argument against exempting statements of opinion from criminal liability is that the notion of an opinion is of uncertain boundaries. If I say that my car is "an excellent one", is that a statement of opinion alone or are there implicit underlying factual nuances? Can the status of an assertion as an opinion depend on the respective degrees of access to the true facts on the parts of speaker and listener?[7] If so, the same assertion, made to *two* listeners, could be both an expression of fact and one of opinion, if one listener was ignorant of the true facts and the other was not. It may be argued that such an uncertain distinction, which loses a defensible policy rationale outside the clearest case, should not be part of the criminal law.

23.14 *We are opposed to the creation of criminal liability in respect of expressions of opinion.*

C. Misrepresentations as to Intention

23.15 We now must consider whether misrepresentations as to intention should be treated in the same way as misrepresentations as to other facts and thus made subject to criminal sanction.

In favour of imposing liability it may be argued that an intention, like an opinion, although not capable of being directly known by others, is nonetheless a fact. Like all facts it may be capable of being inferred, through speech or other conduct. A person may lie about his intentions no less easily -indeed perhaps more easily - than he may about other facts. Moreover, as the Commentary to the *New York Penal Law* observes,

> "since many flagrant swindles are perpetrated by patently fraudulent promises - and with careful avoidance of any misrepresentation of fact -

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7 Cf *Smith v Land and House Property Corporation*, 28 Ch Div 7, at 15 (*per* Bowen, LJ, 1884). See also *Smith*, para 181.

many an expert confidence man has gone scot free for want of a provision [rendering fraudulent promises criminal]."[8]

It is worth noting that in England section 15(4) of the *Theft Act, 1968* specifically includes within the meaning of "deception" a deception as to present intentions.

23.16 As against this several policy arguments have been voiced over the years against penalising misrepresentations as to intention. It is said that this would result in turning debtors into criminals.[9] While the fact of non-payment might not be sufficient evidence of itself to warrant a conviction, it might be given some considerable evidential weight to support an inference of criminality.

Article 223.3 of the *Model Penal Code* expressly provides that:

> "deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise".

Experience in the United States suggests that this type of provision affords sufficient ballast against overwide prosecutions of defaulting debtors.

The supporting Comment notes that the formulation favoured in Article 223.3 is:

> ".... designed to take account of a related fear that has sometimes been expressed. The concern is that businessmen may be unjustly subject to criminal liability when they make contracts intending in the alternative to perform or to pay liquidated damages or such other damages as the law allows. Businessmen know when they make contracts that it is sometimes more profitable to breach and to pay the required damages than it is to perform the contract as originally drawn. Promisees know this as well as promisors, and indeed the private law of contract is designed in a manner that frequently makes nonperformance the more attractive alternative. Plainly, it would be an unwarranted interference with the careful balance achieved by this law if a theft prosecution for false pretences could be substituted for ordinary contract remedies. Among businessmen, especially in certain trades, there will be a general understanding that words of promise mean only that the promisor will perform or submit to civil remedies. In such a context, the promisor could be convicted of theft only if he clearly intended to do neither, as in a case where he accepts the benefits of the promise and then flees the

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8 *NY Penal Code*, section 155.05, *Comment* at 418-419 (McKinney 1967), quoted by TAH & JIR, *Note: Reforming the Law of Acquisitive Offences*, 58 Va L Rev 1326, at 1345 (1973).

9 In the District of Columbia case of *Chaplin v United States*, 157 F 2d 687, at 699 (DC Cir 1946), the court considered that if promissory fraud were made an offence there would be a real risk of prosecuting "one who is guilty of nothing more than a failure or inability to pay his debts". Criminalisation of such conduct would:

> "place a devastating weapon in the hands of a disgruntled or disappointed creditor .... [T]he way would be open for every victim of a bad bargain to resort to criminal proceedings to even the score with a judgment-proof adversary."

country in order to avoid performance or damages on his part. In short, here as elsewhere, the actor is to be understood in the sense in which he expected and desired his hearer to understand him and in the context of general understandings that surround the particular dealings involved. It is only where the actor did not believe what he purposely caused his victim to believe, and where this can be proved beyond a reasonable doubt, that the actor can be convicted of theft."[10]

23.17 Another argument sometimes heard against imposing criminal liability for promissory fraud is that promisees should look after their own interests rather than call on the criminal law to assist them. In *Goodhall*,[11] where promissory fraud was held not to constitute a false pretence, it was stated that "common prudence and caution would have prevented any injury". In reply to this rationale, an American commentator has said:

> "It is true that the wise man will not grant credit to a stranger without investigation, and that such investigation may compel the false promisor to put himself within the scope of the law by making false representations as to existing facts. But then why should not 'common prudence and caution' dictate a thorough check of such existing facts as well, thus leaving the individual to his own devices and to the remedies of civil process on all counts? This earlier notion that the credulous or unwary are fair game for the unscrupulous is simply a variation of the discarded *caveat emptor* doctrine and has no place in modern law."[12]

23.18 *We recommend that it should constitute deception to make a false statement as to future intentions but that deception should not be inferred from the fact alone that a promise was not performed.*

D. Misrepresentations Having No Pecuniary Significance

23.19 We now must consider whether misrepresentations having no pecuniary significance should fall within the scope of the offence. These could arise where, for example, a salesman "misrepresents his political, religious or social affiliations"[13] with a view to securing the buyer's patronage. In the United States, the framers of the *Model Penal Code* thought it better to exclude liability in respect of such misrepresentations.[14] They considered that:

> "the injury done to the buyer is not a property deprivation of the sort that should be condemned and punished as theft, since the deceived person secures exactly what he bargained for in the way of property. It seems clear, therefore, that such misstatements should be the subject of

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10 *Model Penal Code and Commentaries*, p190.
11 Russ & Ry 462, at 463, 168 ER 898, at 899 (1821).
12 *Anon, Note: The Case for a Law of Promissory Fraud?* 53 Colum L Rev 407, at 411 (1953). The *caveat emptor* doctrine has not been discarded in Irish property law.
13 *Model Penal Code and Commentaries*, p194.
14 *Model Penal Code*, Article 223.3 (final sentence).

> a specific exclusion from the law of theft. This is not a case, such as misstatement of opinion or value or affirmative reinforcement of false impression, where a statutory exclusion for deserving cases will also exclude from coverage cases where there should be liability. The irrelevance of such misrepresentation to the underlying purpose of the provisions of theft, i.e., to protect against misappropriation of property interests, clearly points to a blanket exclusion."[15]

23.20 As against this it may be argued that a blanket exclusion could give rise to difficulties. A person who solicits the purchase of a lottery ticket on the basis that he has a particular religious or political affiliation, for example, may induce a sale based on mixed motives. The purchaser may be happy to buy the ticket on the understanding that it will directly or indirectly confer an economic benefit on a religious or political cause in which he believes. It may well be that he would not otherwise have bought the ticket, but he would have secured "exactly what he bargained for in the way of property".

23.21 It can also be argued that these deceptions as to ultimate objects are no less immoral or anti-social than other deceptions. A person who sells encyclopedias by falsely representing himself as a poor student in need of commissions may, in part at least, be considered to be engaging in a misrepresentation as to social affiliation. Certainly he is behaving unjustly towards the householder whom he solicits, by capitalising on the householder's unselfish desire to assist a person in apparent economic distress. Even if this case falls outside the exemption, cases involving lies as to political party or religious affiliation do not. These are not trivial matters; it may be argued that the criminal law should offer no haven for fraudulent people who exploit these sensitive areas for personal economic gain. However, on balance, the practicality of the approach in the Model Penal Code quoted above commends itself to us, the relevant factor being that the deceived person secures exactly what he bargains for in the way of the 'immediate' property purchased and the direct benefit from such property. The net of the criminal law should be trawled no further.

23.22 *We are opposed to changing the law to accommodate misrepresentations having no pecuniary significance.*

E. Should "Puffing" Fall Outside the Definition of the Offence?

23.23 We now must consider whether "puffing" should fall outside the definition of the offence. The easiest way of addressing this issue is to examine how it has been approached in the United States of America, a society well versed in the practices of capitalism. Article 223.3 of the *Model Penal Code* excludes from the offence of deception "puffing by statements unlikely to deceive ordinary persons in the group addressed". The argument presented in the supporting Comment

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15 *Model Penal Code and Commentaries*, pp194-195.

is worth recording *in extenso*:

> "Puffing is sometimes viewed as exaggerated commendation of a seller's wares 'in terms which neither side means seriously' in a setting where both parties to the bargaining process are aware that reliance upon the literal statements is not expected. If this were the extent of the problem, a special exemption might not be needed, since the alleged deceiver could defend on the ground that he had not purposely sought to create a false impression. Indeed, since the phrasing of the exemption is in terms of statements unlikely to deceive ordinary persons 'in the group addressed', in some puffing situations the defense will go forward on this basis.
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> The problem becomes more complicated, however, when considered in the context of mass advertising, and it is to this situation that the statutory exclusion is primarily addressed. Advertising frequently includes statements and suggestions that most will recognize as not intended to be taken literally or seriously, but that could be regarded as purposely intended to create a false impression in the minds of a certain proportion of gullible persons. The exemption .... is accordingly restricted to communications addressed to groups of persons, such as public advertising, in terms which will not deceive the 'ordinary person' in the group. In that situation, where the message cannot be formulated according to the intellectual or critical capacity of the individual reader or hearer, it would be unfortunate to require communication in terms suitable only to the most dense member of the audience or to condemn as theft what most people would regard as, at worst, improper trade practices to be controlled by civil remedies. On the other hand, criminal penalties may well be appropriate in some situations of mass communication. There is no intent to immunize, for example, schemes that represent that the mailing of money will result in the return or property never intended to be sent or misrepresentations of fact designed to induce a purchase or worthless products."[16]

23.24 The authors of the *Model Penal Code* quote[17] the comment of the Indian Law Commissioners in 1838 which brings the policy issues to the fore:

> "A very large part of the ordinary business of life is conducted all over the world, and nowhere more than in India, by means of a conflict of skill, in the course of which deception to a certain extent perpetually takes place. The moralist may regret this: but the legislator sees that the result of the attempts of the buyer and seller to gain an unfair advantage over each other is that in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch; and therefore he does not think it necessary to interfere .... [A]ny law directed against

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16 *Id*, pp195-197 (footnote references omitted).
17 *Id*, p195, fn 43.

such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazaars of India produce in a century."[18]

23.25 It seems that three policy rationales are lurking below the surface. First, and most generally, it is argued that all negotiations involve a battle of cunning: each side must look out for itself and neither can give or expect mercy. Secondly, and to an extent consequentially, it is said that neither side actually believes the seller's exaggerated commendations of his wares. Thirdly, it is argued that those of particular gullibility are fair game.

23.26 Each of these three rationales can be challenged. The first may be considered to represent the spirit of unbridled capitalism, which is at variance with due concern for the common good and the protection of the socially, economically, physically and mentally disadvantaged members of our society. The second, if true, establishes its own redundancy, since a defendant can be guilty of the offence of deception or false pretences only in cases where the deception operated on the mind of the intended victim. The third argument, like the first, is out of harmony with social policy designed to protect the vulnerable. Assuming that the person who thus misled the victim had the requisite *mens rea*, it may be argued that he should not be permitted to invoke the victim's vulnerability as a defence. Despite these challenges, we think the importation of criminality into the rough and tumble world of salesmanship *at this level* is not warranted. The position of the vulnerable buyer has been greatly ameliorated in recent years by consumer protection legislation.

23.27 *We are satisfied that puffing should remain outside the definition of deception.*

F. Non-Disclosure

23.28 We now must consider the extent (if at all) to which a person should be guilty of deception for non-disclosure. It seems beyond argument that a person who by non-verbal conduct fraudulently makes an implied representation should continue to be guilty of an offence.[19] The more troublesome issue concerns cases where, otherwise than by misrepresentation by the defendant, another person is in error about some fact and the defendant capitalises on that error. This is unquestionably dishonest but should it constitute a serious crime?

23.29 Before seeking to address the policy issues, it may be useful to examine how some other legal systems have sought to deal with the problem. In England, section 15(4) of the *Theft Act, 1968* defines "deception" as meaning:

"any deception (whether deliberate or reckless) by words or conduct as

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18 Indian Law Commissioners, *Penal Code*, 122-124 (1838).

19 Cf *Barnard*, 7 C & P 784, 173 ER 342 (1837).

to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person."

The requirement that the defendant have engaged in "words or conduct" is worth noting, since it is not easy to draw a dividing line here between conduct and failure to act. The following passage from *Smith*[20] reveals some of this difficulty:

> "D is generally under no duty to correct any misunderstanding by P, even though D is fully aware of it. 'The passive acquiescence of the seller in the self-deception of the buyer does not entitle the buyer to avoid the contract.'[21] *A fortiori*, it cannot amount to a criminal offence. Anything whatever done by D to confirm P in his error will, however, be capable of amounting to a deception. Positive steps taken by a seller to conceal from a buyer defects in the goods may amount to fraud in the civil law and would seem to be capable of being deception under the Theft Acts .... It has been held to be fraud in the civil law for the seller of a ship to remove her from the ways where she lay dry and where it might be seen that the bottom was eaten and her keel broken, and to keep her afloat so that these defects were concealed by the water.[22] This would seem to amount to deception. Suppose, however, that the ship was already in the water before any sale was in prospect. Would it be an offence for the seller to leave her there when viewed by the buyer and say nothing about the defects? It would seem not; there are no 'words or conduct' here and presumably the seller would not even be civilly liable in such a case."

23.30 It may well be that the seller should not be criminally liable in the latter case; but it may be argued that the reason is not that D has not engaged in conduct. He has advertised the ship and invited the prospective purchaser to come and view it. Putting the clock back further, he has acquired ownership of the ship. The tale of deception, if started early enough, involves conduct on his part. In one sense, it is true, he has "done nothing"; but in another sense, he has done plenty. In some circumstances the failure to "undeceive" can in English (as in Irish) law amount to a criminal offence. These include cases where D makes a true statement (of intention, for example), but the facts later are contrary to the statement (as where he changes his intention). In such a case, D will be guilty of deception if the person to whom the statement was made acts on it "by tendering property ... which D dishonestly accepts".[23] Similarly where D makes what, unknown to him, is a false statement, the falsity of which D later discovers. Here "there is, in effect, a duty on D either to correct P's false belief or, at least, to decline any property ... deriving from that belief".[24]

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20 *Smith*, para 169.

21 *Smith v Hughes*, LR 6 QB 597 (1871).

22 Citing *Schneider v Heath*, 3 Camp 506 (1813), and noting that it was approved by the English Court of Appeal in *Ward v Hobbs*, 3 QBD 150, at 162 (1877).

23 *Smith*, para 174.

24 *Id.*

But the position is less than fully clear. *Smith* states:

> "This is not to argue that criminal liability should be imposed in all cases where the civil law imposes a duty to speak. This is a highly technical matter and there are instances where it would not be obvious to the layman that to remain silent would be tantamount to deception. Such cases may be unsuitable for the imposition of criminal sanctions. The point is that criminal liability should not be imposed where civil law imposes no duty to speak. Where it does impose such a duty then the act may reasonably be held criminal if the words of the Act may fairly be said to cover the case."[25]

The task of advising as to whether to prosecute or, for a trial judge, of directing a jury, on the basis of this test is indeed a formidable one.

23.31 In the United States one finds some parallels with the approach favoured by the *Theft Act, 1968.*

Article 223.3 of the *Model Penal Code*, as we have seen, provides in part that a person deceives if he purposely:

> "(1) creates *or reinforces* a false impression, including false impressions as to law, value, intention or other state of mind ...; or
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> (2) *prevents* another from acquiring information which would affect his judgment of a transaction; or
>
> (3) *fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship*; or
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> (4) *fails to disclose* a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record."[26]

23.32 The notion of "reinforcing" a false impression is worth examining closely. In a case where admittedly the defendant did not create the false impression, he may nonetheless be liable under paragraph (1) "if he confirms the false impression by his affirmative conduct or statements and thereby induces the victim to part with the property".[27] The mere failure to correct a known false

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25 *Id.*
26 Emphasis added.
27 *Model Penal Code and Commentaries*, pp184-185.

impression will not suffice, however.

The supporting Comment to Article 223.3 concedes that this may prove to be "a point of some subtlety"[28] in particular cases. It therefore elaborates as follows:

> "Assume a sale of costume jewellery, which, unknown to the seller, contains a real and valuable diamond. Clearly, there should be no criminal liability if the buyer discovers after his purchase that the jewellery greatly exceeds in value the price he paid. Equally clearly, criminal liability should be possible if the buyer knows of the diamond and affirmatively represents to the seller that he is an expert, has examined the stones, and can confirm that they are only glass. Here, though the buyer may not have 'created' the false impression, he surely has 'reinforced' it by his deceptive statements. The difficult cases will arise where the buyer's conduct falls short of the clear and affirmative misrepresentation illustrated above but nevertheless might be viewed as an affirmative contribution to the misapprehension by the seller, if only by silence in the face of probing questions. Cases of this sort will inevitably arise. It does not seem suitable, however, to seek to resolve them in advance by a more specific rule of law. The statute either must exclude completely the reinforcement of a pre-existing false impression, a solution that allows the clever to evade the law, or it must rely on prosecutors, judges, and juries properly to apply the general principle that affirmative reinforcement of false impressions should in the main be included within the reach of theft by deception."[29]

23.33 The supporting Comment goes on to explain the policies underlying paragraphs (2), (3) and (4), which "incorporate into the concept of punishable fraud certain cases where the actor does not purposely create or reinforce a false impression but where he either interferes with the victim's acquisition of relevant information or fails to correct the victim's misimpression in circumstances giving rise to a duty of affirmative disclosure".[30] The Comment states:

> "Taking advantage of a known mistake that is influencing the other party to a bargain is not criminal under existing law in the absence of special circumstances imposing a duty to correct the mistake. The miner who discovers that his mine is nearly exhausted of ore may sell it to a stranger although he is fully aware that the stranger is buying under the mistaken belief that the property is still valuable as a mine. The prospector who discovers oil under the land of a stranger may buy the land without informing the stranger of his discovery although he knows that the stranger was satisfied by previous tests indicating there was no oil on the property.

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28 *Id*, p185.
29 *Id.*
30 *Id*, p197.

> Section 223.3 does not attempt to make his behaviour criminal, primarily because the borderline between desirable and disapproved behaviour in this area is so ill-defined that criminal sanctions are likely to impinge on conduct well within the bounds of approved commercial activity. For example, suppose a 'book scout' finds what appears to be a rare edition in a dusty attic, and pays the unwitting owner 25 cents, hoping to resell to a rich bibliophile for $100. There is no community consensus on whether he should be obliged to disclose his opinion to the original owner that the volume was worth $10 or to the bibliophile that it was worth no more than $25. The book scout's argument, that when he is not retained as appraiser or counsellor he should not be required to volunteer valuable professional opinion, would be received favourably in many quarters. Before resolving this as a matter of the criminal law, inquiry would have to be made into the extent to which book-scouting as a trade can survive only if this kind of transaction is tolerated, how important it is to preserve the trade, and so forth. This kind of elaborate balancing is beyond the appropriate purview of a penal statute.
>
> However, in the situations covered by Paragraphs (2), (3), and (4) of Section 223.3, liability may be imposed without jeopardizing normal business practices and without entering the field of controversial moral obligations. Interference with the victim's sources of information, as by bribing his advisers or concealing data that would otherwise have been available, clearly constitutes a case for penal deterrence as provided in Paragraph (2). Paragraph (3) imposes an affirmative duty to correct false impressions of the victim only where the actor has previously contributed (however innocently) to the creation of the false impression or has such a relationship with the victim that the latter would be entitled to count on the actor to inform him fully and honestly. Paragraph (4), requiring disclosure of known liens and adverse claims against property that the actor is selling or mortgaging, falls well within common conceptions of moral obligation, although the courts have had difficulty in bringing such non-disclosure within false pretences legislation, especially where the undisclosed adverse claim is of doubtful validity. Such cases should, however, be included within the coverage of provisions on theft by deception."[31]

23.34 Several questions converge. First there is the apparently linguistic question of what constitutes "conduct". That question in fact contains a maelstrom of other issues, relating to causation, duty, and reasonable expectations. There is, moreover, again the question of how much protection the criminal law should give imprudent people by penalising others who capitalise, albeit somewhat passively, on their foolishness. Finally there is the broad economic question of how far the criminal law should properly intrude into commercial negotiations. If it goes far enough to catch all instances of exploitation of ignorance and

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31 *Id*, pp197-199 (footnote references omitted).

naivete it may have swallowed up a range of cases involving a morally defensible failure to disabuse.

23.35 It may be argued that Article 232.3 of the *Model Penal Code* represents a sensible policy of painting liability of this somewhat passive nature with such broad strokes. It is to be noted that both it and English law incorporate elements of the civil law in the formulation of the offence. As we have seen, Professor Smith states that, if the passive acquiesence of the seller in the self-deception of the buyer does not entitle the buyer to avoid the contract, "*[a] fortiori*, it cannot amount to a criminal offence".[32] So also Article 223.3, in paragraph (3), refers to a person who stands in "a fiduciary or confidential relationship" with another. There is, of course, nothing new about incorporating notions of contract and equity into the definition of criminal offences; but it may be argued that the question of imposing an affirmative duty to speak raises such stark policy issues that it should be resolved without recourse to civil law concepts. The imposition of an affirmative duty in contract, or in tort, for that matter, involves policy considerations far different from those arising in criminal law.

23.36 In making recommendations in this area, we are conscious that we are on the borderline between criminal and civil liability and our recommendation can be supported on whichever side of the line it falls. However, we are again attracted by the common sense in the American approach in excluding purely passive conduct from criminality and making criminal the taking of an active step. We do not think that juries will have any difficulty in understanding this approach, according, as it does, with common sense. However, we would not favour the introduction of a provision similar to that in Article 223(4) as it would be inappropriate in the context of the law of property in Ireland today.

23.37 *We recommend the introduction of a provision such as is contained in Article 223.3 of the Model Penal Code but excluding sub-section (4).*

Property and Intention Permanently to Deprive

23.38 *There should be no difference between the definition of the property which can be stolen and of that which can be obtained by deception. Again, the necessity to prove an intention permanently to deprive should not apply to obtaining by fraud when it does not apply in the case of the basic offence.* Difficulties which may have obtained with regard to, for example, the obtaining of leasehold interests would disappear once that intent no longer remained a necessary proof.

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32 *Smith*, para 169.

CHAPTER 24: HISTORY AND DEVELOPMENT OF OFFENCES OF DECEPTION IN THE THEFT ACTS

24.1 The offence of criminal deception found in clause 12 of the CLRC Bill was to correspond to a number of existing offences concerned with obtaining "something" by false pretences. Apart from filling the gap with a provision that one could deceive as to one's present intentions, clause 12 was intended "to simplify the law and remove certain doubts". Clause 12 was as follows:

> "(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
>
> For purposes of this subsection a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or to retain.
>
> (2) A person who by any deception dishonestly obtains credit or further credit for himself or another (whether for performance of an obligation which is legally enforceable or of one which is not) shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
>
> For purposes of this subsection 'credit' includes not only credit in respect of the payment or repayment of money, but also credit in respect of the delivery of goods, the doing of work or the performance of any other obligation.
>
> (3) A person who dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act shall on conviction on indictment be liable to imprisonment for

a term not exceeding two years.

(4) For purposes of this section 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using deception or any other person."

24.2 It is to be noted:-

(a) that it was considered that use of "deception" was simply a matter of language which focused attention on the effect the offender had on the mind of the person deceived rather than on what he actually did;

(b) that "dishonestly" is used but not defined;

(c) that an intention permanently to deprive is still the rule for fraud as well as for theft;

(d) that the offence covers the obtaining of *ownership, possession* or control, thus *overlapping* with theft in regard to cases constituting larceny by a trick under present law;

(e) that the proposed offence is not confined to the obtaining of a chattel, money or valuable security but extends to property generally, including land;

(f) that clause 12(2) replaces the old offence of obtaining credit by fraud in the *Debtors Act, 1869* (exactly the same a s13 of our 1872 Act) and widens its scope so as to cover cases

(i) where debt has already been incurred,

(ii) of obtaining further credit,

(iii) of obtaining credit for another,

(iv) where credit is obtained for the payment of a debt of the performance of our obligation which is unenforceable,

(v) specifically, of credit for delivery of goods or the performance of other obligations as well as in respect of the payment of money: see *Fisher v Raven*.[1] (The fact that deception is defined to cover present

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1 [1964] AC 210.

intentions makes this, perhaps, less significant);

(g) that it was thought necessary to have a general offence (in clause 12(3)) to cater for relatively minor cases of deception such as dishonest release from a debt, dishonest obtaining of employment or a service or of a loan of an article;

(h) that the general offence created in clause 12(3), given a higher penalty than 2 years, would suffice on its own to cover conduct addressed in clauses 12(1) and 12(2). Indeed the Report tells us the Committee divided on this issue between those who wished to create one offence of deception, the essence of which was the dishonest use of deception for the purpose of gain and those who, disliking general catch-all offences, wished to create the specific offences in clauses 12(1) and 12(2) and no general offence at all.

The arguments in favour of the general offence were:

(i) The mischief was the dishonest use of deception for gain. The particular kind of gain was relevant only to sentence.

(ii) Listing specific instances may be incomplete and lead to evasion of justice through wrong classification.

(iii) The single offence would bring simplicity to the law.

(iv) The more broad the provision the greater the protection for the public.

The arguments against were:

(i) English law is generally precise.

(ii) The offence would be preparatory in nature and would create the concomitant offence of attempting to commit it. This in turn might introduce liability for acts not proximate enough to the intended gain to be captured under existing law.

(iii) Too many minor acts would be captured which are tolerated as part and parcel of ordinary commerce and not regarded as truly criminal. Certain offences would become indictable.

(iv) The provision would give rise to overlapping.

(v) It would be illogical to require an intention permanently to deprive for theft to be criminal while rendering criminal the obtaining of a *loan* of an item by deception.

24.3 It is to be noted further that:

(A) Clause 12 is a compromise. The general offence stays but the Committee decided that the penalty appropriate to the conduct covered in clauses 12(1) and 12(2) was too high for the general offence which accordingly carries a maximum of 2 years imprisonment. In recommending a general offence, the Committee counter the arguments against, set out in the previous paragraph as follows:

(i) They do not consider the offence too general. The indictment would always have to be sufficiently particular in any event.

(ii) They consider the deception sufficiently proximate to the gain. A person who dishonestly deceives will have advanced a considerable way in wrongdoing.

(iii) Any general offence is bound to encompass trivia but discretion is exercised all the time by the prosecuting authorities.

(iv) Overlapping is not seen to create a problem. It is useful to have a residual offence in situations where the proofs are not quite sufficient for a prosecution for either of the other offences.

(v) While they recognise that it may seem curious to provide an offence for temporary deprivation, they point out that the offence at least requires *deception* with a view to gain.

(B) That clause 12(4) provides that deception:

(i) May be deliberate or reckless,

(ii) May relate to law or fact,

(iii) May relate to present intentions.

24.4 Roy Stuart, who it should be remembered, wrote about the CLRC Draft Bill before Parliament had considered it, found Clause 12(3) to be "vague,

sweeping and arbitrary" but suggested it might be improved by concentrating on intended loss to the victim rather than on gain to the accused. A general provision could perhaps be re-drafted as:

> A person who without claim of right by any deception induces a person to do or refrain from doing any act and who thereby causes loss to such person shall be guilty of an offence etc.

We will return to this question.

Parliament

24.5 When the Theft Bill finally came before the House of Lords, clause 12(3) was rejected as an uneasy and undesirable compromise. It overlapped with other offences and would cover matter which should not be treated as criminal. Section 16, which created an offence of obtaining a pecuniary advantage by deception, was enacted instead of clauses 12(2) and (3) and covered, specifically, the obtaining of credit by deception together with parts of the rejected general offence which it was thought ought to be retained. Interestingly, section 16 in its original form did not define "pecuniary advantage" but, to avoid uncertainty, it was interpreted as exclusively limited to the circumstances set out in the section. Section 16, as enacted in the *Theft Act, 1968*, provided as follows:

> "(1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
>
> (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where -
>
> [(a) *any debt or charge for which he makes himself liable or is or may become liable (including one not legally enforceable) is reduced or in whole or in part evaded or deferred; or]*
>
> (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
>
> (c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.
>
> (3) For purposes of this section "deception" has the same meaning as in section 15 of this Act."

[*Subsection (2)(a) was repealed by the Theft Act, 1978, s5(5).*]

24.6 The birth and subsequent history of s16 are well described by *Griew*;

> "In the *Eighth Report* the Committee canvassed the arguments for and against some alternative schemes to provide for offences of criminal deception. Had the scheme that the Committee favoured been accepted, there would have been three main provisions. The first, to replace the old offence of obtaining by false pretences, would have dealt with obtaining property by deception; this was accepted and is now embodied in section 15, ... The second would have been an improved and extended version of the old offence of obtaining credit by fraud; this was in itself uncontroversial. The third and highly controversial proposal was for a provision making it an offence, dishonestly and with a view to gain, to induce a person by deception to do or refrain from doing any act. This was included in the Bill but foundered in the House of Lords. It was felt that it would effect too wide and vague an extension of the criminal law. Instead, in place of the second and third of the offences originally proposed, section 16 was devised to cover obtaining credit by deception together with so much of the rejected general offence as was felt to be acceptable. The remnants of section 16, after its partial repeal by the 1978 Act, deal with a variety of specialised transactions that probably should not require individual mention in a well-drafted code."[2]

Pecuniary Advantage

24.7 In examining above the history of s16 of the *Theft Act, 1968*, we heard echoes of the debate about whether theft should be defined in broad or in specific terms. The question here is whether deception which results in *any pecuniary benefit* should be criminalised.

As we have seen in considering the pros and cons of the general offence in Clause 12(3) of the CLRC Bill, the arguments in favour of making all such deception a serious criminal offence range from those based on principle to those based on pragmatic considerations. First, it may be argued that it is right in principle to take this step. The conduct is immoral and anti-social:

> "What particular kind of gain the offender may aim at getting for himself or somebody else at the expense of his victim should be of no account except for the purpose of sentence."[3]

Any list of specific types of dishonesty must necessarily be incomplete and to an extent arbitrary.

24.8 Secondly, a broad general offence, well defined, would simplify the law for

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2 *Griew*, para 8.02, footnote reference omitted.

3 *Eighth Report*, para. 98(i).

prosecutors as well as the general public, and in particular those disposed to engage in fraudulent enterprises, since there would be less prospect of technical defences.

As against these arguments it may be contended that the offence would range too widely:

> "The offence would cover many minor cases of deception of various descriptions which public opinion has not regarded, and would scarcely now regard, as requiring the application of the criminal law to them - for example, offences by traders, advertisers, applicants for employment and persons soliciting the temporary use of an article or some service. The offence would also cover deceptions of a kind which, though criminal under the existing law, are only punishable with minor penalties on summary conviction - for example, using an out-of-date season ticket ...."[4]

24.9 It is worth considering the benefits and drawbacks of a *specifically defined* offence of obtaining a pecuniary advantage by deception. A useful model is section 16(2) of the *Theft Act, 1968* (as amended by section 5(5) of the *Theft Act, 1978*). Having provided in section 16(1) that a person who by any deception dishonestly obtains for himself or another any pecuniary advantage is guilty of an offence, section 16(2) radically limits the generality of section 16(1):

> "The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where:
>
> (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
>
> (c) he is given an opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting."

24.10 The primary advantage of this approach is of course clarity, but the disadvantage, equally clearly, is the fact that it allows dishonest deceits outside this list to go unpunished by this offence. As regards the actual list contained in section 16(2), the instances of bank overdrafts and insurance and annuity contracts are easy to understand and defend. Professor Smith observes that:

> "[i]t may be that insurance and annuity contracts were singled out because they are cases where an insurer is peculiarly dependent on the assured's good faith, since the special facts which affect the risk lie peculiarly within the latter's knowledge. It may, therefore, have been

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4 *Id*, para. 99(ii).

> thought that the insurer needs special protection against the assured's fraud. Even if the increased sum were actually paid, the payment would probably be too removed from the deception to constitute an offence under s15."[5]

24.11 The new offence prescribed in section 16(2)(c), of being given the opportunity to earn remuneration or greater remuneration in an office or employment, by deception, appears to have much to recommend it. It is not unknown in Ireland for a candidate for appointments in the private, State or semi-state sector, to claim that he or she has been awarded impressive post-graduate qualifications abroad. Employers frequently take this claim on faith, whereas if they checked they would discover that the true position was a good deal less impressive and, on occasion, that the claim is entirely bogus. Such persons are acting dishonestly and unjustly, not only to their prospective employers but also to other, more eligible, candidates whom they displace by their fraud.

24.12 Whether the criminal law should confer special protection against deception on those who engage in betting may be debated. In view of the civil law's generally hostile attitude to contracts of this type it may be argued that the criminal law should not have such solicitude. As against this, it might be considered a short-sighted social policy to leave a lacuna in the criminal law for this type of deceit.

24.13 While we are not opposed to making criminal the conduct covered by s16(2), we would rather deal with the matter in the manner of the original clause 12(3) of the CLRC Bill.

24.14 *We do not recommend the introduction of an offence of obtaining pecuniary advantage by deception on the lines of s16(2) of the Theft Act, 1968, as amended.*

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5 *Smith*, para 214.

CHAPTER 25: SERVICES

25.1 We now must consider whether the dishonest obtaining of another's services by deception should constitute a specific offence. Such a strategy stands half way between a general liability for obtaining a pecuniary advantage by deceit and specific offences involving liability for obtaining specific services by deception. It is not surprising that there should be an increasing interest internationally in the idea of a general offence for obtaining services by deception; the growing importance of services in the economy has given them an importance formerly lacking in society.

25.2 Before considering the policy issues it may be useful to consider two possible legislative models, one expressed in very general terms, the other also involving a wide-ranging general liability but including a considerable degree of specificity as well. S1 of the *Theft Act, 1978* provides as follows:

> "(1) A person who by any deception dishonestly obtains services from another shall be guilty of an offence.
>
> (2) It is obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for."

25.3 Some aspects of this offence are worth noting. First, the service must have been obtained by deception:

> "D does not commit the offence where he succeeds in dishonestly enjoying the service without deception as where he secretly enters a cinema or cricket ground or where he induces a taxi-driver to carry him

by threats."[1]

As we shall see, this contrasts with the position under the *Model Penal Code*.

25.4 Secondly, the requirement that the benefit should have been conferred on the understanding it has been or will be paid for does not appear to require that the *deception* must relate to the question of payment. *Smith* submits that the function of the words relating to this understanding is "to exclude from the operation of the section services which are rendered gratuitously".[2] Whether this interpretation truly reflects the legislative intent (if it is proper to speak of such) may be debated: the draft Bill of the Criminal Law Revision Committee on which the Bill which became the Act was based did cut down the range of deception to that which went to the prospect of payment being duly made, and the Bill as introduced was similarly drafted.[3] However, as *Smith* notes:

> "[t]here is no such restriction in s1 of the Act and no warrant in the words used for implying it. The effect is that the section is rather wider than one might expect in a Theft Act. The offence may be committed where no economic loss is contemplated or caused. An example is the case where D induces P to let him have the hire of a car for the day by falsely stating that he has a driving licence. D may intend to pay or even have paid in advance but he is still guilty of an offence under the section."[4]

25.5 *Griew* notes:

> "When the Bill was considered by the House of Lords, clause 1 was criticised as too complex and a new clause was substituted, penalising the obtaining of services by deception. After the Bill had passed the Lords, the new clause was hurriedly referred to the Committee, who recommended instead the further version now enacted as section 1 of the 1978 Act. The essential contribution of the Committee at this final stage was to provide a definition of "services" so as to ensure that the offence would be limited, as all along intended, to an obtaining of services "on which a monetary value is placed". On the other hand the offence that emerged was so drafted as not to be limited to deception as to the prospect of payment; nor, in fact, need credit be involved at all.

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1 *Smith*, para 220.
2 *Id.*
3 Cf Id.
4 *Id* Professor Smith goes on to say (*id*) that:

> "[t]he result is consistent with s15 of the 1968 Act as applied in *Potger*, 55 Cr App Rep 42 (1970) [where a person who induced another to subscribe for magazines by representing that he was a student taking part in a points competition was convicted in spite of the fact that the magazines would have been supplied]. A possible answer to this view is that the jury might not find D's conduct to be dishonest where he intends no economic loss. While the courts continue to leave a wide discretion to juries in deciding whether conduct is or is not dishonest, it is impossible to state the law with any degree of certainty; but if the conduct envisaged is not dishonest, then *Potger* was wrongly convicted."

> Moreover, section 1 does not (as the Lords amendment did) require the offender to have acted "with a view to gain or an intent to cause loss". The result is an offence not only of completely different design from that originally proposed, but also substantially wider in scope.[5] ....
>
> ... [s]ection 1, at least as originally drafted, was designed to control the deceptive obtaining of credit "at the outset of a transaction" (that is, when liability to pay for services is originally incurred). ...."[6]

25.6 The question of what constitutes a "benefit" to the defendant or some other person has yet to be fully answered by the courts. Where the act done is a service in the ordinary commercial sense, it has been argued that it should be sufficient to show that it amounted to a benefit in the eyes of the defendant.[7] Where the act done has not any apparent commercial value, it has been submitted that again the defendant's apparent or actual willingness to pay for the act should suffice to make it constitute a benefit.[8] There seems, however, to be a zone of conduct where the policy of the law, most obviously the criminal law, seeks to protect individuals from harm to them which they may be tempted to sustain. Examples include tattooing of young people and the infliction of bodily harm on an individual with his consent.[9] In cases such as these it may be that the English courts would characterise the desired conduct as incapable of constituting a benefit, and thus a person who induces conduct by this type by deception would not be guilty of an offence.

25.7 *Spencer* refers to yet another overlap, intended or unintended, in the Act:

> "A person 'is induced to confer a benefit by doing some act' *inter alia* where he is persuaded to hand over property to another. Thus there appears to be a considerable overlap between this offence and obtaining property by deception contrary to section 15 of the *Theft Act, 1968*. *Some* overlap is desirable. Two mutually exclusive offences would be excessively inconvenient, because many transactions involve both materials and services: the trickster who obtains bed and breakfast by deception would have to be charged under section 15 of the *Theft Act, 1968* for the breakfast and under section 1 of the *Theft Act, 1978* for the bed, and the man who by deception gets a silicone damp-course injected into the walls of his house would be guaranteed an appeal to the House of Lords, whichever offence he were charged with! If *any* transfer of property counts as 'conferring a benefit by doing some act' and hence performing services, so that any contravention of section 15 the *Theft Act, 1969* is automatically a breach of section 1 of the *Theft Act, 1978* as well, no great injustice would result, since section 1 carried only half the punishment available under section 15. However, an offence of

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5 *Grlew*, para 6-05.
6 *Id*, para 6.06.
7 *Smith*, para 225.
8 *Id*, para 226.
9 Cf *Id*, para 227-229.

obtaining services by deception that also included all cases of obtaining property by deception would be unsightly. This result can be avoided if subsection (2) is interpreted as *limiting*, but not extending, the word 'services' in subsection (1). On this view, conduct would only amount to 'services' if it could fairly be described as 'services' in normal speech. The new offence would then cover obtaining property by deception where work was provided as well, but not obtaining property pure and simple."[10]

25.8 In the United States, Article 223.7 of the *Model Penal Code* provides as follows:

> "(1) A person is guilty of theft if he purposely obtains services which he knows are available only for compensation, by deception or threat, or by false token or other means to avoid payment for the service. 'Services' includes labour, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use of vehicles or other movable property. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.
>
> (2) A person commits theft if, having control over the disposition of services of others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto."

25.9 Two comparisons between this approach and section 1 of the *Theft Act, 1978* are worth making. First, some considerable degree of specificity is given to the concept of "services", though the list is non-exclusive. "Anything that can be classified as a service that the actor 'knows is available only for compensation' falls within the reach of the section".[11] Secondly, the offence in subsection (1) is committed where the services are obtained by deception *or threat*, and subsection (2) prescribes an offence which is equivalent to that of embezzlement in relation to services.[12]

25.10 We now must consider the policy issues. The first is the fundamental one as to whether there should be a *general* offence of obtaining services by deception or whether an offence of obtaining *specific* services would be preferable. In favour of prescribing a general offence it may be argued that services are of such

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10 Spencer *op cit*, at 28.

11 *Model Penal Code and Commentaries*, p251. See also TAH & JIR, *Note: Reforming the Law of Acquisitive Offences*, 59 Va L Rev 1326, at 1329 (1973).

12 *Model Penal Code and Commentaries*, p251.

economic importance today that it is essential that criminal deception in regard to them should be penalised. In favour of an offence of obtaining specific services by deception, it may be argued, as usual, that any general offence is bound to range too widely. The concept of a service is not of sufficient clarity or coherence as to warrant a general offence, where the legislators necessarily cannot address all the kinds of service that will fall within their definition.

25.11 The next question we must consider is whether the deception should have to *relate to the payment for a service* or whether it should be *any deception which obtains a service on the understanding that payment has been or will be made*. In favour of limiting the offence to cases where the deception relates to the payment, it may be argued that this is the essential mischief which the offence should seek to catch. It is of the nature of many services that the time and mode of payment may be difficult to monitor. It cannot be said that there is a social problem resulting from deceptions in a service context which are unconnected with payment; indeed, as we have seen, section 1 of the *Theft Act, 1978*, which rejects the limitation as to deception in respect of payment, ranges "rather wider than one might expect in a Theft Act"[13] in punishing acts of deception where no economic loss is contemplated or caused.

25.12 In favour of the broad approach it may be argued, first, that in catching other deceptions it does no harm; on the contrary, there is every reason to criminalise deception resulting in the victim of the deception's going to trouble to confer a benefit on the deceiver. Secondly, the broad approach avoids the danger of courts being involved in the unprofitable and morally irrelevant task of determining the precise boundaries of the concept of deception as to payment.

25.13 *Spencer* acknowledges that Section 1 of the Theft Act, 1978 is "criticised as too widely drawn" but continues:

> "The offence as finally drawn is not limited to cases where the defendant acted with a view to financial gain for himself or with intent to cause financial loss to another. This, it is said, opens the door to trivial prosecutions: of those who obtain rides on buses by jumping the queue, for example. Even if this particular case falls outside section 1, it is obviously capable of covering some trivial cases. However, although it is undoubtedly unfortunate that an offence should extend to trivial misconduct, this is a defect which it is notoriously difficult to avoid when drafting an offence without making it suffer from the opposite defect. Cases of obtaining services by deception are conceivable which are far from trivial, where a motive of financial gain might be difficult to establish. Furthermore, the coverage of trivial cases is a drawback shared by other offences - theft and criminal damage, for example - which seem to work satisfactorily in practice. In obtaining services by deception, there is at least the requirement of dishonesty, which, though

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13 *Smith*, para 220.

vague, may at least rule out some trivial and oppressive prosecutions as it is interpreted at present."[14]

A provision requiring a claim of right would have a similar effect.

25.14 *We recommend the creation of an offence of obtaining services by deception on the general lines of s1 of the Theft Act, 1978.*

25.15 We must now consider whether the offence should be limited to cases of deception or whether it should also cover cases of threats (as Article 223.7 does). To answer this question it is necessary to decide on what is the gravamen of the offence. If the "centre of gravity" of the offence is the non-payment for the service then it might be thought that it should include cases of both deception and threats, unless the view were taken that to do so would turn the offence into an unpalatable hybrid. There is no problem in dealing with the cases of threats in the context of robbery and blackmail. Indeed, it may be argued that there is no reason to do otherwise.

25.16 If, on the other hand, the "centre of gravity" of the offence is in relation to services (whether or not the deception must be restricted to the question of payment), then necessarily the inclusion of cases of threats is unwelcome.

25.17 *We are satisfied and recommend that the offence should be limited to cases of deception.*

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14 Spencer, *op cit*, at 30.

CHAPTER 26: SECURING THE REMISSION OF A LIABILITY BY DECEPTION

26.1 We now must consider whether the legislation should include a distinct offence or distinct offences penalising securing the remission of a liability by deception. The argument in favour of doing so is that otherwise a debtor who, for example, by a false "hard-luck" story, induced a creditor to write off a debt might not be guilty of a criminal offence. Related deceptions, which may also be dealt with here, are inducing by deception a creditor to forgo payment and dishonestly obtaining an exemption from liability to make a payment.

26.2 A general offence could be drafted to catch all instances of fraudulently obtaining the writing-off, or postponing the payment of, a debt or the exemption from a liability to make a payment. Another approach would seek to identify certain types of debt (such as bank overdrafts) and prescribe with precision the circumstances in which deception will give rise to criminal liability.

26.3 In England section 2 of the *Theft Act, 1978* leans towards the latter approach. It provides as follows:

> "(1) Subject to subsection (2) below, where a person by any deception:
>
> (a) dishonestly secures the remission of the whole or part of any existing liability to make a payment, whether his own liability or another's; or
>
> (b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the

due date for payment is deferred) or to forgo payment; or

(c) dishonestly obtains any exemption from or abatement of liability to make a payment;

he shall be guilty of an offence.

(2) For purposes of this section 'liability' means legally enforceable liability; and subsection (1) shall not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission.

(3) For purposes of subsection (1)(b) a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is to be treated not as being paid but as being induced to wait for payment.

(4) For purposes of subsection (1)(c) 'obtains' includes obtaining for another or enabling another to obtain."

26.4 The drafting of this section has given rise to some criticism and disagreement among the commentators, but the overall policy goals it seeks to forward are reasonably clear. A key issue, addressed in clause (b), is whether dishonestly inducing a creditor to wait for payment should also involve an intent to make permanent default on the liability to make the payment. Clause (b) requires this intent. Thus a debtor who "strings along" a creditor will be liable only where it can be shown (by direct evidence or inference) that the debtor had the intent to make permanent default. Spencer criticises section 2(1)(a) and 2(1)(b) for unnecessarily making the deceptive remission or postponement of a debt criminal in circumstances where there were unlikely to be funds to meet the debt in any event.[1] As against this approach it may be argued that, whereas slow payers should not be made criminals on account of their lethargy, those who engage in deceptive practices to postpone payment are engaging in conduct sufficiently anti-social to warrant a criminal sanction.

26.5 Clause (c) was designed to catch cases such as where the defendant dishonestly obtains a rent rebate or a reduction in his rent for the future.[2] The desirability of penalising such conduct seems beyond argument.

26.6 S2(1)(c) meets with Spencer's approval as "it still covers conduct which is really harmful to the victim and amounts to no other criminal offence", a criterion which commends itself to the Commission.

26.7 His final criticism of section 2 is that it is "complicated". "Long,

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1 Spencer, *op cit*, at 34, 35.
2 Cf *Smith*, paras 239-240.

expensive hours will be spent in the courts discussing arid procedural questions resulting from a failure to specify what the relationship between the three main clauses is, and whether they are three offences or one. It is an ill wind of legal change which blows no barrister any good."[3]

26.8 As with the obtaining of pecuniary advantage, while we see no problem in making criminal the conduct captured by s2, we would rather do so by means of an offence more generally drawn.

26.9 *We do not recommend the introduction of offences of securing the remission of liability, inducing the foregoing of payment or obtaining exemption from liability by deception as found in the Theft Act, 1978.*

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3 Spencer *op cit*, at 35.

CHAPTER 27: MAKING OFF WITHOUT PAYMENT

27.1 We must consider whether there should be a special offence of making off without payment for goods or services where payment on the spot is expected. As we have seen, section 13(1) of the *Debtors Act (Ireland) 1872* deals with one aspect of this issue; but the question here is whether the proposed legislation should contain an offence expressed in more up-to-date terms, dealing with contemporary commercial realities.

27.2 Under existing law a person who had not the fraudulent intent at the time he incurred the debt or liability will not be guilty of an offence under section 13 where he changes his mind before the time for payment. Nor will a person be guilty of false pretences, even if he had a fraudulent intent from the beginning because his false representation relates to an intention as to the future.

27.3 If the law of deceptions were to provide that a person could be liable for false representations as to intention, then one who orders a meal in a restaurant intending secretly not to pay for it would commit this offence. If a person, having intended to pay when ordering, later changed his mind, he would be guilty of an offence of obtaining property, services or a pecuniary advantage by deception, provided an express or implied representation of willingness to pay could be inferred.[1]

27.4 The problem with the notion of implied representations in this context is that the courts can be forced to resolve cases of dishonesty in a somewhat artificial manner.[2] Therefore it may be argued that a specific offence dealing with this particular mischief is preferable.

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1 Cf *Ray*, [1974] AC 370, *Smith*, para 174.
2 Cf *Ray*, *supra*, *Smith*, paras 158, 242.

27.5 S3 of the English *Theft Act, 1978* presents a useful model for discussion. It provides as follows:

> "(1) Subject to subsection (3) below, a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence.
>
> (2) For purposes of this section 'payment on the spot' includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.
>
> (3) Subsection (1) above shall not apply where the supply of goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.
>
> (4) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, committing or attempting to commit an offence under this section."

27.6 The section reads easily and its general idea is plain. But some of its central concepts require further elucidation. First, the notion of payment "on the spot" has given rise to uncertainty. The matter is of considerable practical importance, since it has been suggested the offence cannot be committed *after* the defendant has left the "spot" in question[3] as where, having in innocent forgetfulness walked out of a restaurant without paying the bill, a customer then decides to avoid payment and proceeds down the road.

27.7 *Smith* states:

> "It is the dishonest departure from the spot which is the offence. An attempt to depart from the spot is an attempt to commit it. What is "the spot" depends on the circumstances of the case. In *McDavitt*[4] it was held to be a restaurant and that D, who had made for the door, might be convicted, not of the offence, but of an attempt to commit it. The words in *Brooks and Brooks*,[5] 'passing the spot where payment is required', suggest that the spot is the cash point rather than the restaurant, so that D would be guilty of the full offence if he were stopped between the cash point and the door. Where the offence occurs, as it usually will, on business premises, probably the premises constitute the spot so that the offence is not complete until D has left them. The extent of 'the spot' may be important. Can the offence be committed after D has left it without any dishonest intention? He

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3 Cf *Smith*, para 243.
4 [1981] Crim LR 843.
5 76 Cr App Rep 66, at 70 (1983).

absent-mindedly walks out of the restaurant without paying his bill. As soon as he is outside the door, he realises what he has done, but continues on his way, intending to avoid payment. Possibly his innocent departure becomes a dishonest making off at that moment. If, on the other hand, he arrives home before he realises that he has not paid, he is clearly incapable of committing the offence. This would leave a difficult question as to the point at which making off becomes impossible. The alternative is to hold that making off is important once D has innocently left the business premises or other spot. This has the advantage of certainty and in unlikely in practice to provide a serious limitation on the scope of the offence."[6]

The language of section 3(1) contains no express limitation of the notion of "mak[ing] off" which would require that this occur *before* the defendant has reached the "spot". All that it provides is that he should have made off. The fact that this involves a "difficult question" as to the point at which making off become impossible may be a matter of regret but it scarcely is a sufficient reason for narrowing the scope of the concept to provide certainty based on an arbitrary test unmentioned in the subsection itself.

27.8 This brings us to the notion of "making off". *Smith* rejects the suggestion that it applies only to cases where the defendant departs without the creditor's consent: he considers that:

> "this is too narrow without, at least, some qualification. For example, at the end of a long taxi-ride, D says he is just going into the house to get the fare and disappears into the night never to return. Again if D tells a restaurateur that he has forgotten his wallet and gives a false name and address .... and is allowed to go there is authority for saying that he goes with consent; but the case seems clearly to fall within the mischief at which the section is aimed."[7]

27.9 Perhaps there would be merit in retaining the connection between "making off" and leaving without the creditor's consent. It would always be possible to insert a provision defining "consent", so as to cover the types of case mentioned by *Smith*, where, in ordinary parlance, if not always in law, it may be said that the creditor did not "really" consent to D's departure in that his apparent consent was given on the basis of a false assumption fraudulently engineered by D.

27.10 *Spencer* has contended that "mak[ing] off" means "*disappearing: leaving in a way that makes it difficult for the debtor to be traced*".[8] Smith considers this to be a cogent argument:

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6 *Smith*, para 243 (certain footnote references omitted).

7 *Id.*

8 Spencer, *Correspondence*, [1983] Crim L Rev 573, at 574. Cf Spencer, *The Theft Act, 1978*, [1979] Crim L Rev 24, at 36-39. Cf *Williams*, 879.

> "[It] would cover the dishonest taxi-passenger and the impersonator. It would also apply to D who leaves a cheque signed in a false name. It would not apply to the regular customer of known address who gets away by stealth, force or fraud, or to the person who leaves a worthless cheque with his true name and address. These persons are certainly avoiding payment of a debt but it was not the intention of the section to make the defaulting debtor liable to arrest and punishment without more. The mischief at which the section was aimed was the escape without trace of the 'spot' debtor."[9]

27.11 Again it may be argued that this interpretation, while having much appeal from the standpoint of policy, is not easily reconciled with the language of section 3(1). A well-known customer, no less than an unknown one, surely, in ordinary parlance, can "make off" without paying. Certainly it is reasonable to believe that the waiter, reporting the incident to his manager, could quite appropriately say "You may not believe this but Mr Brown, our best customer, made off without paying tonight. What can have made him do this?" Where the context shifts from a restaurant to a jeweller's shop, the point seems even clearer. D may be quite happy to become known to the staff over a series of visits - if not by name at least by personal acquaintance across the counter. Eventually D asks to see some really expensive rings, and while the attention of the assistant is diverted, escapes out the door. Who can convincingly deny that D has made off without payment?

27.12 In this context it is worth noting Francis Bennion's defence of his draft of section 3 against suggested interpretations by commentators which countenance the possibility that the section extends to those who pass dud cheques.[10] Noting that *Griew* describes the phase "makes off" as "simply an atmospherically loaded synonym for 'leaves' or 'goes away'",[11] Mr Bennion confesses to being unable to understand why *Griew* should say this:

> "Parliamentary draftsmen do not use words that are loaded (atmospherically or otherwise) just for the sake of it. There is a purpose, and it is to indicate the desired meaning.
>
> The Shorter Oxford Dictionary defines to make off as 'To depart suddenly, often with a disparaging implication; to hasten away: to decamp'. The man whose dud cheque is accepted does not hasten away. He has no need to. The processes of the clearing banks are not so rapid that he need fear immediate discovery. So he strolls off rather than making off, and a necessary ingredient of the section 3 offence is lacking. If in a particular case he did hasten away (say because he had a train to catch or was late for an appointment) he would not be 'making off' within the meaning of section 3. His reason for haste would

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9 [1983] Crim L Rev 573, at 574.
10 See Syrota, *Are Cheque Frauds Covered by Section 3 of the Theft Act, 1978?* [1980] Crim L Rev 413.
11 *Griew* 3rd ed, para 15-53.

be extraneous of the offence.

> By carefully-chosen language the draughtsman of section 3 has required guilty haste (or something like it) as an ingredient of the *actus reus*. The crook of cool nerve who walks steadily away without any gesture of payment is of course still 'making off'. He is quite ready to break into a run if pursued."[12]

27.13 A further uncertainty arises as to the scope of the notion of "service", which is not defined in section 3. The point is of some importance since, if the leasing of premises could of itself[13] be regarded as a service, the tenant who did not pay on time might be considered to have been guilty of this offence. One reason why he might not is that "there is no requirement in an ordinary lease that the rent be paid on the spot".[14] Perhaps the more certain way of resolving the matter would be to define "service" in the legislation.

27.14 As regards dishonesty, which is an ingredient in the offence, it is clear that it is not necessary that the defendant should from the outset have intended not to pay: once that intention is formed, dishonestly, before he makes off, he will be liable. Since, in contrast to section 2(1)(b), section 3 does not require an intention *permanently* to avoid payment, it seems that this is not an ingredient of the offence of making off without payment. Clearly, however, if the defendant argued that he was going home to get money to bring back to the creditor, his explanation (if believed) would be likely to establish his honesty and consequent lack of guilt.

27.15 The question of the right of arrest is important in this context. As has been mentioned, section 3(4) provides that any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be committing or attempting to commit an offence under the section. This is a wide power, extending, not just to the proprietor of the establishment but *any other* person.

27.16 The uncertain scope of the offence, which we have already described, has implications in relation to this power of arrest. Spencer, having proposed the narrow interpretation of the meaning of "makes off" which we have quoted, goes on to say:

> "I .... think this interpretation of 'makes off' is the right one because it solves a problem which otherwise arises in connection with section 3(4) .... Years ago the common law set its face against giving hoteliers, restaurateurs and suchlike the power to arrest those who merely fail to pay their bills. Yet if we interpret 'makes off' as synonymous with

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12 [1980] Crim L Rev 670, at 670. Cf Smith, [1982] Crim L Rev 612, Bennion's reply [1983] Crim L Rev 205 and Smith's rejoinder, *Id*, 206.

13 As opposed to cases where services are supplied under or in association with the lease.

14 *Williams*, 879.

'leaves' we give them precisely this. On this view, any customer who sought to leave having committed the offence of making off without payment, and the hotelier or restaurateur would be able lawfully to detain him. To me, at least, it seems highly undesirable that hoteliers, etc. should be given this power, at any rate when they know who the non-paying customer is and where he may later be found. On the other hand, if "makes off" is limited as I suggest, there is no question of the hotelier having the power to arrest a customer who leaves his name backed with some plausible identification."[15]

27.17 Our analysis can address the policy issue raised here unencumbered by undue concern for the precise meaning of section 3. What we have to decide are two separate questions: first, the range of dishonest conduct which should give rise to criminal liability, and secondly the circumstances in which a power of arrest should attach. The fact that section 3(4) extends the power of arrest to *all* cases in which there is a reasonable suspicion that the offence has been or is about to be committed or attempted should not blind us to the possibility that it might be more prudent to cut down somewhat on the power. It may well be considered desirable, for example, to bring within the scope of the offence cases where persons known to the creditor make off without payment; but equally it might be considered quite undesirable that persons should be at risk of being subject to arrest without warrant at any time by the creditor or any person whom the creditor may have told of the incident.

27.18 To limit the power of arrest to cases where the creditor is unaware of the identity of the suspected transgressor may be considered by many to be a useful restraint. A further limitation worth considering would be to limit the power further so that, in effect, it would be one of detention rather than arrest, whereby the creditor would be entitled to stop and detain the suspect for the purposes of establishing his identity. In this context it might be considered useful to restrict the power of arrest or detention to the creditor or any person acting on his behalf. Whether there should be physical limitations may be doubted. Otherwise the bilker would have an incentive to maintain his flight to the sanctuary zone, whether that was defined in terms of an area beyond the immediate environment of the place where payment on the spot was required or expected, or more broadly (such as "a reasonable distance"). Similar doubts apply in respect of temporal limitations.

27.19 We are anxious to avoid the unnecessary creation of new offences and the Model Penal Code, perhaps, might afford a way to avoid a "making off" offence. In Article 223.7(1) it is provided *inter alia* that:

> "Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restuarants, refusal to pay or absconding without payment or offer to pay gives rise

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15 [1983] Crim L Rev, at 574.

to a presumption that the service was obtained by deception as to intention to pay".

It would, of course, be possible to add this type of proviso to the offence of obtaining services by deception, however, it simply creates a presumption. As Spencer says, the "popular and well known defence"[16] to the obtaining by deception offence is the defendant's assertion that he intended to pay at the time he obtained and only changed his mind afterwards. One assumes the same line of defence would be employed in rebutting the presumption and we would as soon create the new, direct, offence as advocate an irrebuttable presumption.

27.20 *We recommend that an offence of making off without payment be created on the lines of section 3 of the English Theft Act, 1978 but with a power of arrest restricted to apply to persons unknown to the creditor.*

16 Spencer, *The Theft Act, 1978*, [1979] Crim L Rev 35.

CHAPTER 28: CHEQUES AND CHEQUE CARDS

28.1 Much dishonesty concerns banks and banking transactions and any modern law of dishonesty should cope comfortably with and make every allowance for transactions involving the use of cheques, banker's cards, credit cards, and money dispensing machines. In addition, investigating Gardai should be afforded all reasonable access to the records of all financial institutions, for the purposes of investigating dishonesty.

(a) Cheques

28.2 When a cheque "bounces", the usual charge preferred at the moment is of obtaining by false pretences. Forgery charges may also lie. As we have seen above[1] the following representations have been held by the Court of Criminal Appeal[2] to be implicit in writing a cheque.

(1) That the drawer has an account at the bank on which the cheque is drawn.

(2) That he has authority to draw on it for the amount of the cheque.

(3) That the cheque as drawn is a valid order for the payment of the amount for which it is drawn in that the state of affairs then existing is such that, in the ordinary course of events, the cheque will be duly honoured on the date appearing on it or subsequently.

(4) Unless indications are otherwise, that it will be presented for payment immediately.

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1 Supra pps122-3.

2 In *Thompson alias Morrison*, CCA 13 October 1960 (No. 2 of 1960) 1 Frewen 201.

28.3 Where an accused writes a cheque having no funds but genuinely anticipating being able to make a sufficient lodgement before the cheque is presented, he is guilty of making a false representation but would be held not to have the necessary intent to defraud to be guilty of the offence of obtaining by false pretences.

28.4 As *Kenny* points out, the act of drawing a cheque does not therefore imply any representation that the drawer "has money in his bank to the amount drawn for, inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it".[3]
The accepted formula for the representation involved in having a cheque, i.e. that "the existing state of facts" is such that the cheque will be honoured in due course, was first laid down in *Hazleton*[4] and followed in all the leading cases since.

The Court of Criminal Appeal in *Thomson alias Morrisson*[5] adopted a similar formula.

Existing Fact
28.5 The law is that for the offence to be committed, the pretence must refer to an existing or past fact and not to intentions regarding the future. We find it impossible to disagree with Glanville Williams that the *Hazleton* formula is essentially a representation as to the future (e.g. an intention to make a timely lodgement) dressed up as a representation as to existing fact. This only became "permissible" after the Theft Act, which admitted for the first time representations as to "present intentions" within the ambit of the offence. We provisionally recommended in the Discussion Paper the introduction of this reform. Otherwise, the present law as to cheques, taken in isolation from the use of cheque cards appears satisfactory.[6]

(b) Cheque Cards
28.6 When a bank gives a customer a cheque card, it guarantees that a cheque "backed", by the card and written for a sum not exceeding a particular sum will be honoured by the bank, whether or not the customer has funds to meet the cheque or has exceeded his overdraft limit. Accordingly, the bank leaves itself at the customer's mercy while the cheque card is "in date" and he has cheques in his cheque book unless it can (physically) repossess the card. To the extent that cheques are only guaranteed up to a certain amount, the bank's liability is limited.

It follows that when a customer draws a cheque "backed" by a card when he has

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3 Kenny's *Outlines of the Criminal Law* (17th ed by JWC Turner) para 346.
4 2 CCR 184 (1874).
5 1 Frewen 201.
6 We examined the cheque as a chose in action earlier, *supra* para 20.31 *et seq.*

no funds or his exceeded his overdraft limit, the cheque will nevertheless be honoured and the payee is not deceived as to that essential fact. It does not concern the payee whether or not the customer has funds. He has cheque card, cheque book and pen.

Two Questionable Decisions

28.7 However, it has been held in England in the case of *Charles*[7] that the payee is deceived in a case where the drawer is over his overdraft limit even though the cheque is going to be honoured by the bank in any event.

Charles wrote a series of cheques backed by his cheque card, knowing that the total of the cheques greatly exceeded his overdraft limit, and obtained gaming chips on foot of the cheques. The manager of the club gave over the chips secure in the knowledge that the cheques would be met because they were backed by the banker's card. The fact that Charles was exceeding his overdraft did not therefore concern him in the slightest as the cheque was valid *as far as the club was concerned*.

Charles was nevertheless convicted of obtaining an overdraft from *the bank* by deceiving *the club*. The decision was based on the premise that Charles made an implied representation that he was authorised to draw all the cheques. Again, this did not concern the club one way or the other. As Glanville Williams argues:

> "The mere fact that a person will be surprised and disconcerted when he discovers a particular fact, and that he would have acted otherwise if he had known the fact in time, does not establish a deception; for if it did, every deliberate and material non-disclosure would constitute a deception."[8]

28.8 The case of *Lambie*,[9] which related to the use of a credit card was similarly decided. *Charles* and *Lambie* were decided on the basis of an implication that had the payee of the guaranteed cheque or acceptor of the credit card in payment actually known of the fraud being perpetrated on the bank, they would not have become party to it and proceeded with the transaction. Who would ever *admit* that they *would* so proceed? The fact is that apart from ascertaining that a card had not been *stolen*, the question would never arise and was never meant to arise. The idea behind the cards was to put traders and supplies of services at their ease in accepting paper or plastic.

28.9 The reasoning behind these decisions is rather contrived. When banks introduced the use of banker's cards and credit cards, they did so, primarily, to make life easier for customers but also because it suited them to do so. They

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7 [1977] AC 177.
8 *Williams*, 779.
9 [1982] AC 449.

would have taken into their calculations the fact that some customers would eventually, inevitably use them without funds. The primary object was to encourage customers to spend within their overdraft limits and make money, in interest, for the banks. Payees were therefore *encouraged* to accept cheques backed by cards, or purchases with credit cards on a *no questions asked* basis. We consider it bad policy to base an offence on deception where deception is irrelevant and does not arise. JC Smith is constrained to observe, "with respect", that the finding in *Charles* seems "to be almost perverse". Where cheque or credit cards are stolen, and used by others the situation is different and is usually covered by the law of forgery.

28.10 The essential mischief to be addressed is the fraud committed on the bank by the customer who has knowingly exceeded his overdraft or whose credit card has been cancelled. Does one wish specifically to address it and create an offence? The banks and credit card companies issue cards with their eyes open to the risk they are taking.

The errant customer will run out of cheques. The number of the cancelled credit card will be circulated. Banks may be said to have broad backs. As against that, why should mischief perpetrated on, say, a supermarket be any more mischievous than mischief perpetrated on a bank. If customers abuse the facilities they are given, less credit is left for other customers.

Original Proposal

28.11 It is not clear whether the Irish Courts would follow *Charles* and *Lambie*. We do not think they should and provisionally recommended in the Discussion Paper the creation of a new offence of using a cheque card or credit card without authority in obtaining anything capable of being dishonestly appropriated.

Consultation

28.12 Consultation revealed some clear opposition to such a wide-ranging offence. The view was pressed that, if banks make the commercial judgment to indemnify against loss those with whom their customers use these cards, it is up to the banks to restrict the opportunities for abuse by sounder scrutiny of their customers rather than making this a matter for policing by the State. We see the force of this criticism. We do, however, appreciate that cheque cards and credit cards perform a useful social function in helping to reduce the amount of cash in circulation and thus minimising opportunities for theft. Moreover, the availability of cash dispensing machines, in conjunction with these cards, has made it easier for customers to avoid carrying large amounts of cash.

28.13 We are divided on this issue but by a majority, we *recommend the creation a more narrowly focused offence of dishonestly using a cheque or credit card after the supplier has sought to communicate to the user notice of the revocation of permission to use it thereafter. Thus, it would not suffice that the user had been informed of the terms of revocability either on receipt of the card or at some time*

thereafter: it would be essential to prove that the supplier of the card had actually revoked permission to use it, in express terms, and that the supplier should have sought to communicate to the user notice of the revocation. The legislation should prescribe the appropriate modes of communication (such as by registered letter to the user's last known address).

CHAPTER 29: OBTAINING, MACHINES AND COMPUTERS

29.1 We must now examine the question whether our law should be changed in order to deal specifically with misconduct relating to computers. First we consider the arguments for and against such legislative change; then we examine the possible approaches which a new law might have.

The Case in Favour of Legislative Change

29.2 The case in favour of legislative change may be presented on two fronts:

1. The increasing incidence of computer crime shows the inadequacy of the present law.

2. The distinctive nature of misconduct relating to computers calls for a distinctive legislative response.

1. The Increasing Incidence of Computer Crime Shows the Inadequacy of the Present Law

29.3 This argument has been widely heard - and heeded - in the United States.[1] It is said that a high and increasing incidence of computer crime shows that the present law is not working, in that it has failed to deter the criminals from embarking on these crimes.

29.4 The argument has been challenged on several fronts. First, its factual

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1 Cf Mennelly, *Prosecuting Computer-Related Crime in the United States, Canada, and England: New Laws for Old Offenses?* 8 Boston College Int'l & Comp L Rev 551 (1985). See also Stevens, *Identifying and Charging Computer Crimes in the Military*, 110 Mil L Rev 59, at 61-63 (1985).

premise has been doubted.[2] After a review of a survey of the incidence of computer crime conducted by the Ontario Provincial Police, reported in 1982, one commentator concluded that it was "contra-indicative of most projected figures".[3] A British commentator, after a review of the empirical studies in the United States, Canada and Britain, concluded that:

> "[t]he evidence of these surveys shows that the case for urgent remedial action based upon the high incidence of computer crime has not been established, either in the United States or in the United Kingdom or anywhere else where serious surveys have been undertaken, but that attempts to establish it seem to have contributed to the growth of concern."[4]

29.5 It is, of course, almost certain that there is some degree of under-reporting of computer crime, but it is also true that such a reluctance is a feature of corporate fraud offences generally. Moreover, it would seem injudicious to conclude from a speculative, shadowy area of under-reported crimes that special legislation would on that account be required.

29.6 It is useful in this context to note what the Scottish Law Commission had to say on the matter:

> "The trouble is that, without having full details of all the cases involved, it is impossible to say whether particular incidents were of a kind that could not have occurred but for the intervention of a computer, or were instead of a kind that could have equally well occurred even if more traditional methods of accounting or whatever had been in use. In particular it is impossible to say whether the advent of mass computerisation has of itself brought about a substantial increase in the volume of corporate fraud and theft compared with what might have occurred anyway even if the computer had never been invented; though it does seem likely that the nature of computer technology, for example its ability to secure the movement of very large amounts of money instantaneously by electronic funds transfer, will have increased the risks to some extent .... [I]t is, we think, impossible to say with certainty whether any increase that there may be in computer-related crimes, or other undesired computer-related activities, is attributable to deficiencies in our present criminal law."[5]

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2 Cf Wasik, *Following in American Footsteps? Computer Crime Developments in Great Britain and Canada*, 14 N Ky L Rev 249, at 249-250 (1987), Tapper, *Computer Crime: Scotch Mist?* [1987] Crim L Rev 4, at 4-8. Webber, *Computer Crime or Jay-Walking on the Electronic Highway*, 26 Crim LQ 217, at 223-225 (1984).

3 Wasik, *op cit*, at 224.

4 Tapper, *op cit*, at 8.

5 Scottish Law Commission's *Report on Computer Crime*, para 3.3 (Scot Law Com No. 106, 1987).

2. The Distinctive Nature of Misconduct Relating to Computers Calls for a Distinctive Legislative Response

29.7 It is sometimes argued that computer crime has such a distinctive nature as to call for a distinctive legislative response. This distinctive nature of computer crime is outlined by Temby and McElwaine:

> "To commit a computer fraud, perhaps involving millions of dollars, the perpetrator need not move from his house. Absolutely no direct human activity is necessary. There is no physical break in, the computer can be programmed to commit the crime and even to erase the evidence. Computer crime is covert - to be effective it must be concealed from its victim. In that regard it is not different from other types of fraud, but of course the means of perpetration are significantly different. Computers leave no fingerprints. There are no documents to evidence transactions. The programme which is used to effect the crime may have been compiled months before and the computer may have left the jurisdiction. Computers pay no regard to jurisdictional boundaries, international sovereignty or time zones. That presents significant difficulties which are not present in more traditional crimes. It may be that the computer is only a new means of committing such crimes, but as such it is fundamentally different from other means."[6]

29.8 As against this, it may be argued that the apparently distinctive features of computer crime amount to no more than a contingent amalgamation of certain factors which, in varying combinations, may be found in a wide range of sophisticated crimes of fraud. As an American commentator has observed:

> "Although some writers classify their behaviour as 'a new array of criminal conduct',[7] such activities do not constitute a completely different category of criminal behaviour at all. To consider illegal computer-related behaviour other than as ordinary crime which uses a computer either as a tool (as in thefts of money or information), a subject (as in computer data-matching frauds), or an outright object of

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6 Temby & McElwaine, *Technocrime - An Australian Overview*, 11 Crim LJ 245, at 254 (1987). See also the Scottish Law Commission's *Report on Computer Crime*, para 3.14, clause (2):

> '.... [I]t is agreed that it is probably undesirable to confer any proprietary status on information, and that, even if that were to be contemplated, it should not be attempted without [a] full-scale examination of the subject .... However, the advent of widespread computerisation has brought with it new features which did not exist in pre-computer days. First, vast amounts of information can be stored in a tiny physical space (in the case of a hard disk, for example, in a space no larger than a paperback book), and all or any of that information can be accessed instantly at the touch of a key. Second, the information so stored will frequently be of a highly confidential or sensitive nature being, for example, anything from personal staff records to corporate trading returns. Third, since computers now perform with ease many tasks which previously would have required the employment of many experts, the information stored in a computer may contain details of future product designs, corporate strategy, or financial and statistical analysis, all calculated by the computer itself. Fourth - and of particular importance - the nature of computer technology is such that hugh amounts of that information can be copied to disc or printed out on paper within a very short time. (Many consultees expressed concern at the ease with which highly confidential information can be extracted from a computer.) For these reasons some attempt should be made to address the problem of the unauthorised 'taking' of computer-stored information.'

7 Citing Sokolik, *Computer Crime - The Need for Deterrent Legislation*, 2 Computer LJ 353, at 364 (1980).

attack (as in physical destruction of computer discs or terminals) is to assume erroneously that just because computer technology is new, any behaviour related to it must also be new. Consequently, lawmakers should examine carefully the related assumption that completely new legislation must be drafted in order to deal with these problems."[8]

29.9 It is, moreover, far from the case that sophistication is the hallmark of all computer crime. As Tapper observes:

> "computers are fundamentally simple machines, and it requires little in the way of expertise to induce them to perform some unauthorised function to the benefit of the operator. Fortunately those who commit such crimes seem to take after their machines."[9]

The Case Against Legislative Change

29.10 The case against legislative change may also be presented on two fronts:

1. Computer owners should improve the protection of computers against criminal interference rather than look to the legislature for support.

2. Changes in the law of theft and related offences will cure the problem.

1. Technical Improvements in Protection of Computers Against Criminal Interference Rather Than Legislation

29.11 A Canadian commentator raises the issue as follows:

> "One method of dealing with this issue is simply to leave it alone. Let industry and commerce resolve the problem they have created. Should the general public have to pay the price of costly police investigations and judicial proceedings after certain undertakings have introduced high security risk computer technology? Perhaps we should leave it to systems owners to secure their computers to avoid minor abuses."[10]

In this context it is worth noting that, in the United States, the *Small Business Computer Security and Education Act* was enacted in 1984, aimed at importing the management of information technology within small businesses, which naturally

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8 Wagner, *Comment, The Challenge of Computer-Crime Legislation: How Should New York Respond?* 33 Buffalo L Rev 777, at 784 (1984).

9 Tapper, *op cit*, at 11. In a supporting footnote, Tapper responds to the argument that only the most simple of crimes are discovered:

> "Such an argument is as unprovable as it is unanswerable. All that can be said is that very few of the crimes to have been reported at all reliably do show any sophistication, that none of the serious surveys of financial institutions most at risk show computers to have been involved in substantial sophisticated fraud, and that no audits of the accounts of such institutions appears to have been qualified because of large, otherwise inexplicable, deficiencies."

10 Webber, *Computer Crime or Jay-Walking on the Electronic Highway*, 26 Crim LQ 217, at 235 (1984).

have less resources available for system security or security audits.[11] The Act "focuses on the prevention of computer-related crime through the protection of information".[12]

A commentator explains that:

> "[t]he major provision of the Act establishes a Computer Security and Education Advisory Council whose function is to advise the Small Business Administration on the nature and scope of computer crime, the effectiveness of State and federal legislation on deterrence and prosecution, the effectiveness of management techniques to improve computer security, and the development of guidelines for evaluating system security. The Small Business Administration, in turn, disseminates this information to small businesses through forums and training sessions."[13]

29.12 It may perhaps be argued that any such preventive strategy should best be regarded as an adjunct rather than a replacement of criminal legislation. Certainly this is the case in the United States. The argument that the State should consciously leave computer-owners to solve the problem of computer abuse may be considered to be based on an inadequate perception of the social dimensions of the problem, as well as underestimating the ingenuity of the hackers.

2. Changes in the Law of Theft, False Pretences and Related Matters Will Cure the Problem in Relation to Computers

29.13 It may be argued that there is no need to introduce specific legislation to deal with computer crime since changes in the law of theft, false pretences and related offences will cure the problem in relation to computers. Unlike other countries which are examining the subject of computer crime at a time when the fundamental principles of offences against property are not under review, we are in the happy position of being able to fashion our recommendations in relation to these general offences in the knowledge of their implications for computer crime.

While a general offence of dishonesty would certainly capture computer related dishonesty, specific legislation dealing with computer crime would have a clarity and notoriety which might have some deterrent benefits. General offences, however efficacious, have a less prominent impact.

29.14 In their Report on Computer Crime, the Scottish Law Commission were satisfied that the ordinary Scottish law of fraud and theft would be sufficiently

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11 See Menelly, *op cit*, at 570.

12 *Id.*

13 *Id*, at 570-571. For consideration of the response by the computer manufacturers in dealing with the problem of unauthorised computer misuse, see Bloom Becker, *Computer Crime Update: The View As We Exit 1984*, 7 W New England L Rev 627, at 640-642 (1985).

flexible to accommodate itself to activities involving computers and do not recommend any computer specific offences other than an offence of unauthorised access.[14]

29.15 The English Law Commission, while accepting that manipulating a computer to obtain money or other property could properly be charged as theft, feel nevertheless that there may be a gap in the criminal law in relation to the 'deception' of a machine in order to obtain a benefit or service or to cause loss i.e. where the thing obtained cannot be stolen in the ordinary sense.[15]

29.16 As we have seen, the distinction arose between larceny and obtaining by false pretences because in the latter case a person was deceived into giving consent to the transfer of ownership.

29.17 A machine or computer can only respond to a physical shape or electronic impulse fed into it. There can be no question of a machine giving a meaningful consent. No mind is deceived. The machine or computer does what it is told or programmed to do. On that approach, if someone achieves unauthorised access to a machine or computer or having authority to use a machine or computer feeds in false information and obtains cash or a chattel, we have a straightforward case of theft or unlawful appropriation.[16]

29.18 Thus if one stole a person's Banklink card, found out his P.I.N. and withdrew cash from his account from a money dispensing machine, one could be charged with larceny. We agree that to cover subject matter other than cash or chattels special provision may, perhaps, be necessary.

Legislation on Access

29.19 The preceding discussion is academic to the extent that, as we have seen,[17] the legislature has already made hacking an offence in the Criminal Damage Act. While we welcome that development, the Commission are divided as to whether the approach in that Act was the best one to the problem. We are agreed that, whatever overlapping might be involved, the problem should be approached by the dishonesty route also.

29.20 The New Zealand Crimes Bill deals with access and use in the one section.

Section 200 of the New Zealand Crimes Bill provides:

> "**Accessing computer, etc., for dishonest purpose** - Every person is liable to imprisonment for 7 years who, directly or indirectly, -

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14 *Op cit*, paras 3.13 to 3.18.
15 See *Kennison v Daire* 64 ALR 17 (1986), chapter 8, *supra* and Law Commission WP 104, para 4.14.
16 Cf *Kennison v Daire* 64 ALR 17 (1986).
17 At para 9.10 *supra*.

(a) accesses any computer, computer system, or computer network, or any part of any computer, computer system, or computer network, with intent dishonestly to obtain for himself or herself or for any other person any privilege, benefit, pecuniary advantage, or valuable consideration; or

(b) Having accessed (whether with or without authority) any computer, computer system, or computer network, dishonestly uses the computer, computer system, or computer network to obtain for himself or herself or for any other person any privilege, benefit, pecuniary advantage, or valuable consideration."

29.21 S115 of the Australian Capital Territory Ordinance provides:

"**Dishonest use of computers**

(1) A person who, by any means, dishonestly uses, or causes to be used, a computer or other machine, or part of a computer or other machine, with intent to obtain by that use a gain for himself or herself or another person, or to cause by that use a loss to another person, is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

(2) In this section, "machine" means a machine designed to be operated by means of a coin, bank-note, token, disc, tape or any identifying card or article."

29.22 Let us again examine the offence of unlawful access in our Criminal Damages Act, 1991:

(1) A person who without lawful excuse operates a computer

(a) within the State with intent to access any data kept either within or outside the State, or

(b) outside the State with intent to access any data kept within the State,

shall, whether or not he accesses any data, be guilty of an ofence and shall be liable on summary conviction to a fine not exceeding £500 or imprisonment for a term not exceeding 3 months or both.

As we are also making the appropriation of information an offence, using, we would suggest, the definition in the recent Criminal Evidence Act, 1992, there is in fact, little left to be covered. For this reason, the Australian s115 set out above is attractive.

Should "Computer" be Defined in the Legislation?

29.23 We must now consider whether the legislation should define the term "computer". The Scottish Law Commission thought not, on the basis that, "since computer technology is advancing so rapidly, any definition even if expressed in terms of function rather than construction, would rapidly become obsolete".[18]

29.24 The Law Reform Commission of Tasmania rejected this approach and argued that inclusion of such a definition is preferable:

> "The new crimes should, as far as possible, be understandable to lay people, as well as to computer experts. The crimes themselves will be expressed in terms of computer technology. Unless the definitions of these terms are readily available, unnecessary confusion may arise over whether or not a particular act amounts to a crime. If at any time in the future the definitions as stated in the legislation are shown to be inadequate because of technological developments in computer science, or for any other reason, then the Government of the day could always introduce appropriate amendments."[19]

29.25 In the United States, where definitions of "computer" are widespread in the legislation throughout many jurisdictions, the Federal legislation of 1984 defines a "computer" as:

> "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter, or typesetter, a portable hand held calculator, or other similar device."[20]

29.26 We are satisfied that computer should be defined in any legislation and for that reason, the Australian s115, set out above, which defines "machine" in a manner which appears to include "computer", is not entirely satisfactory.

Jurisdiction

29.27 Of the nature of things, unauthorised accessing of computers (and other interventions with computers) can take place at long distance. It is thus possible for a person in Ireland to access (or otherwise intervene with) a computer outside the jurisdiction, and *vice versa*.

29.28 It may be argued that, in both of these cases, the Irish courts should have

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18 *Id* para 4.17.

19 Law Reform Commission of Tasmania's Report *supra*.

20 *Counterfeit Access Device and Computer Fraud and Abuse Act of 1984* (FL 98-473, Title II, Ch XXI, section 2102(a), 98 Stat 2190).

jurisdiction.[21]

29.29 *We recommend that an offence be created modelled on s115 of the Australian Capital Territory Ordinance but with "computer" separately defined as in the United States Federal Legislation of 1984.*

29.30 *We recommend that where a computer offence is committed partly within the State and partly in another State the Irish courts should have jurisdiction to try the offender irrespective of whether at the material time he was himself within the State or in that other State.*

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21 The Scottish Law Commission came to a similar conclusion (Scot Law Com No.106, para 5.14). As they point out (*Id*):

> "Of course in the case where the largest computer is in Scotland and the offender is elsewhere, it will not be possible to charge and try the offender unless he can physically be brought within the jurisdiction of the Scottish courts; but that is a different problem from having, or not having, jurisdiction to try the actual offence."

CHAPTER 30: FALSE ACCOUNTING

30.1 The offence of falsification of accounts contained in s1 of the *Falsification of Accounts Act, 1895* is one of the most generally used and serviceable weapons against fraud. It reads:

> "... if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document or account, then and in every such case the person so offending shall be guilty of a misdemeanour, and be liable to *imprisonment* for a term not exceeding seven years ...."

30.2 Not surprisingly, the offence can overlap with forgery. It is a useful and versatile offence for the prosecution because it includes acts preparatory in nature and it can be committed after the main offence of embezzlement or other obtaining or conversion in order to 'cover tracks'. Access to books of account can usually be tied down to a small number of persons and the proofs are comparatively straightforward.

30.3 The *Larceny Act, 1861* contains further offences of false accounting. Among them s82 - *Keeping fraudulent accounts*:

> "Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company, otherwise

than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanour, ..."

and:

"Section 83 - *Wilfully destroying or mutilating books, etc.* Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document shall be guilty of a misdemeanour, ..."

30.4 It is rather old fashioned to have one offence for management, another for staff. It is an obvious reform to consolidate the various offences listed above into one offence. This was done in s17 of the *Theft Act*.

"(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another, -

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or

(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular;

he shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years.

(2) For the purposes of this section a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document."

30.5 Although they would probably be held to be covered in the definition it would be as well specifically to include records kept mechanically by such as meters or turnstiles for accounting purposes. Records should, in addition, include those kept in non-legible form e.g. film (including microfilm), microfiche, magnetic tape and disc.

30.6 Gain and loss are defined in s34(2)(a) of the *Theft Act* as:-

> "(i) 'gain' includes a gain by keeping what one has, as well as a gain by getting what one has not; and
>
> (ii) 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has."

Although gain includes "keeping what one has" we consider it would be prudent also to include within "gain" avoiding detection of previous offences committed or losses (innocently) caused in order specifically to capture persons "covering their tracks".

30.7 Another option would be to consolidate and "modernise" the *actus reus* of the offence and retain the old *mens rea* i.e. the intent to defraud, defined as in *Welham's* case[1] to include an intent to deprive a person of a right or to act to his prejudice in any way or to induce him by deception not to prosecute or take other action open to him.

30.8 The words "made and required for an accounting purpose" found in s17 of the *Theft Act* were considered in *Attorney General's Reference (No. 1 of 1980).*[2] In that case personal loan proposal forms to a finance company contained false particulars. Lord Lane CJ said:

> "... it is to be observed that section 17(1)(a) in using the works 'made or required' indicates that there is a distinction to be drawn between a document made specifically for the purpose of accounting and one made for some other purpose but which is required for an accounting purpose. Thus it is apparent that a document may fall within the ambit of the section if it is made for some purpose other than an accounting purpose but is required for an accounting purpose as a subsidiary consideration."[3]

30.9 The decision has been criticised by Glanville Williams and Arlidge and Parry among others as going too far. Arlidge and Parry say:

> "It is submitted with respect that the decision goes too far in extending the offence to cover documents which are not primarily required for accounting purposes but only as a secondary consideration. If a given purpose is not the document's main purpose, why is the document *required* for that purpose but not *made* for it? A more natural interpretation would be simply that "made" refers to the intentions of the person making the document, whereas "required" refers to those of the person for whom it is made. On this view the distinction does not

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1 *Welham v DPP* [1961] AC 103. See para 6.16 *supra.*
2 [1981] 1 WLR34.
3 *Id* at 38.

necessarily imply, as the Court of Appeal take it to imply, that a purely subsidiary purpose will do."[4]

30.10 Glanville Williams distinguishes between circumstances where an account will result from the making of the document, not itself an account, e.g. a claim for travel expenses and any document with "a financial implication"[5] not intended to be incorporated into an account. This appears a realistic distinction to us.

30.11 The definition of falsification in s17(2) is not exhaustive. It was held in *Edwards v Toombs*[6] that if the defendant's conduct amounts to falsification in the ordinary sense of that word, it is immaterial that it does not fall within the precise terms of section 17(2).

30.12 Subject to making specific provision for records kept mechanically or in non-legible form and, perhaps, to clarification of the type of accounts covered, *we recommend that a section similar to s17 of the Theft Act be adopted for the offence of falsification of accounts*.

4 *Arlidge and Parry* para 6.43.
5 *Williams*, 889.
6 [1983] Crim LR 43.

CHAPTER 31: PROCURING THE EXECUTION OF A VALUABLE SECURITY

31.1 As we saw in Part I,[1] among the offences of obtaining by false pretences under s32 of the *Larceny Act, 1916* is an offence of fraudulently causing or inducing any other person to execute, make, accept endorse or destroy, the whole or any part of any valuable security.

31.2 This section was replaced by section 20(2) and (3) of the Theft Act:

> "(2) A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years; and this subsection shall apply in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and in relation to the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security, as if that were the execution of a valuable security.
>
> (3) For purposes of this section "deception" has the same meaning as in section 15 of this Act, and "valuable security" means any document creating, transferring, surrendering or releasing any right to, in or over property, or authorising the payment of money or delivery of any property or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation."

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1 *Supra* chapter 4.

31.3 The Theft Act added some items to the list in the Larceny Act. "Execution" is a shorthand for all those acts. *Griew* says that:

> "It seems quite plain from the history and from the very particular list in which the term occurs that "acceptance" has here its technical meaning in the law relating to bills of exchange. That is, it refers to the drawee's act of writing on the bill, and signing, his assent to the order of the drawer.[2][3]

31.4 *Griew* is satisfied that execution in the context of the section refers to *physical* operations on the valuable security itself.[4] In *Beck*,[5] the defendant had traveller's cheques which had been stolen in transit between the printers and the bank by which they were to be issued. He forged the cheques and cashed them abroad. The deceived foreign payers presented the cheques to the bank in England, and the bank felt obliged, though it was not in the circumstances legally bound, to honour them. It was held that (the defendant) had procured the "acceptance" of the cheques within the jurisdiction. Although, it was said, the cheques had first been "accepted" within the meaning of s20(2) when their monetary value was paid by a person by whom they were "accepted as genuine" they were "accepted" a second time when payment on them was made by the bank. This final act was within the jurisdiction. *Griew* criticises this decision firstly for holding that a traveller's cheque form, never issued by the bank was a "valuable security" and secondly that although the forged cheque was cashed abroad, it was "accepted" when the forged cheque (never issued) was ultimately honoured by the bank in England.[6]

31.5 *Griew* says that the offence in s20(2) supplements other offences in two ways:

> "(i) First, it strikes at conduct analogous to obtaining property or services, or evading liability, by deception. The aim of a fraud within section 20(2) will commonly be the imposition of some liability upon the victim or a third person (as when D procures P's signature to a deed, a cheque or a guarantee) or the extinction of some liability of D or a third person (as when D by deception induces P to cancel a bill of exchange of which he is the holder). Such a fraud may or may not involve another offence under the Acts. Where it does not section 20(2) enlarges the range of the Acts.
>
> (ii) Secondly, the ultimate aim of one who by deception procures the execution of a valuable security may in fact be the obtaining of property or of some other advantage by use of the security.

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2 *Bills of Exchange Act, 1882*, s17.
3 *Griew*, para 10.15.
4 *Id.*
5 [1985] 1 All ER 571.
6 *Griew* paras 10.14, 10.15.

> Section 20(2) therefore makes a separate substantive offence out of conduct which may be merely preparatory to commission of one of the offences discussed in earlier chapters."[7]

31.6 The English Law Commission are satisfied that while the offence would overlap with a "general" fraud offence it "extends further and penalises conduct which may only be preparatory to the commission of one of the other offences".[8]

31.7 *We recommend the adoption of an offence of procuring the execution of a valuable security similar to the offence in s20(2) of the Theft Act, 1968.*

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7 *Id* para 10.18, footnote references omitted.

8 Working Paper No.104 para 12.29.

CHAPTER 32: FORGERY

32.1 Several possible options for reform of the offence of forgery are set out below for the purposes of discussion.

Should the Offence of Forgery be Scrapped?

32.2 First we must consider whether the offence of forgery should be scrapped, leaving the mischief to be dealt with by the law relating to fraud, supplemented perhaps by a possession-based offence, as well as an expansion of the general concept of attempt.

As the authors of the *Model Penal Code* observe:

> "it is not difficult to understand why the law of forgery developed as an independent branch of the criminal law. The law of false pretences was narrowly conceived in earlier days and may well have been inadequate to serve the purposes of a forgery offense. In addition, and more importantly, the traditional law of attempt was very narrow in its reach and would have prevented conviction of a forger or a counterfeiter apprehended after the false documents have been made but before any effort to pass them off. Since the forger is often a highly skilled professional with great potential to commit widespread fraud, the pressure to permit intervention of the criminal law at the point where his skills have been used to make a false document is both understandable and appropriate. Moreover, common-law attempt was graded as a misdemeanour even where the object offense was a felony and would have required in this context proof of a specific fraudulent intent that in some cases might have been problematic. Hence, ... it seems likely that the development of a separate forgery offense was related to perceived

inadequacies in the law of attempt."[1]

In view of modern developments in criminal law, it may be argued that the underlying rationale of the offence of forgery has been rendered obsolete.

32.3 In England, the *Society of Public Teachers of Law* proposed that the offence should be replaced. They considered it desirable to abolish the distinction between a document telling a lie about its authenticity and one expressing an untrue statement. Any social danger in the making of either document "could be adequately met by penalising only the use of the document to obtain some pecuniary or other advantage. The law of attempt would deal with the unsuccessful use of the document".[2] A new offence could be created to cover the case where the false document was used to affect another in his duty without seeking a pecuniary advantage.

Moreover, the Society accepted that there was a class of things, including bank notes, coinage and perhaps certain categories of official documents, for which there would have to be special provision because of their character and the dangers inherent in their circulation. For these, there could be a prohibition on their possession without lawful excuse.[3]

32.4 The English Law Commission were fundamentally opposed to this argument, which was based on the premise that there was no social need to penalise generally the making of documents giving a false impression of their authenticity. The Commission contended that:

> "[i]n the many and varied activities of modern society it is necessary to rely to a large extent on the authenticity of documents as authority for the truth of the statements which they contain. Indeed, in the vast majority of forgery cases the purpose of the forger is to lull the person to whom the document is presented into a false position in which he will be unlikely, because of the apparent authenticity of the document, to make further enquiry into the correctness of the facts related. The same is not true of false statements contained in a document which carries no spurious authenticity. A letter by an applicant for an appointment setting out falsely his qualifications is in quite a different category from a letter of recommendation purporting to come from a previous employer."[4]

32.5 Accepting the factual differences mentioned by the Commission, some may doubt whether they amount to a difference in principle which, of itself, would warrant rendering the forgery of documents an offence, outside the context of a

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1 *Model Penal Code and Commentaries*, p284.

2 English Law Commission, *Report on Forgery and Counterfeit Currency*, para 13 (Eng Law Com No.55, 1973) (summarising the Society's argument).

3 *Id.* See also Griew, *The Law Commission's Working Paper on Forgery: I. A General Comment*, [1970] Crim L Rev 548, at 553.

4 Eng Law Com No.55, para 14.

fraudulent scheme. It is a fact that people in practice do rely on the authenticity of documents as authority for the truth of the statements which they contain; whether they have no option but to place such reliance in most cases is, however, doubtful. If an applicant for a medical position produces documents to the effect that he or she has worked in an Irish hospital, the matter can be easily checked should the appointments committee so desire. If the experience claimed is in a hospital in the United States, a prudent appointments committee might well be advised to check the documents also. If an applicant for a position as translator claims (without producing documentation) to have worked two years as an *au pair* in France, the prospective employer might well take this at face value or might instead prefer to check out the assertion. However in situations where there was a large number of applications, there simply would not be time to check back on them all and reliance has to be placed on "official" documents.

32.6 Another reason why the English Law Commission preferred to retain the offence of forgery was that there are many cases where a person may have forged documents but not yet have reached the stage of making active use of them:

> "For example, a firm's accountant may have a series of forged cheques in a drawer, waiting for a suitable opportunity to use them. He will not have reached the stage of attempting to obtain an advantage and yet his conduct should be penalised."[5]

Moreover, there are cases where a person is in possession of forged documents (such as passports, credit cards, railway season tickets or football match tickets) but where it may not be possible to show that he is guilty of conspiracy, attempt or aiding and abetting the use of any of the forged documents. A possession-based offence to deal with this problem would have difficulty in setting "any rational limit"[6] on the type of documents to which it would extend since documents such as those mentioned "do not possess any common characteristics, and still less do they bear any similarity to banknotes".[7] The practical effect of this would be "to substitute a *possession* offence of wide scope for the *making offence in forgery*".[8] This, in the English Law Commission's view, would be going too far.

32.7 Most other common law jurisdictions retain forgery as a specific offence. Scots law is exceptional in penalising the uttering of a forged document simpliciter,[9] while dealing with forgery under specific statutes.

32.8 In the United States, the *Model Penal Code* retains forgery as a distinct offence:

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5 *Id*, para 15.
6 *Id*, para 16.
7 *Id.*
8 *Id.*
9 Cf *id*, para 17, fn 24, English Law Commission Working Paper No.104, *Conspiracy to Defraud*, Appendix A, para 15 (1987).

"in part because the concept is so embedded in statute and popular understanding that legislative abolition seems unlikely. Moreover, the special danger of forgery as a threat to public confidence in important symbols of commerce and as a means of perpetrating large-scale fraud is worth recognition. There is also the point that the offense of forgery should be drafted to redress injuries beyond those that would be occasioned by conduct amounting to theft."[10]

32.9 Forgery has its own distinct niche in the criminal law and should be retained as an offence. It captures falsifications which are not captured by falsification of accounts. In the absence of a general offence - falling short of attempt - of "advanced preparedness for crime" it attacks the taking of substantial steps in the direction of economic crime prior to the commission of an actual offence of obtaining or appropriation.

32.10 The *Forgery Act of 1913* works reasonably well but could be simplified as there are too many different sections and penalties for different items forged. The definition of falsification itself has to be examined in the light of the English Law Commission Report and subsequent *Forgery and Counterfeiting Act, 1981* and also the Model Penal Code in the United States. Allowance has to be made for modern methods of storing data. The intent required should be standardised. At present some offences require an intent to defraud, others an intent to defraud or deceive. Does one make special provision for counterfeiting? Should the scope of the possession offence be broadened?

Possible Changes to the Structure of the Offence

32.11 If the specific offence of forgery is retained, the question arises as to what changes, if any, ought to be made to its structure. A number of possible changes need to be considered in turn.

As we found with the *Malicious Damage Act, 1861*,[11] the 1913 Act lists all sorts of different documents in sections 2 and 3 and provides different penalties for forging them. For example, forgery of a deed with intent to defraud is a felony under s2(1)(b) and carries penal servitude for life. Forgery of "any document of title to lands" with intent to defraud is an offence under s2(2)(b) and carries 14 years penal servitude. Forgery of a copy of a register of baptisms with intent to *defraud or deceive* is a felony under s3(2)(b) and carries 14 years penal servitude. Section 4 is a "sweeper" section covering any document not covered by sections 2 and 3 and making it a misdemeanour carrying two years imprisonment to forge such a document.

32.12 Today, a prosecutor wishing to prosecute for forging a document must first check whether it is covered in sections 2 or 3 and if it is, he must lay his charge under the correct section and subsection or, if not covered, under s4. How much

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10 *Model Penal Code and Commentaries*, p284.

11 See our Report on *Malicious Damage* (LRC 26-1988), paras 5-10.

simpler if all documents were covered by one offence with a maximum punishment ceiling appropriate to the most "formal" or "important" documents. As the English Law Commission point out, "the provision of widely defined offences with adequate maximum penalties assists in the simplification of the criminal law ...".[12]

32.13 It is to be noted that, while the 1913 Act does not define document, that "document" in s2(1)(c) includes "bank-note". The English Law Commission advised that forgery of banknotes and counterfeiting of coins should be dealt with separately as it "emerged quite clearly from our consultations that the forgery of banknotes gives rise to problems not met with in relation to forgery generally. The ease and rapidity with which forged banknotes pass as tokens of value make it very difficult to trace any false note to its source, and the fact that they are tokens of value means that once false notes are in circulation there is serious potential prejudice to a large number of innocent persons".[13]

32.14 Sections 5 of the 1913 Act deals with seals and dies and at this stage is somewhat dated.

Things Capable of Being Forged

32.15 Perhaps the most important possible change is in relation to the scope of the definition of things capable of being forged. One solution would extend the definition to all tangible things rather than retain the notion of "document". In favour of this approach it may be argued that no more limited conceptual rationale has yet been proffered. It is a sad commentary on the present law that eminent minds have come to no agreement on even the rudiments of a conceptual rationale for the concept of a document. It has proved very difficult to provide a convincing explanation for any limitations restricting the offence to communications of a documentary nature, as that word is used in ordinary parlance.

32.16 As against this the English Law Commission came to the conclusion that to extend the law of forgery in that way would not be the right solution:

> "In the first place forgery has, apart from the forgery of seals and dies, always been confined to writings, and we do not think that there is any social need for its extension to all tangible things .... [T]he main justification for retaining forgery as an offence is the reliance in modern society upon the authenticity of a wide range of documents, both public and private, as authority for the truth of the statements they contain. A clear distinction can be drawn between the fabrication of a thing which without any writing might mislead others as to its origin, nature or quality, and the falsification of a document which gives apparent

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12 English Law Commission Report No.55, Criminal Law: *Report on Forgery and Counterfeit Currency* (1973) para 7.

13 *Id* para 18.

authenticity to the facts stated in it. There are many cases where even a private document tends to be accepted, if it appears *prima facie* to be authentic, for example a season ticket, whereas, with such things as antique furniture or works of art their acceptance as genuine is usually dependent upon a more exhaustive examination. There can, too, be many legitimate reasons for making reproduction furniture or reproductions of works of art, but few justifications for making false writings or documents, ad this would seem to be a further reason for limiting forgery to the making of false writings or documents.

The essence of forgery, in our view, is the making of a false document intending that it be used to induce a person to accept and act upon the message contained in it, as if it were contained in a genuine document. In the straightforward case a document usually contains messages of two distinct kinds - first a message about the document itself (such as the message that the document is a cheque or a will) and secondly a message to be found in the words of the document that is to be accepted and acted upon (such as the message that a banker is to pay a specified sum or that property is to be distributed in a particular way). In our view it is only documents which convey not only the first type of message but also the second type that need to be protected by the law of forgery. Forgery should not be concerned, for example, with the false making of the autograph of a celebrity on a plain piece of paper, but it should be concerned with the false making of a signature as an endorsement on the back of a promissory note. The autograph conveys only the message that the signature was written by the person who bears that name; the endorsement conveys not only that the signatory made the endorsement, but also that he has authorised delivery of the note and has made himself liable to the holder in due course."[14]

32.17 It may be argued that a stronger case than this can be presented against extending forgery to all tangible things. The idea that documents tend to be accepted if they appear *prima facie* to be authentic whereas other tangible things do not is far from self-evident. Of course, *some* documents (such as season tickets) will lend themselves to such easy acceptance and *some* other tangible things (such as antique furniture or works of art) will not. But all depends on the particular document or other tangible thing (as well as the circumstances in which the document or other thing is forged). Thus, for example, it might be reasonable to assume that what appears to be a Fiat Panda, sold by a reputable dealer, is indeed such, while quite unreasonable to assume without checking properly that what profess to be Hitler's diaries are genuine. In truth, there is nothing distinctively reliable about a document, or distinctively unreliable about other tangible things. If forgery is to be limited to documents it can scarcely be on account of this supposed difference.

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14 *Id*, para 22.

32.18 The attempt to base a distinction on the differing number of legitimate reasons for forgery, as between documents and other tangible things, may seem to some to be doomed to failure. There is little point in attempting to count the number of reasons for making reproduction furniture or for reproducing works of art. From one standpoint it could be said that there are but a couple of such reasons, namely, that such reproductions are considered by some to be aesthetically pleasing, as well as democratic, in rendering beautiful forms (albeit in copy) widely accessible. It is easy to envisage cases where documents are reproduced legitimately - for educational purposes, or as mementoes, or historical records, for example. Even if there could be shown to be a difference in the respective numbers of legitimate reasons for reproducing documents and other things, this would be a curious reason for treating as forgery cases where documents are reproduced with *no* legitimate excuse, while letting the reproduction of other things, again with no legitimate excuse, fall outside the scope of the offence.

32.19 The English Law Commission found it "impossible"[15] to put into simple legislative form the distinction between the two types of message conveyed by a document - namely a message about the document itself, and a message to be found in the words of the document that is to be accepted and acted upon - and to define a document for the purposes of forgery as one conveying both types of message. They considered, however, that the underlying distinguishing feature of the type of document to which forgery should apply was to be found in the idea of an instrument:

> "At common law forgery has been defined as the fraudulent making of a written instrument which purports to be what i[t] is not, although the 1913 Act is primarily concerned with 'documents' and section 7 of the 1913 Act makes it an offence to demand or obtain property under any forged *instrument*. In these contexts the word 'instrument' is used to indicate a document upon which a person will reasonably act where it is tendered or presented to him. A number of the dictionary definitions of the word 'instrument' indicate that it is a formal document which creates or confirms rights or records facts although in the cases decided under section 7 documents of an informal nature have been held to be instruments, as for example, a letter purporting to be signed by an employee asking an employer to send money to be expended in connection with work required to be done on the employer's property, and a telegram to a bookmaker placing a bet. We think that, provided it is made clear that there is no requirement of formality, the subject matter of forgery is best defined as an instrument in writing to include words, letters, figures and any other symbols. This will exclude such things as a painting purporting to bear the signature of the artist, the false autograph and any writing or manufactured articles indicating the name of the manufacturer or the country of origin. It will not, however,

15 English Law Com No.55, para 23.

exclude letters, even of a private or social nature, nor such documents as ancient wills or title deeds which are now of only historical interest. Documents of historical interest only, which although at the time they were made were in the nature of instruments need not, in our view, be protected by the law of forgery. To ensure that such documents do not fall within instruments which can be the subject matter of forgery, we think that there should be a general proviso excluding any thing which is of interest only historically or as a collector's item. Accordingly, whether or not a document purporting to be an ancient title deed was an instrument would depend upon whether it was only of historical interest, or whether it also would, if genuine, still have an operative effect as a deed; in the latter case only would it be an instrument."[16]

32.20 In relation to the increasing use of sophisticated methods of recording information and instruments, such as magnetic impulses or computer tape, the English Law Commission were satisfied that these should be the subject-matter of forgery:

> "The problem with which we are concerned here is not related to the making by means of a machine of a false document, such as a dividend warrant; this is forgery without any extension of definition. The problem is related to the production of false recordings of information or instruments, whether on tape or other material, which are stored for further use. Such tape is a recording of a message just as much as a written recording and it contains a statement, the authenticity of which is vouched for by its existence on the tape.
>
> Undoubtedly such recorded messages should be covered by the law of forgery; the problem is to devise the simplest way of achieving this. We propose that the meaning of the word 'instrument' should be extended beyond instrument in writing to include any disc, tape, sound track or other device, on or in which instructions or data are recorded, or stored by mechanical, chemicals, electronic or other means. Just as in the case of instruments in writing we wish to exclude documents which are of interest only historically or as collectors' items, so we wish to apply that limitation to instruments such as discs, tapes and sound-tracks. This would exclude from the operation of the law of forgery a recording purporting to contain a recorded speech by Mr Gladstone, which would otherwise be included as a device or which data was stored."[17]

32.21 The Commission, in its draft Bill on the subject, proposed[18] a definition of "instrument" as meaning:

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16 *Id.* (footnote reference omitted). The 1981 Act did not in fact exclude documents of historical interest from the definition of "instrument": *cf Smith & Hogan*, 648-649. See further *Arlidge & Parry*, paras 6.06-6.07.

17 English Law Com No.55, para 24-25. The Commission's consideration and ultimate rejection of the possible extension of the definition of "instrument" to include seals and dies (*Id*, para 26) are mentioned presently.

18 *Id*, at p62, clause 6(1) of the draft Bill.

"(a) any instrument in writing, whether of a formal or informal character, with writing including for this purpose not only words and letters but also figures and other symbols, and

(b) any disc, tape, sound-track or other device on or in which instructions or data are recorded or stored by mechanical, electronic, chemical or other means ...."

The Commission were satisfied that this definition embraced:

> "all those documents, the contents of which are to be acted upon. It excludes such things as paintings (whether signed or not) and it does not include inscriptions on, for example, manufactured goods indicating the name or the country of manufacture. On the other hand the instrument may be of the most informal kind, and will include a telegram purporting to place a bet or a letter requesting the provision of money."[19]

What the Commission in effect, proposed, therefore, was that the notion of "instrument", as understood in relation to section 7 of the 1913 Act, should replace the notion of "document" for the purposes of the central offence of forgery.

32.22 We see no need to extend forgery to all other tangible things and would continue to confine the scope of the offence to writings. We have studied with great interest the efforts of the English Law Commission to isolate a coherent and exclusive description of the appropriate subject matter of forgery. They settled on an "instrument in writing" but although they were satisfied it embraced "all those documents, the contents of which are to be acted upon", their draft bill did not so define it. Section 1 of the *Forgery and Counterfeiting Act, 1981* provides that forgery consists of making a false instrument (subject to *mens rea* requirements not of present relevance). Section 8 which gives the word "instrument" "pride of place"[20] goes on immediately to define "instrument" as meaning, *inter alia*, "any document, whether of a formal or informal character". It also gives effect to the English Law Commission's proposed extension[21] of the definition to include devices on or in which information is recorded or stored.

32.23 Fundamental to the English Law Commission's proposals is the premise that, only where a document, *before it has been interfered with*, contains the two messages identified by the Commission, should it be the subject matter of forgery. The second of these messages is that the document "is to be accepted and acted upon (such as the message that a banker is to pay a specified sum or that property is to be distributed in a particular way)".[22]

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19 *Id*, at p63, explanatory note no.2 to clause 6.

20 *Smith & Hogan*, 646.

21 Whether it is in fact an extension may be doubted. As *Smith & Hogan* 649, fn 1 point out, "[i]t has never been of any account in the law of forgery on what material, or in what symbols or code, the information is recorded".

22 English Law Com No.55, para 22.

The emphasis on the expectation of the maker of the document gives pause for thought. On one view, it revives the ghost of Austinian positivism: the maker can expect that the document will be acted on because he bears a relationship with the recipient (or, perhaps, other reader) of the document such that the mere intimation of his desire is sufficient to provoke a compliant response.

It is plain that there is indeed an array of documents composed in a socio-economic context which are of a type where it is entirely reasonable for the writer to expect that the document will be acted on. The English Law Commission mention two such examples: a letter purporting to be signed by an employee asking an employer to send money to be expended in connection with work required to be done on the employer's property,[23] and a telegram to a bookmaker placing a bet.[24] In neither of these cases could the writer of the document be considered to be communicating *de haut en bas* but in both cases he would be considered to have a legitimate entitlement to expect action from the recipient. If the recipient failed thus to act, he would not only have failed to meet with the writer's expectations, but would have *let him down*, morally and, in some cases, legally. The notion here is one of rightful expectation on the part of the writer of the document that the recipient[25] will act upon the communication.

32.24 There are many documents which should be subject of forgery but which lack this element. It may be that the forgery consists of injecting into a document this precise element, as, for example, where notes drawn up by a person setting out how his estate might possibly be distributed are "converted" into a will by the addition of an introductory paragraph and false signatures. It may also be the case that neither before nor after the forgery does the document purport to tell anyone to do anything or to give any intimation of possible disappointment on the part of the writer if no action results from reading it. Under the English Law Commission's approach, ordinary narration with no imperative connotation or expectation of a response could not be the subject of forgery. This may seem to some to be an unwarranted limitation.

32.25 The notion of reliance or expectation on the part of the writer that the document will be acted on may also be criticised on the basis of its open-endedness. Tort law has some lessons to teach on this matter. There the concept of reliance was invoked by courts anxious to overcome the general principle of non-recovery for pure economic loss.[26] It has been greatly expanded over the years and it seems fair to say that on occasion it has involved fictional ascriptions of reliance, or, at all events, reliance of such an inflated

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23 *Code*, [1914] 2 KB 209.

24 *Riley*, [1896] 1 WB 309.

25 The Commission do not expressly refer to the recipient as being the person to act upon the document, but this seems inherent in their proposal, assuming that the notion extends to "ultimate" or "probable" recipients as well as immediate recipients.

26 Cf *McMahon & Binchy*, ch 10, *Hedley, Byrne & Co Ltd v Heller & Partners Ltd*, [1964] AC 465, *Wall v Hegarty*, [1980] ILRM 124 (High Ct, Barrington J), Harvey, *Economic Losses and Negligence: The Search for a Just Solution*, 50 Can Bar Rev 580 (1972), Cane, *Economic Loss in Tort: Is the Pendulum Out of Control?*, 52 Modern L Rev 200, at 201-203 (1989), *Murphy v Brentwood DC*, 1990 2 All ER 908 (HL (Eng)).

dimension as to border on tautology. In one sense it may be said that we rely on others not to drive carelessly nor to take away our good name; but it would scarcely be a jurisprudential advance to recast the law of negligent driving or defamation in terms emphasising this reliance aspect. In the context of documents, in one sense of course it can be said that the writer intends the document he writes to be relied on (unless it is of an utterly private nature such as a diary); but, apart from this general notion of reliance, the writer's specific reliance may wax and wane in specific contexts. A document which has lain dormant for a year may become central to a particular transaction with which the writer is involved - the sale of a house, for example. The suggestion that the notion of reliance will provide a satisfactorily clear criterion for forgery may perhaps thus be doubted.

32.26 A complicating factor concerns the question of reliance by third parties. In tort law, the *Hedley Byrne* principle has been extended to disappointed beneficiaries where a will (or a particular bequest) proves legally ineffective.[27] Should the notion of reliance in the context of forgery be permitted to extend to third party reliance as well as the reliance of the writer?

32.27 It may be useful to compare the English approach with that favoured by the *Model Penal Code.* Section 224.1 applies to "any writing"; the term "writing" is defined as including:

> "printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification."

32.28 This generic approach contrasts with the specificity of the forgery legislation formerly in vogue in many states. In California, for example, "writings" included:

> "any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, bond, covenant, bank bill or note, post-note, check draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or discharge of any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to

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27 Cf *Wall v Hegarty, supra.*

let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, or other contract for money or other property."[28]

32.29 The Comment supporting Article 224.1 notes its extension of "writing" beyond documents having (or purporting to have) legal or evidentiary significance:

> "Thus, it will no longer be possible to defend against a forgery prosecution on the ground that the instrument allegedly forged was not in legal effect a 'will', 'contract', 'note', or other particular type of legally binding document. The broad definition of 'writing' also makes it unnecessary for the criminal law to speak particularly to the forgery of doctor's prescriptions, trademarks, identification and credit cards, diplomas, and professional certificates, as is now frequently the case. Also included in the Model Code offences are private records, accounts, letters, diaries, and other personal documents not purporting to have legal significance in the sense of a 'note' or a 'will'. The phrase 'any writing' is thus defined comprehensively and is meant to be interpreted comprehensively.
>
> The second consequence of this approach is that the reach of the law of forgery is not limited to fraud imposed upon those who rely upon the authenticity of documents, but is extended to harms that occur in other ways. Thus, statutes that speak of damage to one's 'good name, standing, position or general reputation' or that cover forgeries to misrepresent or affect injuriously 'the sentiments, opinions, conduct, character, purpose, property, interests, or rights' of another 'would be carried forward in the formulation contained in section 224.1. Forgery is thus extended beyond pecuniary hurt to encompass other types of injuries that can be caused by misrepresenting the authenticity of documents."[29]

32.30 The definition of instrument in the 1981 Act, except where it extends to discs, tapes and so on, is no more than the definition of document "missing" from the 1913 Act. One can survive as well with as without the definition but if there is to be a definition, we favour the word instrument as the most appropriate and versatile word for definition. Instrument is defined in Section 8 of the 1981 Act as:

> "(a) any document, whether of a formal or informal character;
>
> (b) any stamp issued or sold by the Post Office;

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28 California's *Penal Code*, section 470, cited in the *Model Penal Code and Commentaries*, p286.
29 *Model Penal Code and Commentaries*, pp287-288 (footnote references omitted).

(c) any Inland Revenue stamp; and

(d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means."

32.31 *We recommend that the definition of instrument in s8 of the 1981 Act be adopted. Cash and credit cards should be specifically included.*

Mens Rea

32.32 Under the 1913 Act the intent required for forgery is an intent to defraud, or, in the case of public documents and seals and dies, an intent to defraud or deceive. This distinction was new to the 1913 Act and was not part of the common law. In examining the current law, we noted in the light of the decision in *Welham v DPP*,[30] the leading case on the intent to deceive, that forgery can be committed where the intent is not to occasion economic loss but to cause another to act contrary to his duty.

32.33 Defining the intent to deceive and distinguishing it from the intent to defraud has not been free of difficulty. It would appear to be much tidier to have one type of *mens rea* for all forgeries.

32.34 On one view, it should simply be an offence where a person intends to induce another to accept a forged document as genuine, and, by reason of that, to do or refrain from doing some act. On this approach it would not be necessary to show that the forger intended to cause anyone economic loss.

32.35 The English Law Commission were not impressed by this approach. They considered that it would create:

> "a very wide offence which would penalise such practical jokes as the making of a forged invitation to a social function made with no more wicked intent than of raising a laugh at another's expense by inducing him to act upon the invitation. We do not think that such conduct should be within a serious offence such as forgery."[31]

The strength of this argument may be questioned. Many serious offences can be committed in a trivial way, but that is not a reason for restricting from their scope types of misconduct which should merit criminal sanction. Prosecutorial discretion will ensure that the practical joker who forges an invitation need not

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30 [1961] AC 103. See para

31 English Law Comm No.55, para 32.

be charged.[32] The Commission's disposition of the issue by referring only to a trivial case does not do justice to the important policy question at stake. If a person forges a diary (whether for a joke, political purposes or otherwise), is it self-evident that the offence of forgery should not apply? If the likely injury is more tangible, though no less real, such as a severe mental shock or upset, should not this come within the scope of the offence?

32.36 It may be argued that it would not be desirable for the legislation to require an intent to cause loss. In many cases the accused's intention is to secure an advantage to himself by means of the forgery:

> "The making of a forged security pass to obtain access to a building, the forging of a certificate of competency to drive a vehicle in order to obtain a driving licence, or the forging of documents in the circumstances of a case such as *Welham*[33] would not be within the intention to cause a loss to another. In each of these cases the forgery is intended to be used to induce another to perform a duty which he has in a way in which he would not have performed it had he not accepted the instrument as genuine, and should also be covered."[34]

32.37 Liability could extend (as under present law) to cases where the defendant has made a false document to obtain payment of what was due to him, regardless of whether this was to be regarded as causing a loss to the misled party. The English Law Commission took a different view. They considered[35] that only cases of this type which fell within the scope of the offence of blackmail should subject the demander to criminal liability - for blackmail and not forgery. This limitation would probably not be appropriate, in the view of some people. A creditor who induces payment by means of a forgery is behaving in a clearly anti-social and unjust manner. The law should give no encouragement to this type of practice, which involves the seeking and obtaining of a benefit by a false pretence. A creditor who is owed £100 has no legal right to the £100 in his debtor's pocket; he has a right to be paid £100, regardless of whether the debtor has the money; if the debtor does not, or cannot, pay, the creditor is entitled to obtain a judgment against him and to use the State's machinery for the enforcement of judgments. What the existence of the debt does not justify is the inducement of payment by the debtor by fraud, any more than by intimidation or other extortionate means.

32.38 The recaption of chattels raises somewhat different policy issues. On one view, a person should be entitled to use a forged document to recover what is rightfully his and which has been wrongfully taken from him. This is clearly a

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32 In any event, the example chosen by the Commission would almost always involve some economic loss. In the famous tort case of *Wilkinson v Downton*, [1897] 2 QB 57, 66 LJ QB 493 (Wright J), where the defendant had told the plaintiff that her husband had been severely injured and that she was to go to him, the plaintiff recovered damages in deceit for the 1s. 10½d. she expended on the train journey (as well as £100 for emotional distress).

33 [1961] AC 103.

34 English Law Com No.55, para 33.

35 *Id*, para 34.

stronger case than that of an unpaid debt, but again it may be debated whether it is proper for the law to provide that such conduct should fall outside the scope of the offence. It is easy to envisage cases, in relation to used cars, for example, where disputes can arise about ownership and bailment; it might not seem prudent to inject into such areas of business life, where robust practices are not unknown, a specific exemption from liability for forgery. But a law to this effect could well be perceived by some as an encouragement for this type of practice. The matter can always be dealt with in the context of the defendant's *bona fides* and of claim of right, supplemented by prosecutorial discretion.

32.39 As regards the question of the defendant's *bona fides*, it may be argued that it should not be a defence to show merely that the defendant believed he was legally entitled to any benefit he sought to obtain but that he should also have believed he was legally entitled to act as he did. Proof of a similar belief as to legal entitlement might also be considered in cases where the defendant caused loss or otherwise acted without actual or intended benefit for himself.

32.40 The English Law Commission recommended that forgery should be committed where the defendant made a false instrument intending that he or another would use it with the intention of inducing somebody (whether a particular person or not) to accept it as genuine, and, by reason of that, "to do or refrain from doing some act to his own or any other's prejudice". Clause 6(3) of their draft Bill provided that an act or omission intended to be induced would be to a person's prejudice:

> "if, and only if, it is one which, if it occurs -
>
> (a) will result in a loss by that person in money or other property, whether a permanent loss or a temporary one only, and with -
>
> (i) 'property' meaning for this purpose real and personal property, and
>
> (ii) 'loss' including for this purpose a loss by not getting what he might get as well as a loss by parting with what he has, or
>
> (b) will take the form of giving to somebody an opportunity to earn from him remuneration, or greater remuneration, in some office, or
>
> (c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with the performance by him of any duty.
>
> Provided that there shall be disregarded for the said purposes any act which a person has an enforceable duty to do, and any omission to do

an *act* which a person is not entitled to do."[36]

32.41 The explanatory notes explain that paragraph (a) of subsection (3) covers the great majority of forgery cases, such as the making of false cheques, wills and travel or admission tickets; paragraph (b) covers the forgery of false testimonials in order to obtain employment; paragraph (c) covers such cases as where a person is to be induced by a false instrument, such as a door pass, to admit an unauthorised person to premises, or where the intention is to induce someone responsible for a duty to behave in a way he would not have in relation to that duty had he not accepted the instrument as genuine. The proviso reflects the Commission's view[37] that it should not be forgery to make a false instrument to induce another to do what he is obliged to do or refrain from doing what he is not entitled to do.

A possible difficulty with this approach is that it excludes from criminal liability all cases falling outside this list. Whether this certainty is bought at too high a price is a matter for discussion.

32.42 It is worth noting that section 10(1) of the 1981 Act does not follow the model proposed by the English Law Commission. Apart from differences of detail, section 10(1) includes as an act or omission intended to be induced to a person's prejudice, one which, if it occurs, will result in somebody being given an opportunity to gain a financial advantage from him otherwise than by way of remuneration.

32.43 It may be argued that there is little advantage in introducing into legislation the word "prejudice" while at the same time attaching to it a patently artificial meaning. A person who by forgery gains a financial advantage from another has not acted to the other's prejudice (save to the extent that being deceived is a prejudice. The forger should not have acted in this way, and the law should punish him accordingly, but it may be argued that it should not do it by this means of drafting.

32.44 *We would recommend the adoption of a straightforward provision, i.e, that forgery should constitute an offence where the defendant intends to cause another prejudice or to confer a (gain or) financial advantage on himself or both. It would also be possible to go a few steps further and extend the offence to cases where the defendant's intent is to confer a non-financial advantage on himself.*

32.45 Finally in this context, consideration should be given to *mens rea* in the context of *facilitation* of fraud or injury. Article 224.1 of the *Model Penal Code* imposes liability on a defendant who acts "with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone". Thus a forger commits an offence even where he does not defraud the person to whom he sells or passes the forged writings, "as where the transferee takes with knowledge of the forgery

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36 PP63-64 of the Report.
37 *Id*, para 34.

for the purpose of passing the writings as authentic".[38]

32.46 *We recommend that forgery would be committed in the common situation where the actor makes or alters the writing and gives it to another to execute the fraudulent scheme".*

The Act of Forgery

32.47 The rationale of the crime of forgery has been described as "the need to underpin confidence in various types of social and commercial transactions by guaranteeing key documents on which those transactions turn".[39]

32.48 If the appropriate subject matter for the offence of forgery is any document or writing as is the case in both the 1913 and 1981 Acts, it follows that "if the scope of the offence is to correspond with its rationale, this must be achieved through the requirement that the instrument is false".[40] We now must consider how the act of forgery should be defined. We will examine two models: first that favoured in the 1913 Act, subject to amendments proposed and legislated upon in England, and secondly that favoured in the *Model Penal Code*.

32.49 The act of forgery is broadly defined under the 1913 Act. Section 1(1) prohibits the making of a false document and section 1(2)(a) provides that this may be done by any material alteration, "whether by addition, insertion, obliteration, erasure, removal or otherwise".

32.50 The basic definition of the *actus reus* of forgery is the making of a false document in order that it might be accepted as genuine. This definition has survived essentially unchanged in the 1981 Act as has the type of document which can be forged. The question as to whether a document is false gives rise to much difficulty.

32.51 A document is not false simply because it contains falsehoods or misleading statements. In *Kenny's* famous phrase, it must not only tell a lie, it must "tell a lie about itself".[41] This is usually described as the requirement of automendacity. Forgery usually arises in the case of documents that confer "entitlements", or certify or vouch something, documents that are acted upon and relied upon in commercial transactions, e.g, tickets, receipts, cheques or licences. This essential element of forgery was at the root of the Law Commission's quest to find a distinctive definition of "instrument" and to tie down the elements of forgery by approaching them from the side of the subject matter:

> "... the primary reason for retaining a law of forgery is to penalise the making of documents which, because of the spurious air of authenticity

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38 *Model Penal Code and Commentaries*, pp299-300.
39 Leng, *Falsity in Forgery* [1989] Crim L Rev 687, at 687.
40 *Id.*
41 *Kenny*, para 387.

given to them, are likely to lead to their acceptance as true statements of the facts related in them. We do not think that there is any need for the extension of forgery to cover falsehoods that are reduced to writing, and we do not propose any change in the law in this regard".[42]

32.52 To say that a document tells a lie about itself is a convenient, snappy but incomplete way of describing forgery and any realistic attempt to explain what is forgery must resort to examples. Indeed, both the 1913 and 1981 Acts list specific instances of forgery. S.(1) of the 1913 Act mixed specific modes of forgery with a residual undefined category of falsity. S1 provides as follows:

> " (1) For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals or dies mentioned in this Act the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.
>
> (2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number of any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false:-
>
> (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein;
>
> (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person;
>
> (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it."

32.53 The preferred approach of the English Law Commission, followed in the 1981 Act, was to extend the list of specific instances in which a document might be false and abolish the general category.

32.54 The 1981 Act does not seek to alter the basic definition of forgery. If enshrines the principle of automendacity in a slightly different way. For this

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42 English Law Com No. 55, at para 42.

reason, in every example in s9(1) of the 1981 Act the instrument "purports" to have been made or altered by a certain person or in particular circumstances.

32.55 It may be argued that the language of s(1)(1) of the 1913 Act is quite satisfactory, subject to the inclusion of the requirement of materiality (which will be considered presently), and the need for provisions dealing specifically with photostat documents. In view of the widespread and increasing practice of using photocopied documents, which, as the English Law Commission point out, "assume more the character of duplicate originals than the copies of the original",[43] there appears to be merit in a provision prescribing an offence akin to forgery to make a copy of a document which the maker believes to be a false document, with the intention of inducing another to accept the copy as a copy of a genuine document and by reason of that to do or refrain from doing some act.

32.56 Section 1(2) of the 1913 Act refers to falsity of ".... any material part" of a document as well as to "any material alteration". The necessity of a requirement of materiality has been debated. As *Kenny* observes, "if the fault in the document be not material it is difficult to see how it could be thought to effect the dishonest purpose, or indeed attract any notice which would lead to the making of any criminal charge".[44] The English Law Commission were of the same opinion. They considered that the true issue was whether the false instrument was made with necessary intent; the requirement of materiality was an unnecessary safeguard for defendants and "a complicating factor with no useful function".[45] Their recommendation that it should not be retained was given effect in the 1981 legislation. However, we will examine later cases where falsity may not be material in the context of the instant transaction but is material in the context of a fraudulent scheme viewed as a whole.[46]

32.57 As regards the definition of "falsity" of documents, it may be argued that section 9(1) of the 1981 Act provides a clearer model than section 1(2) of the 1913 Act. We do not attach any substantial significance in this context to the fact that in England in 1925, legislative intervention[47] was considered necessary to remove doubts and declare that a document might be a false document for the purposes of the 1913 Act, notwithstanding that it was false in such a manner as was described in section 1(2) of the 1913 Act. The language of section 1(2) lends itself to no other plausible interpretation.

32.58 Section 9(1) of the 1981 Act provides that an instrument is false for the purpose of Part I of the 1981 Act:

> "(a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or

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43 Cf English Law Comm No.55, para 40, and sections 2 and 4 of the English Act of 1981.
44 *Kenny*, para 396.
45 English Law Comm No.55, para 44.
46 Pp326 *et seq.*
47 *Criminal Justice Act, 1925*, section 35(1).

(b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or

(c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or

(d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms, or

(e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or

(f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or

(g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, or otherwise in circumstances in which, it was not in fact made or altered; or

(h) if it purports to have been made or altered by an existing person but he did not in fact exist."

Examples

32.59 A forged ticket for a football match tells the lie that it is the official ticket issued by say the FAI (for which the FAI has been paid the official price). The forged five pound note tells the lie that it is legal tender issued by the Central Bank. Where a credit card is stolen and the thief using it forges the name of the account holder on a voucher, the voucher tells the lie that it has been signed by the true account holder (who has signed the credit card produced). Similarly, where the account holder's name is forged on a stolen cheque.

32.60 It is not necessarily forgery, however, to use an assumed name. Thus, if a sum in cash were lodged in an assumed name in a building society for tax evasion purposes and subsequently withdrawn by the same person using the same assumed name, the document would not be false even though there would be a rather murky intent to throw the Revenue off the scent. The relevant deposit and withdrawal forms would be signed by the actual "physical" person who lodged the cash.

32.61 In both the 1913 and 1981 Acts it is forgery where a document purports to be made by a person who did not make it. Thus if I use a false name on a document simply because I do not like my own name, and for no other

fraudulent purpose, I am not purporting to be another person. I am still the physical entity "me" under a name I like. This "one-dimensional" approach was the basis of the decision in *More.*[48] In that case More came into possession of a cheque for £5303 in favour of one Mr Jessell. He opened an account in the name Jessell in a building society, signing the name Jessell on the relevant form. He subsequently made out a withdrawal form in the same name and obtained a cheque in favour of Jessell from the society which he cashed the same day at a bank. More was charged, *inter alia*, with forgery under the 1981 Act and the question to be decided was whether the withdrawal form was a forgery under s9.

32.62 The Court of Appeal held that the document was not false under s9(1)(a) or (c) because it was signed by the person making it, the same person who opened the account. It did not tell a lie about itself. However the Court held it was false under s9(1)(h) on the basis that it was made by a person who did not exist. On appeal, the House of Lords held it was not false under any part of the section because it was made by More who had opened the account, had made the withdrawal and was a real person, even though he happened (for his own good reasons) to use someone else's name. The document was not "telling" or declaring that the name on it was the actual name by which the physical maker was known to his mother. If a document is always made by the physical person who makes it, it can *never* be made by someone who does not exist.

32.63 The one dimensional approach has been criticised and analysed in detail by Roger Leng:

> "According to the Court of Appeal and House of Lords the purported maker of a document may be conclusively determined by reference to the single fact that the particular physical person who made it acknowledges it as his own. Thus, the form was not false because "It was undoubtedly the signature of the holder of the account in that name" (Hodgson J). Similarly, Lord Ackner held that the form had not been made by a person who did not exist because "the appellant was a real person: it was he who was the holder of the account and he who signed the form". This approach to determining the purported maker may be described as one-dimensional since all other relevant contextual facts are ignored...
>
> The primary criticism of the one-dimensional approach to determining the purported maker of a document is that it excludes relevant contextual facts which would in common sense assist an understanding of the document. It may also be criticised, first, on the ground that it may produce undesirable results in practice; second, on the basis that it is consistent with the approach taken by the courts where similar issues arise in relation to deception; third, on grounds of principle ...."

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48 [1987] 3 All ER 825.

Leng gives the following example:

> "X who looks like a television performer books into a hotel under the name of that performer. When he leaves he claims that he has lost his wallet and offers an I.O.U. signed in the name of the performer. This is accepted by the hotel on the strength of the reputation of the performer. Is the I.O.U. a forgery? Applying the reasoning of *More* the answer would appear to be no. The I.O.U. is undoubtedly made by X, and the signature on it is undoubtedly his signature. The I.O.U. makes no reference to the performer other than the fact that his name is the same as that assumed by X."

32.64 Leng proceeds to compare the decision in *More* with the decision in *Charles*:

> "The approach of the House of Lords is inconsistent with the approach taken in deception cases to determine what a person impliedly represents (purports) by his conduct. Take the well known case of *Charles.*[49] The defendant in that case had written cheques backed by his cheque guarantee card at a time when to his knowledge permission to use his cheque book and card had been withdrawn by the bank. Upholding his conviction for deception, the House of Lords held that by using the cheques and card he had represented, not only that he was the holder of the relevant account but also that he had current authority from the bank to use the card to guarantee cheques.
>
> The cases of *More* and *Charles* are very similar. Both cases involved a document by which money could be withdrawn from an account. In both cases the court had to determine what was represented or purported on the basis of the document and the circumstances in which it was used. In both cases the defendant was not entitled to cause money to be withdrawn from the account. In *Charles* this was because his authority to use the cheques and card had been revoked. In *More* he was not entitled to withdraw money for his beneficial use because the debt represented by the account belonged in equity to the real MRJ, the payee of the original cheque. At this point the similarity ends. In *Charles* the House strained reality to find that by proffering the card to guarantee the cheque D impliedly represented that he had authority to do so. By way of contrast, in *More* the House declined to find that the withdrawal form implicity purported to be made by somebody who was entitled to the funds in the account. The contrast in the approaches taken in the two cases is particularly notable because in *Charles* it was totally artificial to suggest that the defendant had made a representation about a matter (his authority to use the card) about which the recipient of the cheques had no interest (because the cheques were guaranteed

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49 *Metropolitan Police Commissioner v Charles* [1977] AC 177.

whether D had authority to use the card or not). However, on the facts of *More* there was ample basis for finding that the withdrawal form purported to be made by a person entitled to the debt represented by the account. On More's first visit to the building society when he paid the cheque in he represented that he was the payee of the cheque, MRJ. Thus, as far as the building society were concerned the holder of the account and the real MRJ were the same person. It follows that when More signed the withdrawal form as MRJ and presented it to the building society it purported to be made by the real MRJ.

It is not clear why the House of Lords should approach two fundamentally similar issues in different ways. It is however clear that in *More* the House did not disapprove of *Charles*. Indeed, More's conviction for obtaining £5,000 from the bank by deception was upheld by the Court of Appeal (and approved by the House of Lords) on the basis that in presenting the building society's cheque to the bank, More impliedly represented that he had authority to cash the cheque. In upholding this conviction the court implicitly followed *Charles*.

... there does not seem to be any good reason why the fact that the maker acknowledged the document as his own should be selected to the exclusion of all other contextual facts in order to determine the purport of the document. Since forgery is concerned with planned fraud, it would seem more sensible to construe the document in the context of the course of events by which the fraud would be perpetrated.

....

A person's identity is the sum of the attributes which distinguish that person from others. If this is correct it is possible that different attributes will be the key determinants of identity in different contexts. Forgery is concerned with circumstances in which whether or not a document has legal effect or will be acted upon, depends upon the identity of the maker. Thus, the law contemplates some person who must make an assessment of the identity of the document's maker. In practice the attributes of identity which will be considered crucial will vary according to the nature of the transaction. For instance, a solicitor administering the estate of an intestate is interested in the identity of claimants. In this context, the single key identity factor is the relationship of the claimant to the deceased. All other factors such as name, address and physical appearance will be irrelevant."[50]

32.65 The name used in *More* i.e. Jessell, was a key identity attribute in the context of the fraud as a whole in that Jessell was the actual payee of the original cheque lodged by More. As Kenny points out" ... in order to ascertain what in

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50 Leng *op cit* at 691-694.

fact the document itself purports to be, it is not always enough merely to read it: often external factors also must be taken into account".[51] The same decision would have been reached in More had the prosecution been brought under the similar provisions of the 1913 Act. The question is whether we should retain the definition of falsity in s1(2) of the 1913 Act or adopt the specific approach in the 1981 Act. Whichever is adopted, it would be wise to meet the problem presented in *More*.

32.66 We have no doubt that the legislature would wish persons acting as More had done to be convicted of forgery if only to discourage the use of false names in commerce.

32.67 *We recommend that legislation should provide specifically that it is a distinct offence, not strictly a forgery offence, to use an assumed name on a document in circumstances such as those in the More case i.e. where use of the assumed name is a material part of a fraudulent scheme viewed as a whole.*

Falsity as to Circumstances

32.68 The scope of falsity under the 1913 Acts extends beyond falsity as to authorship to falsity as to the time or place a document was made. The English Law Commission argued in the body of their Report[52] that it was unnecessary to extend the scope of the offence any further but recommended that it extend to time, place or any other circumstance relating to the making of the document.[53] This became the law in Section 9(1)(g) of the 1981 Act. In the case of *Donnelly*,[54] the Court of Appeal held that the 1981 Act and Section 9(1)(g) in particular were intended to make new law. Donnelly was the manager of a jeweller's shop and issued a valuation certificate for items of jewellery that did not exist. This would not have been forgery under the 1913 Act but the Court of Appeal held the certificate purported to be made after an examination of the jewellery and therefore told a lie about the circumstances in which it was made. Commentators have differed about the effect of the decision. *Arlidge and Parry* say:

> "Carried to its logical conclusion this decision would sweep away the traditional distinction between a document which is not what it purports to be and one which merely contains a false statement. If a document makes a statement which is false it literally purports to have been made in certain circumstances (viz. circumstances in which the statement would be true) in which it was not in fact made. It would follow that any false statement in writing would be capable of constituting forgery. This would be a remarkable extension of the offence: making a document which is not what it purports to be is distinguishable from,

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51 *Kenny*, para 388, footnote reference omitted.
52 Para 42.
53 Para 45 and s6(2)(iii) of draft Bill.
54 [1984] 1 WLR 1017.

and more serious than, the mere writing of falsehoods. The latter can be adequately dealt with as deception or attempted deception. It is true that the Act does make new law in some respects, but it would need very plain words indeed to effect such a radical change. Far from dispensing with the old distinction, section 9(1) is clearly a careful attempt to spell out its implications. The phrase "in circumstances in which it was not in fact made" must surely have been intended to be construed *ejusdem generis* with the rest of the subsection. It is therefore submitted that *Donnelly* should not be interpreted in such a way as to obliterate the distinction between forgery and deception. The actual decision may perhaps be justified on the grounds that the valuation certificate had what the Law Commission called a "spurious air of authenticity", it was nothing but a sham. "That which purported to be a valuation after examination of items was nothing of the kind". If the jewellery had in fact existed and had merely been over-valued, it seems unlikely that the decision would have been the same."[55]

32.69 *Smith and Hogan* say:

> "Obviously the valuation certificate told a lie, but did it tell a lie about the *circumstances* in which it was made? If it did then a begging letter in which the beggar, or someone on his behalf, falsely states that he is bedridden or unemployed, is equally a forgery because the circumstances to which the writer alludes are untrue. This would be a remarkable extension of the law of forgery as previously understood but *if* this is the conclusion to which s9(1)(g) inexorably leads then it would have to be accepted."[56]

32.70 They suggest further that *Donnelly* cannot stand after *More*.[57] However Leng counters:

> "This argument holds good only if *Donnelly* contravenes the rule that a document must tell a lie about itself. However, in *Donnelly* the Court held that the certificate was false because it falsely *purported* to have been made after the defendant had inspected the relevant jewellery. In *More* Lord Ackner concluded that the rule of automendacity was retained by virtue of the "purport construction of each of the subsections of section 9(1)". It seems that rather than contradicting the automendacity rule, *Donnelly* is simply an application of it. The decision is novel only because this type of lie about a document had not previously been considered as a basis for falsity in forgery. If that is right *Donnelly* is not inconsistent with *More* and remains good law."[58]

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55 *Arlidge and Parry*, para 6.18, footnote references omitted.
56 *Smith and Hogan* 651-2, footnote reference omitted.
57 *Id*, 652.
58 Leng, *op cit*, at 698, footnote reference omitted.

Actus Reus in The Model Penal Code

32.71 Article 224.1 of the *Model Penal Code* adopts a somewhat different approach to the definition of the *actus reus*. It provides as follows:

> "A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> (a) alters any writing of another without his authority; or
> (b) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed..."

The Comment supporting Article 224.1 explains that:

> "[a]s originally drafted, the predecessor to Section 224.1 provided that 'a thing is forged if it is so made or altered as to convey a false impression as to authorship, authority, date, or other aspect of authenticity; a writing is not forged merely because it contains other misrepresentations'. Under that formulation, 'authenticity' was the crucial concept, and the draft was criticized on the ground that the test of 'authenticity' did not clearly exclude from forgery such cases of extrinsic fraud as pay-roll padding or other false reporting or record-keeping. The section was accordingly revised to specify with greater particularity the kinds of falsification that may constitute forgery and to make clearer the intent to preserve the line between falsity as to genuineness and falsity as to content. The section thus now speaks explicitly of alteration without authority in Paragraph (a). Other action with respect to an instrument 'so that it purports to be the act of another who did not authorize that act' is covered in Paragraph (b), along with other specific conduct dealing with time, place, numbered sequences, and purported copies.
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> This problem has been approached in a number of ways by other drafting efforts. Some older codes merely required a making or alteration that was 'false', presumably in reliance upon the body of existing interpretation to confine the respects in which 'falsity' will make a document into a forgery. Many revisions have followed the Model Penal code definition in substance. Still others have followed the New York approach by separately defining the terms 'falsely make', falsely complete,' and 'falsely alter'. For example, the Brown Commission defined 'falsely makes' as meaning 'to make a writing which purports to be made by the government or another person, or a copy thereof, but which is not because the apparent maker is fictitious or because the

writing was made without authority'.[59] 'Falsely completes' was defined as meaning 'to make an addition to or an insertion in a writing, without authority, such that the writing appears to have been made by, or fully authorised by, its apparent maker', and 'falsely alters' was defined as meaning 'to make a change in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker'.[60] A number of states have followed this approach which carefully preserves, as does the Model Code, the distinction between falsity as to genuineness and falsity as to content. At least one state, however, leaves the matter to implication by speaking of an instrument that 'is not what it purports to be'.[61][62]

32.72 On the question of materiality, the Comment noted:

> "Section 224.1 does not contain a 'materiality' element. The requirement of a purpose to defraud or injure or, alternatively, of knowledge of facilitating fraud by another is an adequate measure of the propriety of applying criminal sanctions. The addition of a 'materiality' element would entail litigation of the sort that has occurred with the perjury offense without the compensating advantage of focusing upon an essential ingredient of liability. One who perpetrates or intends to perpetrate a fraud or other injury by making a non-material alteration should be judged, as in other forgery cases, by the scope of the harm and the nature of the altered instrument.
>
> The rule in the Unites States has been not to include materiality as an element of the crime. Virtually all new codes and proposals adopted since the promulgation of the *Model Penal Code* have endorsed this conclusion."[63]

32.73 Nevertheless, Roger Leng's analysis of the *More* decision has shown that there is still a place for a materiality requirement in the law of forgery.

32.74 *Subject to making specific provision for the the use of an assumed name, we recommended the adoption of a provision similar to that in s9 of the English Forgery and Counterfeiting Act, 1981.*[64]

Uttering a Forgery

32.75 Sections 6 and 7 of the 1913 Act deal, respectively, with uttering a forged document with intent to defraud or achieve, and demanding, receiving or

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59 Brown Commission, *Final Report*, s1754(d).
60 *Id*, s1754(e), (f).
61 Iowa, s715.2.
62 *Model Penal Code and Commentaries*, pp290-292.
63 *Id*, p298 (footnote references omitted).
64 Mr Barry Donoghue, of The Chief Solicitor's Office, has rightly pointed out the formidable difficulties of proof which may confront the prosecution in this context, since it is virtually impossible at present to connect a birth certificate with an individual in the absence of the supporting evidence of a parent.

obtaining property, with intent to defraud, "under, upon or by virtue of" any forged instrument or forged testamentary document.

32.76 It may be argued that, in view of our proposals in relation to fraud, the best solution is to retain the offence of uttering, as provided for in section 6, on the basis that the reference in section 6(2) to "either of the intents necessary to constitute the offence of forging the said document, [etc.]" is to relate to the new offence of forgery which we have proposed. It may also be argued that it is preferable to retain the word "utters" in the definition contained in section 6(2), rather than "uses", which was recommended by the English Law Commission[65] and included in the English Act of 1981.[66] The word "uses", without further definition, could be held to connote use over some minimum period of time, and not to extend to instantaneous acts, such as delivery.

32.77 It is interesting to note that in the United States, Article 224.1 of the *Model Penal Code*, in paragraph (c), makes a person guilty of forgery if, "with purpose to defraud or injure anyone", or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, he "utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b). The supporting Comment states:

> "Subsection (1)(c) is designed to extend the reach of Subsections (1)(a) and (1)(b) to include within the penalties for forgery one who knowingly circulates forged writings as well as one who makes or otherwise completes the forgery itself. Such coverage is well within the tradition of the common law and prevailing legislation and is continued in all modern drafts of forgery legislation. The traditional term 'utter' is used to cover these activities.
>
> An earlier draft of this section defined 'utter' to mean to 'issue, authenticate, transfer, publish, or otherwise give currency to a forged writing or object'. When the language was redrafted to eliminate the forgery of objects from this section and to make the focus upon the authenticity of documents more clear, the terms 'issue,' 'authenticate,' and 'transfer' were added to Subsection (1)(b). It was not thought necessary in light of this change to continue a definition of the term in the final draft. No change of meaning is intended, however, and 'utter' should thus be taken to mean publication or other circulation of a forged writing. The broad scope of current law is thus to be carried forward. In addition, it is intended to assure that display, e.g., of a false medical diploma, is covered even though the actor did not make, issue, transfer, or otherwise dispose of the forged document. The extension of the concept of 'writing' beyond matters having solely pecuniary significance or apparent legal effect results in an extension of the offense

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65 English Law Comm, No.55, para 49.
66 Cf sections 3 and 4 of the 1981 Act.

of uttering to an effort to give currency or credence to such documents."[67]

32.78 There is much to be said for the English Law Commission's view[68] that the technological advances in relation to photocopying make it desirable to have an offence of using (or, as we prefer, "uttering") a *copy* of a false document.

32.79 As regards *mens rea*, it may be argued that the accused must have intended to utter the document with the intent to induce another to accept it as genuine and, by reason of that, to do or refrain from doing some act. The question whether the accused should have been aware that the document was a false one is less straightforward. The matter is not one which has given rise to much practical difficulty as was the case with the law of receiving stolen property, where need to show that the accused knew the goods were stolen was the source of considerable problems for the prosecution.[69]

32.80 It seems that the choice centres on tests based respectively on knowledge, belief and recklessness. To require knowledge appears too lenient: the accused would escape liability even where he strongly suspected the log book or pound note he was using was a forgery. Belief has its own difficulties,[70] including questions of the reasonableness and intensity of the belief. It may be argued that recklessness affords the most satisfactory test.

32.81 Following the same format as we proposed in relation to receiving stolen property, *we recommend that the offence of uttering a forged document or copy of a forged document should require knowledge on the part of the defendant that the document is forged or recklessness in the sense of a conscious disregard, involving culpability of a high degree, of a substantial and unjustifiable risk that the article is forged.*[71] *We would continue to describe the offence as "uttering" rather than as "using".*

Possession Offences

32.82 We now must consider how the possession offences prescribed by section 8 and 9 of the 1913 Act could be improved. One approach would be to penalise the possession of any forged article or any tool or material of forgery. This would have the considerable advantage of simplicity; prosecutorial discretion would ensure that the offence did not range too widely.

32.83 Another approach, favoured by the English Law Commission, was that of *listing* certain forged instruments, and tools and materials of forgery, possession of which should constitute an offence. As to false instruments, the Commission stated:

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67 *Model Penal Code and Commentaries*, pp300-301 (footnote references omitted).
68 English Law Comm, No.55, para 49; see section 4 of the 1981 Act.
69 Cf our *Report on Receiving Stolen Property*, para 3 (1987).
70 Cf *Id*, para 120.
71 Cf *Id*, paras 115, 1130, *Murray*, [1977] IR 360, at 403 (Sup Ct, *per* Henchy J).

"We think that there are two separate, but not mutually exclusive, criteria to be applied in selecting the instruments, possession of which should be an offence. The first is the ease with which they may pass from hand to hand, and the second is the ease with which they may be accepted as genuine because of the circumstances in which they are commonly used. Bank notes by either criterion fall within the class of documents the possession of which, if forged, should be an offence[72] .... Applying the criteria, we consider possession of only the following instruments in addition, if false, should be an offence:

(i) any instrument evidencing the title of any person to any share or interest in any stock, annuity, fund or debit of any state or body corporate or society,

(ii) postal orders and money orders, and

(iii) postage stamps.

We have not included Inland Revenue or Customs wrappers or labels as we understand from the departments concerned that these are now of no significance."[73]

32.84 As to tools and materials, the Commission stated:

"Forgery itself being in the nature of a preparatory offence, we do not think that in the absence of very special circumstances it is necessary to go so far as to penalise specifically acts that are preparatory to the commission of forgery. We have decided against penalising the making of false seals on the basis that this constitutes only a first step to the making of a false instrument which will bear the seal. How far such conduct might be .... indictable as an act of preparation is unclear; but whatever the position we do not wish to bring such conduct within a new Forgery Act. However, ... different considerations apply in the case of tools and materials for counterfeiting currency .... This aspect apart there are two instances that have been urged upon us which require possession of a die for making certain impressions to be penalised. Because of the ease of defrauding the Revenue by the use of impressed stamps on instruments of various kinds to denote that duty on them has been paid and because of the difficulty of detecting such offences, the Inland Revenue authorities have asked that the offence of making or possessing a false die as defined by the *Stamp Duties Management Act, 1891* should be retained. We agree that this should remain an offence. Secondly, the Department of Trade and Industry have asked us to retain an offence of making or possessing a forged die required or authorised by law to be used for the marking of gold or silver plate, or of gold or silver

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72 The offence of possessing counterfeit banknotes is addressed *supra*, pp154 *et seq.*

73 *Id*, para 63.

wares. The law relating to hallmarking is under review by the Department and they are anxious that there should be no weakening of the criminal provisions in this field before the completion of that review. For these reasons we propose the retention of the offence of making or possessing such false dies."[74]

32.85 Section 5(3) of the 1981 Act provides as follows:

> "It is an offence for a person to make or to have in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies, with the intention that he or another shall make an instrument to which this section applies which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice."

32.86 And section 5(4) provides:

> "It is an offence for a person to make or to have in his custody or under his control any such machine, implement, paper or material, without lawful authority or excuse."

It is worth noting the references here to "custody or ... control". In fact this expression is used throughout the possession-based offences prescribed by section 5. The English Law Commission recommended this change from the formula of "custody or possession" favoured in the 1913 Act. The Commission were anxious "to avoid the technicalities connected with the word possession"[75] - an understandable response to the House of Lords decisions on that subject in the years shortly before the publication of the Commission's Report.

We will be examining these provisions in our analysis of the *mens rea* aspects of possession-based offences.

32.87 A final point in relation to the *actus reus* is here worth noting. If the possession offence is to be very widely defined, this arguably reduces the need for the offence of uttering, since one who utters a forged article "will necessarily have it in his custody or control".[76]

32.88 As regards *mens rea* in relation to the possession of forged articles, three principal approaches need to be considered. The first would render criminal possession without lawful authority or excuse. The second would require proof

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74 *Id*, para 84.

75 English Law Com No.55, para 65.

76 Glazebrook, *The Law Commission's Working Paper on Forgery: II: Some Further Comments*, [1970] Crim L Rev 554, at 557.

of an intention to induce another to act to his prejudice in the belief that the forged article is genuine. The third, favoured by the English Law Commission, would create *two* offences out of the first and second approaches just mentioned, attaching a higher penalty, of course, to the second. The English Law Commission considered that, having regard to the nature of the forged instruments it proposed for inclusion on the list (mentioned above), it was:

> "easy to envisage circumstances where possession of such instruments might be of great social danger, particularly where there is an intention that the instruments should be used to induce another to act to his prejudice in the belief that they are genuine. On the other hand the possession of a false postage stamp or even of a false share certificate if unaccompanied by such an intention will normally have less serious implications. For this reason we feel that there should be two offences in relation to possession of the listed instruments, the one requiring an intention that the instruments be used as genuine to induce another to act to his prejudice, and the other requiring only possession without lawful authority or excuse. The first offence should carry the same penalty as the forgery and the using offence, whereas the second offence should carry a maximum penalty of two years' imprisonment. We think that the provision of two offences with differing mental elements will provide adequate protection against possession by persons who have such false instruments for the purpose of a fraudulent scheme, and yet not penalise too heavily those who come into possession of such false instruments and yet with knowledge of their falsity continue to hold them instead of delivering them up to the authorities."[77]

32.89 The question of onus of proof must also be considered. Sections 8 and 9 of the 1913 Act place the onus on the defendant to establish lawful authority or excuse. We have already referred to this shift of onus in our *Report on Receiving Stolen Property*.[78] It may be argued that, while this onus is perfectly satisfactory in the context of such straightforward possession-based offences, it would be quite wrong to shift the onus onto the defendant in a prosecution for "possession with intent". Here, justice would arguably require that the intent be proven by the prosecution. Ordinary experience of human life may well justify the rebuttable inference that the possessor of a forged article had not lawful authority or excuse, but that same experience could scarcely justify a rebuttable inference that the possessor had the forged article with intent to induce another to accept it as genuine, to his prejudice.

Even in relation to the lesser offence, it may be considered desirable (as has been done in England by the 1981 Act) not to shift the onus of proof onto the defendant to establish lack of lawful authority or excuse but rather to leave this on the prosecution, provided that, where the defendant has been shown to have had custody or control or control of an instrument he knew to be false, there

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77 English Law Comm No 55, para 68.
78 LRC No.23-1987, para 125.

would arise an *evidential* burden on the defendant to offer an explanation; where he did offer some evidence of lawful authority or excuse the prosecution would have to discharge the ordinary burden of proof.[79]

32.90 The *mens rea* in relation to tools and materials of forgery raises somewhat different issues of policy. We have already quoted section 5(3) and (4) of the 1981 Act. Commenting on section 5(3), *Smith & Hogan* state:

> "It is accordingly not enough that D possesses implements with which he intends to make an instrument unless the implements are *specially* designed or adapted to make one of the *specified* implements. It is no offence to possess a pen though D's intention is to use it to make one of the specified instruments; nor is it an offence to possess a household cleanser in order to falsify one of the specified instruments since neither the pen or the cleanser are specially designed, nor need they be adapted, for the making of a false instrument. It is of course not possible to provide an exhaustive list of the machines, implements, paper or other materials which are specially designed or adapted for making instruments to which the section applies; it is for the prosecution to establish that the implement etc. is so designed or adapted and that D knew that. 'Knowledge' in this sub-section is not coupled with 'belief' as it is elsewhere in the section and generally in offences under the Act. Clearly 'knowledge' is more restricted than 'knowledge or belief' but the boundary between the two is somewhat speculative.
>
> It is only necessary to show that the implement etc. has been specially designed or adapted to make an instrument to which the section applies, not that the machine etc. has been designed or adapted to make *false* instruments. No doubt it will often be D's intention that he or another should so use it, but it suffices that the implement etc. is specially designed or adapted to produce any of the specified instruments. Very commonly cheque books are stolen and may be found in the custody or control of D; if D has one of the relevant states of mind he is guilty of an offence since the paper or other materials used are specially designed for the making of cheques and cheques are included in the specified instruments."[80]

32.91 Two questions thus arise. The first relates to whether it would be better to include belief, as well, perhaps as recklessness, rather than restrict the offence to cases of knowledge alone. It will be recalled[81] that in *Hanlon v Fleming*[82] the Supreme Court construed the word "knowing" narrowly. Henchy J (with whose judgment the other members of the Court, O'Higgins CJ and Griffin J agreed) cited[83] the following passage from Glanville Williams:[84]

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79 Cf English Law Com No 55, para 70, *Smith & Hogan*, 668-669.
80 *Smith & Hogan*, 667 (footnote references omitted).
81 Cf LRC 23-1987, para 37.
82 [1981] IR 489 (Sup Ct).
83 *Id*, at 498.

> "The word 'knowing' in a statute is very strong. To know that a fact exists is not the same as taking a chance whether it exists or not. The courts ought not to extend a *mens rea* word by forced construction. If, when Parliament says 'knowing' or 'knowingly', it does not mean actual knowledge, it should be left to say as much by amending the statute."

32.92 It may be argued that a person who believes that "a job" has been done on a machine or implement in his custody or under his control is sufficiently anti-social, in taking no steps to resolve the problem, to warrant a criminal sanction. The same argument can be made, somewhat more tentatively, in relation to a reckless individual. In this context we proceed on the basis that recklessness has the meaning equivalent to that we proposed in our *Report on Receiving Stolen Property*.[85]

32.93 The second question is directly connected with the anterior question of whether the legislation should render criminal the possession of *all* forged instruments or only those listed in the legislation. If the latter view is favoured, as in the 1981 Act, then it makes sense to penalise a defendant for knowingly possessing a machine or implement specially designed or adapted to make an instrument to which the section applies. But if the former view is favoured, the *mens rea* element would have to be constricted to avoid overbreadth.

32.94 Realistically, we conclude that whether the offence captures all forged items or only "listed" instruments it would be impossible to prove intent without raising inferences from circumstances.

32.95 *Accordingly, we recommend that the offence be confined to possession of listed machines or implements, as described in the English legislation, without lawful excuse.*

Penalties for Forgery

32.96 At present, life imprisonment is available as a penalty under sections 2(1), 3(1) and 5(1) of the 1913 Act. Fourteen years is available under sections 2(2), 3(2), 5(2) and 5(4). *We agree with the English Law Commission and recommend that the maximum sentence for a forgery or uttering offence should be ten years imprisonment and that the creation of an aggravated offence is not warranted.*

Power of Search

32.97 Under section 16 of the 1913 Act there is a wide power of search, pursuant to a search warrant. The English Law Commission recommended that the proposed new legislation should also contain a wide power of search, again on the basis of a search warrant. Accordingly, section 7(1) of the 1981 Act provides as follows:

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84 *Williams, op cit*, 1st ed, 87. See now 2nd ed, 126.

85 LRC 23-1987.

"If it appears to a justice of the peace, from information given him on oath, that there is reasonable cause to believe that a person has in his custody or under his control-

(a) any thing which he or another has used, whether before or after the coming into force of this Act, or intends to use, for the making of any false instrument or copy of a false instrument, in contravention of section 1 or 2 above; or

(b) any false instrument or copy of a false instrument which he or another has used, whether before or after the coming into force of this Act, or intends to use, in contravention of section 3 or 4 above; or

(c) any thing custody or control of which, without lawful authority or excuse is an offence under section 5 above,

the justice may issue a warrant authorising a constable to search for and seize the object in question, and for that purpose to enter any premises specified in the warrant."

32.98 *We recommend that a section on the lines of s16 of the 1913 Act be retained.*

CHAPTER 33: COUNTERFEITING

33.1 We now must consider whether the law relating to counterfeiting should be changed. In favour of change it may be argued that it would be helpful for the law to prescribe clear offences relating to counterfeiting of bank notes and coin in general, rather than deal with the matter in a series of specific offences making distinctions between bank notes and coin. This was the view favoured by the English Law Commission; section 14 of the 1981 Act gives effect to this change.

33.2 The next question concerns the definition of counterfeiting. On one view a person should be guilty of the substantive offence of counterfeiting only where the counterfeit note or coin is reasonably capable of passing for a genuine one. This is the view favoured by the English Law Commission and given effect by section 28(1) of the 1981 Act. On another view, favoured by the Bank of England and British Treasury, there should be no such requirement of successful resemblance. The English Law Commission considered that thwarted counterfeiters could be penalised adequately by conviction for attempted counterfeiting. If the substantive offence and the offence of attempt were to have the same maximum penalties, any perceived difficulty would be resolved.

33.3 *We recommend that (i) the offence of counterfeiting should apply both to bank notes and coin and (ii) where the counterfeit note or coin is not reasonably capable of passing for a genuine one, the offence of attempt should be charged, and the same penalty should be available for the attempt as for the substantive offence.*

33.4 As regards the definition of bank notes and coin for the purposes of this offence it may be noted that section 27 of the 1981 Act provides as follows:

> "(1) In this Part of this Act "currency note" means:
> (a) Any note which:

(i) has been lawfully issued in England and Wales, Scotland, Northern Ireland, any of the Channel Islands, the Isle of Man or the Republic of Ireland; and

(ii) is or has been customarily used as money in the country where it was issued; and

(iii) is payable on demand; or

(b) any note which:

(i) has been lawfully issued in some country other than those mentioned in paragraph (a)(i) above; and

(ii) is customarily used as money in that country; and

"protected coin" means any coin which:

(a) is customarily used as money in any country; or

(b) is specified in an order made by the Treasury for the purposes of this Part of this Act.

(2) The power to make an order conferred on the Treasury by sub-section (1) above shall be exercisable by statutory instrument.

(3) A statutory instrument containing such an order shall be laid before Parliament after being made."

33.5 *We would favour the extension of protection to all officially recognised international currencies and recommend that a similar provision be adopted.*

33.6 As regards *mens rea*, it will be noted that, in contrast to section 1 of the 1913 Act, which makes the forgery of a bank note an offence if done with intent to defraud, section 2 of the 1861 Act contains no such requirement. In the overwhelming majority of cases, of course, it will make precious little difference whether any *mens rea* requirement is specified in the legislation since most people engaged in these practices will have no legitimate reason for their industry.

33.7 Several possible solutions need to be considered. The first would require an intent to defraud in all cases. The second would be content to establish knowledge on the part of the accused of the intended use of the counterfeit note or coin (by the accused or another person) with intent to defraud. The third solution would convict the accused in the absence of lawful authority or excuse. It would enable prosecutors and the courts to deal sensibly with these cases since the formula would adapt just as easily to the case of the serious counterfeiter as it would to the artist who draws very realistic £100 notes for the sheer aesthetic

pleasure of it.

33.8 *We recommend that liability should attach in the absence of lawful authority or excuse.*

Uttering and Possession of Counterfeit Currency and Powers of Search

33.9 In regard to these matters, we do not wish to weary the reader by rehearsing policy considerations, already mentioned in relation to forgery, in the present context of counterfeiting.

33.10 *Accordingly, we recommend that (i) there should be offences of uttering and possession of counterfeit currency drafted similarly to those in regard to forgery, (ii) there should be a similar power of search, and (iii) similar penalties.*

CHAPTER 34: CONSPIRACY TO DEFRAUD

34.1 We now must consider what changes, if any, should be made in relation to the offence of conspiracy to defraud. Three options will be analysed in turn:

1. To retain the offence unchanged;

2. To abolish the offence; and

3. To limit its scope.

Option 1: To Retain the Offence Unchanged

34.2 In favour of this option it may be argued that the offence at present operates satisfactorily. Its flexibility constitutes a deterrent to dishonest people who are minded to act in a dishonest, but not illegal way. The English Law Commission has identified as an advantage the fact that the offence:

> "fills the gap which might otherwise be left if it were abolished. Although the extent of the gaps amongst existing statutory offences which have been identified does not appear to be very great, and most could be filled by extending existing offences or creating new ones as required, it is difficult to be certain that specific, closely-defined offences would cover all the conduct needing to be covered. The way would be open to ingenious fraudsters to fall through the net and avoid the criminal law, whereas a broad offence like conspiracy to defraud covers conduct which is clearly dishonest and in general deserving of criminal sanction but which could not be brought within any of these offences. Conspiracy to defraud has an inherent flexibility which can turn one of its most obvious defects - of being too sweeping - to advantage; there is less need to recast the law to meet changes in social behaviour and less

need for the judges to make any procrustean attempts to force the facts of an unexpected case into existing well understood legal concepts."[1]

34.3 This argument is of less than central relevance to the position in Ireland. First, it is by no means clear that, in criminal cases, Irish judges have perceived the "need" to engage in procrustean attempts to "force" the facts of a case into existing legal concepts. Secondly, unlike the English Law Commission, we are in a position, when considering the merits and demerits of the present law in relation to conspiracy to defraud, to do so in the context of a global analysis of offences of dishonesty. Thus, if we perceive weaknesses in regard to specific substantive offences, we are free to recommend changes in the definition of those offences rather than leaving it to an unreconstructed offence of conspiracy to defraud to fill in gaps.

34.4 Another argument in favour of leaving the offence unchanged is that sometimes it can "better reflect the true nature of the fraud which has been committed than can a charge of one or more existing substantive offences ...."[2] The suggestion here is that the offence of conspiracy to defraud is defined in wide terms "which concentrate on the broad objective of the conspirators rather than, as is the case with many offences involving dishonesty, or the means of achieving it".[3]

34.5 There is some merit in this argument. Undoubtedly it is true that if the offence of conspiracy to defraud were not available, the prosecution would sometimes have to search through the statute book before finding an offence with which to charge clearly dishonest defendants. In some cases the offence charged would be inappropriate to the defendant's misconduct. There would thus arise the possibility of too low a maximum penalty attaching to the act as well as the practical difficulty of proving the case and the possibility that in some cases there might simply be no other available offence with which to charge. As against this, it may be argued that, if there are real problems associated with low penalties or difficulties of proof, this may be considered an argument, not for the pragmatic invocation of a prosecution for conspiracy to defraud, but for the alteration of the other offences, or the creation of new ones, to provide appropriate penalties and remove unwarranted difficulties in prosecutions. Perhaps the only one of the objections mentioned above that has any substantial force is the first, to the effect that there is something intuitively inappropriate about charging a person with an offence relating to breach of copyright or malicious damage, for example, when the gravamen of the offence is a fraudulent conspiracy. The answer to this objection may be that, if the prosecution for the specific other offence offers an accurate characterisation of the defendant's wrongdoing, as well as the prospects of a suitable penalty, with no extra difficulties in conviction, the fact that the more generic concept of conspiracy to defraud might "feel" more appropriate

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1 Working Paper No.104, para 6.9.

2 English Law Commission Working Paper No.104, para 6.2. See also Smith, *Conspiracy to Defraud: The Law Commission's Working Paper No.104*, [1988] Crim L Rev 508, at 514.

3 WP No.104, para 6.2.

should not be given a great deal of weight. In any event, it is doubtful whether the feeling of inappropriateness in regard to certain specific offences would be assuaged only by a prosecution for *conspiracy* to defraud. It is quite probable that the underlying argument supports a generic broadly defined offence of appropriation or fraud. There may be much to be said in favour of such an approach, including the present consideration; but if this is the true concern, the legislation should make that change rather than preserve unchanged the offence of conspiracy to defraud.

A final argument in favour of leaving the offence unchanged is that it may assist the prosecution in drawing up clear and simple charges, which the jury can more easily comprehend. The English Law Commission have observed that:

> "Fraud cases vary widely in their type, size and complexity. Serious fraud cases are invariably tried by judge and jury. Since the tribunal of fact is not chosen for its expertise and its ability to comprehend complex issues but for other reasons, it is obviously important that the presentation of fraud cases by the prosecution is kept as clear and simple as possible. This point has been stressed many times by judges and prosecutors in the fraud context ...."[4]

34.6 As against this some might argue that, while simplicity is no doubt a virtue in relation to jury trials, it is not so strong a consideration as to afford a justification for defining criminal conduct so broadly. Moreover, the belief that the criterion of criminality embraced by the offence of conspiracy to defraud is simple may be questioned. The notion of conspiracy to defraud is uncertain when analysed closely. In the artificial and hierarchical context of a jury trial where the judge ostensibly instructs the jury on the meaning of the law, the reality of many trials for this offence must be that the more reflective jury members will have a range of unanswered questions about the exact meaning of the criterion by which the defendant's criminality is to be judged; if they are of particular courage they may seek further guidance from the judge, but this is not very likely to satisfy them since at present the law on this matter is intentionally lacking in any conceptual integrity. The offence "works" in relation to the jury when the jury gets on with the business of engaging an intuitive, unreflective response to the facts of the case. To call this process an exercise in judgment is to pay it an unmerited compliment.

Option 2: To Abolish the Offence

34.7 The argument in favour of abolition has already been adumbrated: the offence is broad and uncertain; moreover, its benefits can be secured by reform of the substantive offences involving fraudulent conduct. As against this, it is worth noting that in *Ryan*[5] in 1988, the Supreme Court were content to record without any semblance of qualification that intention complemented by agreement

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4 *Id*, para 6.5.

5 [1989] IR 399 at 407.

between two or more persons may be prosecuted as a crime. Again, in its recent decision in *Ellis v O'Dea*, the Supreme Court has affirmed that "it is a fundamental principle of the Irish common law, applicable to the criminal jurisdiction of the Irish courts, that a person entering into a conspiracy outside Ireland in furtherance of which an overt act is done in Ireland is amenable to trial in the courts of Ireland".[6] Conspiracy to defraud is without question a useful offence, harmonious with ordinary people's value systems, whatever may be said about the poverty of its intellectual base.

Option 3: To Limit the Scope of the Offence

34.8 Under this option, the offence would be retained but its scope limited by the provision of some guidance as to be meaning of defrauding others. This greater specificity could, for example, require that to constitute the offence of conspiracy to defraud the conduct agreed to should itself constitute either a crime, an interference with another's constitutional right or a tort.

34.9 There are two primary drawbacks to this approach. First it drains from the offence the very reason for which some might retain it, namely, its *lack* of specificity and its amenability of application to new situations (such as in relation to computers or cash dispensers) where some uncertainty arises as regards criminal liability under the substantive offences. Secondly, any such limitations as mentioned above would lead to arbitrary results. There is nothing sacrosanct about the boundaries of tort law, for example; nor, in any sense save that bordering on the tautological, can it be said that there is a general principle of tortious liability.

34.10 Another mode of cutting down the potential scope of the offence of conspiracy to defraud would be to restrict the offence (or, perhaps, the possibility of its prosecution) to cases where the facts could not support a charge of any substantive offence. The experience in England, however, suggests that this approach should be treated with caution.

34.11 We must not lose sight of the fundamental *raison d'etre* of the crime i.e. to capture agreements to commit offences which are subsequently "nipped in the bud" and not to act as a "sweeper" where an appropriation or fraud takes place which does not fit into an existing category of criminality. In his judgement in the earlier case of *Ellis v O'Dea and Shields*[7] Walsh J says:

> "One of the charges laid in the present case is that of conspiracy. It is accompanied by a charge relating to the substantive offence. For many years judicial authorities have condemned the joinder of a conspiracy charge when there is a charge for the substantive offence. Whatever justification may exist in certain cases for preferring a charge of an inchoate crime, such as that it may prevent a substantive crime from

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6 Judgment of Finlay CJ, p13, delivered 14th November 1990.
7 [1989] IR 530 at p538.

being committed, it is difficult to see what, if any, justification can exist in justice for adding (it) as a count where the substantive offence is charged. To adopt it as a policy is, to say the least, very dubious."

34.12 Let us by all means improve the substantive law but removal of the well settled and accepted means of dealing with inchoate offences of fraud is uncalled for and unnecessary.

34.13 *We recommend no change.*

CHAPTER 35: AGGRAVATED DISHONESTY

35.1 This chapter is headed "Aggravated Dishonesty" as it groups together instances of dishonesty involving fear, duress and menaces as distinct from fraud or stealth. These offences could be dealt with in a distinct report but as they are found both in the *Larceny Act, 1916* and in the *Theft Act, 1968* we deal with them here for the sake of convenience.

A. ROBBERY

35.2 In the Discussion Paper we provided a detailed analysis of possible changes which might be desirable in respect of the offence of robbery. These related to such aspects as the temporal limitations in the definition of the offence, the meaning of "force" and the requirements as to fear of force and fear for others, the necessity for the commission of the offence of theft as an element in the definition of robbery and the possibility of subsuming the offence of robbery as a species of a general offence of aggravated theft. We ultimately tentatively recommended no change in the law. We noted that the offence had been translated directly from England's *Theft Act, 1968* into our law in 1976 as part of the harmonisation of our laws made necessary by the passing of the *Criminal Law (Jurisdiction) Act, 1976* and its "mirror" legislation in England. It had worked very well over the past fifteen years.

35.3 After further consideration and in the light of consultation, we adhere to this view and recommend no change in the definition of the offence of robbery.

B. BLACKMAIL

35.4 We now must consider how the legislation should deal with the offence of blackmail. Four options suggest themselves. *First*, that no change be made in the present law, *second*, that the legislation adopt a subjective test for blackmail,

third, that it adopt a new objective test, and *finally* that it construct a hybrid test containing subjective and objective elements.

(i) The Option of Leaving the Present Law Unchanged

35.5 In favour of leaving the present law unchanged, it may be argued that, whatever its theoretical uncertainties, it has not given rise to difficulties in practice. It may be considered unwise to set aside a law that is working so successfully in order to gratify the conceptual agitations of legal academics. Moreover, the fact that no difficulties have arisen in practice suggests that the underlying centre of gravity of the offence captures appropriately the conduct deserving of criminal sanction while sensibly leaving those operating at the outer conceptual edges of the offence under a shadow of illegality. Some defenders of the *status quo* may wish to put the point more assertively: they may argue that the core notion of blackmail is given full force by the present law, and that *of its nature* the value judgment on which the offence is based has to be the subject of socio-moral debate.

35.6 As against this it may be argued that, whatever merits the present law may have, it cannot be denied that the drafting of sections 29 to 31 of the *Larceny Act, 1916* leave a great deal to be desired. The duplication between the sections has been widely recognised. Moreover, so far as they involve differentiation, this is based on distinctions lacking significance.

(ii) The Subjective Approach

35.7 We must now consider the strengths and weaknesses of a subjective test of criminal responsibility. In England, s21(1) of the *Theft Act, 1968* provides that a person is guilty of blackmail if he makes any unwarranted demand with menaces (subject to conditions not of present relevance); for this purpose a demand with menaces is unwarranted:

> "unless the person making it does so in the belief -
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand."

35.8 Although this standard seems susceptible to a fully subjective interpretation, as we shall see the courts have injected a significant objective element. The point worth addressing here, however, is whether a fully subjective test would be the best solution.

One commentator thinks not:

> "If a defendant has acted disgracefully by making a certain demand reinforced by threats of a particular kind, I see no injustice in holding

him responsible in a criminal court, even though he may have acted according to his own standard in these matters. On the other hand I see some danger to our general standards of right and wrong, if each man can claim to act according to his own, however low that standard may be."[1]

35.9 The problem is not an academic one. In societies with strong divisions of class and ethnic background, threats may be made by persons who are utterly convinced of the moral rectitude of the demand.[2] Should such threats be exempt from criminal sanction, however unwarranted they may be adjudged by the dominant moral norms in a particular society? Should blackmail be regarded as in essence an act of *mala fides*, so that in the absence of subjective bad faith no crime is committed? A subjective test gives practical effect to a very significant degree of moral pluralism, whereby the right to act in accordance with one's conscience[3] takes priority over the interests of other members of a particular society not to be subjected to menaces that are deemed to be unwarranted by the dominant norms of that society.

35.10 In fact, s21 was neither intended to prescribe, nor has been judicially interpreted as prescribing, a fully subjective test. The Criminal Law Revision Committee stressed that their choice of the word "proper" had been a deliberate one:

> ".... we chose the word 'proper' after considering 'legitimate' or 'fair' instead. Any of the three words would, we think, be suitable. 'Fair' would provide a good test for a jury to apply. It might also be a little more favourable to the accused, because the jury might think that, even if the accused behaved improperly the prosecutor behaved so badly that it was fair that he should be treated as he was. There seems little difference between 'legitimate' and 'proper'. On the whole, 'proper' seems the best word. 'Proper' directs the mind to consideration of what is morally and socially acceptable, which seems right on a matter of this kind; 'legitimate' might suggest that it is a purely legal question whether the accused had a right to utter the menaces."[4]

35.11 The test was to be what the defendant, and not the jury, thought was "morally and socially acceptable".[5] This notion of moral and social acceptability merits closer examination. It has been construed as raising a sociological

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1 MacKenna, *Blackmail: A Criticism*, [1966] Crim L R 467, at 472.

2 Cf *Williams*, 835-836.

3 In many (though presumably not all) cases it could scarcely be argued that a criminal inhibition on menacing conduct, where such conduct is consistent with, but not required by, one's conscience, offends against the principles of moral pluralism; cf *AG v McGee*, [1974] IR 284, at 316-317 (Sup Ct, *per* Walsh, J, 1973).

4 Eighth Report, para 123.

5 Cf. *Griew*, 12-27:

> "The prevailing view (and that of the jury) may be that a threat to expose P's fraud, or to bring criminal proceedings, or to announce to the world that he defaults on his debts of honour, is not a proper means of reinforcing a demand - even to the extent that it provides a standard whereby to judge whether D himself may genuinely have believed the use of the menaces to be 'proper'."

question,[6] whereby the defendant's belief as to the content of the particular moral norms of society in general is what is at issue: the defendant will be excused, not where *he* thinks the use of menaces was "was proper" in the sense of being morally acceptable, but rather where he thinks that members of society in general would be of this view.[7]

35.12 The notion of referring to the moral standards of society needs closer analysis. *Griew* suggests that a defendant:

> "can hardly be intended to have to rely on a belief that *all* respectable people would find his conduct acceptable. That would not cater for the case that should most obviously be catered for, where the matter is close to the moral borderline. It is in such a case that, although the prosecution is a credible one, [a defendant] may most plausibly claim that he thought his use of menaces 'proper'. He should be protected against a conviction of blackmail by a belief that a significant body of respectable opinion would not disapprove. The test need not postulate, or require [a defendant] to conceive of, a single prevailing standard or a uniform body of general opinion."[8]

35.13 In England, the Court of Appeal in *Harvey*[9] introduced a further gloss. The defendants, who had been swindled on an illegal deal involving the promise to supply drugs, had made threats to kill, maim and rape. The trial judge had directed the jury that, as a matter of law, it *could not* be a proper means of reinforcing the demand to make treats to commit serious criminal offences. The Court of Appeal, in upholding their conviction, noted that "proper" was

> "plainly a word of wide meaning, certainly wider than (for example) 'lawful'. But the greater includes the less and no act which is not believed to be lawful could be believed to be proper within the meaning

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6 Cf *Williams*, 836:

> 'The question under (b) is whether the defendant believed that his menaces were 'proper', and 'proper' was intended by the CLRC to mean, and can be read as meaning, 'proper in the minds of people generally'. On this view the question is whether the defendant believed that people generally would approve (or not disapprove) of his conduct.'

See also the English Law Commission's Working Paper No.62, *Offences relating to the Administration of Justice*, para 82 (1975).

7 The reference by the Criminal Law Revision Committee to 'what is morally and socially acceptable' could be interpreted as meaning that the defendant should pass two tests, as regards the propriety of the use of menaces: his belief in its moral propriety according to his own moral standards and his belief that the moral standards of society in general are in accord. Neither the commentators (some of whom were members of the Committee) nor the courts have favoured this interpretation, however. From a policy standpoint it merits serious consideration.

8 An analogous issue has arisen in the tort of defamation, regarding 'right-thinking members of society'. Clearly the fact that a statement lowers a person in the eyes of a particular section of society 'which the Court cannot recognise or approve' (*Quigley v Creation Ltd*, [1971] IR 269, at 272 (Sup Ct, *per* Walsh, J) will not afford a basis for an action. Where, however, the economically and socially powerful members of society hold views (such as antisemitic or otherwise prejudiced attitudes), the question arises as to whether the members of that section of society are 'right-thinking'. If they are not to be held 'right-thinking' the court must rise above mere sociological enquiry; thus far the courts have shown no significant propensity to do so: cf *McMahon & Binchy*, 624-627, *McDonald*, 16-18.

9 72 Cr App Rep 139 (1980).

of [section 21 (1)]. Thus no assistance is given to any defendant, even a fanatic or a deranged idealist, who knows or suspects that his threat, or the act threatened, is criminal, but believes it to be justified by his end or his peculiar circumstances. The test is not what he regards as justified, but what he believes to be proper. And where, as here, the threats were to do acts which any sane man knows to be against the laws of every civilised country no jury would hesitate long before dismissing the contention that the defendant genuinely believed the threats to be a proper means of reinforcing even a legitimate demand."[10]

35.14 The direction of the trial judge had not been "strictly correct",[11] since the jury should have had to determine whether the defendants genuinely believed that the use of menaces "was in the circumstances a proper (meaning for present purposes a lawful, and not criminal) means of reinforcing the demand".[12] The Court of Appeal had no hesitation in applying the proviso to section 2(1) of the *Criminal Appeal Act, 1968*,[13] and dismissing the appeals, since it was of the view that the misdirection could have caused no possible prejudice to any of the defendants.

35.15 Professor Williams has criticised the decision:

> "The logic is defective. What the court evidently means is that 'proper' is a word of narrower denotation than 'lawful' (though it says the opposite). But when the argument is rewritten to make it logical, it remains unconvincing because the major premise is unconvincing. Even a judge would probably find himself forced to admit in some circumstances that an act is proper although unlawful, and public opinion would concede the point more readily than a judge. It is one thing to say that people generally would certainly frown on threats to kill and rape, another to say that they would certainly frown on a threat by a trade union leader to procure breaches of contract, or to organise a trespass upon factory premises; and it would be going even further to say that public opinion on such matters is so clear that the defendant, whoever he is, must have known of it. The Act makes the defendant's belief a jury question, not a matter to be settled by a misplaced reliance on logic.
>
> Suppose, to take another example, that the defendant has threatened to continue to make harassing telephone calls to the debtor (a minor criminal offence) if the debt is not paid. A defence of belief in propriety must be left to the jury ...."[14]

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10 *Id*, at 142.
11 *Id.*
12 *Id.*
13 See *I McLean*, 135.
14 *Williams*, 837. See also *Smith*, paras 326-327.

35.16 We considered analogous issues above[15] in considering subjective and objective approaches to the meaning of dishonesty.

(iii) The Objective Approach

35.17 The objective approach would seek to make the offence of blackmail one devoid of subjective considerations. The test of whether a demand was unwarranted would be entirely objective and would not depend in any way on the moral code or particular value judgments of the accused.

The merits of this approach are obvious. There is something clearly unsatisfactory in having the law defer to subjective considerations on this matter. As a matter of ordinary linguistic use it may surely be said that a fanatic who threatens to blow up a plane is making an unwarranted demand whether or not he thinks otherwise. The notion of warrant does not have to embrace the requirement that no demand is unwarranted unless the demander is of this view. Of course, in determining whether the demand was unwarranted, the law should have regard to all the ingredients of the demander's psychological state - the background of information he has (or has not) when making the demand, his intended meaning, his purpose in making the demand, and his understanding of the likely effect on the party to whom the demand is made. Reference to all these factors is essential before deciding whether the demand was unwarranted; but this is entirely different from *deferring to the values of the demander.*

35.18 As against this, it may be argued that, if the demander's psychological state is to be considered by the jury in determining whether the demand was unwarranted, then, even if no express reference is made to the values of the demander, in truth the test will be a subjective one, at least to the extent that similar demands - for example, to two different bank cashiers to hand over £1000 - may be characterised as warranted or unwarranted depending on elements of the psychological state of the particular demander.

(iv) A Hybrid Approach

35.19 We must now address briefly the option of a hybrid approach containing both subjective and objective elements. It would be possible for the legislation to provide that the defendant should be the arbiter of the moral propriety of his demand, subject, however, to a "long stop" objective proviso, that if the demand, viewed in context, was such that no ordinary person could regard it as a morally proper one to have made, the defendant should be convicted in spite of his subjective good faith. Thus, for example, it may confidently be predicted that a demand for money from the manufacturer of food backed by the threat to contaminate that food would fail the "long stop" test, assuming that it had not already failed the subjective test.

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15 *Supra*, pp193-198.

Should Legislative Specificity be Given to the Test of Whether a Demand Is Unwarranted?

35.20 On the premise that an objective test was eventually to find favour, it would be necessary to address the question whether legislative specificity should be given to the test of whether a demand is unwarranted. Under existing law, as we have seen, the statute speaks only of a "demand" with "menaces", without any "reasonable or probable cause" leaving it to the courts to articulate the full scope of these terms.

35.21 In favour of legislative specificity it may be argued that the present approach has left the law in too uncertain a state.[16] This is especially so in the area of economic (and more particularly industrial) relations, on which the statute at present offers no guidance and the courts have not given clear answers. Glanville Williams, in the context of the British experience, has mentioned the following argument in favour of keeping the law of blackmail to a narrow compass:

> "We are accustomed to a considerable measure of anarchy in the harsh economic world. Under present arrangements, concurred in by all, trade unions are entitled to hold not only employers but the general public to ransom. Perhaps a powerful trade organisation or trade union threatens a small retailer or industrialist to put him on a "stop list" unless he pays a so-called "fine" or agrees to conform to rules designed to benefit the organisation. The leader of a trade union of public employees threatens to call a strike which will deprive the public of its water supply, fire service, electricity, sewage disposal, hospitals or schools unless his members have their pay substantially increased. A trade union sets up a "kangaroo court" to fine its members who have refused to take part in a strike, with the threat that if they do not pay their fines the union will procure their dismissal from their jobs. Although some control has been imposed on some of these forms of behaviour, so far society has been unable to deal effectively with most of them. Monopolistic practices by employers can to some extent be curbed under the legislation specifically directed against monopolies. But the attempts of both Labour and Conservative governments to impose curbs on trade unions have generally been defeated by the superior economic and political power of the unions. In this state of affairs, it would hardly be wise to extend the law of blackmail to economic pressures, except perhaps in extreme circumstances."[17]

35.22 A useful model for consideration is section 223.4 of the American Law Institute's *Model Penal Code*, since it offers a significant degree of simplicity, coupled with an attractive element of flexibility. Section 223.4 treats blackmail for the purposes of obtaining another's property[18] as "theft by extortion", thus

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16 Cf *McCutcheon*, paras 125-134.

17 *Williams*, 835.

18 In contrast to criminal coercion, dealt with under section 212.5.

falling within the scope of the general provisions relating to theft, including that relating to a claim of right contained in section 223.1(3). Section 223.4 provides:

> "A person is guilty of theft if he purposely obtains property of another by threatening to:
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> (1) inflict bodily injury on anyone or commit any other criminal offense; or
>
> (2) accuse anyone of a criminal offense; or
>
> (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
>
> (4) take or withhold action as an official, or cause an official to take or withhold action; or
>
> (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
>
> (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
>
> (7) inflict any other harm which would not benefit the actor.
>
> It is an affirmative defense to prosecution based on paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official actions was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services."

35.23 Some of the more important aspects of this provision may be noted. First, it lists six specific types of threat before adding a seventh, more general, heading of a threat "to inflict any other harm which would not benefit the actor". Thus, the provision in fact deals with *all* threats to inflict harm (save, in respect of threats not coming within the scope of the first six headings, those which would not benefit the actor). To only three of these headings - (2), (3) and (4) - does the affirmative defence apply, but, as has been indicated, the defence of claim of right applies to all the headings. It is to be noted that heading (1) does not extend beyond threats to commit a criminal offence. The drafters rejected the inclusion of broad language condemning threats to carry out "any illegal act

injurious to character, person, or property".[19] Such a formulation, they noted, "would appear to embrace breach of contract and similar conduct for which a civil remedy is available".[20] It was, they thought, "clearly unwarranted to permit an extortion charge in such a context, where breach and renegotiation to avoid breach are a normal part of ordinary business dealings".[21]

35.24 As regards heading (3), relating to threats to expose secrets, the Comment supporting section 223.4 refers to the applicability of the general claim of right defence and the affirmative defence contained in the final paragraph of the section:

> "Threat of exposure may be thought to be a legitimate negotiating technique in situations where the claimant has an honest expectation of restitution, indemnification, or compensation; at the least it is a technique the morality of which should not be resolved by the criminal law of theft."[22]

35.25 As regards heading (4), the typical case covered is extortion under colour of office, as where an inspector of public lifts or a tax collector threatens to report violations of law unless he is paid.[23] A threat to bring about adverse official action "may also be made by one who is not himself an official, as where a political leader threatens to use his power over office holders to the disadvantage of a person who refuses to pay him".[24]

35.26 Heading (5) is, of course, central to our concerns. The supporting comment to section 223.4 states that heading (5):

> "reaches the threat of collective unofficial sanctions where, for example, an official of a trade association or union is lining his own pocket by employing a coercive power that he is supposed to wield on behalf of his organisation. It would also apply where a representative of a consumer group threatened to picket or boycott a store or business unless payments were made to induce him to withhold such action. This conduct obviously needs to be distinguished from situations where a demand is made on behalf of the organization and in order to achieve benefits to which the organization itself may be entitled. [Heading] (5) thus includes the threat only 'if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act'. Where the demand is on behalf of the organization, the [heading] does not apply even though the demand may go beyond any honest claim of right. Such cases are excluded from extortionate threats

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19 Comment to section 223.4, p210.

20 *Id.*

21 *Id.*

22 *Id*, at p215.

23 Comment to section 223, p217. See also heading (2) in this context. Both headings are subject to the affirmative defence, but it is clear that an official who looks for money for not performing his duty to report will not have any expectation of availing himself of this defence, save in the very rarest of circumstances.

24 Comment to section 223.4, p217.

because it would be unwise to subject these bargaining processes to the risk of criminal sanctions, where guilt might well turn on nice questions of what is a 'lawful objective' of a strike or other similar concerted activity."[25]

35.27 The Comment supporting section 223.4 gives some illustrations to indicate the kinds of cases that come within the scope of heading (7):

> "One would be the case of the foreman in a manufacturing plant who requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination. Another would be the friend of the purchasing agent of a large corporation who obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere, or the variation where the purchasing agent himself insists on personal payments by means of the same threat. The section would even apply to a law professor who obtains property from a student by threatening to give him a failing grade or to influence a prospective employer to hire someone else.
>
> The employer in the first illustration (at least with respect to wages) or the corporation itself in the second would not be within the scope of [heading] (7) if it made the same threats, because the employer has a recognized interest in minimizing wages paid and the buyer a recognized interest in reducing the cost of supplies. Their freedom to press for these advantages may, of course, be restricted by other laws requiring a minimum wage, adherence to contractually stipulated wage scales, or forbearing from price discrimination, but such conduct should not be included within the laws of theft.
>
> The phrase 'which would not benefit the actor' is thus meant to preclude a theft prosecution where the purpose of the threat is to secure economic benefit - the obtaining of property - for which the actor may have some claim. The claim need not be legitimate in the sense that the actor believes that he has a claim of right to the property that would trigger the provisions of section 223.1(3). An actor whose behaviour is reached only by [heading] (7) would escape criminal conviction if he shows a legitimate interest even though his demand be excessive or unreasonable. The line is thus drawn between one who in an economic bargaining context attempts to maximize his own advantage and one who attempts to use his position, status, or knowledge, or any other unique characteristic of a situation, to his own personal advantage. It is impossible to catalogue in advance all of the situations in which this might occur and hence desirable that a general principle should be stated to inform the prosecutors and the courts of the nature of the line that must be drawn."[26]

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25 *Id*, p219.
26 Comment to section 223.4, pp223-224.

35.28 The affirmative defence was included in section 223.4 to ensure that a person who had a civil complaint for damages against another could not be convicted of extortion for threatening during negotiations to file a criminal charge:

> "Specific provision of this sort may be unnecessary, given the general claim-of-right provision of Section 223.4(3), but the explicit provision firmly establishes the intention not to intrude into what many regard as legitimate negotiating tactics. On the other hand, one who claims more than he believes is due could not claim the benefits of either defense. The claim-of-right provision in Section 223.1(3) is triggered by an honest belief that the actor was entitled to act as he did; the last sentence of Section 223.4 is triggered by an honest claim of restitution or indemnification. Neither would be applicable to an intentionally excessive demand."[27]

35.29 It is highly desirable that the offences in ss29 to 31 of the *Larceny Act, 1916* be rolled into one offence.

35.30 *We recommend that the approach in s21 of the Theft Act be adopted with one variation. Instead of making an "unwarranted" demand, the offence would consist of demanding, or attempting to demand, with menaces and without a claim of (legal) right, thus retaining for the offence of blackmail the defence common to other offences of dishonesty while maintaining a restriction, the fact that it is a claim of legal right, on total subjectivity. The fact that menaces is undefined in the statute has caused no problems to date, but if it were wished to define or confine the term, the Model Penal Code provides a useful model.*

C. CONSENT AND DURESS

35.31 In the Discussion Paper we addressed the question whether specific legislative provision should be made for cases where old, infirm or feeble-minded persons with assets are singled out by unscrupulous "contractors" or "dealers" who call on them and engage in a transaction for which they charge an exorbitant price. The "work" is more often than not done, then and there, on the roof where it cannot be readily inspected and while an enormous price is demanded and obtained, little or no "work" is done at all. Where something is bought or sold, it is bought at a knock-down price or sold at an exorbitant one. The contractor or dealer is successful because the occupier is over-trusting, elderly, or simple or, more often than not, intimidated. In at least one case known to the Commission, an elderly person, was intimidated and driven down by the "contractor" to his building society where he withdrew his life savings and paid the contractor.

These cases are often very difficult to prove. For example, in cases where work

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27 *Id*, p213.

has allegedly been done on a roof, it is very difficult to prove the exact situation which pertained before the "contractor" did whatever he did to it, if anything. This not only makes it difficult to prove an obtaining by false pretences but also a larceny by "mistake" known to the contractor. Where, for example, an antique is bought at a ridiculously low price, it may not be found subsequently, making it well nigh impossible to prove clearly a mistake as to value known to the "dealer".

Cases of this nature do not get as far as being robbery in the legal, as distinct from the "daylight" sense. Depending on the facts and the interpretation of "menaces" they could be captured by the offence of demanding with menances or blackmail.

35.32 We tentatively proposed in the Discussion Paper that an appropriation of property should be vitiated when procured by intimidation, duress or behaviour which could only be regarded as oppressive in the circumstances of the case.

35.33 Consultation and further reflection have led us, reluctantly, to limit this recommendation to cases where the consent is procured by intimidation. This involves a continuation of the position at present, since larceny by intimidation is an offence. The concepts of duress and oppressive behaviour seem more appropriate to the law of contract, restitution or equity than to the criminal law. Their potential range would be wide, extending far beyond the limited context of elderly, infirm and mentally disabled victims. The specific problem of exploitation by unsolicited offers of sale, purchase or services seems best dealt with by administrative and criminal sanctions targeted on aspects of this type of activity. There is no reason why the penalties should not be very severe where exploitative conduct is involved.

CHAPTER 36: CONCLUSIONS

Summary

36.1 We have reviewed, in this, Part, the broad approaches to reform in various jurisdictions, with particular reference to the English Theft Acts. We have made recommendations in respect of the definition of dishonesty, of the property which can be stolen, the intent permanently to deprive, false pretences (or deception) and various manifestations of fraud. It remains to make recommendations with regard to the nature and scope of the basic offence of appropriation.

Appropriation

36.2 As we have seen, the problem with (dishonest) appropriation as defined in the English Theft Act was:

(a) that it failed clearly to include the acquisition of possession or ownership by consent where consent was unlawfully procured e.g. by fraud or duress;

(b) that appropriation, defined as "any assumption by a person of the rights of an owner" was inadequate and to be truly dishonesty must amount to *usurpation*, and *adverse interference* with the owner's rights. Thus in *Morris* as ultimately decided, dishonest appropriation only took place when the labels were switched i.e. when something was done to which the owner could not have in any sense consented.

36.3 Glanville Williams describes the problem as follows:

> "... the CLRC made a mistake in eliminating the requirement of "no consent" from the definition of theft. We were reacting against the complexities of consent in the distinction between larceny and false

> pretences. But having widened section 15 to cover larceny by a trick, we could safely have put a "no consent" provision into section 1. If we have amending legislation, I would argue that the words "without the consent of the owner" should go back into the definition of theft."[1]

36.4 Hopefully, the law of appropriation in England will, sooner or later, shake off the legacy of the *Morris* decision, unfortunately resurgent in *Gomez*. The post-*Ghosh* situation is little better as the test of dishonesty still rests on the perception of the accused as to what are the juries' standards of commercial propriety rather than on a test relating to a claim of legal right which has served us well for years.

36.5 Let us retain what is tried, trusted and trouble free in the present law and adopt a structure not too dissimilar from that of the *Theft Act, 1968*. We agree with the CLRC that larceny, fraudulent conversion and embezzlement should all form one offence and that (fraudulent) conversion is the most versatile concept of the three. However, we are satisfied, as we believe are most of the commentators, that one could have simplified the *actus reus* while maintaining old terms and concepts for the *mens rea*. Thus, we see no problem in using the words "appropriate", "theft" and "steal". We would, however, define "appropriate" so that it may be clearly seen to play a versatile, pivotal role at the centre of a new scheme.

Fraud

36.6 In reviewing the history of fraud offences it is to be noted that the essential elements of these offences have survived intact their passage through the Theft Acts. Thus we have the "bread and butter" obtaining by deception offence in s15 of the 1968 Act. The offences of obtaining services by deception and of making away without payment found in sections 1 and 3 respectively of the *Theft Act, 1978* are clearly expressed and welcome additions to the criminal law which replace and enhance the obtaining by credit offence which had become over-extended and over-worked. The other offences found in section 16 of the 1968 Act and section 2 of the 1978 Act are a rather fussy replacement of other aspects of the obtaining credit offence, somewhat overelaborate and specific. As Spencer says:

> "The *Theft Act, 1978* is undoubtedly a huge improvement on section 16(2)(a) of the *Theft Act, 1968* which it replaces. This is so even if the criticisms I have made of section 2 are valid. A tangled mass of needless learning can now be thankfully forgotten.
>
> Nevertheless, the new Act prompts a sad thought. In 1967 this area of the law was covered by three offences, all with different sources: obtaining by false pretences under the *Larceny Act, 1916*, obtaining

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1 Williams, *Theft and Voidable Title*, [1981] Crim L Rev 668, at 673.

credit by fraud under the *Debtors Act, 1869*, and cheating at common law. It was hoped that the *Theft Act, 1968* would simplify this area and recast it within a single Act of Parliament. Ten years later the law is again to be found in different places, and instead of three offences, it consists of at least five, possibly even eight, depending on how section 16 of the *Theft Act, 1968* and section 2 of the *Theft Act, 1978* are interpreted. What a shame the original scheme in the Theft Bill 1967 was not enacted!"

A Single Offence of Dishonesty

36.7 Could we survive with less than three offences? As we have seen, the Romans rolled all dishonest dealings into one offence, the key word being "fraudulenta" which covered all sorts of deceit and trickery. Stephen advocated the abolition of the distinction between larceny, embezzlement and obtaining by false pretences. Roy Stuart found nothing in the Report of the CLRC "to convince one that such a change is in any way undesirable".[2] A minority of the Committee itself were in favour of theft including obtaining by false pretences.[3]

36.8 Examples of general offences are the CLRC's:

> "12(3) A person who dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act shall on conviction on indictment by liable to imprisonment for a term not exceeding two years."

The English Law Commission's "possible basic definition of a general fraud offence":

> "Any person who dishonestly causes another person to suffer (financial) prejudice, or a risk of prejudice, or who dishonestly makes a gain for himself or another commits an offence."[4]

An offence proposed by GR Sullivan:

> "A person would be guilty of fraud if, with intent to gain for himself or another he dishonestly caused a loss to any person with foresight that such loss would be the certain or probable consequence of acquiring the gain."[5]

36.9 These offences are broad enough for adaptation to any type of dishonesty, including theft. Indeed, we noted earlier how, in New Zealand, the theft offence in the Crimes Bill 1989 was drafted so as to include fraud and that they then

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2 Stuart *op cit*, at 623.
3 *Eighth Report*, para 38.
4 Law Commission Working Paper No. 104, *Criminal Law: Conspiracy to Defraud*, para 12.4.
5 Sullivan, *Fraud and the Efficacy of the Criminal Law* [1985] Crim L Rev 618 at 623.

proceeded to *exclude* "consensual" obtaining by fraud from the scope of the theft offence. We also noted how the Crimes Bill rolled the obtaining of property, privilege, benefit, service, pecuniary advantage and valuable consideration by false pretences into s192(a) and provided separately for obtaining credit by fraud and inducing others to make documents or other things used to derive a pecuniary advantage.

36.10 On the other hand, the Australian Capital Territory Ordinance, having included obtaining by deception in appropriation, provides, in section 104 an offence of obtaining financial advantage by deception, equivalent to that in section 16 of the *Theft Act, 1968*, in section 105, an offence of obtaining service by deception equivalent to that in section 1 of the *Theft Act, 1978*, in section 106 an offence of evasion of liability by deception, equivalent to that in section 2 of the *Theft Act, 1978* and in section 107 an offence of making off without payment, equivalent to that in section 3 of the *Theft Act, 1978*.

36.11 The English Law Commission have canvassed a general fraud offence, set out above, as an option to replace the common law offence of conspiracy to defraud.[6] This offence would subsume all the dishonesty offences in the Theft Acts, except those of procuring the execution of a valuable security by deception in section 20(2) of the *Theft Act, 1968*, a preparatory offence, and certain possible offences under section 1 of the 1978 Act, where deception does not relate to payment or the defendant does not act with a view to economic gain or loss, e.g. the case of the 17 year old who deceives his way into the over-18 film. Apart from the obvious advantage of creating a specific offence which does not depend on an agreement between two persons to have existence, the English Law Commission say that the conduct covered by the offence would "arguably be generally accepted as being wrong and deserving of being made the subject of criminal sanctions".[7] "The provision of a wide offence with a relatively high maximum penalty would meet the problem that in serious fraud cases, the maximum penalties available may not always be adequate. It would also enable the full facts to be placed before the jury and, where relevant, the sentencer. Unless it was thought desirable merely to create a residual fraud offence, the creation of a broad fraud offence might be tied in with the abolition of some of the existing offences of deception in the Theft Acts 1968 and 1978. Arguably the present fraud offences are too complicated and subtle. Some rationalisation and simplification of the law in this area might therefore by achieved just as has occurred in other areas of the criminal law where broad offences have been enacted in recent years".[8]

36.12 The arguments against are then set out by the Commission. These are, in brief:

(a) That the scope of the offence would be unclear;

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6 *Supra* pp243-244.
7 WP No. 104, para 12.44.
8 *Id* para 12.45.

(b) That the criminal law would be widened to an unnecessary and undesirable extent;

(c) That the offence would capture trivia;

(d) That the exact nature of the mischief being addressed would be concealed.

It is argued in particular that the offence is too broad and general and that the provision of particulars might not be sufficient.[9]

Human Rights

36.13 Under Article 6 para 3(a) of the European Convention on Human Rights, everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

36.14 It is worth quoting the opinion of the European Court of Human Rights in *Sunday Times v UK*[10] on the requirements that flow from the expression "prescribed by law":

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

Due Notice

36.15 What must an accused be told and why? He must know the accusation against him and the sentence he faces. At common law, in the indictment, all the ingredients of the offence with which the defendant was charged, the facts, circumstances and intent constituting it, were required to be set forth with certainty and precision, without any repugnancy or inconsistency, and the

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9 *Id* para 12.46 et seq.
10 [1979] 2 EHRR 245.

defendant charged directly and positively with having committed the offence.

36.16 Under the Indictment Rules found in the Schedule to the *Criminal Law (Administration) Act, 1924*, matters were relaxed to an extent and it suffices for an indictment to contain a statement of the specific offence with which an accused is charged together with such particulars as may be necessary for giving "*reasonable information*" as to the nature of the charge, particulars to be given in ordinary language.

36.17 If an all-embracing offence of "unlawful appropriation of another's property" were created with a maximum penalty of 10 years let us consider how these rules would work out in practice. John's briefcase is stolen from the cloakroom in a restaurant in Main Street by William. William is charged that on the blank day of blank at Main Street he appropriated a briefcase, the property of John, contrary to section whatever of the *Theft Act, 1993*.

36.18 John gives his briefcase to William, who represents himself to be the head-waiter of the restaurant, for safe keeping. William, who has no connection with the restuarant, takes off his bow-tie and makes off with the brief case. Under the new regime the exact same charge would be preferred. Under today's law, William would be charged with larceny in the first instance and with obtaining by false pretences in the second. The prosecution would take place in the context of years of precedent, definition and case law.

36.19 How much worse off are William and his lawyer when met with the new charge? They will know the time, the place, the maximum penalty, the mode of trial and the general nature of the offence. If William remembers what he did at the time, *he does not need any more information to defend himself*. This would probably be the case with the occasional, once off criminal. If he was not there, it does not matter what the charge is as he has a complete defence. If he was there and is a busy criminal, he may not remember exactly how he got hold of the property if his memory is not prompted by the description of the property itself. He should know whether he got it honestly or not. He should know his 'style', whether he practices fraud or not.

36.20 If he remembers nothing he will have no defence with which to instruct his lawyer anyway. In that case, if he is informed in advance that he has to meet a case of larceny or a case of fraud, does it make any difference to his defence? If he looks at the offence-creating statute, he or his lawyer will know the range of activity captured but will not know in advance whether the State will be going down a "taking" or an "obtaining by deception" road *unless he is going for trial and a book of evidence is served*. In the District Court, the defendant with amnesia will have to wait for the opening or the evidence to find out under which leg of the broadly defined offence his infringement falls. Again, if he does not remember, does it matter? If, for example, he has a claim of right, which he remembers, he has something to meet the case with. Under a new regime, the lawyer for the defendant with amnesia will simply have a different range of possibilities to take into account. There will be fewer escape routes. Escape into

another pigeon hole will no longer avail.

Overlapping Offences

36.21 We have already noted Smith's argument that appropriation could not cover obtaining by deception because it was not meant to. But one may ask whether it matters if any offence as defined and drafted covers the territory of another offence. Prosecutors have lived for years with the overlapping of embezzlement and fraudulent conversion of wounding and assault occasioning actual bodily harm and, in Ireland, with the virtually identical offences of obtaining by false pretences in the *Larceny Act* and in our *Criminal Justice Act,, 1951.* In our Receiving Report,[11] we recommended that all unlawful obtainers should be handlers, firstly to deal with the *O'Leary v Cunningham*[12] situation and secondly to ensure that juries would not fall between two stools in reaching their verdicts.

36.22 The fact that the common law is grounded to such an extent on precedent, if it be a blessing at all, is, at least, a mixed one. As we have seen in our glance at the history of the law of theft, the law ended up in a straitjacket whose seams were loosened here and there to afford sufficient 'movement' to capture glaring cases not captured within the basic shape of the jacket. Consolidating legislation merely reproduced the same basic 'cut' of straitjacket, complete with its unsightly bulges.

36.23 As we have seen[13] Smith roundly criticises the judges in *Philippou.*[14] He has a point but the judges had no realistic alternative in the absence of clear legislation. He acknowledges that the particular defendants before the Court in the "old weary round of cases" were dishonest. The question that matters is whether the conduct was, in fact, offensive, meriting sanction under the criminal law. If the conduct is considered sufficiently offensive, it remains to discern why this is so. If the offensive element, say, the usurpation of property rights with risk of loss, is found to be common to stealing, handling, obtaining by false pretences, conspiracy to defraud, 'taking unfair advantage' of a computer and so on, why should not one offence cover everything? It should be drafted with a focus on the common denominator of offensiveness and not be overconcerned with specifying the particular way the offensiveness was manifested.

36.24 Smith laments the "mess" caused by seeking to reconcile the irreconcilable.[15] But the more pigeon holes, the more mess. Why should consent obtained by fraud *not* be treated exactly the same as an absence of consent? Why not give "appropriate" a distinct meaning for purposes of the law of dishonesty and stop worrying about what the layman thinks, who, when the truth be told, uses neither "appropriate" nor "convert" in ordinary speech? When

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11 LRC No. 23 (1987).
12 [1980] IR 367.
13 *Supra*, para 15.25.
14 [1989] Crim L Rev 585.
15 *Id.*

he sits on a jury, the layman will have the law clearly explained to him in any event, given a reasonable judge.

The Model Penal Code

36.25 The framers of the Model Penal code proposed that all forms of theft that had developed over the years be consolidated into a single coherent offence which would encompass all involuntary transfer of property. In their view, the purpose of consolidation:

> "... is not to avoid the need to confront substantive difficulties in the definition of theft offences. The appropriate objective is to avoid procedural problems."[16]

36.26 The Code sets out different types of theft, including theft by receiving. The most important breakdown is between (a) theft by unlawful taking and (b) theft by deception. The former consists of the unlawful taking or exercising of control over the property of another and covers ordinary trespassory taking as well as embezzlement (and fraudulent conversion). The latter encompasses, *inter alia*, the bringing about of a transfer or a purported transfer of a legal interest in property by the creation or reinforcement of a false impression, including a false impression as to law, value, intention or other state of mind, deception as to a person's intention to perform a promise is not to be inferred from the fact alone that he did not subsequently perform the promise. The commentatary says:

> "Even a consolidated offence, as reflected in ss223.2 to 223.8 *infra*, will retain distinctions among methods of acquisition and appropriation. The real problem arises from a defendant's claim that he did not misappropriate the property by the means alleged but in fact misappropriated the property by some other means and from the combination of such a claim with the procedural rule that a defendant who is charged with one offence cannot be convicted by proving another.
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> Examples come readily to mind where an unwary prosecutor might stumble in distinguishing larceny, false pretences, extortion, and embezzlement. An offender who is prosecuted for fraud might escape by proving that the victim did not believe the representations made to him but was merely frightened by them. Similarly, one who gives a bad check as a down payment on an automobile which is thereupon delivered to him on conditional sale may defeat criminal prosecution for obtaining by false pretences by arguing that the vendor reserved title and that the vendee could therefore only be guilty of larceny, the offence against possession. The intricacies of distinguishing between stealing and receiving stolen goods and of the proper procedure for presenting these alternative views of the defendant's involvement may also lead to

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16 *Model Penal Code and Commentaries: Part II*, §§220.1 to 230.5 p133.

needless reversals of convictions.

These problems can be partially solved by more modern definitions of the offences involved, though it will still be necessary to draw what will often be subtle distinctions. There remains a necessity for some device to prevent a charge based on one method of wrongfully obtaining property from being defeated by the defence that the property was acquired by a different wrongful method. While consolidation is not the only way to accomplish this objective, it does seem the most effective way."[17]

36.27 A most attractive feature of Article 223 of the Code is the provision in Article 223.1(1) that conduct denominated theft constitutes *a single offence* and that an accusation of theft supported by evidence that it was committed in any manner that would be theft under the Article will suffice "notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defence would be prejudiced by lack of fair notice or by surprise".

"In general, the Model Code does not deal with the degree of specificity that an indictment or information must contain but reflects the view that the matter is one of procedure beyond the scope of the penal code itself. On the other hand, account must be taken of the possibility that too great a variance between charge and proof may render an indictment or information insufficient to apprise the defendant of the case he must meet. Accordingly, the last clause of subsection (1) refers to the inherent power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defence would be prejudiced by lack of fair notice or by surprise.

The problem of lack of fair notice in an indictment or information is not, of course, unique to charges of theft. If overly specific charging is required, technical defences based on inevitable minor variances can be made to a charge of any type of offence. It should be noted here, however, that the success of the effort to consolidate the various forms of theft into a single offence is limited by the extent to which highly detailed charging is perceived to be mandated by constitutional limitations or the fair notice requirement. It is the premise of subsection (1) that postcharge relief should in most cases suffice to fill in the details of an accusation of theft that the defendant must know in order to meet the case against him. Such relief can come in the form of a bill of particulars or other specification of information following the formal charge or in the form of a continuance of the trial to allow additional time for preparation. If recharging is consistently required, the

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17 *Id.*

advantages of consolidation will be significantly impaired."[18]

36.28 Article 223 lists seven different modes of committing theft, the first being of taking or exercising control over movable property with purpose to deprive. As the expression "exercising control" is used it is clear, and implicit in the Commentary, that there could be fewer subheadings. Certainly, from one point of view, those relating to theft by failure to make "required disposition" (fraudulent conversion) and to disposition of property acquired by mistake seem unnecessary. We find the justification for a distinct offence of obtaining by deception[19] less than compelling. Familiar problems relating to transfer of ownership are mentioned. Indeed the commentator is constrained to insert a reminder that it is not fatal to pick the wrong pigeon hole at the outset. We regret the Institute did not, as an alternative to consolidation suggest and draft one offence, embracing "ordinary" taking and taking by deception, in particular because of their common sense approach to lack of specificity or notice.

36.29 *We recommend that where a Court considers that a charge or count for a dishonesty offence is preferred or laid under the wrong section or sub-section, provision should be made for a simple amendment or where the defendant is prejudiced or taken by surprise, for adjournment and, if necessary, the service of particulars. It should not be necessary to abandon the prosecution.*

A General Offence

36.30 In reaching the decision as to whether or not to recommend a general offence of dishonesty, three considerations arise:

(a) should it be based on deception?

(b) would it encompass trivia?

(c) should it be recommended in isolation?

36.31 We see little point in confining the offence to deception. This is the situation in Scotland where the only constraining factor on the fraud offence is the requirement of a false pretence. The Scottish offence does not even involve the causing of loss or financial prejudice. The recently appointed Director of Public Prosecutions in England, Barbara Mills, Q.C., interviewed, while she was still head of the Serious Fraud Office, about her difficulties in prosecuting fraud, expressed a desire for the enactment of "a new, simple offence of fraud, as in Scotland".[269] Deception, like furtive taking, is simply a means of obtaining property without true consent. If the offence of assault can co-exist with several specific offences of violence against the person, why should not a general offence of dishonesty also co-exist with such specific offences as theft, deception and

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18 Model Penal Code and Commentaries 137-8.
19 *Id* p180 *et seq.*
269 The Times 28/1/92.

forgery?

36.32 The common denominators are the absence of a claim of right and the causing of financial prejudice. Once these can arise together, without deception, there is no point in confining dishonesty to offences of deception.

36.33 Any generally drafted offence such as larceny, criminal damage or assault will capture trivia. Trivial offences, if they enter the system at all, will be filtered out by the Gardai or by the DPP.

36.34 As we saw above, the Court of Human Rights has noted that "excessive rigidity" can flow from the quest for "certainty" and that many laws are "inevitably vague", their interpretation being "a question of practice". Murder, robbery and rape are good examples of offences where the particulars of offence given to an accused in the charge or indictment are stark and simple, requiring much amplification by his lawyer. However, the law has always required particulars to be given of false pretences. Any particularity required by the law at present in a charge for an offence of dishonesty would have to be imported into a charge or count for a new offence. This would not require special legislation and from the point of view of particularity, it does not matter whether there is one offence of dishonesty or twenty.

36.35 *The formula we recommend for a general offence is that proposed by the Law Commission i.e. "Any person who dishonestly causes another person to suffer (financial) prejudice or a risk of prejudice or who dishonestly makes a gain for himself or another commits an offence".*

36.36 The Law Commission adopt the term "prejudice" used in the English *Forgery and Counterfeiting Act of 1981* following the Commission's own recommendation in their Report on Forgery and Counterfeit Currency. We also favour using this formula and *recommend that there should be a specific statutory provision that (financial) prejudice occurs to a person where:*

(i) *he suffers a [temporary or permanent] loss of property; or*

(ii) *he is deprived of an opportunity to earn remuneration or greater remuneration; or*

(iii) *he is deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or*

(iv) *someone is given an opportunity to earn remuneration or greater remuneration from him; or*

(v) *someone is given an opportunity to gain a financial advantage from him otherwise than by way of remuneration.*

36.37 *We also agree with the Law Commission and recommend that a risk of*

prejudice should be captured as a person is exposed to economic loss where a risk is taken with his property which should not be taken or where a person is induced to take such a risk.

36.38 *"Gain", "loss" and "property" should be defined as in the Theft Act, incorporating any variation of definition proposed already. But dishonesty would be defined as "without a claim of right".* (In the Law Commission proposal it is not defined).

Consultation

36.39 In the Discussion Paper, we canvassed several possible approaches. One subsumed all fraudulent conduct under an umbrella definition of theft. Deceitful acquisitions would accordingly be but one mode of committing the offence of theft. Another approach sought to define theft and deception in mutually exclusive terms. The effect would be that a defendant could be guilty of one or other offence but never of both offences. The third approach allowed for some degree of overlap between offences.

36.40 As we indicated in the Discussion Paper, each of these approaches has its advantages and difficulties: none is self-evidently the most satisfactory alternative solution. After having considered the views of those with whom we consulted and after much further deliberation, we have concluded that the best approach is the third one, which allows for some overlap. At first sight, this option might seem to suffer from the drawback of imprecision of definition; moreover, the tidy mind may revolt against the very idea of overlapping offences. Nevertheless we favour this approach because we consider that it best harmonises with actuality. Those who engage in the wrongful acquisition of others' property do not always act in one of two easily distinguishable ways. Of course, there is no difficulty in seeing a conceptual difference between the acts of the pickpocket and the confidence trickster: the pickpocket wishes to take the property by stealth rather than false pretence, whereas the confidence trickster intends to deceive his victim into openly transferring possession, or even ownership, of the property. There is, however, a broad range of conduct where the wrongdoer is willing to engage in a combination of stealth and pretence, and where it is difficult to characterise the nature of the interest he obtains in the property. We consider it preferable for the legislation to prescribe offences overlapping in scope. In some cases it will not even occur to the prosecutor to charge other than one of these offences; in other cases, the conduct may seem to fit very comfortably with both definitions. We see no objection to his right to prosecute for either offence in such circumstances.

36.41 One has to make a choice between having one general offence which would include all other dishonesty offences within its scope, with a high maximum penalty and a general offence which would be a sweeper offence capturing dishonesty not caught by the more particular offences, carrying a lower maximum penalty.

36.42 Some of us were greatly attracted to the former strategy. Recommendations on appropriation, false pretences, forgery, deprivation etc. would become superfluous and this Report would be considerably shortened. It would be a very 'user-friendly' piece of legislation. Others felt that this approach, although logical, was somewhat drastic and amounted, virtually, to a making criminal of the entire civil law.

36.43 If a general offence were enacted, prosecutors would still be inclined to describe a forgery as a forgery and an obtaining by false pretences as such. The Courts will always require a certain level of particularity and to achieve this there is much to be said for a very basic degree of differentiation between dishonesty offences which would channel the charging in the appropriate direction.

36.44 Realistically, we anticipate that the single offence approach would be found too radical by the legislature and that the desire, evidenced in the *Larceny Act, 1990* of adhering as close to the law in England as good law reform permits, may be found to be overwhelming. It is also fair to say that the experts we consulted were generally in favour of the Theft Act approach and many were in favour of maintaining a distinct offence of obtaining by fraud or deception.

36.45 *In the light of this conclusion, we here endorse our provisional recommendation, made in the Discussion Paper, and recommend that:*

1. A person should be guilty of theft who

(a) without the consent of the owner, unless the consent is obtained by deception or intimidation;
(b) dishonestly

appropriates property.

2. A person would appropriate within the meaning of the above who usurps or interferes adversely with the proprietary rights of another in obtaining possession or ownership of or in exercising control over his property. The word "ownership" is used notwithstanding the fact that a voidable title to property only may be obtained.

36.46 Thus we again endorse the Australian approach of including deception within the basic offence of theft. What constitutes deception has already been dealt with. Any charge or indictment for theft by deception would include the same particulars of deception as a charge or indictment for the distinct offence today.

36.47 *As in our Discussion Paper, we would maintain the recommendations made earlier for the creation, despite overlap, of specific offences of*

(a) obtaining services by deception and

(b) making off without payment.

36.48 These specific offences are proposed so that it will be established beyond argument and without resorting to the general offence that certain clearly defined acts generate criminal liability.

36.49 *Again, as in our Discussion Paper, we would recommend that the general offence of dishonesty already proposed should be a residual, "catch-all" offence carrying a penalty of 5 years imprisonment.* We think this general offence was a wise recommendation in the CLRC Report and in the light of history, many would share John Spencer's regret that it was abandoned. The offence would capture, inter alia, the "obtaining pecuniary advantage" and "evasion of liability" offences found in the Theft Acts, other offences that might be captured by conspiracy to defraud and would overlap with the other offences recommended.

PART III: THE INVESTIGATION AND PROSECUTION OF DISHONESTY: PROPOSALS FOR REFORM

CHAPTER 37: A STATUTORY DUTY TO DISCLOSE DISHONESTY

A. Disclosure of fraud

37.1 Under present law there is no specific obligation on the victim of fraud to report its occurrence to the prosecuting authorities. The only criminal sanctions relevant to this context are those applying to accessories after the fact[1] (in cases of affirmative assistance) and to persons guilty of misprision of felony.[2]

37.2 We must consider whether the statute should provide such a specific obligation to report the occurrence of fraud offences.[3] Four principal arguments in favour of this strategy are worth noting. First, it might have some effect in disclosing frauds that would otherwise never have reached the attention of the prosecuting authorities. Secondly, and consequently, it might have some deterrent effect on those contemplating committing fraud. Thirdly, it would mitigate the anomalies resulting from the present differential characterisation of the several different fraud-related offences. Thus, the neglect to report larceny or embezzlement can render a person guilty as accessory after the fact or of the offence of misprision; but no similar fate can befall one who fails to bring his suspicions regarding a case of false pretences or fraudulent conversion to the attention of the authorities, since these latter offences are misdemeanours.

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1 Cf *Kenny*, para 70.

2 Cf *Anon, Note*, 8 U Chi L Rev 338 (1941).

3 In the chapter dealing with computer crime we consider the more limited question whether there should be a duty on victims of computer crime to report its occurrence to the authorities.

Fourthly, considerations of justice to *direct* victims of fraud suggest that a duty to report should be imposed. The board of a company may be tempted not to report an employee found engaging in fraudulent conduct; this may result in financial loss to shareholders. The person upon whom the duty to disclose might lie would, almost certainly, be a person who had a supervisory role and, therefore, a vested interest in covering up. Similarly, the discovery of fraud within a family, after the death of a parent, for example, may be "hushed up", to the detriment of a legatee or family member who is not told of the fraud.

37.3 Against the imposition of a statutory duty to report several arguments may be considered. First, the efficacy of such a strategy may clearly be exaggerated. It has not proved a panacea in the Unites States, for example, where there is an obligation[4] on financial institutions to report any fraud involving more than five thousand dollars. Secondly, if the offences of accessory after the fact and misprision of felony involve anomalies so far as they do not extend to misdemeanours involving much the same type of criminal misconduct, the better solution would be to confront and resolve these anomalies rather than seek to mitigate them by a piecemeal measure. Thirdly, the reasons why companies tend to be reluctant to report fraud may be understandable, if not always altruistic:

> "It is undoubtedly true that there are some powerful disincentives to the reporting of fraud. If a prosecution is launched the details of the fraud will become public knowledge. The reputation of the institution may suffer, so that business is affected. Revealing how the fraud was carried out may encourage others to do the same. For some companies, the disincentive will be the time which will have to be spent in explaining matters to the police and perhaps eventually to the court: the potential disruption to the business of the company may not be worth the effort involved, particularly if there is felt to be little prospect of recovering the proceeds of the fraud. There may, finally, be a reluctance to report fraud in circumstances which would involve the disclosure of confidential details concerning clients."[5]

37.4 It would be wrong also to ignore the human dimension. Fraudulent conversion and embezzlement often are associated with some personal weakness or compulsion such as heavy drinking, alcoholism or gambling. The employers who discover the position may well wish to shelter their employee from the glare of publicity associated with a criminal trial, and to direct him along the same therapeutic path as the court in a criminal prosecution would be likely to do.

37.5 Further objections relate to the question of sanction, and the definition of "fraud offences" and the persons on whom the duty of disclosure should fall. Is the victim of fraud to be threatened with a fine or even imprisonment for failing to report? If not, would the obligation have any efficacy? Is the Director of Public Prosecutions really going to contemplate prosecuting an elderly widow

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4 See the *Fraud Trial Report* (HMSO, 1986) (the *Roskill Report*) para 2.5.
5 *Id.*

who is reluctant to call the guards when she discovers that her nephew has been dipping into her post office account? In the corporate context, who would have the duty to report? The managing director? The accountant? The company secretary? Would an elaborate structure for identifying the relevant officer be required? Is the game worth the candle?

37.6 We would immediately discount "the human dimension" as a factor militating against the introduction of a "non-reporting" offence. The Director of Public Prosecutions will have proper regard to the human dimension in dealing with potential prosecutions for any offence.

37.7 It is important for an open economy such as ours which is constantly seeking to attract foreign business, with emphasis at present on financial services, to keep business as "clean" of fraud as possible. Companies should be discouraged from sweeping fraud "under the carpet" but would having a "non-reporting" offence help to achieve this?

37.8 The distinctions between felonies and misdemeanours will eventually be abolished. The question as to whether any misprision offence should be retained might well merit a distinct report. The Commission has recently recommended mandatory reporting of child sexual abuse by such persons as doctors and teachers.

37.9 Good internal auditing is the best bulwark against fraud and *we would recommend that any auditor who discovers fraud or any form of criminal appropriation in a company's accounts should be required to report same to the Gardai.*

B. Persons in control of companies where fraudulent activities occur

37.10 Should the obligation extend further? Much fraud is engaged in by company directors and occasionally, company accountants. They frequently enlist the aid of bookkeepers, computer operators or other employees in perpetrating fraud either by giving a share in the proceeds or by intimidation with regard to their keeping their jobs. If a generalised non-reporting offence were created to embrace all who work in a company, directors or employees, would this assist the junior employee in withstanding pressure? We feel it would not, as the employee can already assert that what he is being asked to do is criminal. Similarly, if a director has a choice between losing business and exposing management to critical scrutiny as a result of disclosing fraud or taking the risk of being detected in non-reporting, we feel he would take the risk.

37.11 As a result of a thought-provoking suggestion which we received from Michael McDowell, S.C. we gave new thought to a possible interrelationship between the basic dishonesty offences which we have recommended and the principles of company law. Enlarging on this commentator's suggestion (which related primarily to evidential matters), *we recommend that the legislation include a distinct offence consisting of controlling a company at a time when an offence of*

dishonesty is committed by a director, officer, servant or agent of the company in circumstances where the person in control had reasonable cause to believe that such an offence would be or was being committed, having regard to the nature and extent of the control thus exercised.[6] *It should be a defence to this offence that the defendant had acted reasonably in seeking to prevent the commission of the offence.* The recent extension of criminal and civil liability brought about by the *Companies Act, 1990* goes some way towards meeting the type of case we have in mind. Sections 26 and 27 of the Act, which deal with "control" of companies and "shadow directors" respectively, show that the legislature is already sensitive to the realities of corporate activity.

37.12 We consider that it is a matter of legislative choice whether the offence we propose should be incorporated into legislation on dishonesty or in a Companies Act. In either case, *we recommend that the offence should be a summary one, with a provision that the prosecution can be commenced within two years of the offence being detected.*

C. A statutory duty to disclose incidents of computer crime

37.13 We now must consider whether a statutory duty should be imposed on the owners or users of computers to disclose to a named authority incidents of computer crime of which they had been victims.[7] This strategy has been suggested from time to time internationally.

37.14 The arguments in favour of taking this step have been well summarised by the Scottish Law Commission:

> "(a) Non-disclosure by the victims of computer crime simply encourages other wrongdoers to have a go.
>
> (b) Non-disclosure means that the applicability, and possible need for reform of existing law can never adequately be tested.
>
> (c) Non-disclosure means that computer users who have not yet been the victims of a computer crime are less alive than they should be to the need to take adequate steps to protect their own systems.
>
> (d) Non-disclosure (where the victim is a company with shareholders) may mean that, with the help of 'creative' accounting, shareholders are kept in ignorance of losses sustained by the company: they are therefore unable to consider, and if appropriate call in question, the adequacy of the management of the company."[8]

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6 This suggestion has echoes of the judgment in *AG v Singer* referred to at para 5.12 *supra*.

7 Cf Scottish Law Commission's Report (No.106), para 5.8.

8 *Id*, para 59.

37.15 The contrary arguments, summarised by the Commission, are as follows:

> "(a) There is no general duty to disclose crimes, and there is no sound reason why there should be a duty to disclose computer crimes but not, for example, rape or assault.[9]
>
> (b) It would be impossible to define what is meant by a 'computer crime' for this purpose. Bearing in mind that the degree of computer involvement in traditional crimes like fraud or theft may vary from the negligible to the very considerable, the duty might have to extend to all frauds or thefts, but that in turn would mean that there would be a duty to report the theft of even an office pencil. This problem could, of course, be avoided by providing that the duty should only apply in respect of losses above a certain value, but it is difficult to discern any sound principle which would justify drawing such an arbitrary line.[10]
>
> (c) Any duty of disclosure would be virtually unenforceable since, if the loss itself is concealed, it is most unlikely that the failure to disclose it would ever be discovered.
>
> (d) While it is conceded that there may be problems for shareholders if a company fails to reveal losses caused by crime, this is a general problem and not just one arising from computer crime."[11]

37.16 Perhaps the strongest arguments against imposing such a statutory duty are that it would be unenforceable as well as unjust to businesses to force them to reveal weakness or misfortune to some central agency. Even if anonymity were obtained it could not be guaranteed. Whether such a duty would be efficacious is also to be doubted, unless it arose in the context of an audit of the companies accounts.[12] A catalogue of misdeeds relating to computers might serve to

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9 This counter-argument does not greatly appeal to us. Leaving aside considerations arising out of the existence of the common law offence of misprision of felony, the very choice of rape as an example seems to us to show how the issue of whether there should be a statutory duty to report computer crime cannot be treated merely as a species of the issue as to a general duty to report crime. Quite clearly, there would be fundamental objections to imposing a statutory duty on the victim of rape to report that offence (though such a duty would have some obvious beneficial side-effects in relation to detection and deterrence).

10 We doubt whether in fact such line-drawing would be arbitrary. The rationale for doing so has already been stated by the Commission.

11 *Op cit*, paras 5.9-5.10.

12 *Supra* para 37.1 *et seq.*

increase general awareness among computer users of the need for severity,[13] but that goal can arguably be better served by advertising campaigns and education "on the ground". If (which is debatable) the problem of ignorance as to the realities of the danger from computer crime is sufficiently serious to warrant a social response, the Government could launch such a campaign; how that campaign should be financed - by a special tax on computer owners, for example - is a matter on which we consider we should not express a view.

37.17 *We do not recommend that there be a statutory duty to disclose computer crime.*

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13 Cf *id*, para 3.13, fn 2:

> "Numerous commentators have drawn attention to the very low priority given to security by some computer users. For example, Hogg Robinson Ltd published in a report *Computer Security in Practice* (1986), the finding of computer risk management auditors from more than 50 company surveys carried out during the previous two years. These revealed an extremely low level of computer security with password security in particular showing considerable weaknesses. In one case, the password of the chairman of a large company was 'chairman', and it had not been changed for five years."

CHAPTER 38: A RADICAL OVERHAUL OF INVESTIGATORY STRUCTURES?

A. Investigation of Serious Fraud: A Serious Fraud Office?

38.1 First we must consider whether a radical overhaul of the present investigatory structures would be desirable. In England, such an overhaul was proposed by the *Fraud Trials Committee Report* under the Chairmanship of Lord Roskill, in December 1985 and implemented with reasonable expedition by the *Criminal Justice Act, 1987*. The Report contains a detailed analysis of the position in England. Much of its discussion has at least some relevance to our own situation; however, the position is far from identical.

38.2 The Committee summarised matters as they found them as follows:

> "The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right. In relation to such crimes, and to the skilful and determined criminals who commit them, the present legal system is archaic, cumbersome and unreliable. At every stage, during investigation, preparation, committal, pre-trial review and trial, the present arrangements offer an open invitation to blatant delay and abuse. While petty frauds, clumsily committed, are likely to be detected and punished, it is all too likely that the largest and most cleverly executed crimes escape unpunished."[1]

38.3 The Roskill Committee came to the conclusion that, in view of the fragmentation of the system then prevailing, the need for the establishment of an organisation responsible for all the functions of detection, investigation and

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1 *Roskill Report*, p1.

prosecution of serious fraud "ought to be looked at afresh".[2] The result was the creation by the British Government of the Serious Fraud Office,[3] which came into operation on 6 April 1988.[4]

38.4 The Serious Fraud Office, under a Director, includes 26 lawyers, 19 accountants and support staff.[5] The police work in close liaison. Although "constitutional difficulties"[6] prevented the police from actually joining the Serious Fraud Office, the problem was solved to the satisfaction of the Government by having the police officers work in the same building.[7]

38.5 The long term aims of the Serious Fraud Office include:

> "(a) economic benefit if the operation of the Serious Fraud Office generates greater confidence in the City of London;
>
> (b) a reduction in crime to the extent that the Serious Fraud Office deters fraud;
>
> (c) increased efficiency in the criminal justice system to the extent that the Serious Fraud Office can introduce a novel, integrated approach to the handling of complex issues utilising several different disciplines in teams."[8]

38.6 The immediate objectives of the Serious Fraud Office are:

> "(a) to ensure that a coherent approach is taken to the investigation of serious fraud;
>
> (b) to concentrate resources on the essential issues involved in complex frauds;
>
> (c) to increase the speed of investigations and the institution of proceedings in appropriate cases;
>
> (d) to develop expertise in specialist areas of fraud, such as Stock

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2 *Id*, para 2.48.

3 *Criminal Justice Act, 1987*, section 1. See McFarlane, *Tackling Serious Fraud?*, 131 Sol J 926 (1987).

4 See Wood, *The Serious Fraud Office*, [1988] Crim L Rev 175. (Mr Wood was Director of the Serious Fraud Office).

5 *Id*, at 176.

6 *Id*. These include the fact that police officers are "part of a disciplined service subject to a statutory disciplinary code", and under a statutory duty to enforce that code; moreover, they have powers not exercisable by anyone else. These factors "rendered it impracticable to place [them] under the control of the Director of the SFO": *Id*, at 176-177.

7 Cf *Id*, at 177:

> "The advantages of co-location are obvious: there is ease of access, conferences can be arranged at a moment's notice, everyone involved in the case has access to statements and documents and can see them soon after they are obtained. And perhaps the greatest advantage of working in teams is that when the investigation is complete and the prospective defendants interviewed it should not be long before charges are formulated and papers served."

8 *Id*, at 177-178.

Exchange fraud, computer fraud or insurance fraud;

(e) to use the new trial procedures for complex fraud cases efficiently;

(f) to develop the presentation of evidence in complex fraud cases in new, more palatable and comprehensive forms;

(g) to increase the proportion of successful prosecutions."[9]

38.7 The question whether we should make similar structural changes of this nature requires resolution. In favour of making such changes it may be argued that serious fraud is no respecter of national boundaries. In some cases, the actual location of the fraudulent activity is of secondary importance to the fraudster. At a time when we are developing our international financial services, it may be considered desirable to strengthen as far as possible the investigative infrastructure.

38.8 As against this, it may be argued that the incidence of major fraud in Ireland is understandably lower than in England, which has been for long been an international financial centre of some considerable importance.

38.9 Furthermore, it is still early days in England for the Serious Fraud Office, and its long-term impact has yet to be tested. One major irony in its establishment is that its philosophy of integrating (in fact, though not in name) the investigatory and prosecuting functions runs directly contrary to the establishment of the Crown Prosecution Service, which was designed to separate these functions as far as possible.[10]

38.10 Recent cases have brought those issues to the forefront of public awareness. The convictions in the Guinness trial in England recently were the first major "coup" for the Serious Fraud Office. We will examine their implications for jury trial later in this paper.[11]

38.11 In Ireland, the DPP's decision not to prosecute in cases where an allegation of fraud may have been made in public discussion of business affairs has on occasion provoked controversy concerning the ability of the prosecution system in this jurisdiction to deal properly with cases of alleged fraud. Criticisms have sometimes been voiced to the effect that the Garda Fraud Squad and the staff level in the DPP's office are inadequate for dealing with such cases.

38.12 Although the Commission is unaware as to the reasons why any specific prosecutions of this category may or may not have been brought, one of its members, Mr O'Leary, as a result of his experiences working in the DPP's Office,

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9 *Id*, at 178, citing *An Introduction to the Serious Fraud Office*, March 1988.
10 Cf Wood, *op cit*, at 176.
11 See para 39.24, *infra*.

is in a position to make certain general comments on the investigation and prosecution of fraud cases. These can be made without any reference to or implication in respect of any specific case.

38.13 A. When a Garda investigation is complete, the Garda file of witnesses statements together with a covering report containing recommendations as to charges, if any, is forwarded to the DPP.

B. The investigating and prosecuting functions are distinct. The Director of Public Prosecutions is declared, by the *Prosecution of Offences Act, 1974*, to be independent in the performance of his functions and it could be seen to militate against the Director's independence were he perceived to be embroiled in the Garda investigations. In declining to prosecute, he can indicate in which respects a particular investigation is deficient.

C. Many fraud investigations arise out of liquidations and Revenue investigations. The sole concern of the Revenue or the liquidator is the recovery of money, not the prosecution of offences. By the time the Gardai are let near the case, the "trail" has usually gone "cold", the witnesses have become uncooperative, the time for summary prosecutions has elapsed or almost run out and prohibition by the High Court for delay is a very real possibility. This is also the reality in cases where a "private" e.g. a Departmental investigation precedes a Garda investigation.

D. A liquidator's report, however excellent, is not the basis for a *prosecution*. If adequate, it forms an excellent foundation for a Garda investigation.

E. The Gardai are the State's professional investigators of crime. Prosecutions are based on the sworn evidence of witnesses whose statements are first taken by the Gardai and on the documentary evidence and other forensic evidence exhibited in their statements of evidence and produced by them in Court. Even if a liquidator's report contains a statement from a prospective witness, such witness would have to be asked by an investigating Garda to, at least, acknowledge the statement as his and adopt it.

F. Where a liquidator's report is sent to the DPP pursuant to the provisions of s299(1) of the *Companies Act, 1961*, it is forwarded to the Gardai for

investigation. A recent investigation was hampered by the fact that s299(1) of the Companies Act, unlike s299(2), made no provision enabling the liquidator release documents in his possession to the Gardai.[12]

G. A further cause of delay in investigations used to be the refusal of officers of the Central Bank to make statements to the Gardai relating to the investigation in the light of the Oath of Secrecy taken by them under s31 of the *Central Bank Act, 1942.*[13]

H. It has to be said that the Fraud Squad is under-staffed with Gardai. While accountancy back-up is available and availed of it is not "built into" the Squad. When resources are limited, it is not unreasonable for a Minister to give priority to security, drug-trafficking, or prisons. Nevertheless if there is a wish to have more prosecutions for fraud it would be a *sine qua non* to allocate extra resources to the Fraud Squad.

38.14 We see no need for the establishment of a Serious Fraud Office here, indeed, we question the need for its establishment in England as an independent entity. Even if an enlarged Fraud Squad "feeding" *inter alia*, on a flourishing Financial Services Centre were to generate extra cases, we nonetheless are of opinion that the volume would not warrant the establishment of a distinct office. If warranted, a distinct section could always be established within the DPP's office to deal with fraud, headed by a professional officer of the Director, appropriately directed under s4 of the *Prosecution of Offences Act*, to perform the Director's functions in relation to fraud cases.

38.15 If the appropriate accounting expertise were available to the Gardai, it would not be necessary to duplicate it in the DPP's office. If files coming from the Fraud Squad are not clearly intelligible to the Director and his professional staff, the prospects of their being intelligible to a jury are poor indeed. While each office preserves its independence and distinctive functions, there is already a high degree of co-operation and consultation between the DPP's office and the Fraud Squad.

B. Increased Powers of Investigation?

38.16 We now must consider whether the present powers of investigation should be increased. At present the revenue and customs authorities have certain powers of investigation but some have argued that the powers of the Gardai in the context of fraud offences are not sufficiently substantial. It might be thought

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12 S143 of the *Companies Act, 1990*, makes an appropriate amendment to s299(1).

13 Repealed by the *Central Bank Act, 1989*. See section 16 of the 1989 Act, analysed by *R Byrne & W Binchy, Annual Review of Irish Law 1989*, 28-29 (1990).

desirable that the Gardai (or, in the event of structural innovations, the Director of the newly established investigative agency) should have specific statutory power to investigate fraud offences.

38.17 One possible model is section 2 of the English *Criminal Justice Act, 1987*, which provides as follows:

> "(1) The powers of the Director under this section shall be exercised, but only for the purposes of an investigation under section 1 above, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.
>
> (2) The Director may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person whom he has reason to believe has relevant information to attend before the Director at a specified time and place and answer questions or otherwise furnish information with respect to any matter relevant to the investigation.
>
> (3) The Director may by notice in writing require the person under investigation or any other person to produce at a specified time and place any specific documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified class which appear to him so to relate; and-
>
> (a) if any such documents are produced, the Director may-
>
> (i) take copies or extracts from them;
> (ii) require the person producing them to provide an explanation of any of them;
>
> (b) if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.
>
> (4) Where, on information on oath laid by a member of the Serious Fraud Office, a justice of the peace is satisfied, in relation to any documents, that there are reasonable grounds for believing:
>
> (a) that-
>
> (i) a person has failed to comply with an obligation under this section to produce them;

(ii) it is not practicable to serve a notice under subsection (3) above in relation to them; or

(iii) the service of such a notice in relation to them might seriously prejudice the investigation; and

(b) that they are on premises specified in the information, he may issue such a warrant as is mentioned in subsection (5) below.

(5) The warrant referred to above is a warrant authorising any constable:

(a) to enter (using such force as is reasonably necessary for the purpose) and search the premises, and

(b) to take possession of any documents appearing to be documents of the description specified in the information or to take in relation to any documents so appearing any other steps which may appear to be necessary for preserving them and preventing interference with them.

(6) Unless it is not practicable in the circumstances, a constable executing a warrant issued under subsection (4) above shall be accompanied by an appropriate person.

(7) In subsection (6) above "appropriate person" means:

(a) a member of the Serious Fraud Office; or

(b) some person who is not a member of that Office but whom the Director has authorised to accompany the constable.

(8) A statement by a person in response to a requirement imposed by virtue of this section may only be used in evidence against him:

(a) on a prosecution for an offence under subsection (14) below; or

(b) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it.

(9) A person shall not under this section be required to disclose any information or produce any document which he would be

entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court, except that a lawyer may be required to furnish the name and address of his client.

(10) A person shall not under this section be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless:

(a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or

(b) the Director has authorised the making of the requirement or, if it is impracticable for him to act personally, a member of the Serious Fraud Office designated by him for the purposes of this subsection has done so.

(11) Without prejudice to the power of the Director to assign functions to members of the Serious Fraud Office, the Director may authorise any competent investigator (other than a constable) who is not a member of that Office to exercise on his behalf all or any of the powers conferred by this section, but no such authority shall be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority.

(12) No person shall be bound to comply with any requirement imposed by a person exercising powers by virtue of any authority granted under subsection (11) above unless he has, if required to do so, produced evidence of his authority.

(13) Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

(14) A person who, in purported compliance with a requirement under this section:

(a) makes a statement which he knows to be false or misleading in a material particular; or

(b) recklessly makes a statement which is false or misleading in a material particular,

shall be guilty of an offence.

(15) A person guilty of an offence under subsection (14) above shall:

(a) on conviction on indictment, be liable to imprisonment for a term not exceeding two years or to a fine or to both; and

(b) on summary conviction, be liable to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

(16) Where any person:

(a) knows or suspects that an investigation by the police or the Serious Fraud Office into serious or complex fraud is being or is likely to be carried out; and

(b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he knows or suspects are or would be relevant to such an investigation,

he shall be guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from persons carrying out such an investigation.

(17) A person guilty of an offence under subsection (16) above shall:

(a) on conviction on indictment, be liable to imprisonment for a term not exceeding 7 years or to a fine or to both, and

(b) on summary conviction, be liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both.

(18) In this section, "documents" includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production includes references to producing a copy of the information in legible form.

(19) In the application of this section to Scotland, the reference to a justice of the peace is to be construed as a reference to the sheriff; and in the application of this section to Northern Ireland, subsection (4) above shall have effect as if for the

references to information there were substituted references to a complaint."

38.18 If a provision on these lines were introduced into our law, it would be necessary to determine who should exercise this power. If it were to be a member of the Garda Siochana, one possible strategy would be for the legislation to empower the Minister for Justice to appoint a senior officer to perform this function.

38.19 We consider the powers given, in s2(4) and 2(5), to obtain a warrant to enter, search premises and seize documents (including information on computer disc) the most important to be conferred by the section and would be of much greater use to the Gardai than the power to call in a person for questioning in as much as the answers to questions cannot be used in evidence in the case under investigation. (S2(8)).

38.20 Nevertheless we see no objection to the powers given to the Director in s2 of the 1987 Act being given to a senior Garda officer within this jurisdiction. They are analogous to powers of arrest and detention already given to the Gardai in the *Criminal Justice Act, 1984.*

38.21 We would not confer them on the DPP as being appropriate to the investigation rather than to the prosecution of crime. As there is no question of a hearing or an adjudication, we are satisfied that the power to be given would not be held to be judicial within the meaning of Article 37 of the Constitution.

38.22 S2(8) of the 1987 Act provides that a statement made pursuant to a requirement under the section would only be used in a prosecution for refusal to comply with such requirement or where an inconsistent statement is made in a prosecution for another offence. Given similar protection against self incrimination, a provision such as that in s2(2) could be introduced. The availability of privilege against incrimination, in a Constitutional context, is discussed by *Casey*:

> "The question whether, and to what extent, the Constitution recognises this privilege has never arisen squarely for decision. But the Court of Criminal Appeal has noted that the Constitution does not expressly refer to this privilege and has declined to follow United States decisions - such as *Miranda v Arizona* (1966) 384 US 436 - which apply it to the pre-trial stage: *People (DPP) v Pringle* (May 22, 1981). Thus a person being questioned by Gardai has no constitutional right to have a lawyer present - *People (DPP v Farrell* [1978] IR 13: *Pringle's* case [...]. Nor would it be a ground for excluding statements made by an accused that he was compelled to answer them on pain of penalty under the *Offences against the State Act, 1939*, s52: the Court of Criminal Appeal so held, *obiter*, in *People (DPP) v McGowan* [1979] IR 45.
>
> If the Constitution implicitly enshrines a privilege against self-

incrimination on United States lines, then section 52 of the 1939 Act would be of doubtful validity. Also open to challenge would be certain provisions of the *Criminal Justice Act, 1984* which are on similar lines to section 52 -e.g. sections 15 and 16, which create offences of withholding information regarding firearms or ammunition, and stolen property, respectively. Sections 18 and 19 of the same Act in effect allow a court to draw inferences from an accused's failure to account for specified matters; such inferences may be treated as corroborating other evidence but are not *alone* sufficient for a conviction. And in both instances the accused must have been told in advance in ordinary language what the effect of failure might be.

It seems unlikely that the courts will invalidate such provisions. In no decision so far has it been suggested that section 52 of the *Offences against the State Act, 1939* is of doubtful validity. As for the inferences open under section 18 and 19 of the *Criminal Justice Act, 1984*, the judicial attitude seems likely to be that a person convicted on the basis of those provisions has been tried in due course of law. Although the notion of "due course of law" has affinities with the United States due process guarantees, it can hardly be contended that Irish courts are bound by United States decisions as to what due process requires. The more so since views on that subject have changed. In *Griffin v Illinois* (1965) 380 US 609 the Supreme Court held that a judge may not comment on an accused's failure to testify or invite the jury to draw inferences therefrom. But this was on the basis - established in *Malloy v Hogan* (1964) 378 US 1 - that the due process clause of the 14th Amendment incorporates vis a vis the states the 5th Amendment's prohibition against self-incrimination. Such reasoning is obviously not *per se* applicable under Bunreacht na hEireann. And it is notable that in the earlier case of *Adamson v California* (1947) 332 US 46 a majority of the Supreme Court did not think such a judicial comment or invitation violated the due process guarantee of the 14th Amendment. The Irish courts seem likely to accept the *Adamson*, rather than the later *Griffin*, approach."[14]

C. *New Power of Entry?*

38.23 We understand that a weakness in the present law, as perceived by those involved in the investigation of fraud offences, is the lack of wide-ranging powers of entry to search premises for documents. A useful model for the purposes of discussion is section 2 of the (English) *Criminal Justice Act, 1987*, which has already been quoted.

38.24 At common law, a search warrant may be issued by a District Judge or Peace Commissioner, on an information being sworn before him or her alleging

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14 *Casey*, 424-5

a suspicion that goods have been stolen and are in the house sought to be searched.[15] This common law power has been supplemented by statutes, conferring on certain persons in certain circumstances the right of entry onto private property to search and seize property.[16] Thus factory[17] and health[18] inspectors may enter premises (including ships) in specified cases, as may authorised persons in relation to air transport[19] and persons ensuring the humane slaughter of animals.[20] Similarly the Gardai may enter licensed premises to prevent or detect a violation of the licensing laws;[21] they may also search club premises on suspicion that any unregistered excisable liquor is being sold there.[22] Powers of entry in relation to gaming and lotteries range widely: a member of the Garda Siochana may at all reasonable times enter any amusement hall, funfair, circus, travelling show, carnival, bazaar, sports meeting, local festival, exhibition, "or other like event" in which gaming or a lottery is or is likely to be carried on.[23] Moreover, inspectors have wide powers of entry under the *Social Welfare (Consolidation) Act, 1981* where they have reasonable grounds for supposing that persons employed in an insurable employment are employed at particular premises.[24] Similar powers are given to authorised officers under employment legislation.[25] So also persons authorised by a fire authority have a right of entry to premises "at all reasonable times" for the purposes of the *Fire Services Act, 1981*;[26] the same Act permits[27] persons in control at a fire or other emergency to enter any and or building, to cause it to

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15 Cf *Kelly*, 560, *The Garda Siochana Guide*, p1202 (1981).

16 *Ryan & Magee*, 143, *Sandes*, 50-51 (3rd ed, 1951), the *Misuse of Drugs Act, 1977*, section 23(1), as amended by *Misuse of Drugs Act, 1984*, section 12 (see O'Connor, *Annotation*, [1984] 1 CLSA -General note to section 12 and *Charleton*, 34-40), the *Gaming and Lotteries Act, 1956*, section 39, *DPP v McMahon*, [1987] ILRM 87, the *Customs and Excise (Miscellaneous Provisions) Act, 1988*, sections 2, 3, 5. See also the *Larceny Act, 1916*, section 42 and the *Merchandise Marks Act, 1887*, section 12(1); cf *The State (Batchelor & Co. (Ireland) Ltd) v District Justice O Floinn*, [1958] IR 155 (Sup Ct, 1955, rev'g High Ct, Haugh, J, 1954), the *Offences Against the State Act, 1939*, section 29, as amended by the *Criminal Law Act, 1976*, section 5.

17 Cf *Factories Act, 1955*, section 94; see also the *Safety in Industry Act, 1980*, section 53, the *Safety, Health and Welfare (Offshore Installations) Act, 1987*, section 41, and the *Mines and Quarries Act, 1965*, section 131.

18 Cf *Merchant Shipping Act, 1894*, section 206, *Merchant Shipping Act, 1906*, section 26, *Abattoirs Act, 1988*, sections 36(5), 54, *Health Act, 1953*, section 68, *Health Act, 1947*, section 94. See, however, *Brannigan v Dublin Corporation*, [1927] IR 513 (Sup Ct, 1926).

19 *Air Navigation and Transport Act, 1936*, section 39(1), *Custom-Free Airport Act, 1947*, section 7(1), *Air Navigation and Transport Act, 1988*, sections 18, 33(1), *Air-Raid Precautions Act, 1939*, section 33, *Air Navigation and Transport Act, 1975*, section 4(2).

20 *Slaughter of Animals Act, 1935*, section 9. Other examples of a statutory right of entry include the *Oil Pollution of the Sea Act, 1956*, section 21(1), as amended by the *Oil Pollution of the Sea Act, 1977*, section 15, the *Oil Pollution of the Sea (Civil Liability and Compensation) Act, 1988*, sections 32-33, *Air Pollution Act, 1987*, section 14 (see Scannell, *Annotation*, [1987] ICLSA - General Note to the action), the *Restrictive Practices Act, 1972*, section 11(2)(9), an the *Packaged Goods (Quality Control) Act, 1980*, section 1481; *Protection of Animals Kept for Farming Purposes Act, 1984*, section 8 (as to common law, see *H Williams & Co v Dublin Corporation*, 84 ILTR 62 (Circuit Ct, Judge Connolly, 1949): see further Clark, *Annotation* [1984] ICLSA, General Note to section 8) *National Monuments (Amendment) Act, 1987*, section 8(2) 5(1), *Canals Act, 1986*, section 11, *Control of Dogs Act, 1986*, section 7(1), the *Dumping at Sea Act, 1981*, section 4(1), the *Health (Mental Services) Act, 1981*, section 36, the *Prices Act, 1958*, section 24, as amended by the *Prices (Amendment) Act, 1965*, section 24 and the *Restrictive Practices (Amendment) Act, 1987*, section 28 and the *Consumer Information Act, 1978*, section 16(3). For further examples, see *McMahon*, 130, *Kelly*, 560-561.

21 *Licensing Act (Ireland) 1874*, as amended by the *Intoxicating Liquor Act, 1927*, section 22. See *DPP v McMahon*, [1987] ILRM 87 (Sup Ct, 1986). See also the *Intoxicating Liquor Act, 1988*, section 37.

22 *Intoxicating Liquor (General) Act, 1924*, section 25.

23 *Gaming and Lotteries Act, 1956*, section 38. See *DPP v McMahon, supra.*

24 *Social Welfare (Consolidation) Act, 1981*, section 264(2).

25 *Anti-Discrimination (Pay) Act, 1974*, section 6(4), *Protection of Employment Act, 1977*, section 17, *Protection of Young Persons (Employment) Act, 1977*, section 27.

26 *Fire Services Act, 1981*, section 22(2).

27 *Id*, section 28(1).

be vacated by its occupants and to pull the building down.

38.25 Section 16 of the *Forgery Act, 1913* provides for the granting of warrants to search for and seize forged documents etc.

38.26 It may be argued that many of these powers of entry relate to situations of less obvious and immediate social urgency than the present context of fraud offences.

38.27 As against this, it can, perhaps, be argued that it would be wrong to go any further than section 9 of the *Criminal Law Act, 1976* has done. It provides as follows:

> "(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any power, a member of the Garda Siochana, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Siochana in the circumstances mentioned in that Act.
>
> (2) If it is represented or appears to a person proposing to seize or retain a document under this section that the document was, or may have been, made for the purpose of obtaining, giving or communicating legal advice from or by a barrister or solicitor, that person shall not seize or retain the document unless he suspects with reasonable cause that the document was not made, or is not intended, solely for any of the purposes aforesaid."

38.28 The latitude of this power is worth noting. *Ryan & McGee* observe that:

> "[a]lthough that section has the virtue of clarity, the scope of the powers granted to seize property is so wide that it could face a constitutional challenge. Section 9 would appear, for example, to permit a Garda carrying out a 'stop and search' under the Wildlife Act, 1976, without effecting an arrest and without a warrant, to seize anything he finds in the course of his search even if it has nothing whatever to do with the Act in question. Similarly in a search carried out in consequence of an

arrest, as happened in *Jennings v Quinn*,[28] Gardai could seize any item whatsoever even if it fell outside the wide parameters set forth by O'Keeffe, J in that case.

The section also seems to render otiose the words in individual statutes which purport to limit the property which may be seized in the course of a search authorised by a warrant issued thereunder.

The only limitation imposed by section 9 is that the search be carried out under a *power*. This could prove important. If a warrant, for example, were to be issued in connection with a stolen clock it seems clear from section 9 that the Gardai could seize any item which they believe would be of evidentiary value and which they come across *prior* to finding the clock. However, should they find the clock immediately on entering the premises their lawful power to search would thereby be expended and no further search could then be carried out otherwise than as a consequence of the arrest of the occupier."[29]

38.29 Those seeking an extension of their present powers of entry and search may argue that it is precisely the limitations on their anterior powers of search that make section 9 less than fully effective. However, it should not be overlooked that section 42(1) of the *Larceny Act, 1916* gives a power to District Judges and Peace Commissioners[30] to issue a search warrant where there is reasonable cause to believe that any person has in his custody or possession or on his premises "any property whatsoever, with respect to which any offence against this Act has been committed".[31] The argument in favour of further extension may be that in fraud investigations the need is not so much to seize this type of property but the second set of books which are the instruments and evidence of the offence. It could perhaps be argued, stretching language somewhat, that they come within the scope of the property described in section 42(1); but statutory clarification to this effect may seem to some a relatively modest reform.

38.30 *We recommend that if it is desired to have more prosecutions for fraud, resources would be better directed into the Garda Fraud Squad rather than into the establishment of a Serious Fraud Office similar to that established in England. We recommend, in addition, the introduction of investigatory provisions such as those in s2 of the English Criminal Justice Act, 1987, appropriately adapted. Administrative machinery should be put in place to ensure the earliest possible intervention of the Gardai into Revenue or other investigations where fraud is suspected.*

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28 [1968] IR 305.

29 *Ryan & McGee*, 153.

30 Cf the *Adaptation of Enactments Act, 1922*, section 6(1). See *McCutcheon*, para 172.

31 See also section 42(2), limited to searches for property believed stolen. The issue of the constitutionality of the subsection with the Constitution has provoked discussion: see *McCutcheon*, para 174, *King v AG*, [1981] IR 233. Cf *Ryan v O'Callaghan*, High Ct, Barr J, 22 July 1987, noted by R Byrne & W Binchy, *Annual Review of Irish Law 1987*, 86 (1988).

D. Power of Arrest Without Warrant?

38.31 Under the law at present, any person can arrest another person, without warrant, for any larceny, however petty, but not even a member of the Gardai can arrest a person, without warrant, for offences such as obtaining by false pretences, fraudulent conversion or obtaining credit by fraud. *We recommend, that the Gardai be given a power of arrest without warrant for all offences of dishonesty.*

CHAPTER 39: THE PROSECUTION OF DISHONESTY

A. General deficiency

39.1 Two distinct problems of a practical nature arise and are usually dealt with in the text books under this heading.

39.2 The law requires there to be a distinct charge for each act of theft. But an employee can steal small sums of money from his or her employer over a protracted period. This usually comes to light for the first time as a deficiency in the accounts. In the absence of an admission by the employee, these cases are very difficult to prove. Every other possible thief has to be eliminated from the case, beyond a reasonable doubt. It is usually impossible to prove each specific taking. Even where a statement of admission is obtained, the admission is usually couched in general terms. It takes a very contrite thief with a good memory and a painstaking and thorough investigator to secure an admission which would sustain charges for distinct takings. The law permits a charge to be laid for a general deficiency arising between dates when distinct takings cannot be proved.[1]

39.3 Preferring a general deficiency charge is a convenient and time-saving way of dealing with similar acts of dishonesty over a period and there is much to be said for permitting a charge to be laid in this form where the one accused repeats the same offence in respect of the one victim over a period. Again, the prosecution should not be tied to charging in respect of a specific sum of money but should be permitted to charge in respect of a sum exceeding £X.

39.4 An argument sometimes made against this course is that it leads to investigative and prosecutorial laziness. A practical compromise is to make specific provision enabling charges or counts for selected distinct takings to be

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1 *R v Balls* (1871), LR 1 CCR 328.

laid or preferred together with a general deficiency charge and *not* to be deemed void or uncertain for duplicity or uncertainty.

39.5 A defendant should not be able to take undue advantage of the extent of his criminality. If the accused is innocent, it does not matter how the indictment is laid. If he is guilty, one is only concerned with amount. If it does not amount to injustice or to unfair procedures to lay a general deficiency charge when a general statement of admission without detail is obtained from an accused, it cannot amount to injustice or to unfair procedures to lay such a charge even where detailed evidence is available. Administrative efficiency in the context does not necessarily amount to investigative laziness. The true extent of the mischief wrought by the accused is best reflected in a charge in respect of the grand total stolen over the relevant period.

39.6 *We recommend that where there has been a series of appropriations by one accused from one victim, the law should permit a charge or count to be laid in respect of the general deficiency arising either in isolation or together with charges in respect of particular appropriations - notwithstanding any duplicity involved.*

39.7 Another instance of wrongdoing which has attracted use of the description "general deficiency" or "general balance of account" occurs when a person, e.g. a solicitor or an auctioneer who is obliged to keep money in safe custody so he can hand it over to or on behalf of a client or employer, dips into the fund for his own purposes. This would be a clear case of fraudulent conversion under the present law. The problem lies in proving it. When all the clients' money is intermingled and some is taken, it is impossible to say that a *particular* client's money has been taken.

39.8 This situation has caused such concern to the Incorporated Law Society that while this report is being finalised, it is seeking to have legislation introduced specifically dealing with this problem as it relates to solicitors. If this be a problem, the Commission sees it as a problem for the general criminal law and not for solicitors in isolation. It struck us as rather strange that as similar accounting regulations exist for English solicitors, no provision of the English Theft Acts or of any other English statute purports to address the problem. The reason appears to be that the law became well settled in England in a series of cases culminating in *Tomlin*[2] in 1954. Among the other relevant cases in which the law was developed were *Balls*[3] and *Lawson*.[4] The latter case actually concerned a solicitor "raiding" her clients' account and putting the money into her office account, using some of this money for her own purposes. It was "impossible" to trace all the moneys so received by her from the office account into the client's account and thence to any particular client. The sum charged in each count of the indictment was the sum due from the defendant to a particular client and it was held that:

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2 [1954] 2 QB 274.
3 *Supra.*
4 [1952] 1 All ER 804.

"(i) as the evidence for the prosecution enabled a jury to come to the conclusion that on one day between the dates charged in each count of the indictment there had been a fraudulent conversion of some part of the amount charged, there was sufficient evidence to support the counts.

(ii) although in the ordinary case, where it was possible to trace and prove the conversion of individual items of property, it was undesirable to include them all in a count alleging a general deficiency, in a case such as the present, where the individual items could not be traced in detail, the prosecution were entitled to frame their counts in the indictment in the way in which they had been framed."[5]

39.9 Confirmation that this is still the law, unaffected by the Theft Acts, is found in *Griew*:

> "A single count is convenient (indeed often unavoidable) ... - namely, where a servant or agent, liable to account to his principal for money received or held for the principal, is found to have less of the principal's money in his hands than he should have, but where the dishonest appropriations causing the deficiency cannot be individually demonstrated. In such cases it was held under the *Larceny Act, 1916* that a count charging theft, embezzlement or fraudulent conversion of a general deficiency might be framed - that is, a count alleging that on a day between specified dates, D stole (etc.) £X (i.e. the total amount of the deficiency). A conviction on such a count was justified by evidence satisfying the jury that on some unknown day between the specified dates D did steal (etc.) some part at least of the deficiency.[6] There can be no doubt that a similar count charging theft of a general deficiency is proper today."[7]

39.10 It has to be said that in most cases, it would be no easier to prove the conversion of a part of the money than of the whole of the money. The essence of the decision is that if there is a failure to account, the jury are entitled to hold that a conversion of the balance took place.

39.11 While one can generally assume that such well entrenched precedents would be followed in Irish courts, in view of the doubts which prevail within the legal profession itself, it would be as well to legislate. Accordingly, we recommend that:

> *A person shall be presumed to have caused financial prejudice or risk of such prejudice who having been entrusted with moneys for the purpose of*

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5 *Id.*

6 Citing, inter alia, *Lawson*, *Tomlin*, and *Balls*.

7 Griew, *The Theft Acts 1968* and *1978*, para 2-118, certain footnote references omitted.

retaining the same in safe custody or applying, paying or delivering the same or any part thereof in a particular manner, fails to retain same in safe custody or to apply, pay or deliver them in the manner prescribed or to account for them when an account is sought and may be charged or indicted in respect of a deficiency in the relevant account, not exceeding the total amount entrusted, on a date unknown during the period of entrustment, notwithstanding the fact that no particular appropriation of the money entrusted or any part thereof, can be proved.

B. Rights of election in relation to jury trial

39.12 In our Discussion Paper, we recommended that offences of dishonesty should be tried summarily or on indictment at the election of the Director of Public Prosecutions. One commentator, Michael McDowell, SC, took issue with our proposals in relation to the Director of Public Prosecutions' right of election as to jury trial. In his memorandum, he expressed the view that "any effort to produce a summary jurisdiction for theft offences which involved denying the accused a right to elect for trial by jury would itself be unconstitutional". We doubt the merits of this criticism. The parameters of the constitutional entitlement to trial by jury are a matter for the judiciary to determine. It is self-evident that legislation improperly interfering with a constitutional right would be unconstitutional. The question is thus whether our proposal raises constitutional difficulties. We are satisfied that it does not. The Oireachtas is entitled to rely on the integrity of the Director of Public Prosecutions in the exercise of a statutory power of election, so that this power will be exercised consistently with constitutional requirements. If it were not so exercised on any occasion, the District Judge would be charged with the task of protecting the accused's constitutional rights and refusing to try an accused summarily for a minor offence not fit to be so tried. If he or she failed to do so, an eventuality which we have no reason to contemplate would occur with any frequency, the accused's constitutional rights would fall to be protected by the superior courts.

39.13 As to the merits of election by the Director of Public Prosecutions in relation to dishonesty offences, we are satisfied that the accused should not be able to elect for trial by jury in the Circuit Court on a charge of petty theft. Our proposal would simply treat these offences in the same way as recent legislation has treated drug offences, joy-riding offences and offences of criminal damage. The Director of Public Prosecutions is not *required* to prosecute summarily for minor offences; he *may* do so.

39.14 In this general context, it should be noted that, under present law, the Director of Public Prosecutions cannot insist on trial by jury for robberies of property under £200. We consider that the Director should have this power. It seems to us that this would be consistent with our general proposals in relation to prosecutorial election.

39.15 *We adhere to the recommendation that the Director of Public Prosecutions should elect for trial venue.*

C. Preliminary examination

39.16 Turning to judicial procedures, we provisonally recommended in the Discussion Paper that, where it was determined by the prosecutor or the accused that cases covered by the Paper were to be tried by jury, the preliminary examination should be dispensed with and the District Justice should return the accused for trial, as if the preliminary examination had been waived under section 12 of the *Criminal Procedure Act, 1967.* We proposed that the accused should be entitled in every case to apply to the court of trial before he was arraigned for an order directing that he be discharged on the ground that there was no *prima facie* case against him. A small number of commentators took issue with this approach, with varying degrees of emphasis. On further examination, we found that our provisional recommendation had somewhat telescoped what we had intended to convey. The model for reform which we envisaged was that we had already recommended in our Report on Child Sexual Abuse. This would enable depositions to be taken in the District Court, but would still require the District Judge to return the accused for trial in every case where election was made for trial by jury. An accused applying to the court of trial for an order directing that he be discharged would be able to derive any support from the depositions as they might provide.

39.17 *We adhere to the view that the preliminary examination should be dispensed with.*

D. Eligibility requirements for juries in fraud cases

(i) Age Limits

39.18 We now turn to consider eligibility requirements for juries in fraud cases. As regards age limits, our analysis in the Discussion Paper indicated that we were satisfied with the present law, which prescribes eighteen as the minimum age and seventy as the maximum age, with persons between sixty five and seventy excusable as of right. Our consultations revealed support for the present law and *we recommend that in this context it should remain unchanged.*

(ii) A Literacy Requirement

39.19 As regards a literacy requirement, we took no concluded position in the Discussion Paper. We noted that, if such a requirement were to be part of the law, the question would arise as to how it should be given effect. The idea of subjecting prospective jurors in fraud trials to a special reading test might seem repellant. One solution would be to assume competence, but for the matter to be capable of being raised either by the prospective juror or by counsel under the heading of challenge for cause. In this regard, questions could be permitted of a prospective juror seeking to establish his or her ability to read.

39.20 Part I of the First Schedule to the *Juries Act, 1976* renders ineligible as an "incapable" person one who "because of insufficient capacity to read, deafness or

other permanent infirmity is unfit to serve on a jury". While this test may perhaps be regarded as somewhat minimal, we are not disposed to alter it in relation to fraud trials.*After further consideration, our conclusion on this difficult question is that, on balance, it would be better to leave the present law unchanged.*

(iii) A Minimum Educational Requirement

39.21 In the Discussion Paper, we also addressed the not unrelated question of minimum educational requirements. We indicated our opposition to such a change in the present law (which lays down no specific requirements) on the basis that it would be socially discriminatory and in any event would be unlikely to improve the jury's level of comprehension of the facts of a fraud trial unless the test were to place a strong emphasis on sophisticated accountancy or mathematical skills, which solution would raise constitutional doubts. *After further consideration we adhere to this view and recommend no change in the law in this context.*

(iv) Disqualification for Dishonesty

39.22 Turning to disqualifications from jury service, we indicated a preference in the Discussion Paper for excluding any person who had ever been convicted of any offence of dishonesty, regardless of the penalty imposed. *This remains our preference and we so recommend.*

(v) Peremptory Challenge

39.23 In relation to peremptory challenges, after detailed discussion, we tentatively proposed in the Discussion Paper the abolition of this entitlement. Consultation has led us to change our view. There was no substantial support for such a change, and those with experience as prosecutors or as counsel for the accused considered that peremptory challenge had not been abused. *Accordingly we do not now recommend a change in the present law relating to peremptory challenges.*

E. Dispensing with the jury

39.24 As regards more radical options, we analysed in the Discussion Paper the proposals in the Roskill Report in England for the replacement of the jury by a system of a judge sitting with expert assessors in certain serious fraud prosecutions. Some of us expressed our agreement with the views of the Roskill Committee and considered trial by representative jury potentially inadequate for the prosecution of many sophisticated cases of fraud. The view was expressed that trial of fraud by jury had been rehabilitated by the verdicts in the recent Guinness trials. Unless one knew exactly how the jury reached their verdicts it would be impossible to say this was so. Indeed, a letter to the Times from CH Rolph is worth quoting in this context:

> "Many will agree with Judge King-Hamilton's letter (August 30) claiming

> the Guinness verdicts as 'another demonstration of the ability of an ordinary jury to understand a long, complex fraud trial'.
>
> Many others, including me, will see them as demonstrating that if you fill the newspapers with a big story for many months preceding such a trial, giving photographs, biographies, and fond family details, no jury will dream of saying Not Guilty. Innocent or guilty, the accused men haven't a chance".[8]

This is as good as any other hypothesis in the absence of hard evidence.

39.25 However, the constitutional reality of Article 38.5 spared us from making a recommendation on the matter. That reality of course applies equally to us in the context of the present Report and accordingly *we make no recommendation for the replacement of juries in serious fraud cases.*

F. Pre-trial review

39.26 In our Discussion Paper, we indicated that we would be in favour of some system of pre-trial review to save time and money and to clarify the issues for judge and jury. We noted that there would be no problems here from the point of view of the prosecution except one of even better preparation of cases, a burden the prosecution should be willing to carry. There was an ever-present reluctance in defence lawyers to concede or agree anything lest they inadvertently damage their client's interests and incur criticism in the Court of Criminal Appeal. We noted further that defence lawyers must act on their client's instructions within ethical limits and that the defendant has the right to be as obstructive as the system allows.

39.27 We considered it important that the legislation should have sanctions for non-compliance. We provisionally recommended the introduction of provisions similar to those in the English legislation. We considered that Irish legislation would have to ensure, for constitutional reasons, that preliminary hearings would not form part of the trial itself and would not encompass judicial rulings on disputed facts.[9] Sanctions should include the right to comment and a right to reduce legal aid fees. Where the defence was conducted on a solicitor-and-client basis, the judge should be empowered to order payment by the defendant of a contribution towards the costs of the prosecution.

39.28 Consultation with judges and practitioners revealed very little enthusiasm for changes on these lines. There already is an informal practice among some prosecution counsel and defence counsel to seek to focus the issues of a trial, with the approval of the trial judge. The predominant view among those whom we consulted was that this process is better accomplished by these informal means than by statutory imposition. It was, moreover, suggested to us that it

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8 The Times, 3rd Sept 1990.

9 *Curtis v Attorney General* [1985] IR 384.

would be preferable to wait some years before contemplating any statutory change, so that the effect of similar changes in other jurisdictions can be monitored.

39.29 On further reflection we are disposed to agree. *Accordingly we do not recommend the introduction of statutory provisions for the holding of preliminary hearings at this time.*

G. Explanatory evidence

39.30 Modifying a somewhat wider-ranging suggestion which we received from Michael McDowell SC, *we are of the view, and so recommend, that the prosecution should be entitled to call as a witness an accountant who would give evidence explaining accountancy procedures to the jury.* His or her function would be largely educational, explaining what would be an unknown discipline for most jurors. *This witness would not be permitted to express any views on the facts of the case before the court.* We are conscious of the danger of turning the process from trial by jury into trial by accountant.

H. Evidential aids

39.31 In the Discussion Paper we recommended that appropriate provision should be made for the furnishing of evidence by means of overhead projectors, slide projectors, computer terminals and other means so as to help juries understand complicated issues of fact, in fraud trials or in all criminal trials. *We adhere to this view and formally so recommend in relation to fraud trials.*

39.32 We also tentatively recommended in the Discussion Paper: (i) the establishment of a Judicial Studies Board; (ii) the arranging of seminars on such subjects as information technology and accountancy, at which judges would attend; (iii) making accountancy a compulsory subject in training for the Bar; and (iv) making post-qualification training in accountancy and information technology available for practising lawyers. *Again we adhere to these proposals which we now formally recommend.*

I. Penalties

39.33 In the Discussion Paper we considered the question of penalties. At present the maximum penalties for larceny depend in part on the thing stolen, the person from whom it is stolen, the place where it is stolen and the particular circumstances of the defendant.

39.34 In our Report on Receiving Stolen Goods,[10] we had recommended that the same penalty should be provided for larceny and handling and should be ten years' imprisonment. The primary reason for this recommendation was our wish

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10 LRC No. 23 (1987).

to ensure that all those who obtained property unlawfully, whether by larceny, fraud, smuggling or other crime, should, *ipso facto*, be guilty of handling so that in all cases of doubt as to whether, say, larceny or handling was the offence committed, handling could safely be charged. This would have overcome the problem, highlighted in the case of *O'Leary v Cunningham*,[11] which arose when, larceny and receiving having been charged as alternatives, the Court found the accused guilty of the wrong offence and acquitted of the other to the effect that, an acquittal having been recorded, the correct verdict was not available for any re-hearing on appeal.

39.35 The legislature did not follow our recommendations in the *Larceny Act, 1990*. Based on the premise, certainly arguable, that receiving is a more serious crime than larceny, it provided a maximum penalty of fourteen years for handling, Again, while it provided that a person could be found guilty of handling on a charge of larceny or fraud and vice versa, this did not solve the problem created by the "imposed acquittal" on the original offence.

39.36 In the Discussion Paper, we saw no reason to depart from the recommendations in our Report on Receiving Stolen Property. We considered a ten year penalty to be more than adequate for any offence of dishonesty other than robbery or blackmail. We provisionally recommended that any offence of unlawful appropriation of property or of obtaining property by deception should, *ipso facto*, constitute the offence of handling. We also provisionally recommended that ten years' imprisonment to be the maximum penalty for offences of dishonesty other than robbery and blackmail.

39.37 Finally we provisionally recommended, as we had, in our Report on Receiving, that a court convicting of an offence of dishonesty should be entitled to order the payment of compensation.

39.38 In the present Report we reiterate all of these recommendations whichever strategy is adopted. Consultation and reconsideration of the issue have led us to reaffirm this approach. We deal with the penalties for Forgery and Counterfeiting above.[12]

J. Alternative verdicts

39.39 It follows from the above analysis that we consider it essential that there should be a wide-ranging provision relating to alternative verdicts.

39.40 *Accordingly, we recommend that, in respect of a prosecution for an offence of dishonesty, it should be possible for the jury to convict of any other offence of dishonesty.*

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11 [1980] IR 367.

12 *Supra*, paras 32.96, 33.10.

K. Long trials

39.41 We have noted the series of lengthy and expensive trials for fraud in England over the last ten years. Almost certainly, the length of some of these trials reflected the length of the indictments laid in them. We appreciate that these were laid in order properly to reflect the criminality involved in each case and make a platform for a long sentence. However, with the omnipotence of hindsight, it can be said that *some* conviction, carrying a short sentence, is, probably, preferable to no conviction at all, where a trial collapses or a jury is totally confused.

39.42 *We recommend, no doubt unnecessarily, that indictments in fraud trials be kept as short as is warranted by the seriousness of the case.*

CHAPTER 40: SUMMARY OF RECOMMENDATIONS

1. We recommend that dishonesty should be defined in terms of the absence of a claim of legal right. (Para 15.39)

2. We recommend the removal of the requirement to prove an intent to deprive the owner permanently of property in offences of dishonesty. (Para 19.24)

3. We recommend the introduction of legislation, similar to that in s4(2) of the English *Theft Act, 1968* providing that land can be stolen, except in certain circumstances, and excluding the provision in s4(2)(a) relating to trustees. (Para 20.18)

4. We recommend the adoption of the provision in s4(3) of the *Theft Act, 1968* relating to the theft of flora and growing things. (Para 20.24)

5. We recommend the adoption of a provision similar to s4(4) of the *Theft Act, 1968*, setting out the circumstances in which wild creatures, tamed or untamed, may be stolen. (Para 20.30)

6. We recommend that property be defined to include *choses in action.* (Para 20.35)

7. We recommend that property, in the context of dishonesty, be defined to include intellectual property protected by the equitable doctrine of confidentiality, the personal data defined in and protected by the *Data Protection Act, 1988* or other valuable or confidential information. (Para 20.49)

8. We recommend the adoption of a provision similar to that in s5(4) of

the *Theft Act, 1968* to the effect that it shall be an offence to retain property obtained by mistake where there is an obligation, in civil law, to restore it. (Para 21.19)

9. We recommend the enactment of a provision, similar to that in s30(4) of the *Theft Act, 1968* to the effect that one spouse may be prosecuted for stealing from the other spouse but only with the consent of the DPP. (Para 22.8)

10. We recommend using the expression "deception" rather than "false pretences" in offences of dishonesty. (Para 23.5)

11. We recommend that a misrepresentation of law should constitute deception. (Para 23.9)

12. We are opposed to the creation of criminal liability in respect of expressions of opinion. (Para 23.14)

13. We recommend that it should constitute deception to make a false statement as to future intentions but that deception should not be inferred from the fact alone that a promise was not performed. (Para 23.18)

14. Misrepresentations having no pecuniary significance should not constitute deception. (Para 23.22)

15. We are satisfied that puffing should remain outside the definition of deception. (Para 23.27)

16. We recommend the introduction of a provision on non-disclosure such as is contained in Article 223.3 of the Model Penal Code but excluding sub-section (4). (Para 23.37)

17. We do not recommend the introduction of an offence of obtaining pecuniary advantage by deception on the lines of s16(2) of the *Theft Act, 1968*, as amended. (Para 23.14)

18. We recommend the creation of an offence of obtaining services by deception on the general lines of s1 of the English *Theft Act, 1978*. (Para 25.14)

19. We recommend that the offence of obtaining services should be limited to cases of deception and not cover threats. (Para 25.17)

20. We do not recommend the introduction of offences of securing the remission of liability, inducing the foregoing of payment or obtaining exemption from liability by deception as found in the *Theft Act, 1978*. (Para 26.9)

21. We recommend that an offence of making off without payment be created on the lines of s3 of the *Theft Act, 1978* but with the power of arrest restricted to apply to persons unknown to the creditor. (Para 27.20)

22. We recommend the creation of an offence of dishonestly using a cheque or credit card after the supplier has communicated or sought to communicate to the user notice of the revocation of permission to use it. (Para 28.13)

23. We recommend that an offence of dishonest use of a computer be created modelled on s115 of the Australian Capital Territory Ordinance but with "computer" separately defined as in the United States Federal legislation of 1984. (Para 29.28)

24. We recommend that where a computer offence is committed partly within the State and partly in another State the Irish courts should have jurisdiction to try the offender irrespective of whether at the material time he was himself within the State or in that other State. (Para 29.29)

25. We recommend that a section similar to s17 of the *Theft Act, 1968* be adopted for the offence of falsification of accounts. (Para 30.12)

26. We recommend the adoption of an offence of procuring the execution of a valuable security similar to the offence in s20(2) of the *Theft Act, 1968*. (Para 31.7)

27. We recommend that the definition of "instrument" in s8 of the English *Forgery and Counterfeiting Act, 1981* be adopted. Cash and credit cards should be specifically included. (Para 32.31)

28. We recommend that forgery should constitute an offence where the defendant intends to cause another prejudice or to confer a (gain or) financial advantage on himself or both. It would also be possible to go a few steps further and extend the offence to cases where the defendant's intent is to confer a non-financial advantage on himself. (Para 32.44)

29. We recommend that forgery would be committed in the common situation where the actor makes or alters the writing and gives it to another to execute the fraudulent scheme. (Para 32.46)

30. We recommend that legislation should provide specifically that it is a distinct offence, not strictly a forgery offence, to use an assumed name on a document in circumstances where use of the assumed name is a material part of a fraudulent scheme viewed as a whole. (Para 32.67)

31. Subject to making specific provision for the use of an assumed name, we

recommend the adoption of a provision similar to that in s9 of the *Forgery and Counterfeiting Act, 1981.* (Para 32.74)

32. We recommend that the offence of uttering a forged document or copy of a forged document should require knowledge on the part of the defendant that the document is forged or recklessness in the sense of a conscious disregard, involving capacity of a high degree, of a substantial and unjustifiable risk that the article is forged. We would continue to describe the offence as "uttering" rather than as "using". (Para 32.81)

33. We recommend that possession-based offences in the context of forgery be confined to possession of listed machines or implements, as described in the English legislation, without lawful excuse. (Para 32.95)

34. We recommended that the maximum sentence for a forgery or uttering offence should be ten years imprisonment and that the creation of an aggravated offence is not warranted. (Para 32.96)

35. We recommend that a section on the lines of s16 of the English *Forgery Act, 1913* under which there is a wide power of search pursuant to a search warrant, be retained. (Para 32.98)

36. We recommend that:

    (i) the offence of counterfeiting should apply both to bank notes and coin; and

    (ii) where the counterfeit note or coin is not reasonably capable of passing for a genuine one, the offence of attempt should be charged, and the same penalty should be available for the attempt as for the substantive offence. (Para 33.3)

37. We would favour the extension of protection to all officially recognised international currencies and recommend that a provision similar to s27 of the *Forgery and Counterfeiting Act, 1981* be adopted. (Para 33.5)

38. We recommend that liability for forgery of a banknote should attach in the absence of lawful authority or excuse. (Para 33.8)

39. Similar to our recommendations on forgery, we recommend that in the case of counterfeiting:

    (i) there should be offences of uttering and possession of counterfeit currency drafted similarly to those in regard to forgery;

    (ii) there should be a similar power of search; and

(iii) similar penalties. (Para 33.10)

40. We recommend no change in the law relating to conspiracy to defraud. (Para 34.13)

41. We recommend no change in the law relating to robbery. (Para 35.3)

42. We recommend that the approach in s21 of *Theft Act, 1968*, relating to blackmail, be adopted with one variation. Instead of making an "unwarranted" demand, the offence would consist of demanding, or attempting to demand, with menaces and without a claim of (legal) right, thus retaining for the offence of blackmail the defence common to other offences of dishonesty by maintaining a restriction, the fact that it is a claim of legal right, on total subjectivity. The fact that menaces is undefined in the statute has caused no problem to date, but if it were wished to define or confine the term, the Model Penal Code provides a useful model. (Para 35.30)

43. We recommend that where a court considers that a charge or count for dishonesty offence is preferred or laid under the wrong section or sub-section, provision should be made for a simple amendment or where the defendant is prejudiced or taken by surprise, for adjournment and, if necessary, the service of particulars. It should not be necessary to abandon the prosecution. (Para 36.29)

44. We recommend that:

1. A person should be guilty of theft who:

   (a) without the consent of the owner, unless the consent is obtained by deception or intimidation;
   (b) dishonestly

   appropriates property.

2. A person would appropriate within the meaning of the above who usurps or interferes adversely with the proprietary rights of another in obtaining possession or ownership of or in exercising control over his property. The word "ownership" is used notwithstanding the fact that a voidable title to property only may be obtained. (Para 36.45)

45. We recommend the creation, despite overlap, of specific offences of:

(a) obtaining services by deception; and

(b) making off without payment. (Para 36.47)

46. We recommend that a general offence of dishonesty should be created which should be a residual, "catch-all" offence carrying a penalty of 5 years imprisonment. (Para 36.49)

47. The formula we recommend for a general offence is that proposed by the Law Commission, i.e., "any person who dishonestly causes another person to suffer (financial) prejudice or a risk of prejudice or who dishonestly makes a gain for himself or another commits an offence". (Paras 36.35, 36.36)

48. We recommend that a risk of prejudice should be captured in the general offence, as a person is exposed to economic loss where a risk is taken with his property which should not be taken or where a person is induced to take such a risk. (36.37)

49. "Gain", "loss" and "property" should be defined in the general offence as in the *Theft Act, 1968* incorporating any variation of definition proposed already. But dishonesty would be defined as "without a claim of right". (Para 36.38)

50. We recommend that any auditor who discovers fraud or any form of criminal appropriation in a company's accounts should be required to report same to the Gardai. (Para 37.9)

51. We recommend that the legislation include a distinct offence consisting of controlling a company at a time when an offence of dishonesty is committed by a director, officer, servant or agent of the company in circumstances where the person in control had reasonable cause to believe that such an offence would be or was being committed, having regard to the nature and extent of the control thus exercised. It should be a defence to this offence that the defendant had acted reasonably in seeking to prevent the commission of the offence. (Para 37.11)

52. The offence of controlling a company at a time when an offence of dishonesty is committed by a director, officer, servant or agent of the company should be a summary one, with a provision that the prosecution can be commenced within two years of the offence being detected. (Para 37.12)

53. We do not recommend that there be a statutory duty to disclose computer crime. (37.17)

54. We recommend that if it is desired to have more prosecutions for fraud, resources would be better directed into the Garda Fraud Squad rather than into the establishment of a Serious Fraud Office similar to that established in England. We recommend, in addition, the introduction of investigatory provisions such as those in s2 of the English *Criminal Justice Act, 1987*, appropriately adapted. Administrative machinery

should be put in place to ensure the earliest possible intervention of the Gardai into revenue or other investigations where fraud is suspected. (Para 38.30)

55. We recommend that the Gardai be given a power of arrest without warrant for all offences of dishonesty. (Para 38.31)

56. We recommend that where there has been a series of appropriations by one accused from one victim, the law should permit a charge or count to be laid in respect of the general deficiency arising either in isolation or together with charges in respect of particular appropriations - notwithstanding any duplicity involved. (Para 39.6)

57. We recommend that a person shall be presumed to have caused financial prejudice or risk of such prejudice who having been entrusted with moneys for the purpose of retaining the same in safe custody or applying, paying or delivering the same or any part thereof in a particular manner, fails to retain same in safe custody or to apply, pay or deliver them in a manner prescribed or to account for them when an account is sought and may be charged or indicted in respect of a deficiency in the relevant account, not exceeding the total amount entrusted, on a date unknown during the period of entrustment, notwithstanding the fact that no particular appropriation of the money entrusted or any part thereof, can be proved. (39.11)

58. We recommend that the Director of Public Prosecutions should elect for trial venue. (39.15)

59. We recommend that the preliminary examination in the District Court should be dispensed with where the trial is to be before a jury. (Para 39.17)

60. We recommend that the present law regarding age limits for jury service should remain unchanged. (Para 39.18)

61. We do not recommend any change in the present law relating to literacy or educational requirements for jury service. (Para 39.20, 39.21)

62. We recommend that a person convicted of an offence of dishonesty should be ineligible for jury service. (Para 39.20)

63. We do not recommend a change in the present law relating to peremptory challenges of jurors. (Para 39.23)

64. We make no recommendation for the replacement of juries in serious fraud cases. (Para 39.25)

65. We do not recommend the introduction of statutory provisions for the

holding of preliminary hearings at this time. (39.29)

66. We recommend that the prosecution should be entitled to call as a witness an accountant who would give evidence explaining accountancy procedures to the jury. This witness would not be permitted to express views on the facts of the case before the court. (Para 39.30)

67. We recommend that appropriate provision should be made for the furnishing of evidence by means of overhead projectors, slide projectors, computer terminals and other means so as to help juries understand complicated issues of fact, in fraud trials or in all criminal trials. (Para 39.31)

68. We recommend:

(i) The establishment of a judicial studies board;

(ii) The arranging of seminars on such matters as information technology in accountancy, at which judges would attend;

(iii) Making accountancy a compulsory subject in training for the Bar;

(iv) Making post-qualification training in accountancy and information technology available for practising lawyers. (Para 39.32)

69. We recommend that any offence of unlawful appropriation of property should, *ipso facto*, constitute the offence of handling. Ten years imprisonment should be the maximum penalty for offences of dishonesty other than robbery and blackmail. A court convicting of an offence of dishonesty should be entitled to order the payment of compensation. (Paras 39.36, 39.37)

70. We recommend that, in respect of a prosecution for an offence of dishonesty, it should be possible for the jury to convict of any other offence of dishonesty. (Para 39.40)

71. We recommend, that indictments in fraud trials be kept as short as is warranted by the seriousness of the case. (Para 39.42)

APPENDIX A

List of those who sent submissions on the Discussion Paper

Judge JG Buchanan
Denis Vaughan Buckley SC
Mr Kevin Costello, Law Faculty, University College, Galway
Mr Barry Donoghue, The Chief State Solicitor's Office
Barry St. J Galvin, State Solicitor, Cork City
Brendan Grogan SC
Mr EG Hall, Company Solicitor, Telecom Eireann
Mr George Hart, Department of Justice*
Michael McDowell SC
Erwan Mill-Arden, Barrister-at-Law
Detective Inspector Fachtna Murphy
Finbarr Murphy, Barrister-at-Law, Legal Adviser, Bank of Ireland
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The Criminal Law Committee of the Law Society
The Irish Bankers' Federation

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