THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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RECEIVING STOLEN PROPERTY

IRELAND
The Law Reform Commission
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CHAPTER 1: INTRODUCTION

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 various criminal offences which are still mainly governed by pre-1922 legislation, including in particular the law relating to dishonesty, malicious damage and offences against the person. As a first step, the Commission decided to consider the law relating to receiving stolen property, which is still largely, although not exclusively, governed by the *Larceny Act, 1916*. It appeared to the Commission that the law in this area was in some respects unsatisfactory and in need of modernisation. The Commission appreciated that ideally any modernisation of the law of receiving should take place in the context of a comprehensive modernisation of the law of dishonesty in general, such as was embodied in the *Theft Act, 1968* in the United Kingdom. However, the extremely limited resources available to the Commission made it more desirable, in their view, to confine their attention initially to this aspect of the subject. In selecting the receiving of stolen property for attention, they have been conscious of the fact that to the extent that the existing law permits receivers of stolen property to escape conviction for unjustifiable reasons it also facilitates crimes of dishonesty over a wide area.

2. The Commission began by preparing a Discussion Paper 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 people with particular expertise in this area, including judges, barristers, solicitors, academics, the Attorney General's Office, 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 July at which there was a large attendance of those interested. When the results of this exercise had been carefully assimilated and collated by the Commission, a core group was established to take the examination to a further stage. That process has now been completed and this Report embodies the final proposals of the Commission to the Attorney General.

3. A major difficulty in the prosecution and conviction of receiving offences derives both from the nature of receiving itself and from deficiencies in the existing law. Proof of the crime depends to an unusual degree on establishing the state of mind of the alleged receiver. In the absence of admissions, rarely forthcoming, that the accused received the goods knowing them to be stolen or cogent circumstantial evidence to that effect, it may obviously be difficult to convince a jury beyond reasonable doubt that the accused's state of mind was, in general terms, "guilty". Clearly, some of the difficulties experienced by the prosecution in receiving cases could be eased by allowing convictions in cases where the evidence established no more than culpable carelessness rather than guilty knowledge. More radically, the presumption of innocence to the benefit of which accused persons are entitled could be modified in receiving cases by providing that persons found in possession of stolen property should be presumed to be guilty of a crime, as a matter of law, in the absence of explanation. The desirability of ensuring the more effective prosecution and conviction of receiving offences must be recognised; but so must the constitutionally guaranteed right of citizens to a trial in accordance with accepted standards of fairness. These are the most difficult problems with which the Report deals. It deals also, however, with other features of the existing law, which are clearly unsatisfactory and where we are satisfied that there would be little disagreement as to the need for alteration.

4. Chapter 2 contains a statement of the existing law and indicates the areas in which it appears to be unsatisfactory. Chapter 3 consists of a summary of the law in those jurisdictions in which the Commission's researches suggest the most profitable models can be found. Chapter 4 examines the policy considerations which arise and the various options for change which appear to merit consideration and sets out the Commission's final recommendations for reform of the law.

5. The Commission express their gratitude to the following who assisted them in coming to their conclusions:
Mr Eamonn Barnes, Director of Public Prosecutions,
Mr Justice Robert Barr,
Mr Joseph Brosnan, Assistant Secretary, Department of Justice*,
Judge Gerard Buchanan,
Mr Paul Carney SC,
Mr Peter Charleton, Barrister-at-Law,
Dr Alpha Connelly,
District Justice Sean Delap,

Mr Louis Dockery, Chief State Solicitor,
Mr Barry Donoghue, Solicitor, Chief State Solicitor's Office,
Mr Adrian Hardiman, Barrister-at-Law,
Mr George Hart, Special Legal Adviser, Department of Justice*
Mr Justice Seamus Henchy,
Ms Mary McAleese,
District Justice Sean McGee,
Deputy Garda Commissioner John Paul McMahon,
Mr Erwin Mill-Arden, Barrister-at-Law,
Judge Michael Moriarty,
Mr Greg Murphy, Barrister-at-Law,
Mr Justice Rory O'Hanlon,
Professor E F Ryan, Barrister-at-Law,
Mr Garrett Sheehan, Solicitor,
Mr Denis Vaughan-Buckley SC.

We should emphasise that, while we must appreciate the assistance freely given by the foregoing, the recommendations in this Report do not necessarily reflect the views of any of them and the Commission itself is solely responsible for any inaccuracies in the Report.

We also received information as to the law in other jurisdictions from a large number of individuals and organisations. The Appendix mentions several of them by name. We are most grateful to them for their valuable assistance.

*In his personal capacity.

CHAPTER 2: THE PRESENT LAW[1]

6. Statutes in the eighteenth and nineteenth centuries dealt with aspects of the offence of receiving. These culminated in this century in section 33 of the *Larceny Act, 1916,* which provides as follows:

> "(1) Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable —
>
> (a) in the case of felony, to penal servitude for any term not exceeding fourteen years;
>
> (b) in the case of misdemeanour, to penal servitude for any term not exceeding seven years . . .
>
> (2) Every person who receives 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 to a felony under the *Post Office Act, 1908,* or this Act, knowing the same to have been so feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by post, shall be guilty of felony and on conviction thereof liable to the same punishment as if he had stolen, taken, embezzled, or secreted the same.
>
> (3) Every such person may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice.
>
> (4) Every person who, without lawful excuse, knowing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside the

> United Kingdom, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable to penal servitude for any term not exceeding seven years".[2]

A. "Receiving"

7. Section 33 does not define "receiving". The essence of the concept is that the accused has taken the property into his *possession* or under his *control*.[3]

(i) Possession

8. "Possession" is a word of somewhat flexible dimensions.[4] The central notion is clear enough. If I exercise conscious control over goods by holding them in my hand, or placing them in my cabinet, I will normally be considered to possess them. But where the relationship is less direct, some uncertainties can arise. It may be debated whether I "possess" goods that are placed in my premises when I am not there: whether I knew and approved of their arrival will undoubtedly be relevant in answering this question. Moreover, a question which can often arise in the context of receiving stolen goods relates to the time at which possession of goods *begins*. Police authorities have often intervened during the course of the negotiation or the hand-over of the goods, and the would-be receiver has strenuously argued that matters had not gone so far as to have involved him in crossing the threshold of possession or control. The willingness of the courts to adopt the concepts of "actual" and "constructive" possession has on occasion confused rather than clarified the issue. Finally, goods may sometimes be in the possession of another person over whom the defendant has authority or control. In these circumstances, the question may arise as to whether the defendant by reason of that authority or control should be regarded as possessing or exercising control over the goods.

9. The Irish case of *Nugent & Byrne*[5] is a good example of how the issue of possession may prove troublesome. A bag of money was found by the Gardaí on the floor of Nugent's car behind the driver's seat, just after he had sat into that seat. The car had been parked outside a public house in Francis Street, Dublin, from just after 9.15 p.m. until closing time. The two defendants were in the pub all the time. The Gardaí had the car under continuous observation from about 9.20 p.m.

The trial judge had charged the jury as follows:

> "If anybody put that money there into that car in Francis Street, it must have been put in during that five minutes, unless it was already there before the car stopped in Francis Street."

The jury convicted. The Court of Criminal Appeal ordered a new trial for Nugent, as it did not consider that this charge to the jury had put his defence, "such as it was", fairly or adequately to the jury.

Davitt P, for the Court, stated,

> "The car was his and normally a person is in control of his own car and its contents. If Nugent was aware that the money was in his car then he was in control of it, and it could properly be said

> to be in his possession ... In [Nugent's] case ... the position was that money stolen from O'Connor's on the night of Saturday or early morning of Sunday was found on Monday in his car. The issues in his case were: (a) was he aware that the money was in his car; (b) if so did he know it was stolen, and had he a fraudulent intent?
>
> If he was not aware that the money was in his car then it must have been put there without his knowledge. The Guards were not there watching the Renault car merely by chance; they were obviously acting on information received — on a 'tip-off' from somebody who knew that the money was in the car, and who could be someone who derived his knowledge from the fact that he was involved in the stealing himself. In these circumstances it was essential to put Nugent's defence, such as it was, clearly to the jury. A person is not necessarily aware at all times of what is in the back of his car. As far as the evidence goes the money could have been put in the car at any time subsequent to the stealing and up to 9.20 on the Monday evening. The opportunity was necessarily limited to the period of five minutes between 9.15 and 9.20."[6]

The trial judge's only reference to Nugent's defence, in the passage quoted above, was not sufficient, in the view of the Court of Criminal Appeal.

Byrne, the passenger, had also been arrested, when he had "opened the passenger door and was about to get in".[7] He too had been convicted of receiving the money. The Court of Criminal Appeal set aside his conviction. Davitt P, for the Court, said:

> "There was, in fact, no evidence at all that he was ever in possession of the money found in the car. There was no evidence that he was or should have been aware that it was in the car; no evidence of any facts or circumstances from which such knowledge could be inferred. Apart from the question of knowledge there is nothing in the evidence to suggest that he had any control over the car or its contents. The car was not his. There is no evidence to show any connection between him and the car, or Nugent, except his own evidence that he had been a passenger in it during the journey from Nugent's house to the licensed premises — a journey of some 2 or 3 minutes — and that he was going to be a passenger in it again. It would be strange indeed if a person who accepts a lift in a car were on that account alone to be presumed to be aware of, and accountable for, all its contents."[8]

10. A most interesting issue of possession arose in the Irish case of *Byrne*.[9] A box containing a pendant, brooch and other items of jewellery was sent by post to a person living in Dalkey. The box was stolen when in transit, where exactly does not appear to have been clear. The first defendant was a letter carrier at Dalkey, but it would not have been his duty to deliver the box. It might, however, have been taken by him, or others, during or after the sorting.[10]

The day after the box had been posted, the second defendant, who was the mother of the first defendant, tried to pawn the pendant. While

she was in the pawn office, her son remained outside, and when she left he followed her and joined her "some distance off".[11]

Within about a week to ten days, a girl who knew the first defendant received a box by post, directed in his handwriting, containing the stolen brooch.

The jury convicted both defendants of receiving. On appeal, their counsel argued that there was no evidence of a joint possession of the goods; that the pendant was not proved to have been in the first defendant's possession at all; and that if the evidence showed him guilty of any offence it was larceny and not receiving.

By four to three, the Court of Crown Cases Reserved affirmed the conviction. The majority held that, on the evidence, the jury had been warranted in finding both defendants guilty of receiving the goods, knowing them to have been stolen. But the minority was of opinion that the evidence against the first defendant had gone to show that he had stolen, rather than received, the pendant and that he could not be convicted of receiving.

(ii) Control

11. As has been noted, it is not necessary for the prosecution to establish that the defendant possessed the goods: it will suffice to show that they were under his control.[12] In *Lawless*,[13] in a prosecution for receiving, the jury, having retired for some time, returned to ask the question: "May an accused be considered a receiver of stolen property if such property is under his supervision and control, as opposed to any actual physical possession?" The trial Judge dealt with the question by reading to the jury the following passage from *Archbold*[14]:

> "The actual manual possession or touch of the goods by the prisoner, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the prisoner has a control, so that they would be forthcoming if he ordered it."

The Court of Criminal Appeal considered that this was "an accurate and satisfactory"[15] reply to the questions put by the jury.

12. *Miller*[16] offers a good example of how an employer may be held to have received the stolen property even without actually touching it. In this case the thief brought some pieces of stolen cotton into the defendant's public house. The thief went behind the counter. The defendant called her employee and told her that the thief wished the employee to pawn the cotton. The employee did this, and brought back the money which she gave to the thief in the defendant's presence. The defendant never touched either the cotton or the money.

The Court of Criminal Appeal affirmed the conviction for receiving. Lefroy CJ, for the Court, said:

> "The question was, whether this was a receiving of stolen goods by the mistress? It appears to us that it was virtually a receiving by [the appellant], inasmuch as her servant, by her order and direction, received the goods from the thief, took them to the

> pawn office, and brought back the money to the thief. This, in our opinion, was virtually as much a receiving of stolen goods as if her own hand, and not that of her servant, had received them. No question can be raised in this case involving the necessity of those subtle distinctions taken on former occasions, with respect to the continuance of the possession of the goods in the thief, for the goods here were clearly transferred to hands which were virtually those of [the appellant] herself."[17]

13. In *Rooney*,[18] members of the Garda Siochána came to a factory and on going round the back came upon the three accused crouched behind a 3 ft high wall. When the accused stood up, ten rolls of wallpaper were found at their feet. In the course of his charge, the trial Judge directed the jury to apply to this evidence a straightforward test as to whether the accused either physically handled the goods or whether they had obtained such control over them as was consistent with possession. He used the word "appropriation" in regard to the question whether they had obtained such control.

The Court of Criminal Appeal affirmed the convictions of the accused. Finlay CJ observed that "appropriated" was, in the view of the Court, "an appropriate word for the assistance of the jury".[19] It had therefore been open to a jury properly directed to conclude that the accused exercised a control equivalent to possession.

14. In *Hobson v Impett*,[20] in 1957, the appellant had helped one Porritt to unload from a cart a sack containing stolen ingots and to take the ingots into Porritt's home, where the appellant was a lodger. At the conclusion of the unloading the appellant knew that the sack contained stolen ingots. The following day, the appellant helped Porritt and another man to load fifteen of the ingots into the back of a car, by picking up some of them and carrying them from Porritt's home to the car. The appellant knew that the ingots being taken in the car were to be offered for sale. He travelled in the car as a passenger but it was not proved that he touched the ingots again or took any part in offering them for sale at the end of the journey. For a period on the journey he was left alone with the ingots. Later that day, the police found sixty-three of the stolen ingots at Porritt's house. The appellant was convicted of receiving. The Appeal Committee dismissed the appeal, but the Divisional Court quashed the conviction.

Goddard LCJ said:

> "It is not the law that, if a man knows goods are stolen and puts his hands on them, that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom he is assisting, and the alleged receiver may be only picking the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping. What the Appeal Committee might have found on these facts, and could obviously have found, was that there was a joint possession here and that both Porritt and this appellant were receiving the goods. But the court can only come to the conclusion that the Appeal Committee, by the way in which

they have stated the Case, mean: 'We found he received the goods because we had directed ourselves in this way, that the mere manual possession in these circumstances was sufficient to be a felonious possession'. That is far too wide. It cannot be the law that merely because a man picks up goods which he knows are stolen he is receiving the goods."[21]

(iii) When is the Act of "Receiving" Completed?

15. It may sometimes seem quite plain that the defendant had every intention of receiving stolen property but it may be less plain that he had actually gone far enough to be regarded as having completed the act of receiving. In the famous case of *Wiley*,[22] the police, on bursting into the accused's stable, found the accused with two other men standing round a closed sack full of stolen birds, "as if they were bargaining, but no words were heard".[23] By eight to four, the Court for Crown Cases Reserved held that the accused's conviction for receiving should be set aside.

Coleridge J, for the majority, said:

> "So considering the facts, the prisoner was guilty of being in the house with the thieves, having the goods in their possession, and helping them with the goods still in their possession to a place under his control, with the knowledge that they were stolen, and the guilty purpose of buying them, and so himself acquiring a possession distinct from that of the thieves, on a contingency which never happened.
>
> Until that should happen he never intended to have a possession, nor is it found, in fact, that he had, nor did the thieves intend to admit him to any such possession, actual or constructive. No case of joint possession with them intermediately arises; it did not exist in fact; it is excluded by common intention. Now, I conceive that receiving imports possession, actual or constructive, and, therefore, that the verdict was wrong."[24]

(iv) Possession Outside the Defendant's Premises

16. On the question of possession *outside* the defendant's premises, the Victoria decision of *Merriman*[25] is of some interest. Stolen goods were left in a lane adjoining the defendant's property early one morning. The men who left them there had made a prior arrangement with the defendant that they would deposit stolen goods there. The Supreme Court set aside the defendant's conviction of receiving. Hodges J provided a clear analysis:

> "The question . . . which the Court is called upon to determine may be stated in some such form as this: Supposing it to be proved to the satisfaction of the jury that A agreed with B that if B would deposit any articles he might steal in a certain place A would pay B for any articles so deposited, that B afterwards stole and deposited in the agreed place certain articles, can the jury convict A of receiving stolen property knowing it to be stolen, even if it be proved that A did not know that any property had been stolen, and did not know that the articles had been so deposited, and consequently had made no payment and

> exercised no dominion over the property? In my opinion he cannot. If he has no knowledge that his property is stolen, and no knowledge that the property has been deposited there, and has done no act exercising dominion over it, and made no payment in respect of it, however morally guilty that individual may be, and although morally it may be as serious a wrong as receiving stolen property knowing it to have been stolen, yet it is not the offence [of receiving under the statute] . . . It is not sufficient to prove that an individual was ready and willing to receive property knowing it to have been stolen; you must go the whole length of proving that he received the property and that he knew that it was stolen. Now, in this case, which is a case such as I have described, he cannot be said to have received such property until he has done some act with regard to it, nor can he be said to know it has been stolen until he knows it is stolen property. You could not convict a pawnbroker of this offence by proving that he was ready and willing to commit it — *i.e.* ready and willing to receive stolen property. Until he does some act with regard to the property he is entitled to decline to commit a crime."[26]

(v) Taking or Receiving?

17. On occasion, it may not be clear whether the goods were received or stolen from the thief. In an unreported case mentioned in an article in 1945,[27] two defendants took property from a place where it had been hidden by thieves. The defendants knew that the thieves were unaware of this act. The article records that:

> "there was an asportation by [the two defendants] of the goods but no offering or giving by the thieves. Hence this was not the ordinary case of receiving stolen property . . . [T]hey were acquitted of th[e] offence [of receiving]. Later they pleaded guilty to a fresh charge of stealing the property . . . from the 'cache' of the thieves."[28]

A defendant charged with receiving sometimes claims that he was given the property by a person who, by his conduct, manner or reputation, frightened the defendant into taking it. This type of defence can, of course, proceed on the grounds of duress[29] or the absence of dishonesty;[30] but it may also be perceived as raising an issue regarding possession.

B. The Meaning of Property

18. Section 46 (1) of the *Larceny Act, 1916* provides that:

> "[t]he expression 'property' includes any description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

Although this definition extends to real property, it has been observed that:

> "the offence of receiving appears to contemplate only movable property. It is possible for C to obtain real estate in circumstances amounting to felony, as where he forges title deeds, but D would hardly receive the estate by moving into possession."[31]

A more troublesome question arises in relation to the possible scope of the words "any property into which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise".[32] The judicial analysis of this question has been somewhat rudimentary.[33]

In *D'Andrea v Woods*,[34] a number of saving stamps were stolen and converted for their cash value. Some of the Bank of England notes received for them were handed to the appellant, who knew that they were part of the proceeds of the theft and conversion of the stamps.

The Queen's Bench Division had no hesitation in upholding a conviction for receiving. Lord Goddard CJ said:

> "Obviously the Act was contemplating the theft of property which was then changed into some other property or into money, and that money being used to buy something else... It is quite sufficient to say here, without going further, that this [money] falls exactly into the definition of property converted or exchanged. Therefore, as the appellant knew that these notes had been acquired by theft, he was properly convicted..."[35]

This case gives some indication of the great breadth of section 46 (1) so far as its express language is concerned.

C. Requirement that the Property Must be Stolen[36] or Obtained by Felony or Misdemeanour

19. Before a person may be convicted of receiving stolen property, it must be shown that the property, at the time of the receiving, was stolen property[37] or property obtained by felony or misdemeanour.

(a) Stolen Property

20. If the property which the defendant received was never stolen, or if, having been stolen, it has ceased to be so before the time of the receiving, the offence will not be committed. In *Creamer*,[38] the English Court of Criminal Appeal held that the effect of section 36 of the *Larceny Act, 1916* was that a wife who appropriated her husband's property was not guilty of larceny unless she took it when she was leaving him or on the point of doing so. Thus the man to whom she gave the property could not be guilty of having received it since the property was not stolen property. The Court rejected the argument that the effect of the section was merely of a procedural nature, preventing the prosecution of the wife. If the Court had accepted this interpretation, it seems clear that the charge of receiving could have been sustained.

In *Walters v Lunt*,[39] the respondents were charged with receiving from their son, aged seven, a tricycle which he had stolen. The justices refused to convict on the ground that, as the child was under the age of eight,[40] he could not be guilty of larceny and that therefore the parents

could not be guilty of receiving, since the tricycle taken by the child was not property "stolen or obtained . . . under circumstances which amount to felony or misdemeanour". The King's Bench Division dismissed the appeal by way of case stated.

Counsel for the appellant had argued that the statutory provision providing that no child under the age of eight "can be guilty of any offence" did not mean that a child under that age was not capable of committing an offence, and that, therefore, although the child could not be convicted as a principal, the receivers of property stolen by him were nonetheless liable to be convicted, and, under section 33 (3) of the *Larceny Act, 1916,* the respondents could be convicted even though the child, as the principal offender, was not amenable to justice.

Rejecting the appellant's argument, Lord Goddard CJ[41] placed reliance on *Creamer.*[42] He said:

> "In the case now before us the child could not have been found guilty of larceny because he was under eight years of age, and, unless he is eight years old, he is not considered in law capable of forming the intention necessary to support a charge of larceny. Therefore the justices came to a perfectly proper decision in point of law on the charge of receiving."[43]

Lord Goddard CJ continued:

> "This, however, will not prevent the prosecution from preferring a further charge against the respondents for larceny, because, in my opinion, the facts show that it would be open to the justices to convict them either of larceny as bailees or of larceny by finding.[44] In the case before us the child brought the goods home, and the respondents took possession of them and kept them. It can, therefore, be submitted to the justices that the respondents put themselves in the position of bailees of the true owner, and, by doing the acts and telling the untruths which they did, provided a ground on which the justices could find that they had converted the goods to their own use. Alternatively, it could be submitted to the justices that this was a case of larceny by finding, the respondents finding the goods in their home, brought there by the child. If the justices come to the conclusion that at the time when the respondents found the goods, i.e. when the child brought them home, they believed that the owner could be discovered by taking reasonable steps — and I should not think the justices would have much difficulty in finding that — the respondents will be guilty of larceny by finding. Therefore, we dismiss this appeal. It will be for the police to decide whether they will prefer any further charge before the justices. If they do so, the decision of the justices on the receiving charge will be no bar to a conviction if they find the facts for larceny."[45]

21. In *Farrell*,[46] Wild CJ of the New Zealand Supreme Court followed *Walters v Lunt.* The defendant was charged with receiving from a named person a cheque form which before then had been obtained by a crime, knowing at the time of receiving that the cheque form had been dishonestly obtained. The defendant successfully moved that no indictment should be presented on the ground that the depositions did not disclose that the cheque had been "obtained by any crime," as section 258 of the *Crimes Act, 1961* required.

Wild CJ considered that, if anything, the case before the Court was stronger than *Walters v Lunt*, in that the depositions contained evidence that the named person had been acquitted of stealing on account of her insanity:

> "Therefore they show positively that the cheque was not 'before then obtained by a crime'."[47]

22. In *Dolan*,[48] the owner of some brass castings found them in the pockets of the thief. He sent for a policeman. The policeman took the castings, and he went with the owner and the thief to the defendant's shop, where the thief had previously sold other stolen goods. The policeman gave the goods to the thief, who was then sent by the owner to sell them in the shop. This the thief did. The shopkeeper was successfully prosecuted for receiving but his conviction was quashed by the Court of Criminal Appeal.

Lord Campbell LJ said:

> "If an article once stolen has been restored to the master of that article, and he having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the Act of Parliament?"[49]

23. In *Schmidt*[50] four thieves stole goods from the custody of a railway company, and sent them in a parcel by that company's line addressed to the defendant. The theft was discovered during the transit. A policeman attached to the company opened the parcel, established what its contents were, retied it, and later directed a porter to take it to the defendant's house. This was done. The policeman found the parcel unopened in the house, and arrested the defendant.

The Court for Crown Cases Reserved, by a majority, quashed the conviction. Keating J said:

> "If the goods got back into the possession of the owner, then, according to *Dolan*,[51] the conviction is wrong. In this case, the property is laid in the railway company; and they must be taken to be the owners. Then the property is stolen from them and subsequently gets back into their possession. The felonious *transitus* was then at an end."[52]

Mellor J, who was one of those dissenting in the case, "concur[red] with the propriety"[53] of *Dolan*, but added that, in *Dolan*'s case,

> "the goods got back into the possession of the true owner. In this case the policeman merely looked at the goods,[54] and had not taken possession of them."[55]

Lush J held that, if the railway company had carried the stolen goods after the theft "in the usual course",[56] he would not quash the conviction. But, he noted:

> "while the goods are in their possession, they are discovered to be the stolen property, and after that the railway company did not intend to carry them on in the usual course, but made a mere pretence of doing so, and really held them to the order of the true owner."[57]

24. In *Villensky*,[58] a parcel of two dozen nightgowns was handed to a firm of carriers for conveyance to the consignees. While the parcel was in the depot, one Clark, an employee of the firm, was seen by another employee to remove it from one part of the premises to another. When another employee examined the parcel, he found that it had a label on it addressed to the defendants.

This employee reported the facts to his superintendent, who, having inspected it, gave directions that it should be replaced in the part of the premises where it had been found, and that a special delivery-sheet should be made out according to the name and address on the label. The superintendent also directed that two detectives should travel in the van with the parcel when it was being delivered.

The parcel was accepted by the defendants "under circumstances pointing clearly to the conclusion of complicity with [the thief], and knowledge on their part that it had been stolen".[59] No question arose on that point.

At the conclusion of the evidence, counsel for the defence objected that there was no case to go to the jury, inasmuch as at the time the parcel was received by the defendants it had ceased to be stolen property, the bailees, the carriers, having resumed actual possession of it. This objection was overruled, and the defendants were convicted of receiving. The question for the opinion of the Court for Crown Cases Reserved was whether on the facts the objection as a valid one. The Court held that the objection was valid. Lord Coleridge CJ said:

> "This is, in my opinion, a perfectly plain case, and is concluded by the decision in *Dolan*. There is no doubt that Clark stole these goods and the other two prisoners intended to receive them; but the carriers, in whose name those responsible for the prosecution insisted on the case going on, had in the meantime, before its receipt by the prisoners, got hold of the property, which, by their special directions, was sent off to the prisoners' house in a special van accompanied by two detectives. I must confess that I cannot conceive of a case of resumption of possession if this is not one."[60]

A L Smith LJ was of the same opinion. He said:

> "There is no doubt that Clark stole it; but after the theft the carriers regained possession of the property, and delivered it to the persons who have been convicted of receiving it. On the authority of *Dolan*,[61] and also I think on that of *Schmidt*,[62] I think it clear that possession of the stolen property was resumed by the carriers."[63]

Pollock CB also agreed. He said:

> "The decisions in *Dolan*[64] and *Schmidt*[65] are, in my judgment, founded on law and on solid good sense, and they should not be frittered away. It is, of course, frequently the case that when it is found that a person has stolen property he is watched; but the owner of the property, if he wishes to catch the receiver, does not resume possession of the stolen goods; here the owners have done so, and the result is that the conviction must be quashed."[66]

Finally, Cave J, concurring, considered it "impossible to distinguish this case from *Dolan*,[67] which, in my judgment, is directly in point".[68]

25. *Villensky* may be contrasted with *King*,[69] a decision of the English Court of Criminal Appeal, in 1938. A fur coat was stolen from a house. Shortly afterwards, the police went to a flat where they found a man called Burns. The police told him that they were making inquiries about some stolen property, and Burns said that there was nothing there. A little later, realising that the police were going to search his premises, Burns admitted the theft, and produced from a wardrobe a fur coat, which was done up in a parcel. Then, when one of the police was in the act of examining the contents of the parcel, the telephone rang and there was a conversation between Burns and the other party. The police heard Burns say: "Yes ... No ... Come along as arranged".

The police then suspended their operations so that this person might indeed come along as arranged. After twenty minutes the appellant arrived. He knocked at the door and, having been admitted by Burns, said: "I have come for the coat. Harry sent me". The police, who were hiding behind the doors, heard this remark. Burns handed the coat to the appellant.

The appellant was charged with receiving the coat, and convicted. The Court of Criminal Appeal dismissed his appeal.

Humphreys J, for the Court, noted that counsel for the appellant had argued that the conviction was improper because the coat was no longer stolen by the time the appellant received it. The difficulty with this argument was that:

> "the facts in this case fail to show that the stolen property had been reduced into the possession of the owner — which, of course, it had not been — or into the possession of the police, at the time when it was received by the appellant ... There is no doubt that in a very few moments it would have been reduced into the possession of the police, which would have been sufficient for the purpose of the legal argument that it was no longer stolen property. On the facts of this case, however, there was ample evidence (if there was any receipt at all by [the appellant], though it was not admitted by him) that, at the time of the final possession of the coat it had not been in the possession of the police officer, and that it was stolen property."[70]

King has met with little enthusiasm among the commentators.[71] *Smith & Hogan* observe that:

> "[i]t may be questioned whether this case is not really on the other side of the line. No doubt it is not every act which will reduce the goods into the possession of P — for instance an act done simply to identify the goods[72] — but it seems somewhat unrealistic to say, in circumstances like these, that the police did not possess the goods when they had taken the parcel and were *examining the contents*. If it be said they had not yet ascertained it was the coat for which they were looking, they had no reason whatever to doubt C's word and their subsequent conduct showed they entertained no doubts on that score. It may be wondered whether a similar tolerance would have been shown to

D on the question of possession if the police had arrested him as he was in the act of examining the contents of the parcel."[73]

(b) Property Obtained Under Circumstances Amounting to Felony or Misdemeanour[74]

26. The indictment "must specify that the property was obtained under circumstances amounting to a felony or misdemeanour known to the law".[75] A conspiracy to obtain goods[76] or money[77] by fraud, embezzlement[78] and "incurring a debt or liability [or] obtaining credit under false pretences or by means of other fraud"[79] fall within the scope of this requirement.

The word "obtained" is important: it has been held that section 33 does not extend to cases of receiving goods which had been obtained lawfully but had been subject to later fraudulent misappropriation, unless the misappropriation amounted to larceny by a bailee or servant, or embezzlement.[80]

Samuels says:

> "By 'obtained' an actual or physical obtaining is meant, and what is referred to is such obtaining as occurs in the case of obtaining by false pretences, and a larger and comprehensive form of words is used so as to include property obtained by any other kind of fraud."[81]

D. Proof of Theft[82]

27. Although there is no direct proof of the ownership and theft of the goods received by the defendant, the theft may be inferred from the circumstances.[83] In *Sbarra*,[84] in 1918, it was stated:

> "The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen and further may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft."

In *Cohen v March*,[85] where the defendants were charged with having received razor blades, Lord Goddard CJ, for the King's Bench Division, said:

> "It is not necessary to speculate on the circumstances which may lead a person in the presence of a policeman to tell an untruth. They very frequently do; they frequently tell unnecessary untruths which may often lead to their conviction. But the mere fact that the men told an untruth as to when they acquired these ... blades does not seem to me of itself, and without more, to be enough to say that it was evidence on which a jury could find that in fact the goods were stolen. I suppose there might be a case — circumstances differ so infinitely — in which a person makes a statement on which a jury would be justified in finding that he did know that the goods were stolen. For instance in *Rex v Mills*[86] the defendant was found dealing with valuable property, offering it at very much under its true value. When challenged he said: 'All I can tell you is that it is not the proceeds of a job in

> London.' The jury could infer from that that what he meant was that those goods were the proceeds of a job in the country and not in London. That would clearly be — and it was held to be — evidence from which a jury could infer that the goods were stolen. But I cannot find that in the present case the prosecution proved any circumstance with regard to the receipt of the goods by the defendants except their own statement, which was shown to be untrue as to the date when they obtained them."

In *Young*,[87] the following year, Lord Goddard CJ sought to place these remarks in context. The appellant had been found guilty of receiving a considerable quantity of new, untarnished and recently milled metal. The appellant had sworn that the metal had not been stolen. In upholding the conviction for receiving, Lord Goddard CJ referred to his earlier statement in *Cohen v March* that there might be a case in which a person makes a statement on which a jury would be justified in finding that he did know that the goods were stolen. He continued:

> "The court was not there intending to lay down any principle of law. They were merely dealing with the particular facts of the case, and they came to the conclusion that the evidence did not justify the jury in finding that the goods were stolen.
>
> In the present case again they so found, and, in the opinion of the court, there was evidence on which they could do so. There was a very careful summing-up by the deputy chairman, and the jury having seen the metal and heard the appellant . . . tell a story on oath which they rejected, it is not surprising that they came to the conclusion that he had stolen the property. It is one thing to make some answer to a policeman, it is quite another to give evidence on oath at the trial, and, if the jury found that they disbelieved [the appellant] on oath, they might think he had a good reason for telling a perjured story and they could find him guilty of stealing."

In *Fuschillo*,[88] the accused was found with over a ton of sugar on his premises at a time, during the war, when sugar was rationed. There was no direct evidence as to its provenance, but the accused, when cautioned, had been unwise enough to say:

> "I don't know why I took it in. I'm a fool. This means going away."[89]

The English Court of Criminal Appeal affirmed the conviction. The court was satisfied that the surrounding circumstances provided sufficient evidence to go to the jury on the charge. The court referred with apparent approval to the statement in *Sbarra*[90] quoted above.

In England, the courts have evinced some difficulty in coping with cases where evidence as to the provenance of the property is attributable solely to the statement of the accused. The decisions are not easy to reconcile, but some strands of a coherent approach are discernible. If the statement of the accused is to the effect that he acquired the property at a ridiculously low price, this affords evidence that the property was stolen.[91] Where, however, the prosecution have to rely merely on the admission by the accused that the property is

stolen, there being no other evidence on the point, it seems that the court should treat this evidence as hearsay and acquit.[92]

E. Thief as a Witness for the Prosecution

28. The thief is a competent witness for the prosecution.[93] Since he is an accomplice, the trial judge must warn the jury of the danger of convicting the defendant of receiving on his evidence unless it is corroborated[94] in some material particular which implicates the defendant.[95]

Samuels states:

> "The thief might allege a crime against anyone against whom he had a grudge from malice or revenge. The fact that the property was found on the defendant's premises has been held to be sufficient corroboration, though this seems open to doubt.[96] The thief himself may have put the property there."[97]

As Pollock CB said in *Pratt*,[98] the thief:

> "proves the theft, he proves the possession (for the mere fact of the goods being on the prisoner's premises which might be without his knowledge or assent, does not prove possession, much less receiving by him), and he proves the guilty knowledge. There is nothing to confirm him, except a fact which is quite consistent with the falsity of his story; for he might have put the goods on the prisoner's premises without his knowledge. The evidence, therefore, is not such as would make it safe or proper to convict, and the jury ought to acquit."

F. Difficulty in Proving Documentary Records or Computer Print-outs

29. In cases of receiving on a large scale, the property may consist of substantial numbers of consumer goods, such as television sets or video recorders. In these circumstances, the owner may be unable to identify the individual items and may seek to bridge this evidential gap by producing invoices or delivery dockets bearing serial numbers of one sort or another. This, however, may in turn be met by the objection that only the person who actually entered up the invoices or delivery dockets can prove them under the rule against hearsay. In some cases, of course, it may be simply impossible to produce any such evidence, a lacuna in the law which was strikingly illustrated by the leading English case of *Myers v Director of Public Prosecutions*.[99] The facts in the case are helpfully summarised in a leading English textbook as follows:

> '[T]he accused was charged with frauds involving passing off stolen cars as models rebuilt from wrecks. In order to avoid detection the stolen cars had to have their own identifying numbers removed and the identifying numbers of the wrecked cars substituted for them. Unfortunately for this enterprise the number cast into the cylinder block could not be changed. The prosecution case thus rested upon the discrepancy in the relevant cars between the numbers which could be changed, which corresponded to those of a wrecked car, and the one which

> could not be changed and accordingly corresponded to that of a stolen car. In order to establish the relevant combinations of numbers the prosecution called as a witness the custodian of the manufacturer's records. These consisted of microfilmed copies of record cards which passed along the production line with the vehicle and on to which the relevant numbers were entered. After having been filmed the original records were destroyed. It was not denied that the records were inherently reliable, nor that no oral testimony would have been credible, even if those who wrote the numbers on the cards could have been identified and found. It was, however, held by the House of Lords that these records amounted to hearsay and came within no recognised exception to the rule.[100]"

In the Law Reform Commission Working Paper on the Rule Against Hearsay,[101] doubts were expressed as to whether *Myers* represented the law in the jurisdiction. It was pointed out[102] that a less restrictive approach to the admissibility of records had prevailed in other common law jurisdictions. Reference was made *inter alia* to the decision of the Supreme Court of Canada in *Ares v Venner*[103] where it was held that "hospital records including nurses' notes made contemporaneously by someone having personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein".

It should not be thought, however, that the decision in *Myers* necessarily represents the law in this jurisdiction. In *Marley*,[104] Keane J, speaking for the Court of Criminal Appeal, said:

> "The applicant relied in the course of his submissions on the decision of the House of Lords in *Myers v Director of Public Prosecutions*. In that case, it was clear that no useful purpose would have been served by calling the various employees of the motor car company (even if they had been identifiable) who had filled in the various record cards since it was inconceivable that they could have any recollection of recording individual numbers. Nevertheless, the House of Lords held in that case that without such evidence the records were inadmissible as not falling within any of the established exceptions as to the rule against hearsay. By contrast, in the present case, it could hardly be said that no useful purpose would be served by calling [B], the identifiable and identified author of the disputed entries, who alone could give firsthand evidence of the manner and circumstances in which they were made. The court, accordingly, finds it unnecessary to express any opinion as to whether the *Myers* case should be followed in this country, having regard to the fact that the principle it lays down has not been applied in certain other common law jurisdictions (and has been reversed by statute in the United Kingdom: see *The Rule Against Hearsay*, [Irish] Law Reform Commission, Working Paper No. 9-1980 pp. 79-80)."

In *Prunty*,[105] McCarthy J, speaking for the Court of Criminal Appeal, said:

> "Counsel for the Director of Public Prosecutions, in this Court, has not sought to contest that there was this element of hearsay

> but has asked this Court to adopt what might be termed the somewhat robust attitude taken by Lord Pearce and Lord Donovan, in the minority, in *Myers v Director of Public Prosecutions*. It may be, as in *Myers* case, where the essential witness cannot be obtained, the court should feel obliged to admit records, albeit hearsay, *but there is no evidence that such is the case here*. At first sight, in any event, it would seem that a means of proof analogous to that of the Bankers Books Evidence Act would require the intervention of the legislature."

Both of these passages are clearly *obiter*. It cannot, in these circumstances, be assumed that, in a case where the issue directly arose, the Court of Criminal Appeal or the Supreme Court would necesarily adopt the same approach as the majority in *Myers*. It is, accordingly, surprising to find that in receiving prosecutions in the Circuit Court it is accepted, apparently without argument, that it does indeed represent the law in this jurisdiction.

G. Property Stolen Abroad

30. We now consider subjection (4) of section 33 of the 1916 Act, which deals with receiving property stolen abroad. The background to the subsection is of some interest. In *Debruiel*,[106] a person who had robbed a house in Guernsey and taken the stolen property to England was prosecuted for larceny and receiving, in Devonshire. The charges were held unsustainable. Byles J said:

> "The island of Guernsey was not a part of the United Kingdom, and a larceny committed therein would be in the same position here as if it had been committed in France. Now, clearly a larceny committed in France could not be taken cognizance of in this country. The statute cited as to venue[107] was expressly limited to a larceny within the United Kingdom. Nor could the prisoner be convicted of receiving, because that crime consisted in the guilty receipt of stolen goods; that is to say, goods stolen according to the law of England, and that law does not recognise a stealing in a foreign country as a crime which it will punish."[108]

This ruling was followed until the passing of the *Larceny Act 1894*, section 1 of which was substantially reproduced in section 33(4) of the *Larceny Act 1916*.

Section 33(4) provides that:

> "Every person who, without lawful excuse, knowing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside the United Kingdom, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable to penal servitude for any term not exceeding seven years."

31. After Independence, the question arose as to the scope of section 33(4). In *Finegan*,[109] FitzGibbon J, speaking for the Court of Criminal Appeal said:

> "By sect. 3 of the *Adaptation of Enactments Act, 1922* the expression 'United Kingdom' in ... sub-section [(4) of section 33] means 'Saorstát Éireann'. So interpreted, that sub-section presupposes in the first instance a taking of property outside the Saorstát under such circumstances that it would, if committed within the Saorstát, have been a felony or misdemeanour, and provides that any person who receives or has in his possession property so taken outside the Saorstát shall be guilty of an offence of the like degree (whether felony or misdemeanour).'

The result of this interpretation was satisfactory: property stolen in either Northern Ireland or in Britain fell within the scope of the subsection. But this view has not ultimately prevailed.

It has twice[110] been held by the Supreme Court that section 33(4) applies where goods are stolen in Northern Ireland, *but not in Britain*. This conclusion results from a different interpretation of section 3 of the *Adaptation of Enactments Act 1922*. In *The State (Gilsenan) v McMorrow*,[111] Henchy J said that the range of adaptation effected by section 3 was as follows:

> "1. Whenever one finds the name 'Ireland' alone in a British statute, one reads it as meaning Saorstát Éireann.
>
> 2. Whenever one finds the expression 'Great Britain and Ireland' in a British statute, one reads it as meaning Great Britain and Saorstát Éireann.
>
> 3. Whenever one finds the expression 'United Kingdom' (i.e. of Great Britain and Ireland) in a British statute, one reads it as meaning Great Britain and Saorstát Éireann."

In *The People (Attorney General) v Ruttledge*,[112] O'Byrne J (for the Court) had said:

> "Section 33, sub-s. 4, of the Act of 1916 contemplates two separate, distinct, and mutually exclusive areas being (a) the receiving and possession of property in the United Kingdom and (b) the stealing or improper obtaining of the property outside the United Kingdom. The effect of adopting that statute is to make it binding upon the State as though it had been passed by the Oireachtas and, accordingly, the receiving or possession must take place within the territory of the State, i.e., the territory for which the Oireachtas is purporting to legislate. The original stealing or obtaining of the property must have taken place outside the United Kingdom, as that expression has been adapted, that is to say outside Great Britain and Ireland in the special sense in which 'Ireland' is used in the Act of 1937. This brings about a peculiar and, perhaps, unexpected result. Where, as in this case, the original larceny of the property is alleged to have taken place in Belfast, the case comes within s. 33, sub.-s. 4, of the Act of 1916 and may be prosecuted under that subsection; whereas, if the original larceny had taken place in any other part of Great Britain, the sub-section would have been inapplicable."

In *Gilsenan*'s case,[113] Kenny J, joining with the other members of the Supreme Court in expressing agreement with O'Byrne J's analysis, commented:

> "This leads to the remarkable conclusion that it is not a crime under our law to receive or have possession in the State of goods stolen in Britain. The close commercial connections between Britain and the State make it desirable that amending legislation should be introduced and passed."

32. It should, however, be noted that the observations on these matters in *Ruttledge* and *Gilsenan* were *obiter*, since in both cases the property was alleged to have been stolen in Northern Ireland. It is also at least arguable that the opinion of the court in both cases was given *per incuriam*, since their attention does not appear to have been directed to the provisions of s. 39 (3) of the Act of 1916. This provides that:

> "Every person who receives in any one part of the United Kingdom any property stolen or otherwise feloniously taken in any other part of the United Kingdom may be dealt with, indicted, tried and punished in that part of the United Kingdom where he so receives the property in the same manner as if it had been originally stolen or taken in that part."

Applying the form of adaptation found in *Ruttledge* and *Gilsenan* to be correct, this would read:

> "Every person who receives in any one part of *Great Britain and the Republic of Ireland* any property stolen or otherwise feloniously taken in any other part of *Great Britain and the Republic of Ireland* may be dealt with, indicted, tried, and punished in that part of *Great Britain and the Republic of Ireland* where he so receives the property in the same manner as if it had been originally stolen or taken in that part."

It would appear to follow that a person could be prosecuted under this section in respect of property stolen in Great Britain but received in the Republic of Ireland.

It is, of course, the case that s. 39 (3) was enacted in its original form because of the existence of separate legal jurisdictions within the United Kingdom and in this general form ceased to be a necessary part of the legal framework of the 1916 Act so far as this jurisdiction was concerned after 1921. But it remains on the statute book and if the Act is to be literally construed in the manner proposed in *Ruttledge* and *Gilsenan*, the conclusion would seem to follow that it permits such prosecutions and convictions. It has also, however, the remarkable and patently unintended consequence that the State apparently assumed an extra-territorial jurisdiction which it could not enforce by providing for prosecutions and convictions in England in respect of receiving offences committed in England where the property was stolen in this jurisdiction. The only way in which this manifestly unreasonable result can be avoided is to adopt what has been called by the Supreme Court in another case[114] a schematic or teleological approach and to depart from the literal construction of s. 3 of the *Adaptation of Enactments Act 1922*. In the words of Henchy J in that case:

> "This means that [the legislative provision] must be given a construction which does not over-step the limits of the operative

range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act ... as a whole ... Such a departure from the literal in favour of a restrictive meaning was given this justification by Lord Reid in *Luke v Inland Revenue Commissioners*[115] when he said:

> 'to apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though the standard of drafting is such that it rarely emerges. The general principle is well settled. It is only when the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail'."[116]

The literal construction adopted in *Ruttledge* and *Gilsenan* of s. 3 of the *Adaptation of Enactments Act 1922* as applied to the relevant sections of the *Larceny Act, 1916* would clearly "over-step the limits of the operative range" of s. 39 (3). This result can be avoided only by departing from the literal construction and construing s. 3 of the *Adaptation of Enactments Act 1922* in this manner:

> "For the purpose of the construction of any British Statute, the name of 'Ireland' whether used alone or in conjunction with the expression 'Great Britain' or by implication as being included in the expression 'United Kingdom' and the expression 'United Kingdom' shall *where the context so admits or requires* mean Saorstát Éireann."

This is undoubtedly doing some violence to the words used in the section but can it be said that it is a construction of which the section is absolutely incapable? That seems a somewhat extreme view, given the finding by the Court of Criminal Appeal (admittedly, it would seem, without argument) in *Finnegan* that this was in fact what the section meant. It is surely beyond argument that it is what was intended.

In the result, it is thought that whether a schematic or a literal construction is adopted of the relevant legislation, the *obiter dicta* in *Ruttledge* and *Gilsenan* are of doubtful authority. Clearly, however, the sensible course to adopt would be to introduce amending legislation putting the matter beyond any doubt.

H. Husband and Wife[117]

33. Husband and wife "stand in no special position"[118] with regard to the offence of receiving: either may receive property stolen or received by the other.[119] Of course, the nature of family life is such that stolen goods may be left at a house where they are taken in by one of the spouses at a time when the other spouse is out. When he or she returns, the question may arise as to whether his or her action (or more troublesomely, inaction) constitutes receiving. If the goods were left in pursuance of a previous authorisation by the absent spouse, then no great difficulty arises: the absent spouse would normally be guilty of receiving. If, however, there was no prior agreement, it seems that the

absent spouse may be convicted where he or she "adopted" the act of his or her spouse in taking in the goods. In *Dring*,[120] Martin B observed that "[a] man is said to adopt an act when it has been done for him, or by his previous authority, and he afterwards recognises it."[121] In that case the conviction of the husband was quashed because the Court for Crown Cases Reserved was not satisfied that the jury verdict to the effect that he had adopted his wife's receipt of the stolen goods had intended to attach to the concept of adoption the narrowly drawn definition given by Martin B. Cockburn CJ (with whom the other Judges concurred) said:

> "The word 'adopted' may mean that the husband passively consented to what his wife had done without taking any active part in the matter; and in that case we think it would not be right to say that he was guilty of receiving. True it may mean that he did take such active part, but we cannot put this rigid construction upon the word 'adopted'; and it would be going too far to say, upon this finding of the jury, that the conviction can be supported."[122]

This notion of "adoption" involves some other difficulties in relation to receiving stolen goods. In cases where the act has not been done with his or her previous authority, a question may arise as to whether the reception by the absent spouse took place before the adoption. Inevitably the absent spouse, on his or her return to the home, will have to look at, or be told about, the stolen goods there, *before* he or she decides whether to adopt what has gone before. One conceptual solution is to regard the *act of adoption* as constituting the reception by the spouse who has returned to the home.[123] But there may be cases where a period of passive acquiescence is followed by a more active participation. In these circumstances, it may be argued that the accused should not be convicted on account of the failure of the *mens rea* to coincide with the reception.

In the wake of the Supreme Court decision in *Walsh*,[124] holding that the presumption of marital coercion was inconsistent with the Constitution, there is no need to consider the earlier decisions[125] on this aspect of receiving.

34. As regards the position relating to receiving goods *stolen* by one spouse from another, it may happen that by reason of the restrictions contained in section 9(3) of the *Married Women's Status Act 1957*[126] the receiver of what would be stolen goods, save for this provision, will be exempt from responsibility under section 33. This was held in *Creamer*,[127] already mentioned, where the English Court of Criminal Appeal construed 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 the goods was not guilty of the offence of receiving since they were not stolen goods.

I. Knowledge

(i) "Knowledge" In General

35. Section 33 (1) of the *Larceny Act 1916* requires knowledge on the part of the defendant that the goods were stolen. What does "knowledge" mean in this context? Since it is necessary for the prosecution to establish that the goods *in fact* have been stolen, the only type of case that can warrant a conviction is where the defendant believed that the goods were stolen and his belief was *correct*. Again, however, one must ask what is meant by "belief"in this context? A person's belief may range from complete certainty through confident belief to mere suspicion. The strength of the belief may also bear a close relationship to the strength of the evidence on which that belief is founded, but there is no necessary connection. Thus, it is possible that a person may be fully convinced that goods were stolen, although his conviction is based on slight evidence only. Conversely, it may not occur to a person that goods were stolen, even though the evidence is compelling and such that no reasonable person could conclude otherwise. Moreover, in the latter case, a person confronted with such compelling evidence may simply exclude from his mind the necessary inferences which a reasonable person will draw.

36. In two decisions since Independence, the question of the relationship between knowledge and belief has been discussed by the Irish courts. In both of these cases, the courts took the position that knowledge, as distinct from belief, was essential.

In *Berber and Levey*,[128] a decision of the Court of Criminal Appeal in 1944, Black J, delivering the judgment of the Court, said:

> "Taking the charge of the learned Judge as a whole, the jury might well have understood from it that the standard of ordinary prudence in commerce is the test to be applied to the conduct and explanations, acts and omissions, of the accused persons. The question of guilty knowledge is well dealt with in Wills on Circumstantial Evidence, 7th Ed., p. 103 in the following passage: 'It is not necessary that the receiver of stolen property should have obtained a guilty knowledge by direct information; it is sufficient if the circumstances under which it was received were such as must have satisfied any reasonable mind that it must have been dishonestly obtained.' The word 'must' deserves emphasis in both places where it occurs in this passage.
>
> The fact that a person has been so imprudent that he did not know that the property was stolen, when, it he had not been so imprudent, he would have known it, is the negation of guilty knowledge. It would be absurd to regard it as a proof of the very thing it negatives. To set up ordinary prudence as the test of guilty knowledge is to make imprudence a necessary badge of fraud, whereas a reasonable mind may often be satisfied that property was received under circumstances indicating a transacting (*sic*) that was casual or incautious, indiscreet or venturesome, or even rash, without being criminal."

37. In *Hanlon v Fleming*,[129] the Supreme Court addressed the question. The case was concerned with extradition, and the accused

contended that section 22 of England's *Theft Act 1968*, which included the expression "knowing or believing", did not correspond with section 33(1).

Henchy J, with whose judgment the other members of the Court, O'Higgins CJ and Griffin J, agreed, said:

> "A series of judicial decisions, both in this country and in England, has firmly established that it is essential for a conviction for receiving stolen goods contrary to s. 33, sub.-s. 1, of the Act of 1916 that the accused must, at the time of the receiving, have actually known the goods to have been stolen. Recklessness as to whether they were or were not stolen is not sufficient. Actual knowledge of the fact that they were stolen is of the essence of the offence. This is not the same as direct knowledge, such as an accused would have if he saw a looter smash a shop window and abstract goods which were displayed inside. Of course, the actual knowledge may be proved circumstantially."[130]

Having quoted from Black J's judgment, for the Court of Criminal Appeal in *Berber and Levey*,[131] Henchy J said:

> "In dealing with the arguments propounded in this case I am not entitled to analyse or interpret the *Theft Act 1968*. I must focus my attention on the words 'knowing or believing the same to be stolen goods' and first consider whether a conviction under s. 33, sub.-s. 1 of the Act of 1916 which contained those words would be good. I am satisfied that it would not. Apart from the fact that it might be held bad for duplicity, it would indicate that the jury may have found the *mens rea* to be something less than actual knowledge that the goods had been stolen; that would be in the teeth of s. 33, sub.-s. 1, of the Act of 1916 and the judicial decisions under it.
>
> While knowledge and belief frequently coincide or overlap (for example, I both know and believe that this is the Supreme Court), there are many matters which one may believe to be correct without being able to say that one knows them to be correct. For example, I may believe that there is life in outer space, that evolution is the origin of species, that a particular person did a particular act, but I may have to admit that I do not know, or do not know with any substantial degree of certainty, that such beliefs are well founded. Without entering into the intricate logical, metaphysical and philosophical problems involved in a comparison of knowledge with belief, and keeping the matter on the plane of ordinary usage (which is, presumably, how it should be dealt with by both judge and jury), I would point to the commonly used expression 'I believe it to be so, but I do not really know'."[132]

Henchy J also cited[133] the following passage from Glanville Williams:

> "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."[134]

38. In the light of these decisions, the law in Ireland can be stated to be as follows:

1. Nothing less than actual knowledge that the goods were stolen is sufficient to found a conviction for receiving stolen goods.
2. Actual knowledge need not be *direct*: thus, the alleged receiver need not have witnessed the theft of the goods.
3. Since actual knowledge is essential, a *belief* that the goods were stolen falling short of such knowledge will not suffice. *A fortiori*, mere *suspicion* that they were stolen will not suffice.
4. Recklessness as to the provenance of the goods is also not sufficient to found a conviction in respect of stolen goods.

(ii) **Knowledge of Category of Crime**[135]

39. In the English Divisional Court decision of *Nieser*,[136] in 1958, it was held that, where a person is charged with receiving property obtained under circumstances amounting to misdemeanour, the prosecution must prove that he "knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to misdemeanour",[137] though it was not necessary to prove that he "knew that [it] was obtained under circumstances which amount in law to the specific misdemeanour by which [it was] in fact obtained".[138] On the other hand, said Diplock J, for the Court, it was:

> "not sufficient merely to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell, which we feel compelled to hold is an essential ingredient of the offence charged."[139]

The Court was willing to apply the same rules as to property obtained by felony as it had articulated in relation to property acquired by misdemeanour. Diplock J said:

> "Similarly, where property has been stolen or obtained under circumstances which amount to felony it is sufficient, and it is also essential, to charge and to prove that the receiver knew that the property fell into the general category of property which has been obtained under circumstances which do in law amount to felony, but it is unnecessary to prove that he knew that the property was obtained under circumstances which amount in law to the specific felony by which it was in fact obtained."[140]

Nieser met with a critical response from the commentators.[141] As one of them observed:

> "The astonishing and absurd result is that to a charge of receiving property knowing it to have been obtained by a

misdemeanour it is a defence to show that the defendant believed it was obtained by a felony."[142]

Of course, the decision in *Nieser* was perfectly correct having regard to the manner in which section 33 (1) was drafted. The "astonishing and absurd" result is thus attributable to the subsection rather than to the court.

The fact that the boundary line between felony and misdemeanour may often be difficult to draw on the facts of a particular case gives rise to difficulties in this context. As has been pointed out, this line is "often arbitrary and finely drawn, as between obtaining by false pretences and larceny by a trick, and the defendant might well not know of the exact circumstances".[143]

(iii) When Must the Accused Have the Guilty Knowledge?

40. In *Johnson*,[144] Grantham J stated that:

> "the innocent receipt of a chattel, and a subsequent dishonest appropriation of it after knowledge that it is stolen do not constitute the crime of receiving unless something takes place after the guilty knowledge which can be regarded either as a fresh act of receiving or as completing the original receiving if the latter was in fact incomplete at the time."

In *Lillis*,[145] the Irish Court of Criminal Appeal referred to the English case of *Tennet*[146] with approval and applied the principles it embraced. The Court held that there was no basis for the applicant's contention that the words used by the trial judge in his direction to the jury had conveyed to them that they should convict if guilty knowledge supervened upon the innocent receiving. The case involved a motor car which had admittedly been stolen and which was in the possession of the applicant for a period of at least ten days. The trial judge had told the jury that if "the evidence is such as to satisfy you that while it was in his possession he had guilty knowledge ... and if you can reasonably infer that the accused had guilty knowledge, that he knew it was stolen, then you can convict him in the absence of any explanation on his part," and "the question you have to decide is, have you sufficient facts and circumstances there to suggest to you a reasonable inference of guilty knowledge on the part of the accused that he was in possession of and sold a car which was not his own car, and which was a stolen car? You have that possession and sale by him within two weeks of the theft of the car in question and, as I told you, if you are satisfied that these circumstances do point to guilty knowledge on his part, then in the absence of an explanation you are entitled to convict."

In spite of the Court of Criminal Appeal's holding in this case, it can perhaps be argued that the charge did not adequately bring out the requirement that the knowledge be at the time of the reception. However, the report of the case mentions[147] that the trial judge in his charge first directed the jury "more than once" to concentrate their attention on the question whether the applicant received the car knowing it to have been stolen.

41. In *Matthews*[148] the appellant admitted that he knew the property was stolen at the time when he received it but he claimed that he received it with the intention of handing it over to the police. He sent a telephone message to the police and made an appointment; but, when the police came to see him, he did not hand over the property. He was placed in a police car and taken off in custody to a police station. Somehow or other, while in the car, he managed to slip the stolen property behind the seat of the car. It was found the following day.

The Chairman of Quarter Sessions directed the jury as follows:

> "You may think that when [the appellant] telephoned to the police he may have intended to hand over the stolen property. Assume that he did, if he changed that intention, then we are in this position: he received property which was stolen, which he knew to be stolen, and having no guilty intent originally, nevertheless he changed that intent and kept it, and my instructions are that in those circumstances that is no defence to these charges, because the guilty intent is present when he did not hand it over to the police."

The appellant was convicted. The Court of Criminal Appeal quashed the conviction. Goddard LCJ (for the Court) said:

> "In the opinion of this Court, that is a misdirection. If the appellant received the property in the circumstances which he desired the jury to find, with the intention of at once handing it over to the police, though the learned Chairman might well have asked the jury whether in all the circumstances the appellant could possibly have had that intention, then that would not be a felonious receipt.
>
> The Court cannot possibly accept the argument which has been addressed to it on behalf of the prosecution that a person who has received stolen property intending at once to hand it over to the police or the true owner, is nevertheless guilty of the felony of receiving stolen property. That would mean that if somebody chased a thief and picked up stolen property, which had been dropped by the thief, he would be guilty of the offence of receiving stolen property. That is so startling that I am surprised the argument can be put; at any rate, it is not the law.
>
> If at the time when the property is received the receipt is innocent, the fact that the receiver changes his mind and later misappropriates that property does not turn the receipt into a felony, and that has been the law of this country for very many years . . . It was never said in *Riley*[149] or in *Ruse v Read*[150] that the defendant had become guilty of receiving. What was said was that he had become guilty of stealing.
>
> In this case, if the jury had believed the appellant's evidence that he had innocently taken the property in the sense that he intended to return it to the true owner or the police, there would be no trespass, and therefore he could not be guilty of the offence of stealing. There was a complete misdirection by the learned Chairman on the law of receiving, and therefore the conviction on [this] count . . . must be quashed . . ."[151]

42. In *Curlija*,[152] a decision of the Supreme Court of South Australia, the defendant was convicted of receiving stolen money. A thief, one Stic, between 3 a.m. and 4 a.m. threw the money on the floor of the defendant's apartment, saying to him, "I have got some money for you", and mentioning the amount ($1,000). According to the defendant's evidence he said that he told Stic "It is too much for me", but Stic replied: "Just keep it, I got plenty". Stic then left. The defendant then went back to bed. When he got up, at about 6 a.m., he picked up the notes from the table and put them in a wardrobe. Later he and an associate heard about the robbery and it occurred to the defendant that the notes had been stolen. Later still, probably on the following day, when a large group of policemen appeared in the vicinity, he hid the money.

In upholding the conviction, the Court stated:

> "...we think that the practical common sense of the matter is that, for this purpose, the time of receipt is not a moment of time, but the period occupied by a transaction. In the present case, if the appellant's evidence is accepted, the transaction began when Stic threw the bundle of notes on the floor, and ended when the appellant made up his mind to keep them, whenever that was. But on his own showing there was nothing in the appellant's mind at 6 a.m. that had not been in it at 4 a.m."[153]

This approach is of debatable merit. It could lead to a conceptual justification for holding criminal a determination to keep the goods, made after reception. The argument would be that, unless the defendant clearly decided not to take the goods at the time of reception the fact that his mind remained open let the "process" of reception continue until he had made up his mind, one way or the other.

J. Evidential Aspects

(i) In General: The "Doctrine" of "Recent Possession"

43. We now must consider how the prosecution *proves* the case of receiving stolen property. Sometimes, of course, the position is reasonably clear. A receiver is caught in the act where the circumstances of the reception point unambiguously to his guilt; or, perhaps, a person confesses to being a receiver. Frequently, however, the case is less clearcut. The prosecution may invoke the facility afforded by section 43(1),[154] but the evidence thus permitted[155] to be adduced goes only to the question of proof of guilty knowledge.

Most frequently, the evidence as to the guilt of the accused is circumstantial. There is nothing wrong with circumstantial evidence if it is of sufficient potency to prove the case beyond reasonable doubt. The fact that the accused was found in possession of recently stolen goods may, in some circumstances at least, be regarded as circumstantial evidence worthy of close attention by the jury.[156] Glanville Williams has said that it is "difficult or impossible" to draw a firm boundary between circumstantial evidence and presumptions of fact.[157]

Possession of recently stolen goods without explanation gives rise to a presumption of fact (also called a discretionary presumption or a provisional presumption) that the person in possession is guilty of larceny or of receiving the property. Once the prosecution have raised this presumption of fact, the trial judge must let the case go before the jury. Such a presumption shifts the evidential burden from the prosecution to the defence. It does not affect the legal burden of proof which remains on the prosecution at every stage to satisfy the jury beyond reasonable doubt of the guilt of the accused.

Apart from their efficacy in getting the prosecution case to the jury, presumptions of facts are "the lowest and least effective presumptions".[158] The evidential burden is light and is easily discharged: "if the defendant gives any explanation of his possession consistent with his honesty so that the jury are left in doubt, he is entitled to an acquittal".[159]

If the accused gives no evidence at all, the judge should tell the jury that they *may* convict on the prosecution evidence, fortified as it is by the presumption of fact. We will see later, in our examination of the *Oglesby*[160] decision, how this presumption of fact was wrongly perceived as having acquired the status of a legal doctrine.

44. In the leading English case of *Schama and Abramovitch*,[161] Reading LCJ said:

> "Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the person is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution."

45. In *Finnegan*,[162] an Irish Court of Criminal Appeal case of 1933, the emphasis on the onus remaining on the prosecution was somewhat qualified. FitzGibbon J for the Court, said:

> "Possession of goods, recently stolen, is a fact from which a jury may infer, in the absence of a reasonable explanation on the part of the accused, either that he stole the goods, or that he received them knowing them to have been stolen. To sustain a conviction, the prosecutor must prove, first, that the goods were stolen in fact, and then that they were found in the possession of the accused, within a period which can reasonably be described as recently after the theft. It is for the jury, upon the facts in evidence, to decide whether the accused was himself the actual thief or whether he received the goods knowing them to have been stolen."[163]

The first sentence gives rise to no concern, but the second sentence might suggest that, once "recent possession" has been established, this would be sufficient to sustain a conviction.

In *Berber and Levey*,[164] the Irish Court of Criminal Appeal addressed the issue. Black J, for the Court, said that:

> "as to the explanation of the receipt of the stolen property, whether the accused person has given any explanation or not, or whatever his explanation may be, it must never be forgotten that the one ultimate question is whether, upon the evidence as a whole, the prosecution has established beyond a reasonable doubt guilty knowledge on the part of the accused at the time of the receipt.[165] This question is distinct from, and is not necessarily to be determined by, the truth, or the probability, or or the reasonableness, in the estimation of the jury, of the story told by the accused if any explanation by him is before the jury.[166]"[167]

In *A.G. (Comer) v Shorten*,[168] Davitt P quoted the passage from Reading LCJ's judgment in *Schama and Abramovitch* and said:

> "This somewhat involved statement of the law has done duty for many years; and has, perhaps, led to some equally involved directions or misdirections being given to juries.[169] It, however, states one thing quite clearly: that the onus resting on the prosecution never changes; nor does any burden shift to the defence. In this respect it was approved of in *Woolmington's* Case.[170] Since *Berber and Levey's* Case[171] I think that the proper way in which to approach the determination of a case of receiving recently stolen goods is as follows: if the prosecution have established the fact that the defendant had possession of goods recently stolen, and has given an explanation that he came by them innocently, the tribunal, whether judge, justice or jury, must consider whether the facts established admit of any reasonable construction which is consistent with the innocence of the accused. If they do, and one such construction may be that the explanation is true, he should be acquitted; if they do not he may be convicted. It has to be remembered, however, that the fact that he made an explanation, and what he said, are parts of the circumstantial evidence in the case relevant to the issue whether or not he had guilty knowledge."

46. In *Oglesby*,[172] the Court of Criminal Appeal again addressed the question. Kenny J, speaking for the Court, said:

> "In the opinion of this Court the so-called 'doctrine of recent possession' does not alter the law relating to the onus of proof in criminal cases as it was stated in *Woolmington's* Case,[173] and in the... decision of the Supreme Court in *The People v Quinn*[174]... The cases decided before 1935 in relation to the so-called doctrine of recent possession in receiving cases, in so far as they decide that an onus lies on an accused person in possession of goods which have recently been stolen to give an explanation or in so far as they decide that the jury may convict him if they reject the explanation which he gives, must now be regarded as incorrect."[175]

Kenny J quoted the passages from *Schama and Abramovitch*[176] and *A.G. (Comer) v Shorten*[177] set out above, and said:

> "Both these passages show that the so-called doctrine of recent possession does not shift or discharge the onus which rests on the prosecution of proving that *on all the evidence* the accused was guilty[178]... All these cases are consistent with the view that the jury may infer guilty knowledge if they are satisfied that the explanation offered by the accused is untrue; they are not authorities for the view that the jury must, or should convict if they are satisfied that the explanation offered is untrue.
>
> As counsel for the prosecution placed reliance on what he called 'the doctrine of recent possession', we wish to say that it does not exist. The so-called doctrine is a convenient way of referring to the inferences of fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts. It is a way of stating what a jury may infer and references to it as a doctrine are misleading because they give the impression that possession of recently stolen property raises a presumption against the accused or casts some onus on him. (See the decision of this Court in the *A.G. v Finegan*,[179] the decision of the Queen's Bench Division in *D.P.P. v Neiser*[180] and the discussion in the third edition of Wigmore on Evidence, at sections 152, 1143, 1781 and 2513)."[181]

In *Neiser*,[182] Diplock J, speaking for the court, said:

> "The inference appropriate to the particular facts proved is not a presumption of law, it is merely an inference of fact drawn by applying common sense to the proved facts, and there is no 'doctrine' that in a receiving case where recent possession on the part of the accused is proved he is presumed, in the absence of evidence to the contrary, to have known the true facts of the way in which the goods were obtained."

More recently, McCullough J, speaking for the English Court of Criminal Appeal, in *Ball*,[183] said:

> "The so-called doctrine of recent possession is misnamed. It has nothing to do with goods recently possessed. It concerns possession of goods recently stolen. It is not even a doctrine. It is in fact no more than an inference which a jury may, or may not, think it right to draw about the state of mind of a defendant who is dealing in goods stolen not long beforehand. It is based on common sense."

There is nothing in these passages — or in any other judgments that we are aware of in Ireland and England — which should inhibit a jury from drawing appropriate inferences of fact where stolen property is found without explanation in the defendant's possession, even though the theft was not "recent" (whatever that means). If gold bullion to the value of thirty million pounds stolen from Fort Knox turns up in a bank vault in Dublin thirty years later, and the customer in whose name it is lodged declines to give any explanation, it would appear that the jury would be entitled to convict if satisfied beyond reasonable doubt that he had received the bullion knowing it to be stolen. In such a case, it would appear, as a matter of common sense, that they should be

entitled to draw such an inference. More characteristically, however, prosecutions for receiving are brought where the goods have been recently stolen and hence the evolution of the "doctrine" under consideration.

It is of interest to note that the "doctrine" appears to have arisen from a misunderstanding by counsel for the appellant in *Schama and Abramovitch* of the trial judge's charge. The trial judge — as quoted — said nothing at all in his charge about the fact that the goods were *recently* stolen and the inferences that might be drawn from that fact. The appeal was allowed principally on the ground that he had failed to remind the jury that the burden of proof rests at all times on the prosecution. The impression seems to have developed, however, that the court was laying down some sort of doctrine peculiar to recently stolen goods. It would seem that this mistaken notion has been finally expelled from the law in both Ireland and England as in other jurisdictions.

47. If the "so-called doctrine"[184] of recent possession has no distinctive evidential implications, then there is little point in worrying over the question whether possession is or is not "recent". Nevertheless the courts have devoted much attention to this issue over the years. Samuels notes that:

> "recent possession has not been established in cases of silk stolen eight months previously,[185] nor of a horse or sheep stolen six months previously, [186] nor of an axe and saw stolen three months previously.[187] But the fact that cloth, even though passing from hand to hand, had been stolen two months previously was left to the jury, perhaps a little surprisingly.[188] Recent possession has been established where the stolen property was found hidden on the person of the defendant the day following the theft and he said that he found it.[189] In one case the defendant lodged with X, and subsequently disappeared. Later X's wife left X, and was subsequently found with the defendant who was in possession of a large quantity of X's property, having some on his person. There was held to be sufficient evidence of recent possession to go to the jury."[190]

(ii) "An Explanation Which Might Reasonably be True"

48. The reference to an explanation which "might reasonably be true" has given rise to some discussion. In *Berber and Levey*,[191] the applicants had given an explanation of how they bought stolen goods from the thief, believing that he had got them honestly. The Judge told the jury, correctly, that, if this explanation might reasonably be true, they ought to acquit on the receiving charges. But then the Judge went on to tell them that, if the explanation might *not* reasonably be true, it would be their duty to convict. The Court of Criminal Appeal held that the effect of these two inconsistent instructions was that the jury had been "presented with an illusory antithesis on a vital issue".[192] Since it was impossible to be sure that the jury had not acted on the second of these instructions, the conviction could not stand.

In *Garth*,[193] the English Court of Criminal Appeal sought to clarify what was said in *Abramovitch and Schama* on this question. The Recorder had stated the law as follows:

> "Anyway, the prosecution have to prove guilty knowledge, and in the absence of any explanation by the accused man you are entitled to convict him of receiving stolen goods knowing them to have been stolen, if he fails to give an explanation which you can possibly believe. If, on the other hand, he gives an explanation, and that is one which, although you do not think it to be true, you think might possibly be true, then he is entitled to be acquitted."

This direction met with the disapproval of the Court of Criminal Appeal. Goddard LCJ (for the Court) said:

> "That was stating the law far too favourably because, of course, any explanation may possibly be true. That is not in the least what *Abramovitch's* case lays down. I have more than once endeavoured to say what *Abramovitch's* case does lay down, and it is this: Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possibly be true, because, as I have said, any account may possibly be true. A much more accurate direction to the jury is: If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction."[194]

In *Rawther*,[195] a decision of the Supreme Court of Ceylon in 1924, Bertram CJ referred to *Abramovitch and Schama* and said:

> "[T]he perplexity that has been created by *Abramovitch* does not arise so much from any difficulty in apprehending its principle, but from a particular expression used by Lord Reading in stating it. In phrasing this statement Lord Reading made a slight verbal departure from the customary phraseology. Instead of the ordinary expression 'a reasonable explanation' he used the expression 'an explanation which may be reasonably be true'... I doubt whether Lord Reading had any specific intention in making this verbal variation. By 'an explanation which may reasonably be true', I think he simply meant, 'a reasonable explanation'. But the expression seems to have been interpreted as though it meant, 'an explanation which is physically possible'. At any rate, in *Norris*[196] the jury found, firstly, that the prisoner's explanation might reasonably be true; and secondly, that it was not true in fact. It is satisfactory to note that it has been authoritatively declared by the judgment in this case that these two findings are incompatible.
>
> To say that an explanation is reasonable means that it is reasonable in all the known circumstances of the case..."[197]

In *Melody*,[198] a decision of the Irish Court of Criminal Appeal in 1967, Ó Caoimh P, for the Court, said that in a prosecution under section 33 for receiving

> "[t]he jury should be told that if they believe the explanation given by the accused they should acquit him; that if they think that his explanation might reasonably be true, though they are not convinced of its truth, they should also acquit him; and that if they are of opinion that the explanation is not true that in itself does not establish the guilt of the accused, but the fact that he has given an explanation which they believe to be untrue is a factor to be considered by the jury, together with all the other relevant circumstances, on the question of his guilt."

The trial judge had directed the jury to the following effect:

> "It is for you to say if it is an explanation which might reasonably be true. If you consider that it might reasonably be true you must acquit the accused. If you come to the opposite conclusion, that is, that you do not think it might reasonably be true, it means the State has proved the case."

The Court of Criminal Appeal held that this direction was "misleading in that it conveyed to the jury that the untruth of the explanation offered by the accused established his guilt".[199]

More recently, in *Rooney*,[200] Finlay CJ, speaking for the same court and referring to the principle in *Oglesby*, said:

> "that principle, shortly stated, is that the jury is obliged to acquit if they accept that the explanation given by the accused is true or even if they do not believe it to be true they accept that it might have been true".

It is respectfully submitted, in the light of *Melody* and the other authorities referred to, that this states the law too favourably from the point of view of the accused.

49. The mere failure by the accused to give an account of how he became possessed of property or the giving of a false account by him will not suffice to show that he stole or received the goods in his possession, unless there is other evidence indicating that the goods had been stolen. As Griffith CJ said in the High Court of Australia decision of *Trainer*:[201]

> "It is admitted that you cannot avoid the necessity of proving property in the thing stolen, or of proving that there has been a crime committed, by alleging that the property taken was that of some person unknown, but it is suggested that you can draw both conclusions from the mere fact that the person in possession of property does not satisfactorily account, or gives a false account of his possession, of it. To infer from a man's giving a false account of property which, *prima facie*, is his own, that he has stolen it, is an obvious fallacy. If the law is defective in that respect, it is a matter for the legislature, and not for the Courts to remedy."

(iii) Evidence as to Possession of other Stolen Property and as to Previous Convictions[202]

50. Section 43 of the *Larceny Act 1916* provides as follows:

> "(1) Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen,[203] or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings —
>
> (a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been[204] in his possession;
>
> (b) the fact that within five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last-mentioned fact may not be proved unless —
>
> (i) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given;
>
> (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession."

(a) Possession of Other Stolen Property

51. The substance of paragraph (a) first appeared in section 19 of the *Prevention of Crime Act 1871*. In *Ballard*,[205] in 1916, before the 1916 Act was enacted, Reading LCJ said:

> "It was urged that great care should be exercised in the recourse which is had to this section, and the Court agrees with [counsel] in that view. According to the common law at the time the Act was passed, on a charge of receiving, evidence could not be given of finding in the prisoner's possession other goods in respect of which he was not then charged. But Parliament in 1871 thought it right and in these cases of receiving stolen goods, evidence should be admitted which would not otherwise have been admissible. No doubt that was because in many cases there was not sufficient evidence of guilty knowledge. In those days a prisoner could not give evidence. Parliament said, 'Where you find a man in possession of stolen property he may be unfortunate, and not guilty, but if you find other stolen property in his possession it may not be easy to believe that it is merely a coincidence'. The section has to be carefully administered, no doubt, and ought not to be used where there are counts for both stealing and receiving for the purpose of getting a verdict on the count for stealing, where the court cannot exclude the evidence as there is a count for receiving; it might induce the jury to convict of stealing on very slight evidence. So if the charge is substantially one of stealing, and not receiving, the evidence ought not be given."

It is a matter for the discretion of the Court to decide whether the other goods not the subject of the indictment should be produced in court and evidence be given as to their being found in the possession of the accused until after they have been shown to have been stolen.[206]

If evidence is admitted as to stolen goods having been in the possession of the accused on an earlier occasion, and the evidence does not prove the fact that these goods were stolen, the Judge should direct the jury to disregard the evidence.[207] In *Girod*,[208] Alverstone LCJ observed that "[t]he non-production of a receipt is no evidence that a thing is stolen, and one hopes that no other rule will ever prevail".

Where section 43(1)(a) applies, the prosecution is not limited to giving evidence merely of the *fact* that stolen property was found in the possession of the accused: in *Smith*,[209] the English Court of Criminal Appeal was of opinion that "the same evidence can be given with regard to statements by the prisoner and to the circumstances in which other stolen goods were found in the prisoner's possession as could be given on the trial of an indictment for receiving those goods".

In *Hayes*,[210] it was held that the fact that the stolen property of which the accused was earlier found to be in possession is the subject of a second and similar indictment for receiving against the accused and about to be tried at the same assizes is not a reason for excluding evidence as to such possession. Lopes J was of the opinion that the 1871 statute contained "no limitation of the kind suggested"[211] It is possible that courts today would be more disposed to respond to the potential prejudice for the accused.

Section 43(1) does not have the effect of preventing the adduction of evidence which would have been available in the absence of the statutory provision. Thus, in *Powell*,[212] evidence by the thief that he had sold other stolen property to the appellant was held admissible.

(b) Previous Convictions

52. When it comes to giving evidence of previous convictions,[213] under the facility afforded the prosecution by section 43(1)(b), the courts have shown a clear appreciation of the dangers of injustice resulting for the defendant unless the facility is placed under strictly controlled limits. In *Davies*,[214] Lord Goddard CJ said that this type of evidence was:

> "of a most prejudicial kind and is only allowed in receiving cases because the legislature, no doubt, recognised the difficulty which often arises of proving guilty knowledge in receiving cases. In the opinion of the court it must be restricted to those cases."

Lord Goddard expressed the "true rule"[215] when he said:

> "If the case is substantially one of receiving and is presented to the jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted. At the same time it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that, if the prosecution feel that they cannot confine their case to one of receiving, but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then if they include in the indictment a count for either of those offences they must refrain from giving evidence of previous convictions."[216]

It is worth noting that evidence as to a previous conviction may be admitted "for the purpose of proving guilty knowledge". In *List*,[217] the "real issue"[218] was not that of guilty knowledge, but whether or not the accused ever came into the possession of the stolen goods. Roskill J held that, in the particular circumstances of the case, it was appropriate to exclude evidence as to previous convictions. The only other evidence against the accused was the otherwise uncorroborated evidence of the thief.

Roskill J said:

> "A trial judge always has an overriding duty in every case to secure a fair trial, and if in any particular case he comes to the conclusion that even though certain evidence is strictly admissible, yet its prejudicial effect once admitted is such as to make it virtually impossible for a dispassionate view of the crucial facts of the case to be thereafter taken by the jury, then the trial judge, in my judgment, should exclude that evidence."[219]

Roskill J reached his decision, first, as a matter of construction of the statute and, secondly, as a matter of principle, "the principle being that a trial judge... has an overriding discretion to exclude any evidence the prejudicial effect of which hopelessly outweighs its probative value".[220]

In *Herron*,[221] the English Court of Criminal Appeal held that Roskill J's judgment in *List* was "correct and sound in law".[222] The Court adopted and followed his decision to the fullest extent.

Samuels states:

> "Proof of previous convictions does not relieve the prosecution from the necessity of proving that the defendant knew that the property which is the subject matter of the trial itself was stolen; it merely eases the task."[223]

(c) Constitutional Implications of Section 43 of the Larceny Act 1916

53. Misgivings have been voiced as to the constitutionality of the section, although it does not appear to have been challenged in any case (perhaps because it is not availed of with any great frequency by the prosecution). The doubts arise as a result of the decision in *King v The Attorney General*.[224] It was there held that s. 24 of the *Vagrancy Act 1824* which created the offence of "loitering with intent" by a "suspected person or reputed thief" was inconsistent with the provisions of the Constitution. In the High Court, McWilliam J found that the terms of the section were inconsistent with Article 38.1 of the Constitution which requires that no person shall be tried on a criminal charge save in due course of law, stating that:

> "the provisions that evidence may be given of the known character of the accused and that no evidence need be given of any act showing, or tending to show, intent are contrary to the concept of justice which is implicit in the Constitution."[225]

The learned judge also observed that:

> "One of the concepts of justice which the Courts have always accepted is that evidence of character or of previous convictions shall not be given at a criminal trial except at the instigation of the accused, as that could prejudice the fair trial of the issue of the guilt or innocence of the accused."[226]

In the Supreme Court, the conclusion of McWilliam J as to the unconstitutionality of the section was unanimously upheld, but with some difference in emphasis in the judgments as to the basis of unconstitutionality. O'Higgins CJ confined himself to saying that he agreed with the reasons given by McWilliam J. Henchy J considered that the ingredients of the offence and the mode by which it could be committed exhibited so many features which offended the Constitution that it was unnecessary to specify the manner in which it violated Article 38.1. Kenny J was satisfied that the ambiguity and uncertainty of the offence which the section purported to create rendered it unconstitutional.

King, accordingly, cannot be regarded as authority for a general proposition that any law permitting the introduction of evidence of previous convictions of the accused, except in relation to sentencing, offends the constitutional guarantees of a trial in due course of law and of fair procedures in such trials. It is, moreover, a feature of *King* that the impugned section renders the previous convictions one of the ingredients of the offence. In the section under consideration, the introduction of the evidence is permitted solely for the purpose of establishing guilty knowledge. All that can be safely said, at present, is that *King* at least raises a doubt as to the constitutional propriety of the section which must be borne in mind when considering its retention in our law and *a fortiori* its possible extension.

K. The Relationship Between Larceny and Receiving[227]

54. The relationship between larceny and receiving has given rise to some problems. The courts are quite satisfied that "[t]he same person cannot be guilty of... stealing... and of receiving".[228] In the Supreme Court decision of *Carney*[229] in 1953, O'Byrne J regarded it as being "of course, elementary" that a charge of receiving implies that some person other than the accused stole the goods.

In the Supreme Court case of *O'Leary v Cunningham*[230] in 1980, Kenny rejected as "nonsense"[231] the view that, when several persons rob or steal, they can be regarded as having received the goods from each other. Kenny J was satisfied that "no one can rob or steal and at the same time receive".[232] He added:

> "The true position is that when one or several rob or steal, they cannot be convicted of receiving the stolen goods. They are guilty of robbery or stealing and not of receiving."[223]

In *O'Leary v Cunningham*, the defendant was charged with robbery and receiving. The District Justice convicted him of receiving, and made no order in respect of the charge of robbery. The defendant appealed to the Circuit Court. The evidence there established that the defendant had actually participated as a principal in the robbery. The

Circuit Court Judge stated a case to the Supreme Court, seeking to establish whether the Court on these facts had power to convict the appellant of receiving, and, if not, whether it might convict him of robbery.

The Supreme Court held that the answer to the first question was clearly in the negative. Kenny J first established that the District Court verdict was incorrect:

> "The very short interval in time ... between the robbery and the arrest and the fact that the two offences are charged in the charge sheet as having been committed at the same time and place show that the accused should have been convicted in the District Court of robbery and not of receiving and that the District Justice was wrong in convicting him of the latter offence."[234]

Although the Circuit Court had certain powers[235] to substitute a conviction for one offence for that of another, Kenny J was not aware of any statutory provision which allowed any Court to find an accused guilty of robbery when he had been charged with receiving stolen goods. Kenny J accepted the argument made by counsel for the appellant that the doctrine of *autrefois acquit* protected the defendant from conviction in the Circuit Court for the offence of robbery when he had already been acquitted of that charge in the District Court. The fact that the District Justice had failed to record a verdict[236] was irrelevant. Kenny J did not wish to conceal his reluctance to come to this conclusion, since it had "the effect that a man clearly guilty of the serious offence of robbery must be acquitted."[237]

55. In the English case of *Seymour*[238] Lord Goddard CJ set out a strategy to deal with cases where it may not be clear whether the accused was the receiver or the thief. He said:

> "In cases where the evidence is as consistent with stealing as with receiving, the indictment ought to contain a count for stealing and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then ... if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the count of stealing. Equally, if they come to the conclusion that it is a case of stealing, they should be discharged from giving a verdict on the count of receiving. Sometimes a difficulty has arisen. We have had to quash a conviction, say, for receiving and the court has come to the conclusion that the evidence showed stealing and not receiving. If a verdict has been returned on the count of stealing, this court cannot substitute for the verdict of receiving a verdict of stealing. If, however, the jury are discharged from giving a verdict on the count of stealing, and if this court comes to the conclusion that the proper verdict is stealing and not receiving, they can alter the verdict under the Criminal Appeal Act, 1907, Sect. 5(2) ... It is much better to put into an indictment, as a rule, both counts, although it very often happens that, as the case develops, it becomes a case either of

> stealing or receiving only... Therefore, while it is desirable that the two counts should be included in the indictment, the jury should be told, in cases where the evidence is equally consistent with stealing or receiving, that it is for them to come to the conclusion which is the right verdict, and if they find a verdict of guilty on one count, they should be discharged from giving a verdict on the other count."

Samuels states that:

> "[W]here, in pursuance of a common plan, A steals goods and immediately hands them over to B, waiting outside the premises, B cannot be convicted of receiving because he was a principal in the second degree to the larceny;[239] whereas if B were simply an accessory before the fact to the larceny and not a principal in the second degree, he can be convicted of receiving[240]."[241]

L. Thief Aiding and Abetting the Receiver

56. Although a thief will normally be charged with larceny rather than receiving, it seems that he may be open to a charge of aiding and abetting the receiver where he passes on the stolen goods to him. In *Carter Paterson & Pickfords Carriers Ltd v Wessel*,[242] the appellant was acquitted of larceny but convicted of receiving. The Divisional Court held that the conviction was proper.

Lord Goddard CJ said:

> "He ought to have been convicted... of stealing, but, having been convicted of receiving, the appeal ought to have been dismissed on the ground that although he was not a principal in the first degree, he was none the less a principal in the second degree... If ever there was a case in which a person aided, abetted, counselled or procured the commission of the offence of receiving, surely this is that case. He went off and fetched... the principal receiver, and brought him there in the car and thereby enabled the offence to be committed by [that person]. Naturally, in the ordinary course, if a man is convicted of receiving, one does not trouble to consider whether the thief aided and abetted the receiver, but that is the position in fact if it is he, the thief, who hands or sells the goods to the receiver, because except for the action of the thief, in those cases where the thief hands the goods or leaves the goods with the receiver, or sells them to him, the receiver would not have been able to receive the goods.
>
> Therefore, it seems to me to be clear, although this point has not arisen before, that a man who acts in this way can properly be convicted as a receiver although he is also the thief, because he has in this case procured the commission of the offence by the receiver."[243]

In spite of the possibilities afforded by *Carter Paterson & Pickfords Carriers Ltd v Wessel*, there is much to be said for the view that "a simple count for larceny against the thief would appear to be preferable in practice".[244]

M. Incitement to Receive[245]

57. Where a person incites another to receive he is guilty of an offence.[246] This is so even if the other person does not in fact receive.

Where there was no possibility of the other person's engaging in an act constituting receiving, the position becomes somewhat complicated. It would appear that the defendant should be liable if he believed that there was such a possibility,[247] though the cases on attempted receiving suggest that where there was in fact no stolen property, an indictment for incitement would fail.[248]

N. Section 13 of the Criminal Justice Act 1951

58. Section 13 of the *Criminal Justice Act 1951* provides as follows:

> "(1) A member of the Garda Síochána may arrest without warrant a person whom he reasonably suspects of having or conveying in any manner any thing stolen or unlawfully obtained.
>
> (2) A person who is charged before the District Court with having in his possession or on his premises with his knowledge or conveying in any manner any thing which may be reasonably suspected of being stolen or unlawfully obtained and who does not give an account to the satisfaction of the Court how he came by it shall be guilty of an offence and on conviction by the Court shall be liable to a fine not exceeding five pounds or, at the discretion of the Court, to imprisonment for a term not exceeding two months."

Subsection (2) of section 13 seeks to make possession of property that may reasonably be suspected of being stolen or unlawfully obtained an offence unless the defendant gives a satisfactory account to the Court of how he came by it. However that is not what the subsection actually says. It provides that a person charged with possession of such property "and who does not give an account to the satisfaction of the Court how he came by it" is guilty of an offence. It would appear that after section 13(2) was enacted, many successful prosecutions were brought until, in the mid-sixties, a District Justice adverted to this point and dismissed a prosecution. As the sub-section is drafted, a person cannot commit an offence until he actually appears in Court. A person cannot be charged with an offence before he commits it. The Attorney General of the day, subsequent Attorneys General and the Director of Public Prosecutions all saw the force of the District Justice's logic and the section has fallen into desuetude.

It is interesting to note that earlier statutory provisions which section 13(2) replaced were drafted in a similar manner. Moreover, equivalent legislation in some other jurisdictions is drafted in the manner which has given rise to concern here.

59. If we set aside for a moment the insurmountable difficulty perceived by the prosecuting authorities, it is of interest to examine some featues of the subsection. First, where the property is on the person's premises with his knowledge, it falls within the scope of the subsection even though it is not in his possession. This relieves the prosecutor from having to rely on the admittedly flexible concept of possession[249] in cases where the property is proven merely to be on the

premises with the knowledge of the person charged. Second, a person who conveys "in any manner" the property in question falls within the scope of the subsection even in cases where this conduct does not constitute receiving.[250]

Thirdly, it should be noted that it is not necessary to show that the person ought to have suspected that the property was stolen or unlawfully obtained when that person came into its possession. Thus the requirement as to the contemporaneity of the act of receiving and the guilty knowledge, which applies in relation to the offence of receiving,[251] has no counterpart in section 13(2). Reference to guilty knowledge brings us to the question of *mens rea* under the subsection. It should be noted that the test is an *objective* one, namely, that the property "may be reasonably suspected of being stolen or unlawfully obtained". It is thus not necessary to prove what the person actually believed. The subsection does not expressly mention whether it is the time the property was in possession of the accused (or on his premises with his knowledge) or the time of trial that is appropriate to determine the question whether the property may be reasonably suspected of being stolen or unlawfully obtained.

The present tense suggests strongly that it is the time of trial. If this is so, it ought be considered that hardship and injustice could be caused to a person in a case where, at the time he had possession of the property, there was no reason to have doubts as to the legitimacy of their provenance. Of course, the accused is free under the subsection, to provide a satisfactory explanation but it must at the least be considered unfair to expose him to the risk of conviction in the event of his unwillingness or inability to give this explanation. If the words in question were to be construed as referring to the time when the property was in the person's possession, this would impose a standard of objective due care which would be far easier to defend. Nevertheless, as we have mentioned, the language of the subsection seems to suggest the contrary interpretation.

60. The subsection also raises some doubts about the burden of proof. Presumably the prosecution must prove beyond reasonable doubt (i) that the property was in the possession of the accused or on his premises with his knowledge or conveyed by him, and (ii) that the property may be reasonably suspected of being stolen or unlawfully obtained. But the effect on the onus of proof of the reference to the person's failure "to give an account to the satisfaction of the Court" creates another problem. On one interpretation, it leaves to the Court the function of determining the quantum of evidence which satisfies it. It may, however, be argued that some specific standard is envisaged. To "satisfy" a Court would appear to be a formidable task, greater than that of simply giving *some* evidence, and greater than that of proof on the balance of probabilities. Indeed, it may possibly be that the standard envisaged is that of proof beyond reasonable doubt.

O. The Criminal Justice Act 1984

61. The *Criminal Justice Act 1984* includes a number of provisions

that are of relevance to the subject of receiving stolen goods. Section 16 is of most explicit relevance. It provides as follows:

> "(1) Where a member of the Garda Síochána —
>
> (a) has reasonable grounds for believing that an offence consisting of the stealing, fraudulent conversion, embezzlement or unlawful obtaining or receiving of money or other property has been committed,
>
> (b) finds any person in possession of any property,
>
> (c) has reasonable grounds for believing that the property referred to in paragraph (b) includes, or may include, the property referred to in paragraph (a) or part of it, or the whole or any part of the proceeds of that property or part, and
>
> (d) informs that person of his belief,
>
> he may require that person to give him an account of how he came by the property.
>
> (2) If that person fails or refuses, without reasonable excuse, to give such account or gives information that he knows to be false or misleading, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding twelve months or to both.
>
> (3) Subsection (2) shall not have effect unless the accused when required to give the account was told in ordinary language by the member of the Garda Síochána what the effect of the failure or refusal might be.
>
> (4) Any information given by a person in compliance with a requirement under subsection (1) shall not be admissible in evidence against that person or his spouse in any proceeding, civil or criminal, other than proceedings for an offence under subsection (2)."

62. A number of points about this section may be noted. Subsection (4) is of vital practical importance. It means, for example, that information which a person gives in compliance with subsection (1) may not be admitted in evidence against that person or his or her spouse in any proceedings for receiving stolen goods. Thus, a Garda who is suspicious as to the provenance of the goods might in many cases be reluctant to resort to the procedure permitted by section 16(1), because to do so may effectively close the door to a later prosecution for receiving. If the suspicion is indeed well founded and the case is otherwise a strong one, the receiver would be only too happy to admit his guilt, thereby making it very difficult to convict him of *any* offence, not even under section 16 since he would not have failed or refused to give an account of how he came by the property. Of course, evidence that might otherwise tend to implicate the defendant may always be given, in spite of subsection (4), but in practice this other evidence often will not be enough to sustain a conviction. None of the information given by the suspected person will be admissible and the effect of this may be to exclude valuable evidence.

In practice a Garda might consider it desirable to seek information as to the provenance of the goods *without* complying with the requirements of subsection (3). The case where resort to section 16 may prove attractive is where it seems[252] absolutely clear that a suspect will refuse to give an account of how he came by the property even after he had been told in ordinary language what the effect of this refusal might be.

One matter of interpretation which is not entirely clear concerns the sequence of facts specified in paragraphs (a) to (d) of subsection (1). Logically paragraph (c) must follow after paragraphs (a) and (b), and paragraph (d) must follow after paragraphs (a), (b) and (c); but the question arises as to whether, *temporally* speaking, paragraph (b) must follow paragraph (a). In other words, is it necessary that the Garda should actually have reasonable grounds for believing that an offence of stealing etc. has been committed *before* he finds any person in possession of any property? The answer would appear to be no. The entire subsection is drafted in a manner which seems to indicate that pains were taken to ensure that no such temporal sequence is necessary. It would have been quite easy to add to paragraph (b) some extra words, such as "which he believes may comprise part or all of such property", if a temporal sequence had been envisaged. The sequence may be explained by an assumption that goods will be found on premises and that before they are found, the Garda will have made an application for a search warrant under s. 42 of the *Larceny Act 1916*.

63. Section 18 of the 1984 Act should also be noted. It provides as follows:

"(1) Where —

(a) a person is arrested without warrant by a member of the Garda Síochána, and there is —

(i) on his person, or

(ii) in or on his clothing or footwear, or

(iii) otherwise in his possession, or

(iv) in any place in which he is at the time of his arrest any object, substance or mark, or there is any mark on any such object, and the member reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of the offence in respect of which he was arrested, and

(b) the member informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark, and

(c) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the

accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal.

(2) References in subsection (1) to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(3) Subsection (1) shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(4) Subsection (1) shall not have effect unless the accused was told in ordinary language by the member of the Garda Síochána when making the request mentioned in subsection (1)(b) what the effect of the failure or refusal might be.

(5) Nothing in this section shall be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(6) This section shall not apply in relation to a failure or refusal if the failure or refusal occurred before the commencement of this section."

Although the section does not appear to have been directed at the offence of receiving stolen property, it is drafted in such a way that it may be of some relevance. If property believed stolen may be described as an "object", then it may well be that a Garda can reasonably believe that the presence of stolen property, which is in the possession of a person, may be attributable to his participation in the commission of the offence in respect of which he is arrested, e.g. larceny or receiving stolen property.

Thus, the effect of section 18 would appear to be that the failure or refusal to account for property in one's possession in such circumstances (a) would enable the court or jury to draw such inferences from the failure or refusal as appear proper, and (b) on the basis of these inferences, would be capable of amounting to corroboration of any other evidence in relation to which the failure or refusal is material. It is true that a person is not to be convicted of an offence solely on an inference drawn from his or her failure or refusal to account for the presence of the property; but in some cases at least there will be other evidence. An important limitation imposed by section 18 is, of course, that the person must have been already arrested without warrant by a member of the Garda Síochána;[253] thus, the provisions of the section will not be capable of being availed of speculatively.

64. Finally, reference may be made to section 19, which is similar to section 18, but concerns inferences arising from the presence of a

person at a particular place "at or about the time the offence in respect of which he was arrested is alleged to have been committed". Again section 19, like section 18, appears capable of referring to the offence of receiving, especially to cases where the police arrest a person after a "tip off" that stolen property is to be handed over at a certain time and place. Again the restriction regarding arrest without warrant should be noted.

P. Attempted Receiving

65. It is, of course, quite possible for a person to be guilty of the offence of attempted receiving. He may, for example, be thwarted just as he is about to complete the reception of the stolen goods. A more difficult question arises where the goods are not actually "stolen goods" at the time they are received. Clearly the accused is not guilty of the full crime of receiving, but is he guilty of an attempt to receive?

In *Haughton v Smith*,[254] the House of Lords held that, where the goods were not stolen goods at the time of the handling, the accused, regardless of his *mens rea*, could not be convicted of attempted handling. Lord Hailsham LC said:

> "In my view, it is plain that, in order to constitute the offence of handling, the goods specified in the particulars of offence must not only be believed to be stolen, but actually continue to be stolen goods at the moment of handling. Once this is accepted as the true construction of the section, I do not think that it is possible to convert a completed act of handling, which is not itself criminal because it was not the handling of stolen goods, into a criminal act by the simple device of alleging that it was an attempt to handle stolen goods on the ground that at the time of handling the accused falsely believed them still to be stolen. In my opinion, this would be for the courts to manufacture a new criminal offence not authorised by the legislature."[255]

Q. Receiving as a Summary Offence

66. Section 97 of the *Larceny Act 1861* provides as follows:

> "Where the stealing or taking of any property whatsoever is by this Act punishable on summary conviction, either for every offence, or the first and second offence only, or for the first offence only, any person who shall receive such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a Justice of the Peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this Act made liable."

In contrast to section 33(1) of the 1916 Act, all that is necessary under section 97 is that the defendant knows that the property has been "unlawfully come by". Therefore, "[t]he fact... that he may think the property has been taken by felony, misdemeanour, or summary offence becomes irrelevant. It is enough that he knows the property, which

has in fact been taken in circumstances amounting to a summary offence, to have been taken by some criminal means."[256]

The requirement that the defendant's knowledge must be shown to exist at the time of the receiving applies to an offence under section 97[257] as it does to an offence under section 33 of the 1916 Act.

67. Apart from section 97 of the 1861 Act, section 2 of the *Criminal Justice Act 1951* permits summary trial of (*inter alia*) an offence under section 33 of the *Larceny Act 1916*, involving property the value of which does not, in the opinion of the Court, exceed £50 (amended to £200 by section 19 of the *Criminal Procedure Act 1967*) if the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be so tried, and the accused, on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily.

FOOTNOTES

[1] See Kenny's *Outlines of Criminal Law*, ch. 18 (19th ed., by J W Cecil Turner, 1966), Smith & Hogan, *Criminal Law*, 453-466 (1st ed., 1965), Archbold, *Pleading, Evidence & Practice in Criminal Cases*, 767-780, paras. 2081-2104 (36th ed., by T Fitzwalter Butler & M Garsia, 1966), *Russell on Crime*, chs. 66-69 (11th ed., by J W Cecil Turner, 1958), P A Ó Síocháin, *The Criminal Law of Ireland*, ch. 12 (6th ed., 1977), J Hall, *Theft, Law and Society*, 53-62, 70-76, ch. 5 (2nd ed., 1952), Samuels, *Receiving: The Present State of the Cases*, 3 Sol. Q. 12 (1964), Prevezer, *Some Aspects of Receiving*, 13 Current L. Prob. 60 (1960), *Anon., Receiving Stolen Goods Well Knowing Them to Have Been Stolen - Difficulty of Proof of Offence*, 85 Ir. L.T. & Sol. J. 25, 31 (1951), Binchy, *Receiving Stolen Property: Time for Statutory Extension?*, 105 Ir. L.T. & Sol. J. 189, 195 (1971).

[2] The common law misdemeanour of receiving appears to remain with regard to any form of receiving not specifically covered by the statute: cf. Archbold, *op. cit.*, para. 2081.

[3] See *Rooney*, C.C.A., 15 December 1986 (99-101/86).

[4] In *Smith*, 6 Cox C.C. 554, at 556 (C.C.A., 1855), Erle, J said:

> "'Possession' is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied — varying very much in its sense, as it is introduced either into civil or into criminal proceedings."

In recent years there have been many case dealing with the scope of the concept of possession in respect of drugs offences. These cases provide some useful insights but it would be wrong automatically to incorporate all of their *dicta* into the context of the offence of receiving stolen property: cf. C R Williams & M S Weinberg, *Property Offences*, 349 (1986).

[5] 98 I.L.T.R. 139, *Frewen*, vol. 1, p. 294 (C.C.A., 1964). See also *Minister for Posts and Telegraphs v Campbell*, [1966] I.R. 69, at 73-74 (Davitt P).

[6] 98 I.L.T.R., At 140, *Frewen*, vol. 1, p. 296.

[7] I.L.T.R., at 140, *Frewen*, vol. 1, p. 296.

[8] *Id.*

[9] 3 Ir. L.T. & Sol. J. 348 (Cr. Cas. Res., 1869).

[10] The report merely states: "From the bag the letters and parcels were sorted he might have taken them; but so might have others".

[11] 3 Ir. L.T. & Sol. J., at 348.

[12] *Gleed*, 12 C.A.R. 32 (Ct. Crim. App., 1916).

[13] C.C.A. 6 November 1968 (No. 38 of 1968), *Frewen*, vol. 1, p. 338.

[14] 36th ed., para. 2096.

[15] *Frewen*, vol. 1, at 342 (*per* Henchy J. for the Court).

[16] 6 Cox C.C. 353 (Ir. Ct. of Crim. App., 1853).

[17] *Id.*, at 356.

[18] C.C.A., 15 December 1986 (99-101/86).

[19] P. 2 of Finlay CJ's judgment.

[20] 41 C.A.R. 138 (Div. Ct., 1957), analysed by McDermott, 1 Tasmanian U.L. Rev. 113 (1958).

[21] 41 C.A.R., at 141. Cf. *Burke*, 9 J.L.R. 596 (C.A., 1967).

[22] 2 Den. 37, 169 E.R. 408 (1850).

[23] *Id.*, at 37 and 408, respectively.

[24] *Id.*, at 48 and 412, respectively. The question of receiving by one spouse from another is considered *infra*, para. 33. As to receiving by a parent from a child, see *Smith*, 25 C.A.R. 119 (C.C.A., 1935).

[25] [1907] V.L.R. 1 (Full Ct., 1906).

[26] *Id.*, at 5-6. Note that in such circumstances a conviction could now be obtained in England under s. 22(1) of the *Theft Act 1968*.

[27] *Anon., Another Aspect of "Receiving"*, 109 J.P. 52 (1945).

[28] *Id.*, at 52.

[29] See *Whelan*, [1934] I.R. 518 (C.C.A., 1933). Cf. *Crooks* [1981] 2 N.Z.L.R. 53 (C.A.). In England it has been held that the test of whether a defendant was impelled by duress to act as he did is objective, not subjective, and accordingly a defendant is required to have the self-control reasonably to be expected of an ordinary citizen in his situation: cf. *R v Howe and Another*, [1987] 1 All E.R. 771. The subject of provocation raises some related issues: see McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 Modern L. Rev. 133 (1987).

[30] Cf. *infra*, para. 131.

[31] Smith & Hogan, *Criminal Law*, 456 (1st ed., 1965).

[32] See *Anon., Receiving Proceeds of Misappropriated Property*, 73 L.J. 343 (1932). Decisions prior to the 1916 Act include *Walkley*, 4 C. & P. 132, 172 E.R. 640 (1829) and *Robinson*, 4 F. & F. 43, 176 E.R.

459 (1864). In *Walkley* the accused was acquitted of receiving six promissory notes of a value of £100 each where the evidence showed that the thief had changed the notes into £20 notes at different banks. It seems clear that the basis of acquittal was that the accused had been charged with receiving the original notes rather than their proceeds: cf. *id.*, at 133 and 640 respectively. In *Robinson*, the defendant had received a mixture of stolen oats and peas from a thief. The indictment charged a receiving of a mixture which had been stolen, knowing it to have been stolen. The evidence of the thief was that the mixing of the elements had taken place after the theft. Pollock CB directed an accquittal on the basis that, contrary to the terms of the indictment, a "mixture" had not been stolen, and thus the defendant could not have received a stolen mixture. The jury declined to return a verdict of not guilty, declaring that, when the thief had mixed the oats and peas, it had become a mixture. Pollock CB, "with some firmness", told the jury that they were bound to accept his direction, in point of law, to return a verdict of acquittal, and he peremptorily directed them to do so. The jury, "after some hesitation and with great reluctance", at length did as Pollock CB required.

In the Queensland decision of *Richards*, 28 Q.J.P.R. 88 (Sup. Ct., Brisbane, 1934), Webb, J. followed *Walkley*. As a result, section 433 of Queensland's *Criminal Code*, which had not contained an extended definition of property on the lines of section 46 (1) of the *Larceny Act 1916*, was amended, by section 18 of the *Criminal Code Amendment, Act of 1943*, which inserted into section 433 a provision to the effect that:

> "where the thing so obtained has been—
> (1) converted into other property in any manner whatsoever or
> (2) mortgaged or pledged or exchanged for any other property, any person who knowing—
> (a) that the said property is wholly or in part the property into which the thing so obtained has been converted or for which the same has been mortgaged or pledged or exchanged; and
> (b) that the thing so obtained was obtained under such circumstances as to constitute a crime under the first paragraph of this section;
> receives the whole or any part of the property into which the thing so obtained has been converted or for which the same has been mortgaged or pledged or exchanged, is guilty of a crime within the meaning of the first paragraph of this section and may be indicted and punished accordingly".

See also the New Zealand decision of *Lucinsky*, [1935] N.R.L.R. 575 (C.A.), which interpreted *Walkley* more broadly than the manner suggested above.

[41] See, e.g. the one-sentence disposition of the issue by Lord Hewart CJ, for the English Court of Criminal Appeal, in *Klein*, [1932] W.N. 99 (point not reported in 23 C.A.R. 185). In *Barrow*, 24 C.A.R. 141 (C.A.A. 1934), the English Court of Criminal Appeal quashed a conviction for receiving stolen goods where the appellent was in possession of a cheque which had been given by another person for the stolen goods. Avory J (for the court) said (at 143-144):

> "[T]here was undoubtedly evidence that the appellant was in possession of a cheque which had been given in payment for the stolen goods. That fact of itself, although creating a suspicion that the appellant had had some dealing with the stolen goods, is not, in the opinion of the court, sufficient evidence that he was actually in possession of them, so as to justify a charge of receiving . . . . [U]pon the charge of receiving it was essential to prove that the appellent was in possession of the goods either manually or constructively, and we have come to the conclusion that there was in this case no evidence sufficient to justify the conviction."

There seems to be nothing in this case which indicates that section 46 was before the minds of the judges. Cf. C. Williams & Weinberg, *Property Offences*, 388 (1986).

In *Farnan*, 67 L.L.T.R. 208 (Circuit Crim. Ct., 1933), Judge Davitt is reported as having held that, to substantiate the offence of receiving, it was necessary to show that the money received was the money actually stolen. Again, the absence of any reference to section 46 in the report suggests that it was overlooked.

[43] [1953] 2 All E.R. 1028 (Q.B. Div.).

[45] *Id.*, at 1029.

[46] See Smith & Hogan, *Criminal Law*, 454-456 (1st ed., 1965).

[47] The identity of the owner need not be proven but, if the indictment specifies an owner, an amendment during the trial to "a person unknown" may so prejudice the defendant as not to be permissible: see *Gregory*, [1972] 2 All E.R. 861, [1972] Crim. L. Rev. 509 (C.A.).

[48] [1919] 1 K.B. 564 (C.C.A.).

[49] [1951] 2 All E.R. 645 (K.B. Div.), criticised by P.B., *Note: Receiving Stolen Property - Goods Taken by Child Under Eight - Meaning of "Stolen"*, 2 U.W. Austr. Ann. L. Rev. 163 (1951).

[50] Section 50 of the *Children and Young Persons Act 1933* provided that "no child under the age of eight years can be guilty of an offence".

[51] With whom Hilbery and Ormerod JJ concurred.

[52] [1919] 1 K.B. 564.

[53] [1951] 1 All E.R., at 646.

[44] For criticism of this *obiter* statement, see Edwards, *Note: Larceny by a Bailee and Larceny by Finding*, 68 L.Q. Rev. 167 (1952), Williams, *Note: Criminal Law - Larceny - Receiving*, 15 Modern L. Rev. 222 (1952). In an unreported case three years before *Walters v. Lunt*, a conviction for larceny was apparently successful: cf. A.J.C., *Receiving Goods "Stolen" by a Child under Eight*, 113 J.P. 496 (1949).

[45] [1951] 2 All E.R., at 646-647.

[46] [1975] 2 N.Z.L.R. 753 (Sup. Ct., Wild CJ); cf. Brown, *Receiving Goods Stolen by Children or the Insane*, [1979] N.Z.L.J. 506, P. B., *op. cit.*, 2U.W. Austr. Ann. L. Rev. 163, at 165 (1951). Caldwell, *op. cit.*, p. 234, cautions that "[i]t should be noted .... that [in *Farrell*] the defence offered no objections to the substitution of a count alleging theft of the cheque."

[47] [1975] 2 N.Z.L.R., at 754.

[48] Dears. 436, 169 E.R. 794 (1855).

[49] *Id.*, at 441 and 796, respectively. See also *Hancock v. Baker*, 14 Cox C.C. 119 (Ct. Crim. App., 1878).

[50] L.R. 1 C.C.R. 15 (1866).

[51] *Supra*.

[52] L. R. 1 C.C.R., at 19.

[53] *Id.*

[54] In fact the policeman did more than look at the goods, but Mellor, J. presumably meant by his expression to refer to the policeman's examination of the goods.

[55] L.R. 1 C.C.R., at 19.

[56] *Id.* (This expression appears to refer to a case where the railway company carried the goods in ignorance of their changed status).

[57] *Id.*

[58] [1892] 2 Q.B. 597 (Cr. Cas. Res., 1892).

[59] *Id.*, at 598.

[60] *Id.*, at 599.

[61] *Supra*.

[62] *Supra*.

[63] [1892] 2 Q.B., at 599.

[64] *Supra*.

[65] *Supra*.

[66] [1892] 2 Q.B., at 599-600. In *Attorney-General's Reference (No. 1 of 1974)*, [1974] 1 Q.B. 744, at 751, Lord Widgery, C.J. (for the Court) described Pollock B's judgment as "brief and helpful".

[67] *Supra*.

[68] [1892] 2 Q.B., at 600.

[69] [1938] 2 All E.R. 662 (C.C.A.)

[70] *Id.*, at 664.

[71] See Smith & Hogan, *Criminal Law*, 454-455 (1st ed., 1965), Williams & Weinberg, *op. cit.*, 352-353, *Anon., Receiving Property Stolen or Unlawfully Obtained*, 108 J.P. 627 (1944), J.Y., *Proof of Larceny in Receiving Cases*, 101 Sol. J. 238 (1957).

[72] Citing *Petch*, 14 Cox C.C. 116 (1878).

[73] Smith & Hogan, *Criminal Law*, 454-455 (1st ed., 1965).

[74] See Samuels, *op. cit.*, at 15, *Anon., Receiving*, 18 J. Crim. L. 85 (1954).

[75] Samuels, *op. cit.*, at 15.

[76] *Kutas*, 17 C.A.R. 179 (C.C.A., 1923).

[77] *Klein*, 23 C.A.R. 185 (1932).

[78] Archbold, *op. cit.*, para. 2089, Samuels, *op. cit.*, at 15, citing *Frampton*, 8 Cox 16 (1858); see, however, the strongly argued submission by Prevezer, *Some Aspects of Receiving*, 13 Current L. Problems 60, at 67 (1960), to the effect that *Frampton* turned on a specific provision of the *Larceny Act 1827* (section 47) which had no direct equivalent in the 1916 Act, so that the principle of *Bianchi*, [1958] Crim. L. Rev. 813 would appear to exclude liability in this context.

[79] *New*, [1957] Crim. L. Rev. 685, at 685 (Central Crim. Ct.). *New* distinguished *Schweller*, 18 C.A.R. 52 (C.A.A., 1924).

[80] See Samuels, *op. cit.*, at 15, *Misell*, 19 C.A.R. 109 (1926) *Bianchi*, [1958] Crim. L. Rev. 813 (Huddersfield Q.S.).

[81] Samuels, *op. cit.*, at 15, citing *Misell*, *supra*, at 111 (*per* Lord Hewart CJ).

[82] See Samuels, *op. cit.*, at 13-14, Stone, *Proof that Goods Are Stolen*, 129 N.L.J. 1018 (1979) McCormick, *Circumstancial Proof in Larceny and Receiving*, 21 Austr. Police J. 46, 320 (1967).

[83] Samuels, *op. cit.*, at 13. Cf. *Burton*, Dears. 282, at 284, 169 E.R. 728, at 729 (Cr. Cas. Res., *per* Maule J 1845), *Conway*, 60 I.L.T.R. 41 (C.C.A., 1952).

[84] 13 C.A.R. 118, at 120, 87 L.J.K.B. 1003, at 1004 (1918). See also *Mills*, K.B. Div., 11 November 1946, unreported, referred to in *Cohen v March*, [1951] 2 T.L.R. 402, at 403, where it was stated:

> "The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time he received them."

[85] [1951] 2 T.L.R. 402, at 403-404 (K.B.Div.).

[86] *Supra*.

[87] [1953] 1 All E.R. 21 (C.C.A., 1952). See also *Herron*, [1963] Crim. L. Rev. 575 (C.C.A.), *Hayes and King*, 114 L.J. 274, [1964] Crim. L. Rev. 542 (C.C.A.). As to specification by the prosecution of ownership of the stolen property, cf. *Gregory*, [1972] 2 All E.R. 861, [1972] Crim. L. Rev. 509 (C.A. (Crim. Div.)).

[88] Charles J observed (*id.*, at 491):

> "There he was a true prophet, because he did go away."

[90] 13 C.A.R. 118, at 120, 87 L.J.K.B. 1003, at 1004 (1918).

[91] See *Overington*, [1978] Crim. L. Rev. 692 (Ct. App. (Cr. Div.)), *Hack*, [1978] Crim. L. Rev. 359 (Inner London Crown Ct., Rubin, J.), *McDonald*, 70 C.A.R. 288, [1980] Crim. L. Rev. 242 (C.A. (Cr. Div.)), *Korniak*, 76 C.A.R. 145, [1983] Crim. L. Rev. 109 (C.A. (Cr. Div.), 1982).

[92] See *Marshall*, [1977] Crim. L. Rev. 106 (Knightsbridge Crown Ct., Owen, Q.C., Dep. Circ. J., 1976), *Hulbert*, 69 C.A.R. 243 (1979), *Porter*, [1976] Crim. L. Rev. 58 (Middlesex Crown Ct., Judge Solomon, 1975); cf. *McDonald*, *supra*.

[93] *Haslam*, 1 Leach 418, 168 E.R. 311 (1786) (prosecution brought under 22 Geo. III, c. 58).

[94] The failure by the accused to give evidence will not constitute corroboration: *Blank*, [1972] Crim. L. Rev. 176.

[95] *Shaw*, [1960] I.R. 168 (C.C.A.), *Pratt*, 4 F. & F. 315, 176 E.R. 580 (1865), *Robinson*, 4 F. & F. 43, 176 E.R. 459 (1864), *Jennings*, 7 Cr. App. R. 242 (1912), *Reynolds*, 20 Cr. App. R. 125 (1927), *Davies v D.P.P.*, [1954] A.C. 378, *Roma*, [1956] Crim. L. Rev. 46 (C.C.A., 1955), *Anslow*, [1962] Crim. L. Rev. 100 (C.C.A., 1961); cf. *Vernon*, [1962] Crim. L. Rev. 35 (C.C.A., 1961), which held that, although receivers were accomplices of the thieves from whom they received goods, on a trial of the latter for larceny, the converse was not necessarily true: in some cases the judge could properly rule that there was no evidence that the witness was a "participant"; in other cases, in which there was evidence on which a reasonable jury could find that the witness was a "participant", the issue was one for the jury: for critical analysis of *Vernon*, see *Commentary*, *id.*, at 36-37. In *Phillips and Marks*, [1962] Crim. L. Rev. 464, the English Court of Criminal Appeal held that, though it was desirable that a warning should be given in the case of a co-prisoner, charged with larceny, giving evidence, it was not obligatory on the trial judge to do so: for criticism, see *Commentary*, *id.*, at 465-466. *Phillips and Marks*, as well as *Prater*, 44 Cr. App. R. 83, [1960] Crim. L. Rev. 189 and *Heaps*, [1961] Crim. L. Rev. 354 (C.C.A.), represent some advance on the former approach, laid down in *Barnes and Richards*, 27 Cr. App. R. 154 (1940).

[96] Citing *Caslin*, 45 Cr. App. Rep. 47 (1961), *Smith*, 46 Cr. App. R. 277 (1962).

[97] Samuels, *op. cit.*, at 14.

[98] 4 F. & F. 315, at 316, 176 E.R. 580, at 581 (1865).

[99] [1965] A.C. 1001.

[100] *Cross on Evidence*, 460 (6th ed., 1985).

[101] Working Paper No. 9-1980.

[102] *Id.*, p. 80.

[103] [1970] S.C.R. 608, at 626.

[104] [1985] I.L.R.M. 18, at 24 (C.C.A., 1984).

[105] [1986] I.L.R.M. 716, at 717-718 (C.C.A.) (emphasis added).

[106] 11 Cox C.C. 207.

[107] Which corresponded with section 39 of the *Larceny Act 1916*.

[108] 11 Cox C.C., at 208 (1861).

[109] [1933] I.R. 292, at 294-295 (C.C.A.).

[110] *The People (Attorney General) v Ruttledge*, [1978] I.R. 376 (Sup. Ct., 1947), *The State (Gilsenan) v McMorrow*, [1978] I.R. 360 (Sup. Ct.).

[111] [1978] I.R., at 372.

[112] *Id.*, at 380-381.

[113] *Id.*, at 376.

[114] *Nestor v Murphy*, [1979] I.R. 326, at 329 (Sup. Ct., *per* Henchy, J. (for the Court)).

[115] [1963] A.C. 557, at 577 (H.L. (Eng.)).

[116] [1979] I.R., at 329.

[117] See Smith & Hogan, *Criminal Law*, 459-460 (1st ed., 1965), Samuels, *op. cit.*, at 25-26.

[118] Smith & Hogan, *op. cit.*, 459.

[119] See, e.g. *M'Athey*, Le. & Ca. 250, 169 E.R. 1384 (1862) (receiving by husband from wife), *Baines*, 69 L.J.Q.B. 681 (Cr. Cas. Res., 1900) (receiving by wife from husband).

[120] Dears. & Bell 329, 169 E.R. 1027 (1857).

[121] *Id.*, at 331 and 1028, respectively.

[122] *Id.*, at 332 and 1028, respectively. See also *Orris*, 1 C.A.R. 199 (C.C.A., 1908), *Pritchard*, 9 C.A.R. 210 (C.C.A., 1913). Cf. *Peach*, 108 Sol. J. 814, [1960] Crim. L. Rev. 134 (C.C.A., 1959), where Lord Parker, C.J. is reported (108 Sol. J. at 814) as having said that "it seemed to the court that in the case of joint tenants of a room, knowledge by one that the goods in the room were stolen and the absence of any steps being taken by that joint tenant to get the other to remove the goods was capable of amounting to evidence that the man concerned had become a joint possessor and in joint control of the goods." For criticism, see *Commentary* [1969] Crim. L. Rev., at 135.

[123] Cf. *Woodward*, Le. & Ca. 122, 169 E.R. 1329 (1862), where the husband (in the view of Wilde, B.) adopted his wife's act.

[124] [1981] I.R. 412 (Sup. Ct.).

[125] *Baines*, 69 L.J.Q.B. 681 (Cr. Cas. Res., 1900), *Brooks*, Dears. 184, 169 E.R. 688 (1853); also *Mawji*, 22 E.A.L. R. 524, at 528 (1955); cf. *Holley*, [1963] 1 W.L.R. 199 (C.C.A., 1962) (accessory after the fact to housebreaking and larceny).

[126] Section 9(3) provides as follows:

> "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."

See further Smith & Hogan, *Criminal Law*, 390 (1st ed., 1965).

[127] [1919] 1 K.B. 564 (C.C.A.).

[128] [1944] I.R. 405, at 411-412 (Ct. Ct. App.).

[129] [1981] I.R. 489 (Sup. Ct.).

[130] *Id.*, at 496.

[131] [1944] I.R. 405, at 411-412.

[132] [1981] I.R., at 497.

[133] *Id.*, at 498.

[134] G. Williams, *Textbook of Criminal Law*, 87 (1st ed., 1978). See now, 2nd ed., 1983, 126.

[135] See Samuels, *op. cit.*, at 21-22.

[136] 43 C.A.R. 35 (Div. Ct., 1958).

[137] *Id.*, at 43.

[138] *Id.*

[139] *Id.*, at 43-44.

[140] *Id.*, at 44.

[141] Samuels, *op. cit.*, at 22. Goodeson, *Note*, [1959] Camb. L.J. 14, Smith, *The Guilty Mind in Criminal Law*, 76 L.Q. Rev. 78, at 94-96 (1960).

[142] Samuels, *op. cit.*, at 22. See also *Smith*, *op. cit.*, at 95:

> "D receives goods from X who tells a great story of how he obtained them by a daring burglary. D believes the story. In fact, X obtained them simply by telling lies in circumstances amount to false pretences. D now has a real belief that he is receiving goods obtained by felony; in fact, he is receiving goods obtained by a misdemeanour, and the only way to deal with him is to change the law, and the sooner the better."

[143] Samuels, *op. cit.*, at 22. Cf. *Commentary* to *Nieser*, [1959] Crim. L. Rev. 129, at 130, wherein it is argued that application of a test of recklessness or wilful blindness could obviate this difficulty. In view of *Hanlon v Fleming*, [1981] I.R. 489 (Sup. Ct.), this option may not be available under Irish law at present.

[144] 6 C.A.R. 218, at 220 (C.C.A., 1911). See also *Tennet*, [1939] 1 All E.R. 86 (C.C.A., 1938).

[145] [1958] I.R. 183 (C.C.A., 1954). See also *M'Athey*, Le. & Ca. 250, 169 E.R. 1384 (1862).

[146] [1939] 1 All E.R. 86.

[147] [1958] I.R., at 184.

[148] 34 C.A.R. 55 (C.C.A., 1949).

[149] Dears. 149, 169 E.R. 674 (1853).

[150] [1949] 1 E.R. 398.

[151] *Id.*, at 58-59. Cf. *Peach* 103 Sol. J. 814, [1960] Crim. L. Rev. 135 (C.C.A., 1959), *Dickson and Gray*, [1955] Crim. L. Rev. 435 (C.C.A.).

[152] [1967] S.A.S.R. 1 (Sup. Ct. (*In Banco*), 1966).

[153] *Id.*, at 5.

[154] Cf. *infra*, paras. 50-53.

[155] Subject to the power of the Court to rule such evidence inadmissible.

[156] See Samuels, *op. cit.*, at 20-21, *Anon., Possession of Recently Stolen Property*, 86 Ir. L.T. & Sol. J. 235, 241 (1952).

[157] *Criminal Law, The General Part*, 879 (2nd ed., 1961).

[158] *Id.*, 877.

[159] G Williams, *Textbook of Criminal Law*, 49 (2nd ed., 1983).

[160] *Oglesby*, [1966] I.R. 162 (C.C.A.). *Infra*, para. 46.

[161] 11 Cr. App. R. 45, at 49 (C.C.A., 1914). See Fraser, *Stolen Property: The Defence that 'Might Reasonably be True'*, 1 U.B.C.L. Rev. 553 (1963).

[162] [1933] I.R. 292 (C.C.A.).

[163] *Id.*, at 295-296.

[164] [1944] I.R. 405 (C.C.A.).

[165] Citing the statement on the onus of proof in *Woolmington*, [1935] A.C. 462, at 481.

[166] Citing *Badash*, 13 C.A.R. 17.

[167] [1944] I.R., at 411. See also *Shaw*, [1960] I.R. 168 (C.C.A.) where Maguire CJ, for the Court, said (at 173):

> "In the absence of any explanation whatever by the accused as to how he came to possess the [stolen goods] the jury were, if they accepted the evidence, entitled, in our opinion, to treat it as corroboration of [the thief's] evidence."

See further O'Connor, *Corroboration and the Testimony of Accomplices in the Irish Law of Evidence*, 4 D.U.L.J. 12, at 14-19 (1982).

[168] [1961] I.R. 304, at 311 (High Ct., Davitt, P., 1959).

[169] Citing *Badash*, *supra*. *Berber and Levey*, [1944] I.R. 405, at 411.

[170] *Supra*. Cf. Duncan, *Drug Offences and Strict Liability, Part IV*, 104 Ir. L.T. & Sol. J. 187, at 188 (1970).

[171] *Supra*.

[172] [1966] I.R. 162 (C.C.A.).

[173] *Supra*.

[174] [1965] I.R. 366.

[175] [1966] I.R., at 165.

[176] *Supra*.

[177] *Supra*.

[178] Kenny, J. here cited the statement of Lord Goddard C J in *Aves*, 34 C.A.R. 159, at 160 (C.C.A., 1950), to the effect that:

> "[w]here the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or, (b) if the jury are satisfied that the explanation he does offer is untrue."

See also *Smythe*, 72 C.A.R. 8 (1980), *Ng Mou-wo*, Hong Kong Ct. App., 6 November 1984 (1984-279).

[179] [1933] I.R. 292.

[180] [1958] 3 All E.R. 662.

[181] [1966] I.R., at 167-168.

[182] [1958] 3 All E.R., at 669.

[183] [1983] 2 All E.R. 1089, at 1092-1093.

[184] *Oglesby*, [1966] I.R., at 167, (C.C.A., *per* Kenny J for the Court).

[185] Citing *Marcus*, 17 C.A.R. 191 (1923).

[186] Citing *Cooper*, 3 C. & K. 318, 175 E.R. 570 (1852) and *Harris*, 8 Cox 333 (1860).

[187] Citing *Adams*, 3 C. & P. 600, 172 E.R. 563 (1829).

[188] Citing *Partridge*, 7 C. & P. 551, 173 E.R. 243 (1836).

[189] Citing *McMahon*, 13 Cox C.C. 275 (1875).

[190] Samuels, *op. cit.*, at 20-21. See also *Rowther*, 25 N.L.R. 385 (Sup. Ct., 1924), *Siriwardene v Dionis*, 27 N.L.R. 358 (Jaye Wardene A J 1925).

[191] [1944] I.R. 405 (Ct. Cr. App.).

[192] *Id.*, at 411 (*per* Black J.).

[193] 33 C.A.R. 100 (1949).

[194] *Id.*, at 101.

[195] 25 N.L.R. 365, at 391-392 (Sup. Ct., 1924).

[196] 86 L.J.K.B. 810 (1917).

[197] Cf. the Australian decisions holding that, if the jury come to the conclusion that the defendant's explanation might reasonably be true, even though they do not believe it, they are not entitled to use the doctrine of recent possession against the defendant: *Petrie*, 47 S.R. (N.S.W.) 20 (C.C.A., 1946), *Jorgic*, 80 W.N. (N.S.W.) 761, [1963] N.S.W.R. 66 (C.C.A., 1962), *McKenna*, [19645] N.S.W.R. 433 (C.C.A. 1964).

[198] C.C.A. No. 3 of 1967, 11 May 1967, *Frewen*, vol. 1, p. 319, at pp. 324-325.

[199] *Id.*, p. 325.

[200] C.C.A., 15 December 1986 (99-101/86), at p. 3 of judgment.

[201] 4 C.L.R. 126, at 137 (H. Ct. Aust., 1906).

[202] See Samuels, *op. cit.*, at 22-24, *Anon., Guilty Knowledge*, 82 J.P. 318 (1918).

[203] This word is important. "To make such evidence admissible the receiver must be charged with knowing the property to have been stolen and not obtained in any other way even in circumstances which amount to felony": *Nieser*, [1958] 3 All E.R. 662, at 668 (C.C.A., *per* Diplock J (for the court), 1958).

[204] Cf. the liberal interpretation of the words "found in his possession" in *Rowland*, [1910] 1 K.B. (C.C.A., 1909) so as to embrace former possession by the accused. The words "or had been" remove this difficulty.

[205] 12 C.A.R. 1, at 4 (C.C.A., 1916).

[206] In *Smith*, [1918] 2 K.B. 415, at 419 (C.C.A.), Darling J, for the Court, said:

> "It may be that the better course to adopt would be, before giving evidence that the goods were found in the prisoner's possession, to give evidence that they were stolen, but it would be difficult to give evidence that they were stolen without producing them in Court, and the natural inference from their production would be that they were in some way connected with the prisoner . . . It is a matter for the discretion of the judge at the trial to say which is the more convenient course, and we cannot say that one course is right and the other wrong. If the prosecution, having given evidence that certain articles, not the subject of the indictment, were found in the prisoner's possession, should fail, with regard to some of them, to prove that they were stolen, the judge can point out to the jury this defect in the evidence, and the failure of the prosecution to prove that all the goods were stolen would tell in the prisoner's favour."

[207] *Girod*, 70 J.P. 514, at 516 (C.C.R., *per* A T Lawrence J, 1906).

[208] *Id.*

[209] [1918] 2 K.B. 415, at 419 (C.C.A., *per* Darling J, for the Court).

[210] 14 Cox 3 (Oxford Circuit, Lopes, J., 1877).

[211] *Id.*, at 4.

[212] 3 C.A.R. 1 (C.C.A., 1909). See Samuels, *op. cit.*, at 23.

[213] As a general rule, subject to certain exceptions, the prosecution may not adduce evidence of previous convictions: see *Anon., Guilty Knowledge*, 82 J.P. 318, at 319 (1918); cf. Horzepa, *Note: Receiving Stolen Goods - Exclusion of Evidence of Previous Crimes*, 36 Conn. B.J. 639 (1962).

[214] [1953] 1 Q.B. 489, at 493 (C.C.A.).

[215] *Id.*

[216] *Id.*

[217] [1965] 3 All E.R. 710 (Roskill J.).

[218] *Id.*, at 711.

[219] *Id.*, at 712.

[220] *Id.*, at 713. See also *Turner*, [1957] Crim. L. Rev. 474, *Auton*, [1958] Crim. L. Rev. 549.

[221] [1967] 1 Q.B. 107 (C.C.A., 1966).

[222] *Id.*, at 114 (*per* Havers, J., for the Court).

[223] Samuels, *op. cit.*, at 24. See *Davis*, 1 L.R.C.C.R. 272 (1870) and *Harwood*, 11 Cox 388 (1870).

[224] [1981] I.R. 233 (Sup. Ct., 1980, aff'g High Ct., McWilliam J, 1978).

[225] *Id.*, at 242.

[226] *Id.*, at 241-242.

[227] See Eddy, *Stealing or Receiving? The Court and Alternative Charges*, 118 J.P. & Local Govt. Rev. 635 (1954), J.Y., *Receiving*, 103 Sol. J. 846 (1959).

[228] *O'Leary v Cunningham*, Sup. Ct., 28 July 1980 (145A-1979), *per* Griffin J. at p. 3 of his judgment. in the same case, Kenny J. at p. 4 of his judgment, observed that it was "trite law that when an accused is charged with receiving, the prosecutor must prove that the goods or money were stolen by some person who was not the accused".

[229] [1955] I.R. 324, at 341 (Sup. Ct., 1953). Cf. *Byrne*, C.C.A., 10 March 1966 (C.C.A., No. 1 of 1966), *Frewen*, vol. 1, p. 303, *Finegan*, [1933] I.R. 292 (C.C.A.).

[230] *Supra*.

[231] P. 6 of Kenny J's judgment.

[232] *Id.*

[233] *Id.*, pp. 6-7.

[234] *Id.*, p. 7.

[235] E.g. under section 44 of the *Larceny Act 1961*. Under s. 44(1), an accused charged with robbery may be convicted of an assault with intent to rob. Under s. 44(2), an accused charged with embezzlement may be convicted of stealing. S. 44(3) provides that an accused charged with stealing may be convicted of obtaining by false pretences and acquitted of stealing. Interestingly, s. 44(4) provides that a person indicted for obtaining by false pretenses is not entitled to be acquitted on that count if it is proved he stole the property. The reason for the distinction in approach between the two sub-sections may be that in general larceny, a felony, is considered to be a more serious offence than obtaining by false pretences, which is a misdemeanour. S. 44(4) is referred to *infra*, para. 136. Under section 53(4) of the *Road Traffic Act 1961* an accused charged with dangerous driving may be convicted of driving without due care and attention.

[236] Although Kenny J considered that the effect of what the District Justice did "was to acquit the accused": p. 15 of Kenny J's judgment.

[237] *Id.*, p. 16.

[238] [1951] 1 All E.R. 1006, at 1007 (C.C.A.). See also *Christ*, 35 C.A.R. 76, at 79 (C.C.A., *per* Devlin J, for the Court, 1951).

[239] Citing *Coggins*, 12 Cox C.C. 517, at 521 (C.C.A. *per* Blackburn J, 1873).

[240] Citing *Hughes*, 8 Cox C.C. 278 (1860). *Goodspeed*, 6 C.A.R. 133, 27 T.L.R. 255 (C.C.A., 1911).

[241] Samuels, *op. cit.*, at 26.

[242] [1947] K.B. 849 (Div. Ct.), criticised by J W C T[urner], *Note*, 10 Camb. L.J. 112 (1948).

[243] *Id.*, at 852-853.

[244] Samuels, *op. cit.*, at 28.

[245] *Id.*, at 29.

[246] *McDonough*, 106 Sol. J. 961, [1963] Crim. L. Rev. 203 (C.C.A., 1962).

[247] Cf. *Commentary* [1963] Crim. L. Rev. 203, at 204.

[248] Cf. *id.*

[249] Cf. *supra*, paras. 8-10.

[250] Cf. *supra*, paras. 11-14.

[251] Cf. *supra*, paras. 40-42.

[252] A well-advised and shrewd receiver (and many receivers are such) could well seek to trap those investigating the crime by *seeming* to be likely to refuse to give an account of the goods' provenance. Thus, the section would appear capable of being more safely invoked against the more "amateur" receiver.

[253] Cf. the *Criminal Justice Act 1984*, section 13(1).

[254] [1975] A.C. 476 (H. L. (Eng.), 1973).

[255] *Id.*, at 490.

[256] Smith & Hogan, *Criminal Law*, 466 (1st ed., 1965).

[257] *Id.*

CHAPTER 3: COMPARATIVE ASPECTS

67. In this chapter we examine briefly the law on receiving in some other jurisdictions, concentrating on those aspects of the subject which are of greatest relevance to the policy issues which must be resolved when proposing changes in the law here.

THE UNITED KINGDOM

(a) England and Wales, and Northern Ireland

68. For many years the law of receiving stolen property was the same in England and Wales and Northern Ireland as in our law. Section 33 of the *Larceny Act 1916* governed the position.

In 1966 the Criminal Law Revision Committee published its Eighth Report, *Theft and related Offences*.[1] The Committee made wide-ranging recommendations on the entire subject. It proposed a new offence of theft to replace the offences of larceny, embezzlement and fraudulent conversion. This new offence dispensed with the requirement of asportation, and concentrated on dishonest appropriation of another's property.

The Committee recommended some significant changes in relation to the offence of receiving stolen property. First it recommended[2] that the *actus reus* be extended beyond cases where a person dishonestly receives stolen goods to those where he dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or where he arranges to do so. In view of this significant extension, the Committee considered that the word "handling" described the offence better than the word "receiving".

The Committee recommended[3] the introduction of a rather complicated new definition of "property", to ensure that some reasonable limits be put on the very broad definition contained in section 46(1) of the *Larceny Act 1916*, so far as concerns the proceeds of stolen goods.

On the question of *mens rea*, the Committee recommended[4] that liability should be attached where the defendant knew or believed that the goods were stolen. It said:

> "The extension of the offence to goods believed to have been stolen will be a substantial and, we think, valuable one. It is a serious defect of the present law that actual knowledge that the property was stolen must be proved. Often the prosecution cannot prove this. In many cases indeed guilty knowledge does not exist, although the circumstances of the transaction are such that the receiver ought to be guilty of an offence. The man who buys goods at a ridiculously low price from an unknown seller whom he meets in a public house may not *know* that the goods were stolen, and he may take the precaution of asking no questions. Yet it may be clear on the evidence that he *believes* that the goods were stolen. In such cases the prosecution may fail (rightly, as the law now stands) for want of proof of guilty knowledge. We consider that a person who handles stolen goods ought to be guilty if he believes them to be stolen. A purchaser who is merely careless, in that he does not make sufficient inquiry, will not be guilty of the offence under the new law any more than under the old."[5]

69. The *Theft Act 1968* gave effect to the Committee's recommendations with regard to receiving (or "handling", as the offence became known). Section 22 provides as follows:

> "(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.
>
> (2) A person guilty of handling stolen goods shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years."

In Northern Ireland, the *Theft Act (Northern Ireland) 1969* introduced the same changes in the law in Northern Ireland.

70. In England, in applying the provisions of section 22, the Courts have run into some difficulties in relation to the wide permutations of conduct extending beyond the old notion of receiving.[6] In *Bloxham*[7] Lord Bridge said that there were *two* offences under section 22: the first that of receiving, the second a new offence which could be committed in any of the various ways specified in the provision. Dr Glanville Williams has observed[8] that this statement involves a slight misunderstanding of a rule developed in the Court of Appeal. He added:

> "Previously the C[ourt of] A[ppeal] had said simply that the single offence in sub. (1) [of section 22] should be charged in two counts (an unorthodox procedure); but the rule was only advisory, and an information charging 'handling' *simpliciter* was not bad for duplicity . . . Now Lord Bridge, *obiter*, says it is two offences. Notwithstanding that his Lordship was speaking on behalf of the House of Lords, he must be regarded as being wrong. There is only one offence on the

wording of the statute; the Court of Appeal has decided that there is only one offence; and Lord Bridge did not refer to the precedents or purport to overrule them. Of course, prosecutors did not refer to the precedents creating two offences. But if an indictment or information charges Lord Bridge's two 'offences' as a single offence, the charge should assuredly be regarded as valid.

It is a pity that the courts have not gone further in splitting up the subsection *de facto*. The statement that handling by dealing should be charged in a single count is an inconvenient rule when the prosecution desire to charge both handling by undertaking and handling by assisting. These two forms of handling would be much better put in separate counts."[9]

71. The mental element has also given rise to some problems. Efforts by some trial judges to give some explanation of the phrase "knowing or believing" have caused more harm than good. The boundaries between a subjective and an objective approach have proved difficult to maintain, especially in cases where the facts should have given rise to suspicion as to the goods' provenance or where the accused was considered to have been "wilfully blind".

In the past three years the Court of Appeal has been forced to spell out the position in clear terms.

In *Moys*,[10] the trial judge told the jury that strong suspicion coupled with a deliberate shutting of the eyes was not merely an alternative but was equivalent to belief. The Court of Appeal held that this was not correct. Lord Lane CJ (for the Court) referred to a paragraph in *Archbold*[11] which, although "perfectly accurate if one takes the trouble of reading it through from start to finish and perhaps examine what it is that Jones LJ says in *Griffiths*[12]",[13] was considered a source of possible trouble if a trial judge had not immediate access to the law reports it mentioned. Lord Lane CJ said:

> "[I]t would perhaps be less likely to lead to mistakes, and they are frequent in this particular branch, if the second sentence of the paragraph 18-165 were amended to read some such words as these: 'The question is a subjective one and it must be proved that the defendant was aware of the theft or that he believed the goods to be stolen. Suspicion that they were stolen, even coupled with the fact that he shut his eyes in the circumstances, is not enough, although those matters may be taken into account by a jury when deciding whether or not the necessary knowledge or belief existed.' Perhaps if the paragraph were amended in some such way, this Court would not be troubled as frequently as it is by this sort of problem."[14]

In *Hall*,[15] Boreham J, speaking for the Court of Appeal, said:

> "We think that a jury should be directed along these lines. A man may be said to know that goods are stolen when he is told by someone with first hand knowledge (someone such as the thief or burglar) that such is the case. Belief, of course, is something short of knowledge. It may be said to be the state of mind of a person who says to himself: 'I cannot say I know for certain that these goods are stolen, but there can be no other reasonable

> conclusion in the light of all the circumstances, in the light of all that I have heard and seen'. Either of those two states of mind is enough to satisfy the words of the statute. The second is enough (that is, belief) even if the defendant says to himself: 'Despite all that I have seen and all that I have heard, I refuse to believe what my brain tells me is obvious'. What is not enough, of course, is mere suspicion. 'I suspect that these goods may be stolen, but it may be on the other hand that they are not'. That state of mind, of course, does not fall within the words 'knowing or believing'."

In the Court of Appeal case of *Harris*,[16] in 1986, Lawton LJ said:

> "In our judgment the words 'knowledge or belief' are words of ordinary usage in English. In most cases, but not all, all that need be said to a jury is to ask them whether that which is alleged by the prosecution, namely receipt, knowing or believing that the goods were stolen, has been established."

Lawton LJ referred to the statement of Lord Lane CJ in *Moys*[17] and said:

> "It was submitted . . . on behalf of the appellent that some such direction [as that indicated by Lord Lane, C.J.] should be given in every case where the issue is whether the defendant believed that the goods were stolen. We doubt whether this is so. We have to look at all the circumstances of every case. It is for the judge to decide from the feel of the case which is before him whether the jury do require further assistance as to what is meant by the word 'belief'."[18]

Turning to *Hall*,[19] Lawton LJ said:

> "It may well be that in many cases, depending on how the case for the Crown is conducted, it is necessary to give the kind of direction to which Boreham, J. referred in *Hall*; but we doubt whether it is necessary in every case."[20]

72. Section 32(1) of the *Salmon Act 1986* introduced a new handling offence for salmon. A person is guilty of an offence:

> "if, at a time when he believes or it would be reasonable for him to suspect that a relevant offence has at any time been committed in relation to any salmon, he receives the salmon, or undertakes or assists in its retention, removal or disposal by or for the benefit of another person or if he arranges to do so."

Sub-section 32(3) provides that:

> "It shall be immaterial . . . that a person's belief or the grounds for suspicion relate neither specifically to a particular offence that has been committed nor exclusively to a relevant offence or to relevant offences; but it shall be a defence in proceedings for an offence under this section to show that no relevant offence had in fact been committed in relation to the salmon in question."

It was necessary to create a special handling offence for salmon because of the provisions of Section 4(3) of the *Theft Act* (which provide that only tamed or captive wild creatures can be stolen) and because it is impossible to distinguish a lawfully taken salmon from

one unlawfully captured. While this explains why Parliament dispensed with the necessity of proving that the salmon the subject matter of the offence was unlawfully obtained, it does not of itself account for the broadening of the *mens rea* to reasonable suspicion.[21]

(b) **Scotland**[22]

74. Unlike the position in England, where the handling of stolen goods is dealt with by statute in the *Theft Act 1968*, in Scotland the receipt of stolen goods remains a common law crime. Commonly termed "reset", the crime consists of "the retention of goods obtained by theft, robbery, fraud or embezzlement, with the intention of keeping them from their true owner".[23] Reset was originally limited to receiving property obtained from theft, but is now extended to cover receiving property from these other crimes as well.[24]

Possession of the property is required to commit the crime, although "possession" is not used in any technical sense, and is generally taken to mean having the property in one's keeping or control.[25] Distinctions may be made in English law between receiving and handling stolen property, but in Scotland "[i]t is the possessing and not the receiving that is important".[26] It does not matter who the goods are received from; if a person keeps stolen property after learning that it is stolen, he is guilty of reset on acquiring the guilty knowledge irrespective of whether he acquired the goods from the thief.

It is not clear what the common law position would be if the theft took place in Ireland and the reset in Scotland. So far as thefts in England, Wales and Northern Ireland are concerned, the matter is regulated by section 7(2) of the *Criminal Procedure (Scotland) Act 1975*, which provides that:

> "Any person who in Scotland receives property stolen in any other part of the United Kingdom may be dealt with, indicted, tried and punished in Scotland in like manner as if it had been stolen in Scotland."[27]

The mental element required to commit the crime of reset is knowledge that the goods were stolen, or that they were the proceeds of one of the other crimes. An intention to conceal and withhold the goods from the owner is also required.

75. There are two unusual aspects of the crime of reset which are of interest for comparative purposes. They both date back to the time, centuries ago, when the basic principles of the crime were formed. The first is that:

> "[a] wife is not in the ordinary case held guilty of reset if she conceals property to screen her husband, without proof of active participation."[28]

The reason for this exception was that the wife was considered to be bound to cherish and protect her husband, and, so far from informing against him, to conceal his delinquencies, and protect him from punishment. In recent years, the courts have attempted to restrict this exception as far as possible, and it has been held that it would not apply to a husband, and that, in the case of a wife, she must show:

(a) that the husband brought the property into the home, and

(b) that she kept it for the purpose of protecting her husband.[29]

A second unusual aspect of the crime is that the detention of a pupil child (a boy under 14 and a girl under 12) is treated as reset. The reason for this is that, historically, pupil children had no legal personality and, for the purposes of theft, were treated as the property of their parents. Since a pupil child could be stolen (the offence being known as *plagium*), and since whatever can be stolen can be resetted, it followed that a person who detained or concealed a child who had been stolen would be guilty of reset.

The Scottish Law Commission published a Report [No. 102] on Child Abduction on 12 February 1987. One of the main recommendations contained in the Report is that *plagium* should be abolished and that a new statutory offence of child abduction be created. If this proposal is implemented, the detention of children will no longer be regarded as reset, since children will no longer be capable of being stolen.

CANADA

76. Section 312(1) of the *Criminal Code* provides as follows:

> "Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from:
>
> (a) the commission in Canada of an offence punishable by indictment; or
>
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment."

The Law Reform Commission of Canada in their *Report on Recodifying Criminal Law*, vol. 1, published in March 1987, have proposed that there should be an offence of Criminal Dealing, to the effect that:

> "Everyone commits a crime who carries on a business of dealing in things obtained by crime anywhere, if the crime would have been a crime in Canada."[30]

In a supporting Comment, the Commission observe that:

> "[i]t is often said that the receiver of stolen goods is a greater social menace than the actual thief. For without the market provided by the former there would be little profit in the activities of the latter. This is particularly true of the professional receiver or dealer in stolen property. For this reason the new Code adds a novel provision to articulate something which at present is reflected, if at all, only in sentencing."

AUSTRALIA[31]

77. Australia offers some useful points of comparison, with a wide variety of strategies having been adopted over the years in the various states.

(a) Victoria[32]

78. The law relating to receiving stolen property in Victoria is contained in sections 88 to 90 of the *Crimes Act 1958*, which (in spite of the year of its title) is modelled on Britain's *Theft Act 1968*. Thus the offence is one of "handling" rather than "receiving".

It also appears that (as our Court of Criminal Appeal made clear in *Oglesby*):

> "[t]he status of th[e] so-called doctrine [of recent possession] has been significantly eroded in recent years.[33] It may be that its only effect now is to enable the prosecution to resist a no-case submission if the elements underlying the doctrine are present and there is no other evidence which supports the existence of *mens rea*. Certainly the doctrine creates no legal presumption in favour of *mens rea*. It is only a manifestation of the ordinary principles of circumstantial evidence."[34]

It appears[35] that the police in Victoria more commonly charge suspects with unlawful possession of property reasonably suspected of being stolen or unlawfully obtained under section 26 of the *Summary Offences Act 1966*.

(b) Queensland

79. Section 433 of the Criminal Code provides (in part) that:

> "[a]ny person who receives anything which has been obtained by means of any act constituting an indictable offence . . . knowing the same to have been so obtained is guilty of a crime."[36]

It goes on to provide that to prove the receiving of anything it is sufficient to show that the accused has, either alone or jointly with some other person, had the thing in his possession or has aided in concealing or disposing of it. Thus, the concept of receiving is broader than under our law but not as broad as under the law in England or Victoria.

It is an offence to have in one's possession or convey anything suspected of being stolen or unlawfully obtained.[37] Williams & Weinberg state:

> "Once the constituent elements of the offence are established, the onus shifts to the accused to give an account to the satisfaction of the court as to how he or she came by the thing in question. Under this provision all that is required is proof of suspicion simpliciter — there is no requirement of reasonableness."

(c) Western Australia

80. Western Australia's *Criminal Code* in essence is the same as Queensland's, which it adopted. Section 414 is virtually identical with

Queensland's section 433, save that it uses the word "property" in preference to "thing." As in Queensland, the jury may bring in a verdict of "guilty of stealing or receiving but we are unable to say which".[38] In these circumstances, the judge must enter a conviction for whichever offence carries the lesser punishment.[39]

81. In 1983 Mr M J Murray QC, Crown Counsel, submitted to the Government of Western Australia a Report, entitled *The Criminal Code - A General Review*. As regards the *actus reus* of receiving, Mr Murray considered that the changes made in the legislation in Britain and Victoria offered "very little improvement"[40] on the offence of receiving as drafted in section 414. It is worth noting in this context that the section provides that, for the purpose of proving the receiving of anything,

> "it is sufficient to show that the accused person has, either alone or jointly with some other person, had the thing in his possession, or has aided in concealing it or disposing of it."

This extension of the notion of receiving contains the substance of the change to the *actus reus* brought about by the legislation in England and Victoria.

Mr Murray recommended[41] the inclusion in section 414 of an express requirement that the accused receive the property dishonestly. The absence of this requirement, he said, had led to difficulties, resulting in one (unreported) case in the Judge's having to construe the section as if it required the dishonest receipt of the goods. Mr Murray said: "That I think in the end was not a correct ruling in law, but it was clearly one designed to produce a just result".[42]

Mr Murray also recommended[43] the inclusion of the words "or believing" after "knowing" in section 414. He said:

> "This improves the position in that difficult area where the accused is in reality shutting his eyes to facts which ought to demonstrate to him that the goods are stolen. For example, he may deliberately not enquire and may not obtain any direct knowledge as to how the person who gives him the goods originally came by them. It should be enough if he believes them to have been stolen. At present under the Code that situation has to be handled by the jury inferring, contrary to the denials of the accused, that he was in fact aware of the nature of the goods he obtained."[44]

The Government of Western Australia is gradually implementing particular provisions of the Murray Report, though as yet no move has been made to alter the sections of the Code dealing with receiving.[45]

82. It seems that in practice the police frequently prosecute for the summary offence of being in possession of property reasonably suspected of being stolen. Section 69 of the *Police Act 1892* provides as follows:

> "Every person who shall be brought before any Justice charged with having on his person or in any place, or conveying, in any manner any thing which may be reasonably suspected of being

> stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such Justice how he came by the same, shall be liable to a penalty of not more than two thousand dollars, or in the discretion of the Justice may be imprisoned, with or without hard labour, for any term not exceeding two years."

The major advantage of this section, from the police point of view, is that it places on the defendant the burden of giving a satisfactory explanation of how he came by the property. It is, of course, practically identical to s. 13 of our *Criminal Justice Act 1951* which, as we have seen, has been regarded as inoperable for many years.

The Law Reform Commission of Western Australia currently has a reference to review the offence in the Police Act, though as yet the Commission has formed no concluded view on section 39.[46]

(d) The Australian Capital Territory

83. Section 113 of the *Crimes (Amendment) Ordinance 1985* has changed the law in the direction of the legislation adopted in England and Victoria, but, in its express terms, falls short of the full scope of the *actus reus* favoured in those jurisdictions.[47] Subsection (1) of section 113 renders it an offence for a person to receive stolen property or dishonestly undertake its reception, retention, removal, disposal or realisation by another person. But this form of drafting does not expressly incorporate such forms of handling as assisting in the retention, removal, disposal or realisation of stolen property, or arranging to do so. Whether the practical effect of this restriction would be great is doubtful, however. The words "undertakes its reception", etc. would extend to many acts with preparatory or augmentary dimensions.

(e) New South Wales

84. Section 188 of the *Crimes Act 1900* defines the *actus reus* fairly broadly so as to include, not only receiving but also the disposal or attempted disposal of stolen property. This change was made in 1974,[48] and goes part of the way down the road of section 22 of the English *Theft Act 1968*.

Section 420 of the 1900 Act provides, in part, that:

> "On the trial of a person for feloniously receiving stolen property, evidence may be given:
>
> (a) that he has been, within seven years previously, convicted of larceny, or the felonious receiving of stolen property, or of obtaining property by false pretences:
>
> (b) that other stolen property, if stolen within twelve months before the commission of the offence charged . . . has been found in his possession, or on his premises,
>
> and such facts may be taken into consideration by the jury as evidence of guilty knowledge.
>
> Provided always, that:
>
> (1) the same facts have been given in evidence against the accused on his commital; or

(2) that ten days' notice, at the least, was given him before his trial of the intention to adduce such evidence."[49]

Section 189A(1) of the Act provides as follows:

> "Whosoever, without lawful excuse, receives or disposes of or attempts to dispose of or has in his possession, any property stolen outside the State of New South Wales, knowing the same to have been stolen, and whether or not he took part in the stealing of the property, shall be liable to penal servitude for ten years."

The words "and whether or not he took part in the stealing of the property" were added in 1974, to resolve judicial uncertainties.[50]

Section 189B, also added in 1974, provides that, where the evidence discloses that property was stolen in the course of transmission into or out of New South Wales, the accused is liable to conviction for receiving, or disposing of the property, without proof that the stealing took place in New South Wales.[51]

85. Section 527C[52] of the 1900 Act provides for a summary offence of unlawful possession, punishable by up to six months' imprisonment. Williams & Weinberg state:

> "The elements of the offence are that the defendant (1) has something (2) in her or his custody, or the custody of another, or in or on premises (whether belonging to or occupied by the defendant or not) (3) which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained. It is a defence if the defendant satisfies the court[53] that there were no reasonable grounds for suspecting that the thing referred to in the charge was stolen or otherwise unlawfully obtained . . .
>
> The word 'thing' in s. 527C is broader in scope than property which is capable of sustaining a charge of larceny. Where the thing in question is money, the mere fact that the notes or coins are not identical in specie with what was stolen will not prevent the proceeds from being regarded as the same 'thing' within the meaning of the section.[54]
>
> While most other jurisdictions favour the expression 'possession' (or 'actual posssession') s. 527C speaks of 'custody', or having anything 'in or on the premises'. There is authority for the proposition that despite the absence of an express requirement to this effect, before a reverse onus is cast upon a defendant by virtue of this latter formulation, the prosecution must prove that the defendant was aware that it was on the premises.[55] A defendant does not 'have' a thing in or on premises if he or she is unaware that it is there.
>
> The prosecution must establish that the thing may be *reasonably suspected* of being stolen or otherwise unlawfully obtained. Evidence must be adduced that some person actually entertained a suspicion, and it must be a suspicion which, at the time the charge is heard, can be seen to have been reasonable in the circumstances.
>
> It seems that in New South Wales the position is that it is a matter for the magistrate to decide whether, at the time the charge is heard, it is then proper to entertain a reasonable

suspicion that the goods were stolen or unlawfully obtained when they were found in the custody of the defendant. Thus, additional grounds for suspicion which come to light after the defendant is arrested may be used to satisfy the requirement of reasonableness. On the other hand, subsequent inquiries which fail to support an initially reasonable suspicion may be taken into account to prevent a conviction. The position is otherwise in other jurisdictions.[56] The New South Wales approach has the potential disadvantage of exposing suspected persons to unjustified arrests in the hope that the police will be able to accumulate more evidence prior to trial.

The suspicion must relate to the goods (or some of them) but need not extend to the person charged. There is no need for the prosecution to establish that the goods were, in truth, stolen or otherwise unlawfully obtained (as is required for the indictable offence of receiving). Indeed, the offence may still be made out if it transpires that the goods were not, in fact, stolen.

The defence under s. 527C requires the defendant to satisfy the court that there were no reasonable grounds for suspecting that the goods were stolen or unlawfully obtained. Unlike the position in other jurisdictions, the defendant is not required to give a satisfactory account as to how he or she came by the goods. The failure to give such account may mean, however, that the defendant will fail to demonstrate that there were no reasonable grounds for suspecting the origins of the goods. The onus on the defendant in relation to the statutory defence is satisfied by proof on the balance of probabilities."[57]

(f) South Australia

86. The law relating to receiving is contained in sections 196 to 200 of the *Criminal Law Consolidation Act*. These provisions derive in the main from the English Act of 1861. However section 199 provides that, where the thief is punishable summarily, so is the receiver; the maximum sentence in these circumstances is one year's imprisonment. Section 200 provides that, on the hearing of a charge of receiving, there may be proved against the accused:

(a) the fact that other property stolen within a period of 12 months prior to the date of the alleged offence was found or had been in the accused's possession;

(b) any prior conviction of the accused for a dishonesty offence created by the laws of South Australia, or of the Commonwealth of Australia or of any other State or Territory.

If the Crown want to prove a prior conviction under (b), 7 days' written notice prior to the trial must be given to the accused or his solicitor.

Legislation in 1986 (Act 90 of 1986) changed the definition of "property" so that it means:

> "real and personal property, whether tangible or intangible, and includes a wild animal that is in captivity or ordinarily kept in captivity."

87. A summary offence should also be noted. Section 41(1) of the *Summary Offences Act 1953* provides as follows:

> "Any person who has in his possession any personal property which, either at the time of such possession, or at any subsequent time before the making of a complaint under this section in respect of such possession, is reasonably suspected of having been stolen or unlawfully obtained shall be guilty of an offence."[58]

Section 41(2) provides that it is a defence that the defendant "obtained possession of the property honestly". Williams & Weinberg state:

> "This defence can be established even if the prosecution is able to show that at some stage *after* the goods came into the possession of the defendant, the defendant realised that he or she had no right to continue to retain possession of them.[59] The defendant's state of mind at the time the goods were first obtained is the critical issue."[60]

(g) Tasmania

88. The law relating to receiving stolen property is contained in sections 258 and 259 of the Criminal Code. Section 258(1) renders it an offence for any person, without lawful excuse, to receive or have in his possession any stolen property, knowing it to be stolen property. Section 258(2), which defines "stolen property", provides that the term:

> "shall not include any . . . thing which, after having been so obtained has been returned to its owner, or to which any person has acquired a lawful title completed by delivery."

Thus, it appears that, where a third party, such as a police officer, takes possession of the goods, this would *not* come within the ambit of the subsection.[61]

Section 258(2) permits the prosecution, in support of the averment of guilty knowledge, to give evidence of:

> (a) the fact that the accused had in his possession other stolen property within the 12 months preceding the date of the alleged crime; and
>
> (b) the fact that within 3 years preceding his being charged with the crime the accused had been convicted of a crime under section 258 or 259 or of theft or a related dishonesty offence.[62]

The facts mentioned in paragraph (b) are not admissible unless the accused has been given a week's notice in writing of the intention to prove this fact and evidence has previously been given that the stolen property in respect of which the accused is charged was found or had been in his possession.[63]

Section 259 deals with taking rewards for stolen property. It provides as follows:

> "Any person who corruptly takes or agrees to take any reward, directly or indirectly, under pretence or on account of helping any person to recover any stolen property, is (unless he has used all due diligence to cause to be brought to trial the person who stole or obtained such property) guilty of a crime."

89. The only note of a Tasmanian Supreme Court case dealing with these sections of the *Criminal Code* is *Regina v Quillerat*.[64] It reads as follows:

> "Under s. 258 of the *Criminal Code* if a person who has obtained property honestly discovers it to be stolen and makes no attempt to find the true owner and no report to the police, he has no lawful excuse to remain in possession and is guilty . . .
>
> Under the section to know the property is stolen is not to know for sure but have a real belief. That a person has closed his eyes to means of knowledge is not to be accounted knowledge but is evidence of that person's belief."

90. Section 39 of the *Police Offences Act 1953* makes it an offence to be found in possession of any property reasonably supposed to have been stolen or unlawfully obtained without being able to give a satisfactory account of such possession. Williams & Weinberg state:

> "The meaning of the word 'supposed' was considered in *Thompson v Gibbens*.[65] It was argued by the defendant that he could not be convicted of an offence under s. 39 because the evidence was such that the arresting officer did not merely 'reasonably suppose' the goods to have been stolen, but at the very least believed that they were stolen. It was submitted that a charge of stealing, or receiving, ought to have been brought and that the laying of this summary charge operated to deprive the defendant of his right to a trial by jury, as well as putting the burden of proof upon him. These arguments were rejected. It was held that the prosecution could be maintained, notwithtanding that a charge of stealing or receiving might have been proved if the police had seen fit to lay such a charge. Had the evidence been stronger, and had it been clear that the policeman knew the goods had been stolen (rather than strongly suspecting this to be the case) a charge under s. 39 might have constituted an abuse of process and might have been stayed as an exercise of the inherent discretion of the court.
>
> Under s. 39 the prosecution must prove:
>
> 1. That the defendant was found in possession of the property.
> 2. That at the time of the finding the property was supposed by a particular person to be stolen.
> 3. That such supposition was reasonable.[66]
>
> It is then for the defendant to give a satisfactory account of her or his possession, a legal burden which may be discharged on the balance of probabilities[67]."

91. The *Second-Hand Dealers Act 1905* imposes on second-hand dealers wide-ranging duties of recording information as to the details of purchases. The Law Reform Commission of Tasmania in its Report No. 25, published in 1979,[68] recommended that, in the light of changing social and economic patterns of behaviour, new legislation should aim to cut down on the keeping of records which are not essential to discourage dealing in, and the tracing of, stolen property of reasonably substantial intrinsic value. The Commission proposed that several categories of dealers[69] should be exempt either because they

fell under separate legislation, or were subject to their own regulatory procedure[70] or because it was considered inappropriate to bring them within the scope of the new Act.[71] This report is still being considered by the Tasmanian Government.[72]

(h) The Northern Territory

92. Section 229(1) of the *Criminal Code* provides in part that any person who receives anything that has been obtained by means of a crime knowing or believing it to have been so obtained is guilty of a crime.[73] Subsection (5) provides that:

> "[f]or the purpose of proving the receiving of anything it is sufficient to show that the accused person has, either alone or jointly with some other person, had the thing in his possesion or has aided in concealing it or disposing of it."

The drafting of this provision has been criticised on the basis that it does not exclude the possibility of a person jointly responsible for the theft of an item being convicted of receiving it simply because he has aided the co-offender in concealing or disposing of it.[74]

NEW ZEALAND[75]

93. The law relating to receiving is contained in sections 258 to 262 of the *Crimes Act 1961*. Section 158 (as amended by section 2 of the *Crimes Amendment Act 1985)* provides as follows:

> "(1) Every one who receives anything[76] stolen, or obtained by other crime, or by any act wherever committed which, if committed in New Zealand, would constitute a crime, knowing[77] that thing to have been stolen or dishonestly obtained,[78] is liable —
>
> (a) To imprisonment for a term not exceeding 7 years if the value of the thing so received exceeds the sum of [$300];[79]
>
> (b) To imprisonment for a term not exceeding one year if the value of the thing so received exceeds the sum of [$100] and does not exceed the sum of [$300];
>
> (c) To imprisonment for a term not exceeding three months if the value of the thing so received does not exceed the sum of [$100].
>
> (2) Except as provided in subsection (3) of this section, where any one is being proceeded against for an offence against this section, the following matters may be given in evidence to prove guilty knowledge, that is to say —
>
> (a) The fact that other property obtained by means of any such crime or act as aforesaid was in the possession of the accused within the period of 12 months before the date on which he was first charged with the offence for which he is being tried;
>
> (b) The fact that, within the period of 5 years before the date on which he was first charged with the offence for which he is being tried, he was convicted of the crime of receiving.

Provided that the last-mentioned fact may not be proved unless there has been given to the accused, whether before or after an indictment has been presented, 7 days' notice in writing of the intention to prove the previous conviction, or until evidence has been given that the property in respect of which the accused is being tried was in his possession.

(3) Nothing in subsection (2) of this section shall apply in any case where the accused is at the same time tried on a charge of any offence other than receiving."

94. Section 259 deals with the question of receiving the property of a spouse. It provides as follows:

> "Every one commits the crime of receiving within the meaning of section 258 of this Act who, while a husband and wife are living together, receives from either of them anything the property of the other obtained from that other in a manner that would amount to a crime if they were not married, knowing it to have been dishonestly obtained; and the provisions of that section shall apply accordingly."

Section 260 specifies the time at which receiving is complete:

> "The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over the thing, or aids in the concealing or disposing of it."

Section 261 deals with the position where the property has been restored to the owner. It provides as follows:

> "When the thing unlawfully obtained has been restored to the owner, or when a legal title to the thing so obtained has been acquired by any person, a subsequent receiving of it is not an offence, although the receiver may know that the thing has previously been dishonestly obtained."

Finally, section 262 deals with the related question of taking a reward for recovery of stolen goods. It provides that everyone is liable to imprisonment for a term not exceeding three years:

> "who corruptly takes or bargains for any reward, directly or indirectly, in consideration that he will help any person to recover anything obtained by any crime, unless he has used all due diligence to cause the offender to be brought to trial for the crime."

UNITED STATES[50]

95. The law in the United States in relation to receiving stolen property has many close similarities with Irish law. Understandably, in view of the fact that every State has its own rules of criminal law, there is a degree of divergence on several aspects. Moreover, the United States Constitution and the Constitutions of some individual States have had an influence on evidential matters, especially in relation to presumptions. Also the Model Penal Code offers a most thorough and coherent model for statutory reform which demands close attention.

It is useful to concentrate on four elements:

(a) The *actus reus* of the offence;
(b) The necessary *mens rea;*
(c) The specific question of attempted receiving;
(d) Evidential aspects.

(a) The Actus Reus

96. The classic notion of "receiving", as understood in our law, comes within the scope of the *actus reus* of the offence in all jurisdictions in the United States. But a number of states extend liability to "retaining",[81] "concealing",[82] or "aiding in concealing"[83] the property.

A few statutes, such as section 496(1) of California's Penal Code, impose liability for withholding the property from the owner. Perkins & Boyce comment:

> "This may be helpful as a matter of emphasis but it is not necessary because such disposition would be held to be 'aid in concealing'. This phrase, in such a statute, does not require that the goods be secreted in a place of hiding. Any act which assists the thief in his appropriation of the property, or tends to prevent recovery by the owner, is concealment."[84]

The *Model Penal Code*[85], in section 223.6 (1), provides that a person is guilty of theft[86] if he "purposely receives, retains, or disposes" of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner.

"Receiving" is defined as "acquiring possession, control or title, or lending on the security of property". The Comment on the section states:

> "The provision goes beyond most laws in effect when it was drafted in reaching a person who acquires stolen property otherwise than by purchase. In particular, this formulation covers pawnbrokers, where acquisition of stolen property takes the form of a loan transaction in which the goods are accepted as security. By defining 'receiving' to include the retention of possession, the Model Code also makes it possible to convict a person who receives without knowledge that the goods were stolen but who, upon learning of their status, nevertheless resoves to keep or sell them."

(b) The Necessary Mens Rea

97. Under the Model Penal Code formulation, it suffices to prove that the accused believed the goods had probably been stolen. The Comment on the section states:

> "American receiving statutes in effect at the time the Model Penal Code was formulated typically adopted the language of the original English statute, which required that the actor know of the stolen character of the property at the time he received it. Taken literally, this requirement of knowledge could mean that the receiver must know the details of each of the elements of

> conduct and culpability that make up the offense of the original thief. Such a requirement would of course impose an impossible burden on the prosecution, for it is unlikely that the receiver would know or be interested in the precise particulars of the original theft and even more unlikely that the prosecutor could uncover evidence of such awareness."

The comment cites Judge Learned Hand's statement in *United States v Werner*,[87] that "the receivers of stolen goods almost never 'know' that they have been stolen, in the sense that they could testify to it in a court room . . . Nor are we to suppose that the thieves will ordinarily admit their theft to the receivers: that would much impair their bargaining power".

The Comment also states:

> "Recent codes and proposals are sharply divided among three basic approaches to the question of required culpability for criminal receiving. About a third continue the requirement that the receiver 'know' that the property in question is stolen property. A slight plurality agree with the Model Code judgment that knowledge or belief 'that it has probably been stolen' is the appropriate standard. The remainder adopt the position taken by some older statutes and penalise receiving with 'reasonable grounds for believing the property stolen,' thereby imposing liability for negligence. The proposed federal criminal code as enacted by the Senate imposes liability for recklessness with regard to the fact of receiving property 'that has been stolen'."

(c) **Attempted Receiving**

98. Much analysis has been given by courts and commentators in the United States to the question of attempted receiving.[88]

The most famous, and widely-criticised, case, holding that a charge of attempted receiving will not lie unless the goods are in fact stolen is *People v Jaffe*[89] in which the New York court considered that "if all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to do with the same purpose a part of the thing intended".

The trend of more recent decisions is towards imposing liability in such circumstances.[90]

(d) **Evidentiary Aspects**[91]

99. Statutes in a number of States used to provide that possession of recently stolen goods gave rise to a presumption that the defendant knew that the goods had been stolen.

100. The constituional implications are extremely complicated,[92] and what follows is merely a summary of the position.

First, it is clear that the prosecution must prove beyond reasonable doubt every fact necessary to constitute the crime charged.[93] However, where the defendant seeks to establish an "affirmative defence", such

as that of insanity,[94] the legislation of a State may place the burden of proof on the defendant.[95]

In *Tot v United States*[96] it was stated that:

> "a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

In *Leary v United States*[97] it was held that a criminal statutory presumption had to be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it could "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend". Since the presumption with which it had to deal did not satisfy this test, the Court left open the question "whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use".[98]

In *County Court of Ulster County, New York v Allen*,[99] the Court distinguished between mandatory and permissive presumptions. The former type of presumption "tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the connection between the two facts".[100] In this case, the prosecution "may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt".[101] A permissive presumption, on the other hand, is one "which allows — but does not require — the trier of fact to infer the[presumed] fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant".[102] The Supreme Court in the *Ulster County* case was satisfied that:

> "[t]here is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis of a finding of guilt, it need only satisfy the test described in *Leary*."[103]

101. On the specific question of presumptions in relation to receiving stolen property the cases are far from unanimous.[104] In the United States Supreme Court decision of *Barnes v United States*,[105] a permissive inference of guilt from unexplained possession of recently[106] stolen property was upheld. Justice Powell, delivering the opinion of the Court, said:

> "The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks

were stolen.[107] Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable-doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process."[108]

In the light of the later jurisprudence on presumptions, notably the *Ulster County* case, the burden on the prosecution would not be so heavy.

CYPRUS

102. Section 306 of the *Criminal Code* provides as follows:

> "Any person who receives or retains any property, knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, is guilty of an offence of the like degree (whether felony or misdemeanour) and is liable —
>
> (a) in the case of felony, to imprisonment for five years;
>
> (b) in the case of misdemeanour, to imprisonment for two years."

Section 307 used formerly to contain a provision dealing with receiving property fraudulently obtained, but this was repealed by section 17 of the *Criminal Code (Amendment) Law 1952*.

103. Section 309 deals with unlawful possession of property. It provides:

> "Any person who has in his possession any chattel, money, valuable security or other property whatsoever, which is reasonably suspected of being stolen property, is, unless he establishes to the satisfaction of a Court that he acquired the possession of it lawfully, guilty of a misdemeanour and is liable to imprisonment for six months."

HONG KONG

104. Hong Kong's *Theft Ordinance*,[109] section 24, follows identically England's *Theft Act 1968*, section 22.

INDIA[110]

105. Section 410 of the Indian *Penal Code* provides a definition of stolen property as follows:

> "Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as 'stolen property' whether the transfer has been made, or the misappropriation or breach of trust has been committed, within

or without India. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property."

Section 411 deals with dishonestly receiving or retaining stolen property. It provides as follows:

"Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Section 413 deals with habitually dealing in stolen property:

"Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The greatly enhanced penalty for habitually dealing is worth noting.

Section 414 deals with assisting in concealing (etc.) stolen property:

"Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

FOOTNOTES

[1] Cmnd. 2977 (1966).

[2] Paras 128ff. of the Report.

[3] Paras. 136-138 of the Report.

[4] Para. 134 of the Report.

[5] *Id.*

[6] Cf. *infra*, para. 108.

[7] [1983] 1 A.C. 109, at 113.

[8] G Williams, *Textbook of Criminal Law*, 859-860 (2nd ed., 1983).

[9] *Id.*, 860, fn. 5.

[10] 79 C.A.R. 72 (C.A., 1984).

[11] 41st ed., para. 18-165.

[12] 60 C.A.R. 14, at 18 (1974).

[13] 79 C.A.R., at 76.

[14] Id.

[15] 81 C.A.R. 260, at 264 (C.A., 1985).

[16] 84 C.A.R. 75, at 78 (C.A., 1986).

[17] 72 C.A.R. 72, at 75 (1984).

[18] 84 C.A.R., at 79.

[19] 81 C.A.R. 260, at 264 (1985).

[20] 84 C.A.R. at 79.

[21] See Howarth, *Handling Stolen Goods and Handling Salmon*, [1987] Crim. L. Rev. 460.

[22] See Gordon, *The Criminal Law of Scotland*, ch. 20 (2nd ed., 1978).

[23] *Id.*, 683.

[24] *Id.*

[25] *Id.*

[26] *Id.*, 684.

[27] See also section 292 (2) of the Act, and cf. Gordon, *op. cit.*, 684-685.

[28] Macdonald's *Criminal Law of Scotland*, 68 (5th ed.).

[29] *Smith v. Watson*, 1982 S.L.T. 359.

[30] Section 18(6) of the draft Code.

[31] See C R Williams & M S Weinberg, *Property Offences*, ch. 8 (1986), P Brett & P Waller, *Criminal Law: Cases and Text*, 395-398 (3rd ed., 1971), Bourke's *Criminal Law* 370-374 (2nd ed., by D Sonenberg & C New, 1969), R Carter, *Criminal Law of Queensland*, ch. 41 (6th ed., 1982), Watson & Purnell, *Criminal Law in New South Wales*, vol. 1A, paras. 696-718, E Edwards, R Hayes & R O'Regan, *Cases on the Criminal Code*, 440-448 (1969), C Howard, *Criminal Law*, 228-234, 248-249 (4th ed., 1982).

[32] See C R Williams & M S Weinberg, *Property Offences*, 374-395 (1986).

[33] Citing the Victoria decisions, *Beljajev*, [1984] V.R. 657 and *Cottrell*, [1983] V.R. 143.

[34] Williams & Weinberg, *op. cit.*, 387-388.

[35] Letter from Mr Desmond Lane, Legal Officer, Policy and Research, Law Department, Victoria, 13 February 1987.

[36] Cf. Williams & Weinberg, *op. cit.*, 368-369.

[37] *Id.*, 371, citing the *Vagrants, Gaming and Other Offences Act 1931*, sections 25, 47(2) and 52, and *R v Justices at Cloncurry; Ex parte Ryan*, [1978] Qd. R. 213.

[38] Section 586(4).

[39] Williams & Weinberg, *op. cit.*, 370.

[40] P. 272 of the Report.

[41] *Id.*, p. 273.

[42] *Id.*, p. 272.

Id., p. 273.

[43] *Id.*

[44] Letter for Dr P R Handford, Executive Officer and Director of Research, Law Reform Commission of Western Australia, 19 February 1987.

[45] *Id.*

[46] See Williams & Weinberg, *op. cit.*, 371.

[48] *Id.*, 348, fn. 2, 351-352.

[49] Cf. *id.*, 360.

[50] Cf. *id.*, 365-366, citing *Foster*, 118 C.L.R. 117 (1967), *Sawyer*, 16 F.L.R. 354 (1970) and *Brennan*, 16 F.L.R. 358 (1970).

[51] *Id.*, 366.

[52] Enacted in 1979, in consequence of the repeal of the virtually identically drafted section 50 of the *Summary Offences Act 1970*: Williams & Weinberg, *op. cit.*, 367.

[53] On the balance of probabilities: *id.*, 367, fn. 96, citing *Ex parte Patmoy; Re Jack*, 44 W.N. (N.S.W.) 351 (1944), *Wooley v Bomford*, [1969] Tas. S.R. 127.

[54] Citing *Grant*, [1979] 2 N.S.W.L.R. 478 and *Grant*, 55 A.L.J.R. 490 (1980).

[55] Citing *J.A.L. and L.L.*, 3 D.C.R. 182 (1974).

[56] Citing *Ferrell v Burrows*, (1973) 4 S.A.S.R. 416, considered *infra*.

[57] Williams & Weinberg, *op. cit.*, 367-368.

[58] See *id.*, 368.

[59] Citing *Ferrell v Burrows*, (1973) 4 S.A.S.R. 416.

[60] Williams & Weinberg, *op. cit.*, 368.

[61] *Id.*, 372.

[62] Cf. chapters XXIV to XXVII of the *Criminal Code*.

[63] Section 258(4).

[64] [1962] Tas. S.R. (N.S.) 370.

[65] [1948] Tas. S.R. 107.

[66] Citing *Weston v Smith*, [1963] Tas. S.R. 27.

[67] Citing *Nicholas v Fleming*, [1959] Tas. S.R. 165.

[68] *Report No. 25 on the Second-Hand Dealers Act 1905.*

[69] E.g. dealers in second-hand motor vehicles and spare parts, auctioneers and estate agents.

[70] E.g. certain associations of antique dealers and dealers in fine art.

[71] The Commission considered that charitable institutions should be automatically exempt in relation to donated goods but not goods that they paid for; it recommended that the Minister be given power to exempt specific charities generally or in respect of any particular class of goods.

[72] Letter from W.G. Briscoe, Research Director, Law Reform Commission of Tasmania, 6 February 1987.

[73] See Williams & Weinberg, op. cit., 373.

[74] *Id.*

[75] See Garrow & Caldwell's *Criminal Law in New Zealand*, 231-240 (6th ed., by R.A. Caldwell, 1981), Adams, *Criminal Law and Practice in New Zealand*, paras. 2090-2148 (2nd ed., 1971).

[76] Cf. *Lucinsky*, [1935] N.Z.L.R. 575.

[77] At the time of the reception: cf. Adams, *op. cit.*, p. 547, para. 2106. Retention after acquiring knowledge subsequent to the receiving may constitute theft by conversion: *Stone*, [1920] N.Z.L.R. 462.

[78] Cf. *Creamer*, 32 N.Z.L.R. 449 (1912), holding that the words "dishonestly obtained" are to be understood, not as referring to moral dishonesty, but as a summary of the earlier words in the subsection referring to a crime or to an act which would be a crime if committed in New Zealand; see Adams, *op. cit.*, p. 546, para. 2105.

[79] The references in the section to money in decimal currency in square brackets were substituted for references to money in the former currency by section 7 of the *Decimal Currency Act 1964*. The amount was raised to $300 from $40 by the *Crimes Amendment Act 1986*, No. 4, section 4. The 1986 Act also raised the amount of $10 to $100 in subsections (b) and (c) of section 258(1).

[80] See LaFave & Scott, *Handbook on Criminal Law*, 681-691 (1977), 765-775 (Student ed., 2nd ed., 1986), Perkins & Boyce, *Criminal Law*, 394-405, 624 (3rd ed., 1982), *American Jurisprudence*, vol. 66, pp. 293-333 (2nd ed., 1973) and update supplement, pp. 24-48, Wharton's *Criminal Law*, vol. 4, ch. 25 (1981), Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich. L. Rev. 1511 (1976), *Anon., Property Theft Enforcement and the Criminal Secondary Purchaser of Stolen Goods*, 89 Yale L.J. 1225 (1980), Chamberlain, *Anti-Fence Legislation*, 14 A.B.A.J. 517 (1928) Clark, *Note: Receiving Stolen Goods*, 58 Dickinson L. Rev. 290 (1954), Wadden, *Note: Criminal Law - Receiving Stolen Goods - Elements in the Crime*, 26 N. Carolina L. Rev. 192 (1948), Weaver & Smith, *Note: Receivers of Stolen Property in Pennsylvania*, 12 U. Pittsburg L. Rev. 269 (1951), Miles, *Comment: Criminal Law - Possession of Property - Burden of Proof - Duty to Explain*, 68 Mass. L. Rev. No. 4, 199 (Dec., 1983), Hon. L. Sand, J Siffert, W Loughlin & S. Reiss, *Modern Federal Jury Instructions: Criminal*, ch. 54, Kroese, *Comment: Arizona's Elimination of Specific Intent from the Crime of Receiving Stolen Property*, 23 Ariz. L. Rev. 1362 (1981).

[81] E.g. Ark. Stats. Ann., section 41-2206(1); Conn. Gen. Stats. Ann., section 53a-119 (8); Del. Code Ann. 11 section 851; Code of Ga. Ann., section 26-180b(a); Utah Code Ann., section 76-6-408(1); Rev. Code of Wash. Ann., section 9A.56.140(1); cited by Wharton, *op. cit.*, para. 459, fn. 67. See also Ohio Rev. Code, section 2913.51 (A), *Commonwealth of Pennsylvania v Kelly*, 446 A. 2d 941 (Pa. Super., Ct., 1982).

[82] E.g. Code of Ala., section 13-3-55; Cal. Penal Code, section 496(1); Minn. Stats. Ann., section 609.53(1) (2); Utah Code Ann., section 76-6-408(1); Rev. Code of Wash. Ann., section 9A.56.140(1); cited by Wharton, *op. cit.*, para. 459, fn. 69; see also *Corpus Juris Secundum*, vol. 76, para. 7, and West's Wisc. Stats. Ann., section 943-34.

[83] E.g. West's Fla. Stat. Ann., section 812-831 (1976); La. Stat. Ann. Rev. Stat. 14:69 (1979), cited by Perkins & Boyce, *op. cit.*, p. 396, fn. 24; also Va. Stat. section 18.2-108, cited in M.P.C., para. 223.6, fn. 7.

[84] Perkins & Boyce, *op. cit.*, p. 397. A particularly wide definition is contained in Massachusetts ((p) ch. 226, section 21 (cited in M.P.C., Para. 223.6, fn. 7)) ("receives, buys, retains, possesses, controls, sells, transfers, transports, sends, or conceals").

[85] The *Model Penal Code* has been prepared by the American Law Institute, a private organisation of high prestige, whose members are lawyers, judges and scholars, which restates the common law and recommends reform of statutes. The approach favoured by the Model Penal Code was substantially endorsed by the National Commission on Reform of Federal Criminal Laws in its *Study Draft of a New Federal Criminal Code*, published in 1970 and in the *Criminal Code Reform Act of 1979* (see Report of the Committee on the Judiciary, United States Senate (96th Congress, 2d Sess., Report No. 96-553)), which has not yet been enacted. Section 1732(a) provides that: "[a] person is guilty of an offence if he traffics in property of another that has been stolen." "[a] person is guilty of an offence if he buys, receives, possesses, or obtains control of property of another that has been stolen." An affirmative defence is provided by section 1733(b) if the defendant intended to report the matter to the police or the owner. Cf. the Report of the Committee on the Judiciary, United States Senate, *supra*, at 704. Valuable information on this subject was supplied to the Commission by Professor Martin Levine of the Law Center, University of California, and Professor Paul F Rothstein, of Georgetown University Law Center, Washington, D.C.

[86] This incorporation of receiving into the offence of theft is considered *infra*, paras. 135-136.

[87] 106 F. 2d 438 (2d Cir. 1947).

[88] See Robbins, *Attempting the Impossible*, 23 Harv. J. of Legislation 377 (1986), Dugdale, *Note: Criminal Law - Putting the Defense of Legal Impossibility to Rest in North Carolina*, 19 Wake Forest L. Rev. 605 (1983), McCardle, *Note: Criminal Law - Attempt - Impossibility of Consummation of Complete Criminal Act not a Bar to Conviction for Attempt*, 6 Villanova L. Rev. 575 (1961), Poche, *Note: Criminal Law: Impossibility in Fact*, 48 Calif. L. Rev. 314 (1960), G. Fletcher, *Rethinking the Criminal Law*, 154-157 (1978), *Anon., Note: Criminal Law - Attempt - Conviction of Attempt to Receive Property Not in Fact Stolen*, 13 Vand. L. Rev. 790 (1960), Arnold, *Criminal Attempts - The Rise and Fall of an Abstraction*, 40 Yale L.J. 53 (1930), Cherner, *Note: Legal Impossibility Is Not a Defense to Inchoate Crimes*, 58 Temple L.Q. 365 (1985).

[89] 185 N.Y., at 497, 78 N.E., at 170.

[90] Robbins, *op. cit.*, at 415, citing *People v Rojas*, 55 Cal. 2d 252, at 258, 358 P. 2d 921, at 924, 10 Cal. Rptr. 465, at 468 (1961) (a leading decision), *Darr v People*, 193 Colo. 445, at 449, 568 P. 2d 32, at 35 (1977), *State v Rios*, 409 So. 2d 241, at 244 (Fla. Dist. Ct. App., 1982), *Darnell v State*, 92 Nev. 680, at 681-682, 558 P. 2d 624, at 625 (1977), and *State v Davidson*, 20 Wash. App. 893, at 898, 584 P. 2d 401, at 404 (1978).

In *Rojas, supra*, 358 P. 2d, at 924, the Court said:

> "... [T]he criminality of the attempt is not destroyed by the fact that the goods, having been recovered by the commendably alert and efficient action of the Los Angeles police, had, unknown to defendants lost their 'stolen' status ... In our opinion the consequences of intent and acts such as those of defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out."

[91] See Guernsey, *Note: Constitutionality of Presumptions on Receiving Stolen Property: Turning the Thumbscrew in Michigan and other Statutes*, 21 Wayne L. Rev. 1437 (1975), Moehlmann, *Case-note: Criminal Law - Presumption That Unexplained Possession of Recently Stolen Goods Is Sufficient Evidence of Guilt of Receiving Stolen Goods Held Unconstitutional*, 75 Dickinson L. Rev. 544 (1971), Murdock, *Receiving Stolen Goods - Inference of Guilty Knowledge from Recent Possession*, 26 J. of Cr. L. Criminology & Police Science 618 (1936), T.J.W., *Note, The Presumption Arising from the Possession of Stolen Property: The Rule in Indiana*, 6 Ind. L.J. 73 (1972), Deahl, *Note: Receiving Stolen Property - The Doctrine of Recent Possession and Problems Associated with Defendant's Testimony*, 14 Land & Water L. Rev. 291 (1979), *Anon., Note: Due Process Requirements for use of Non-Statutory Inferences in Criminal Cases*, [1973] Wash. U.L.Q. 897. As to police powers of search and seizure, in relation to property believed to have been stolen, see LaFave, *Search and Seizure*, vol. 2, 243-247 (2nd ed., 1987), Burkoff, *Search Warrant Law Deskbook*, Section 9.3 (1987).

[92] See generally *McCormick on Evidence*, 987-1000 (3rd ed., 1984), P Rothstein, *Evidence: Cases Materials and Problems*, 1421ff (1986), P Rothstein, *Evidence: State and Federal Rules*, ch. 2 (1981), Jefferies & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979), Ashford & Rissinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969), Neeson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187 (1979).

[93] *In re Winship*, 397 U.S. 358 (1970). See McCormick, *op. cit.*, 989.

[94] Cf. *Patterson v New York*, 432 U.S. 197 (1977), Distinguishing *Mullaney v Wilbur*, 421 U.S. 684 (1975).

[95] The conceptual distinction between the ingredients of an offence and an affirmative defence is less thas fully clear. In *Patterson*, 432 U.S., at 210, the Court acknowledged the danger that state legislatures might "reallocate burdens of proof by labelling as affirmative defenses at least some elements of crimes now defined in their statutes". But the Court was satisfied that there were "obviously" constitutional limits beyond which the States might not go in this regard.

[96] 319 U.S. 463, at 467 (1943).

[97] 395 U.S. 6, at 36 (1969).

[98] *Id.*, at 36, n. 64.

[99] 442 U.S. 140 (1979).

[100] *Id.*, at 157.

[101] *Id.*, at 167.

[102] *Id.*, at 157.

[103] *Id.*

[104] See Guernsey, *op. cit.*, Moehlmann, *op. cit.*

[105] 412 U.S. 837 (1973).

[106] See *Commonwealth of Pennsylvania v Williams*, 468 Pa. 357, 362 A. 2d 244, 89 A.L.R. 3d 1190 (1976), (and supporting *Annotation* in A.L.R.); *Commonwealth of Pennsylvania v Worrell*, 419 A. 2d 1199 (Pa. Super. Ct., 1986), *People v Roder*, 33 Cal. 3d 491, 189 Cal. Rptr. 501, 658 P. 2d 1302 (1983), analysed in 11 Pepperdine L. Rev. 187, at 228-232 (1983).

[107] Citing *Turner v United States*, 396 U.S. 398 at 417 (1970), *Leary v United States*, *supra*, at 46.

[108] 412 U.S., at 845-846.

[109] Laws of Hong Kong, cap. 210 (1980 ed.).

[110] See the Indian *Penal Code 1860* (1986 ed.).

CHAPTER 4: PROPOSALS FOR REFORM

In this chapter we make proposals for reform of the law in regard to receiving stolen property.

A. General Policy Considerations

106. At the outset it is perhaps desirable to spell out our general approach towards reform of criminal law, and of the subject of receiving stolen property in particular. We consider it appropriate that the law should be framed in such a way that conduct which is, by common consent, wrongful and lacking social or individual justification should not fall outside the scope of criminality merely by reason of the technical operation of rules applied without concern for the policies which those rules seek, or should seek, to serve. For example the decision of *Walters v Lunt*,[1] whilst arguably correct in terms of the present rules as to criminal liability for receiving, clearly gives rise to concern. That concern is not simply an instinctive incoherent reaction that immoral behaviour ought to be punished; instead it causes us to re-examine the rule, previously regarded as satisfactory and sensible, that a necessary ingredient in the offence of receiving is that the goods should have been stolen. Thus a controversial case forces us to look more closely at the rules and to examine the policies which they seek to serve. That examination may sometimes result in the conclusion that a particular rule, although having somewhat unpalatable results in certain contexts, is, on balance, the best that can be devised. It may on other occasions result in the conclusion that what seemed a sensible rule must either be modified, subjected to certain qualifications and exceptions, or perhaps even abandoned entirely.

While the exposition of the present law in Chapter 2 and the comparative material in Chapter 3 establish clearly, in our view, that our present law on receiving is in many respects unnecessarily favourable to the accused, presents unreasonable obstacles to the

prosecution and is seriously out of date, it would, however, be wrong to adopt in response a posture so extreme as to deprive the accused of safeguards which are an essential feature of our system of criminal justice. The necessary consequence of ensuring that the innocent are not convicted is that the guilty will sometimes escape.

We are also of the view that, while conditions peculiar to this jurisdiction, including the requirements of the Constitution, must constantly be borne in mind, it is desirable that our law in this area should correspond reasonably closely to the law in the neighbouring jurisdictions of Northern Ireland and Great Britain. Where that legislation seems reasonably adapted to securing the same objectives as those which we would wish to see achieved by the law, we think there is much to be said, particularly in the context of extradition, for endeavouring to ensure a degree of harmony, so far as practicable, between the criminal law in the different jurisdictions. It is useful to cite some observations[2] of Henchy J in this connection:

> "If the process of reasoning and comparison by which correspondence of offences is recognized or not recognized for the purpose of Part III of the *Extradition Act 1965* seems haphazard or otherwise unconvincing or illogical, this is a flaw which was pointed out when this court decided *Furlong's case*.[3] The passage of time since the 1965 extradition arrangements were made has resulted in those arrangements being increasingly more difficult to operate. The Irish Act of 1965 is the Irish counterpart of the *Backing of Warrants (Republic of Ireland) Act 1965*. Section 47, subsection 2 of the Irish Act of 1965 excludes judicial extradition when the offence specified in the warrant does not correspond with an offence under the law of this State. While in the year of 1965 such correspondence existed between many offences, the extent of the subsequent reform of the criminal law in the United Kingdom and the absence of any corresponding range of reform in this State have sharply reduced the number of corresponding offences. The result is that the envisaged system of extradition has shrunk to the extent that it now operates only vestigially.
>
> It is high time that fresh extradition arrangements were negotiated, preferably on the basis of specifying (by name or type or conceptual range) the offences for which extradition will be granted, rather than on the basis of the shifting and uncertain foundation of corresponding offences. It is not in accordance with the co-operation against crime that should exist between States, particularly neighbouring States, that immunity from prosecution or punishment should be made available by the facile device of the person charged or found guilty transferring himself to another jurisdiction where the law does not contain a corresponding offence."

It must be emphasised, however, that our overriding objective must remain the enactment of a law on this topic which is just and reasonable as well as effective. The wider policy considerations affecting the law of extradition addressed by Henchy J do not concern us in this Report and we think it is clear that the desirability of securing legislative harmony between the jurisdictions in these islands must play a secondary role in our conclusions.

B. The Scope of the Concept of "Receiving"

107. We must first consider whether the concept of "receiving" stolen goods, as it operates under present law, is satisfactory.

In defence of the present approach it may be argued that, although its parameters can be uncertain in their application in specific cases, the present definition has not given rise to serious difficulties. The law should be slow to make a criminal offence out of conduct where the motivation of the person involved may be that of passively seeking to facilitate a friend rather than to play an active role in the disposition of the stolen goods.

We are not impressed by this argument. The question of motive, though important, should not determine the scope of the *actus reus* in this context. Moreover there is a range of conduct which by common consent is anti-social and without any justification but which falls outside the scope of receiving as at present defined.

108. *We consider that the case for expansion is unanswerable.* The only question is as to how best this should be done. In England, as we have seen,[4] section 22 of the *Theft Act 1968* provides that it is an offence, not only if a person receives stolen goods, but also if he "dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so". This offence contains so much more than receiving that it was considered appropriate to change the name of the offence to "handling" stolen goods.

Another precedent is section 223.6 of the United States *Model Penal Code.* Under this, it will be recalled, a person is guilty of theft if he "purposely receives, retains or disposes of movable property..."; and "receiving" means "acquiring possession, control or title or lending on the security of the property".

Both these models undoubtedly extend the concept of "receiving" in a significant manner and the adoption of either of them should assist in the prosecution and conviction of persons whose behaviour in relation to stolen goods would be regarded by society at large as criminal, but who at present escape conviction because of the narrow confines of the concept of "receiving".

We are satisfied that the offences we propose should be capable of being committed at a time other than the moment of receipt of goods. It is worth noting that section 33(4) of the *Larceny Act 1916* constitutes a possession-based offence. *We consider that a person should be capable of committing the offence if, having received the property innocently, he subsequently retains it with mens rea.* We are also satisfied that the penalty for larceny and receiving should be the same. We see no reason why a thief should not also be a handler: in fact later in the report we will discuss the question whether in the future larceny and handling should be assimilated into one offence, as has been done in the Model Penal Code. There are clearly different modes of dealing with stolen property, possessory and non-possessory. *Nevertheless we are of opinion that only one offence should be created and that the legislation*

should provide for a simple form of charge and indictment for that offence.

It was the policy of the British parliament when it enacted Section 22 of the *Theft Act* to keep dealing and handling distinct offences. This policy, according to Professor JC Smith, added "further unfortunate complications to an already complicated offence".[5] Kilner Brown J in *Bloxham*[6] refers to "the convoluted terminology of the section as a whole". Spencer points out[7] that the section prohibits thirty two types of non-possessory handling and that it would not be *possible* for a defendant to commit some of the offences created — for example, to "undertake the retention of stolen goods by another". Glanville Williams observes that the draftsman "obscured his meaning by rolling the various alternatives into a complex sentence"...[8] Referring to the fact that he was a member of the Criminal Law Revision Committee which considered the draft of the sub-section, he says: "Little did we realise what an ugly duckling we were fostering!"[9]

Whatever about the drafting of the section as a whole, *we think that "handling" is an appropriate general description of the offence.* Glanville Williams has given his imprimatur to the word "dealing" to cover handling which is not handling by receiving. Dealing is one of the modes of the *actus reus* most frequently used under Section 186 of the *Customs Consolidation Act, 1876.* It has been pointed out to us, however, that there is a danger it might be given a somewhat narrow interpretation, for example, one which would confine it to commercial transactions and thus defeat the object of employing it as a word of general definition.

The words normally used when offences of possession are created, in relation to drugs, firearms or explosive substances, for example, are "having in possession" and "having under control". *We recommend that the word "handling" should be used as the one word to describe the actus reus of the offence. "Handling" should in turn be defined as receiving property or having it in one's possession or under one's control or arranging (or assisting in) its retention, removal or disposal by another person.*

C. The Mental Element

109. We must now consider the difficult question of the mental element in the offence of receiving. The policy issues are complex, and allow for no obviously satisfactory answer. The best approach is to examine several possible legislative strategies, testing their strengths and weaknesses. These strategies are the following:

1. Liability based on reception[10] without regard to the belief of the accused as to whether the goods were stolen;
2. Liability based on reception where a reasonable person ought to *suspect* that the goods were more probably stolen than not;
3. Liability based on reception where a reasonable person ought to have been *certain* that the goods were stolen;

4. Liability based on reception where the accused was *reckless* as to whether the goods were stolen;
5. Liability based on reception where (i) the accused was reckless as to whether the goods were stolen, *and* (ii) a reasonable person ought to have been certain that the goods were stolen;
6. Liability based on reception where the accused *actually* suspected that the goods were stolen;
7. Liability based on reception where the accused believed that the goods were stolen;
8. Liability based on reception where the accused was *virtually certain* that the goods were stolen;
9. Liability based on reception where the accused was *actually certain* that the goods were stolen;
10. Shifting the burden of proof;
11. A "graded" solution, where the severity of punishment would depend on the extent of *mens rea*;
12. Imposing more onerous obligations on convicted receivers.

We should note at the outset that the precise enunciation of the basis of liability in each of these categories need not greatly exercise us. What we are concerned to bring forward are general reference points, in the gradual progress from complete disregard for the mental element, reasonable or unreasonable, through an objective standard of reasonable belief, culminating ultimately in a completely subjective standard, with the need for certainty on the part of the accused that the goods were stolen. We have traced this progress in twelve stages; it would, of course, have been possible to break it down into even more stages.

1. Liability based on reception without regard to the belief of the accused as to whether the goods were stolen[11]

110. Under this approach, an accused could be convicted of receiving where he receives or has in his possession stolen[12] goods, without any need on the part of the prosecution to show that he believed them to have been stolen, or, indeed, to show that a reasonable person would have had any suspicion as to their provenance. In favour of this approach it can be argued that an offence drafted on these lines would offer considerable practical advantages. At present, when a professional receiver makes no statement, it is very difficult for the prosecution to establish proof of the necessary ingredient that the accused knew that the goods were stolen. If the law were to forego this requirement, the prospects of conviction could be far greater. Prosecutorial discretion might ensure that prosecutions would be taken only where in fact there was reason to believe that the accused had acted dishonestly.

The criminal law is no stranger to strict liability. Apart from operating in a wide range of statutory offences in regard to public health and other areas, the law relating to mistake of age in regard to carnal knowledge, for example, punishes conduct even when the mistake is reasonable.

Receiving, it is said, is a serious social problem. The familiar statement that without receivers there would be fewer thieves is obviously true. From time to time the Oireachtas, bearing in mind the exigencies of the common good, has addressed serious social problems by creating absolute offences, some of which cannot be reconciled with a "subjectivist" approach. An obvious example is the legislation relating to the possession of drugs. Another example is that relating to driving with excess blood-alcohol. The consequences are extremely serious for certain persons convicted. Statistics show that the legislation has saved lives and reduced serious injuries.

111. We have no hesitation in rejecting this option. We find it difficult indeed to see how legislation on these lines could be reconciled with the constitutional guarantee that persons are not to be tried for serious criminal offences save in due course of law. An offence creating a form of absolute liability in these circumstances would seem to merit the description given by Henchy J in *King*[13] of the offence purportedly created by s. 4 of the *Vagrancy Act 1824*:

> "[T]he ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut... so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."

No useful comparison can be drawn with the existing legislation relating to the possession of drugs or driving with excess blood alcohol, which relate to the possession or consumption of specific substances perceived as socially dangerous in defined circumstances. The proposed new offence would, by contrast, encompass under the one umbrella of serious criminal guilt the professional "fence" who plays a major figure in the organisation and promotion of crime and an

innocent housewife who buys for full value in perfectly good faith a second-hand vase in an antique shop wholly unaware that it is stolen and with no reason to suppose that it is stolen. It can indeed be said that this option is mentioned for the sake of completeness only and does not deserve further serious consideration.

2. Liability based on reception where a reasonable person ought to suspect that the goods were more probably stolen than not

112. This option adopts an objective test of responsibility: the accused will be liable, not for what he *actually* suspected regarding the provenance of the goods, but for what he ought, as a reasonable person, to have suspected. An offence drafted on these lines would no doubt make it clear that this test of reasonableness would be determined in the light of information to which the accused had, or ought to have had, access.

There is something to be said in favour of this option. In summary, the reception of stolen goods without due regard to the possibility of their having been stolen is clearly anti-social behaviour. Thieves need receivers: they need the professional fence but they also need the careless purchaser who buys property at a clear undervalue with no concern for the provenance of the goods. On this view, a person who acquires stolen property without taking due care as to its origins may be regarded as having only himself to blame if he is punished[14] for his carelessness. In his book, *Theft, Law and Society*,[15] Jerome Hall[16] writes:

> "The fabrication of false explanations to refute the presumption of recent possession is facilitated by the usually defensible rule, consistent with the general requirements of the *mens rea* doctrine, that the knowledge of the particular defendant on trial controls rather than that of 'an ordinary, reasonable, and prudent person' in the situation of the defendant and under the circumstances of the case."

There are undoubtedly difficulties in proving the true state of the defendant's mind. It is not to be expected that professional receivers will make statements admitting guilty knowledge. Nor can it be assumed that they will tell the truth on oath. In the result, a jury, fairly and carefully directed by the trial judge, may find the greatest difficulty in avoiding the conclusion that there is at least a reasonable doubt as to whether the prosecution have proved such guilty knowledge. Against this background, the introduction of an objective test of guilty knowledge has obviously much to commend it.

As against this, however, the criminal law has traditionally leaned strongly against offences based on negligence rather than subjective intention or recklessness. Its policy, generally speaking, has been to punish subjective guilt rather than objectively defective conduct. There are, it is true, some important exceptions to this general principle, notably manslaughter. But the question remains as to whether there are social factors sufficiently compelling to make receiving stolen property an offence based on negligence when larceny is not.

A further argument advanced against criminal liability based on this objective criterion is that the interests of society are enhanced by having a reasonably free market in goods. If people who are engaged in the buying and selling of goods, whether they be businessmen or not, have to exercise a high degree of caution in the acquisition of property under the threat of criminal sanction, the result could be a chilling effect on economic activity to the detriment of society. There would be an inevitable tendency to "play safe" lest a court or jury should come to the conclusion that the facts warranted a reasonable suspicion that the goods were stolen.

As against this, the view can be expressed that it is the free market in goods which causes the problem and that it would make receiving more easily detected if trade were entirely directed into established retail outlets and away from public houses, roadsides and other informal outlets. (This would have the incidental benefit of enabling the State more readily to collect taxes arising from such sales.) On this view, the market for the thief should be restricted and, if possible, abolished. A further argument against this option, however, is that it might have the unintended consequence of placing unwarranted restrictions on the economic freedom of certain economically disadvantaged persons, including those lacking a permanent home. Pawnbrokers, shopkeepers and private persons might consider it safer to avoid some kinds of economic transactions with these persons on the (possibly quite unwarranted) view that a suspicion arose as to the provenance of goods in their possession. This could be met by the argument that the law should encourage such traders to be careful since, at present, some of them are responsible, wittingly or unwittingly, for the disposal of much stolen property.

On balance, however, the arguments based on social considerations are not nearly sufficiently strong to justify such an inroad on the traditional approach of the criminal law.

3. Liability based on reception where a reasonable person ought to have been certain that the goods were stolen

113. This option[7] is, of course, similar in a number of respects to option no. 2. The only difference is in regard to the degree of suspicion. The same basic arguments and counterarguments apply as with option 2 although trade would be less restricted.

The principal argument in favour of this option is that, while there may be some reason for hesitating in rendering criminal conduct that is simply unreasonable, there is far less reason to do so where the accused must have acted with a high degree of carelessness.

A major argument against this option is that, whether the test be subjective or objective, *certainty* as to the provenance of goods represents an impossibly high test.

4. Liability based on reception where the accused was reckless as to whether the goods were stolen

114. This option is far closer to the traditional policy of criminal law

although, as we have seen,[18] it does not represent the law in relation to receiving stolen property.

In favour of this option it may be argued that the requirement of recklessness affords sufficient deference to subjective wrongfulness in this context. We are dealing here with anti-social conduct of a serious kind. If an accused, having addressed the question whether the goods were stolen, decides to take a chance, it may be said that this behaviour is sufficiently wrongful to warrant punishment.[19]

Recklessness was used by the legislature in the definition of rape in the *Criminal Law (Rape) Act 1981*. The legal implications of recklessness were addressed by the Supreme Court in the context of a prosecution for capital murder of a Garda in the *People v Murray*.[20] It appears to us that the concept of recklessness, properly defined, has advantages in the context of the appropriate *mens rea* for receiving. We say "properly defined" because, unless the term is clearly defined, the Court could interpret the term in either a subjective or objective sense. One interpretation would require the accused to have actually adverted to the risk that the property had been stolen before there could be a conviction. Under the alternative interpretation there could be a conviction if a reasonable man would have adverted to the risk in the circumstances, whether or not the particular accused adverted to the risk.

By way of illustration, the English Law Commission in their Report (No. 29) on Criminal Damage, published in 1970, recommended that the formula "unlawfully and maliciously" used in the *Malicious Damage Act 1861* be replaced by a formula of intention or recklessness, (as regards perpetrating the particular damage). In their Working Paper on the topic (No. 23), in 1969, they had expressly approved of the decision in *Cunningham*[21] and quoted the following passage from the judgment in paragraph 33 of the paper:

> "We have also considered the following principle, which was propounded by the late Professor C S Kenny in the first edition of his *Outlines of the Criminal Law* published in 1902 and repeated at page 186 of the 16th edition edited by Mr J W Cecil Turner and published in 1952:
>
> > 'In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) an actual intention to do the particular *kind* of harm that was done; or (2) recklessness as to whether such harm should occur or not (i.e. *the accused has foreseen* that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured...'
>
> We think that this is an accurate statement of the law."

The Commission clearly intended the recklessness test to be subjective. The *Criminal Damage Act 1971* duly incorporated a recklessness provision without specifically defining the term. In due course, and to the surprise of many commentators, the House of Lords approved of an objective test in their decision in *Caldwell*.[22] Lord Diplock broadened the definition as follows:

> "'Reckless' as used in the new statutory definition of the *mens rea* of these offences is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech, a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was."[23]

115. All of this points to the desirability of a specific definition of recklessness. Mary McAleese concluded an article[24] on the subject as follows:

> "We need some standardisation of the definition of concepts basic to criminal liability, e.g., intention, negligence and the one in question, recklessness. If the courts cannot do it,[25] why not the legislature?"

If one adopts the subjective approach one could look to the English Law Commission for a definition:

> "A person is reckless if (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present."[26]

Mary McAleese says of this definition:

> "The test is clearly and unequivocally subjective, though in relation to the question whether the risk taken was justified or not, the court is entitled to ask would a reasonable man have thought it justified or not; but the ancillary test only comes into play where it has already been established that the accused either knew or had adverted his mind to the possibility that the risk existed, and is in no way inconsistent with the view that recklessness means and only means *subjective* recklessness."[27]

There can be little or no doubt that recklessness in criminal law has always been defined in a subjective sense, at least before the *Caldwell* decision. Ranged in its favour are Kenny, Smith and Hogan, Jerome Hall, Glanville Williams, the English Law Commission and the American Law Institute, not to mention Lords Edmund Davies and Wilberforce who dissented in *Caldwell*. It presents an acceptable and just definition for the criminal law in general.

One argument against a criterion based on recklessness is that it would create difficulties for those engaged in dealing and in formal commerce. They would certainly advert to the risks involved in their trade and would have to be extremely cautious.

Blakey and Goldsmith say in support of a recklessness test:

> "Use of a recklessness test would permit partial reconciliation of two somewhat conflicting aims of the criminal law. First, by applying a subjective test, a recklessness standard would hold the prosecution to a higher burden of proof than would an

> objective test, thus limiting criminal punishment to only particularly blameworthy conduct. Second, such a standard, although not as favourable to the prosecution as an objective test, would facilitate the prosecution and conviction of offences since authorities would not be required to prove actual knowledge."[28]

In his judgment in *Murray*,[29] Henchy J considered the test of recklessness to be well stated in section 2.02(2)(c) of Tentative Draft No. 4 of the Model Penal Code:

> "A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."

It may be argued that this definition of recklessness could form an appropriate basis for a definition of recklessness in a new offence of handling unlawfully obtained property.

5. Liability based on reception where (i) the accused was reckless as to whether the goods were stolen and (ii) a reasonable person ought to have been certain that the goods were stolen

116. This option offers a cumulative test of liability. An accused would be liable only where he was reckless and a reasonable person would have been certain that the goods were stolen.[30] In favour of this combination of the subjective and objective approaches, it may be argued that it best reflects the reasonable claims of the accused not to be subjected to unduly wide-ranging criminal liability. The objection to punishing a person for receiving where he is guilty merely of recklessness may be considered to be answered if the circumstances are such that any reasonable person, far from simply adverting to the possibility or likelihood of the goods being stolen, would have been convinced that they were so.

As against this, it may be argued that any attempt satisfactorily to combine subjective and objective criteria is doomed to fail. If the claim of the subjective approach is good enough to heed, the objective approach must to that extent give way. The whole basis of the subjective approach is that unreasonable, foolish or careless conduct should not, as a general rule, give rise to criminal liability in the absence of subjective *mens rea*. To consider that there is room for compromise, it may be said, is simply to misunderstand the moral force of the subjective approach.

117. From an entirely different standpoint, the present option may also be criticised. If there is a sufficient degree of subjective *mens rea*, the additional heavy requirement that objectively the facts should warrant a reasonable person being *certain* that the goods were stolen may seem to be an overcautious limitation. Why should a person who

accepts goods when he continues to believe that there is a real possibility that they were stolen be relieved of liability because the hypothetical reasonable person would not be certain that they were so? Such a criterion would be likely greatly to restrict the scope of the offence of receiving, unless perhaps the legislation also provided that, where the accused was nearly, or actually, certain that the goods were stolen, he could be convicted, regardless of whether or not a reasonable person would have been certain that they were so. Alternatively, as has been mentioned, the objective element in the cumulative formula could be modified so as to require merely that a reasonable person, in the circumstances, would have *suspected* that the goods were stolen.

6. Liability based on reception where the accused actually suspected that the goods were stolen

118. With this option we have reached a point where courts have sometimes been willing to convict for receiving. We have seen[31] that in England, where knowledge or belief that the goods were stolen suffices, several trial judges have used the language of suspicion when addressing juries, only to find the Court of Appeal insist that suspicion, even strong suspicion, is not enough.

In our discussion of this option we proceed on the basis that the suspicion in question would have to be one of substantial proportions, rather than merely fanciful. Perhaps it might be expressed in terms of a belief that the goods were more likely than not to have been stolen.

A strong case may be made in favour of this option. Why should any person escape criminal liability where he accepted property when actually suspecting that it was stolen? The conduct has nothing to be said for it from the standpoint of personal moral responsibility or of social needs.

119. There does, however, remain the question of a possibly undue limitation on commerce. Dr Glanville Williams, addressing this issue, has written:

> "Parliament might... word the offence of handling in terms of realising the probability that the goods are stolen, but the change would involve certain dangers for people engaged in lawful trade.
>
> In considering the proposal for legislative (or judge-legislated) change, one has to think not only of youths selling unlikely objects greatly below their value but, say, of pawnbrokers advancing money on precious jewellery. A shabbily-dressed woman enters a pawnbroker's shop in London and pawns an expensive necklace. The pawnbroker questions her and is by no means satisfied by her replies as to her ownership of the necklace, but he nevertheless makes an advance upon it, because the necklace is not included in the police list of stolen goods. Perhaps he risks losing the necklace to a person with superior title, but he accepts that as inevitably incident to his business. The question is: does he risk being convicted of handling? A dealer in antiques may similarly buy a valuable piece from a person who does not look like the usual owner of such furniture,

> though he tells a story about it that, while being rather unlikely, yet may be true. Is there any great need, and would it be just to say that the dealer is guilty of handling if the article turns out to be stolen?...
>
> If anything, the criminal law should be less severe upon traders who take risks than the civil law, not more severe. Moreover, people must be allowed a margin of safety. If they cannot buy goods that they know to be probably stolen, then they cannot safely buy goods when there is an appreciable possibility that they are stolen, because no one knows when lawyers, judges and juries between them may not turn possibilities into probabilities."[32]

We see the force of this argument, but we consider that the social implications might be less significant than Dr Williams suggests. We again stress that "suspicion" in the context of this option envisages a serious rather than a fanciful concern as to whether the goods were stolen.

7. Liability based on reception where the accused believed that the goods were stolen

120. We must now consider whether the test should be one of *belief* that the goods were stolen. This solution was adopted in section 22 of the *English Theft Act 1968,* to unfortunate effect.[33] These difficulties have been attributed to the judicial interpretation of the section. Spencer observed that:

> "[s]ometimes you would think that the courts were trying to make a dog's breakfast of the law of handling stolen goods. In one line of cases in Section 22 of the *Theft Act, 1968* they have interpreted the words 'knowing or believing them to be stolen' to mean 'knowing or knowing them to be stolen', so perpetuating the defect in the earlier law which the addition of the words 'or believing' was designed to cure.[34][34]

There is, however, an inherent problem with using the word "belief" in this context, which the English courts were surely correct in sensing. Belief admits of degrees of commitment, ranging from certitude to suspicion.[35] There is little advantage in a legislative definition which leaves the question of the accused's *mens rea* in such an imprecise state.

8. Liability based on reception where the accused was virtually certain that the goods were stolen

121. This option is very close to the existing law, if not, indeed, identical to it. It affords a subjective test, which is the approach generally favoured by the criminal law. It is not so restrictive as to require absolute certainty on the part of the accused that the goods were stolen.

But the drawback to this option must also be recognised. It fails to render criminal conduct where the accused adverts to the risk that the goods are stolen, and strongly suspects that they are, but that strong suspicion falls short of virtual certainty.

It is also worth mentioning (although not necessarily as a criticism of this option) that the task of the prosecutor in attempting to prove this *mens rea* would be an unenviable one. Sometimes the facts are so strong that they will support, if not require, the inference that the accused must have been certain, or virtually certain, that the goods were stolen; but in many cases this conclusion will not be warranted. The result is that many people in possession of stolen property in suspicious circumstances would, in practice, be beyond the reach of the criminal law.

9. Liability based on reception where the accused was actually certain that the goods were stolen

122. This option, in requiring actual certainty, would go further than most common law jurisdictions have done. Unquestionably it ensures that no defendant who is uncertain as to the provenance of the goods will be convicted. But of course it thus leaves free from criminal responsibility for receiving, those who accepted goods with a virtual certainty that they had been stolen.

It may be argued that this option has the balance wrong. It cannot be defended on the basis that any broader range of liability could prejudice innocent persons: those who accept goods when having a virtual certainty that they were stolen can scarcely be described as "innocent".

It should, however, be noted that this option would ensure the free movement of goods. No one in commerce could possibly complain about a law which penalised reception only when accompanied by absolute certainty that the goods had been stolen.

10. Shifting the Burden of Proof

123. We have noted in Chapter 2 that, when the prosecution have proved unexplained possession of goods recently stolen, a presumption of fact is raised which shifts the evidential burden of proof onto the accused. In these circumstances, once the presumption of fact is raised, the court should not accede to an application for a direction on behalf of the accused. In *Oglesby*,[36] the Court of Criminal Appeal while they expressed their decision in a different manner, and with different emphasis, confirmed this as the law. They rejected the proposition that a "doctrine of recent possession" shifted the legal burden of proof onto the accused.

We are satisfied that the *Oglesby* decision has occasionally been misunderstood by the courts. Certain Judges and District Justices have, from time to time, interpreted the decision to mean that unexplained possession of recently stolen goods does not even raise a presumption of fact and have therefore acceded to applications for a direction. These directions are perhaps explained by the passage in the *Oglesby* judgment in which the court, attacking the "so called doctrine"[37] of recent possession describes it as:

> "...a way of stating what a jury may infer and references to it as a doctrine are misleading because they give the impression that possession of recently stolen property raises a presumption against the accused or casts some onus on him."[38]

While it is true that the onus of proof never leaves the prosecution or, to put it another way, that no legal or persuasive burden of proof is shifted onto the accused, such possession does raise a presumption of fact which shifts an evidential burden onto the accused.

In addressing the problem presented by offences based on possession where no presumptions of fact have evolved into well settled law, the legislature has addressed the problem by making specific statutory provision for the raising of inferences and the shifting of burdens. Section 4 of the *Explosive Substances Act 1883* and Section 27 (A) of the *Firearms Act 1964*, as inserted by Section 8 of the *Criminal Law (Jurisdiction) Act, 1976*, create similar offences for the suspicious possession of explosives and firearms. Section 27 (A) provides:

> "A person who has a firearm or ammunition in his possession or under his control in such circumstances as to give rise to a reasonable inference that he has not got it in his possession or under his control for a lawful purpose, shall, unless he has it in his possession or under his control for lawful purpose, be guilty of an offence..."

The drafting of this section lays bare the inferential process upon which the prosecution has to rely in any case in which the proofs are based on circumstantial evidence. The Explanatory Memorandum to the Act says the following about this offence:

> "The essence of the offence will thus be the suspicious circumstances in which the person in question has the firearm or ammunition. Where the defence is that the accused's purpose is lawful, the new section casts an evidential burden on the accused of proving this. That is to say, if the prosecution proves the possession or control and the suspicious circumstances, and the accused's defence is that his purpose was lawful, it will be for him to give, adduce or elicit evidence to raise an issue fit for consideration as to the lawfulness of his purpose."

Thus as far as the burden of proof is concerned, the law is the same for receiving stolen goods as it is for the suspicious possession of firearms. Only the drafting is different.

124. Another mode of shifting the burden of proof suggested by some of our commentators is the raising of presumptions. This can be done either by adopting a general formula or by prescribing the specific circumstances in which presumptions would arise. Section 15 (2) of the *Misuse of Drugs Act, 1977* provides a combination of the general and the particular:

> "15 (1) Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence.
>
> (2) Subject to section 29 (3) of this Act, in any proceedings for an offence under subsection (1) of this section, where it is proved

> that a person was in possession of a controlled drug and the court, having regard to the quantity of the controlled drug which the person possessed or to such other matter as the court considers relevant, is satisfied that it is reasonable to assume that the controlled drug was not intended for the immediate personal use of the person, he shall be presumed, until the court is satisfied to the contrary, to have been in possession of the controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act."

Section 15(2) shifts the legal burden of proof onto the accused. However, it would be open to the legislature to employ the presumption formula but to raise evidential burdens only. It has been suggested to us that presumptions shifting a burden of proof could be raised where, for example, the accused is in possession of recently stolen goods, where he gives a false explanation for such possession, or where he admits buying the property at a price significantly lower than market value.

125. A further mode of shifting the burden of proof would be to create an offence similar to that found in Section 8 of the *Forgery Act 1913*, which would provide that an accused found in possession of stolen property would be guilty of an offence if such possession was without lawful authority or excuse, the proof whereof should lie on the accused. When a legal burden of proof is placed on the accused, the judge must direct the jury that, although on other matters it is for the prosecution to satisfy them beyond reasonable doubt, on the matter in question it is for the defence to satisfy them on a balance of probabilities.

126. The shifting of the legal or persuasive burden of proof onto the accused would have the constitutional implications which we have already stressed in our discussion of the first option. In their Report on Evidence, the English Criminal Law Revision Committee were "strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only".[39] Later in the same paragraph they said:

> "The real purpose, we think, of casting burdens on the defence in criminal cases is to prevent the accused, in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting at the end of the evidence for the prosecution that he has no case to answer because the prosecution have not adduced evidence to negative the possibility of an innocent explanation. This applies especially to cases [....] where the defence relates to a matter peculiarly within the knowledge of the accused [....] It seems to us that it is entirely justifiable to impose a burden on the defence for this purpose but that the purpose is sufficiently served by making the burden an evidential one.
>
> The change would get rid of the present need for the judge to give the jury the complicated direction on the difference between the burden on the prosecution of proving a matter beyond reasonable doubt and that on the defence of proving a matter on a balance of probabilities. Many judges have said that they find

> it difficult or impossible to direct juries on this in a way which the jury are likely to find satisfactory or even intelligible."

We agree. Even if they raise evidential burdens only, we do not favour setting out specific circumstances in which presumptions may be raised in the section constituting the offence. In the examples above and in any other examples given to us, the accused is in possession of the property. Under the law as it stands such unexplained possession is already sufficient to shift an evidential burden onto the accused.

We are satisfied that to superimpose a layer of statutory presumptions on top of the presumption of fact which already exists in relation to stolen goods would give rise to difficulty and prove confusing both for judges in charging jurors and for the jurors themselves. We agree with Professor Cross when he says:

> "It would be unreasonable to expect anything approaching neat precision in this area of the law. Indeed it has been the subject of an extraordinary catalogue of complaints such as that, 'every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness, and has left it with a feeling of despair'."[40]

11. A "Graded" Solution, where the Severity of Punishment would depend on the extent of Mens Rea

127. We now must consider what can be described as a "graded" solution, whereby the prescribed punishment would vary in severity according to the degree of *mens rea* established on the part of the defendant. The extent of gradation could, of course, range from the complete absence of *mens rea* to full certainty that the goods were stolen. A more limited range of gradation would be between recklessness and knowledge. The case in favour of the latter option was put by two commentators as follows:

> "Since a defendant who knowingly purchased stolen property is more blameworthy than a defendant who made a reckless purchase, distinctions in the penalties imposed might be appropriate. More importantly, such a gradation of punishment would facilitate both plea bargaining and the successful prosecution of fences whose cases are taken to trial. For example, in exchange for lighter punishment, a defendant could plead guilty to a lesser fencing offence than that for which he might have been convicted had the case gone to trial. Further, in cases actually tried, jurors would no longer have to elect between convicting a fence of one offence or not convicting him at all. By permitting prosecutors to bring separate charges alleging actual knowledge and recklessness, similar to the procedure in many jurisdictions were prosecutors charge a defendant with both first-degree and second-degree murder, verdicts could more closely reflect the facts; jurors presumably would be less likely to acquit a defendant who made a reckless purchase because they would no longer have to mete out the same punishment as they would to a person who knowingly purchased stolen goods."[41]

The imposition of differential punishments based only on differences in *mens rea* would unduly restrict the Court in its sentencing functions. Undoubtedly the extent of *mens rea* would often play a very important part in determining the appropriate sentence, but it is only one of a number of important factors to which the Court should give consideration. For the legislature to prescribe significant differences in punishment based on this factor alone might be considered to be a restrictive solution.

12. Imposing more onerous obligations on convicted receivers

128. Under this solution, the law would have a generously subjective standard for first offenders, requiring proof of knowledge or near certainty that the property was stolen. However, a person who had then been convicted of receiving would thereafter be held to an objective standard of using due care in respect of receiving or otherwise dealing with property.

In favour of this approach, it may be argued that a person who has "had his fingers burnt" may be called on to exercise due care in future. Having shown himself to be dishonest in relation to another's property, he can be required to exercise greater control in the future. It is true that he is being called on to exercise care that others are not required to exercise, but they have not been found guilty of receiving and in any event the obligation imposed is only that of exercising *reasonable* care. Why should a convicted receiver be entitled to insist on dealing with others' property in the future without exercising due care as to its provenance?

A practical argument in favour of this approach is that it would make far easier the task of the prosecuting authorities in relation to professional receivers who are happy to avail themselves repeatedly of the "knowledge or near certainty" test, which makes conviction so difficult.

129. There are, however, some strong arguments against this approach. It can be said that one act of criminal receiving, with knowledge or near certainty that the property is stolen, is not a rational basis on which to impose a new and different duty, ranging far more widely and continuing for an indefinite time. If there is a sound rationale for imposing a criminal sanction for the failure to exercise due care as to the provenance of property, the rationale can scarcely be limited to cases where a person has, on one previous occasion, acted, not without due care, but rather in a different manner, involving subjective appreciation that the goods were stolen.

The question must arise as to why the requirement of exercising due care, if this be sound, should be restricted to those convicted of receiving. It would be curious if a convicted thief should be free of this requirement, or indeed, any other person convicted of an offence involving dishonesty. If this suggestion were followed, there would be a very major extension of the imposition of an objective requirement of exercising due care.

Also to be borne in mind is the practical problem of the prejudicial implications for a person accused of receiving, judged by this objective test, in that the jury would be told of the previous conviction of the accused. It would be possible to devise a system whereby the jury would not be told of this fact, but, if there were a "two-tier" offence of receiving, with the objective test applying only to those who have a previous conviction for receiving, it would be difficult for the jury not to be aware of this fact, as part of the common experience of society, even if no express reference had been made to it during the proceedings.

There is a further and, in our view, fatal obstacle to this proposal. We have already referred to the doubts as to the constitutional validity of s. 43 of the *Larceny Act 1916*, which already permits the introduction of evidence as to the possession of other stolen property and of previous convictions for receiving, raised by the decision of the Supreme Court in *King v Attorney General*. In our view, these doubts must equally apply to the constitutional validity of the option now under consideration and accordingly we think it must be rejected.

Conclusion

130. We think that the present law is undoubtedly too favourable to the accused. After detailed consideration of the several options for reform mentioned above, *we have come to the conclusion, and recommend, that the test of liability in the new offence should depend on whether the defendant knew or was reckless as to whether the goods were unlawfully obtained.* We consider that such a provision would not erode the rights of defendants unfairly. *As regards the definition of recklessness for this purpose, we are attracted by the approach favoured by the American Law Institute in section 2.02(2)(c) of the Tentative Draft No. 4 of the Model Penal Code, which we consider should form the basis of the legislative definition.*

We also consider that, without in any sense altering the present state of the law in relation to the burden of proof, it would be useful to re-state the law as laid down by the Court of Criminal Appeal in Oglesby and Melody in statutory form so as to make it clear that where the accused is charged with handling unlawfully obtained property and the prosecution have proved possession by the accused and that the goods had been unlawfully obtained, the jury should be told that they may, in the absence of any reasonable explanation, find the accused guilty.

Dishonesty

131. Section 22 of the *Theft Act* provides that the handling must be done "dishonestly". The Criminal Law Revision Committee had taken the view that the ingredient of dishonesty was implied in Section 33(1) of the *Larceny Act 1916*. They were of opinion that "the considerable extension of the offence makes it desirable to provide expressly that dishonesty should be necessary, and this will be in accordance with the bill generally".[42] Somewhat like "belief", the word "dishonestly" has had a rather unsettled history in the English courts. Professor JC Smith suggests a definition in the context of theft:

> "Knowing that the appropriation will or may be detrimental to the interests of the owner in a significant practical way."[43]

Whereas that definition may work well for theft it would superimpose yet another tier of knowledge or recklessness on to the basic *mens rea* for handling. If any formula were thought necessary we would consider it preferable to use the phrase "without lawful excuse" used in Section 33(4). This phrase can be used without shifting any legal burden onto an accused and circumstances and factors constituting lawful excuses can be set out in the legislation. It is the formula used by the U.K. Parliament in the *Criminal Damage Act 1971* instead of "unlawfully".

However, we are not convinced that it is necessary to include in the section constituting the new offence of handling any provision corresponding to "dishonestly", "unlawfully", or "without lawful excuse". The absence of such a word or expression in Section 33(1) of the *Larceny Act 1916* has given rise to no problem. The Criminal Law Revision Committee were not specific as to any problem generated by the expansion of the receiving offence in the *Theft Act*. Commenting on the English Law Commission Report on Criminal Damage (No 29) which preceded the 1971 Act, Smith and Hogan say:

> "The mental element (*mens rea*) traditionally requires intention or recklessness as to all the consequences and circumstances which constitute the *actus reus* of the crime in question..."[44]

and

> "This distinction drawn by the Law Commission between the 'mental element' and the element of 'unlawfulness' may, perhaps, be questioned. The distinction is rather one of convenience since the mental element and unlawfulness are two faces of the single coin of *mens rea*."[45]

Cases where the goods are not stolen

132. We have seen how, under present law, a conviction for receiving will not lie where the goods, at the time of reception by the defendant, were not in fact stolen goods. This situation may result from the fact that the apparent "thief" was not such; it may also occur where the goods, although they had indeed been stolen, had ceased to be so before their reception by the defendant. We have also examined cases where there is no direct proof of theft.[46]

We have seen what great difficulties have arisen in other jurisdictions in relation to prosecutions for attempted receiving in cases where the goods were not stolen at the time of the reception. The problem of criminal liability for attempting the impossible is a formidable and controversial one.

Two approaches may be considered. The first solution seeks to ensure that the defendant may be convicted of attempted handling. Much of the English Law Commission's Report [No. 102] on *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* is devoted to the *Haughton v Smith*[47] decision and its consequences. In *Partington v Williams*[48] the defendant took a wallet from a drawer in

the office of her employers and looked in it with the intention of stealing any money it might contain. It contained none. She was convicted of attempting to steal, but the conviction was quashed on appeal. In *Nock and Alsford*[49] the appellants, who agreed to obtain cocaine by separating it out from a powder which in fact did not contain cocaine, were successful in their appeal against conviction for conspiracy to contravene section 4 of the *Misuse of Drugs Act 1971.*

So far as it is relevant to the question of receiving, we agree with the English Law Commission's conclusion that:

> "it would be generally accepted that if a man possesses the appropriate *mens rea* and commits acts which are sufficiently proximate to the *actus reus* of a criminal offence, he is guilty of attempting to commit that offence. Where, with that intention, he commits acts which, if the facts are as he believed them to be, would have amounted to the *actus reus* of the full crime or would have been sufficiently proximate to amount to attempt, we cannot see why his failure to appreciate the true facts should, in principle, relieve him of liability for the attempt. We stress that this solution to the problem does not punish people simply for their intentions.[50] The necessity for proof of proximate acts remains."[51]

Following on the English Law Commission's Report, the *Criminal Attempts Act 1981* was passed. Section 1 provides:

> "(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit an offence.
>
> (2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.
>
> (3) In any case where —
>
> (a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
>
> (b) if the facts of the case had been as he believed them to be, his intention would be so regarded,
>
> then for the purpose of subsection (1) above, he shall be regarded as having had an intent to commit that offence."

In his *Textbook of Criminal Law*, Glanville Williams comments:

> "This rather cumbrous provision boils down to the rule that in an attempt you take the facts as the defendant believed them to be. If, on the supposed facts, he would have been guilty of an attempt then he is guilty of it."[52]

133. We can find no recent Irish cases on the subject of attempting the impossible. In view of the fact that this report is confined to receiving (and attempted receiving) and does not extend to the offence of larceny (and attempted larceny), or to the law of attempt in general, we do not address this latter question. *We limit our recommendation to the proposal that, in a prosecution for attempted handling (as the offence*

will be termed), the defendant may be convicted even though the facts are such that the commission of the offence of handling is impossible if, on the facts as the defendant believed them to be, he would have been guilty of attempted handling.

The second approach to the problem in relation to receiving is to exclude, from the proposed legislation, the requirement of proof that the goods were unlawfully obtained.[53] The effect of this solution would be that the defendant is guilty of the substantive offence of handling, not merely of an attempt to commit that offence.

This, however, is a somewhat drastic solution and we do not think that the mischief is sufficiently widespread to justify so radical a proposal.

Property believed to have been acquired by criminal means other than by stealing

134. We now must consider the position where a person receives property believing that it was acquired by criminal means other than by theft. He may, for example, believe (or later say he believed) that the goods had been the subject of embezzlement or fraudulent conversion. A somewhat different problem, which apparently occurs reasonably frequently, is that the person claims that he believed that the goods had been smuggled into the State from Northern Ireland or elsewhere.

Yet another difficulty under present law (as we have seen[54]) is that if the accused believes the goods were obtained by a felony when they were, in fact, obtained by a misdemeanour only, he is not then guilty of receiving.

To resolve these difficulties *we consider that the legislation should provide that the offence would be committed in respect of goods unlawfully obtained and that it should not be necessary to specify how the goods were unlawfully obtained. "Unlawfully obtained" could be defined as "obtained in circumstances amounting to an offence (including any breach of Section 186 of the Customs Consolidation Act 1876)" The definition should be extended to cover cases where the goods were obtained lawfully and were subsequently criminally misappropriated.*

Handling and Larceny

135. We now must consider the very troublesome question of the relationship between receiving and larceny. As we have seen, the courts have frequently asserted that a person cannot at the same time be guilty of both receiving and larceny. Where the District Justice at the preliminary examination refuses informations on one charge and returns the accused on trial for the other, it is not possible for the Director of Public Prosecutions to return the accused for trial on the charge in respect of which informations were refused.[55] Also, as we have noted, where the District Justice convicts on one of the two charges and either acquits or makes no order on the other, the Circuit Court on appeal may not substitute a conviction on this other charge.[56] Thirdly, where a justice convicts of larceny in a case which is arguably

receiving, the accused is not exposed to any risk in appealing to the Court of Appeal, as he cannot be prosecuted again on the receiving charge. Finally, in a case where only receiving is charged, the accused may seek and obtain an acquittal if he can convince the Court that he was in fact the thief.[57]

How best can the law be improved? A radical solution would be to assimilate the offence of receiving into that of theft. This is done by section 223.6 of the *Model Penal Code*. A Comment supporting the provision states:

> "Consolidation of receiving with other forms of theft affords the same advantages as are involved in other aspects of the unification of the theft concept. Consolidation reduces the opportunity for technical defences based upon legal distinctions between the closely related activities of stealing and receiving. One who is found in possession of recently stolen goods may be either the thief or the receiver. If the prosecution can prove the requisite state of mind to deprive the true owner of the property, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired the goods from another person who committed the act of taking. Consolidation also has a consequence favourable to the defence by precluding conviction of both offences for the same transaction. Under prior law, multiple liability occasionally occurred, as where the defendant was held guilty as a principal in the original theft for helping to plan that crime and also of the 'separate' offence of receiving or taking his share of the proceeds."

136. We are greatly attracted by this solution, and it may well be that, when we are making recommendations for the reform of the law of larceny, we will favour this approach. We consider, however, that it would be premature and quite inappropriate to make such a recommendation now, before we have come to any conclusion on the question of reform of the law of larceny.

If this radical solution is not now to be availed of, other solutions may be contemplated. One would be for the legislation to provide that where a person is charged with larceny he may be convicted of handling and *vice versa*. This would solve a number of problems, but only if the legislation were to provide specifically that a conviction for one offence did not involve an acquittal in relation to the other.

Section 44(4) of the *Larceny Act 1916* provides that if a person is indicted for false pretences and it is proved that he stole the property in question "he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences". This is an unusual provision and provides for an artificial finding but it serves as a useful precedent.

137. Finally, we must consider a problem that can arise at trial. It may be clear that the defendant was guilty of either theft or handling but it may not be clear which. In these circumstances Professors Williams[58] and Smith[59] are of the view that the jury must acquit. In *Shelton*,[60] however, Lawton LJ commented:

> "Both Professors were envisaging a situation which would be most unlikely to arise in practice with a jury. If at least 10 jurors favoured a conviction for theft and two for handling, there would be a majority verdict for a conviction for theft. But if less than 10 were in favour of one count and three in favour of the other, then there would be no agreement which would support a conviction on either count. The correct order in such a case would be, not for an acquittal, but for the jury to be discharged."

This solution, with respect, does not seem adequate. The problem is not one of disagreement among different members of the jury; it is that, for *any* member of the jury, the facts are not sufficiently clear to decide the issue one way or the other. All that a member of a jury can be sure of is that the accused is guilty of one of the two offences.

One solution would be for the jury to convict of the offence with the lesser maximum sentence, which is larceny. This approach is favoured in Western Australia. In our view, it would be quite inappropriate in view of the fact that the maximum sentence bears no relationship to the actual sentence in the everyday case. In any event, receiving is generally regarded by the community (including the criminal community) as a less serious offence than larceny.

138. Acquittal would clearly be a most unsatisfactory result, where the jury are satisfied that the accused is guilty of either receiving or larceny, the only uncertainty being as to the actual offence committed. *After much consideration, we suggest that the best way of dealing with this is to incorporate into the definition of "unlawfully obtained" the words "either by the accused himself or by another person".*

A duty on the part of dealers and collectors to make reasonable inquiry as to the legal right of the transferor to dispose of the goods

139. Having considered the general question of liability for receiving, we now must consider whether it would be desirable to introduce a provision imposing a duty, under criminal sanction, on dealers and collectors of personal property to make reasonable inquiry that the person selling, delivering or otherwise disposing of the goods has a legal right to do so.

140. There are a number of arguments, on principle and from a pragmatic standpoint, in favour of taking this step. First, it seems appropriate that those who choose to engage in a business enterprise involving the reception of property should take reasonable steps to protect society and its individual members from the risk of theft. Undoubtedly, a significant encouragement for theft is a "no questions asked" policy on the part of dealers and collectors. From a pragmatic standpoint, there is also much to be said for introducing an offence on these lines. Depending on how precisely the offence was drafted, it could offer a useful way of catching the person who acquires goods on a "no questions asked" basis who argues that it simply had not occurred to him to enquire about the goods' provenance. His failure to make reasonable enquiry would suffice to render his conduct criminal.[61]

141. There are, however, serious arguments against this proposal. First, it would of course be contrary to the subjective approach generally favoured by our criminal law.

142. A second argument is based on considerations of practical convenience. A duty of reasonable inquiry, under pain of criminal prosecution, would lead to an enormous increase in paperwork and delay, with possibly little improvement in relation to theft since thieves would simply look to new (or indeed old) markets among receivers who are neither collectors nor suppliers. Moreover, if the proposed new ground of liablity were to have real "teeth", the effect might be to impose an undue restriction on the movement of goods.[62]

We consider that the balance of the argument is against introducing such a provision.

A special offence for those engaged in business abusing their position of trust

143. We must now consider whether it would be desirable to introduce a separate new provision over and above specific provisions dealing with receiving. It may be argued that there are those who undertake particular moral responsibilities in business, especially businesses which, if abused, may facilitate theft by offering an attractive route for redistributing stolen goods into the legitimate marketplace. If persons engaged in these businesses abuse their position by disposing of goods which they know are stolen they may be considered to be guilty not merely of the offence of handling as we have proposed but also of the separate wrong of abuse of what might be called "professional trust" in misusing their business vocations by disposing of stolen goods, thus received, through these channels.

There is undoubtedly evidence that persons involved in legitimate businesses are among those guilty of receiving stolen property. Stuart Henry states that:

> "recent evidence suggests that the main support of illegal sales from the thief is the legal businessman. Marilyn Walsh in her evidence to the United States Select Committee investigation, *Criminal Redistribution (Fencing) Systems*, reports 67% of the fences she studied were proprietors of legitimate businesses,[63] while the District Attorney for Los Angeles put it this way:
>
> > 'One of the major supports for illegal sales is the greed of the legitimate businessman. Too many legitimate businessmen are willing to buy hot merchandise if it assures them of higher profit'.[64]
>
> The evidence implies that it is not the case that one species of actor, the 'fence', buys stolen goods, whereas another, the 'businessman', buys legitimate ones. Rather it demonstrates that businessmen buy cheap goods in order that they may sell at a profit; a greater or lesser proportion of their purchases may be illicit."[65]

While there may be a great deal to be said for establishing an offence on the lines suggested above, we are doubtful as to whether, in

practice, it would work satisfactorily. It could well raise a problem of double jeopardy. Problems of duplication in trials and sentencing would be likely to occur. We do not accordingly recommend the establishment of this offence.

Documentary Records and Computer Print-outs

144. In 1980 in the Commission's Working Paper on Hearsay, (Working Paper No. 9-1980) proposals were made which would have had the effect of making out-of-court statements admissible in all cases where the maker of the statement testified or was not available. While recommending that these proposals should be adopted in civil proceedings, the Commission deferred making a similar recommendation in relation to criminal proceedings until such time as observations had been received from interested persons. Unfortunately, despite repeated appeals, no such observations have been received and the Commission has not felt it was possible to proceed to a Final Report until such observations were received. However, it is now represented that the amendment of the law relating to the admissibility of business and administrative records is required as a matter of urgency. In these circumstances *the Commission recommends the immediate adoption of the limited provision suggested in its Working Paper as appropriate in a context where the existing rule against hearsay was retained. Under this provision records possessed of a guarantee of trustworthiness comparable to direct oral evidence or admissible hearsay would be admissible.* In its Report on a Criminal Evidence Bill the Commission proposes to consider whether a more far-reaching reform would be desirable — for example, a provision along the lines of sections 68 to 72 of the British *Police and Criminal Evidence Act 1984*. The Commission reiterates its appeal to interested parties to submit their observations.

The Proceeds of Theft

145. We now must consider whether the definition of "property" contained in section 46(1) of the *Larceny Act 1916*[66] needs to be amended. It is clear that some notion of "proceeds" of theft must be included; otherwise, the law "would provide a rogue's charter for professional fences"[67]; receivers could avoid liability for the offence of receiving money,[68] for example, merely by asking the thief to get the money changed into smaller (or larger) denominations.[69] The idea of permitting such a technical defence to be reintroduced into the law is obviously unappealing.

At the same time, section 46(1) can be criticised for its unduly broad scope. It designates as "stolen" goods which are acquired by innocent purchasers, as well as the proceeds of each new transaction. It is possible, though far from likely, that the courts could interpret the words "whether immediately or otherwise" as implying some limitation in the number of transactions or period of time that may elapse after the original theft. On this interpretation, "otherwise" should mean "different from immediately to an extent to be specified by the Court", rather than "every other possible case". However, the word "otherwise", on ordinary interpretation, would not seem to contain any such limitation.

Whatever conceptual objections may be raised about the scope of section 46(1), the fact is that it appears to have caused no difficulties in practice. Nevertheless, there seems to us to be merit in introducing some limits on the scope of the concept of "proceeds" of theft, if this can be done without causing new difficulties.

146. It is useful in this regard to look at the experience in England. Section 24(2) of the *Theft Act 1968* provides that, for the purposes of the provisions of the Act relating to goods which have been stolen,

> "references to stolen goods shall include, in addition to the goods originally stolen and parts of them (whether in their original state or not),—
>
> (a) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation of the whole or part of the goods stolen or of goods so representing the stolen goods; and
>
> (b) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of a handler of the stolen goods or any part of them as being the proceeds of any disposal or realisation of the whole or part of the stolen goods handled by him or of goods so representing them."[70]

The effect of section 24(2) is that "the goods which the accused is charged with handling must, at the time of the handling or at some previous time:

> (i) have been in the hands of the thief or of a handler, and
>
> (ii) have represented the original stolen goods in the sense of being the proceeds, direct or indirect, of a sale or other realisation of the original goods."[71]

The section is undoubtedly complex especially in its implications in relation to disposition by the thief or handler of stolen money or cheques through his bank account.[72] No difficulty arises where the account consists only of stolen money or cheques;[73] but where it is fed by both lawful and stolen money or cheques and the thief or handler draws money from his account, "the prosecution must be able to prove, by reference to the history of the account, that the cash was capable of representing stolen goods. This may perhaps be possible even if honest money in the account could alone cover the withdrawal; but it would need to be shown that [the thief or handler] intended to withdraw stolen rather and honest money."[74]

Where instead of withdrawing money, the thief or handler writes a cheque, drawn on his account and intended to enable another party to obtain a transfer of part or all of the credit balance, or of cash, the question arises as to whether the cheque is "stolen goods"[75] In *Attorney-General's Reference (No. 4 of 1979)*,[76] it was not necesary to decide this point. However, Lord Lane CJ (speaking for the Court) said:

> "It appears to us that there is much to be said in favour of the proposition that receipt of such a cheque, drawn in circumstances wherein it is plain that it must serve to transfer the proceeds of stolen goods, would constitute receiving stolen goods on the grounds that such a cheque would directly or indirectly represent the stolen goods within s. 24(2)(a)."[77]

The commentators are not so sure. Smith states:

> "If the cheque operated as an assignment of part of the debt represented by the bank balance then the answer would be in the affirmative; but it is clear that a cheque does not so operate.[78] So long as the cheque drawn by [the thief or handler] is not presented, the thing in action represented by his credit balance is undiminished. No part of the stolen thing has yet been disposed of or realised. When [the party to whom the cheque is given] cashes the cheque or has it credited to his account the cash or any resulting credit balance will be stolen goods for it is the proceeds of a disposition of the stolen thing in action which is correspondingly diminished."[79]

And Griew states:

> "To be 'stolen' the cheque must 'represent... [the original money or cheque] in the hands of [the thief or handler on whose account the cheque is drawn] as being the proceeds of [a] disposal or realisation ... of ... [the bank balance] representing [the original money or cheque]'.[80] But the cheque now drawn by [the thief or handler] is surely not the *proceeds* of such a disposal or realisation but rather the means of effecting one."[81]

147. Having mentioned the complexities of the issue, we must acknowledge that any attempt to provide a cut-off point as to proceeds inevitably will prove difficult and to some extent arbitrary in its potential effect, since the wrongfulness of the receiver's conduct does not depend on how the property or its proceeds may be "laundered" before reaching him. *We are satisfied that a provision drafted on the lines of section 24(2) would be a useful reform.*[82]

Section 43(1) of the Larceny Act 1916

148. We have already referred to the doubts as to the constitutional validity of this section. In the light of these misgivings, we do not recommend the expansion of the section, although that has been suggested to us. Indeed, as the section is apparently rarely relied on by prosecution, we think that no useful purpose is served by its retention in our law. *Accordingly we recommend that it be repealed.*

Property stolen outside the State

149. We have seen[83] how in two decisions[84] the Supreme Court has interpreted section 33(4), in the light of section 3 of the *Adaptation of Enactments Act 1922*, as embracing cases where the goods were stolen in Northern Ireland but not where they were stolen in Britain. This is clearly anomalous and was an unintended result of section 3.

We therefore recommend that in the proposed new statutory provision, the reference should extend to property stolen or obtained "outside the State". This would catch property stolen or obtained in Britain as well as property stolen or obtained in Northern Ireland.

Procedure

150. Receiving is a scheduled offence under the *Criminal Justice Act 1951* as amended by the *Criminal Procedure Act 1967*. A District Justice can deal with an offence summarily if he considers it a minor offence fit to be so tried and if the accused agrees to be tried summarily. If the property involved exceeds £200 in value, the Director of Public Prosecutions must, in addition, consent to summary disposal. At all times, the accused has an absolute right to trial by jury. The £200 ceiling was fixed 20 years ago and is obviously out of date. *On balance, we consider that the new offence of handling, as well as the present offence of larceny, should be indictable offences, but should be prosecutable on indictment only at the election of the prosecution.* Notwithstanding a prosecution election for summary disposal, a District Justice has a duty to return the accused for trial on indictment if he considers the offence not to be a minor offence.[85]

Penalty

151. The maximum penalty for receiving is 14 years imprisonment after conviction on indictment. The fact that such a heavy penalty was provided reflects the seriousness of the offence. By way of comparison, "ordinary" burglary carries 14 years, robbery and aggravated burglary carry life. Larceny only carries 5 years. We are of opinion that the disparity between the maximum for larceny and receiving is too great. *The same sentence should be provided for larceny and handling. Perhaps a period of 10 years would be appropriate. We also consider that, where appropriate, in addition to any penalty imposed, the Court should be able to order payment of compensation by the handler to the victim of the primary offence whether or not that offence was committed by the handler himself.*

Powers of Arrest

152. *We consider that the powers of arrest which apply to the offence of receiving under present law should continue to apply to the new offence of handling which we have proposed.* We see no policy considerations that would suggest any change in the law on this matter.

Form of Indictment

153. In relation to the *actus reus*, we have recommended in paragraph 108 that "handling" should encompass by definition all modes of committing the *actus reus*. *We recommend that this be reflected in the indictment for the offence which should be framed as a single count rather than as alternative counts for different species of handling.*

In the passage from his indictment in *Hanlon v Fleming* quoted in paragraph 37, Henchy J refers to the fact that the use of the words "knowing or believing the same to be stolen goods" in a conviction might be held bad for duplicity. Rule 5 of the Rules in the First Schedule to the *Criminal Justice (Administration) Act, 1924* provides, inter alia, that where an enactment constituting an offence states the offence to be the doing of an act "with any one of any different intentions" or "states any part of the offence in the alternative", such "... intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the court charging of the offence".

For the avoidance of any doubt, which may arise in relation to convictions, *we recommend that the legislation should provide specifically for the use of the formula "knowing or being reckless as to whether etc" in all complaints, indictments, convictions or other orders or proceedings. Similarly, legislation should provide that it is not necessary in any proceeding to specify the particular mode of unlawful obtaining alleged. As we have pointed out above, the accused may only be aware in a general sense of the unlawful provenance of the goods.*

Legislation could prescribe a form of charge and indictment for handling and amend Item 9 in the appendix to the Rules in the First Schedule to the 1924 Act already referred to.

FOOTNOTES

[1] [1951] 2 All E.R. 645. See *supra*, para. 20.

[2] *Hanlon v Fleming* [1981] I.R. 489, at 499-500.

[3] *The State (Furlong) v Kelly*, [1971] I.R. 132.

[4] Cf. *supra*, paras. 69-70.

[5] JC Smith, *The Law of Theft*, para. 408 (5th ed., 1984).

[6] [1981] 2 All E.R. 647, at 649 (C.A., Crim. Div.), rev'd [1983] 1 A.C. 109 (H.L., 1982).

[7] Spencer, *The Mishandling of Handling*, [1981] Crim. L. Rev. 682, at 683-4.

[8] G Williams, *Textbook of Criminal Law*, 865, fn. 5.

[9] *Id.* 869 fn. 2.

[10] We use the term "reception" here to describe the *actus reus* of receiving under existing law.

[11] See Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich. L. Rev. 1511, at 1589-1592 (1976).

[12] We need not here consider what should be the precise scope of the concept of "stolen goods". For present purposes, it is not of great importance save to this extent: it seems clear that an offence of receiving which had no regard for the question of the actuality of reasonableness of the belief of the accused as to whether the goods were stolen would have to be based on a prior actual theft (or other dishonest appropriation) of goods.

[13] [1981] I.R. 233, at 257.

[14] Of course, the offence of receiving indicated in this option would be a *different*, less serious, offence than that under section 33 of the *Larceny Act 1916*. Nevertheless, it is possible that a new offence drafted on these lines would still carry with it, for some time at least, the stigma associated with the present offence under section 33.

[15] p. 190 (2nd ed., 1952).

[16] Hall has been described as a "determined apologist" for the *mens rea* concept: Elliot, *Theft and Related Problems - England, Australia and the U.S.A. Compared*, 26 Int. & Comp. L.Q. 110, at 137 (1977).

[17] Cf., e.g. Pa. St. Ann. tit. 18, section 4817 (1961) ("... knowing, or *having reasonable cause to know*, the same to have been stolen ...").

[18] *Op cit.*, paras. 35-38. The Criminal Law and Penal Methods Reform Committee of South Australia in its Fourth Report, *The Substantive Criminal Law*, Published in 1977, recommended (paras. 16.1-16.2) that recklessness should be a basis of criminal liability as an alternative to that of knowledge or belief.

[19] The *Model Penal Code*, section 202(2)(c) defines recklessness as follows:

> "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

[20] [1977] I.R. 360.

[21] [1957] 2 Q.B. 396.

[22] [1981] 1 All E.R. 961.

[23] *Id.*, at 966.

[24] *Just What Is Recklessness?*, [1981] D.U.L.J. 29, at 37.

[25] Ms McAleese found the *Murray* decision unhelpful: cf. *id.*, at 34-37.

[26] L.C.W.P. No. 31, pp. 30-31 (1970).

[27] [1981] D.U.L.J., at 31.

[28] *Op. cit.*, at 1561.

[29] [1977] I.R. 360, at 403. Cf. the later draft of the section, cited *supra*, fn. 19.

[30] There are of course other possible cumulative tests, including that of recklessness in circumstances where a reasonable person would have *suspected* that the goods were stolen.

[31] *Supra*, para. 71.

[32] Williams, *Handling, Theft and the Purchaser Who Takes a Chance*, [1985] Crim. L. Rev. 432, at 434-435. In a supporting footnote, Dr Williams adopts a formulation suggested by Dr A T H Smith, as follows:

> "The law should not incriminate honest dealers who make no enquiry whether the goods they buy are stolen, even though they suspect that the goods might be stolen. Such persons have no means of ascertaining the truth, nor the time to do so; or they may be able to do so only at the expense of causing offence or annoyance to the persons with whom they deal. To avoid doing

that, their only safe course may be not to buy at all. But the public interest in free trade outweighs the public interest in ensuring that no trade in stolen goods ever occurs, and people should be free to buy unless they know that the goods are stolen."

[33] Cf. *supra*, para. 71.

[34] *Op. cit.*, at 682.

[35] Griew, *Consistency, Communication and Codification*, in *Reshaping the Criminal Law*, 57, at 70 (Glazebrook ed., 1978).

[36] [1966] I.R. 162.

[37] *Id.*, at 168.

[38] *Id.*

[39] Para. 140.

[40] *Cross on Evidence*, (6th ed) p. 132 (footnote omitted).

[41] Blakey & Goldsmith, *op. cit.*, at 1561.

[42] 8th Report, para. 128.

[43] *Op. cit.*, para. 124.

[44] Smith & Hogan, *Criminal Law* (4th Ed) p. 656 fn. 2.

[45] *Id.* p. 6, 56-7.

[46] *Supra*, para. 27.

[47] [1975] A.C. 476.

[48] 62 Cr. App. R. 220 (1975).

[49] [1978] A.C. 979.

[50] Cf. *Eagleton*, 6 Cox C.C. 559, at 571 (1855), *Davey v Lee*, [1968] 1 Q.B. 366, *Stonehouse* [1978] A.C. 55, *Richmond*, C.C.A. No. 28 of 1935 (*Frewen*, vol. I, p. 28), *Thornton*, [1952] I.R. 91.

[51] Para. 2.96 of Report No. 102.

[52] *Op. cit.*, 406.

[53] Cf. Hogan, *The Criminal Attempts Act and Attempting the Impossible*, [1984] Crim. L. Rev. 584, at 585:

> "The right and proper way (perhaps I should say one right and proper way for there may be others) to deal with the would-be handler of non-stolen goods is simply to amend section 22 [of the *Theft Act 1968*] to make it an offence to handle goods (with no qualification that they be stolen), knowing or believing them to be stolen and that offence could be attempted."

See also *Anon., Property Theft Enforcement and the Criminal Secondary Purchaser of Stolen Goods*, 89 Yale L.J. 1225, at 1238 (1980).

[54] *Supra*, para. 39. See *Nieser*, [1958] 3 All E.R. 662 (C.C.A.).

[55] *Costello*, [1984] I.R. 436 (Sup. Ct.).

[56] *O'Leary v Cunningham*, Sup. Ct., 28 July 1980 (145A-1979).

[57] This defence was unsuccessfully raised by the defendant in the recent case of *Callaghan*, in the Special Criminal Court earlier this year.

[58] G Williams, *Testbook of Criminal Law*, (2nd ed., 1983).

[59] Smith, *Commentary* on *Devail*, [1984] Crim. L. Rev. 428, at 429.

[60] 83 C.A.R. 379 at 383 (C.A., 1986).

[61] Cf. the Prison Committee of the Association of Grand Jurors of New York County, *Criminal Receivers in the United States*, 52-53 (1928).

[62] Cf. Weaver & Smith, *Note: Receivers of Stolen Property in Pennsylvania*, 12 U. Pittsburg L. Rev. 269, at 274 (1951):

> "Since personalty is involved, dealers in second-hand goods can not be required to insist upon proof of ownership of each article accepted without suffering detrimental business effects".

Cf. Williams, *Handling, Theft and the Purchaser Who Takes a Chance*, [1985] Crim. L.R. 432, at 434-435) (discussing position in relation to handling).

[63] United States Senate Select Committee on Small Business 93rd Congress 2nd Session, *Criminal Redistribution (Fencing) Systems Part 3* (1974 U.S. Government Printing Office, Washington), 527, see also the excellent analysis by Marilyn Walsh, in *The Fence*, ch. 4 (1977); and cf. J Hall, *Theft, Law and Society*, 157 (2nd ed., 1952): "[A] large number of receivers are engaged in legitimate businesses at the same time [as] they are carrying on an illegal traffic in stolen goods. Their legitimate trade masks the illegitimate".

[64] U.S. Select Committee, *Criminal Redistribution (Fencing) Systems Part 1*, *op. cit.*, p. 1.

[65] Henry, *On the Fence*, 4 Br. J. of L. & Soc. 124, at 132-133 (1977).

[66] Cf. *supra*, para. 18.

[67] C.R. Williams & M.S. Weinberg, *Property Offences*, 390 (1986).

[68] Cf. *Walkley*, 4 C. & P. 132, 172 E.R. 640 (1829), *Richards*, 28 Q.J.P.R. 88 (Sup. Ct., Brisbane, 1934), and *Lucinsky*, [1935] N.Z.L.R. 575 (C.A.).

[69] Cf. J C Smith, *The Law of Theft*, para. 392 (5th ed., 1984).

[70] Section 24 (3) must be read in conjunction with section 24 (2), which provides as follows:

> "But no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the theft."

[71] Criminal Law Revision Committee's Eighth Report, para. 138.

[72] See Griew, *The Theft Acts 1968 and 1978*, para. 13-06 (5th ed., 1986), J C Smith, *The Law of Theft*, para. 395 (5th ed., 1984), Smith, *Commentary* to *Attorney-General's Reference (No. 4 of 1979)*, [1981] Crim. L. Rev. 52.

[73] Cf. Griew, *op. cit.*, para. 13-06, *Attorney-General's Reference (No. 4 of 1979)*, 71 C.A.R. 341, at 348, [1981] 1 All E.R. 1193, at 1195 (C.A. Cr. Div., 1980).

[74] Griew, *op. cit.*, para. 13-06. In *Attorney-General's Reference (No. 4 of 1979)*, 71 C.A.R. 341, [1981] 1 All E.R. 1193, at 1195, Lord Lane C J (for the Court) said:

> "The difficulties arise for the prosecution where, as in the present case, the stolen cheques are paid into a mixed account containing sums honestly obtained. In our opinion the difficulties are of proof and not of principle.
>
> The mere fact that stolen cheques have been paid into a mixed account will often render more difficult proof that at least part of what was received by an accused from that account represented the stolen goods in the hands of the thief as being the proceeds of the goods stolen. It does not preclude such proof.
>
> In some circumstances proof may be simple. For example, a particular account, into which it is proved that stolen cheques were paid, may have been little used with few cheques drawn on it. It might readily be demonstrated that the sum paid to the accused was in excess of that part of the balance which could possibly represent the proceeds of honest cheques. In such circumstances the accused would be shown to have received stolen goods with s. 24 (2)(a)."

[75] Cf. Smith, *op. cit.*, para. 395.

[76] *Supra*.

[77] [1981] 1 All E.R., at 1198.

[78] Citing *Schroeder v Central Bank of London Ltd.*, 34 L.T. 735 (1876).

[79] Smith, *op. cit.*, para. 395.

[80] Citing section 24 (2)(a).

[81] Griew, *op. cit.*, para. 13-06. (Further modifications made in above quotation to those made, with respect to section 24 (2)(a), by Griew).

[82] C R Williams & M S Weinberg, *Property Offences*, 391 (1986), referring to section 90 (2) of Victoria's *Crimes Act 1958* (which is identical to section 24 (2) of the English *Theft Act 1968*), comment that:

> "[a]lthough . . . drafted in a cumbersome fashion, the compromise it achieves is not unreasonable. Where the property the accused is charged with handling has been at some previous time in the hands of the thief or a handler, and represents the proceeds of the original stolen goods, the connection between those goods and the goods the accused has dealt with is sufficiently clearly defined to warrant a conviction for handling. The accused must be shown to have known of the source of what was being dealt with at the time of the alleged handling and this may be difficult to establish where the chain of transactions is a lengthy one."

[83] *Supra*, paras. 31-32.

[84] *The People (Attorney General) v Ruttledge*, [1978] I.R. 376 (Sup. Ct., 1947), *The State (Gilsenan) v McMorrow*, [1978] I.R. 360 (Sup. Ct.).

[85] See the judgment of Henchy J in *The State (McEvitt) v District Justice Delap*, [1981] I.R. 125.

CHAPTER 5: SUMMARY OF RECOMMENDATIONS

1. The basis of criminal liability should extend beyond that of "receiving" as defined in the law at present by the creation of a new offence of "handling" stolen goods as provided for in the English *Theft Act 1968*, subject to certain modifications: paras. 107-108.

2. "Handling" should be defined as receiving property or having it in one's possession or under one's control or arranging to have it in one's possession or under one's control or arranging (or assisting in) its retention, removal or disposal by another person: para. 108.

3. The test of liability in the new offence should depend on whether the defendant knew or was reckless as to whether the goods were stolen: para. 130.

4. "Recklessness" should be defined so that a person acts recklessly if he consciously disregards a substantial and unjustiable risk that the goods were unlawfully obtained. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances to him, its disregard involves culpability of high degree: para. 130.

5. The legislation should provide, for the avoidance of doubt, that the possession of unlawfully obtained property where no explanation is given (or no explanation which the court or jury think is reasonably possible) is evidence upon which the court or jury may conclude that the accused handled the property knowing it to be unlawfully obtained or reckless as to whether it was unlawfully obtained, if satisfied beyond reasonable doubt that such is the case: para. 130.

6. In a prosecution for attempted handling, the defendant may be convicted even though the facts are such that the commission of the offence of handling is impossible if, on the facts as the defendant

believed them to be, he would have been guilty of attempted handling: para. 133.

7. The legislation should provide that the offence of handling would be committed in respect of goods unlawfully obtained, and it should not be necessary, in a charge or indictment for the offence, to specify how the goods were unlawfully obtained. "Unlawfully obtained" could be defined as "obtained in circumstances amounting to an offence (including any breach of Section 186 of the Customs Consolidation Act 1876)." The definition should be extended to cover cases where the goods were obtained lawfully and were subsequently criminally misappropriated: para. 134.

8. The offence of handling stolen goods should be committed where the goods are unlawfully obtained either by the accused himself or by another person, so as to ensure that, in cases where the court or jury is uncertain as to whether to convict the accused of larceny or handling, a conviction is nonetheless recorded: para. 138.

9. The law as to the proof of business or administrative records should be amended in accordance with the recommendations to that effect contained in the *Rule Against Hearsay* (Law Reform Commission Working Paper No. 9-1980 at pp. 205/206), so as to deal with the possible difficulty created by the decision in *Myers v Directors of Public Prosecutions*, [1965] A.C. 1001: para. 144.

10. For the purposes of the law of handling stolen goods, the definition of the proceeds of goods unlawfully obtained should be clarified along the lines suggested by s. 24(2) of the English *Theft Act 1968*: para. 147.

11. Section 43(1) of the *Larceny Act 1916* should be repealed: para. 148.

12. References to goods stolen or unlawfully obtained should extend to goods stolen or unlawfully obtained outside the State so as to ensure that property stolen or obtained in Britain is captured as well as property stolen or unlawfully obtained in Northern Ireland: para. 149.

13. The new offence of handling, as well as the offence of larceny, should be indictable offences, but should be prosecutable on indictment only at the election of the prosecution: para. 150.

14. The same sentence should be provided for larceny and handling. Where appropriate, in addition to any penalty imposed, the Court should be able to order payment of compensation by the handler whether or not that offence was committed by the handler himself: para. 151.

15. The powers of arrest which apply to the offence of receiving under present law should continue to apply to the new offence of handling: para. 152.

16. The indictment for handling should not have to specify the particular species of handling alleged: para. 153.

GENERAL SCHEME OF A BILL TO PROVIDE FOR AMENDMENTS OF THE LAW IN RELATION TO THE RECEIVING OF STOLEN PROPERTY AND OTHER MATTERS CONNECTED THEREWITH

1. Provide that the Act may be cited as the *Criminal Justice Act 1988*.

2. Provide:

   (a) that a person who handles property which has been unlawfully obtained knowing or being reckless as to whether the same has been unlawfully obtained shall be guilty of an offence and shall be liable on conviction on indictment to be imprisoned for a period not exceeding ten years and to a fine not exceeding ten thousand pounds or to both such fine and imprisonment and on summary conviction to be imprisoned for a period not exceeding one year and to a fine not exceeding one thousand pounds or to both such fine and imprisonment;

   (b) that the offence created by (a) above and the offence of larceny shall be prosecutable on indictment only at the election of the prosecution.

3. Provide that, for the purposes of s. 2(a), a person handles property if he receives it or has it in his possession or under his control or arranges to have it in his possession or under his control or arranges (or assists in) its retention, removal or disposal by another person.

4. Provide, where appropriate, and in addition to any penalty imposed, for payment of compensation by the handler to the victim of the primary offence whether or not that offence was committed by the handler himself.

5. Provide that property is unlawfully obtained if it has been obtained by the accused or another person inside or outside the State in circumstances amounting to an offence within the State.

6. Provide that a person is reckless within the meaning of s. 3 if:

   (a) he consciously disregards a substantial and unjustifiable risk that the property he handles is unlawfully obtained;

   (b) the risk is of such a nature and degree that considering the nature and purpose of the handler's conduct and the circumstances known to him, its disregard involves culpability of a high degree.

7. Provide:

(a) that in any complaint, charge, indictment, conviction, order, information, warrant, or other proceeding, the *mens rea* of the offence created in s. 2(a) may be stated in the alternative, i.e. "knowing or being reckless", without being bad for duplicity;

(b) that it shall not be necessary in a prosecution for the offence created by s. 2(a) to specify the particular mode of unlawful obtaining;

(c) by way of schedule to the Act a form of charge or count;

(d) for consequential amendments to Item 9 in the appendix to the Rules in the First Schedule to the *Criminal Law (Administration) Act, 1924.*

8. Provide that the penalty for larceny shall be the same as that for handling.

9. Provide that a person charged with or indicted for larceny may be found guilty of handling.

10. Provide that references to goods unlawfully obtained shall include, in addition to the goods originally unlawfully obtained and to parts of them (whether in their original state or not):

(a) any other goods which directly or indirectly represent or have at any time represented the goods unlawfully obtained in the hands of the unlawful obtainer as being the proceeds of any disposal or realisation of the whole or any part of the goods unlawfully obtained or of goods so representing the goods unlawfully obtained; and

(b) any other goods which directly or indirectly represent or have at any time represented the goods unlawfully obtained in the hands of a handler of the unlawfully obtained goods or any part of them as being the proceeds of any disposal or realisation of the whole or part of the unlawfully obtained goods handled by him or of goods so representing them.

11. Provide that, for the purpose of an attempt to commit handling, the facts shall be taken to be as the defendant believed them to be.

12. Provide that, for the avoidance of doubt, the possession of unlawfully obtained property where no explanation is given (or no explanation which the court or jury think is reasonably possible) is evidence upon which the court or jury may conclude that the accused handled the property knowing it to be unlawfully obtained or reckless as to whether it was unlawfully obtained, if satisfied beyond reasonable doubt that such is the case.

13. (1) Provide that in any criminal proceedings a statement contained in a document shall, subject to this section, be

admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if:

(a) the document was compiled by a person acting under a duty from information which was supplied by a person acting under a duty who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the document directly, was supplied by him to the compiler of the document indirectly through one or more intermediaries each acting under a duty; and

(b) the conditions specified in subsection (2) below are satisfied as regards each of the following: the person who originally supplied the information, the person who compiled the document and any intermediaries through whom the information was supplied.

(2) Provide that the conditions referred to in subsection (1)(b) above are the following, namely:

(a) that the person in question has been or is to be called as a witness in the proceedings; or

(b) that the person in question, being competent to give evidence on behalf of the party desiring to give the statement in evidence, refuses to give evidence on behalf of that party; or

(c) that it is shown with respect to the person in question:

(i) that he is dead or is unfit by reason of his bodily or mental condition to attend as a witness; or

(ii) that he is outside the State and that it is not reasonably practicable to secure his attendance; or

(iii) that all reasonable steps have been taken to identify him, but that he cannot be identified; or

(iv) that, his identity being known, all reasonable steps have been taken to find him, but that he cannot be found, or

(v) that, having regard to the time which has elapsed since he supplied the information and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement.

(3) (a) Provide that no statement shall be admissible in evidence by virtue of paragraph (a) of subsection (2) until the completion of the examination-in-chief of all witnesses to which the paragraph is applicable, except by leave of the court.

(b) Provide that, where by virtue of leave given pursuant to paragraph (a) of this subsection a statement has been received in evidence on the footing that any person or persons shall be called as a witness in the proceedings, then, if any such person is not subsequently so called the

statement shall not be admissible by virtue of paragraph (a) of subsection (2) and (unless it is or becomes admissible otherwise than by virtue of that paragraph) shall be disregarded accordingly.

(4) Provide that where a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated proceedings, whether civil or criminal, and that document falls within subsection (1)(a) above, then in any criminal proceedings in which that person has been or is to be called as a witness a statement contained in that document shall not be given in evidence by virtue of subsection (2)(a) or (c)(v) above without the leave of the court; and the court shall not give leave under this subsection in respect of any such statement unless it is of the opinion that, in the particular circumstances in which that leave is sought, it is in the interests of justice for the witness's oral evidence to be supplemented by the reception of that statement or for the statement to be received as evidence of any matter about which he is unable or unwilling to give oral evidence.

(5) Provide that where, in any proceeding, a statement is given in evidence by virtue of this section, there may be given in relation to any person who compiled a document containing the statement, or who supplied information to that compiler, including any intermediary, and is not called as a witness

(a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness;

(b) with the leave of the court, any evidence which, if that person had been called, could have been put to him for the purpose of destroying his credibility as a witness, being a matter of which, if he had denied it, evidence could not have been adduced by the cross-examining party.

(6) Provide that a statement which is admissible by virtue of this section shall not be capable of corroborating evidence given by any person who compiled the document or supplied any information contained in it, including an intermediary through whom such information was supplied.

(7) Provide that in deciding for the purposes of this section whether or not a person is fit to attend as a witness, a court may act on a certificate purporting to be a certificate of a duly registered medical practitioner.

(8) Provide that for the purposes of this section, a duty includes a duty which is not legal or contractual.

(9) Provide that in estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of this section,

regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and in particular to the question whether or not any person who originally supplied the information from which the document was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not any such person or any person concerned with compiling or keeping the document containing the statement had any incentive to conceal or misrepresent the facts.

(10) Provide that a statement shall not be given in evidence by virtue of this section (without the leave of the court) unless, at least fourteen days before the trial, a notice is served on each of the other parties to the proceedings stating the grounds on which it is claimed that the statement is admissible and the evidence to be given in support of this claim and having attached thereto a copy of the document containing the statement.

(11) Provide that the court may give leave to give in evidence a statement admissible by virtue of this section notwithstanding the fact that notice has not been given in accordance with tne last preceding sub-section if the other parties to the proceedings have not been prejudiced by the lack of notice or it has resulted from factors outside the control of the party wishing to give the statement in evidence.

(12) Provide for permitted methods of service of the notices required by sub-s. (10).

(13) Provide that, where in any proceedings a statement contained in a document is admissible by virtue of this section it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document or of the material part thereof authenticated in such manner as the court may approve.

(14) Provide that for the purpose of deciding whether or not a statement is admissible in evidence by virtue of this section, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including the form and contents of the document in which the statement is contained.

(15) Provide that this section shall not apply to any statement which is admissible by virtue of the common law or of any other statute.

(16) Provide that for the purposes of this section

"computer" means any device for storing and processing information;

"document" includes, in addition to a document in writing, whether produced by a computer or otherwise:

(a) any map, plan, graph or drawing;

(b) any photograph;

(c) any disc, tape, sound-track, or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

"film" includes a microfilm;

"statement" includes any oral or written utterance whether or not it is intended to be assertive and any conduct which is intended to be assertive.

"a copy" includes:

(a) in the case of a document falling within paragraph (c) but not (d) of the definition of "document" in this section, a transcript of sounds or other data embodied therein;

(b) in the case of a document falling within paragraph (d) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;

(c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and

(d) in the case of a document not falling within the said paragraph (d) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not;

and any reference to a copy of the material part of a document shall be construed accordingly.

14. Provide for repeals and amendments to the *Larceny Act, 1916*, the *Criminal Justice Act, 1951* and the *Criminal Procedure Act, 1967*.

NOTES ON THE SCHEME

2. This alters the law by creating a new offence of handling unlawfully obtained property to replace the existing offence of receiving stolen property and prescribes the maximum penalties for the new offence.

3. This provides for a definition of "handling" which is a modified form of the definition of the similarly entitled offence in the English *Theft Act 1968*.

5. This provides that the new offence will be committed whether the property has been unlawfully obtained inside or outside the State and remedies the possible defect in the law which came to light in the *People (Attorney General) v Rutledge* and *The State (Gilsenan) v McMorrow.*

6. This provides a definition of "recklessness" for the purpose of s. 2 which is essentially subjective, but which allows certain objective factors to be taken into account, along the lines suggested by the United States Model Penal Code.

7. This provides for greater simplicity in the drafting of charges, indictments etc. in respect of handling and is also intended to minimise the risk of such charges or indictments being found bad for duplicity in circumstances where the offence is clearly charged.

10. This alters the law as contained in s. 46(1) of the *Larceny Act 1916* by providing a more precisely drafted concept of the receiving of "proceeds" of larceny along the lines suggested by s. 24(2) of the English *Theft Act 1968.*

11. This alters the law, in the context of handling, on the lines suggested by s. 1 of the English *Criminal Attempts Act 1981.*

12. This clarifies the position, for the avoidance of doubt, in relation to cases where a defendant fails to give any, or a reasonably possible, explanation as to unlawfully obtained property in his possession.

13. This provides for the implementation in a modified form (confined to criminal proceedings) of the recommendations contained in our Working Paper on *The Rule Against Hearsay* as to the proof of business and administrative records and, if implemented, will ensure that the decision of the House of Lords in *Myers v Director of Public Prosecutions* will no longer be applied in Ireland.