The Law Commission

Working Paper No 50

Second Programme, Item XVIII
Codification of the Criminal Law

General Principles

Inchoate Offences
Conspiracy, Attempt and Incitement
5 June 1973

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This is a Working Paper circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission will be grateful for comments before 1 January 1974.

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WORKING PAPER NO. 50

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CODIFICATION OF THE CRIMINAL LAW

GENERAL PRINCIPLES

INCHOATE OFFENCES: CONSPIRACY, ATTEMPT AND INCITEMENT

Introduction by the Law Commission

1. The Working Party[1] assisting the Commission in the examination of the general principles of the criminal law with a view to their codification has prepared this Working Paper on the inchoate offences. It is the fourth in a series[2] designed as a basis upon which to seek the views of those concerned with the criminal law. In pursuance of its policy of wide consultation, the Law Commission is publishing the Working Paper and inviting comments upon it.

2. To a greater extent than in previous papers in this series the provisional proposals of the Working Party involve fundamental changes in the law which, we think, will prove much more controversial than those made in the other papers. The suggested limitation of the crime of conspiracy to

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1. For membership see p. ix.
2. The others are "The Mental Element in Crime" (W.P. No. 31), "Parties, Complicity and Liability for the Acts of Another" (W.P. No. 43) and "Criminal Liability of Corporations" (W.P. No. 44).

commit criminal offences and the suggested reformulation of the test for deciding whether conduct can amount to an attempt to commit a crime are perhaps the proposals most likely to give rise to debate and, upon these, we shall particularly welcome comment.

3. In paragraphs 8-14 of the Working Paper the Working Party reaches very emphatically the conclusion that conspiracy should be limited to conspiracies to commit criminal offences: it sees no place in a criminal code for any offence of conspiracy to do something which is not itself criminal. Provisionally we agree with this proposal but we are anxious that, in a consultative document, the firm language in which it is expressed should not discourage discussion. We hope that those who comment on this paper will treat this conclusion as a purely provisional one.

4. As is foreseen in paragraph 32 of the Working Paper, we ourselves have begun our study of those areas of the law where conduct is criminal only if two or more conspire to do it. It is too early to make any certain forecast but our preliminary research seems to show that it is mainly in the field of fraud, which in the context of conspiracy has a wide connotation, that any serious lacunae would be left in the criminal law by a limitation of conspiracy as is suggested and we propose to publish a Working Paper of our own on this subject as soon as possible.

5. The Working Paper also deals with the practice of joining a count for conspiracy with counts charging substantive offences alleged to be the object of the conspiracy.[3] One of the criticisms that has been widely made of this practice is that it widens the scope of evidence admissible against each defendant; and it is argued that the evidence

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3. Para. 54 of the Working Paper.

may be only remotely connected with some defendants, but of a highly prejudicial nature. The Working Party consider this objection to be not soundly based, and point out that the result is the same in all cases where a common enterprise is alleged. It may be, however, that the practical effect of the rules is to work greater hardship in the case of conspiracy, where the definition of the offence includes the element of agreement. Proof of the agreement must often be by inference from a potentially wide range of facts. It is not always easy for a jury to distinguish between evidence relevant only to a charge of conspiracy and evidence relevant only to a change of a substantive offence. Some, but pehaps not all, of the risks of injustice which may arise from this source are dealt with in paragraph 54(iv) of the Working Paper. This is a matter on which our commentators may wish to express their views generally.

6. In paragraphs 74-87 the Working Paper sets out the argument for a new approach to the problem of determining how the conduct required for the commission of an attempt should be defined. This conduct is defined as a "substantial step" towards the commission of the intended offence; it would be for the judge alone to determine whether the conduct in question constituted a substantial step. A principal argument advanced in support of this change is that the present law leaves unpunished the conduct of the accused in such cases as R. v. Robinson, R. v. Komaroni and Comer v. Bloomfield.[4] Whether or not the result in each of these cases is to be regarded as unsatisfactory depends upon how far back from the completion of an offence it is thought right to extend criminal liability. The fact, however, that the substantial step test would allow conviction in each of these cases does not demonstrate that the test is in itself satisfactory. The present law is admittedly imprecise, but it has

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4. Para. 73 of the Working Paper.

two features which seem to be valuable. The first is that it requires a line to be drawn between acts of preparation and acts constituting an attempt. The second is that, there is to be a conviction, it is ultimately for the jury to decide whether or not the conduct is sufficiently proximate to amount to an attempt, as clearly emerges from the judgment of the Court of Criminal Appeal in R. v. Cook.[5] If, as has been suggested[6], the whole question of what conduct amounts to an attempt must be decided as a matter of common sense in each particular case, it is for careful consideration whether the definition of an attempt can be better formulated than in terms of adequate proximity determined by a properly instructed jury.

7. Comment should be addressed to -

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and it would assist the Commission if it were sent by -

1st January 1974.

5. (1964) 48 Cr. App. R. 98.

6. See Smith & Hogan, Criminal Law, 2nd ed., p. 170.

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I INTRODUCTION

1. This Working Paper in the series covering the general part of the criminal law deals with the three common law offences of conspiracy, attempt and incitement. These are known as inchoate offences since they may be committed notwithstanding that the substantive offence to which they relate is not committed. Indeed, if the substantive offence is committed, no question of attempt will normally arise, and where there has been incitement the person inciting becomes a party, as an accessory to the substantive offence.[1] Conspiracy differs from the other two offences in that even where the offence it was conspired to commit has in fact been committed there are circumstances in which a charge of conspiracy is appropriate.[2]

2. In the Working Papers on the Mental Element[3] and Complicity[4] we adopted the scheme of setting out propositions, which summarised in short form our provisional proposals for restatement of the law, accompanied by illustrations and a commentary. We have not followed this scheme in the present paper since the nature of the subject matter does not lend itself to this treatment. Particularly in the case of conspiracy and attempt the problem in relation to several aspects of the law is to determine which of a number of possible approaches to adopt.

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1. Working Paper No. 43, Proposition 6.
2. See para. 58.
3. Working Paper No. 31.
4. Working Paper No. 43.

Where more than one approach is possible we think it right to set out the arguments for and against each of them; and, while we give our provisional view as to which we favour, we invite comment on the approaches which we provisionally reject, as, indeed, on any which we may have failed to mention.

3. At an early stage we considered whether it was right to retain the traditional distinctions between the three inchoate offences. Theoretically it would be possible to subsume all of them under an extended concept of committing preparatory acts. All of them at present require some activity to have taken place. Conspiracy, for example, at present requires as a minimum the agreement between two individuals to commit a crime or some other unlawful act.[5] It is a possible view that any overt act directed to the commission of an offence with an intent to commit a crime should constitute an attempt; and, on this basis, conspiracy itself would be no more than a particular kind of attempt. We have come to the conclusion, however, that this apparent simplification of the law would itself raise difficulties which would render it impracticable. Such a scheme, it seems to us, would cause considerable difficulty in the definition of the concept of "overt act" - even if given an alternative lable - and for this very reason, in fields other than conspiracy, might go perilously close to penalising the mere intention to commit an offence. We discuss this problem further in the context of attempts.[6] Here it is sufficient to state that we have come to the provisional conclusion that the traditional distinctions between conspiracy, attempts and incitement, even if the boundaries of these offences require some amendment, serve

5. See further, paras. 6 and 32.

6. See para. 64 et seq.

to characterise the nature of conduct required to be penalised,[7] and to avoid the danger of penalising intention alone.

4. Another preliminary question which we have considered, and which is linked with that last discussed, is whether additional inchoate offences are required to penalise conduct which clearly falls outside that hitherto regarded as conspiracy, attempt or incitement. We have, in particular, discussed the creation of an offence of facilitation such as may be found in some United States criminal codes. This would penalise the provision of assistance, such as the giving of tools to commit a crime, in cases where a substantive offence is not committed at all, a fact situation falling outside both the present limits of incitement and our proposals in regard to this offence. The justification for an offence of facilitation is that provision of such assistance has been held sufficient for complicity in crimes actually committed, and logically, therefore, it ought to be penalised on occasions where no crime is committed. Our provisional conclusion is that, despite the attraction presented by the opportunity of filling this apparent gap in the law, no new offence should be created. We take this view because there has not hitherto been any demand for the creation of such an offence and because in principle, inchoate offences ought not to be permitted to proliferate unless the need for them has been demonstrated. We believe, therefore, that the three existing inchoate offences, with the adjustments which this Paper proposes, are adequate to cover the whole field of inchoate crime. This is, however, a question upon which the views of the recipients of the Paper would be welcome.

5. In the following sections of this Paper we examine in turn the inchoate offences and the problems peculiar

7. Subject to our comments in para. 4.

to them, beginning with the most controversial of the three, the law of conspiracy. There remain certain problems which all three have in common, with which we have found it convenient to deal in relation to the three offences together. These problems are -

(1) Whether the inchoate offences should relate only to indictable offences or should extend also to summary offences; (paragraphs 103-110)

(2) What penalties are appropriate; (paragraphs 111-125)

(3) Whether and to what extent it should be possible to incite, conspire or attempt to commit an offence which in fact it is impossible to commit; (paragraphs 126-136) and

(4) Whether a defence of withdrawal should be provided in relation to all three inchoate offences. (paragraphs 137-143)

II CONSPIRACY

1. Introduction

6. In simplest terms the offence of conspiracy requires an agreement between two or more persons to effect some "unlawful" purpose.[8] The offence is complete as soon as the parties agree and it is immaterial that they never begin to put their agreement into effect. They remain liable to be prosecuted for conspiracy even if they have

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8. Smith & Hogan, Criminal Law, 2nd ed. p. 151.

completed their "unlawful" purpose, although the courts discourage the preferring of a conspiracy charge when the substantive offence has been committed.[9]

7. Although there are aspects of the agreement and of the intentions and capacities of the parties who enter into it which will require consideration, the main area of uncertainty in the present law of conspiracy concerns the object of the agreement. It is clear that any conspiracy to commit an offence, whether it be an indictable or summary[10] offence, is itself criminal. What is far from clear is the exact extent of those other "unlawful" objects, other than criminal offences, which will make an agreement a criminal conspiracy. The following can, with varying degrees of certainty, be said to be such objects -

a) conspiracy to defraud

b) conspiracy to defeat the course of justice

c) conspiracies relating to public morals and decency

d) conspiracy to do a civil wrong

e) conspiracy to "injure"

f) conspiracies with a public element.

These categories are briefly elaborated below[11], but we would stress that such a brief statement of the law cannot be unassailable in the present confused state of the authorities, and the classification is adopted purely for the sake of exposition.

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9. R. v. West [1948] 1 K.B. 709, 720, and see para. 54.
10. R. v. Blamires Transport Services Ltd [1964] 1 Q.B. 278.
11. Para. 16 et seq.

Should criminal conspiracy be confined to agreements to commit offences?

8. The lack of a clear definition of those "unlawful" aims which may make an agreement an unlawful conspiracy has been one of the major criticisms of the law of conspiracy. A second and related criticism is that, in creating and extending criminal liability for combinations to achieve "unlawful" ends, the courts have searched with undue diligence to discover different heads of liability.[12]

9. In the light of these criticisms, we feel that we should begin by declaring our attitude to considerations of this nature. It seems to us not merely desirable, but obligatory, that legal rules imposing serious criminal sanctions should be stated with the maximum clarity which the imperfect medium of language can attain. The offence of conspiracy to do an unlawful act offends against that precept in two ways. First, it is impossible in some cases even to state the rules relating to the object of criminal agreements except in terms which are at best tautologous and unenlightening.[13] Secondly, in those cases where at least a statement of the offence is possible, that statement covers such a wide range of conduct that it is impossible

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12. These criticisms would not, of course, apply to conspiracies to commit crimes.

13. See, e.g. Willes J. in Mulcahy v. Reg (1868) LR 3HL 300 defining the innominate category of conspiracy to injure in well-known terms as "an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means". This definition has proved fruitful. In Mogul Steamship Co. v. McGregor (1889) 23 Q.B.D. 598, 617 Bowen L.J. described the tort of conspiracy to injure as "a combination of several persons against one with a view to harm him". Russell on Crime 12th ed. Vol 2, p. 1490 says "A combination without justification to insult, annoy, injure or impoverish another person is a criminal conspiracy".

to decide (assuming a set of facts established) whether an offence has been committed or not.[14] It seems to us, therefore, that the offence of conspiracy to do an unlawful, though not criminal, act ought to have no place in a modern system of law. Nevertheless, it is necessary to examine the arguments which might be used to support the present position.

10. It is often said that the jury is the best safeguard against oppressive prosecutions, and can be relied upon to reflect public feeling at any given time.[15] We consider, on the contrary, that the role of the jury in some areas of conspiracy is one of the most unsatisfactory aspects of the law. It is true that a jury is sometimes called upon to apply its collective values to sensitive questions.[16] We, however, regard it as a matter for regret that it leads to the substitution of the judgment of the jury for a clear and satisfactory statement of a rule of law. The jury is traditionally regarded as a guardian of individual freedom, but this is because it is the tribunal of fact, not because it is a law-giving agency, the role it assumes in many conspiracy cases. To ask the jury not only whether the accused did the acts alleged, but whether he ought to be punished, seems to

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14. These observations would not apply to conspiracies to commit torts or breaches of contract. Whether these are in fact criminal conspiracies is, however, itself a difficult question to answer.

15. See, e.g. Shaw v. D.P.P. [1962] A.C. 220, per Viscount Simonds at 269, Lord Tucker at 289, Lord Morris at 292 and Lord Hodson at 294. Judicial opinion is not unanimous. See Lord Reid in Shaw at 281-2 (supra) and in Knuller v. D.P.P. [1972] 3 W.L.R. 143; and the comments of Lawton L.J. in Kamara [1972] 3 All E.R. 999.

16. Under, for instance, the Obscene Publications Act 1959.

confuse two roles, fact-finding and legislative. A jury may be influenced very strongly by a judge's direction, not only on the facts, but more important, on the elements of the offence. Though the combined effect of the decisions in Shaw[17], Knuller v. D.P.P.[18] and R. v. Bhagwan[19] is to deny the existence of a judicial power to create new offences relating to morals, decency, or "public mischief", the asserted effect of such a denial is minimised by the facility with which a novel set of facts may be subsumed under an existing head of liability in conspiracy.

11. It used to be argued that the very fact that a conspiracy to do certain acts involves the concerted efforts of two or more makes it in itself a dangerous thing, justifying greater attention than the law would give to a corresponding act done by one person. The validity of this argument, of course, cannot be tested empirically. This argument is perhaps less persuasive, however, in cases involving no more than two people where one person only is charged with conspiracy with another "unknown", particularly if he is at the same time charged with other substantive offences without conspiracy. Further, the court has to find the criminal - "unlawful" - element in the object of the agreement. The agreement itself becomes criminal only because of its object, and therefore the numbers involved are irrelevant to criminal liability once it is shown that a minimum of two only agreed, of whom only one need be charged. It may be that a combination of, say, a dozen, is formidable; but it is difficult to see how much gravity is added to one man's conduct by the agreement of one other.

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17. [1962] A.C. 220.
18. [1972] 2 All E.R. 898.
19. [1972] A.C. 60.

12. It is also said that, as an inchoate offence, conspiracy enables the criminal law to intervene at an early stage of the commission of a crime. This is true, and we would not dispute that this will continue as the most important rationale of conspiracy to commit crimes. But it is hard to see how this could be relevant where the agreement is not to commit a crime (or even a tort) but to commit what may or may not later be characterised as an "unlawful" act. The very issue in such a case will be whether the defendants have committed a crime by making their agreement. Therefore, the power to intervene at an early stage does not seem to be a material consideration in deciding whether criminal conspiracy should extend beyond agreements to commit crimes. Further, conspiracy to do an "unlawful", as distinct from a criminal, act is generally charged where the contentious conduct has been completed. The object is to obtain a conviction where the prosecution feels that another charge may fail, which it would clearly do where the "unlawful" act is not also a criminal act. Inchoate offences may widen the net to catch incipient criminal behaviour, but here, in a dubious area of non-criminality, a theoretically inchoate offence is used to stretch the substantive law.

13. If this is acknowledged, it can still be argued that the use of conspiracy charges to enlarge the range of criminal liability in particular cases is itself desirable. It cannot be foreseen what the dishonest or immoral may do and conspiracy has therefore a useful role in ensuring that those who indulge in reprehensible conduct do not go unpunished. We do not dissent from the proposition that the manifestations of viciousness may be infinite. But, even assuming for the sake of argument that all were agreed what conduct ought to be punished, we do not think that the proper role of conspiracy is to provide a means of convicting those whose conduct would not otherwise have been punishable.

It may be true that there is a danger of cases in which justice is apparently evaded. We regard this as an inevitable and acceptable price to pay in order to avoid the creation of oppressive "catch-all" offences. If there are to be such offences, we believe that their creation is a matter for Parliament, and to make such offences depend upon the existence of a combination is, in our view, unacceptable.

14. This argument emphasises the importance we place on the necessity for certainty in the criminal law. As values change, the fields in which the law takes a part, or from which it abstains, may also change. What should and should not be the subject of interference by the criminal law is a controversial question, and one which is certain to arise in the context of offences which may be thought necessary to replace existing areas of conspiracy liability. The extended form of conspiracies to do acts other than crimes, however, is one which we feel has no place in a modern system of criminal law. Our view is reinforced by another factor: our deliberations are conducted in the context of the long-term aim of codifying the criminal law. A law of conspiracy extending beyond the ambit of conspiracy to commit crimes has, in our view, no place in a comprehensively planned criminal code.

2. The object of a criminal conspiracy

A. Conspiracy to commit a criminal offence

15. This is the normal instance of a conspiracy charge and needs no further elaboration at this stage.

B. Conspiracy to defraud

16. This offence is committed in any case where the defendants' agreement had as its object the falsification

of a transaction, whether in the specific sense that they should tell lies about the elements of that transaction, or the more general sense that they should present a false front to the world, although they should not lie about the dealings in question.[20] Their dishonest acts need not involve an actual lie, so long as the "victim's" expectations are in some way unsatisfied by dishonest means. There is, therefore, no question of fitting the conduct into the framework of a statutory deception, and conspiracy may be charged irrespective of whether there is or is not other liability. Loss to the victim, or gain to the defendants, need not be proved, but need only be "likely" to flow from the dishonesty, and there may be liability even though the loss or gain is hard to assess in financial terms. This is, at least in part, because the concept of "fraud" has here become extended to include "public frauds" involving dishonesty whereby a body charged with a 'public' duty or power is induced to exercise it in the wrong circumstances.[21] In such cases financial gain may be very remote, and the "prejudice" suffered may not be financial at all. Such public fraud conspiracies are also prosecuted as conspiracies to effect a public mischief.[22]

17. The proposed restriction on conspiracy may leave some gaps in the present range of liability for dishonesty. The desirability of creating specific statutory replacements for some or any of these will be considered in a later Law Commission Working Paper, with particular regard to the efficacy (or lack of it) of the present statutory fraud offences.

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20. R. v. Parker and Bulteel (1916) 25 Cox C.C. 145.
21. Board of Trade v. Owen [1957] A.C. 602.
22. e.g. R.v. Brailsford [1905] 2 K.B. 730.

C. Conspiracy to defeat the course of justice

18. Broadly, any agreement directly or indirectly to interfere with the proper initiation, progress or outcome of any action or prosecution is a criminal conspiracy. To do acts tending similarly to pervert or defeat the course of justice is itself an offence. Whether there are any differences between the conspiracy and the substantive offence is a question difficult to answer with confidence. Both offences are closely related to contempt of court, and offences which may also amount to particular manifestations of perverting the course of justice include the concealment of crime and hampering police investigations, misconduct in office, bribery and embracery, criminal libel and blackmail (if false accusations are made), interference with evidence, perjury and subornation of perjury, and freeing persons or property from lawful custody.

19. As this list suggests, liability for conspiracy extends beyond interference with the judicial process itself to the protection of the police function. Its restriction to specific offences may leave technical gaps in the law. English law, however, has traditionally been as jealous in guarding the freedom of the individual from interference by authority as in asserting the unimpeded functioning of the courts. It seems to us therefore, that to confuse the judicial and the police role would be to run a very serious danger of eroding the protection afforded the individual. A consideration of any offence which might be required to replace this head of conspiracy must not ignore this.

D. Conspiracies relating to morals and decency

20. Whether regarded as examples of public mischief or as separate heads of conspiracies to commit "unlawful" acts, the offences created or held to exist by the House of Lords

in Shaw v. D.P.P.[23] and Knuller v. D.P.P.[24] represent one of the most spectacular growths in the scope of conspiracy in recent times. The effects of the two decisions, at the risk of simplification, may be summarised as follows:

(1) Conspiracy to corrupt public morals

21. It is an offence to agree to do any act the effect of which is (or may be inferred to be) to "corrupt" the morals of such members of the public as may be influenced by that act, whether those persons are already "partly corrupted" or not.[25] The "corruption" consists in the facilitation or encouragement of any activity which is "unlawful" (though the "unlawfulness" itself consists only in deviation from an assumed common morality). Although the defendants must theoretically intend this result, the only intention relevant as a question of fact is the intention to do the act itself, e.g., publishing, from which act both the conspiracy and the intention to corrupt (the motive) may be inferred. In the case of written material, there is no defence of public good in publishing[26] once the corrupting nature of the material is made out.

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23. [1962] A.C. 220.

24. [1972] 3 W.L.R. 143.

25. The decision of the Court of Criminal Appeal in Shaw was based on liability without conspiracy, a possibility mentioned only obiter in the House of Lords. No mention was made of such a separate misdemeanour in the House of Lords' review of the law in Knuller. The cases cited in the Court of Criminal Appeal in Shaw were cited in Knuller to support the existence of the misdemeanour of outrage to public decency, whilst the other cases discussed by the House of Lords in Shaw all turned on conspiracy.

26. As under the Obscene Publications Act 1959, s. 4.

(2) Outrage to decency

22. It is an offence (even without conspiracy) to do any act "in public" which outrages contemporary standards of decency.[27] This includes the publication of material, even though that material is only part of a more substantial publication. The act or material must be such that more than one person "was able" to see it, and in addition must be in some way "projected" in public. On the other hand, there is no requirement that any actual witness should be outraged, the outrage to canons of decency being a matter for the jury.[28] As far as the question of intention and motive was canvassed in Knuller, it appears that (as in conspiracy to corrupt) motive (to outrage) need not be established if intention to do the act is established, whether by proof or by inference. There is, again, no defence of public good in doing the act or disseminating the material.

23. The decision on outrage to public decency in Knuller undoubtedly makes it easier for the prosecution to obtain a conviction on a given set of facts than would previously have been the case. Whether it actually extends the law to cover more than a very few cases which would not previously have been dealt with by statutory provisions, common law offences, or Shaw itself, is doubtful, as indeed is its relationship with these offences. We consider that any reform which involves eliminating the decision in Shaw must also involve a reversal of Knuller, for the objections to each are the same. At the same time, such a reform cannot be undertaken without a very searching consideration of what new offences may technically be necessary, and as a matter of policy desirable, to prevent gaps appearing in the law.

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27. Knuller v. D.P.P. [1972] 3 W.L.R. 143.
28. Following R. v. Mayling [1963] 2 Q.B. 717.

We have in mind in particular two possible areas for consideration; first, cases in which young children may be persuaded or induced to lend themselves to indecent displays and in which the only present liability in those responsible would be under Shaw; and, secondly, single showings of obscene and unlicensed films where the only available weapon is a prosecution for conspiracy to corrupt public morals.[29]

E. Conspiracy to commit a civil wrong

24. It seems that the possibilities are increasing of a general growth of this type of conspiracy charge. Exactly how far this growth has gone is not yet clear, for new decisions have (as yet) not entirely resolved the obscurities and contradictions contained in the older authorities.

(1) Conspiracy to commit a tort (not in itself a crime)

25. Most old dicta suggesting that there is criminal liability in this area refer to fraud, violence, or malice, leaving open the possibility of other categories. Fraud and violence seems to be well covered, without reference to

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29. In relation to films, the Obscene Publications Acts 1959 and 1964 apply only to private houses to which the public are not admitted. Presentation of films cannot be prosecuted for obscenity (or for a common law offence the essence of which is the publication of an absence article) -

    a. in private houses where public are admitted on payment;
    b. in a club to members;
    c. in a factory to the workers; and
    d. in a cinema not licensed under the Cinematograph Act 1909.

    Prosecution for keeping a disorderly house requires, to succeed, an element of continuity absent where there is a single showing only of a film.

tortious liability in most cases. The introduction of the word "malice" serves, as usual, to confuse; it may be a reference to conspiracy to injure another (below, F) which is certainly a tort and quite possibly a crime. In Kamara,[30] however, the Court of Appeal has held that any conspiracy to trespass is itself an indictable offence. The reasoning of the court was that all torts are "unlawful acts", which suggests very strongly that an agreement to commit any tort (subject to questions of the state of mind required) is also a crime. This result, if correct, would go to the very root of the relationship between tort and crime, as the court itself acknowledged with regard to trespass.

(2) Conspiracy to break a contract

26. There is, apart from nineteenth century trade dispute cases, only the flimsiest authority that agreeing to break a contract is a criminal conspiracy.[31] However, to break a contract is an "unlawful" act, and the question (as always in this type of analysis) is whether it is of that type of unlawfulness requisite to make an agreement a criminal conspiracy. The decision in Kamara suggests civil actionability as the test and if an appropriate case were to come before the courts for decision, the possibility of a charge of conspiracy to break a contract being upheld seems, on this basis, to be quite strong. It seems to us, however, that any court would hesitate before coming to such a conclusion.

27. In neither of these cases could there be any criminal liability without conspiracy. We consider that this type of

30. [1972] 3 All E.R. 999, now an appeal to the House of Lords.

31. Vertue v. Lord Clive (1769) 4 Burr, 2472, per Yates J.; R. v. Parnell (1881) 14 Cox C.C. 508, an Irish case.

offence is undesirable, but consideration must be given as to whether there might be areas where new criminal offences are needed.

F. Conspiracy to injure

28. It cannot be firmly asserted whether this is a crime as well as a tort. The complete identity of criminal and civil law seems to have been assumed in Mogul S.S. v. McGregor[32] and Quinn v. Leathem[33] and is suggested by Lord Reid in his dissenting speech in Shaw, but denied by Lord Porter in Crofter Handwoven Harris Tweed v. Veitch.[34] Since conspiracy to injure is a tort itself, the reasoning in Kamara also strongly suggests that there is such liability. Whether there is complete identity between tort and crime is very doubtful; some damage must be shown in the tort action, which is not necessary in crime, and the "malice" which (it seems from the dicta) would be the basis of the crime is merely evidence of lack of intention to further legitimate interests in the tort. Careful consideration must be given as to whether there is any justification for such a criminal liability.

G. Conspiracies with a "public element"

29. Although it appears to be settled that conspiracies to effect a public mischief are a group of conspiracies to which no additions are now possible,[35] it is not exactly

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32. [1892] A.C. 25.
33. [1901] A.C. 495.
34. [1942] A.C. 435, 488.
35. R. v. Bhagwan [1972] A.C. 60; Knuller v. D.P.P. [1972] 3 W.L.R. 143.

clear what may be comprised in the term "public mischief". This means that there is still scope for judicial extension of conspiracy to new fact situations.

30. "Public fraud" cases, conspiracy to corrupt public morals, outrage to public decency, and conspiracies to defeat or pervert the course of justice may be regarded as public mischiefs, but it is probable that there are two remaining types of conspiracy which may not be so described. These are seditious conspiracy, and conspiracies to spread false rumours to affect prices or the value of assets.

31. Finally, though there may be liability for acting (with or without agreement) in breach of statutory duty, this is curtailed by the decision in R. v. Bhagwan[36] That case also decided that there is no liability for an agreement to evade or nullify the purposes of a statute unless the means used are fraudulent (in the broad conspiracy sense) or themselves directly prohibited by statute or common law.

32. We have made clear our provisional view that the object of conspiracy for the future should be limited to the commission of a substantive offence or offences. The areas of the law which it will be necessary to scrutinise in the light of that decision of principle will be the subject of other Papers to be issued by the Law Commission. Our examination of the elements of the law of conspiracy in the following paragraphs proceeds on the assumption that the object of conspiracy will be limited in accordance with our provisional proposal.

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36. [1972] A.C. 60.

3. Elements of the offence of conspiracy

(a) Agreement

33. The present law of conspiracy makes clear that although an agreement to pursue the object of the conspiracy is essential,[37] it is not necessary that all the parties should have evinced their consent at the same time or on the same occasion, nor indeed that they should all have been in communication with each other or should be aware of each other's identity. Whilst we believe this to be right in principle, we consider that it is essential that each of the conspirators should entertain a common purpose in relation to the specific offence or offences which are its object. Thus, for example, if the agreement has as its object the robbing of a particular bank the conspirators may be indicted together although the agreement upon the crime to be carried out may have been reached by means of a "wheel" or "chain" conspiracy. As the Court of Appeal recently put it:-[38]

> "The essential point in dealing with this type of conspiracy charge, i.e. "wheel" or "chain" conspiracies where the prosecution have brought one, and only one, charge against the alleged conspirators, is to bring home to the minds of the jury

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37. See R. v. Walker [1962] Crim. L.R. 458; conviction for conspiracy quashed as W's activity was only "negotiation".

38. R. v. Ardalan [1972] 1 W.L.R. 463, 469-470. A "wheel" conspiracy is where the defendants, having a common criminal purpose, conspire not directly with each other, but each with the same third party. A "chain" conspiracy is where the defendants having a common criminal purpose, conspire, not through one common intermediary as in the case of a "wheel" conspiracy, but through successive intermediaries between each defendant.

> that before they can convict anybody upon that conspiracy charge, they have got to be convinced in relation to each person charged that that person has conspired with another guilty person in relation to that single conspiracy ..... there must not be wrapped up in one conspiracy charge what is in fact a charge involving two or more conspiracies."

The case of R. v. Meyrick and others[39] is an unsatisfactory example of the application of these principles, since, although the jury were correctly directed upon the law as it was understood to be, they found the two defendants guilty upon evidence which appeared to disclose only that each of them conspired separately with a third person for the commission of different offences by that third person and each of them. It was distinguished in R. v. Griffiths,[40] where convictions for conspiracy were quashed in circumstances which showed there was a central figure who had conspired separately with a number of other persons for the commission of a series of separate offences of the same kind but where the purpose of each other person was limited to the specific offence in which he was involved; but we believe that the basis for the distinction made, that is, the size and nature of the locality in Meyrick was such that the defendants "well knew what was happening", is unsatisfactory. Because of the problems raised by these cases, we think it is necessary to emphasise the essential foundation of conspiracy, namely, the agreement: we believe that mere common purpose without agreement, although it may involve complicity in crime, should not amount of itself to conspiracy.

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39. (1929) 21 Cr. App. R. 94.
40. [1966] 1 Q.B. 589.

(b) One-man companies

34. We think that the agreement which constitutes the essential foundation of conspiracy must be one between two or more natural persons; that is, there must be at least two minds.[41] Although there is some earlier authority which suggests the contrary[42], R. v. McDonnell[43] held that when the sole director of a company which he controls (a "one man company") is charged with conspiracy with his own company, the director cannot be liable. Conspiracy is, of course, an offence which requires a mental element[44] and in our Working Paper on Corporations[45] we have discussed whether corporations should be capable of liability for offences having a mental element. If it is assumed that they may be so liable, we believe that the decision in McDonnell's case must be right. In order to convict a corporation of such an offence it is necessary to identify someone whose guilty mind and activities are, for these purposes, to be treated as those of the company itself; and if all that has happened is that that individual has made a decision on his own, he cannot be taken to have agreed with another. On the other hand, assuming corporate liability for mens rea offences, it may be perfectly proper to charge a company with conspiracy if the mind and activities of one of the individuals party to the conspiracy are identified as the mind and activities of that company.

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41. Whether there must be an actual meeting of minds we discuss further at para. 43.

42. R. v. I.C.R. Haulage Ltd. [1944] K.B. 551.

43. [1966] 1 Q.B. 233.

44. See para. 49 et seq.

45. Working Paper No. 44, The Criminal Liability of Corporations.

(c) Husband and wife

35. Although it seems to be the law that a husband and wife can be accomplices in a crime or one can be guilty of inciting the other to commit crime[46], a man cannot at present conspire with a woman who is his wife at the time when the agreement is made.[47] There are arguments which favour both the abolition of this rule and its retention. It may be argued that husband and wife are treated as separate persons for the purpose of the criminal law in the context of offences against the person and against property. Furthermore, the Criminal Law Revision Committee are proposing[48] that spouses should be competent as prosecution witnesses in all cases, and compellable in cases of violence to the other spouse, and offences of violence or sexual offences against children; and they also propose that the privilege against disclosure of marital communications (which is limited to communications to the spouse giving the evidence) should be abolished. These proposals may lead to the conclusion that the status of husband and wife may be so radically altered that the present rule applying in conspiracy cases ought to be abolished.

36. The other view is that, so long as the institution of marriage remains at it is known today, it would be wrong to make a husband and wife liable for conspiracy, since it would

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46. R. v. Manning 2 C. and K. 903n.: Archbold 37th ed. para. 46.

47. This is universally stated to be the law by the writers of treatises and books and is supported by the Privy Council's decision in Mawji v. R. [1957] A.C. 526 and by such earlier cases as Robinson (1746) 1 Leach 37 and Whitehouse (1852) 6 Cox C.C. 38. There is, however, no direct English authority on the point.

48. See 11th Report, Evidence (General) pp. 92 et seq., and clause 9 of the draft Bill, (1972) Cmnd. 4991.

represent a factor tending to undermine the stability of the marriage. A change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife would be charged with conspiracy with him. Such a publicised change in the law in this respect could therefore bring practical disadvantages which might outweigh its possible advantages. Our provisional conclusion, which is not unanimous, is that the arguments, on balance, favour the retention of the present position.

4. Conspiracies with participants exempted from liability

37. In this section, we consider four special cases which raise particular problems in regard to the agreement required for conspiracy. The situations are outlined in the following paragraphs and we consider thereafter whether it is desirable and possible to apply a consistent solution to all of them.

(a) Conspiracies with children and persons incapable of forming the necessary intent

38. In these cases, the child under the age of criminal responsibility or the person who is, by reason of mental disorder, incapable of forming the necessary intent, is incapable of conspiring; but it is probable that, at present, this does not preclude the other from being convicted of conspiracy.

(b) Conspirators who are not liable for prosecution for the substantive offence

39. Perhaps a more common case than the one postulated in the last paragraph is one in which A conspires with B (who is normally responsible in law) for the commission of a particular crime in respect of which B is not liable to prosecution. For example, a man conspires with a woman not in fact pregnant to procure her abortion[49] or a man conspires with a mother that he should remove her child from the custody of its lawful guardian. In neither case could the woman have been guilty of the substantive offence as a principal because the relevant offence[50] expressly excludes her liability. Yet on conspiracy charges, the liability of the woman in the first case is established and in the second case, uncertain. In both cases, it seems probable that the party with whom she conspires, the non-exempt party, would be liable.

(c) Conspirators who are victims

40. This problem is of practical importance only in relation to sexual offences against young women or children (including abduction) and certain types of child stealing. In many instances of these offences the young woman or girl who may be regarded as the victim, will be a consenting party, and the absence of such consent may involve a different offence.[51] It is probable that, at present, conspirators who are victims would

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49. R. v. Whitchurch (1890) 24 Q.B.D. 420.

50. Offences Against the Person Act 1861, s. 56.

51. E.g. offences under the 1861 Act, s. 56, the Sexual Offences Act 1956, ss. 18-20.

be held not liable[52] while the other party would be. Our Working Paper on Complicity[53] proposes exemption of the victims of offences from liability as accomplices.

(d) Participants in Offences by others

41. Our Working Paper on Complicity proposes that those whose conduct is an integral element in the commission of an offence by another person should not be guilty of complicity in that offence.[54] This problem is of practical importance where the commission of that person's offence involves the completion of a transaction with a second person, as in the case of offences which take place on a sale or supply of goods or services in breach of the penal provisions of a statute (for example, selling intoxicants without a licence or supplying them to persons under age). The essential involvement of the buyer or customer in transactions of this kind means that, in many cases, an offence will be committed by the completion of the transaction with him. Since an agreement is a prerequisite to such sale or supply, he will, therefore, have agreed to the commission of the offence. At present, there is no authority whether he would be liable for conspiracy, although there is nothing in the law to prevent such a finding; nor is there authority as to the conspiracy liability of the seller in such cases, where, in principle, the case for liability is stronger.

42. In most of the fact situations described under the four headings above, it will be seen that, at present the party who, for whatever reason, incurs no criminal liability

52. See R. v. Tyrrell [1894] 1 Q.B. 710 (an accessory case).
53. Working Paper No. 43, Proposition 8.
54. Working Paper No. 43, Proposition 8.

for the ultimate offence, is probably also not guilty of conspiracy to commit. It is true that this was not the result reached in Whitchurch's[55] case, where the woman was found guilty of conspiring to procure her own abortion, although not pregnant; but this case may be criticised as going against the intent of Parliament through its circumvention of the limitation of responsibility imposed by statute. In some of the instances described, such as the child under age, the party is regarded as incapable of forming a criminal intent. In others, the party may be so capable, but policy reasons exclude the party's liability for the substantive offence. Whatever the basis upon which these cases may be rationalised, where there is a conspiracy between an exempt and a non-exempt party, we consider that in all cases the exempt party should not be convicted.

43. The considerations which apply to the non-exempt party in these cases are more complex. It might appear at first sight that there is no reason why he should not be prosecuted for conspiracy. Where one person is by statute expressly exempted from liability for his or her activity, for example the exception in section 56 of the Offences against the Person Act 1861[56], it may, nevertheless, be thought desirable that the non-exempt party in a conspiracy to do the prohibited act should be penalised for what is an offence on his part. On balance, however, we have come to the conclusion that the non-exempt party should in none of the cases under discussion be liable for conspiracy. This will eliminate the theoretical problems which attend the alternative solution, such as whether all the necessary elements of conspiracy can be held to exist

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55. (1890) 24 Q.B.D. 420; but see also R. v. Sockett (1908) 72 J.P. 428.

56. Excluding the mother's liability for taking her child away from its lawful guardian.

where one party to the alleged agreement is, by reason of mental disorder, incapable of forming the necessary intent. At the same time the apparent gaps in the law which this solution appears to create will, we believe, largely be closed by the proposals we make in regard to the law of attempt.[57] We are proposing the adoption of a "substantial step" as the actus reus in attempts, and one example of a substantial step which we give is soliciting any person (whether innocent or not) to engage in conduct constituting an external element of the substantive offence. Normally, a non-exempt party will be guilty of an attempt under the proposed test by reason of his incitement of the exempt party. In other cases, where it is not the non-exempt party who is responsible for the incitement, we believe it would be unjust to hold him guilty of any offence, for example, where an older man is incited by a girl under 16 to unlawful intercourse.[58] Elimination of conspiracy in these cases would, for the most part, therefore, leave no gap in the law which could not be sufficiently closed by other means.

5. "Inchoate" conspiracy and conspiracy to commit other inchoate offences

44. The rationale for the existence of the offence of conspiracy is, in part, as we have indicated,[59] the opportunity which it presents for authority to intervene at an early stage in the conduct leading to the commission of the ultimate offence. Of the three inchoate offences, it is, perhaps, the one which permits the earliest such intervention. Nevertheless, there is authority for the existence of the offence of attempting or inciting to conspire.[60] Our

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57. See para. 87 et seq.

58. Or cases of the Whitchurch type in which the woman concerned may be responsible for soliciting the commission of the offence.

59. See para. 12 above.

60. See R. v. De Kromme (1892) 17 Cox C.C. 492, 494.

provisional view is, however, that, as a matter of principle, such extensions of the law of inchoate offences in relation to conspiracy cannot be justified. The matter presents some difficulty since conspiracy postulates an agreement and mere negotiation for an agreement is insufficient to found a conspiracy charge.[61] Most situations which it is necessary to cover will be dealt with by a charge of incitement to commit the substantive offence, since the concept postulates that one individual will approach another to persuade the other to join with him in a criminal enterprise. In other situations we believe that extending the law in this way takes it further back in the course of conduct to be penalised than is necessary or justifiable.

45. There is, however, one situation where the extensions under discussion could be of practical value. Where an individual agrees with another to commit a crime, and that other is a police informer or otherwise intends to frustrate its commission, the first individual is doing all he can to conspire, and believes himself to be conspiring. Unlike the case of the agreement with the child[62] he knows nothing of facts which prevent the conduct from being a genuine agreement to do a criminal act. His own conduct cannot properly be characterised as constituting any other inchoate offence. It is a possible view, therefore, that where a person mistakenly believes he is conspiring with another, he should be guilty of attempted conspiracy. We take the view, however, that no such exception should be made to our proposal to exclude this concept. If the individual who has the full mental element is responsible for taking the initial steps in the "agreement", he will in any event most probably be

61. R. v. Walker [1962] Crim. L.R. 458: see para. 33 n. 37.
62. See para. 38.

guilty of incitement. Where it is the police informer who acts in effect as an agent provocateur, we believe it would be undesirable in principle to render the individual incited guilty of attempted conspiracy. This accords with the view we have taken in regard to the liability of non-exempt parties in conspiracies with exempt parties.[63]

46. Similar considerations apply to some degree in the decision whether to extend the law of conspiracy to conspiracy to commit attempts and incitements. Theoretically, at least, it is possible for a person to conspire with another to attempt a substantive offence. But what is normally in contemplation is an offence to be consummated, not one to be pursued no further than the point of attempt; and if this is the true position, in practice there is no place in a Code for conspiracies to attempt substantive offences. We believe that this is the correct conclusion and that, on examination, cases which may be postulated as conspiracies to attempt prove either to be conspiracies to commit a substantive offence or not to contain all the necessary elements of conspiracy. For example, picking an empty pocket may constitute an attempt to steal[64], but if two persons conspire to steal not knowing the pocket to be empty, this will constitute a conspiracy to steal rather than a conspiracy to attempt to do so;[65] while if the first conspirator knows the pocket to be empty but allows the second to make the attempt, the first lacks the full mental element essential for conspiracy.[66] Furthermore, quite

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63. See para. 43.
64. R. v. Ring (1892) 61 L.J.M.C. 116: see para. 130.
65. See discussion on impossibility at paras. 126 et seq.
66. See para. 49 et seq.

apart from these considerations of theory, we believe that, as in the case of attempted conspiracy, extension of the law of conspiracy in this way cannot be justified: while the offence of conspiracy rightly permits early intervention by the police, we would not support the view that such intervention should be permitted at a still earlier stage in the commission of a substantive offence when, ex hypothesi, the evidence does not establish any intention on the part of the conspirators to commit that offence. For the avoidance of doubt, however, we believe that it will be necessary to provide in the Code that any charge of conspiracy to attempt shall be deemed to be conspiracy to commit the substantive offence.

47. Conspiracy to incite raises rather different considerations because there is nothing illogical in the concept. The situation where two person conspire to incite another to commit an offence may not be uncommon, and a conspiracy to incite at large the commission of a particular offence is another obvious possibility. While these situations could be met by, or example, a charge of conspiracy with the intent that an offence be committed, we believe that the charges may be more readily understood in terms of a conspiracy to incite the offence. We therefore propose that this kind of conspiracy be retained.

6. Mental element in conspiracy

48. After some vicissitudes in the Court of Criminal Appeal[67], the principle now laid down by the House of Lords in Churchill v. Walton[68] is that "if on the facts known to the accused what they agreed to do was lawful, they are not rendered artificially guilty (of conspiracy) by the existence of other facts, not known to them, giving a different criminal quality to the act agreed to be done". This means that before there can be liability for conspiracy the parties must intend to pursue a course of action and they must know of the facts which make their agreed course of action an offence. The requirement that one must know of facts which make a course of action an offence does not mean, of course, that one must know that the conduct is an offence. There is an

67. R. v. Clayton (1943) 33 Cr. App. R. 113: R. v. Jacobs [1944] K.B. 417: R. v. Sorsky (1944) 30 Cr. App. R. 84.

68. [1967] 2 A.C. 224.

essential difference between conspiring to take out of the possession of her parents a girl whom the conspirators believe to be over 16 years of age, and a girl whom they know to be under 16 although they do not know it to be an offence to take a girl under 16. Ignorance of the law is in conspiracy, as elsewhere, no defence.[69]

49. It is necessary to analyse the requisite element a little beyond the present rule as enunciated in Churchill v. Walton[70], for there are two aspects of the mental element to be considered. The first concerns the mental state in regard to the consequences of the course of action which it is agreed to pursue; the second concerns the mental state in regard to the circumstances surrounding the course of action.

As to consequences

50. The fact that the parties have agreed on a course of action does not necessarily mean that they intend all the consequences of that action, and it would not be right to hold them liable for conspiring to commit an offence with a mental element unless they had in respect of the consequences of their action the mental element required for the commission of that offence.

e.g. (a) A and B agree to explode a blasting charge of gelignite in a quarry at a pre-arranged hour. Unknown to them two children have agreed to meet at the spot at that hour. A and B

69. R. v. Jacobs [1944] K.B. 417.
70. [1967] 2 A.C. 224.

have agreed on a course of action which will result in a person being killed - the external element of the offence of murder. But as they did not intend to kill a person they are not guilty of conspiracy to murder.

(b) A and B agree as above, knowing that X will be in the quarry at the time of the explosion and hoping to kill him. They are guilty of conspiracy to murder because they intend the consequences of their course of action.

(c) A and B agree to destroy by fire a cottage they own. They know that in so doing they are very likely to endanger the life of X, but they agree nevertheless to continue with their plan. They are reckless as to whether the life of another will be endangered and therefore have the mental element required for the commission of the aggravated offence of criminal damage.[71] They are guilty of conspiracy to commit that offence.

51. Accordingly it is necessary to provide that, where a mental element of intention or recklessness is required to make criminal the consequence of the course of action upon which the parties are agreed, a party will not be guilty of conspiracy to commit that offence unless he has the requisite mental state of intention or recklessness (as the case may be) as to that consequence.

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71. S. 1(2) of the Criminal Damage Act 1971.

As to Circumstances

52. Where the object of the parties' agreement will not be criminal unless there is knowledge of certain circumstances (or recklessness as to the existence of certain circumstances) a party is guilty of a conspiracy to commit that offence only when he has knowledge of or is reckless as to those circumstances (as the case may be).

E.g. A and B agree to take out of the possession of her parents X, who is an unmarried girl under 16, and is in the possession of a parent, against the parents' will. Assuming that the substantive offence requires for its commission knowledge that the girl is unmarried, they will be guilty of conspiring to commit it only if they know she is unmarried or are reckless as to this.

53. Where no knowledge of, or recklessness as to, circumstances is required to make what is agreed upon an offence, there should still be required at least recklessness as to those circumstances before a party to an agreement to a course of action which would result in the commission of the external elements of an offence can be guilty of conspiracy to commit the offence.

E.g. A and B agree to take a girl whose age they do not know, but who is under 16, against the will of her parent. Assuming that the substantive offence does not require for its commission knowledge that

the girl is under 16[72] A and B will be guilty of conspiracy to commit the offence only if they are at least reckless as to whether the girl is under 16. If they believe on reasonable grounds that she is over 16 they will not be guilty.

7. Consummated conspiracies

54. It is clear on the authorities that a conspiracy does not "merge" with the substantive offence, the object of the conspiracy, when that offence has been committed, and a person may be convicted both of the conspiracy and of the substantive offence. But strong judicial objections have often been urged against the joinder of conspiracy counts, particularly when widely framed, with counts charging one or more substantive offences at which the conspiracy is alleged to have been aimed. It has been said that the inclusion of a conspiracy count in this way -

(i) adds to the length and complexity of trials, and in particular complicates the task of summing up to a jury,[73]

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72. This assumption is made only for the purposes of this illustration. We consider that as a matter of principle this offence should require a mental element at least of recklessness in accordance with our proposals in Working Paper No. 31, 'The Mental Element in Crime'. The mental element in conspiracy will also have to take account of the difficulties raised by murder, which requires at least intent to cause grievous bodily harm. A conspiracy recklessly to cause grievous bodily harm as a result of which a person dies could not, therefore, without modification of the mental element, constitute conspiracy to murder.

73. R. v. Griffiths [1966] 1 Q.B. 589, 594.

(ii) tends to obscure questions of fact vital to the decision of the case,[74]

(iii) tends to produce inconsistent verdicts,[75]

(iv) allows evidence to be given which is relevant to the conspiracy count, but which may have, despite any warning against relying on it, a prejudicial effect on an accused in relation to one or more of the substantive counts.[76]

The cases in which the criticisms of the joinder of a conspiracy count with counts charging one or more substantive counts have been expressed most strongly are those in which the conspiracy count itself has been very widely drawn.[77] Indeed it is clear that the main

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74. R. v. Dawson [1960] 1 W.L.R. 163.

75. E.g. a verdict that two accused are not guilty of the substantive offence alleged against them, but guilty of conspiracy to commit it, although the evidence clearly shows it was committed, R. v. Cooper and Compton (1947) 32 Cr. App. R. 102; or a verdict of guilty of the substantive offence but not guilty of conspiracy, R. v. Sweetland (1957) 42 Cr. App. R. 62.

76. R. v. Dawson [1960] 1 W.L.R. 163, 170 per Finnemore J.: "We think that W is really a typical example of a man who was sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connection either direct or indirect, and in which he took no part whatever".

77. In R. v. Dawson [1960] 1 W.L.R. 163 the conspiracy was alleged to involve 8 named persons conspiring over three years in connection with transactions relating to the surcharge, sale, barrelling, bottling and processing of orange juice concentrate, the purchase, sale and conversion of buses, bogies and landing vehicles and the discounting of bills of exchange; in R. v. Griffiths [1966] 1 Q.B. 589 the conspiracy was alleged to involve 9 named persons conspiring over 4 years in connection with a series of transactions; only two of the accused were involved in all of these.

criticism is not of the joinder of the counts but of the form of the conspiracy charge.[78] Furthermore, the last of the above listed criticisms is clearly not soundly based, at all events as a matter of strict law, for the rules as to admissibility are the same in conspiracy as in all other cases where a common enterprise is relied on.[79] There may, nevertheless, be some substance in the point made in Dawson[80] that, where there is a widespread conspiracy canvassed in the evidence, some of the evidence of fraudulent conduct may rub off on one of the joint accused in one of the substantive counts, but this, in our view, does no more than indicate the need for the exercise of care in the decision to join the two types of counts in one indictment, a matter to which we refer again below.[81]

55. While there may be some substance in the other objections mentioned in the last paragraph, there are, in our view, practical reasons for maintaining what is believed to be the present position, namely that conspiracy should be chargeable even though the offence which was its object has been committed, and that both the substantive offence or offences and a conspiracy to commit it or them should be chargeable in the same indictment and triable together. The basic justification for this is that, if it is not permissible, there are certain situations where persons who should be convicted may easily escape. In the first place the prosecution may be uncertain at the start of a trial on

78. R. v. West [1948] 1 K.B. 709, a case in which there was only a charge of conspiracy.

79. See Phipson on Evidence 11th ed. paras. 263-273.

80. See fn. 75 above.

81. See para. 58.

a charge of committing a substantive offence that the evidence will in the end establish that charge. It may be that, because vital evidence is ruled inadmissible, or because a witness fails to convince the jury, there is insufficient evidence to establish the commission of the offence, although there is strong evidence to establish a conspiracy to commit it.[82] Conversely, the evidence required to establish a conspiracy may fall down, although there is evidence to establish the commission of the substantive offence against one of the defendants. If there are not before the jury counts charging in the first case a conspiracy as well as the substantive offence, and in the second case a substantive offence as well as a conspiracy, a defendant who deserved to be convicted may well escape. Furthermore, there are a significant number of cases where, although the evidence available to the prosecution permits the formulation of substantive charges against one or more defendants, the evidence available against others is not sufficiently specific to permit the drafting of substantive counts against those others which would comply with the requirements of the Indictments Act 1916 as giving proper information to the defendants of the offences charged.

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82. In R. v. Cooper and Compton (1947) 32 Cr. App. R. 102, 110, Lord Goddard C.J. expressed the difficulties thus: "In a great many cases there is no doubt at all that a verdict of Guilty of conspiracy but Not Guilty of the particular acts charged is a perfectly proper and reasonable one. In such cases it would be very wrong not to use in the indictment a charge of conspiracy. Criminal lawyers know that often while a general conspiracy, for example a conspiracy to steal, is likely to be inferred by the jury from the evidence, it may be that the evidence of the particular acts forming the larcenies, which are charged in the indictment, are supported by rather nebulous evidence. In such a case the jury may say ... Not Guilty of larceny, but Guilty of conspiracy to commit larceny".

56. Two examples show the real practical difficulties which arise in the situation referred to above -

(a) A and B have obtained money on accommodation bills put forward as genuine trade bills. For some reason the evidence as to individual transactions may fall down; for example, records may have been destroyed by fire. In such a case a conspiracy to obtain money on bills is charged, but such substantive counts as can be framed are also charged in case the jury decide to acquit one of the two defendants.

(b) Three men, A, B and C, directors of a Company combine to evade purchase tax on goods dealt with by the Company. It is possible to prove the fraud against all three men only by calculating the overall total of goods dealt with in a three-year period compared with the amount of tax declared on each of the twelve quarter days in that three years. It is possible to prove some substantive offences against one of the three and also conspiracy against all three. All are, therefore, charged with conspiracy. The one is also charged with whatever substantive offences can be established, in case the jury acquit the other two.

57. At present, it would be permissible to charge substantive offences against one or more of the defendants in

these examples and to include a count of conspiracy laid against all the defendants. We think that the law should continue to permit a conspiracy to be charged, notwithstanding that the offence which is its object has been committed and whether or not the commission of that offence is also charged. But we stress that the only justification for including both substantive counts and a related conspiracy in the indictment is to guard against the jury having to acquit a defendant because he has not been charged with what the evidence establishes he is guilty of, whether it be conspiracy or the substantive offence. Substantive counts are charged in case the evidence of conspiracy breaks down; conspiracy is charged in case the evidence on the substantive counts against one or more defendants breaks down.

58. We feel, however, that the practice described above should only be followed after due weight has been given to the complications which may follow from the joinder of substantive and conspiracy counts. We do not feel that the complications are sufficiently great to warrant a proposal that in no circumstances should a conspiracy count be charged when commission of the substantive offence is also charged while, at the same time it is, in our view, not possible to limit by legislation the circumstances in which this course should be permitted. Nor do we think that the rules governing particularity should be relaxed so as to permit greater freedom in drafting substantive charges for it is plainly necessary that an accused person should be given adequate information on the charges levelled against him so as to be able to identify the occasion which is complained about. We invite views, however, as to whether or not it should be the practice for a judge to require justification from the prosecution on the grounds we have indicated for proceeding to trial on an indictment including substantive counts and a related conspiracy count. If there is no justification, the prosecution should be required to elect

whether to proceed on the substantive counts or on the conspiracy, and, in the event of an acquittal of any defendant on the count or counts proceeded with, to undertake not to proceed against him on the count or counts left on the file.[83]

8. Conviction of one only of two or more conspirators

59. It is well settled that if three or more persons are charged with conspiracy and tried together, and there is evidence against only two of them, these two may properly be found guilty despite the acquittal of the remainder. But where there is evidence against only one of those charged and the remainder are acquitted, that one cannot be convicted. The authorities are fully considered in R. v. Plummer[84] and the origin of the rule discussed. It appears to be based upon the principle that "one being acquitted on the record, the conviction of his companions on the same record must be directly repugnant and contradictory to the other"[85]. If, however, the conspiracy is charged as being between two named persons and a person or persons unknown, acquittal of one of the named persons will not automatically result in the acquittal of others[86], for in such circumstances there is not any inconsistency on the face of the record. Nevertheless, the court may, in such a case, where there has been acquittal of one and conviction of the other

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83. The review of areas of the law requiring examination in the light of our proposal to limit the ambit of conspiracy to commit substantive offences may, of course, result in proposals to create new offences, particularly in the area now covered by conspiracy to defraud, which, if enacted, would reduce the number of conspiracy charges generally, and hence the necessity for their inclusion in the same indictment as substantive counts; see para. 15.

84. [1902] 2 K.B. 339; and see Kannangara v. R [1951] A.C.1.

85. R. v. Plummer, at 346.

86. R. v. Thompson (1851) 16 Q.B. 832; R. v. Anthony [1965] 2 Q.B. 189.

named conspirator, still look to the evidence to determine whether or not the conviction is or is not justified on the basis that the convicted person conspired with the person unknown.[87] Despite dicta that the rule applicable in joint trials might follow in the case of separate trials,[88] this has not yet been finally decided, though R. v. Plummer is authority for the conclusion that where three persons are jointly charged with conspiring together and two are acquitted, judgment passed on the third on a plea of guilty is bad and cannot stand.

60. The rule has been criticised in some of the cases in which it has been applied as being technical[89] and more recently in the text books.[90] Indeed, the application of the rule automatically and without regard to the evidence in every case may well seem to result in a disregard of realities. For example, A and B are charged with conspiracy and both plead not guilty: after the prosecution has opened its case, A changes his plea to guilty and the jury convict him on the direction of the judge. But B's statement to the police is held to be inadmissible, with the result that at the close of the prosecution's case the jury is directed to acquit B. Under the present law, the judge has to tell A to change his plea to not guilty and direct that he should be acquitted. We believe it plain in such a case that the conviction of A should be allowed to stand. It is true that on the face of the record the two verdicts appear to be inconsistent, but that is a purely technical reason for allowing to escape a person whom the evidence proves to be guilty, for as against that person all that has to be proved is that he conspired with another who, so far as the first is concerned, is shown to have conspired with him and to have had

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87. See cases cited in n. 86.

88. R. v. Cooke (1826) 5 B. & C. 538 and R. v. Ahearne (1852) 6 Cox C.C.6.

89. R. v. Plummer [1902] 2 K.B. 339, 350; R. v. Manning (1883) 12 Q.B.D. 241.

90. Smith & Hogan Criminal Law 2nd ed. p. 155; G.L. Williams Criminal Law 2nd ed. para. 213.

the capacity to do so. We feel that there are sufficient safeguards in the appeal procedure to ensure that, if a jury has convicted only one of two conspirators where there was no basis on the evidence for differentiating between the two, such a verdict will not be allowed to stand. If, on the other hand, there is a real basis for such differentiation we believe it to be wrong that a man against whom there is sufficient evidence of conspiracy should be acquitted. As we are proposing a change of the present law we should welcome views on our provisional proposal.

61. Where there is a separate trial of each conspirator, with possibly different evidence being available in each, we are clear that there is similarly no need for the rule that the later acquittal of one of two alleged conspirators should result in the acquittal of the other who has already been found guilty. If the later trial throws doubt on the correctness of the verdict in the earlier trial there will be a remedy in an appeal out of time, or, in an appropriate case, by the grant of a pardon. Here again, however, we welcome comment.

Summary

62. (a) The object of conspiracy should be limited to the commission of substantive offences, but the relevant areas of the law should be examined for possible gaps which this limitation may cause, with a view to the creation of any new substantive offences which may be necessary (paragraphs 8-32).

(b) A conspiracy should require the agreement of two or more natural persons to commit a particular crime or particular crimes.

As at present, one spouse should not be chargeable with conspiracy with the other if they were married at the time when the agreement was made (paragraphs 33-36).

(c) Where one party is incapable of forming an intent or is not liable to be prosecuted for the substantive offence or is otherwise exempt from liability, he should not be liable for conspiracy. The non-exempt party to such a conspiracy should also not be liable for conspiracy, although he may be liable under our provisional proposals as to attempts (paragraphs 38-43).

(d) The concepts of attempted conspiracy and conspiring to attempt should be rejected but conspiracy to incite should be retained (paragraphs 44-47).

(e) The mental element in conspiracy requires, in principle, that the parties must intend to pursue a course of action and must know of the facts which make their agreed course of action an offence. But more detailed provisions (set out in the Paper) are needed as to the mental state in regard to the consequences of the agreed course of action, and as to the circumstances surrounding that course of action (paragraphs 48-53).

(f) Where the substantive offence has been committed, a charge of conspiracy should still be possible whether or not the offence itself is also charged; but in circumstances which do not justify charging both, the judge

should require the prosecution to elect upon which charge it wishes to proceed with before the trial begins (paragraphs 54-58).

(g) Where one only of two or more conspirators tried together is found guilty, the present rule that he must be acquitted should be abolished (paragraphs 59-61).

III ATTEMPTS

(1) Should the concept of a general "attempt" be retained?[91]

63. Before discussing the substantive law on attempts and making proposals for change, we deal, relatively briefly, with two preliminary questions -

(a) Is a general law of attempt necessary?

(b) If so, at what stage in the preparation of crime should there be liability for attempt?

We deal with these preliminary questions in turn.

(a) Is a general law of attempt necessary

64. Assuming that something like a law of attempt is needed in respect of many offences, the alternative to a

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91. "Attempt" is here in quotation as its use is not meant to prejudge the content of the law covered by the word.

general law of attempt[92] necessarily involves the tailoring of every offence (or many offences) to include within it an appropriate width of penalised conduct which will exclude the necessity for an inchoate offence of attempt in respect of it. For example, robbery would include, not only stealing with the use of force[93] but the attempt to do so where there is no actual appropriation[94]; theft would need to be redrafted to include not only the dishonest appropriation of property belonging to another with the intention of permanent deprivation, but the attempt to do so where there is no property capable of appropriation.[95] It is true that recent Acts which have in some degree had the effect of codifying certain branches of the criminal law, such as the Theft Act 1968 and the Criminal Damage Act 1971, have widened the scope of certain offences in comparison with the pre-existing law; but this has not been done with the object of making redundant the application of the present law of attempts to acts which fall short of the completed offence. Each of these Acts does have provisions penalising certain conduct, such as being equipped, when not at one's place of abode, with any article for use in the course of any "burglary, theft or cheat"[96], or having custody or control of anything intending without lawful excuse to use it to destroy or damage property[97]; but they are not intended to deal exhaustively with all conduct which might amount to

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92. The case for this alternative is fully argued by P.R. Glazebrook in 85 L.Q.R. 28 - "Should We have a Law of Attempted Crime?"

93. Theft Act s. 8.

94. See Theft Act 1968, ss. 1(1) and 3(1).

95. As in R. v. Ring (1892) 17 Cox C. C. 491; see further para. 126 et seq.

96. Theft Act 1968, s. 25.

97. Criminal Damage Act 1971, s. 3.

an attempt. In our view, it would unduly complicate the offence-creating provisions of the Acts to seek to amend them with the particularity which would be required to define precisely the nature of all the preparatory conduct to be penalised, even asuming that this was possible. The Acts were drafted against the background of a continuing law of attempts and the current review of other aspects of the criminal law[98] also assumes its continuance in some form; and we are aware of no foreign criminal code which dispenses with this requirement. For these reasons, we take the view that a general law of attempt is needed as part of the Code.[99]

(b) At what stage in the preparation of crime should there be liability for attempt?

65. The second preliminary question is whether the concept of attempt should be retained or whether an alternative concept would produce more satisfactory results. It is clear that, in principle, it is just as important to prevent the commission of substantive offences as to punish those who commit them. The police should, therefore, be able to intervene at the earliest practicable stage which is consistent with the public interest. But we do not think that the test of social danger can in itself provide an adequate criterion of when an activity has reached the stage when intervention is required. The mere intention in a serious case constitutes a social danger but, provided it remains no more than an intention, no intervention is justifiable.

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98. Forgery and perjury are under review by the Law Commission, offences against the person by the Criminal Law Revision Committee.

99. But as to whether the general law should apply to minor offences, see para. 103.

It is only when some act is done which sufficiently manifests the existence of the social danger present in the intent that authority should intervene. It is necessary to strike a balance in this context between individual freedom and the countervailing interests of the community.

66. In some cases, the problem of balancing social and individual interests has been met by the adoption of a technique other than the law of attempt, for example, by the creation of offences of procurement, possession, threats and going equipped. Provisions of this kind, however, relate only to specific crimes and particular types of attempt in relation to these crimes. They do not purport to offer more than a partial remedy. There are in a few instances specific attempts in statutes creating the substantive offence, relating for the most part to sexual offences[100], but this, as we have indicated, is not the practice in more recent codifying Acts. Within a limited sphere another solution has been found by going back a stage further than the earlier stage at which the present law of attempt seeks to operate and providing that, in certain limited types of offence by statute, acts "preparatory to" the commission of substantive offences shall in themselves constitute offences.[101] Generally, however, English law has hitherto not travelled back this far in the chain of causation[102] unless the preparatory

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100. See Archbold 37th edition, para. 4302.

101. See Official Secrets Act 1920, s. 7.

102. But see R. v. Gurmit Singh [1966] 2 Q.B. 53. In upholding the conviction in this case, the court followed early 19th century cases: see Fuller (1816) R. & R. 308, Dugdale (1853) 1 E. & R. 435 and Roberts (1855) Dears 539. The last case was decided after Eagleton (1855) Dears 515 (see para. 70) and seems inconsistent with it. If the cases are regarded as examples of attempt, they are not consistent with later developments; if as examples of another offence, as the court in Gurmit Singh thought, that offence would seem to be limited to procuring "unequivocal" materials for commission of certain offences.

act itself constitutes a substantive offence, as where forgery is committed as a preliminary step in an ultimate intended offence of deception.

67. The desirability of balancing social and individual interests, and the general practice of English law hitherto, lead us to the conclusion that employment of a concept much wider than that till now regarded as attempt, such as any overt act evidencing a criminal intention, would not be satisfactory. Our view is, therefore, that in the generality of cases the attempt should be the first stage at which conduct leading to a crime should itself constitute a crime. We take this view notwithstanding that the definition of the conduct constituting an attempt may require some extension.

(2) The scope of attempts

68. There are four main lines of approach to the question of defining the scope of activities constituting attempt:-

(a) the "first stage" theory;

(b) the "final stage" theory;

(c) The "unequivocal act" theory, subject to modification;

(d) the "proximity" theory.

We consider each in turn in the following paragraphs, noting their disadvantages, and then put forward a suggested approach which we believe will to some extent overcome the difficulties attendant upon the approaches listed above.

(a) The "first stage" theory

69. This test applied alone seizes on the first overt act done towards the commission of the offence as the criterion. In form it appears to be adopted by some Continental Codes, which refer to "acts exhibiting the commencement of the execution" of crimes although this form of words might be regarded as equally consistent with an "unequivocality" test;[103] and it also met with a measure of approval in the English draft code of 1879[104], Stephen's Digest Article 29[105], and the Indian Penal Code.[106] In these latter cases, however, it seems to have been qualified by the additional test of proximity.[107] In our view, this approach would not be generally acceptable as it would be feared that it would lay such stress upon the proof of intention as establishing the commission of an attempt, rather than on proof of activities, that it might lead to a miscarriage of justice.

(b) The "final stage" theory

70. No attempt takes place, in accordance with this theory, unless and until the intending offender has done all that is necessary for him to do in order to bring his crime to completion. At one time it met with approval in English law and was certainly adopted by Parke B. as decisive in R. v. Eagleton[108] where he stated that -

> "the mere intention to commit a misdemeanour is not criminal. Some act is required and we do not think all acts towards committing a

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103. See provisions set out in Appendix G.
104. See Appendix A.
105. See Appendix A.
106. See Appendix B.
107. See para. 73.
108. (1859) 6 Cox C.C. 559, 571

> misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are .... Here no other act on the part of the defendant would have been required. It was the last act depending upon himself towards the completion of the crime and therefore it ought to be considered as an attempt."

Parke B.'s judgment was referred to, without the material passage being cited or approved in R. v. Robinson.[109] The approach also appears to find favour in Scotland although it is discussed in two different forms:[110] on the one hand, the stage of attempt is reached once the defendant has done all that it is necessary for him to do in order to bring the offence to completion; and on the other, the stage of attempt has not been reached as long as it is possible for the accused to repent and to intervene and prevent the completion of the crime. It is thought that the theory in its first form is more consistent with Scottish authority.[111]

71. In our view, the objections to this approach are too serious for it now to be considered as the basis of the law of attempt. In the first place, it is difficult, from a practical point of view, to see how it could be applied to certain serious crimes. On a strict application of the test, attempted rape, for example, would not be possible and it is this approach which may well have been responsible for the conclusion that there could not be a verdict of attempting to demand money with menaces because "there is a demand or there is not".[112] More importantly, however, it seems to us that the theory allows too many persons who might be thought deserving of punishment (as in Robinson's

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109. [1915] 2 K.B. 342.

110. Gordon Criminal Law (1967) p. 167 et seq.

111. See Gordon op. cit pp. 174-5.

112. R. v. Moran (1952) 36 Cr. App. R. 10.

case)[113] to escape it; and, furthermore, allows intending offenders to advance far in their conduct before effective intervention can take place. In our view, therefore, it goes far to negative the purpose of the law of attempt referred to in paragraph 64 and would, again, make the task of the police more difficult.

(c) The "unequivocal act" theory

72. This theory in its pure form, that is, that the act itself, without regard to any statement of intention, either contemporaneous or subsequent, must unequivocally demonstrate the intention to commit the relevant offence, was propounded by Salmond and found its way into the New Zealand Crimes Act 1908. It was, however, found not to work in practice and was discarded by section 72(3) of the New Zealand Crimes Act 1961. It has had some effect in English law in such cases as Davey v. Lee[114] and Jones v. Brooks[115], but in neither of these cases can it be said to have been adopted fully.

(d) The "proximity" test

73. Throughout the English cases runs the common theme that before there can be an attempt there must be a step towards the commission of an offence which is immediately and not remotely connected with the commission of it. There is probably no case in which the issue of whether or not the act amounts to an attempt has been raised where the contrast between an attempt and an act of preparation has not been stressed. Sometimes it has been said that because the

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113. [1915] 2 K.B. 342.

114. [1968] 1 Q.B. 366.

115. (1968) 52 Cr. App. R. 614. See further Appendix A.

accused had done all that it was necessary for him to have done, his act was sufficiently proximate to the offence attempted;[116] sometimes it has been said that because there was still opportunity for the accused to change his mind the stage of preparation had not been passed. But no abstract test has ever been evolved for determining whether an act is sufficiently proximate to the offence to be an attempt, and it is difficult to know with any precision when there is that proximity which is required. It is because application of the test results in there being no liability for an attempt in cases like R. v. Robinson[117], R. v. Komaroni[118] and Comer v. Bloomfield[119] that the majority of us feel that there should be a reformulation of the law. If it is right that one of the main reasons for a law of attempt is to allow the authorities to intervene at a sufficiently early stage to prevent a real danger of the substantive offence being committed, all these cases demonstrate that the present law is unsatisfactory.

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116. R. v. Eagleton (1859) 6 Cox C.C. 559, 571.

117. [1915] 2 K.B. 342: here a jeweller insured his stock against theft for £1500, concealed some on the premises, tied himself up with string and called for help. He told the police who broke in that he had been knocked down and his safe robbed. He confessed when the property was found later, but his conviction for attempting to obtain money by false pretences was quashed.

118. (1953) Law Journal, vol. 103 p. 97; the defendants trailed a lorry for some 130 miles, even giving assistance to it when it broke down, awaiting a chance of stealing it and its £34,000 load; held, no attempt, only continuous act of preparation.

119. (1971) 55 Cr. App. R. 305; the defendant drove his vehicle into a wood to hide it, and enquired of the insurers whether a claim would lie for its loss; held, no attempt to obtain money by deception.

A suggested approach

74. The approach favoured by the majority is the "substantial step" theory. This does not appear to have been expressly adopted in any English authority although the decision of Rowlatt J. in R. v. Osborn[120] lends support to it. It is to be found in the Australian Territories Draft Code[121] where "conduct which is or which [the defendant] believes to be a substantial step towards the commission of the offence" is formulated as the sole test for attempt. A number of examples are set out as indicating, without being exclusive, circumstances which are in law sufficient to constitute a "substantial step". A somewhat similar formulation is found in the New York Revised Penal Law, Article 110, namely "with intent to commit a crime, [engaging] in conduct which tends to effect the commission of a crime".[122]

75. It may be that certain criticisms can be levelled at the substantial step test. First, the words "substantial step" are not words of much precision in themselves, nor do they relate the closeness of the step to the commission of the crime. In the Australian Draft Code they are said to include preparation and an indication of their substance can be gained only from the examples there set out. Secondly, the adoption of the test would cast very much wider the net by which acts preceding the commission of an offence would be brought within the operation of the criminal law. As the examples in the Australian Draft Code show, the reconnoitring of the place contemplated for the intended offence is penalised as well as, for example, the buying of safe-breaking equipment. It may be thought that this is penalising conduct which is too remote from a contemplated offence,

120. (1920) 84 J.P. 83.

121. See Appendix E.

122. See also provisions of the Model Penal Code, Appendix F.

and comes very near to making an offence out of the mere formulation of an intent.[123] On the other hand, the majority of us feel that these possible disadvantages are outweighed by the advantage the test would bring of enabling unsatisfactory cases such as Robinson[124] and Comer v. Bloomfield[125] to be considered afresh; and the provision of examples as guides would assist in ensuring that preliminary steps only, which are not substantial, are not held to be attempts.

76. The substantial step test would, like any of the alternatives, require proof of the necessary mental element[126] as well as of the activity alleged to be the substantial step. It may be argued that such a definition would result in intention being deduced from the commission of the act itself; and that an act otherwise neutral in character might be held to be a substantial step even though the safeguard was still said to reside in the requirement of intent. Alternatively it might be criticised as, in some circumstances, penalising mere intent. Neither criticism is, in the majority view, valid. In all cases the prosecution will have to prove both activity amounting to a substantial step and the necessary intent and, as we have indicated, the presence of examples as guides will, in practice, preclude conviction upon mere intent. On the other hand, no jury could properly convict unless satisfied that the defendant did have the requisite intent. There will undoubtedly be circumstances in which it will be proper to

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123. E.g. would it be a substantial step towards publishing a written statement known to be false with intent to deceive creditors (s. 19 of the Theft Act 1968) to draft the statement in the privacy of one's study?

124. [1915] 2 K.B. 342: see para. 73 n. 117.

125. (1971) 55 Cr. App. R. 305: see para. 73 n. 119.

126. See para. 86.

infer that intent from the activities of the accused but in other cases independent evidence of intent would be required, and might be obtained, for example, from statements of the accused made either before or after the event.

77. In common with other possible approaches to the definition of what constitutes an attempt, we recognise that the substantial step test is not ideally clear. The provision of examples, however, will give content to it which should make it more readily understandable to a jury. The majority of us, therefore, take the provisional view that it is, in principle, the most practical of all approaches and, accordingly, we consider it necessary to describe its elements in more detail.

(3) Elements of the "substantial step" test

78. We have considered the desirability of appending to the general words by which conduct constituting an attempt is to be defined a number of illustrations such as appear in the Australian Draft Code and the Model Penal Code.[127] We have come to the provisional conclusion that such illustrations would be helpful. We stress at the outset, however, our view that it would be for the court to direct the jury on whether the particular acts alleged constitute a substantial step or not, and, if they find the acts proved, to direct them further to convict. On this basis, therefore, the illustrations are not exhaustive but are examples of what are substantial steps if the requisite intent is proved. But they do not negative the sufficiency of other conduct which may even, according to the circumstances, include conduct constituting preparation for the commission of an offence. With these factors in mind, we examine the illustrations in the following paragraphs.

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127. Appendices E and F.

(a) Committing an assault for the purpose of the intended offence

79. This illustration would cover, for example, an assault on a mother for the purpose of kidnapping her child.

(b) Lying in wait for, searching out or following the contemplated victim or object of the intended offence

80. This is taken from the Australian and Model Penal Codes, with the addition of the word "object" which covers vehicles.

(c) Enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission

(d) Reconnoitring the place contemplated for the Commission of the intended offence

81. Illustrations (c) and (d) are again taken from the two Codes, this time without alteration.

(e) Unlawful entry upon a structure, vehicle or enclosure, or remaining thereon unlawfully for the purpose of committing or preparing to commit the intended offence

82. Unlike the formulation in the two Codes, this illustration is so drafted as to include the example of a person who unlawfully hides in a building after it has been closed in order to steal; and the formula is also widened by not requiring that the offence should have been intended to be committed in the place in question - for example, a person may enter a room next to a bank for the purpose of tunnelling into the bank.

(f) Acquiring, preparing or equipping oneself with materials to be employed in the commission of the offence, which are specially designed for such unlawful use or which serve no lawful purpose in the circumstances

83. This example rewrites illustrations (e) and (f) in the Australian Draft Code. We have taken the view that, in principle, "possession" of materials ought not in itself to amount to conduct constituting an attempt. Even when qualified by the factor of design specially for unlawful use, such a concept may cause difficulties. Nevertheless, if the necessary proof is available we do not favour any restriction upon the type of articles or materials which the circumstances indicate are to be used in the commission of an offence. Mere possession of a pen, for example, could not, in our view, in any circumstances be held to be a substantial step in the commission of forgery, nor possession of a box of matches a substantial step in the commission of arson. But the circumstances may be such that it is quite clear, upon the evidence, that a pen was acquired for the purpose of forgery or that matches were to be used to commit arson; and, in our view, no rational distinction can be drawn between various categories of materials where the circumstances provide ample evidence of why the materials were acquired.

84. On the other hand, there are situations where a concept broader than acquisition is required. Where, for example, a person decides to commit a crime by means of an object already in his possession, for example, to murder someone with a pistol he has kept for many years, acquisition is inappropriate to describe his conduct; but so also is possession. The attempt in such cases may be thought to take place when the person engages in conduct which strongly indicates his intention to use the object for an unlawful purpose. We have considered, and rejected, the formulation of the Model Penal Code (paragraph 5.01(2))

which requires that for conduct in general to amount to a substantial step it must be "strongly corroborative of the actor's criminal purpose". Whether the word "corroborative" or "indicative" is used, we believe that there is a danger here of re-introducing an "equivocality" test, which we consider undesirable. We have also considered the possibility of including by way of illustration the possession of materials "strongly indicative of the firmness of intent"; but we think it undesirable to introduce here an explicit reference to the mental element. Our solution is the total exclusion of the concept of possession, but the introduction of the phrase "equipping oneself with", which, in our view, adequately covers the situation referred to in this paragraph.

85. We have stated[128] that, in our provisional view, possession of itself ought not to amount to conduct constituting an attempt. There are, no doubt, particular contexts in which possession offences are justified.[129] The present law, however, contains several very widely drafted provisions[130] and it is our provisional view that, if the test of a substantial step is adopted with a clear illustration on the lines of example (f), it may be possible to re-examine the scope of these provisions.

(g) Preparing or acting a falsehood for the purpose of an offence of fraud or deception

86. There is little doubt that the conduct in Robinson[131] would be held to be a substantial step of a general nature in the commission of the offence; but to place the matter

128. See para. 83.

129. E.g. in forgery, the law relating to dangerous drugs, and the Prevention of Crime Act 1953.

130. Theft Act 1968, s. 25(1), Criminal Damage Act 1971, s. 3.

131. [1915]2 K.B. 342.

beyond doubt we favour the provision of a specific illustration to cover that and similar cases.[132]

(h) Soliciting any person, whether innocent or not, to engage in conduct constituting an an external element of the offence

87. The Australian formulation (section 53 (g)) confines the illustration to instances of soliciting an innocent agent, and on the law as it is presently understood this must be correct, as solicitation of another with a guilty mind constitutes incitement, rather than attempt. There is, however, a problem arising in cases such as R. v. Curr[133], where the accused solicited women to collect family allowances to which he was not entitled. Assuming that the ultimate crime is not completed, on a charge of attempt in such case, the prosecution must show the agent's innoce; while on a charge of incitement it must show that the accused believed that the person incited had the necessary mental state. Yet the accused must be guilty of one or another inchoate offence. Provisionally, therefore, we consider that an attempt should cover the soliciting of agents whether innocent or otherwise. Although this will result in an overlap with incitement in many instances, it may in some circumstances be more natural to charge an incitement; and it will, in any event, without any extension of the substantive law, simplify the task of prosecution authorities in the type of case covered by the illustration.

(4) The mental element

88. In principle, it might seem right that the mental or fault element appropriate to the relevant substantive offence should apply to an attempt to commit it. On the case law as

132. E.g. Comer v. Bloomfield (1971) 55 Cr. App. R. 305.
133. [1968] 2 Q.B. 944.

it stands, however, this creates some difficulties. In murder, for example, the mental element at present is intent to kill or to do grievous bodily harm, but in R. v. Whybrow[134] it was held on appeal that the mental element in attempted murder was limited to intent to kill. In Gardener v. Akeroyd[135] there are dicta which suggest that a mental element is, in principle, required for an attempt to commit an offence whether or not the substantive offence itself has a mental or fault element. R. v. Collier[136] suggests the contrary: the defendant was charged with attempting to have intercourse with a girl under 16 but over 13. Being under 24 he sought to raise the defence under section 3(6) of the Sexual Offences Act 1956 that he believed on reasonable grounds that the girl was over 16. The defence was held to be available on the charge of both an attempt and the substantive offence, which suggests that the strict character of the liability in relation to the girl's age applies in principle to attempt.

89. We have provisionally come to the conclusion that the basic principle that should apply is that intention to bring about the consequences which form part of the elements of the offence must be established before there can be liability for an attempt to commit that offence. To state the rule in these general terms, however, conceals the complexity that flows from the fact that offences are cast in forms which, depending upon the circumstances, provide for a fault element sometimes in relation to consequences, and sometimes in relation to circumstances. It is necessary, therefore, to distinguish between the mental element in regard to consequences and the mental element in regard to circumstances

134. (1961) 35 Cr. App. R. 141.
135. [1952] 2 Q.B. 734 at 747 and 751.
136. [1960] Crim. L.R. 204.

which we believe may be effected by the following formulation -

(a) As to consequences

> Where a particular consequence must be brought about before the offence in question is committed, an attempt to commit that offence is committed only when the actor intends[137] that consequence.

(b) As to circumstances

> Where what a person attempts to do will not be criminal unless a certain circumstance exists, he is guilty of an attempt to commit that offence only when he has knowledge of or (where recklessness is all that the substantive offence requires) is reckless as to the existence of that circumstance.

Formulated in this way, we believe the two propositions state all the necessary requirements of the mental element.

5. Successful attempts

90. Where a person has succeeded in committing an offence it is obvious that he should not be convicted both of this and of attempting to commit it, and in this non-technical sense it can be said that the attempt merges with

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137. As to the meaning of "intention", see Working Paper No. 31, "The Mental Element in Crime", Proposition 7A (1).

the completed offence. The common law doctrine of merger, under which a charged misdemeanour merged with a felony that the facts established, with the result that the defendant had to be acquitted of the misdemeanour, is now out of place following the abolition of the distinction between felonies and misdemeanours.[138] There is now a provision[139] that a person charged on indictment with an attempt to commit an offence may be convicted as charged notwithstanding that the evidence shows him to be guilty of the completed offence. So far as summary trial is concerned there is no similar statutory provision, and whether there could be a conviction for attempt at a summary trial of an indictable offence is uncertain.[140] In our view there is no ground for distinguishing between the cases upon the basis of the court in which they are tried and we suggest that the provisions just mentioned should be made of general application.

Summary

91. It is our provisional view that -

(a) the inchoate offence of attempt should be retained as such; the offence will more readily suit current developments in the reform of the criminal law and the background of existing law, and will correspond more exactly to the activities which it is socially desirable to penalise than any alternative concept. (paragraphs 64-67).

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138. Criminal Law Act 1967, s. 1.
139. Criminal Law Act 1967, s. 6(4).
140. R. v. Males [1962] 2 Q.B. 500.

(b) The actus reus of an attempt should be defined as conduct which is a substantial step towards the commission of the ultimate offence. It must be for the judge to direct the jury as a question of law as to whether particular conduct amounts to a substantial step. Conduct constituting preparation for the commission of an offence may, according to the circumstances, amount to a substantial step. Without negativing the sufficiency of other conduct, some types of conduct constituting a substantial step should be illustrated by a series of examples (paragraphs 78-87).

(c) The mental element required for an attempt should be the intention to commit the substantive offence, subject to the special provisions detailed in paragraph 89(a) and (b) (paragraph 89).

(d) On a trial for an attempt to commit an offence in any court a defendant should be liable to be found guilty as charged, notwithstanding that he is proved to be guilty of the completed offence (paragraph 90).

IV. INCITEMENT

1. Introduction: the present law

92. We deal in this paper only with the common law offence of incitement and not with those specific statutory incitements which are to be found, for example, in section 4 of the Offences against the Person Act 1861[141], section 7(2) of the Perjury Act 1913[142] and section 7 of the Official Secrets Act 1920. Nor do we deal with incitement to certain conduct which may not itself be an offence but is penalised by some statutes.[143] These offences have to be considered under the class of specific offences to which they relate.

93. The present law is that inciting another to commit an indictable or a summary offence[144] is itself an indictable offence at common law.[145] Incitement requires the presence of an element of provocation or persuasion[146] which must reach the mind of the person incited though it need not be effective in any way. It is immaterial that the

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141. This is under review by the Criminal Law Revision Committee, which is examining offences against the person.

142. Subornation of perjury requires that perjury shall have been committed. This subject is under review by the Law Commission: see Working Paper No. 33.

143. See e.g. Incitement to Mutiny Act 1797, Incitement to Disaffection Act 1934, Public Order Act 1936, s. 5, Indecency with Children Act 1960, s. 1(1), Police Act 1964, s. 53 and Race Relations Act 1965, s. 6.

144. R. v. Curr [1968] 2 Q.B. 944.

145. Incitement to commit a summary offence is triable summarily with the consent of the accused: Magistrates' Courts Act 1952, s. 19(8) and First Schedule, para. 20.

146. R. v. Christian (1913) 78 J.P. 112.

the incitement is not directed to a particular person, but is addressed to people in general.[147] Incitement requires an intention that the offence incited should be committed, and it must be proved that the inciter knew of all the circumstances which would render the act incited the crime in question. Among these circumstances is the mental element of the person incited to do the act, without which that person would not commit an offence, and it is clear that the inciter must believe that the person incited has the mental state necessary to make what he is being incited to do an offence.[148] In R. v. Curr[149] the accused was acquitted of inciting women to commit offences under the Family Allowances Act 1945 because the prosecution failed to prove that the women (who had done the acts incited) had the mental element required for such offences. We believe that the correct test is not whether the person incited had the necessary element but whether the inciter knew or believed that he had[150], as it is not necessary that any offence should be committed or even intended by the person incited. It is also our view that, in parallel with our proposal concerning the mental element in attempt as regards circumstances, it should suffice that an inciter was reckless as to the mental element of the person incited.[151]

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147. R. v. Most (1881) 7 Q.B.D. 244, where the incitement was in an arti in a newspaper with a wide circulation.

148. If the inciter believes that the person incited does not have the necessary mental element, he will intend to commit the offence through an innocent agent, and may be guilty of an attempt to commit the offence.

149. [1968] 2 Q.B. 944.

150. See Smith & Hogan, Criminal Law, 2nd ed. p. 150.

151. See para. 89(b).

2. Should there be an offence of incitement?

94. The reasons for having an offence of incitement are basically:

(a) the need to deter people from encouraging others to commit offences, even when no offence is committed as a result of the encouragement; and

(b) the need to allow the law to step in at the earliest possible stage to discourage persons incited from committing the offences they have been incited to commit.

Incitement, not being dependent upon any agreement between inciter and the person incited, differs in nature from conspiracy, although it might be argued that in most cases where the inciter was successful a conspiracy resulted, and that where he was unsuccessful he had attempted to conspire. But our consideration of conspiracy has led us to suggest that there should be no offence of attempted conspiracy[152], and that such conduct is more appropriately dealt with, where necessary, as incitement. It can be argued that there will be an overlap between incitement and attempt if attempt is to be defined as taking a substantial step towards the commission of an offence, with the requisite intent, and if a substantial step is to include soliciting any person, whether innocent or not, to engage in conduct constituting an element of the offence intended.[153] Whether or not every incitement would necessarily constitute

152. See para. 44.

153. See para. 87.

an attempt, retention of the concept of incitement is, in our view, desirable, since a charge of incitement would be more readily understandable by the defendant and simplify the task of prosecuting authorities where the facts make the charge appropriate.

95. Our provisional view is that it is desirable to retain the specific offence of incitement, which has characteristics of its own that are well known. Its absorption by a wider preparatory offence - particularly if this were to be known as attempt - would tend to conceal rather than make clear the true nature and the essentials of incitement. In addition there is clearly a place in the law for an attempt to incite[154], where a message having the necessary character is intercepted before it reaches the person for whom it was intended, for it would not be satisfactory to have to resort to an attempted attempt or attempted preparatory act to penalise such conduct. We cannot, however, conceive of instances where it would be appropriate for a defendant to be charged with inciting another to attempt an offence; as in the parallel case of conspiracy to attempt[155], all possible instances which may be cited seem on examination to be incitement to commit the substantive offence. Incitement should, in our view, be limited accordingly: and to eliminate the possibility of incitements to attempt being charged, we believe that it will be desirable for the Code to provide that if a count contains a wrong charge in this form, it will be deemed to be charge of inciting the relevant susbstantive offence.

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154. R. v. Banks (1873) 12 Cox C.C. 393.

155. See para. 46.

3. Problems arising from the present law

(1) Meaning of incitement

96. It is said that incitement requires some element of provocation or persuasion[156] and in this respect requires more than would be required to render a person guilty of abetting, counselling or procuring the commission of a crime actually committed. It is difficult, however, if not impossible, to draw any real distinction between the degree of persuasion required for incitement as an inchoate offence and the persuasion which may be present in many instances of abetting, although clearly there are many situations in which persuasion as such is not an element of liability as an accomplice. In Working Paper No. 43[157] we define accessories as those who incite or help the commission of an offence by the principal, and incitement is further defined to include encouragement and authorisation. We do not believe that any distinction is necessary as a matter of definition between the incitement by individuals to commit an offence which is not committed and the incitement on the part of accessories to an offence which is committed. Accordingly, we propose that incitement as an inchoate offence should be defined to include encouragement and authorisation.

(2) Incitement to commit offences which become capable of commission only in the future

97. It seems clear on the authorities that incitement occurs in these cases. In R v. Sheppard[158], Sheppard was held rightly convicted of incitement of a pregnant woman to

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156. Smith & Hogan, Criminal Law 2nd ed. p. 149.

157. "Parties, Complicity and Liability for the acts of another", Proposition 6.

158. [1919] 2 K.B. 125, and see R. v. McDonough (1963) 47 Cr. App. R. 37.

kill her child when born. The child was born alive and the mother did not kill it. The Court left open the question whether the same result would follow if the child had been born dead. It is suggested that it would; to incite someone to commit a crime if certain conditions occur must clearly be an incitement, whether or not those conditions occur.

(3) Incitement by a person who would not be liable for the offence incited

98. In general liability for incitement does not depend upon liability for the offence incited but in R. v. Tyrrell[159] a girl under 16 years of age who had encouraged a man to have carnal knowledge of her was acquitted not only on a charge of aiding and abetting his offence but also on a charge of inciting the offence. The reasoning in the short judgment was that it was impossible to say that the Act, which was absolutely silent about aiding or abetting or soliciting or inciting, could have intended that the girls for whose protection it was passed should be punishable under it for offences committed upon themselves. We have have suggested[160] that a person should not become an accessory to an offence if he is a person whose conduct under the definition of the offence is inevitably incidental to its commission and such conduct is not expressly penalised. An extension by analogy of such a rule to incitement would exempt the girl from liability for incitement on facts like those in Tyrrell's case[161], it would also mean that a person who persuaded an unlicensed seller to sell him goods which it was an offence to sell with-

159. [1894] 1 Q.B. 710.
160. Proposition 8 of Working Paper No. 43.
161. [1894] 1 Q.B. 710.

out a licence[162] would not be an accessory to that offence. As we pointed out in the commentary on that illustration, the rule would create certain difficulties; it may seem anomalous to exempt the buyer from liability when other persons who encourage the transaction (not being parties to it) are guilty as accessories.

99. In the field of incitement it seems right to retain a similar rule and to provide that where the participation of the inciter would be inevitably incidental to the commission of the offence incited there should be no liability for incitement, unless there were express provision to the contrary in the legislation. The operation of such a rule can be illustrated by reference to the Misuse of Drugs Act 1971. Section 4(3) as read with Schedule 4 provides for imprisonment for 14 years for supplying a Class A drug, whereas section 5(2) provides for imprisonment for 5 years for possessing such a drug. It would be out of accord with the scheme of the Act for X who persuaded Y to supply X with a Class A drug to be liable to 14 years' imprisonment for inciting an offence under section 4(2) when he would only be liable to 5 years' imprisonment if he obtained possession of the drug. The restriction in the terms we suggest would not, of course, mean that a person who incited another to supply a drug to a third person would not be liable for incitement. In the same way X would be guilty of inciting Y to contravene section 6 of the Sexual Offences Act 1956 if she encouraged Y to have unlawful sexual intercourse with Z, a girl under the age of 16, even though X was herself only 15 years of age.

100. We suggest, therefore, that in cases where the participation of an inciter in the offence incited, as that offence is defined, would be inevitably incidental to that offence, there should be no liability for the incitement

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162. Illustration (c) on p. 67 of Working Paper No. 43.

unless the legislation makes express provision for the inciter to be liable for his part in the offence incited or the incitement.

(4) Incitement of a person who would not be guilty of the offence incited

101. We have said[163] that incitement requires an intention that the offence incited should be committed, and that it must be proved that the inciter knew of all the circumstances which would render the act incited an offence, or at least believe that such circumstances exist. In particular, where the offence incited requires a mental element for its commission the inciter must at least believe that the person he incites has the required mental element. Different considerations arise here from those relevant in conspiracy because in the latter case it is of its very essence that there should be a union of two guilty minds, whereas in the case of incitement the law is concerned only with the activity of the inciter. There is no difficulty either in logic or in equity in regarding a person who incites a police informer to commit an offence as an inciter although the person incited has no intention of committing any offence.

102. Different considerations arise where the incitement is of those whom the inciter knows not to have the required mental element because of infancy or mental defect. A parent who incites his own child under 10 years of age to shoplift and to bring the goods back to him will not be guilty of incitement because what he is inciting is no offence in the child. He will, however, be guilty of an attempt to steal through an innocent agent, since his conduct will amount to a substantial step in the commission of the offence of theft.[164]

163. Para. 94 above.
164. See para. 87.

Summary

102. (a) A separate offence of incitement is required to cover the case where the offence incited is not committed (paragraph 93).

(b) The external element of the offence should be inciting another to the commission of an offence, including an offence which may become capable of commission only in the future. Incitement should be defined to include encouragement and authorisation (paragraphs 94-96).

(c) The mental element of incitement should be an intention that the external elements of the offence incited should be committed and a belief that all the circumstances existed (including any necessary mental state of the person incited) necessary to make the conduct incited an offence. Recklessness as to whether the external elements would be committed and recklessness as to whether all the circumstances existed should be sufficient (paragraph 93).

(d) A person should not be guilty of incitement where his participation in the offence as defined would be inevitably incidental to its commission unless the legislation makes express provision for the inciter to be liable either for his part in the offence incited or for the incitement (paragraphs 97-98).

(e) Although there is no place for an offence of inciting another to attempt to commit an offence, or of inciting another to conspire, there is need to retain attempted incitement as an offence (paragraphs 94 and 100).

V. PROBLEMS COMMON TO INCHOATE OFFENCES

1. Should inchoate offences be applied to summary offences?

103. We stated in the introduction[165] that certain problems common to inchoate offences may conveniently be treated in relation to all three. The first of the problems with which we deal in this section is whether inchoate offences should be limited in application to indictable offences or whether they should extend to summary offences.

(a) Present law

104. Despite earlier doubts[166], there is now authority that incitement[167] and conspiracy [168] to commit purely summary offences are themselves offences. Conspiracy is triable only on indictment but incitement to commit a summary offence is triable summarily with the consent of the accused.[169] In regard to attempts the generally accepted view is that, in the absence of specific provision, an attempt to commit a summary

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165. See para. 5.

166. See Williams, Criminal Law 2nd ed. (1961) para. 193 in regard to incitement, and para. 221 in regard to conspiracy.

167. R. v. Curr [1968] 2 Q.B. 944.

168. R. v. Blamires Transport Services Ltd. [1964] 1 Q.B. 278.

169. Magistrates' Courts Act 1952, s. 19(8) and 1st schedule para. 20.

offence is not itself an offence. This suggests a possible distinction between attempt on the one hand and conspiracy and incitement on the other hand, for, while there seems to be no justification for arguing that an attempt to commit an offence should be triable by a higher court than that which tries the offence itself, it may be argued that conspiracy, because of the numbers involved, and incitement, because of the possibility of incitement of large numbers of people, should be triable by a higher court. We consider whether and to what extent inchoate offences should extend to summary offences in the following paragraphs, and the linked question of how far, if extending to summary offences, the inchoate offence should itself be only a summary offence, is considered in the section in which we discuss penalites.

(b) Statement of arguments

105. Three possible views may be taken as to what the law should be for the future and arguments may be adduced in favour of each: namely, that no inchoate offence should extend to summary offences; that all inchoate offences should so apply; and that the law should remain as it is at present.

106. In favour of the first of these views it is arguable that summary offences generally are of relatively low importance. Although all offences are aimed at the prevention of some social evil, in general summary offences are not concerned with conduct which causes very grave damage to society; they have a lesser element of criminality. Even if a particular summary offence is thought to be serious, the fact remains that the legislature has not thought it worthy to be tried on indictment. Consequently, unless legislation specifically so provides there is little justification for extending the law of inchoate offences to cover them. Furthermore, as the cases cited in paragraph 104 show, the application of incitement and conspiracy to summary offences is apparently a

very recent development. The reports are said to indicate that there are very few prosecutions for conspiracy and incitement to commit summary offences and, furthermore, it seems that there is no demand for the extension of the law of attempt to summary offences. Until such a demand is established in relation to particular summary offences, it is argued, it is unnecessary to extend inchoate offences to them, and also undesirable in principle to extend the criminal law to cases where the need for the extension has not been demonstrated.

107. In favour of the second view it may be argued that since the basic object of the criminal law is to prevent crime the police should be given an armoury of offences which enables them to step in at the earliest stage in planned or threatened offences, whether these be indictable or summary. While the summary offences will not necessarily have serious consequences for the person or property (although they may have) they may well have visible effects upon society which it is desirable to prevent. A typical example is an offence under the Litter Act 1958 now punishable by a maximum fine of £100.[170] Where, for example, a police officer observes an individual taking rubbish from his motor-car boot apparently in the course of depositing it on a wayside verge, at present he can do no more than warn of the consequence of the completed activity; but if the law of attempt were to apply to the offence, a charge would be possible. Again, while it is true that some summary offences are less serious than some indictable offences, the distinction between them by no means always represents the true dividing line between offences of minor and major gravity. The offence charged in R. v. Blamires[171] for example, might be considered far more serious than the theft of a small

170. Dangerous Litter Act 1971, s. 1(1).
171. [1964] 1 Q.B. 278.

amount of money, the penalty for which is in theory far higher. While it is true that there are few reported cases of conspiracy and incitement to commit summary offences, some would argue that this is not necessarily a real indication of the frequency with which such charges are brought. It is also true that the legislature has chosen to make the offence in Blamires' case,[172] for example, only a summary offence despite its potentially serious effect upon the persons directly concerned (that is, the long-distance lorry drivers) but at the same time the legislature must equally be taken to have known that, in serious cases involving a conspiracy, it is possible to prosecute conspiracy to commit that offence on indictment with an unlimited penalty.

108. Justification for retaining the present position lies in acknowledging a distinction between conspiracy and incitement on the one hand and attempt on the other hand. The distinction lies in the fact that in conspiracy and incitement there is always more than one person involved. In the one case, there is a real possibility that because of conspiracy the commission of an offence may be difficult to guard against. In the other, there is an element of inducement to act by one person directed towards another person which is deserving of punishment even if the substantive offence is not committed. In the case of an attempt, however, there is merely a failed offence, which does not necessarily involve any other person. It may also be argued in favour of the present position that to make it an offence to attempt summary offences generally will introduce unnecessary complexity in the administration of the law by the police and the the lower courts. The dividing line between what is and what is not an attempt has always been difficult, and it will remain so even if the "substantial step" test for which we express a preference is eventually adopted, and the amount of time which may be spent in magistrates' courts considering complicated questions of whether or not there has been an attempt to commit a minor offence may well be out of proportion to the advantage accruing from allowing the law to intervene

172. [1964] 1 Q.B. 278.

at an early stage. Accordingly, where the legislature wishes to penalise an attempt to commit a summary offence it should do so expressly, either in general terms or by specifying the conduct short of a completed transaction which it wishes to penalise.[173] It may further be urged that, where summary offences may be committed on a wide scale simultaneously by a large number of people, of whom in practical terms it is impossible to charge every one, the police have a particularly invidious task in selecting those among them who ought to be brought before the courts. The possibility of charging those who conspired to commit or incited the commission of these summary offences provides a justifiable basis of policy for such a process of selection.[174] This is a factor which is generally inapplicable in the case of attempts.

(c) Conclusion

109. We think that the argument that conspiracy and incitement have a part to play where there is a widespread commission of summary offences, whether by a few, or a large number of, people, is a powerful one. The present law recognises that both conspiracies and incitements to commit summary offences are punishable and we see no reason to alter that principle. Whether, however, charges of conspiracy and incitement to commit summary offences should themselves be capable of being

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173. By penalising a person who "sells or offers for sale" certain goods.

174. If, for example, a trade organisation were to advise its members not to comply with some regulation thought to be oppressive and unfair, and a large number of traders throughout the country were to follow that advice, it would be more satisfactory to charge those responsible with incitement than to select individual members for prosecution: see further para. 123.

tried summarily is a separate question, which we discuss later.[175] So far as concerns attempts, while consistency of treatment is always attractive, this without more would not warrant the extension of the criminal law to cover attempts to commit summary offences. But on balance our majority view is that the arguments set out in paragraph 107 justify the same treatment of attempts as for conspiray and incitement. Magistrates' courts have with increasing frequency to deal with indictable offences triable summarily, and in that context they deal with attempted offences without undue difficulty. The modern tendency in statutes, such as the Theft Act 1968 and the Criminal Damage Act 1971, is to create a few indictable offences with high maximum penalties to cover all contraventions of whatever seriousness, but triable summarily with the consent of the accused in appropriate cases. Thus, under the present law in regard to inchoate offences there can be a conviction for an attempt to commit an indictable offence tried summarily but not for an attempt to commit a purely summary offence which, arguably, may be of equal seriousness. This is an anomaly which, tentatively, we believe should be eliminated.

110. Our provisional conclusion is, therefore, that all three inchoate offences should be available in relation to summary offences. The arguments, however, are finely balanced and we should welcome comments as to whether this conclusion is right and acceptable. In addition, we reserve for further discussion later in the Paper the question whether conspiracy and incitement to commit summary offences should themselves be capable of summary trial.[176]

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175. See para. 123 et seq.

176. See paras. 122-124.

2. Penalties

(a) The present law

111. Penalties for common law offences are at large unless they are limited by statute. There is no general statutory provision as to the penalty for incitement or conspiracy. In consequence any incitement or conspiracy to commit any offence, whether it be a statutory offence with a fixed penalty or a common law offence, or whether it be a summary offence or one triable on indictment, is punishable by imprisonment or by a fine or by both in the discretion of the court. This general rule is subject to some exceptions where legislation has specifically created an offence of conspiring[177] to commit or inciting[178] and offence and has provided a penalty for the conspiracy on indictment.

112. In regard to attempts, there is now a general provision[179] that a person convicted on indictment of an attempt to commit an offence for which a maximum term of imprisonment or a maximum fine is provided by any enactment shall not be sentenced to imprisonment for a term longer,

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177. E.g. conspiring or soliciting to murder, punishable with 10 years imprisonment under Offences against the Person Act 1861.

178. E.g. inciting another to commit an offence under the Official Secrets Act 1911 and 1920, punishable in the same way as the offence incited; Official Secrets Act 1920, s. 7.

179. Criminal Law Act 1967, s. 7(2), giving statutory force to the decision in R. v. Pearce [1953] 1 Q.B. 30 that the punishment for an attempt should not exceed the maximum for the offence attempted. Criminal Law Revision Committee, Seventh Report, (Cmnd. 2659).

nor to a fine larger, than that to which he could be sentenced for the completed offence. In the case of common law offences, where the penalty for the offence is at large, the penalty for an attempt is also at large. In addition there are still some attempts for which specific penalties are provided by statute, the penalty sometimes being the same as for the completed offence[180], and sometimes a lesser penalty.[181]

(b) Proposals for the future

(i) Attempts

113. The policy underlying section 7(2) of the Criminal Law Act 1967 that, subject to the maximum provided for the completed offence, the penalty for an attempt should be at large is, in our view, the right one and should be of general application. Some Codes[182] provide for lower penalties for attempts than for the completed offences but it is suggested that this treatment fails to take into account the fact that attempts may range in scope from the offence which is frustrated at the last moment, either by chance or the intervention of a third person, to the earliest and most remote acts of preparation which can properly be regarded as an attempt. It is for this reason that we propose as a general rule (which will, of course, be subject to specific provision by Parliament) that the penalty for an attempt to commit an offence should be in the discretion of the court subject only to the limitation that it does not exceed any maximum prescribed for the completed offence. If in accordance with

180. E.g. in the case of attempting to commit an offence under the Official Secrets Act (s. 7 of the Official Secrets Act 1920).

181. See in particular the penalties in the Second Schedule to the Sexual Offences Act 1956 for attempts to commit certain of the substantive offences.

182. E.g. Indian Penal Code, s. 511, and Canadian Criminal Code, s. 406.

our provisional view,[183] attempts to commit summary offences should be made offences, this proposal in regard to penalties would also, we feel, achieve the right result in regard to summary offences by making an attempt to commit a summary offence itself a summary offence.

(ii) Incitement

114. In our view the principles valid for attempts are for the most part also valid for incitement. It may possibly be argued that the person who incites an offence is deserving of greater punishment than the person who commits the offence, but this has not been the policy of the law in the past, even though, as we have pointed out, the punishment for incitement has always been at large. There is statutory provision[184] that, where the offence has been committed, a counsellor or procurer is liable only to the same penalty as the principal; and where the law has specifically created offences of incitement, the penalty provided has never exceeded that for the offence incited.[185] One who counsels or procures the commission of an offence which is actually committed is liable to no greater punishment than one who commits the offence; and it would, therefore, in our view, be unnecessary to impose on a person inciting an offence that was not committed a punishment greater than could be imposed upon a person who committed the substantive offence. Accordingly, we propose that the penalty for incitement should be in the discretion of the court, subject only to the limitation that it should not exceed the maximum prescribed for the substantive offence. Where the offence incited is a summary one, the maximum penalty should, similarly, be that for the relevant summary offence.[186]

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183. See para. 109.

184. Accessories and Abettors Act 1861, s. 8 as read with Criminal Law Act 1967, s. 1.

185. Offences against the Person Act 1861, s. 4, Perjury Act 1913, s. 7(2), Official Secrets Act 1920, s. 7.

186. See further, para. 124.

(iii) Conspiracy

115. At present the penalty for conspiring is not limited by any maximum penalty provided for the substantive offence, and there is clear authority that in appropriate circumstances a greater penalty may be imposed for conspiracy to commit an offence than that laid down for the offence itself. The codes and draft codes of various countries deal with the penalty for conspiracy in different ways. Some provide for the same penalty in respect of serious offences as could be awarded for the offence itself, with a fixed maximum for other offences which may or may not exceed that for the completed offence[187], another provides for the same penalty as for the completed offence with with a maximum of 7 years' imprisonment.[188] Yet others provide a graduated scale related to the penalties for completed offences, which may allow for the imposition of a higher penalty for conspiracy than for a completed offence.[189] We have given consideration to each of these possible solutions.

116. It is necessary to discuss at the outset the justification for the present position which permits the imposition of a penalty for conspiracy greater than that for the completed offence. There are two differing lines of reasoning which have led to the present law. In the first place there is authority that the agreement or concurrence of several persons in the execution of a criminal design is a proper ground for raising the penalty imposed on them above what would be proper in the case of a sole defendant.[190] In

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187. Indian Criminal Code,s. 120B.

188. New Zealand Crimes Act 1961, s. 310(1).

189. Canadian Criminal Code 1954-1966, s. 108(1), and the Draft English Code (1879), s. 420.

190. Verrier v. D.P.P. [1966] 2 A.C. 195, 223 and dicta in R. v. Field, Field and Wheater [1965] 1 Q.B. 402, 423.

the second place, there is authority that, where there is a conspiracy to contravene a law on a large or continuing scale, that fact is sufficient justification for the imposition of a greater punishment than that provided for the substantive offence.[191] We examine in turn these two rationales.

117. The first rationale put forward as justification for treating a conspiracy to commit an offence as more serious than the offence itself is most clearly stated in Verrier v. D.P.P.[192] The facts were that the appellant and A conspired together and with B to cheat and defraud whatever insurance company might insure the life of A by falsely pretending that A had died at sea. A's life was insured for £150,000 and it was arranged that it would be made to appear as if he had been drowned when a yacht sailed by B was sunk at sea. B was drowned in disposing of the yacht and the scheme never came to fruition. Had the scheme been successfully carried through the substantive offence would have been obtaining money by false pretences contrary to section 32 of the Larceny Act 1916 carrying a maximum penalty of 5 years' imprisonment. The trial judge, describing the conspiracy as "a gigantic, ambitious and indeed impudent fraud", imposed a sentence of 7 years' imprisonment upon the appellant. This was upheld by the House of Lords[193] "because there were

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191. R. v. Morris [1951] 1 K.B. 394, 399 where the evidence showed that the appellant had been engaged in smuggling on an extensive scale for many months, a sentence of 4 years' imprisonment was upheld for conspiracy to contravene the customs laws, although 2 years was the maximum imprisonment provided for the contravention of these laws; R. v. Blamires [1964] 1 Q.B. 278, 282, where a fine of £1000 was imposed on a charge of conspiracy to permit and encourage drivers of lorries to make false records of their daily driving over a period of 6 months in contravention of the Road and Rail Traffic Act 1934, which provided a fine of £20 for a first offence of such a nature and of £50 for a subsequent offence.

192. [1966] 2 A.C. 195, 223.

193. [1966] 2 A.C. 195, 223.

grounds for treating the conspiracy as an offence different from and more serious than the substantive offence". In reaching this conclusion Lord Pearson, with whose speech the other Law Lords agreed, relied directly upon the following passage from Mr. Justice Wright on Conspiracy[194] in which are mentioned cases where the agreement or concurrence of several persons in the execution of a criminal design may be a proper ground for aggravation of their punishment:-

> "Such would be cases in which the co-operation of several persons at different places is likely to facilitate the execution or the concealment of a crime or in which the presence of several persons together is intended to increase the means of force or to create terror, or cases of fraud in which suspicion and ordinary caution are likely to be disarmed by the increased credibility of a representation made by several persons".

There are also dicta in R. v. Field, Field and Wheater[195] that an unlawful combination to obstruct the police may, by the very fact of the combination, be an offence of a more serious character than obstruction of the police by one person and might properly be treated as a different and more serious crime.[196]

118. We are not convinced that there is any justification for regarding conspiracy to commit a single offence as more serious than committing the offence itself, nor do we think it right that where an offence is committed by two or more persons acting together it should be possible for the prosecution to secure an increased penalty by charging them with

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194. Wright, Law of Criminal Conspiracies and Agreements, 81-2.

195. [1965] 1 Q.B. 402, 423.

196. The imposition of a sentence of imprisonment for 25 years in D.P.P. v. Lonsdale (22nd March, 1966) for conspiracy to contravene s. 1(1) of the Official Secrets Acts 1911 and 1920 is a further example, for the maximum penalty under the Acts themselves for contravening s. 1(1) is imprisonment for 14 years.

conspiracy instead of with the substantive offence. In making provision for a particular maximum penalty by statute, we believe that Parliament must be taken to have envisaged the worst possible case of the actual commission of that offence. Accordingly, the existence of a prior conspiracy to effect the commission of that offence on one occasion only is not, in our view, a circumstance of aggravation which should increase the maximum so provided. If it is thought that the penalty provided for the case where a single person commits an offence is inadequate, Parliament itself should, in our view, provide a higher penalty for that offence or, alternatively, for that offence where a specified number of persons participate in it.[197]

119. The second rationale upon which a greater punishment for conspiracy can be justified is that there may be circumstances in which the conspiracy involves the contravening of a law upon a large or continuing scale, as in the case of the examples cited in footnote 191. The problem lies in devising a simple rule to allow the imposition of a greater penalty where a conspiracy involves contravention on this scale to ensure that the power to impose the greater penalty is limited to the appropriate case.

120. There seem to be three possibilities in regard to offences triable on indictment. (Somewhat different considerations apply to summary offences to which we refer separately).[198] The first would leave the penalty for conspiracy in general in the discretion of the courts. This is the present position and, for the reasons given in

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197. E.g. Game Act 1831, s. 30 which provides for a fine of £50 for trespassing by five or more persons in pursuit of game, but for a fine of £20 if less than 5 persons are involved. See too s. 23 of the Larceny Act 1916 (now repealed) which increased the penalties for robbery and assault with intent to rob from 14 and 5 years' imprisonment respectively to life imprisonment if two or more persons were involved.

198. See para. 122.

paragraph 118, we reject it as a general principle. The second solution would require a separate count of conspiracy in respect of each offence which is the object of the conspiracy and permit the imposition of a penalty which was the total of the maximum for each substantive offence. A conspiracy to rob three banks, for example, would be charged on three counts of conspiracy and be punishable with a maximum of three times the maximum for robbery itself. The difficulty here is that in perhaps the majority of cases where it might be argued that a higher maximum should be available, it may be clear on the evidence that the conspiracy was directed towards the commission of more than one offence, but it will not be clear precisely how many such offences were contemplated. Furthermore, where it is clear that a definite and large number of offences is contemplated, this solution might lead to undesirable and perhaps unnecessary complexity in the indictment.

121. We have come to the provisional conclusion that the third possible solution would be the most satisfactory. This would provide simply that where the evidence is sufficient to indicate that the conspiracy is to involve the commission of more than one offence, the penalty may be raised above that for the relevant substantive offence to a maximum of twice the prescribed period of imprisonment. Where it is clear that the conspiracy is to commit several offences but the evidence does not indicate how many, the prosecution will, on the suggested basis, merely have to specify in the indictment that more than one offence was contemplated; this would suffice to raise the penalty to twice the maximum for that offence if it is established. We believe, however, that this proposal ought to be subject to three restrictions. In the first place, wherever a conspiracy to commit more than one offence is alleged, we think that the verdict of the jury should indicate whether they find the defendant guilty of conspiring to commit one offence or more than one offence. In

our provisional view, this would not impose any difficulty upon the judge in giving the appropriate direction to the jury, nor would it be unduly difficult for the jury to understand. Secondly, we consider that the suggested penalty of twice the maximum period of imprisonment should be available only where the conspiracy has as its object the commission of more than one offence of the same kind. The increased penalty would be available, for example, if it was alleged that that conspiracy was to rob a number of banks, but not where the object was to burgle a bank and, if necessary in the course of the burglary, to murder a night watchman. In such a case different counts would be required to obtain the jury's verdict as to whether or not a particular conspirator agreed to murder as well as to burgle. Lastly, conspiracy to commit indictable offences - and this applies also, in our view, to conspiracy to commit a single indictable offence - should itself be triable only on indictment; we consider that the complexities of the law of conspiracy make it desirable that the decision of law in every case should be in the hands of a judge.

(iv) Conspiracy and incitement to commit summary offences

122. Conspiracies to commit summary offences present special problems. Our provisional proposal is that conspiracy should continue to be available in relation to such offences;[199] but we have further proposed[200] that conspiracy to commit one offence should not itself be punished by a penalty greater than that for the substantive offence. It is probably true to say, however, that conspiracy to commit summary offences can only be of importance where the offence concerned is planned to occur on a wide scale, and where the conspiracy, in consequence, is of far greater importance than the commission in individual instances of the offence

199. Para. 109.

200. Para. 118.

itself.[201] If this is accepted, it will be clear that the provisional proposal which we make in regard to indictable offences, that is, that a maximum of twice the penalty for the substantive offence should be available where the conspiracy is to commit more than one such offence, will be of little assistance in the case of summary offences, where the maximum penalty in most instances is very low.

123. We believe that there is a substantial case for making special provision for conspiracy to commit summary offences on a wide scale. One possible way of doing this would be to provide that conspiracy to commit one summary offence should itself be a summary offence, while conspiracy to commit more than one such offence should be tried on indictment. This course, however, we do not favour. For one reason, we cannot envisage circumstances which would justify charging a conspiracy to commit a single summary offence; the circumstances are likely to be such that either there is no need to prosecute the conspiracy to commit the single offence or that there is a need to charge conspiracy to commit a large number of offences. For another, we have explained that we consider that the complexities of the law of conspiracy are such as to make it desirable that the decision of law should lie with a judge, and we believe that this consideration applies whether the offences which are the subject of the conspiracy are indictable or summary. Our conclusion is, therefore, that provision may best be made by allowing for a conviction on indictment for conspiracy in relation to summary offences only where it is proved that there was a conspiracy to commit more than one summary offence. As in the case of conspiracy to commit indictable offences, this would be permitted only where the offences concerned are of the same kind. Provisionally, we suggest that the offence should carry a maximum sentence of two years' imprisonment.

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201. As in Blamires' case [1964] 1 Q.B. 278; see para. 116 n. 191.

124. Many of the arguments we have used in relation to conspiracy seem to us to be applicable also in the case of incitement. In the Blamires case[202] the conspiracy was made more serious by its widespread nature, but it is certainly arguable that in situations of that character involving agreements by the management and employees to disregard the law, if the evidence supports it, it might well be preferable for those responsible to face a charge on indictment of incitement to commit the summary offence on a number of occasions and to be liable to a maximum penalty of two years' imprisonment. Further, as we have seen[203], incitement may be directed at large and on this ground there may also be a case for incitement to commit summary offences to be tried on indictment. In the case of incitement, however, our majority view is that it should be possible to try summarily incitement to commit several summary offences of the same nature, and that there may be instances where a charge of incitement to commit a single summary offence may be appropriate and where, therefore, the incitement itself should be tried summarily. We propose, therefore, that incitement to commit a summary offence should be triable summarily, and that incitement to commit more than one summary offence should be triable on indictment with a maximum of two years' imprisonment.

Summary of proposals as to penalties

125. We propose that -

(1) The maximum penalty for incitement or attempt to commit an offence should be that provided for the substantive offence, whether the offence is summary or indictable (paragraphs 113-114).

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202. [1964]1 Q.B. 278; see para. 116 n. 191.
203. Para. 93.

(2) The maximum penalty for conspiracy to commit one indictable offence should be that provided for the substantive offence (paragraph 118), and for conspiracy to commit more than one indictable offence of the same nature, twice the maximum provided for the substantive offence. In any event, conspiracy should be triable only on indictment (paragraph 121).

(3) Conspiracy to commit one summary offence should not be an offence but conspiracy to commit more than one summary offence of the same nature should be an offence triable on indictment, with a maximum penalty of two years' imprisonment (paragraph 123).

(4) Incitement to commit more than one summary offence of the same nature should be an offence, triable on indictment with a maximum penalty of two years' imprisonment (paragraph 124).

3. Impossibility

(a) Statement of problems

126. Although liability for cases where it is impossible for an inchoate offence to be successful is usually discussed in relation to the law of attempts, this question is also of importance with regard to incitement and conspiracy. The same principles are applicable to the case where one person incites another to commit an offence which is in fact impossible of performance, or conspires with another to commit it. In this section we are not discussing the case where what a person is incited to do, or what is

attempted or conspired, is not an offence in law although the defendant thinks that it is. There can be no liability for an inchoate offence where there is no substantive crime except in the mind of the defendant. For example, a man has, or attempts to have, intercourse with a girl over the age of 16 believing that she is over 16 and believing that it is a crime for him to do this act on the facts as he believes them to be. In this instance the indictment could never disclose an attempt to commit a crime; and to hold otherwise would, in our view, extend the criminal law to unwarrantable lengths by making criminal the mere intention to act in a way which the defendant thought was criminal.

127. The aspect of impossibility with which we are concerned relates to those cases where the defendant who attempts incites or conspires to commit an offence known to the law believes that the circumstances are such that the offence will be committed; but the circumstances are in fact such that the means adopted or proposed are inadequate or the object is unattainable. As most of the authorities and the learning on this subject are related to attempts it will be convenient to discuss the problem in that context but, as we have indicated, the same principles are applicable to incitement and conspiracy. We discuss very briefly the main approaches to the topic in the following paragraphs.

128. Two main approaches have emerged from theoretical consideration of the subject in recent years.[204] The "objective" approach is concerned principally with danger to the interests of the community involved in different

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204. For discussion of the problem, see generally, Williams, Criminal Law, 2nd ed. (1961) pp. 642 et seq., Smith & Hogan Criminal Law 2nd ed. (1969) pp. 171 et seq and writers there cited.

kinds of conduct whereas the "subjective" approach has regard to the moral guilt of the accused person. The strict application of the first would have the result that any endeavour to achieve something that turns out to be impossible would not be punishable as a criminal attempt, but the weight of juristic opinion and the current of judicial decisions in common law countries, including America, and in Europe does not support this view. The objective approach also raises the problem whether a distinction is to be drawn between what has been termed "absolute" impossibility, where there can be no criminal attempt, and cases of "relative" impossibility, where there may properly be a conviction for an attempt. Absolute and relative impossibility may relate both to ineffective means and unattainable objects. For example, one may cite, as an example of absolute impossibility, shooting another with a toy pistol (ineffective means) or shooting at a stump wrongly believed to be a man (unattainable object) and, as an example of relative impossibility, shooting another with a firearm which happens to be empty (ineffective means) or shooting at a bed where a man was mistakenly believed to be sleeping (unattainable object). In our view, such distinction are unsatisfactory and provide no adequate criterion for determining the law for the future.

129. The subjective approach is founded upon the mental state of the accused as to the circumstances creating the impossibility, whether these circumstances relate to the means employed or the object sought. The solution is justifiable in so far as it is based on the argument that a person who has done all that he thinks necessary to achieve a criminal purpose is deserving of punishment and that punishment may deter him from repeating the activity, possibly with more success. On this basis, the safeguard against conviction in inappropriate cases lies in the fact that the further removed from possible success is the attempt, the greater will be the need for cogent evidence of the intent before there can be a conviction.

130. It is now clear in English law that the fact that a criminal objective is impossible of achievement does not prevent the person who attempts to achieve that objective being guilty of an attempt to commit the offence in question.[205] The path trodden in the authorities[206] in reaching this conclusion is a tortuous one with a number of blind alleys from which there has had to be retreat to the main course. It seems to us that little purpose would be served by an analysis of the cases in detail, nor do we feel that further consideration of the theoretical aspects discussed in the previous paragraphs will aid appreciably in determining precise legal rules. We prefer to postulate a number of hypothetical examples and to consider as a matter of principle whether there should be liability in these instances; and then to suggest a principle which will apply early and unambiguously to the examples given.

(b) Examples

131. a. D, in the hope of finding something valuable to steal puts his hand in P's empty pocket. If he steals something he is guilty of theft; if it is not proved whether there was anything in the pocket to steal (as happened in Ring's case[207]) it is clearly desirable that he should be guilty of attempted theft. The result should, in our view, be the same even if it is proved that there is nothing in the pocket capable of being stolen.

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205. R. v. Ring (1892) 17 Cox C.C. 491.

206. See in particular R. v. Goodchild (1846) 2 C. & K. 121; R. v. Collins (1864) Le. & Ca. 471; R. v. Hensler (1870) 11 Cox C.C. 570; R. v. Ring (1891) 17 Cox C.C. 491; see also Percy Dalton Ltd (1949) 33 Cr. App. R. 102, 110.

207. (1892) 17 Cox C.C. 491.

b. D, intending to kill P, fires number of bullets into the bed in which he believes P to be sleeping. In fact P is behind the wardrobe, or in the next room, or even in another country. In our view, it can make no difference how long P has not been in the bed, or how far away he is from it, to the question whether D is guilty of an attempt.[208] Once the test of the unequivocal nature of the act is rejected, the determining aspect in each case is the intent with which the act is done. In the circumstances postulated above, there is evidence that D intended to kill P by firing bullets into him on the bed. It can, we believe, make no difference if P has put a log of wood in the bed to mislead D.[209] Nor can it make any difference that P had already died before D discharged the shots.

c. D, intending to kill P, administered to him a very small dose of a mild poison quite incapable of killing anyone in such a quantity. This is clearly an attempt to murder[210] and, it seems to us that it can make no difference whether the substance is lethal in a larger quantity or entirely harmless; nor can

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208. Cf. R. v. Gaylor (1857) Dears & B. 288.
209. Cf. R. v. MacPherson (1857) Dears & B. 197.
210. R. v. White [1910] 2 K.B. 124 (C.C.A.).

it make any difference that D mistakenly administered a harmless substance believing it to be a poison, or deliberately administers a particular substance believing mistakenly that it is lethal. In either case his conduct coupled with his proved intent constitutes an attempt.[211]

d. Goods are stolen and repossessed by the owner (or the police on his behalf) but are left where they are to entrap D, a notorious receiver. D, not knowing of the repossession, takes the goods which are no longer "stolen" in law.[212] D, in our view, should be convicted of an attempt to receive stolen goods.[213] Similarly, where he has gone to get stolen goods, he should be liable if there are in fact no goods on the premises.[214]

e. D thinks he is smuggling heroin, although he is in fact smuggling a harmless powder. D should be liable for an attempt to smuggle heroin.

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211. R. v. Brown (1899) 63 J.P. 790. Contra R. v. Osbourn (1920) 84 J.P. 63.

212. R. v. Crispin [1971] Crim. L.R. 228.

213. This was not the conclusion reached in R. v. Smith (The Times 31/3/73) by the Court of Appeal. Leave was given to appeal to the House of Lords.

214. See McDonough (1963) 47 Cr. App. R. 37 (an incitement cases).

f. D thinks he is selling pears above the controlled price but, in fact, owing to a deviation in the weight of the box, the pears he sells are within the controlled price.[215] The case for rendering D liable is, it seems to us, less clear. At any rate, if he is made liable it is not on the ground of mere intention, for there is conduct which he thought carried out his intention.

g. D thinks he is smuggling dutiable lace but, in fact, the lace is British made and not dutiable. Again the case for rendering D liable is less clear but, for the reason given in example f., we believe that in principle he should be liable.

h. D offers P a sum of money as a bribe to secure a contract from a Government department, believing that P is employed by that department. P is not so employed. In our view, D should be guilty of an attempted corrupt practice under the Prevention of Corruption Acts 1906 and 1916.

132. These examples indicate that, in principle, the fact that the accused's criminal purpose cannot be achieved, whether the means used are inadequate (as in example c.), or the object is unattainable (as in examples a. and b.), should not prevent his endeavour from amounting to an attempt.

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215. See R. v. Percy Dalton Ltd. (1949) 33 Cr. App. R. 102.

(c) Proposals

133. There appear to us to be two common factors in the examples above. In the first place, it seems that an attempt is committed notwithstanding that the means by which the crime is intended to be committed would in fact be inadequate for the commission of it (example c.). Secondly, an attempt is committed even though the person in respect of whom the crime is intended to be committed is dead or does not exist (example b.) or does not possess a characteristic which D believes that person to possess and which is necessary for the crime; or, similarly, the property in respect of which the crime is intended to be committed does not exist (example a. and example d., second case) or does not possess a characteristic which D believes it to possess and which is necessary for the crime (examples d., first case, e., g. and possibly f.)[216] We believe that these are intelligible and unambiguous criteria for dealing with these exceptional cases, and that in other cases where, owing to the non-existence of an element required by law for the crime, the accused cannot commit the contemplated crime, he should not be guilty.

134. The advantage possessed by a rule resting on the two common characteristics which we have deduced from the cases postulated is that it is reasonably clear in operation; we believe that in its application to most fact situations it will give a consistent result. An obvious disadvantage, however, lies in its extreme breadth of operation. Apart from cases where what is attempted (or incited or is the object of a conspiracy) is not an offence in law at all[217], it is difficult to conceive of convincing examples which will not fall within its terms and will not, therefore,

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216. Example f. is borderline, but to clarify the matter it might be enacted that the quantity of property is to be considered a characteristic of the property.

217. See para. 126.

constitute an offence. Furthermore, another apparent danger allied to this objection is that, as a result of their breadth of operation, these proposals may operate in trivial cases for which it is difficult to justify the imposition of criminal liability. For example, if a person thinks he is evading customs duties by smuggling goods into this country believing them to be dutiable when, because the goods were made here, they were not so dutiable, he will be liable under our proposals, even if the "evasion" comes to light only as a result of his own confession as to the facts as he believes them to be (example g.).

135. We have considered, but rejected, a suggestion that, to avoid imposition of liability in seemingly trivial cases, the proposed criteria should apply only in respect of indictable offences for which the maximum penalty exceeds 5 years' imprisonment. The main argument in favour of this limitation is that it would avoid the necessity for discussing these complex questions in trivial cases. We doubt, however, whether it is possible to make a satisfactory distinction between serious and trivial cases in this way. The difficulties of this kind of case are avoided by covering almost all offences, notwithstanding the element of impossibility. The remedy in the type of case instanced in example g. is for the court to give an absolute discharge; and the prosecution will thereby be discouraged from instituting proceedings in trivial cases of that kind.

Summary

136. We propose that -

(i) A person may be guilty of an attempt to commit a crime notwithstanding that the means by which the crime is intended to be committed would in fact be inadequate for the commission of the crime.

(ii) A person may be guilty of an attempt to commit a crime notwithstanding that -

(a) the person in respect of whom the crime is intended to be committed is dead, does not exist or does not possess a characteristic which the person believes him to possess (necessary for the crime);

(b) the property in respect of which the crime is intended to be committed does not exist or does not possess a characteristic which the person believes it to possess (necessary for the crime);

(iii) Save as aforesaid a person is not guilty of an attempt to commit the crime if he could not commit the crime contemplated owing to the non-existence of an element required by law for that crime.

(iv) The principles outlined in (i), (ii) and (iii) should apply also to incitement and conspiracy.

4. The defence of Withdrawal

137. Proposition 9 of Published Working Paper No. 43[218] provides that a person who has incited or given help towards the commission of an offence is not guilty as an accessory if he genuinely withdraws from participation in time to make it possible for the offence not to be committed, and either

218. "Parties, Complicity and Liability for the Acts of Another.

communicates his withdrawal to the principal or takes reasonable steps in an endeavour to prevent the offence being committed. In that Paper we took the view that the law should give a reasonable encouragement to an accomplice to withdraw, provided he does so genuinely. Our view is that, despite the fact that the offence has been committed genuine withdrawal will prevent complicity in it.

138. It is now necessary to consider whether there should be a withdrawal defence available to a person charged with an inchoate offence. Should a conspirator who withdraws from a conspiracy in any circumstances be provided with a defence to a charge of conspiracy? Should abandonment of an attempt before commission of an offence be a defence to a charge of attempt? Should one who incites another to crime be able to avoid conviction by undoing the mischief he has done either by persuading the person incited not to commit the crime or by otherwise preventing its commission?

139. There is some difference between the two situations: in the case of complicity in a crime which is committed, withdrawal has not, by definition, prevented the crime but it can prove a change of intention before the crime is committed on the part of the individual who raises the defence. In the case of inchoate offences, however, the crime is complete as soon as agreement is reached, an attempt is made or encouragement or authorisation given so that, even though withdrawal may prevent the substantive crime being committed, it cannot undo the fact that at one stage, at least, the individual concerned will actually have committed the inchoate offence. It is clear, therefore, that, were a withdrawal defence to be provided, it would differ in both content and effect from the one which we propose in relation to complicity.

140. One possible formulation of a withdrawal defence to the three inchoate offences is to be found in the Model Penal

Code.[219] Each offence is here provided with a separate defence:

> "Section 5.03. Criminal Conspiracy
>
> (6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.
>
> Section 5.01. Criminal Attempt
>
> (4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection 1(b) or 1(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.
>
> Section 5.02 Criminal Solicitation
>
> (3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

The defence which we propose in relation to complicity provides that the defendant, after his decision to withdraw in time,

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219. Of the American Law Institute.

need do no more than communicate that decision to the other parties or take "reasonable steps in an endeavour to prevent" commission of the offence. The common element, however, in this formulation is that the circumstances must not only show a "complete and voluntary renunciation" of the criminal purpose, but that the individual raising the defence must, after deciding to withdraw, by his own actions have prevented the commission of the substantive offence. We believe that, were a withdrawal defence to be provided, this would be a minimum prerequisite in its formulation.

141. In our view, the most persuasive argument in favour of the provision of a withdrawal defence is that, since the object of the criminal law is to prevent crime, it is equally important to give reasonable encouragement to a conspirator, attempter or inciter to withdraw before a substantive offence is committed as it is to encourage an accomplice to end his participation in that offence. The absence of such a defence may operate to dissuade an individual who might otherwise decide to cease participating in the planning of a crime from taking that decision, since, having become a party to the inchoate offence, there is no inducement for him to cease his activities before commission of the substantive offence takes place. It may well be that the type of criminal who is liable to change his mind in this way is a relative newcomer to crime and would, in any event, be given the opportunity to give evidence for the prosecution. But provision of the defence would make it quite clear that the criminal in these circumstances would not be liable to be charged at all.

142. There are, however, other considerations which must be balanced against those put forward in the preceding paragraph. If it is accepted that the main rationale for the existence of inchoate offences lies in the danger to society in the planning and preparation of crime and the opportunity they give to the police to intervene at a

relatively early stage in criminal activity, it seems hard to avoid the conclusion that provision of a withdrawal defence - which, ex hypothesi, will entirely exonerate the party concerned from guilt - is unjustifiable in principle. For example, if the mere act of soliciting or inciting another to crime is so socially dangerous that it attracts liability to punishment, it may be argued that, once the incitement is committed, the individual responsible should be liable to punishment because he created a risk of an offence taking place and intended that it should be committed. This leads to the conclusion that efforts by an individual to nullify the effects of his conduct (whether he is successful or not in his efforts) ought properly to be reflected in mitigation of the penalty which the court might otherwise impose, rather than by provision of a formal defence. Although it is true that, under our proposals, both substantive offences and related inchoate offences will attract the same maximum penalty, in practice the courts might be expected, as they do at present, to have regard to the relative seriousness of the inchoate offence. A "just failed" attempt may attract almost as heavy a penalty as the substantive offence; and attempt abandoned at some earlier stage may merit a lower sentence; and participation in the early stages of preparations for an offence the commission of which the individual either later tries prevent or in the commission of which he takes no part, would be unlikely to be prosecuted and, if it is, may be visited by no more than a nominal penalty.

143. The arguments presented in these paragraphs do not seem to us to be decisive either in favour of or against the provision of a defence of withdrawal. It would therefore assist us if our recipients, particularly among the police and prosecuting authorities, would advise us whether they consider a withdrawal defence formulated with the degree of stringency suggested in paragraph 140 would help in the administration of the law.

ENGLISH LAW

1. Draft Code, Appendix to the Report of the Criminal Code Bill Commission, (1879) C. 2345.

74. "An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence or by some other cause.

Every one who, believing that a certain state of facts exists, does or omits an act the doing or omitting of which would if that state of facts existed be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time or the act or omission impossible.

The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission fo that offence, and too remote to constitute an attempt to commit it, is a question of law."

Note. The Commissioners stated that this was declaratory of the common law.

2. Stephen's Digest of the Criminal Law, 9th ed., Article 29:

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted.

The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.

An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is an attempt to commit that crime.

The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.

3. Davey v. Lee [1968] 1 Q.B. 366. Lord Parker CJ adopted paragraph 1 of Stephen's definition (above) and followed this by adopting paragraph 4104 of Archbold, Criminal Pleading, Evidence & Practice, 36th edition, which stated as follows:

> "It is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime."

4. Jones v. Brooks (1968) 52 Cr. App. R. 614 in which it was held that two questions had to be asked, i.e. -

(i) does the act, looked at in conjunction with evidence of the expressed intention of the defendant show that it was directed to the commission of an offence? and

(ii) if so, was it sufficiently proximate to the completed offence?

INDIAN PENAL CODE
1860

ATTEMPTS

A General Principle

511. Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore, is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

B Specific Offences

Preparatory Acts

Treason type

122. Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

126. Whoever, commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Government of India, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or required by such depredation.

Homicide

307. Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Illustrations

(a) A shoots at Z with intention to kill him, under such circumstances that if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(b) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

308. Whoever does any act with such intention or that knowledge and under such circumstances that, if he by act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

399. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Attempts

Certain attempts to commit specified offences are covered by other sections of the Code and thus, by its terms, excluded from section 511 set out above. Examples of these attempts are to be found in:

Treason type - sections 121, 124, 125, 126

Corruption of public servants - 161, 163, 165, 213

Coinage offences - 239, 240, 241

Extortion offences - 385, 387, 389

Robbery and burglary offences - 393, 394, 398, 460

The purpose of the particular provisions listed above seems to be limited to providing penalties in excess of those available under section 511 for the general run of attempts.

CANADIAN CRIMINAL CODE

24 (1) Every one who, having an intent to commit an offence does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

Section 406 categorises 3 types of attempts as follows:

(i) to commit an indictable offence punishable with death or life imprisonment - the attempt is indictable, punishable with up to 14 years;

(ii) to commit an indictable offence punishable with 14 years or less - the attempt is indictable punishable by half the maximum term for the completed offence;

(iii) to commit the summary offence - the attempt is a summary offence.

NEW ZEALAND CRIMES ACT 1961

72 Attempts

(1) Every one who, having an intent to commit and offence does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

(3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

Appendix E

DRAFT CRIMINAL CODE

for the

AUSTRALIAN TERRITORIES

ATTEMPTS

51. Attempts to Commit Offences

(1) An attempt to commit an offence is itself an offence.

(2) The same conduct may constitute one offence and an attempt to commit another offence.

52. Definition of Attempt

When a person intending to commit an offence enagages in conduct which is or which he believes to be a substantial step towards the commission of the offence, he is said to attempt to commit the offence.

53. Circumstances Constituting a Substantial Step

Conduct constituting mere preparation for the commission of an offence may, according to the circumstances, amount to a substantial step within the meaning of section 52 of this Code and, without negativing the sufficiency of other conduct the following may be held sufficient in law to constitute a substantial step for the purposes of section 52 of this Code:

(a) lying in wait for, searching out or following the contemplated victim of the intended offence;

(b) enticing or seeking to entice the contemplated victim of the intended offence to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the intended offence;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offence will be committed;

(e) possession of materials to be employed in the commission of the offence which are specially designed for such unlawful use, or which can serve no lawful purpose in the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the offence, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose in the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the offence.

54. Abandonment of Attempt

Where an attempt to commit an offence is voluntarily abandoned the circumstances of such abandonment shall be taken into consideration in mitigation of any sentence to be imposed in respect of such attempt.

Appendix F

THE AMERICAN LAW INSTITUTE

MODEL PENAL CODE

ATTEMPTS

5.01 Criminal Attempt

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct Which May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1) (c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: there follows a list (a) to (g) which is precisely the same as the type of conduct listed in section 53 (a) to (g) of the Australian Territories Draft Code .

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Withing the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Appendix G.

European Criminal Codes

French Penal Code.

Article 2.

Every attempt to commit a felony (i.e. an offence which the law punishes by deprivational or infamous punishments - Article 1) manifested by commencement of execution is considered like the completed felony, unless the attempt has been terminated, or it has fallen short of success only because of circumstances independent of the perpetrator's will.

Article 3.

Attempts to commit misdemeanours (i.e. offences which the law punishes by correctional punishments - Article 1) are considered as misdemeanours only when specifically provided by law.

[No provision is made in regard to attempts to commit violations, i.e. offences which the law punishes by regulatory punishments.]

German Penal Code.

Article 43 (definition)

1. Anybody who manifests a decision to commit a felony or gross misdemeanour by acts constituting the commencement of the execution of such felony or gross misdemeanour, shall be punished for attempt if the intended felony or gross misdemeanour has not been completed.

2. An attempted gross misdemeanour is punishable only when expressly provided by statute.

Article 46 (Withdrawal)

The attempt as such remains free from punishment if the

perpetrator -

1. has abandoned the completion of the intended act, not having been prevented from such completion by circumstances independent of his will, or

2. by his own activity has averted the occurence of the effect necessary for the completion of the felony or gross misdemeanour, at a time when his act had not yet been discovered.

German Draft Penal Code, 1962

Article 26 (Definition)

1. Anybody who evidences his intention to complete an act by conduct constituing the commencement of carrying it out, or which would constitute the commencement of carrying it out under his view of the situation, but which does not lead to completion, is attempting to commit a criminal act.

2. Any conduct by which the perpetrator commences the effectuation of the definitional elements, or by which he directly proceeds thereto, constitutes a commencement of carrying out an act.

Article 28 (Withdrawal)

1. Anybody who voluntarily desists from the further carrying out of the act or prevents its completion, shall not be punished for attempt.

2. If several persons are jointly engaged in an act, anyone of them who voluntarily prevents its completion shall not be punished for an attempt.

3. If the act remains uncompleted apart from any doing of the person withdrawing, or if it is committed without his antecedent conduct, his voluntary and earnest endeavour to prevent its completion shall suffice to exempt him from punishment.

Norwegian Penal Code

Section 49

An attempt to commit a felony is punishable. An attempt is an act purposively directed at, but falling short of, completion of the felony.

An attempt to commit a misdemeanour is not punishable.

Section 50

An attempted felony is not considered punishable if the offender, before he knows that the felonious attempt has been discovered, by his own free will desists from the continuation of the felonious act before the attempt has been completed, or prevents the result which would constitute the completed felony.

Italian Penal Code

Article 56

Whoever commits acts which are appropriate for and directed in an unequivocal manner to the commission of a crime is responsible for attempted crime if the action is not completed or the event does not take place.....

If the guilty person voluntarily desists from the action, he shall only be liable to the punishment for the acts performed when these of themselves constitute a different offence.

If he voluntarily prevents the occurence, he shall be liable to the punishment prescribed in respect of the attempted crime, reduced by one-third to one-half.

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