REPORT OF THE CRIMINAL
LAW REFORM COMMITTEE

THE LAW RELATING TO THE FRUSTRATION OF ATTEMPTS BY IMPOSSIBILITY

Presented to the Minister of Justice
in January 1973

REPORT

OF

THE CRIMINAL LAW REFORM COMMITTEE

THE LAW RELATING TO THE FRUSTRATION OF ATTEMPTS BY IMPOSSIBILITY

To: The Minister of Justice

PART I

1. The Committee has been asked to examine the law relating to the frustration of attempts by impossibility. A particular instance of this type of frustration came before the Court of Appeal in The Queen v. Donnelly (1970) NZLR 980. The members of the Court of Appeal were in that case divided in opinion. The Committee has addressed itself to the general question of the effect of frustration and to the specific application of the law to the offence of receiving.

2. Donnelly called at the left-luggage department of the Auckland railway station. He presented a ticket and asked for the luggage to which it related. It was the Crown's case that he knew it related to a suitcase containing gramophone records; that he knew that the records had been stolen; and that he was unaware that in the meantime the records had been restored by the police to their owner. For Donnelly it was submitted that when he presented the ticket the records had ceased to be stolen property and that he could not therefore be found guilty of receiving or of attempting to receive stolen property. The learned trial Judge ruled against this submission. Donnelly was convicted of attempting to commit the crime of receiving, but a case was stated for the Court of Appeal.

3. It was held by the Court of Appeal (North P. and Turner J., Haslam J. dissenting) that the ruling of the trial Judge was erroneous and the conviction was set aside. The majority held that this was a case of "legal impossibility" and that s.72 of the Crimes Act

1961 did not apply. Turner J. said (p.993) that s.72(1) is to be read as if the words "in fact" were inserted, thus:

> Every one who, having an intent to commit an 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 <u>in fact</u> to commit the offence or not.

He distinguished physical impossibility from legal impossibility and proceeded (pp.991, 992):

> If in the case before us the appellant can be said to have had "an intent to commit an offence" he must be taken as having done an abundance of acts "for the purpose of accomplishing his object", and can therefore in terms of s.72 be found guilty of an attempt to commit the offence which he intended to commit, notwithstanding that in the circumstances it was not possible to commit it. But can it be said that in this case the appellant had an intent to commit the offence? He intended, no doubt, to do acts which he thought amounted to an offence; but these acts do not in law constitute an offence. He intended on 28 August to receive the records. Section 261 provides that to receive those records on 28 August would not have amounted to an offence. What the appellant intended to do, therefore, was to do something which was not an offence. If he is to be convicted of a criminal attempt, it must be simply because of his erroneous belief that what he was attempting to do was an offence in law, when actually it was not one.

> A belief that what he was doing was not a crime could not have excused the appellant, if what he actually did had in law amounted to a crime. Ignorantia legis neminem excusat. I see no reason why his mistaken belief that what he was doing was a crime should convict him, if in fact all the acts which he did or attempted to do would not in law amount to a criminal offence. To say that he should be convicted because "he meant to do it" seems to me to involve some confusion between the ideas of sin and crime. The criminal law has always concerned itself with acts rather than with thoughts, and to accept the submissions of Mr Neazor would be to convict a man for his sinful thoughts, where all his actions, without those thoughts, would leave him guiltless in the eyes of the law. Whether he may properly be condemned on such an account must in my opinion be left to the ultimate arbitrament of an Authority higher than this Court.

Haslam J., dissenting, held that there was no justification for reading by implication into the language of the definition an exemption which, on his view, was unwarranted on the plain meaning of the words. He said (pp.994, 995):

> In my opinion the concluding phrase in s.72(1) makes irrelevant what may be described as an objective impossibility in the circumstances to commit the offence intended. These considerations must apply in every instance, whether or not legal consequences also arise from the factual impossibility. In the present instance, there was ample evidence that Donnelly intended to commit the crime of receiving and presented the ticket for the purpose of accomplishing that object.

> If in fact the goods had been at that time in the uninterrupted custody of the Railways Department, and the clerk, on instructions from the police, had refused to deliver the goods when Donnelly tendered the ticket, clearly Donnelly could have been convicted of attempted receiving. Another hypothetical variation of the narrative would have been a case where Donnelly presented the ticket with the same intent and purpose, but at a time when, without the knowledge of either the accused or the clerk, the goods had already been handed over by mistake to an unknown party and were untraceable. Clearly in the latter event, he could properly have been convicted of attempted receiving. Yet in each instance the outward acts and mental processes of the accused would have been unchanged. If it may safely be assumed that the purposes (sic) of s.72 is to punish intentions to commit a crime which are expressed in a sufficiently proximate act, then the mischief in each of the three instances appears to be indistinguishable and the anti-social conduct of the accused equally blameworthy.

4. Reasons for dissatisfaction with the result of the appeal may be formulated in a variety of ways. The following summary covers some of the points:

> The plea of "legal impossibility" raises a technical and unmeritorious defence. It should be sufficient to prove that the accused intended to commit a crime and did a sufficiently proximate act for the purpose of accomplishing his object.

> Whether the impossibility was factual or legal the mischief is the same and there

should be no distinction between them with regard to criminal liability.

Liability to conviction turns on events which have no relation to a person's dangerousness or moral blameworthiness.

If we consider the purposes of the criminal law there is no sound basis on which to grant exemption where the complete crime was "legally impossible". Measures intended to deter or to reform are as appropriate, and as justifiable, in this case as in the case of factual impossibility.

Immunity is being granted because of chance circumstances unrelated to the conduct of the accused. Liability comes to depend on fortuitous circumstances in a way that is not acceptable in a rational criminal code.

5. It must be conceded at once that under the law as it now stands a person may be acquitted of an attempt where his moral guilt is exactly the same as that of a person who may be convicted. It is quite evident that immunity may depend on facts unknown to the accused, and that the outcome may be said to depend on pure chance. Nevertheless there are arguments on the other side and the pros and cons need to be examined.

6. As will appear later in this report it may be argued that the decision in Donnelly's case is contrary to an earlier decision of the New Zealand Court of Appeal and that some of the reasoning in the majority opinions is open to criticism. But it is not for the Committee to put itself in the position of the Privy Council and ask whether the decision should be sustained on appeal. The issue for the Committee is whether, assuming the law to have been correctly enunciated by the Court of Appeal in Donnelly's case, the law so stated is in need of amendment. We therefore address ourselves to two questions:

> Should the general law of attempts be altered by an amendment to s.72?
>
> Should the law as to specific attempts (e.g. attempted receiving) be altered (e.g. by amendments to ss.258-261)?

7. Put another way the main questions that call for an answer are these:

> Where a person has not gone beyond an attempt to accomplish his object should he be criminally liable for an attempt if the object, when accomplished, would not, in the actual circumstances, be a crime although in the circumstances as he believed them to be it would be a crime?
>
> Where a person has accomplished his object should he be criminally liable for an attempt if his conduct is not, in the actual circumstances, a crime, but in the circumstances as he believed them to be would have been a crime?

(These formulations are imperfect because of the latent ambiguity in the expression "accomplishing his object", but they may nevertheless suffice as indicating the nature of the problem.) In R. v. Donnelly the first of these questions arose for decision and was answered by North P. and Turner J. in the negative and by Haslam J. in the affirmative. On the reasoning by which they reached these conclusions they would have given the same answers to the second question. Should the law remain as laid down in the Court's decision?

8. Donnelly's case was not concerned with the effect of a mistake of law, but the Committee has also addressed itself briefly to this question since it is closely related to the questions already mentioned. A person may mistakenly believe that he is committing an offence, not because he is under a misapprehension as to the facts, but because he is mistaken as to the

criminal law or as to a mixed question of fact and law. For example:

> D distributes an innocent leaflet, knowing the contents and mistakenly believing that it expresses a seditious intention.
>
> E attempts to commit suicide, thinking that it is still a criminal offence to do so.

An additional question may therefore be posed, expressed in some such way as this:

> Where a person has done or attempted to do something which is not an offence, believing, because of a mistake of law, that it is an offence, is he (or should he be) guilty of a criminal attempt?

PART II

INTENTION AND THE EFFECT OF MISTAKE

9. "Intention" may have one or more of several different meanings. Suppose, for example, that it is an offence to shoot a homing pigeon. The statement "he intended to shoot a homing pigeon" may refer to any of the following situations (inter alia):

(i) He intended to shoot a bird. It was a homing pigeon. He believed it to be a homing pigeon.

No element of mistake. If he performs a sufficiently proximate act to accomplish his object he is guilty of an attempt. If he accomplishes his object he has committed the full offence.

(ii) He intended to shoot a bird. It was a homing pigeon. He believed it was not

a homing pigeon.

Here there is a mistake which may afford a defence to a charge. He has committed the actus reus of the offence. The question is whether he must have done so with knowledge of all the relevant circumstances. In this report we are not concerned with this question.

(iii) He intended to shoot a bird. It was not a homing pigeon. He believed that it was a homing pigeon.

This is the type of case with which we are concerned. Prima facie, as it was not a homing pigeon he cannot be convicted of shooting a homing pigeon; but can he be convicted of attempting to do so?

In general terms: where a person does or attempts to do something which, viewed objectively, is not the actus reus of an offence, but would have been if the circumstances were as he believed them to be, can he be convicted of an attempt? Posed as a question of statutory interpretation, what is the meaning of the words "an intent to commit an offence" in s.72 (1)? On their proper interpretation do they lead to results so unsatisfactory as to call for some amendment?

10. Two different analytical methods have been used in dealing with this problem, and they lead to opposite results. One is the objective method used by North P. and Turner J. in <u>Donnelly</u>'s case. The other is the subjective method used by Haslam J. in his dissenting judgement.

11. <u>The objective method</u>:

This might also be termed the "retrospective" method, since it takes as its starting point what was actually accomplished (or would have been accomplished),

reasoning from that in order to determine what was attempted. One looks at what has in fact been done or attempted, viewing the matter objectively, i.e. in the light of the facts as they are. Is this the actus reus of an offence? If not, no crime has been committed and no crime has been attempted. Thus one who shoots a bird that is not a homing pigeon, though he thinks it is, has neither committed nor attempted to commit the offence of shooting a homing pigeon. R. v. Donnelly decides that this is the correct method. Using this approach Donnelly was not guilty for in the words of Turner J. what Donnelly intended to do was to do something which was not an offence.

12. The subjective method:

Alternatively this might be referred to as the "prospective" method, for it concentrates on what was initially in the mind of the actor. One takes the circumstances as the accused at the time of the attempt believed them to be. What he intended to do is defined by reference to those circumstances, whether or not they are congruent with the facts of the situation. Thus if he intends to shoot a bird that he believes to be a homing pigeon he intends to shoot a homing pigeon. If it is not in fact a homing pigeon he cannot be convicted of shooting one, but he may be convicted of attempting to do so for he "intended to shoot a homing pigeon" and "shooting a homing pigeon" is an offence. Approaching the question in this way Haslam J. held that Donnelly intended to commit the crime of receiving and could be convicted of the attempt although if he had actually obtained possession of the goods when he presented the ticket he could not have been convicted as a receiver.

13. North P. in Donnelly cited at length from R. v. Austin (1905) 24 N.Z.L.R. 983, C.A. He distinguished that case as one of factual impossibility whereas Donnelly was one of legal impossibility. But the Court of Appeal in Austin used the subjective method and not the objective method which was adopted by the majority in Donnelly. Austin's conviction for an attempt was

upheld. To determine whether he intended to commit an offence the Court enquired whether he would have committed an offence if the circumstances had been as he supposed them to be, i.e. if the substance supplied (which was innocuous) had been noxious. If the decision in Donnelly is right Austin should have been acquitted unless the cases are to be distinguished on the ground discussed in the next paragraph.

14. Austin's case was distinguished as being one of "factual impossibility" or "supervening physical impossibility". Reference was made to the concluding part of s.72(1): "whether in the circumstances it was possible to commit the offence or not". These words were construed as meaning "whether in the circumstances it was possible in fact to commit the offence or not". Haslam J., on the other hand, held that the concluding phrase of s.72(1) made irrelevant "what may be described as an objective impossibility to commit the offence intended", adding that these considerations must apply in every instance, whether or not legal consequences also arise from the factual impossibility.

15. Under s.200(1) it is an offence to administer poison with intent to cause grievous bodily harm. A person who administers some harmless substance believing it to be poison does not commit the offence, but the reason is not that the means used was ineffectual to achieve his purpose. The reason is simply that the section specifies the administration of poison. Is it not a legal impossibility to commit this offence with something other than poison? According to Donnelly, Austin's case, which is directly analogous to the example given, was a "clear example of a factual impossibility" in which there could be a conviction for an attempt.

16. If the conduct of the accused is to be assessed subjectively the thing attempted must have been such that on the facts as he assumed them to be it would have been an offence. "Factual impossibility" would

be irrelevant, as the final words of s.72(1) affirm, but "legal impossibility" as referred to in Donnelly's case could not conceivably arise. Equally, however, if the conduct of the accused is to be viewed objectively in accordance with the approach which the majority in Donnelly's case held to be the right one, the accused must have attempted to do something which, in the circumstances actually existing, would have been an offence. This could never include "an offence that is legally impossible". Consequently there is no scope, on either view, for regarding the concluding words of s.72(1) as applicable to anything other than factual impossibility.

17. It remains extremely difficult to see how s.72(1) so construed is to be applied consistently with the decision of North P. and Turner J. on liability for attempts. Turner J. gave as an example of an attempt within the meaning of s.72 the case of a man who walked into a room intending to steal a specific diamond ring which had, however, been taken to a bank for safe custody. On the learned Judge's general approach to the problem we are first to ascertain what was actually done or attempted, and if this was not or would not have been an offence, no criminal attempt has been committed. As the ring was not there to be taken there could be no theft of the ring. Consequently, on the objective approach, there could be no attempted theft of the ring. But Turner J. says there would be, attributing this result to the concluding words of s.72(1). How are these views to be reconciled? To make possible a conviction for the attempted theft of the ring one must go beyond the facts which actually existed and take into account the mistaken belief of the accused that the ring was there. This is a fundamental departure from the principle that liability depends on an objective and not a subjective view of the facts. If we can take account of his mistaken belief that there was a ring in the room why may we not take account of the fact that Donnelly thought there were stolen goods at the railway station to be received? The judges refer to the distinction between factual and legal impossibility, but if the absence of the ring brought about a factual impossibility

why did not the absence of stolen goods bring about a factual impossibility? If one can be convicted of attempted theft although the intended subject of the crime was not there to be taken why can one not be convicted of attempted receiving when the intended subject (stolen property) was not there to be received? Apparently one could be convicted of attempting to steal a will which the testator had destroyed the day before. Is not the destruction of the will exactly comparable with the restoration of the suitcase to its owner in Donnelly's case in the sense that the intended subject-matter of the crime has thereby ceased to exist?

PART III

SUBJECTIVE AND OBJECTIVE APPROACHES COMPARED

18. Putting aside the difficulties mentioned in para.17 it is time to compare, on their merits, the subjective and objective approaches which have been described. Part III of this Report presents what has been said or might be said on either side. Reference is made to some general principles of liability and to some of the consequences of adopting one approach rather than the other. Argument and counter-argument are presented together.

19A. Advocates of the subjective approach emphasize the subjective nature of "intention" and "attempt" as these words are generally used and the subjective elements connoted by "intent", "purpose" and "object" which are used in s.72(1). The overt conduct in a criminal attempt must go beyond mere preparation but may in itself occasion no harm at all. The crux of the matter is that there is a criminal purpose and the risk of future harm. We are not concerned with the harm that someone caused in trying but with the harm he was trying to cause. The criminal process focuses on the character and attitudes of the offender as disclosed by evidence of his actions and his intentions. His conduct must be evaluated in

the light of what was in his mind. Facts unknown to him are in this context irrelevant. The question whether an attempt to commit a crime has been made is determinable solely by the state of the actor's mind and his conduct in the attempted consummation of his design.

19B. In the cases which we refer to as instances of "legal impossibility" there is no present harm and no risk of future harm. What harm is caused when a man receives, or attempts to receive, goods that are not stolen or takes his own umbrella? If there is no actus reus in the transaction actually completed no prescribed event has occurred. If in the circumstances no harm has been or could be done the fact that the accused acted with an evil intention is insufficient to warrant the use of criminal sanctions.

20A. The history of the criminal law discloses an increasing recognition that the subjective assessment is the only proper one in the field of criminal responsibility. The introduction of defences based on mistake of fact and the like implies the rejection of the notion that liability should depend on what happened irrespective of what was intended. Through the definitions of particular crimes or through the pervading doctrine of mens rea a person avoids liability where, on the facts as he believed them to be, his conduct would have been lawful. The subjective approach is the right one if the criminal law is to be other than crude and primitive.

20B. The exonerating effect of ignorance and mistake is acknowledged. But what is being proposed is that mistake should have an incriminating effect. The accused is to be judged in the light of the facts as he mistakenly believed them to be where the result is to make him guilty although no forbidden act has been performed. It does not follow from the rule that

mistake may extinguish criminal liability that it should create it. The use of a subjective approach to exculpate may be regarded as proper without endorsing the use of that approach where it will have the opposite effect.

21A. A man who intended to break the law but is acquitted is not discouraged from future attempts to break the law. This time, by a lucky chance, his criminal intention did not materialise in a crime. Next time it might well do so.

21B. As no prohibited conduct has in fact occurred there is no clear necessity for imposing criminal liability. A repetition of what has just been done (which is not a crime) is not something that must be prevented, for it will be another lawful act. As he has not committed a crime on this occasion he ought not be punished for the purpose of preventing the possible commission of a crime in the future. The acquittal cannot be read as showing that he has a licence to break the law thereafter. Conceivably he might be encouraged by his acquittal to indulge in some enterprise in the future that <u>was</u> criminal in the false hope that he would be providentially extricated by some fortuitous circumstances, but this is too flimsy a foundation on which to base the law.

22A. A person who attempts to commit an offence but fortuitously fails to do so (as in <u>Donnelly</u>'s case) stands in need of punishment or correction or treatment because he has shown an intention to defy the law. He has shown himself to be a dangerous person who is prepared to break the law when it suits him. To acquit him on a charge of attempt is not wise social policy.

22B. (The reply is usually expressed with eloquence and fervour, although this does not assure its validity.) "We will concern ourselves with the prevention of future anti-social conduct only when we can anchor it to some specific offence already committed. We will not permit detention on the ground of dangerousness where this is assessed in any other way. It is fundamental to the preservation of liberty under the rule of law that persons who have committed no offence shall not be placed under restraint through criminal procedure on some assessment of the likelihood of their offending in future. It might possibly be of benefit to society that a number of persons who have not been convicted of an offence should be subjected to compulsory measures to improve them, but any movement in that direction will be strenuously resisted."

23A. Guilt or innocence should not depend on chance circumstances unrelated to the knowledge and intentions of the accused. On the objective approach liability is made to depend on fortuitous events in a way that gravely reflects on the system of criminal justice.

23B. To accept this criticism as valid and to act upon it would involve a revolutionary change in the entire criminal law. At almost every point we take account of the actual results of behaviour and distinguish offences accordingly. It is hard to credit that the abandonment of this practice is feasible at present. It would mean that attempts should be punished as severely as completed crimes; that negligence should be punished having regard exclusively to the possible, not the actual, outcome; that no distinction should be drawn between murdering by poisoning and administering a glass of milk with intent to kill. There is a basic difference between law and ethics. The criminal law is not concerned with moral fault

per se but with fault that occasions or is likely to occasion harm. Moreover, a change which departs so radically from the customary judgment of behaviour might have the result of undermining the criminal law through loss of the support which is needed if it is to be an effective instrument of control. In cases such as Donnelly's a conviction for attempt might, it is true, accord better with public opinion than his acquittal; but if the principle is sound it must apply equally in other cases where this is most unlikely to be the case, such as stealing one's own umbrella. It may also be suggested that the elimination of the element of chance where it operates to increase criminal liability, as in manslaughter, is not the same as eliminating the effect of chance where, as here, it operates to exempt from criminal liability. This occasions no comparable injustice.

24A. Proof that someone intended to commit a crime and prepared to commit it does not suffice for a conviction. But when in addition it is proved that the accused did an act for the purpose of accomplishing his object and that the act was sufficiently proximate to the consummated offence there is ample to warrant a conviction for an attempt. Both the actus reus (of attempt) and mens rea have been proved. To convict on this evidence is not to confuse the ideas of sin and crime nor to regard moral blameworthiness as sufficient in itself for criminal liability.

24B. It is an essential step in that argument that the accused intended to commit a crime. But if what he attempted to do would not have been a crime even if he had done all he proposed to do a conviction for an attempt really amounts to a conviction based on his evil intention. What he did or attempted to do was not a crime, but he thought it was. In other words "he is to be convicted for his sinful thoughts, where all

his actions, without those thoughts, would leave him guiltless in the eyes of the law" (Turner J.)

25A. That liability for attempts should be based on the facts as the accused believed them to be may be supported by reference to existing statutory provisions. Under s.186 of the Crimes Act, for example, a person commits an offence if he supplies any drug believing that it is intended to be unlawfully used to procure a miscarriage. If the person supplying the drug was mistaken in believing that the drug was intended to be so used he could still be convicted of the offence. Furthermore there are very many offences in which it must be proved that an act was done with a certain intent on the part of the person doing the act. The offender may be completely mistaken as to the likely effect of his act, and the results may be quite different from those that were likely or intended. But these mistakes afford no defence to the charge. He is judged, as he should be, from the subjective point of view. The question is: what in point of fact did he intend?

25B. The existence of s.186 in no way supports the subjective approach to criminal attempts in general. Assuming that the objective approach were the correct one the provisions of s.186 could readily be accounted for. The legislature, regarding criminal abortion as a notorious evil, has prohibited preparatory acts that would not have fallen within s.72 and has provided the same maximum penalty as for the completed offence. It will be observed that cases where the definition of an offence includes the word "believing" are rare. No doubt this may be because the legislature assumes that, generally speaking cases of mistake will be adequately covered by s.72, but it is just as likely that the legislature did not deem it necessary to impose any criminal liability at all where no actual harm was done. As regards "injuring with intent" and similar offences, this appeal to the law as it is evaporates on examination. If a wholly subjective

approach had been adopted the offence committed by a person who meant to cause bodily injury known to be likely to cause death would be the same whether in the result someone was killed or was grievously injured but survived or suffered minor bodily harm or no one was hurt at all. The general scheme of offences in the Crimes Act is simply not based on a consistently subjective approach to the question of criminal liability.

26A. One cannot expect that every offence will be so defined as to cover expressly the case where the accused mistakenly believes he is bringing about the prohibited situation. In prohibiting theft and saying no more the legislature does not impliedly declare that no criminal attempt is committed where a person believes he is committing theft. Especially in the light of the final phrase in s.72(1) it is possible, and desirable, to construe this provision as applying in all cases in which the accused mistakenly believes he is bringing about a prohibited situation.

26B. As s.186 shows, an offence can readily be defined by reference to the facts as the accused believes them to be. Where this has not been done the proper inference is that the legislature does not deem it necessary to punish where moral obliquity is not accompanied by conduct causing actual or potential harm. To apply s.72 in the manner proposed is, moreover, illogical. If liability *should* depend on the circumstances as the accused believes them to be, and the transaction has been completed, he should be guilty of the full offence and not merely of an attempt. If a motorist drives at 50 mph in a 55 mph area believing it to be a 30 mph area, and if his liability should depend on what he believed the situation to be, he should be convicted of exceeding the 30 mph limit. Why should he be convicted only of attempting to do so?

27. Reviewing the arguments which have been summarised in this part of the Committee's report the majority are of opinion that the case for legislative amendment is inconclusive. The Committee therefore does not submit any proposal for the amendment of s.72 of the Crimes Act 1961 in respect of the frustration of criminal attempts by impossibility.

PART IV

MISTAKE OF LAW

28. The subjective view leads to unsatisfactory results where the mistake was one of law. If a person believes he is offending against a prohibition which does not exist, with what offence is he to be charged? What penalty may be imposed? The view is generally taken that the legal quality of an act is not affected by a mistaken belief that it is illegal, and that there can be no conviction for an attempt to commit a non-existent crime. (For an argument to the contrary, which the Committee finds unconvincing, see Brett, An Enquiry into Criminal Guilt (1963), 128.) When s.72 speaks of an intent to commit an offence this presumably means some actually existing offence. An alteration of the law in this respect would seem to us to be impracticable and inexpedient. A mistake of law, meaning a mistaken belief that a certain offence exists in the criminal law, may be the only true case of "legal impossibility". It gives rise to no criminal liability. Even the advocates of the subjective approach concede (so far as our reading goes) that here no change is warranted. None is recommended by the Committee.

PART V

ATTEMPTED RECEIVING

29. Although the Committee does not recommend any change in the general law of attempts it does recommend a change in the law as to attempted receiving.

30. In King (1938) 2 All E.R. 662 a fur coat had been stolen by Burns. The police went to his flat. He admitted the coat was stolen and produced a parcel from a wardrobe. While a policeman was in the act of examining the contents King rang Burns, who said "Come along as arranged". The police concealed themselves until King had arrived and the coat had been handed to him by Burns. The question whether he had committed the offence of receiving or of attempted receiving depended on whether the actions of the policeman when examining the parcel constituted taking possession of it. By an interpretation which most commentators consider strained the Court of Criminal Appeal held that although in a very few moments it would have been reduced into the possession of the police it had not in fact been in their possession when King received it.

31. King's appeal against conviction was dismissed, but in many other reported cases it had been found (as it was in Donnelly's case) that possession has been taken by the police or resumed by the owner personally, with the consequence that the accused has been acquitted.

32. The law appears to the Committee to be unsatisfactory on two counts:

(i) It places unwarranted difficulties in the way of the detection of theft and receiving, and the apprehension and conviction of offenders. At the stage of investigation reached in King, for example, it introduces an element of absurdity when steps properly taken by

detectives in ascertaining the facts could so easily afford the accused a successful defence. It is against the public interest that would-be receivers should escape because of measures that are properly taken in the investigation of the theft or for the identification and apprehension of the receiver.

(ii) Since the case turns on the question whether property has been "restored to the owner" (s.261) regardless of what was known to the accused the outcome may depend on the resolution of difficult questions as to possession, the extent of the authority of agents, the relationship between the owner and the police, and similar matters, which have no real connection with the accused and introduce complications and refinements which would be better avoided. For instance, the question whether there has been an attempted receiving of stolen goods recovered by the police may turn on the question whether the police took possession with the owner's authority, and this in turn may depend on whether the owner knew his property had been stolen and reported the matter to the police. If this is so it is plain, in our opinion, that the existing law on the subject of receiving should be amended.

33. We recommend that ss.258 to 261 be so amended that every one who receives anything that he believes to have been obtained by crime commits the offence of receiving unless when he receives it he believes that it has been restored to its owner.

For the Committee

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Chairman

15 December 1972

MEMBERS

Mr R.C. Savage Q.C. (Chairman)
Associate Professor B.J. Brown
Professor I.D. Campbell
Mr W.V. Gazley
Inspector R.I. McLennan
Mr P.G.S. Penlington
Mr K.L. Sandford
Mr P.B. Temm Q.C.
Mr D.A.S. Ward C.M.G.
Ms P.M. Webb
Mr C. Anastasiou (Secretary to 15 November 1972)
Mr J.C. Pike (Secretary from 20 November 1972)