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Author	Gill, Brian
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THE CRIME OF FRAUD: A COMPARATIVE STUDY

Brian Gill, M.A., LL.B., Advocate.

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University of Edinburgh

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Crim. L.R.	Criminal Law Review
C.L.P.	Current Legal Problems
Harv. L.R.	Harvard Law Review
J.L.S.	Journal of the Law Society of Scotland
LQR	Law Quarterly Review
MLR	Modern Law Review
SALJ	South African Law Journal
SLT	Scots Law Times
T.H.R.-H.R.	Tydskrif vir Hedendaagse Romeins-Hollandse Reg.

INTRODUCTION AND SUMMARY

This thesis contains an examination of the development in Scots law of the common law crime of fraud in comparison with the development of the crime of fraud in the law of South Africa. In contrast with the Anglo-American jurisdictions where the law has traditionally consisted of statutory offences such as false pretences and deception, the Scottish and South African systems have developed a general crime of fraud applicable to a wide range of cases involving deception. In both systems the crime of fraud was closely connected in its early stages with a series of specific offences of falsehood in a manner strongly suggestive of the influence of the corresponding Roman law.

The advantage of flexibility offered by such a crime is however balanced by the corresponding uncertainty as to the range of protected interests relevant to the crime. The latter question has remained a matter of acute controversy in modern times in both systems. An important consequence of the flexibility of approach made possible by the general conception of fraud has been that in both systems the development of the crime has not been impaired by the creation of numerous ad hoc statutory offences of misrepresentation under, for example, the Trade Descriptions Act 1968 or, in South Africa, the Insolvency Act 1934. In each system, the statutory offences have tended to supplement the ambit of
/liability

liability of the common law crime rather than vice versa.

The distinction between fraud and theft has been one of recurring difficulty in both systems and in each the influence of English doctrines associated with larceny and false pretences has been particularly strong. In Scots law, the original conception of theft, which limited the crime to cases where the goods were obtained by violence or stealth rather than by deception, has been greatly modified, not least because of English doctrines imported into the law of contract. In South Africa, a similar modification has resulted from the importation of the crime of theft by false pretences, with its obvious origins in the English larceny legislation. Even today, its proper place in the South African criminal law has never been clearly worked out.

The examination of modern statutory offences of fraudulence is outwith the scope of this thesis, although reference is made to the modern English offences in the context of mens rea by way of contrast with the development of the theory of the mens rea in the two common law systems.

The scheme of the thesis is as follows:

In Part I, the historical development of fraud in relation to the early offences of falsehood is traced in the laws of Scotland and South Africa with reference to the Roman law which, as modified by the Roman-Dutch /writers

writers, was at most an indirect influence on the modern South African theory and, in Scots law, scarcely an influence at all. The active development of the definition of the crime in the nineteenth century Scots law and in the pre-Union South African case law is then described.

In Part II, the elements of the crime are analysed under the headings of the deception, the mental element, causation, and the result and in connection with the latter element the modern case law is discussed by way of illustrating the difficulties of defining satisfactory limits to the range of results relevant to the crime. The further special problem of the potential prejudice theory of the modern South African crime is also discussed. In each chapter in this Part, comparative examples are drawn from the corresponding statutory offences in English and other jurisdictions.

In Part III, the distinction between theft and fraud is dealt with in relation to the transfer of title in cases involving deception. The distinction is considered historically and the influence of English doctrines in the offences of larceny and obtaining on the development of modern Scots law is then discussed. This Part concludes with a survey of the distinction between theft and fraud in South African law and an analysis of the hybrid offence of theft by false pretences, particularly in relation to problems of the transfer of title.

PART ONE

Historical Survey

CHAPTER I

The early Scottish law of fraudulent offences

A. FALSEHOOD

The early criminal law of Scotland restricted the punishment of fraudulent acts to those specific offences which fell within the generic description of falset or falsehood. The Regiam Maiestatem describes falsehood as follows: "Generale crimen falsi plura sub se continet crimina specialia, quemadmodum de falsis chartis, de falsa moneta, de falsis mensuris et falsis ponderibus, et similia quae talem continent falsitatem super qua debet aliquis accusari et convictus condemnari".¹

Balfour's paraphrase of this passage refers to the "divers and sundrie crimes"² of falset and includes the further cases of false instruments and writs,³ from which there developed in later law the specific crime of "forgery".⁴ Falsehood also included the offences of perjury, falsehoods by notaries,⁵ false depositions,⁶ the clipping or adulteration of current coin,⁷ and the adulteration of wine.⁸

The foregoing features of falsehood are typical of an early crime. In the primitive stages of the Scottish criminal law, as in Roman law and English law, only the more obtuse forms of dishonesty were repressed and then only where they affected the public at large.⁹ In the Scottish offences of falsehood it was the essentially /public

public nature of the misrepresentation and not any specific harm to an individual, which formed the basis of liability.¹⁰ These offences fell within two broad categories; those which involved practical techniques of fabrication, such as counterfeiting and forgery, and those which involved deception of a public nature such as perjury, the dishonest exploitation by a notary of his public office, and suppositio partus.¹¹

Generally speaking, such falsehoods attacked a publicly accepted standard of accuracy and might not be guarded against by ordinary caution.¹² The Act 1621 c.22, for example, was passed for the purpose of "eschewing the danger wherein many of His Majestie's Lieges stand by counterfeiting and falsifying of Evidents". It was probably for these reasons that counterfeiting was brought within the treason laws.¹³ For these reasons, too, it was sufficient for liability that the falsehood was "uttered", since the interests of the public were thereby put at risk. Under the Act 1621 c.22 even the uttering of a false writ was held to be unnecessary¹⁴ and this principle survived in the Scots law of foregery until the eighteenth century.¹⁵ Liability in falsehood was therefore predicated upon the potentially prejudicial nature of the forbidden act, and the occurrence of actual prejudice or harm to any particular individual was not required.

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In these respects the Scottish offences of falsehood closely resembled the crimina falsi of the Roman law, those specific acts of public dishonesty which were made criminal in the Republic under the Lex Cornelia de falsis, for example counterfeiting,¹⁶ bribery in connection with litigation¹⁷ and forgery of certain documents such as wills.¹⁸ These, like the other iudicia publica under the leges Corneliae were earlier in origin than the generalised crime of fraud which under the name stellionatus developed during the Empire, and was tried extra ordinem instead of by the quaestiones.¹⁹

The early Scots law, at least as it was expounded by the writers, maintained a similar distinction between falsehood and a general crime of fraud or "stellionate". The main sources on this question, the writings of Mackenzie, Forbes and Bayne, are significant in two respects: firstly, in the attempt by those writers to generalise a single crime of falsehood from the numerous statutory offences already referred to, and secondly, in their attempt to introduce the term stellionate from the Roman law, with little authority for it in contemporary practice, to describe a general crime of fraud. In his description of falsehood, Mackenzie incorporates a considerable amount of civilian authority,²⁰ although his classification of the crime according to its methods of commission is more closely related to /Scottish

Scottish practice. The question of the prejudice element in falsehood is scarcely discussed, except in connection with forgery where Mackenzie is in some doubt as to whether uttering is necessary.²¹

Forbes defines falsehood as "a palming and imposing upon the world some counterfeit instead of a reality; or a deceitful suppression, or imitation of the truth, to the prejudice of another".²² Bayne adopts the civilian definition of "a fraudulent imitation or suppression of truth done to the hurt and prejudice of another".²³

Forbes does not deal with falsehood in relation to the question of the harm or prejudice, if any, which may result, but Bayne states that the crime requires "damage either done to another, or which will probably be the consequence of the falsehood, with this difference as to the punishment of the crime, that in the last case it will be mitigated".²⁴ In order to meet his requirement that the offence must be at least potentially prejudicial, Bayne considers uttering to be necessary in forgery.²⁵ In these statements lies the origin of the modern Scottish principle, established in the nineteenth century, that liability for forgery was complete on the occurrence of the uttering.²⁶

B. STELLIONATE

Along with these uncertain attempts to establish
/general

general principles of liability for falsehood, the same writers attempted to establish a correspondingly general liability for fraud in relation to private acts of dishonesty affecting individuals. It is quite clear that before Mackenzie's time there was no such general crime of fraud in Scots law. There were, however, a number of specific statutory offences, not constituting falsehoods, in respect of private acts of dishonesty. It was the use in one of these statutes of the term stellionatus, with its obvious reference to the Roman law,²⁷ which seems to have provided a basis for the description of a crime of fraud known, among the writers at least, as stellionate.

The only statutory use of the word stellionatus is to be found in the Act 1592 c.60 which declared the granting of double assignations, sales or mortgages to be "crimen stellionatus of the law". Balfour²⁸ and Kames²⁹ discuss the crime of stellionate in relation to the offences under this Act. Other writers, however, considered that the offences against the Act 1540 c.23³⁰ (double alienations of lands, etc.) and the Bankruptcy Act 1696 c.5 (fraudulent bankruptcy)³¹ constituted stellionate, and in this respect they seem to have applied a definitional approach to the crime based upon the Roman pattern.

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The Roman crime of stellionatus comprehended cases of private trickery and swindling. It was a residual crime³² which supplemented but did not include the crimina falsi, and since it was not a legitimum crimen, it carried no fixed penalty.³³ The function of the crime was to extend criminal liability to fraudulent acts which in earlier law were actionable only civilly. As a result of the development of this general crime of fraud a charge of stellionatus, according to Ulpian, could be brought in respect of any fraudulent act giving rise in the private law to the actio de dolo.³⁴ Among the examples of it in the Digest are the pledging of property already encumbered by lien³⁵ and the obtaining of credit on a pretence of wealth.

The Act 1592 c.60 was taken up by Mackenzie as the basis of a general common law crime which protected private economic interests against fraudulence. Mackenzie in describing "stellionate"³⁶ draws heavily on Roman authority. Significantly, however, he cites no authority in Scottish practice. He says of stellionate that "to infer this crime, it is requisite that there be a cheat or fraud used, and that the cheat want another name, for there are frauds which cannot be comprehended under this title, as falsifying writs, counterfeiting seals". He takes the use of the term stellionatus in the Act of 1592 to indicate "that our
/law

law presupposes the civil law to be our law as to the crime, for it does not determine what is to be accounted stellionate, or appoint a particular punishment for stellionate, but only clears declaratorily, that the disposing duties or rents of lands to several persons, shall be accounted stellionatus; and therefore, whatever was punished as stellionate by the civil law, may be punished as such by ours, not only a pari, or by extension, but by approbation, the Roman law having by the allowance of that Act become ours".³⁷ In the absence, however, of further authority, it seems unlikely that the Act of 1592 had or was intended to have the wider effects ascribed to it by Mackenzie.

The writers after Mackenzie adopted his treatment of stellionate with little alteration. Forbes describes stellionate as "a general word signifying any crime committed by fraud wanting a more particular name".³⁸ In addition to the examples taken from the Digest, he mentions the case of one who obtains money from a messenger sent to pay a debt by pretending to be the creditor.³⁹

Bayne, like Mackenzie, considered that all of the acts constituting stellionatus in the Roman law were also punishable as such in Scotland, by the express /authority

authority of the Act of 1592. He defines the crime as comprehending "those facts which though criminally fraudulent, yet whose essential characters are different from those which have received a fixed and certain name".⁴⁰

Erskine too recognised a general common law crime of stellionate defining it as "a term used in the Roman law to denote all such crimes where fraud or craft is an ingredient, as have no special name to distinguish them by. It is chiefly applied, both by the Roman law and that of Scotland, to conveyances of the same right granted by the proprietor to different disponees".⁴¹

There is, however, a case noted in 1710 in the Justiciary Records of Argyll where a charge of "stellionate and fraudulent and sinister practices and couzenage" was brought in respect of an allegation that a landlord had tricked "ane poor ignorant and unliterat person" to hand over to him his receipt for rent in order to obtain double payment of it.⁴²

Despite these general statements of the crime, it seems reasonably clear that there is only slender evidence to suggest that stellionate was ever established eo nomine as a crime of dishonesty in Scottish practice. Hume, despite his extensive survey of the Justiciary Records, makes no mention of it.

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In contrast, however, there is ample evidence to prove that as early as 1722 and as late as 1842, the term was in common use in criminal practice in indictments libelling certain unusual forms of assault to severe injury.⁴³

There was however obvious uncertainty among the Scottish writers as to the true distinction between falsehood and stellionate. Mackenzie, for example, considered it falsehood to soak tobacco to increase its weight.⁴⁴ On this point he followed the authority of Carpzovius, who included stellionatus within a general crime of falsum.⁴⁵ Matthaëus on the other hand, in distinguishing falsum from stellionatus, considered it to be stellionatus to mix dust with pepper, or sand with meal, or fat with butter, or to store spices underground in order to increase their weight by humidity.⁴⁶

Forbes was probably wrong in his view that falsehood was committed by "sturdy beggars who counterfeit lameness to procure charity; or those who feign themselves to be dumb to draw money from people, or soldiers who, upon a feigned pretext of sickness have got themselves listed, and lurk as invalids in a hospital".⁴⁷

None of these examples falls within any of the recognised categories of falsehood and on civilian authority they clearly constitute stellionatus.

Furthermore, the Scottish writers who preceded Hume gave little attention to the result element in cases of fraud

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and, probably because of the restricted definition of theft in that period⁴⁸ which confined the crime to cases of forcible or clandestine methods of appropriation,⁴⁹ were free of the problems of title which complicated the development of fraud in later law.

FOOTNOTES FOR CHAPTER I

1. R.M. IV 13.1
2. Practicks, 519
3. cf. 1551 c.17 (notaries) and 1621 c.22 (forgery)
4. The term was first used in Scottish legislation in the Act 1609 c.17 (forgery of testimonials).
5. 1540 c.15
6. 1555 c.22
7. 1696 c.45, which ratified numerous prior statutes. Cf. also Brown and Macnab (1793) M 4901
8. 1551 c.1, 1581 c.33
9. Hall, Theft, Law and Society, Book 1; Kunkel, Ch.4
10. Mackenzie 27, 3: Kames, H.L.T., 51
11. Mackenzie 27, 11; Forbes, 2, 161-4; Burnett, 164
12. Mackenzie 27, 3. This was also the basis of the ancient English offence of "cheating" which required methods injurious to the public generally, such as the use of false weights and measures (cf. Stephen, History iii, 161).
13. Forbes 2, 57; Ersk Inst., 4.4,22
14. Dempster, (1620) Mackenzie 27, 3
15. Hume i, 148; Macdonald 1st ed., 89. In Roman-Dutch practice forgery and uttering were separate offences. (cf. R. v. Reynolds 1924 TPD 607; R. v. Hymans, 1927 AD 35).
16. D.48.10.9
17. D.48.10.1.2
- /18.

18. D.48.10.2
19. D.47.11.3, 47.20.3; Kunkel, 63 - 71. Cf. Jones, Criminal Courts of the Roman Republic, 107-8. Von Bar, History of Continental Criminal Law, pp.39-41, 303. Burchell and Hunt, Ch.1. Cf. also Van den Heever, J.P. in R. v. Frankfort Motors 1946 OPD 255.; Ver Loren van Themaat, 148 ff.
20. Mackenzie 27. He starts from the civilian definition of falsum as "veritatis imitatio vel suppressio in praeiudicium alterius, (ibid.) Cp. Matthaeus, De Crim., 48.7.1., de falso.
21. ibid. 27, 3
22. 2, 161
23. Inst. 142
24. ibid., 142 cf. Bell's Dictionary, s.v. Falsehood
25. ibid., 146-7
26. Michael Hinchy (1864) 4 Irv. 561, 565-6
27. D.47.20., de Stellionatu
28. Practicks, 166
29. Equity, II, 40-1
30. Mackenzie 28,2; Forbes, 2, 169-70; Bayne, 155
31. Ersk.Inst. 4.4.79
32. Davidson, Problems, 2, 163; D.47.20.31
33. D.47.20.3.2
34. D.47.20.3.1
35. D.47.20.3.1
36. Mackenzie, 28

37. ibid., 28.2
38. Forbes 2,169
39. ibid, 2.170. This example was based on the case of James Clark (1634), the facts of which, according to Mackenzie (28.2), constituted stellionate.
40. Bayne, 155-6
41. Inst. IV 4.79; cf. IV, 4,58. In his Princs. 1st ed. (1754) 4.4.44 Erskine describes stellionate as an existing crime in terms of the same definition. See however the authorities quoted in note 43 infra.
42. William Campbell (1710) Just.Rec.Argyll, Stair Soc.Vol.25, p.246
43. Hume i.328; i,237; Alison, i.196; Macdonald 1st ed., 186 and cases cited. It is surprising to find that in Sir John Rankine's (21st) edition of Erskine's Principles (1911) (4.4,41) the term is discussed solely in connection with fraud.
44. Mackenzie 27,10
45. cf. infra, Ch.2
46. De Crim. 48.7.15
47. Forbes 2,163
48. e.g. Clark (1634); Mackenzie 28,2
49. Cf. Chap. 11 infra.

CHAPTER II

The development of fraud in Roman-Dutch and
South African law

A. THE ROMAN-DUTCH WRITERS

In view of the adoption by the early Scottish writers of a Roman approach to crimes of dishonesty, and their enthusiastic use of Roman terminology, it is useful at this stage to describe the variety of approach taken by the Roman-Dutch writers; and to trace the rapidity of development of the modern South African law on the matter by way of contrast with the more gradual development of the Scots.

There was a divergence of approach among the Roman-Dutch writers¹ between those who strictly adhered to the Roman distinction between the crimina falsi and stellionatus and those who described a unified crime of falsum or falsity which comprehended the general offence of swindling as well as the specific crimina falsi. There was also some uncertainty among the latter writers as to whether actual prejudice was required in falsum.²

Matthaeus³ and Voet⁴ are closest in their treatment to the outline of the Roman law, both dealing with falsum and stellionatus in separate titles. Matthaeus requires actual loss as an element of the offence of stellionatus but not of falsum.⁵ Voet, although adhering to the
/Roman

Roman distinction,⁶ mentions one or two contemporary instances of swindling which, in a departure from the Roman theory, are statutorily denominated as falsum, such as certain forms of switch-selling and adulteration of merchandise.⁷ Van Leeuwen⁸ also maintains the Roman distinction between falsum and stellionatus, noting the particular case of switch-selling given in Sande's Decisiones Frisicae⁹ as an example of stellionatus.¹⁰

On the other hand, the writings of Damhouder, the German jurist Carpzovius, Huber and van der Linden are to the effect of unifying the two crimes. Damhouder¹¹ discusses crimen falsi according to five methods of commission the first of which, falsitas per consensum, is clearly referable to stellionatus.¹² Carpzovius, although defining stellionatus¹³ separately from "crimen falsi",¹⁴ deals with the latter as a generalised crime and not a collection of specific statutory offences. According to Carpzovius, potential prejudice sufficed in falsum,¹⁵ but falsitas non nociva was not punishable.¹⁶ Huber does not mention stellionatus but includes minor frauds and tricks within the categories of falsum.¹⁷ Van der Linden¹⁸ states that the crime of falsity requires actual prejudice of a wide range of categories. He includes in falsity those acts which are classed under the general term bedriegerijen or cheating.

/Although

Although writers such as Matthaeus and Voet formally maintained the Roman distinction between the crimina falsi and stellionatus, there was sufficient modification of the Roman position in Roman-Dutch practice and in the statements of other writers to ensure that that distinction would be obscured.¹⁹

B. THE SOUTH AFRICAN CASE LAW

It became accepted at an early stage in the law of the Cape that the Roman distinction between falsehoods and fraud no longer applied.²⁰ Although in later years the Roman conception of falsehood was recognised and on occasions adopted, notably in the Transvaal case of R. v. Cowan & Davies,²¹ where there was a charge of bribery of witnesses, fraud became completely assimilated with falsum, so-called, and has remained so in the case law ever since.²² The reports indicate that from an early stage the terms fraud, falsum, crimen falsi,²³ falsitas,²⁴ falsiteit²⁵ and falsity²⁶ came to be used indiscriminately, and the assimilation of the two crimes was in due course completed by the Appellate Division in a series of decisions between 1924 and 1928.

The Appellate Division first considered the definition of fraud in R. v. Faulding²⁷ where they identified fraud with crimen falsi and stated, obiter, that a /potentially

potentially prejudicial consequence was sufficient to constitute fraud.²⁸ The matter was more fully considered in R. v. Jones & More²⁹ where, under reference to the Roman-Dutch writers, fraud was defined in terms of falsum as "a wilful perversion of the truth made with intent to defraud and to the prejudice of another".³⁰ In that case, however, it was held to be sufficient, where the deception failed to achieve its purpose, that the false representations were "calculated to prejudice" the victim, but that where the accused's object was carried out, actual prejudice was essential.³¹ At about this time in R. v. Seabe³² the court considered a charge of fraud where the facts of the case disclosed forgery. The court again identified the two offences as species of a generic crime of "crimen falsi".³³ In R. v. Hymans,³⁴ where the charge was forgery, the court accurately stated the theory of prejudice in falsum but misstated the historical position by describing forgery as "a special type of fraud".³⁵ Finally, in R. v. Davies³⁶ it was confirmed that fraud was a species of "crimen falsi", which was defined in that case as "a wilful perversion of the truth made with the intent to defraud and to the actual or potential prejudice of another".³⁷

C. THE PREJUDICE ELEMENT

The inconsistency of the theory expounded in the /foregoing

foregoing cases with the historical principles of the matter is fully explored by de Wet and Swanepoel.³⁸ But the main difficulties in the modern South African approach lie in the analytical problems created by the attempt to engraft a result crime such as fraud on to a generic conduct crime such as falsum.³⁹ The most notable consequences of this attempt have been the remarkable extension of the range of relevant consequences in fraud and the development of the theory that in fraud a potentially prejudicial consequence is sufficient to attract liability for the completed crime, with the associated problems which this theory causes in the law of attempts.⁴⁰

It may also be said that the South African courts, as the case law has developed, have become inaccurate even in their conception of falsum because, although it was a conduct crime, they have looked upon potential prejudice in some cases as if it were an element of the actus reus and therefore a matter requiring to be specified in the charge.⁴¹ The true position, however, in falsum, as in any conduct crime, is surely that the potentiality of the conduct to cause prejudice of one sort or another is the policy reason which determines that that conduct shall be held criminal; for example drunk driving, or the carrying of offensive weapons. This, it is submitted, is what the Roman-Dutch writers understood when they stated /that

that falsum of an innocuous nature was not punishable,⁴² and is probably what was meant by Innes C.J. in R. v. Hymans⁴³ where he suggested that forgery was to be taken as prejudicial per se and that it would be for the accused to plead the harmlessness of the forgery by way of defence. This approach is similar to that of Scots law where it has never been necessary to include averments of potential prejudice in the terms of the charge.

From the early forgery cases it became established in South Africa that the prejudice element need not be economic⁴⁴ and that it included such considerations as threats to public safety,⁴⁵ infringement of a variety of legal rights,⁴⁶ loss of reputation or loss of public office,⁴⁷ and exposure to risk of prosecution⁴⁸ or civil litigation.⁴⁹ The limitations put upon the prejudice element were directed not so much to the nature of the result as to the remoteness of it or the unlikelihood of its occurrence.⁵⁰ There was also a de minimis principle applied in some cases.⁵¹ From an early stage the theory of the matter was applied also to fraud⁵² and such results as the displeasure of the victim's superiors were considered to be relevant.⁵³ Various formulations of the prejudice element were attempted: for example, in R. v. Dhlamini⁵⁴ it was said that "(Prejudice) includes far more than pecuniary loss.

/It



It includes impairment of reputation or personal dignity. It extends to the risk of prosecution, however unfounded, as the result of acting on the forged document, and we have assumed that the term is wide enough to cover any substantial inconvenience which the perpetration of the forgery may cause".⁵⁵ The matter was summarised in Heyne,⁵⁶ a fraud case, where Schreiner J.A. described the prejudice element as involving "some risk of harm, which may not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed."⁵⁷

The result therefore of these decisions is to establish in modern South African law a crime of fraud which applies where the prejudice, if any, sustained by the victim, can be of virtually any kind.⁵⁸ The borrowing of the conceptions of prejudice historically associated with the crimina falsi have thus ensured that fraud in the modern South African law cannot satisfactorily be classified, as it usually is, as an offence against property.⁵⁹

From an analytical standpoint, however, the enduring consequence of the process of assimilation which created the composite crime of which fraud is really only a part, has been the theory that so-called "potential prejudice" is sufficient to create liability for the crime.⁶⁰

FOOTNOTES FOR CHAPTER II

1. On the Roman-Dutch writers, see generally Van Hamel, Inleiding tot de studie v. h. Nederlandsche Strafrecht, in the sections quoted in the Continental Legal History Series edition (1916) of Von Bar's History; cf. also Burchell and Hunt ch.1
2. The Roman law and the conflicting views of the commentators on these points are reviewed by Leyser, Sp.557, 615.
3. De Crim. 47.13; 48.7
4. Voet 47.20; 48.10.1
5. De Crim. 47.13.2.2; 48.7.7.6
6. Voet 47.22.1
7. ibid. 48.10.6
8. R.H.R., 4.33. 12-16; C.F., 5.6; 5.10.1
9. Dec.Frisc 5.9.8
10. R.H.R. 4.33.16
11. c.c. 109-112; 119-123
12. c.120
13. Carpz. 133,3
14. ibid. 93.15
15. ibid. 93.12
16. ibid. 42.61
17. H.R. 6.7
- /18.

18. Inst., 2.6.4
19. Cf. Hunt, 710-713; 742-744. De Wet and Swanepoel, 410f., 500f.; Van Themaat, 150f.
20. R. v. Castleden (1888) 6 S.C. 236 (Sale of property already pledged) R. v. Brandford, (1889) 7 S.C. 169 (fraud rather than falsum). Stellionatus is noted as a nomen iuris in R. v. Boden (1901) 21 SALJ 275 (fraudulent redemption of a pledge) and in Terrington v. Simpson 2 M 115 and R. v. Brandford (supra). See Anders and Ellson, Chapter 15.
21. 1903 TS 798
22. R. v. Firling (1904) 18 EDC 11; R. v. Jolosa 1903 TS 694. Hunt, 712, 734.
23. R. v. Herzfelder 1907 TH 244.
24. R. v. Sedat 1916 TPD 431; R. v. John 1943 (1) PH, H 67; Goddefroy v. R. 1945 NPD 451; R. v. Youngleson (1), 1948 (1) SA 819 (W); R. v. Moshesh, 1948 (1) SA 681 (O), R. v. Motsieloa 1957 (1) PH, H 50; R. v. Wege, 1959 (3) SA 269 (C).
25. Mafayi v. Stale (1890) 7 CLJ 263; R. v. Deetlefs 1953 (1) SA 418 (4D). Cf. Gardiner & Lansdown, 6th ed.; 1734-5.
26. Moolchund v. R. (1902) 23 N.L.R. 76; Akbar v. R. 1915 NPD 497.
27. 1924 AD 483.
28. ibid., 485.
29. 1926 AD 350.
30. ibid., 352.
- /31.

31. Cf. R. v. Wood 1927 AD 19. This view was later modified in R. v. Henkes 1941 AD 143.
32. 1927 AD 28
33. ibid., Wessels JA at 34
34. 1927 AD 35
35. ibid., 39-40 Cf. R. v. Reynolds, 1933 WLD 1,4
36. 1928 AD 165; cf. R. v. Kruse. 1946 AD 524, 532
37. Davies, supra, 170. Cf. also R. v. Heyne 1956 (3) SA 604 (AD), 622.
38. at 415f.
39. Cf. Van den Heever J. in R. v. Moshesh 1948 (1) SA 681 (O), 684-5.
40. Cf. infra, Chs. 9, 10
41. R. v. Armstrong 1917 TPD 145, 149-50; R. v. Adams 1948 (1) SA 1199 (N); R. v. Qumbu, 1952 (3) SA 390 (O)
42. e.g. U.C.Cons 148 - falsitas non nociva was not criminal; Carpz. 42.61; Boehmer, ad CCC, art. 112, 1 - nocivum, vel ad minimum optatum ac idoneum ad nocendum; Cf. R. v. Firling (1904) EDC 11, 14f.; R. v. Dhlamini, 1943 TPD 20; R. v. Kruger, 1950 (1) SA 591 (O)
43. 1927 AD 35, 38
44. R. v. Jolosa 1903 T.S. 694
45. R. v. Slater (1901) 18 SC 253
- /46.

46. R. v. Lin Yunn Chen 1908 TS 634; R. v. Armstrong 1917 TPD 145; R. v. McLean 1918 TPD 94, 97; R. v. de Beer 1940 TPD 268
47. R. v. Macatlane 1927 TPD 708; R. v. Seabe 1927 AD 28, 33
48. Naidoo v. R. 1920 NPD 117; R. v. Dhlamini 1943 TPD 20
49. Pretorius v. R. 1961 (2) PH, H 211
50. R. v. Firling (1904) EDC 11, 17; R. v. Seabe, (supra)
51. R. v. McLean, supra, at 98; R. v. Moshesh 1948 (1) SA 681 (O), 683
52. R. v. Jacobs (1903) 20 SC 82
53. R. v. Moshesh (supra)
54. 1943 TPD 20
55. ibid, 23
56. 1956 (3) SA 604 (AD)
57. ibid, 622. It was held, however, in R. v. Leballo 1954 (2) SA 657 (O) that a false accusation to the police that a named individual had committed theft which caused suspicion to fall on the individual and certain investigations to be carried out was not fraud. The ratio of the decision was that the Appellate Division had held the charge of calumnia, on similar facts, to be obsolete in R. v. Chipso, 1953 (4) SA 573 (AD).
58. Hunt, 73Of.
- /59.

59. cf. Hunt, Part 3

60. See infra, Ch.9; Hunt, 734., De Wet and Swanepoel dispute this principle on historical and theoretical grounds, 410f.

CHAPTER III

The development of fraud in modern Scots law

A. HUME, ALISON AND BURNETT

The distinction maintained by the early Scottish writers between a group of offences called falsehood and a general common law crime of fraud came to grief in Hume's discussion "Of Falsehood and Fraud".¹ Hume described the following categories of falsehood: forgery² written falsehoods,³ that is to say, false statements in authentic writs; and falsification or vitiation of writs, a miscellaneous group of lesser forgeries devised in order to avoid the death penalty - for example, the alteration of the sum in a bill of exchange, the insertion by the writer of a deed of a provision in his own favour - and sundry other written falsehoods, such as the antedating of deeds and the issue by public officials of false certificates. Hume also included in falsehood a crime of false conspiracy which he defined as "any sort of conspiracy or machination, directed against the fame, safety or state of another, and meant to be accomplished by the aid of subdalous and deceitful contrivances, to the disguise or suppression of the truth".⁴ The two examples of this cited by Hume involve the deception of innocent witnesses in order to cause a miscarriage of justice.⁵ The last category described by Hume is the false assumption of character or office, such as that of a clergyman or exciseman.⁶

Hume defines fraud as comprehending "those offences, of a private and patrimonial nature, which fall under the description of what is known in England by the name of Swindling; and are committed by some false assumption of name, character, commission or errand, for the purpose of obtaining goods or money, or other valuable thing, to the offender's profit".⁷ He includes in this category the case of Jack and Ewing,⁸ where weights were furtively switched within Revenue premises in order to avoid duty. He also includes schemes to defraud insurers,⁹ and, contrary to historical principle, the use of false weights and measures.¹⁰

By the end of the eighteenth century the historical distinction already referred to had become blurred. In George Smith the indictment was for "fraud and wilful imposition"¹¹ and in Nicholas Kirby it was for "fraudulent and wilful imposition and falsehood".¹² This obscuring of the proper historical distinction culminated in Burnett's definition of falsehood¹³ in which the two crimes of falsehood and fraud became completely assimilated. Alison, who deals with these offences under the heading of "Fraud and Swindling"¹⁴ does not use the term "Falsehood" at all, but instead recognises "forgery" as a separate offence.¹⁵

B. FRAUD IN 19th CENTURY PRACTICE

In the first half of the nineteenth century the case law followed the example of writers such as

/Hume

Hume and Alison in obscuring the historical signification of the term "falsehood", and various terms were adopted in Scots practice to describe private fraud, such as "swindling"¹⁶ and "falsehood, fraud and wilful imposition". It was inevitable that the latter description should give rise to uncertainty and for a considerable time it was not clear if it described three separate offences¹⁷ or one offence.¹⁸ There was a striking divergence between the theory of the early writers and the practice of the courts, and the historical principles of the crime of fraud were quickly lost sight of. Early in the century the term "falsehood" appears to have been used purely as a term of vituperation in indictments alleging dishonesty.¹⁹ Later, about 1836, the nomen iuris "falsehood, fraud and wilful imposition" was adopted. Two cases in which this style was used are McInnes and MacPherson,²⁰ where the accused obtained money on a pretence of being policemen, and McKinlay and McDonald²¹ where sheriff-officers acted while under suspension. In Robert Millar,²² a sheriff-officer executed a diligence while under suspension and received fees from the instructing law agent. He was charged with "falsehood, fraud and wilful imposition", and the indictment charged three consequences - the payment of fees to him by the agent, the imprisonment of the debtor and the ultimate loss sustained by the agent's clients. On the historical principles of the matter, /the

the accused was liable for falsehood on respect of his conduct in pretending to be an authorised sheriff officer, and the falsehood was aggravated by its consequence to the debtor. He was also liable for fraud in respect of his obtaining the fees from the agent. It would appear, however, that the charge in that case was intended to describe fraud rather than falsehood. This view derives some support from the case of John Smith²³ where a sheriff officer fabricated and uttered a false service copy of a summons and citation. He was charged with "falsehood, fraud and wilful imposition" in respect of his having obtained from the pursuer the expenses he said he had incurred, "as also falsehood", in respect of the fabrication and uttering of the copy summons, "as also falsehood and fraud" in respect of the false execution of his duty. It is difficult to assess what supposed distinction lay behind the latter form of charge. Soon after, in James Wilson²⁴ the same charge of "falsehood and fraud" was added, for no obvious reason, to a charge of "falsehood, fraud and wilful imposition" where the facts disclosed fraud but certainly not any of the offences of falsehood. Although it was recognised as late as 1844 that forgery was only a particular type of falsehood properly so-called,²⁵ it was decided in 1852 that the term "falsehood, fraud and wilful imposition" described one offence.²⁶ The inevitable result of this was that the true nature of falsehood was

/lost

lost sight of and after 1853 falsehood and forgery tended to be considered separately, contrary to the true principle of the matter.²⁷

The charge of falsehood, fraud and wilful imposition was regularly used in cases both of uttering and of fraud where money or property was obtained as a consequence,²⁸ and in certain cases 'the charge was breach of trust and embezzlement' as also falsehood and fraud.²⁹ Fraudulent bankruptcy charges were also combined with a general charge of "falsehood, fraud and wilful imposition",³⁰ but in one such case in 1837 the second charge was simply "fraud".³¹ That charge was held to be relevant, Lord Justice-Clerk Boyle observing that "Fraud, especially when practised by an insolvent person is a relevant charge" and adding that it was "not necessary that the fraud should eventually succeed".³² When the Crown tried unsuccessfully to establish attempt liability at this time the charge was one of "attempting to commit fraud".³³ That the term falsehood, fraud and wilful imposition referred to fraud and not to falsehood is clear from the statements made in Michael Hinchey,³⁴ and particularly from that of Lord Justice-Clerk Inglis that if the misrepresentations failed to achieve a result there was only "an attempt to commit fraud".³⁵ "Falsehood" however, was not used in indictments about this time where an uttering had not led to the obtaining of /property

property. In these cases the term "forgery"³⁶ was used. From a historical viewpoint, however, these were precisely the cases in which "falsehood" properly so-called was committed.

The confusion between falsehood and fraud was compounded by the practice of charging fraud in addition to uttering in cases where the use of a forgery resulted in loss to the victim.³⁷

By the middle of the nineteenth century the historical distinction between falsehood and stellionate or fraud had been irretrievably lost. In Taylor³⁸ in 1853 the accused sent a letter to the victim which purported to come from the victim's brother, asking her to send money to a post office to be collected. The victim sent the money but the accused did not call to collect it. The accused was charged with forgery and with "falsehood, fraud and wilful imposition". There was clearly liability for forgery, a form of falsehood, since a false writ had been made and uttered, and if it had been recognised as a case of falsehood it would have been unnecessary to consider the result element, since liability was complete as soon as the writ was uttered. But since a charge of fraud was brought, it was necessary for the Court to consider if there had been a sufficient result. It was held that it was not essential that the accused should have obtained the /money

money and that liability for fraud was complete as soon as the victim posted the money in response to the letter. This was probably only an attempted fraud,³⁹ but since there was at that time no liability for attempted fraud the Court took an extended view of the result element.

It will be apparent, therefore, that the terminology adopted by the Crown in the nineteenth century cases proceeded from a failure to understand the proper distinction between falsehood and fraud and the nature and elements of each of those crimes. In view of the confusion of terminology and the conflicting judicial observations on the matter, it is scarcely surprising that later writers, particularly Macdonald, were led to make futile classifications in their treatment of the crimes. The confusion has persisted into modern law as is illustrated by the curious substitution of the term "falsehood, fraud or wilful imposition" by section 52 and Sch. 5 of the Criminal Justice (Scotland) Act 1963 for the term "falsehood, fraud and wilful imposition" in the jurisdiction provisions of section 4 of the Summary Jurisdiction (Scotland) Act 1954. Historically, however, the confusion arose primarily in connection with forgery and written falsehoods.

In 1859 in Simon Fraser⁴⁰ the Full Bench decided by a majority that it was "falsehood" but not "forgery" to exhibit a genuine signature to a writ which falsely recorded an execution of citation. In that case the /accused

accused, a sheriff officer, had obtained the signature of another with the word "witness" after it, on a blank piece of paper. He then superscribed an execution of citation of a criminal libel which he himself signed as sheriff officer. The debate proceeded on the concession⁴¹ that the witness had intended that his signature should be used for the purpose for which it was actually used and the decision accordingly was restricted to the limited principle that false statements in a genuine writ were falsehood but not that particular species of falsehood called "forgery". This distinction had the authority of Hume. It may be contrasted with what is submitted to be the correct distinction which was made as late as 1864 by Lord Neaves in Michael Hinchey⁴² when he distinguished between forged documents and documents which were "false merely in the sense of being mendacious". Uttering authentic documents which contained written lies was in his Lordship's view, at the most attempted fraud, but uttering forged documents was sufficient to constitute liability for "forgery or falsehood".⁴³

C. MACDONALD'S ANALYSIS OF THE RESULT ELEMENT

Macdonald's Criminal Law appeared soon after Hinchey in 1867. Macdonald maintained the formal distinction between falsehood and fraud. He followed Hume and Burnett in discussing the whole matter in one /chapter

chapter entitled "Falsehood and Fraud", a description which he explained, inaccurately, as "embracing all offences which consist in fraudulent deception" and, like Hume, he obscured the historical basis of the two crimes by wrongly classifying the relevant factual elements.

Macdonald, like Hume, made a primary distinction between "falsehood by writ" and "fraud and cheating" which comprehended all other criminal dishonesty.⁴⁴ "Falsehood by writ" was divided into forgery and "minor falsehoods by writ",⁴⁵ a category which consisted of the drafting, signing and issuing of documents narrating falsehood by persons acting in an official capacity, for example the making of false seisins by notaries or false executions by messengers "setting forth proceedings which never took place" the signing of executions as witnesses by persons who were not present and the issuing of false certificates of marriage or of banns. This category also included minor fabrications not amounting to forgery, such as antedating a deed, serving a false copy summons, fabricating a letter which was unsigned or uttering false but unsigned banknotes.⁴⁶

The distinction between falsehood by writ and fraud and cheating which was made by both Hume and Macdonald was almost on the right lines, but the inclusion by /Macdonald

Macdonald of the vitiating of deeds⁴⁷ and by both Hume and Macdonald of the use of false weights and measures⁴⁸ as examples of fraud and cheating was contrary to historical principle. The difficulties created by this classification are demonstrated in Macdonald's discussion of the prejudice or practical result aspect, from which no clear principle emerges, and in his attempted distinction between the various methods of cheating. But the immediate and enduring result of the confusion was the attempt by Macdonald to distinguish the so-called category of "practical cheating". This category, so far as it related to a method of committing fraud, involved only an immaterial distinction of fact, and so far as it extended to fraud the principle of the crime of forgery was misconceived. Macdonald himself adopted the term, which had not previously been used in the Scottish courts, to describe a supposed category of fraud in which a result was unnecessary. According to Macdonald "Practical cheating seems to divide itself into two classes; first, where an article is made over to others as being that which it is not, for the purpose of obtaining an advantage; and, second, where a fraudulent act is done to the defeat, or with a view to the defeat of the rights or privileges of others".⁴⁹ From the first of these classes, Macdonald distinguished a category of cases in which spurious articles were /"uttered"

"uttered"⁵⁰ and concluded that since these were "the corporeal embodiment of a fraud",⁵¹ liability was complete at the moment of the uttering. In the second class, Macdonald included all cases of "vitiating or destruction of deeds, concealment (sc. of assets) by insolvent persons, or the like...". In such cases the overt act of vitiating or destruction of a document already in existence, combined with the intent to defraud, constitutes a complete offence, without any subsequent success of the fraud".⁵²

This classification was patently unsound, however, because it involved the propositions that the vitiating of an existing and genuine deed in any essential part was criminal even without uttering, unlike forgery;⁵³ and also that specific nominate common law and statutory offences such as fraudulent bankruptcy, fraudulent concealments by insolvents, fire-raising or sinking ships to defraud insurers, and falsehood in registrations of births, marriages and deaths were species of a general crime of fraud, which was certainly not the case.

D. THE MODERN VIEW OF THE RESULT ELEMENT

Macdonald's category of "practical cheating", although adopted by Gordon⁵⁴ has, fortunately, not been subject to any judicial development in modern law. The analytical problems to which its adoption /gives

gives rise are discussed in a subsequent chapter. From a historical point of view, however, the importance of the description lies in its association with the development of a theory of fraud in the late nineteenth century in which actual loss to the victim was not essential.

The other significant aspect of the modern Scots law of fraud has been the extension of the range of relevant consequences beyond those which are purely economic, culminating in the now generally accepted proposition that "any definite practical result...is enough".⁵⁵ The difficulties in this theory too are discussed in a later chapter. It may however be pointed out, to conclude this historical survey, that the effect of Adcock v. Archibald together with the decisions which have followed upon it has been to establish the possibility in modern Scottish practice of a liability scarcely less wide-ranging than that of the South African offence so that any form of dishonesty not constituting some other recognised common law or statutory offence can be brought within the ambit of fraud. The limits of this offence, and it is submitted notwithstanding the dicta in Adcock that there must be such limits, have never been judicially discussed.

FOOTNOTES FOR CHAPTER III

1. Hume i, 137f.
2. i, 140f.
3. i, 158-162. There were conflicting views on this passage in Simon Fraser (1859) 3 Irv. 467
4. i, 170
5. Campbell and Muschet (1721) Hume i, 170, and Elliot and Nicholson (1694), ibid.
6. i, 172
7. i, 172
8. i, 173
9. i, 176-7
10. i, 177-8
11. (1791) Burnett 166
12. (1794) Burnett 167
13. Burnett, 164
14. i, 362, 368
15. i, 371-428; cf. Simon Fraser, (1859) 3 Irv. 467
16. J. and R. Mackintosh (1840) 2 Swin.511; Eliz.Murray (1852) J. Shaw 552 where the term was disapproved as a nomen iuris.
17. McIntyre, (1837) 1 Swin.536; Maitland (1842) 1 Broun 57.
18. Eliz.Murray, supra.
- /19.

19. Bramwell (1819) Hume i, 174; T.Gray (1827) Syme 254; J. and J. Christie (1841) 1 Swin.534; (all embezzlement cases) and Edwards (1828) Syme 302 "falsehood and forgery", reported sub nom Gillespie and Edwards (1827) Syme Appdx.47 as "forgery".
20. (1836) 1 Swin.198
21. (1836) 1 Swin.304
22. (1843) 1 Broun 529
23. (1852) 1 Irv. 125
24. (1853) 1 Irv. 300
25. Stalker and Cuthbert (1844) 2 Broun 70, 77-8
26. Eliz.Murray, supra. There was later a fanciful theory that the term described the three elements of the crime of fraud. Cf. John Hall, (1881) 4 Coup.438, 445; Ersk. Principles, 21st ed. 4,4,33a
27. Daniel Taylor (1853) 1 Irv. 230; Simon Fraser (1859) 3 Irv. 467, 475
28. Foodie and Campbell (1837) 1 Swin.509; Jas.Smith (1839) 2 Swin.346; Mackintosh (1840) 2 Swin.511; Caulfield (1840) 2 Swin.522 (fraud) Neil (1845) 2 Broun 368 (forgery).
29. Bramwell (1819) Hume i, 174; T.Gray (1827) Syme 254; J. and J. Christie (1841) 1 Swin.534.
30. McLaren (1836) 1 Swin.219; O'Reilly (1836) 1 Swin.256.
31. McIntyre (1837) 1 Swin.536

32. ibid, 539
33. Shepherd (1842) 1 Broun 325; Gunn (1832) 5 Deas and Anderson 256; Bell's Notes 2
34. (1864) 4 Irv. 561
35. at 568-9
36. cf. cases reported in Swinton; vols. 1 and 2
37. Duncan and Cumming (1850) J.Shaw 334; Taylor, (1853) 1 Irv. 230
38. supra, n.37
39. cf. Gordon, 553 n.2
40. (1859) 3 Irv. 467
41. ibid, 479, 482
42. (1864) 4 Irv. 561
43. ibid, 565-6
44. Macdonald, 1st ed., 89, 103
45. ibid, 89, 98-9
46. Anderson, 197f. made a similar distinction. A relic of the traditional conception of falsehood is to be found in the statutory offence of "wilful falsehood" in oaths under the Bankruptcy(s) Act 1913, s.186.
47. ibid, 107f., 113
48. ibid, 109f.
49. ibid, 111
50. He relied on the cases of Bannatyne (1847) Ark.361, and Paton (1858) 3 Irv. 208.
- /51.

51. ibid, 112
52. ibid, 113; 107-9
53. ibid, 113-4
54. Gordon 559
55. Adcock v. Archibald 1925 J.C. 58, 61

PART TWO

The Analysis of Fraud

CHAPTER IV

The element of deception

A. THE METHODS OF DECEPTION - REPRESENTATIONS

The first element to be considered in the actus reus of fraud is the element of deception or the creation of a false belief. In principle, no obvious legal limitation suggests itself as to the range of methods of deception which the law should repress. Nevertheless a feature of both the Scottish and South African case law has been the tendency to impose limitations upon the relevant methods of deception, under the obvious influence of the traditional English approach which confined the element of deception within the requirement of an objectively false representation or pretence. Although as a result of the Theft Act 1968 English law has largely been liberated from this requirement,¹ current law in Scotland and in South Africa is still affected by it in certain important respects.

The older Scottish writers considered the question in very general terms, speaking of fraud, swindling, cheating, cozenage, trickery and the like,² but Hume³ drew heavily on contemporary English case law in his analysis of fraud, and since then the Scottish writers have always narrowed the issue by speaking of a "false pretence".⁴ The effects of this approach are to isolate the representation element from the accused's
/state

state of mind, and to establish a series of cases in which certain so-called implied representations are recognised.⁵ The requirement of an objectively false representation creates difficulties of analysis because it may easily lead to the assumption that the accused, the victim and the court share an identical understanding of the meaning of the representation, and further that the representation has a single meaning or at least an identifiable range of meanings. There are practical difficulties in so viewing the question, particularly in matters of description. These are apparent in R. v. Wege⁶ where the South African court had to consider the truthfulness of a sellers' assertion that a vehicle was "new". Although the decision was reached on a properly subjective basis on a review of the evidence, the Court referred, unnecessarily, to a previous judicial definition of "new" in a civil case. This may be a suitable technique in the civil law but is inappropriate in a criminal case. The question is, firstly, what the accused meant by the description, and further what he intended or knowingly allowed the victim to understand by it. Accordingly, while as Gordon^{6a} suggests, the accused is entitled to show that he used "glory" to mean "a knock-down argument", he must further prove in such a case that he did not intend the other party to understand anything else by it. This is aptly illustrated by the following statement /of

of Herbstein A.J.P. in R. v. Wege:

"Whatever meaning "new" may have in the abstract, it is clear that, in the instant case, (the salesman) used it in a particular sense and himself acted - as it were - as his own dictionary, for he meant that the tractor was in "a new condition" as is shown by his further statement that it had just been off-loaded at the station. The only reason he could have had for saying this was to make it clear that the tractor had not been used - even for demonstration purposes."⁷

Similarly, in R. v. Alexander (Pty) Ltd.,⁸ where the words used were capable of two different meanings, it was necessary for the Court to refer to the accused's state of mind to determine which meaning was proved.⁹

B. IMPLIED REPRESENTATIONS

One of the recurring difficulties in the law is that of assigning "implied" representations to the conduct of the accused in certain circumstances. For example, Gordon states that

"Where A gives B a cheque drawn by him on a bank he impliedly represents that he has an account in the bank and has authority from the bank to draw the cheque and that the cheque will be honoured on presentation."¹⁰

Smith and Hogan state that the drawer of a cheque represents

"as a fact, that it is a valid order for the payment of its amount at the bank on which it is drawn".¹¹

/Although

Although there are cases to that effect,¹² such statements are no more than canons of evidence, the representation in each case being a jury question.¹³ Accordingly, it is the substance of the accused's actings spoken or otherwise, which must be examined on a review of the evidence in order to determine what representation he intended to convey,¹⁴ as, for example, where confidence tricksters or card sharpers pretend to be strangers to one another.¹⁵ It is submitted that the most useful summary of the Scottish view is that of Lord Fraser in H.M. Adv. v. Livingstone:¹⁶

"Any deception by which one man makes another believe to the latter's injury, something that really does not exist. It may be done either by direct assertion or by a suggestion, not amounting to direct assertion, of something which was untrue."

C. PROMISES AND PREDICTIONS

One of the traditional limitations in English law in the former statutory offence of obtaining by false pretences was that which confined the pretence to a statement of present fact, thereby excluding representations which were either promissory or predictive. A promissory representation is essentially a statement as to the present and not to the future. It is a statement of present intention. A predictive /representation

representation is also a statement as to the present since it is a statement of present belief as to the occurrence of a future event.

Promises

It has always been accepted in Scotland that a false promise is criminal when accompanied by a further false pretence as to a present fact¹⁷ but where liability has been asserted on the basis of a false promise only the position was, until recently, less consistent. In the case of Meldrum and Reid¹⁸ an indictment for fraudulently obtaining goods on credit narrated that the accused had misrepresented that he would be receiving payment of a sum of money at a future date. It then narrated that the accused

"did fail to pay the price of said (goods) and did thus defraud"

the victim. The indictment was probably irrelevant in that it failed to allege that the panel intended not to pay at the time he obtained the goods and in the later case of James Chisholm¹⁹ the Court insisted on such an allegation. In two notable cases Lord Cockburn accepted the relevancy of promissory fraud. In James and Robert Mackintosh²⁰ he remarked that it was enough for liability that an order for goods, if duly fulfilled, was combined with a resolution never to pay entertained at the time. In James Hall²¹ where the representation libelled was simply one of intention to pay the Court had no doubt that the

/charge

charge was relevant. Lord Cockburn on that occasion remarked that it was not buying goods without paying that constituted the crime, but buying goods and obtaining delivery with the intention of not paying for them.²² However, in John Hall²³ the earlier view was departed from. That too was a case where goods were obtained by means of false representations of intention to pay. The objection to the relevancy was sustained by Lord Young for reasons which were clearly adopted from contemporary English theory.

"Now although a man who buys goods which he knows he cannot pay for, and therefore, in a very real and practical sense, has no intention of paying for, and still more a man who, being unable to pay, buys goods intending to leave them unpaid is certainly dishonest, I am unable to extend the criminal law, as administered in this Court, to such dishonesty as that. The purchaser of goods certainly promises to pay for them whether the promise is expressed or left to implication, and if he does not intend to keep it he is dishonest. But intention with respect to future conduct, whether expressed or implied, would be a very inconvenient and hazardous issue to send for trial in a criminal court, and I am indisposed to countenance a legal proposition which might expose anyone to be criminally tried and convicted on such an issue - although the establishment of it might be useful in the comparatively rare cases in which credit is improvidently given to knaves /who

who have practised no falsehood or false pretences beyond representing expressly or impliedly, that they are honest men who will honourably pay their debts. I am of the opinion that the falsehood which is essential to the crime here charged must relate to a present or past fact, that is, that something shall be asserted (falsely) as an existing or past fact. This indeed is the common legal notion of falsehood. A promise, or profession, of intention to pay money, or do anything else, in the future not intended to be kept, is immorality beyond the scope of the criminal law, which does not, in my opinion, protect people against the consequence of their credulity by punishing those who abuse it - beyond this, that swindlers who impose on them by false representations (spoken, written or acted) regarding past events or existing facts shall be punished."²⁴

In the later case of Macleod v. Mactavish²⁵ promissory misrepresentation was accepted by the Court without comment, but later still in Strathern v. Fogal in 1922²⁶ Lord Ashmore remarked that professions of intention could not ground a criminal complaint. He was of opinion in that case that the pretences alleged, being related to future conduct, were irrelevant.²⁷ This was a surprising point of view since the professions of intention made by the accused were accompanied by a misrepresentation of existing fact to the effect that certain leases had already been entered into. In

/this

this respect therefore the decision applied an even more restrictive principle than the English law of the time.

Promises in English and American law

The exclusion of promissory misrepresentations originated in the restrictive approach adopted by the English judges towards the crime of obtaining by false pretences in the nineteenth century. It was established in England as early as 1821 that a false promise was not a "false pretence",²⁸ although the principle was never applied to the crime of larceny by trick.²⁹ This led to the curious result that it was criminal to obtain possession by a promissory pretence, but not criminal to obtain title by this means.³⁰ Moreover in the civil law it was always recognised that a false statement of intention could in the appropriate case render the defendant liable for deceit.³¹

Since the 1757 Act formed the basis of the law of false pretences in the American jurisdictions it was not surprising that the English approach was closely reflected in the American decisions.³²

In both the English and American jurisdictions, however, the principle was consistently modified in one important respect, in that where the false promise was /accompanied

accompanied by a false pretence as to some other existing fact, generally a false assumption of character or the like, the accused was held criminally liable.³³ In an attempt to resolve the difference between the civil and criminal effects of false promises, the courts frequently fell back upon an illusory distinction between a false statement of intention and "a mere promissory false pretence",³⁴ but this distinction was later rejected.

In England the problem arose as a clear cut issue in R. v. Dent³⁵ where a jury found that the accused, who had obtained payment in advance under a contract, had at the time of making the contract no intention of carrying out the work. The Court of Criminal Appeal held this finding to be an insufficient basis for conviction. The court distinguished Edgington v. Fitzmaurice³⁶ and reaffirmed the common law principle that a false representation as to the future was not per se criminal unless coupled with a statement of existing fact. There was no distinction, in the view of the Court, between false statements of intention and promises. The question of the dividing line between present and future, where there was a promise made to do something, was said to be vague but this was because few promises intended to be performed immediately did not import some statement about the promisor's readiness to perform.³⁷ The issue was equally clear-cut in Chaplin v. U.S.³⁸ where the appellant had obtained money on a /promise

promise to repay it and there were no accompanying representations as to the present or past. In that case too a jury had found that at the time of making the promise the appellant had no intention of carrying it out. The majority opinion of the court in reversing the conviction reaffirmed a consistent line of authority but the importance of the case was in the sharp divergence of view between the majority and the dissenting opinions both of which explored the social and judicial policy behind the traditional rule. Clark J. in the majority opinion distinguished the concept of intention as a fact in criminal cases and in civil cases on the ground that failure to fulfil a promise was as consistent with ordinary commercial default as with criminal conduct and that there was a risk of prosecution, in circumstances of failure or inability to pay, which might impede business dealings.

These and other arguments in support of the traditional rule all proceeded, however, on an unnecessary substitution of law for fact. As Edgerton J. observed in his dissent, to justify the traditional rule it would be necessary to show that false statements of intention are a harmless way of obtaining money or else that such an intention could not be proved in prosecutions for false pretences although it was constantly /proved

proved in other prosecutions, including those for larceny by trick and in civil actions for deceit. The court in Chaplin did not attack the jury's finding of fact as to the intention of the appellant, but merely subjected that finding to an arbitrary rule of law, a rule which would make a prosecution impossible even where there was an admission by the accused that he never intended to fulfil his promise. As Edgerton J. put the matter

"The old illusion that a promise states no facts is not the only source of the old tolerance of falsehoods regarding intention. That a fool and his money are soon parted was once accepted as a sort of natural law. In 1821 the fact that 'common prudence would have prevented the injury' seemed to an English court a good reason for refusing to penalise an injury which had been intentionally inflicted by a false promise. The fact that common agility in dodging an intentional blow would have prevented an injury would not have seemed a reason for refusing to penalise a battery. Fools were fair game though cripples were not. But in modern times, no-one not talking law would be likely to deny that society should protect mental as well as physical helplessness against intentional injuries".³⁹

The trend of modern statutory reforms is to classify false promises as relevant types of false pretence,⁴⁰ and in English law in particular the matter is now settled by section 15 (4) of the Theft Act 1968.

The modern Scots Law on false promises

As a result of the dictum of Lord Ashmore in
/Strathern

Strathern v. Fogal, the modern position of Scots law on this question remained until recently in some doubt. The academic writers were generally hostile to the traditional English rule. T.B. Smith,⁴¹ for example, argued for the principle of the English civil law that the existence of an intention is a matter of fact, and he was supported in this view by Gordon.⁴² Macdonald, too, preferred the earlier Scottish authorities to the same effect.⁴³

The question arose for decision in the appeal in H.M. Adv. v. Richards.⁴⁴ In that case it was an essential part of the charge that the accused had caused a nominee purchaser on his behalf to submit false statements to the sellers of a property as to the purposes for which he intended to use it. The defence relied on R. v. Dent⁴⁵ for the contention that such representations, being purely de futuro, could not found a charge of fraud. The Court of Criminal Appeal rejected this argument. Lord Justice-Clerk Grant, with whom Lord Milligan concurred, after a survey of the case law, was of the opinion that Gordon's conclusion that

"a statement of present intention as to future conduct can ground a charge of fraud"⁴⁶

was "fully justified by authority".⁴⁷ Lord Wheatley, however, while expressing general agreement with the Lord Justice-Clerk concluded that in the instant case the representation was

"not just a present statement about future /intentions

intentions, but a statement of fact in relation to the qualification of [the nominee] for consideration"

as a prospective purchaser.⁴⁸

South African law

In South African law the courts still formally adhere to the view that only representations as to the present or past are relevant to criminal liability but the view is taken that every promise implies a statement of intention and that this intention is an existing fact.⁴⁹ The South African courts have therefore accepted in the criminal law what has always been accepted in the civil law in England.⁵⁰

Accordingly where the accused not only fails to fulfil a promise but had no intention of fulfilling it when he made it then he is liable for fraud and this principle has been accepted also in regard to theft by false pretences.⁵¹

Predictions

Another aspect of the traditional policy which required a pretence to be false in respect of an existing fact is in the exclusion of predictions. A prediction may be distinguished from a promise in respect that while it is in the accused's powers to fulfil a promise, his predictions may relate to the occurrence of an independent event. Predictions /therefore

therefore relate to expectation rather than intention. Accordingly it can be argued that if only existing facts can be considered, the event which is the subject of prediction is not a fact until such time as it occurs. This difficulty has been avoided both in Scotland and in South Africa, in two cases on similar facts, by means of construing an implied representation. In Meldrum and Reid⁵² and in R. v. Larkins,⁵³ representations by the accused that they would receive a payment at some future date were held in the circumstances to imply a representation of present entitlement to such payment. The statutory and common law liabilities on clairvoyants are presumably based on similar reasoning.⁵⁴ There is no logical reason why predictions should be excluded from liability since they are statements of the existing belief of the accused. There is statutory liability in Scotland and England for false predictions or forecasts under the Prevention of Fraud (Investments) Acts 1939⁵⁵ and 1958⁵⁶ and the Protection of Depositors Act 1963⁵⁷ and it would be strange and unsatisfactory if in a case where charges were laid both under the statute and at common law the jury should be instructed to find in fact whether predictions or forecasts were true or false in considering the statutory charge, while being directed to disregard them under the common law charge.

/Many

Many such predictions are virtually representations of present facts other than the accused's expectation, and liability cannot be avoided by means of the syntactical form in which a statement is cast. For example, a statement to a prospective purchaser of the amount which a property will yield in rents could amount to a statement of existing fact as to its current yield.⁵⁸

D. OPINIONS

On similar reasoning statements of opinion should not be distinguished from statements of fact since every assertion of opinion is an assertion of a present state of mind. It is therefore possible falsely to assert an opinion and to deceive another as to the sincerity of that opinion. Representations of belief, of expectation⁵⁹ and of opinion⁶⁰ can be established as false in the civil law, which makes all the less plausible the view that their exclusion from liability in the criminal law is based on the lack of any satisfactory test or measurement.⁶¹ The problem arose in the Scottish case of H.M. Adv. v. Pattisons⁶² tried before Lord Justice-General Balfour, where one of the allegations was that the panels had misrepresented the financial standing of a company by overvaluing whisky stocks in the company accounts. It was argued on relevancy by the defence that the value of the whisky was a matter of opinion and could not
/found

found a criminal charge. The Lord Justice-General repelled the objection on the view that this was a pure jury question.

"If the prisoners can by evidence satisfy the jury that [the increase in the stated value] was an honest increase, they will give the accused the benefit of this view and acquit them of this charge; but as the charge stands, and it is not irrelevant, I should not feel justified in declining to allow it to go to a jury."⁶³

South African law appears to adopt a similar view.⁶⁴

E. REPRESENTATIONS OF LAW

There is no Scottish authority in cases where the pretence is as to a question of law. In the South African case S. v. Schnittker,⁶⁵ it was held that a misrepresentation as to law was relevant. In that case the accused had represented, according to the charge, that the complainant was obliged by law to exhibit certain notices in his premises although the accused knew there was no such legal obligation. It was held that the charge alleged a pretence of fact. The Court relied on a principle of the law of contract which distinguishes expressions of opinion as to the legal effects of a particular fact situation and expressions of fact as to the relevant law on a particular point.⁶⁶ The latter is sometimes described as "A conclusion of law stated as a fact".⁶⁷ This however is an unnecessary definitional refinement, since any assertion of a legal proposition in circumstances such as those in Schnittker involves an assertion that
/the

the belief that the proposition is accurate is genuinely held. The simple question of fact is therefore whether the accused honestly held the view of the law which he asserted.⁶⁸

The traditional theory on misrepresentations of law in Anglo-American jurisdictions, and the theoretical objections to it, are well illustrated in the American case of State v. Edwards⁶⁹ where a pretence that corporate stock was not subject to assessment after purchase was held to be a misrepresentation as to law and not to be criminal. The dissenting judge considered that the representation implied that the facts necessary for the legal rule to come into effect already existed.⁷⁰ One of the less plausible justifications for the traditional rule which excluded these pretences from liability was the principle ignorantia iuris neminem excusat. This argument was cogently dismissed by the dissenting judge in the following way:

"One is not shielded by reason of his ignorance of law from the consequences of his own illegal action. But the maxim that ignorance of the law excuses no-one was not intended, and ought not to be used, to enable a wilful wrongdoer to protect himself from the consequences of his act because of his victim's ignorance of the law. To use the maxim to that end is a perversion of it".⁷¹

The question never arose in English law but the Criminal Law Revision Committee had little doubt that such
/representation

representation should be criminal⁷² and this is expressly provided for in section 15(4) of the Theft Act 1968. It is unlikely that Scots law would now follow any different rule.

F. EXAGGERATED COMMENDATION, ADVERTISING AND SALES TALK

One of the most important social problems relevant to the law of fraud is the extent to which the criminal law should interfere in the course of trade in respect of advertising claims and sales talk, and it is notoriously difficult to devise a satisfactory test which reconciles logical theory with the realities of commerce. Gordon attempts to resolve the question on the basis of a distinction between opinion and fact, but as has already been submitted, statements of opinion can theoretically be as false as statements of fact. According to Gordon

"The line between opinion and fact is necessarily not a definite one, and it is a question for the jury in each case whether the alleged representation falls within the class struck at by the law. A considerable latitude is allowed to sellers to "puff" their goods in advertisements, and it is unlikely that, for example, 'Brand X removes grease instantly' would be regarded as a fraudulent representation, if it were false".⁷³

This is a more satisfactory approach than the robust attitude adopted by Lord Ardwall in Tapsell v. Prentice⁷⁴ where he spoke of statements which were

"just the ordinary lies that people tell when they want to induce credulous members of the /public

public to purchase goods, or to do something
for them",⁷⁵

a view of the matter which is flatly contradicted by
Lord Ardwall's own judgment at first instance, and
those of the Second Division affirming it, in the
celebrated civil case of Bile Bean Mfg. Co. v. Davidson.⁷⁶

Nevertheless the test proposed by Gordon is
unsatisfactory in several respects. There is no
satisfactory theoretical distinction between statements
of opinion and statements of fact. As has been submitted,
every statement of opinion involves an assertion as to
the honesty or sincerity with which the opinion is
held. The indefinite nature of the dividing line
between opinion and fact creates uncertainty as to
the extent of liability. Moreover greater social harm
may be involved by assertions of opinion by salesmen
which are not honestly held and which may relate to
matters which the salesman may know to be untrue, than
by more direct assertions of untruth.

Still less satisfactory is the solution proposed by
Smith and Hogan who argue that a knowing exaggeration of
the quality of goods will not necessarily infer
liability for the English offence of obtaining by
deception because, as they argue,

"Regard must be had to the effect produced in
the mind of P. There is a deal of give and
take in commercial transactions and P is
/unlikely

unlikely to be deceived by mere puffs. On the sale of a car it is thought that D would not be guilty of deception when he asserts that the car is "a good runner" for no-one is really deceived by puffs of this kind".⁷⁷

This however is an over-simplified solution, involving as it does an arbitrary pre-emption of an issue of fact with a rigid principle of law which ignores entirely the intention of the accused, and the actual proven effect of his assertion on the mind of the victim.

In contrast, an attractive statutory solution is offered in the New Zealand Crimes Act, 1961 which provides that

"Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent as to amount to fraudulent misrepresentation of fact".⁷⁸

The determination of that question is a question of fact.⁷⁹

The problem may also be examined from the standpoint of Hunt who suggests an exclusion of puffing from liability

"on the ground that the necessary fraudulent intent is not present and/or on the ground that it is an honest expression of opinion. A puff, properly so-called, is a statement which X does not intend or expect Y to take /literally

literally, but at a discount for exaggeration. Such an intention falls short of the intent to defraud required: X does not intend his statement to be acted upon".⁸⁰

This test adequately meets the difficulty that certain misleading or exaggerated advertising is published in the expectation that few will be deceived by it, but in the hope that at least some will. On the "intent" approach there would be liability for such advertising in the appropriate case and it is submitted that from the social point of view this is a conclusion to be supported, because it is generally the most credulous and susceptible who suffer most by such deception. The content of mass advertising cannot be varied according to the critical faculties of those who read it but it is submitted that it is reasonable to require of such advertising that it should not be capable of misleading even the most unintelligent reader. Such a principle would leave ample scope for advertising technique without unduly inhibiting the advertiser.

In any event it is submitted that any criticism of the wide ranging liability previously suggested is adequately met by consideration of the question of causation because in the average case there is probably, on the facts, no causal connection between the advertising and the purchase of the goods since
/the

the purchaser generally acts upon his own opinions and judgment; but precisely in the case where the purchaser is most susceptible to advertising or is most reliant upon the knowledge, skill or persuasiveness of the salesman there will still be a causal connection and therefore liability; and it is submitted in that case there ought to be liability.

G. SUMMARY

From an analytical standpoint the classification of "non-factual" statements into predictions, opinions, statements of value, statements of the law and the like is unnecessary. It is sufficient to observe that all such statements involve at the very least an assertion of belief. The exclusion of such statements from the scope of liability because their subject matter cannot be empirically verified is based on an error of analysis caused by undue concentration on the pretence itself. It is not the subject matter of the pretence which need be true or false: as to all of these matters it is possible to hold a belief. It is therefore possible to effect a deception by creating a false impression in the mind of another as to the existence of that belief. There can be no convincing reason why the law should not distinguish honest from dishonest statements of belief as to the unverifiable, just as it distinguishes honest from dishonest statements of belief as to the verifiable. In each of those /situations

situations there is a verifiable fact involved, namely the belief itself, and if the courts were, as a matter of evidence, to have proper regard to the state of mind of the accused and his intentions as to the state of mind of the victim, there would be no reason why any particular method of deception should be excluded from the scope of liability.

H. OMISSIONS

Materiality

One important difficulty which has been created by the former requirement of the "false pretence" in English law, and as a result in certain statements of Scots law, has been the situation where liability is founded on an omission. Various situations can be said to involve an omission of material facts from a representation of other facts. In England a distinction was attempted in a civil action Peek v. Gurney⁸¹ between "mere non-disclosure of material facts" and "active mis-statement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false".⁸² But this is not a satisfactory analysis. Materiality cannot be seen in isolation from the question of causation. If the disclosure of a particular fact would have caused the complainer to have acted otherwise than he did, then that fact is material. Non-disclosure in that situation cannot fail to affect /the

the overall truthfulness of what is actually said. In R. v. Kylsant⁸³ a prospectus which was absolutely true in everything which it said but omitted certain further information with the result that it gave a misleading impression of the true state of a company's affairs was held to be "false in a material particular" within the meaning of the relevant statutory provision.⁸⁴ This principle is well established in insurance law in regard to proposal forms.⁸⁵ The decision in Kylsant could only be reached by reference to more than the actual words of the prospectus, namely the impression of the reader.

Duty to disclose

A problem remains, however, in cases where there is a complete failure by the accused to make any representation at all. The common law of fraud in Scotland leaves this question in some doubt. Gordon suggests the following approach

"Fraud may be committed by omission in cases where A has a duty to disclose the truth to B. This duty may arise from a contractual relationship between A and B which obliges A to disclose the whole truth to B; in such cases any concealment of truth would lead to a fraudulent misrepresentation, since there will be implied in all these statements a representation that he has disclosed the whole truth.....There may also be cases in which A innocently makes a statement to B which he subsequently realises as creating a false impression on B from which A stands /to

to benefit. If it is A's duty to correct that impression his failure to do so will amount to a fraudulent misrepresentation. Whether or not he has such a duty will depend on circumstances".⁸⁶

Hunt commits himself to a similar view.⁸⁷ This approach is not however a helpful one. It is a circuitous argument which offers no guidance as to the circumstances which will or will not infer a duty to disclose. Above all, however, it suggests that the duty to disclose is restricted in some way or other and at least in the criminal aspect of fraudulence is not one of general application; and this is a questionable proposition.

The whole "duty" mechanism is inappropriate and unsatisfactory. The question may be a simple one where there exists a statutory duty to disclose⁸⁸ and, as has been decided in Scotland, failure in that duty can give rise to common law liability for fraud;⁸⁹ but otherwise it is by no means clear whether the duty to disclose posited by the criminal law is separate and distinct from the duty to disclose of the civil law, for example the duty to disclose in insurance law.⁹⁰ If it is, then to say that failure in such a duty gives rise to liability is a tautology. On the other hand, if the duties are coterminous, considerable inroads must be made on the subjective basis of liability.

Knowledge and causation

As an alternative to the duty theory the question
/may

may be considered from two aspects, namely the accused's knowledge and causation. This was the approach taken by Lord Fraser in H.M.Adv. v. Livingstone⁹¹ a statutory prosecution under the Bankruptcy Acts where he observed to the jury

"There was no assertion certainly that (the accused) was not an undischarged bankrupt, but, on the other hand, he kept back the important fact that he was an undischarged bankrupt. He knew perfectly well that if he had told that fact he would not have got credit for a single sixpence".⁹²

This, it is submitted, is the preferable theory. Apart from the simple, and possibly rather few, cases where there is an explicitly established duty, the courts need only determine the following questions of fact: would disclosure of the fact omitted have induced the victim to act otherwise than he did; and can the accused be proved to have intended that the victim would not have acted otherwise than he did? If those facts are proved, then, it is submitted, the necessary mens rea is established. To speak of the matter as inferring a duty to disclose in the situation is to say little more than that there is a duty not to defraud. The foregoing view is supported by the dicta of Lord Kyllachy in the civil case of Patterson v. Landsberg,⁹³ where in relation to an allegation that certain items of jewellery had been falsely represented by the sellers to be antiques, his Lordship held, on the facts, inter alia,

/"(1) that

"(1) that the appearance of age and other appearances presented by (the) articles constituted by themselves misrepresentations.....
.....(2) that this being so, the defender was not entitled to leave, as he says he did, the articles to speak for themselves, but was bound to displace the inferences which the appearance of the articles was to his knowledge bound to suggest".⁹⁴

This approach also derives support from the judgment of Lord Justice-General Balfour in H.M. Adv. v. Pattisons⁹⁵ where one of the charges against the accused was that they had published a prospectus containing a certificate of the profits of the company prepared by accountants from company books from which material entries had been omitted. It was objected by the panels that since the whole of the company books had been put before the accountants the missing entries could have been detected by them, and accordingly the mere submission of the books to the accountants constituted no representation as to their accuracy. This objection was repelled on the basis that it was a jury question:

"Upon (the) evidence one or other of two views might be taken. If the jury should think that the books were presented under such circumstances as practically to say to the accountants "We shall tell you nothing about these books; we shall not tell you whether the ultimate books are complete; find out all that for yourself in this roomful of books." - the jury would consider /whether

whether omissions from the final books were or were not fit matters for a criminal charge. On the other hand, if evidence is led before the jury that, according to the practice of book-keeping pursued by honest firms, these things ~~should~~ have appeared in the ledger and ultimate books, and if accountants experienced in those matters say that the presenting of the books implied a representation that they were true and accurate, it would be for the jury to draw their own conclusions, and to say whether any misrepresentation was implied, and that the accountants were not expected to pursue back every transaction to its ultimate source, but were entitled to make a balance from what they took to be honest and accurate statements".⁹⁶

Several South African cases support the general proposition that fraud can be committed by silence but there has been little attempt in the South Africa courts to formulate a general theory on the question. The question was raised but not decided in R. v. Herzfelder⁹⁷ In a later case, R. v. Larkins,⁹⁸ Gardiner JA cited with approval, obiter, the text in Voet:⁹⁹ "Reticentia falsum committitur.....generaliter, si quis veritatem dolo malo retic verit celaveritque, quo alios in errorem deducat." In that case however, the actions of the accused were such as to warrant a finding in fact that by implication he had positively represented his right to a payment of salary at a specified future date, that right having already been assigned to a /third

third party.

The leading modern authority on this question is S. v. Heller (2),¹⁰⁰ in which liability for omission to disclose was fully accepted. That case, however, was decided under reference to the existence of a civil duty to disclose owed by a director, in his fiduciary capacity, to his company.¹⁰¹ The theoretical difficulties in so deciding the issue have already been discussed.¹⁰² Nevertheless the learned judge gave an indication of a wider view of the question by holding that for a breach of such a duty it was necessary, inter alia, that the circumstances be such as "to equate the non-disclosure with a representation of the non-existence of that fact".¹⁰³ On the assumption that the relevant intent exists, the latter approach indicates what is submitted to be the better view, namely that whether or not a silence is fraudulent is a pure jury question to be approached on a thoroughly subjective basis, independently of the duties of disclosure of the civil law.

FOOTNOTES FOR CHAPTER IV

1. but not completely, see Ray v. Sempers [1973] 3 WLR 359.
2. cf. Chapter 1.
3. Hume i, 68-70.
4. e.g. Macdonald, 5th ed. 52; Gordon 537.
5. e.g. Gordon, 538f.
6. 1959 (3) SA 268 (C).
6a. Gordon, 558.
7. ibid, 272. Cp. Gibson v. National Cash Register Co. 1925 SC 500.
8. 1946 AD 110.
9. ibid, 116-7; Cf. S. v. Shaban 1956 (4) SA 646 (W).
10. Gordon, 538-9.
11. Smith and Hogan, 3rd ed., 440.
12. e.g. R. v. Hazelton (1874) LR, 2 CCR 134; R. v. Deetlefs 1953 (1) SA 418 (AD).
13. Especially in the case of a post-dated cheque:
Deetlefs, supra; Rae v. Linton (1874) 3 Coup. 67.
R. v. Blackmore, 1959 (4) SA 486 (FSC), 494.
S. v. Landsberg 1971 (1) FH, H 65 (T).
14. e.g. R. v. Kysant, [1932] 1 KB 442; S. v. Shaban 1965 (4) SA 646 (W); S. v. Ressel 1968 (4) SA 224 (AD), 231; S. v. Judin 1969 (4) SA 425 (AD).
15. Steuart v. Macpherson 1918 JC 96. cp. Wm. Clark and Ors. (1859) 3 Irv. 409; Menzies (1849) J. Shaw 153.

16. (1888) 15 R (J) 48, 50.
17. Caulfield (1840) 2 Swin 522; Harkins (Harkisson) (1842) 1 Broun 420; Kronacher (1852) 1 Irv. 62; John Hall (1881) 4 Coup.438, 447-8.
18. (1838) 2 Swin 117.
19. (1849) J. Shaw 241, 250.
20. (1840) 2 Swin 511, 512.
21. (1848) J. Shaw 254.
22. ibid, 260.
23. (1881) 4 Coup. 438.
24. ibid, 446-7.
25. (1897) 25 R (J) 1.
26. 1922 JC 73.
27. ibid, 82. Despite the fact that such pretences were the sole basis of the specimen complaint in the Summary Jurisdiction (Scotland) Act 190 §
~~Section, Part 2.~~
28. R. v. Goodhall (1821) Russ. and Ry. 461; R. v. Lee (1863) 9 Cox CC 304; see however R. v. Jones (1853) 6 Cox CC 467.
29. R. v. Pear (1779) 1 Leach 212.
30. Beale, The Borderland of Larceny, (1892) 6 Harv.L.R. 244, 248-53; cf. also, The case for a Law of Promissory Fraud, (1953) 53 Col.L.R. 407.

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31. Edgington v. Fitzmaurice (1885) 29 Ch.D. 459, 483; Angus v. Clifford [1891] 2 Ch. 449, 470-1.
32. Perkins, 250, 256-7.
33. R. v. Bates and Pugh (1848) 3 Cox CC.201; R. v. West (1858) 8 Cox CC.12; McCuiston v. State (1942) 141 ALR 205; Finlay v. State (1948) 145 ALR 299; Perkins, 259.
34. R. v. Woodman (1879) 14 Cox CC.179.
35. [1955] 2 QB 590.
36. [1885] 29 Ch.D. 459.
37. cf. Craymer, [1955] Crim.L.R. 556.
38. (1946) 168 ALR 828.
39. ibid, 832.
40. e.g. Crimes Act 1961, s.245(3) (New Zealand).
41. Short Commentary, 202.
42. Gordon, 548.
43. Macdonald, 5th ed., 56.
44. 1971 JC 29.
45. supra, n.35.
46. Gordon, 548.
47. Richards, supra, 33.
48. ibid, 34.
49. R. v. Deetlefs 1953(1) SA 418 (AD) R. v. Blythe 1916 TPD 449, 452; R. v. Persotam, 1938 AD 92; R. v. Havenga 1925 TPD 349. S. v. Strydom 1962(3) SA 982(N).

50. See Hunt, 721-4, where the case law is fully surveyed.
51. e.g. R. v. Havenga, supra.
52. (1838) 2 Swin 117.
53. 1934 AD 91.
54. R. v. Zillah 1911 CPD 643.
55. 1939 Act s.12(1).
56. 1958 Act s.13(1).
57. s.1.
58. van Heerden v. Smith, 1956 (3) SA 273 (O).
59. Marine Insurance Act 1906, s.20 (3).
60. Anderson v. Pacific Fire etc. Insur. Co.
(1872) LR 7 CP 65, 69.
61. Perkins, 255.
62. (1901) 3 Adam 420.
63. ibid, 471-2.
64. Hunt, 719-720.
65. 1964 (3) SA 10 (GW).
66. cf. Kerr, Fraud and Mistake, 7th ed. 39-41.
67. Sampson v. Union etc. Wholesale Ltd., 1929
AD 468, 479.
68. Hunt, 720.
69. (1929) 65 ALR 1253.
70. ibid, 1255.
- /71.

71. ibid, 1256, Cf. Howard, Australian Criminal Law, 213-4.
72. Eighth Report; Cmd. 2977, ss.101 (ii).
73. p.540.
74. (1910) 6 Adam 354.
75. ibid, 357.
76. (1906) 8 F 1181.
77. Smith and Hogan 3rd ed., 440.
78. s.245 (4).
79. s.245 (5).
80. Hunt, 721.
81. (1873) LR 6 HL 377.
82. at 403.
83. [1932] 1 KB 442.
84. Cf. R. v. Bishirgian (1936) 25 Cr.App.R 176.
85. London Assce. v. Mansel (1879) 11 Ch.D. 363.
86. Gordon, p.539-40.
87. 717f.
88. e.g. Consumer Credit Act 1974, ss.107-111.
89. Strathern v. Fogal 1922 JC 73, 80-2. Hunt enumerates several such duties in South African civil law, pp.717f.
90. Marine Insurance Act 1906, ss.17-18; Greenhill v. Federal Ins. [1927] 1 KB 65, 76.

91. (1888) 15 R (J) 48.
92. ibid, 50.
93. (1905) 7 F 675, 681.
94. ibid, at 681. Italics added. Cp. Gibson v. National Cash Register Co. 1925 SC 50.
95. (1901) 3 Adam 420.
96. at 649-70; cf. the similar dicta of Schreiner JA in R. v. Heyne 1956 (3) SA 604 (AD), 619.
97. 1907 TH 247.
98. 1934 AD 91, 94.
99. 48.10.4.
100. 1964 (1) SA 524 (W).
101. ibid, 536.
102. supra.
103. ibid, 537 Cf. also S. v. Hepker 1973 (1) SA 472 (W).

CHAPTER V

The mens rea of fraud

A. FACT AND LAW

The term "fraud" relates to law and not to fact. When an action or a state of mind is said to be "fraudulent" a legal quality or characteristic is being ascribed to it. The imposition of liability depends upon the attribution of that legal characteristic to the proved facts of the case. The purpose of the definition of the crime of fraud is to prescribe the facts necessary for the attribution of the character of fraudulence to an individual's conduct. It therefore follows that "fraud" ought not to appear within the terms of the definition of the crime otherwise the definition becomes circuitous. The definitions of the crime however commonly require the presence of "an intent to defraud" or "fraudulent intent",¹ and these terms are commonly used in statutes to define an element in liability.² In considering such phrases it is important to distinguish the respective provinces of fact and law which they imply.

Intention relates to factual results. It does not, or at least it need not extend to the legal quality of those results. There are obviously cases in which intent may extend to law as well as to fact. The

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political demonstrator, for example, may intend to publicise his cause by breaking the law, for example by breach of the peace, and will perform the physical act necessary to achieve that quality of illegality; or a tramp seeking shelter for a winter's night may break a shop window in order to be taken into custody; but these are exceptional situations. In each the extension of the intent to law as well as to fact is essentially a matter of motive with which the Court is not concerned. For the constitution of liability the Court is concerned solely with the question whether the accused intended the physical consequences of his actions. That it is unnecessary and indeed irrelevant for the intent to extend beyond those consequences is indicated by the principle ignorantia iuris neminem excusat, for if knowledge of the illegality is unnecessary, still less necessary is the intent to achieve it.

These considerations indicate the error of such phrases as "intent to defraud"³ or "intent to cause prejudice",⁴ Since the fraudulence of an action or the prejudicial quality of the result is a matter of law, the circuitous argument which these terms imply can be avoided only by recasting the analysis of intent in terms of fact. This is best done by relating the intent element to each of the two elements in the factual composition of the crime of fraud, namely the /deception

deception and its consequences. This reflects the general distinction made by Burchell and Hunt between intention in respect of circumstances and intention in respect of consequences.⁵

B. HONESTY OF KNOWLEDGE AND BELIEF

Intent to deceive involves two questions of fact; the accused's own belief as to the truth of what he asserts and his intention as to the belief of the complainer.

Scots law and English law

In assessing the state of mind of the accused in relation to the truth or falsity of the representation the Scottish Courts nowadays apply a subjective test. If therefore the Crown fails to establish that the accused actually knew that his representation was false, the prosecution must fail.⁶ The subjective approach extends also to cases where, on proof that the representation was false, the accused claims to have had an honest belief that it was true.

Certain dicta in the older Scottish cases⁷ suggested that an honest belief recklessly arrived at could form the basis of a civil action of fraud, but it is now well settled that the presence of an honest belief necessarily excludes fraud.⁸ A fortiori, there cannot be criminal liability in such cases.⁹ This is illustrated in Brander v. Buttercup Dairy Co.,¹⁰ where

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on a finding that a representation had been made with gross carelessness but not with dishonest intent the High Court made clear that the two mental states could not be equated.

In both Scotland and England the principle applicable in both the civil and criminal law is that laid down by the House of Lords in Derry v. Peek.¹¹ Although in that case recklessness was accepted as a relevant state of mind for fraud, the recklessness was admitted, subjectively, as a matter of evidence, and not of law, to the extent that its existence could justify an inference that the maker of the statement had no honest belief in the truth of what he said. In the classic formula of Lord Herschell in that case:

"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false".¹²

Lord Herschell saw the third case as

"but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states" -

an observation which emphasises that recklessness per se is not equivalent in law to intention, but may, as a matter of evidence, indicate actual dishonesty of belief.¹³

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The distinction between an assertion of a false belief arrived at by carelessness, and even gross carelessness, but nonetheless honestly, held, and an assertion uttered with such recklessness or indifference as to its truth that it cannot be said to be believed to be true has been recognised in Scottish practice since the judgment of Lord President Inglis in Lees v. Tod.¹⁴ In Paterson v. Ritchie,¹⁵ for example, a widow applied for and was granted a widow's pension although at the time she was cohabiting with a man. She was acquitted of fraud in the Sheriff Court on the ground that under the relevant statute she was in the circumstances entitled to a pension. The High Court held on an interpretation of the statute that the woman was not entitled to the pension but refused the prosecutor's appeal on the ground that she might well have believed that she was. It follows of course from this subjective test that in considering the accused's belief in the truth of what he says

"The question is not whether the (accused) in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made."¹⁶

The circumstances may be such that it cannot be held as
/a fact

a fact that the representation was understood in the sense claimed by the accused, but this is a question of evidence.

It follows also from this subjective view of honesty that the reasonableness of the belief cannot as a matter of law determine liability, but will at the most raise certain inferences of fact.¹⁷ In Nimmo v. Lanarkshire Tramways Co.¹⁸ a school teacher travelled on a special workmen's tram service at a reduced fare to which, the tramways company maintained, he was not entitled. He was acquitted of a statutory offence of knowingly travelling beyond the distance for which he had paid on the ground that it had been established in evidence that he genuinely believed he was entitled to the reduced rate of fare.

The test of honest belief was however challenged in an interpretation of the Prevention of Fraud (Investments) Act 1939, s.12(1), which with its successor the Prevention of Fraud (Investments) Act 1958, s.13(1) imposed criminal liability for, inter alia, "The reckless making of any statement, promise or forecast which is misleading, false or deceptive" whereby people were in certain circumstances induced to invest money. In R. v. Bates¹⁹ the provision was interpreted as covering the case where there was a high degree of negligence in reaching the belief on which the statement /was

was based, although the belief was honestly held.

This view was approved obiter by the Court of Criminal Appeal.²⁰ In a later case²¹ under the same section, however, Salmon J. insisted on the interpretation of recklessness laid down in Derry v. Peek.

In a case under the 1958 Act a further interpretation was proposed of recklessness which seemed to envisage liability without actual dishonesty provided that there was a finding in fact that the statement was rash and that there was no real basis of fact to support it.²² The test seemed hardly to differ from that in Bates. It may be doubted whether as a matter of inference there can be said to be any possibility of honest belief in such circumstances, but in any event the test must be rejected to the extent that it fails to take adequate account of the subjective element.²³

Difficulties arise in the situation where the accused neither states a fact on his own authority nor expressly affirms his own belief regarding it, but merely passes on the information second-hand, attributing its authority to another source. Here it may be thought to be a defence that he accurately relates the information given to him should that information be proved false; but this is not sufficient. The Court should examine the knowledge or belief of the accused regarding the /truth

truth of the information. If he does not know the information to be false, or at any rate if he does not actually believe it to be false, the accused cannot be liable because in limine he has an honest state of mind. If however he knows or believes it to be false and intends to deceive another as to its truth, then he cannot escape liability by attributing the information, albeit truthfully, to another source. There may of course be a question of causation involved and it will be a question of fact whether the victim relied on the authority of the accused or of the original source. In the latter situation, however, in the circumstances posited there could well be liability on the accused's part for an attempt.

South African law

The leading South African case, R. v. Myers,²⁴ expressly adopts the rule in Derry v. Peek²⁵ together with a statement in Halsbury²⁶ that a belief is not honest which is "The outcome of a fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what (the accused) desires and is determined to, and afterwards does, in a sense, believe". In Myers the Appellate Division emphasised the subjective basis of liability in such a case in holding that /negligence

negligence in making enquiries or unreasonableness in drawing inferences from the known facts, whether such negligence or unreasonableness be gross or of a lesser degree, can never in itself amount to an absence of honest belief.²⁷ Such seeming negligence or unreasonableness may however give rise to an inference that the accused actually knew that his statement was false,²⁸ or that his alleged belief in its truth was the outcome of a "fraudulent diligence in ignorance",²⁹ or that his hopes to fulfil his statement of intention were so nebulous as not to constitute a bona fide belief in the statement.³⁰ The intentional aspect of deci^et and the unintentional aspect of negligence were said in R. v. Heuer³¹ to preclude the assimilation of the two states of mind as a matter of law.

Since the test of the honesty of the belief is a subjective one³² there can be no presumption at common law of a dishonest state of mind.³³ For example, in R. v. Ngweshiza,³⁴ a native woman represented that she could point out a wizard. It was held on appeal from conviction that it could not be presumed that she knew that the representation was false.³⁵ An adverse finding in fact was made against an educated European woman who claimed to have powers of clairvoyance.³⁶

/On

On the assumption that the accused has no honest belief in the truth of the statement, it is clear that some further element of intent must be present, otherwise novelists, for example, would incur liability. It is helpful to consider this intent again in terms of deception rather than of fraudulence.

C. INTENT TO DECEIVE

Intent to deceive relates the dishonest state of mind of the accused to the state of mind of his victim. The relationship denotes the intention on the part of the accused that what he himself knows or believes to be untrue should be believed to be true by his victim. Clearly whether or not that intention is present is a question of fact, intent, in this branch of the law at least, being a thoroughly subjective question.³⁷ The significance of the representation is therefore as an index to the intent.³⁸ It will be apparent that this interpretation of intent to deceive, being confined to the effect of the deception on the belief of the victim, ignores entirely the results of that belief. In view of the insistence in the definition of the crime in Scots law on the element of fraudulence, it is obvious that a result-related aspect of intent is required,³⁹ although as has been suggested the phrase "intent to defraud" does not satisfactorily express the point. The intent must be related to the result because fraud is a result crime and where liability is predicted upon a result, that result must, unless there /is

is strict liability, be "intended". To hold otherwise would undermine the subjective basis of liability. As Gordon states,

"Fraud is a 'crime of intent' and A cannot be guilty of fraudulently inducing B to do X unless he intended to produce such a result by his falsehood."⁴⁰

Smith and Hogan give a useful illustration of the same point in relation to the English offence of obtaining by deception:

"In the course of negotiations for the purchase of goods on credit, for example, D might tell what to him is an inconsequential lie (e.g. that he is old Etonian) but, as it turns out, this is the substantial reason why P allows him to have the goods on credit. It is thought that D would not be guilty of obtaining by deception although he has in fact deceived P and this deception in fact caused P to part with the property."⁴¹

This question was touched upon in the South African case of S. v. Coomer⁴² where an 83 year old creditor who held a bond over a house concluded an agreement with the owner of the house for its purchase by him. Before the title could be transferred to him, the creditor stated to a third party that he was the owner of the house and then leased it to the third party with an option to purchase. The true owner then removed the third party after she entered on the occupancy of the house. It was held on a review of the evidence that the accused creditor never "intended" to represent to the third party that he was the owner and further that he had no intent to deceive her and /therefore

therefore no "intent to defraud". The latter question was considered in terms of the accused's "honest intention of carrying out his undertaking"⁴³ with the third party. Likewise there can be no intent to deceive where a false statement is made in the honest belief that the complainer knows that the statement is false.⁴⁴

To distinguish between intent as to the creation of false belief and intent as to the consequences of such false belief may perhaps seem rather unreal. On a common sense view no one intends to mislead another simply for the sake of misleading him. The creation of a false belief is generally an essential preliminary step towards achieving certain desired behaviour on the part of the party deceived. There can be few cases where this is not so. Equally, there can be few beliefs which are not acted upon in some way or another, so that in some cases the deceiver will at least expect certain consequences of his deception to occur, albeit with varying degrees of certainty as to the nature of those consequences and the likelihood of their occurrence. This is a question of evidence. Deliberate deception raises certain inferences as to the results intended by the deceiver; but, theoretically at least, a distinction must be made between the deception-related and the consequence-related aspects of the intent, in order to meet the situation where the accused intends to /deceive

deceive but does not intend, and may indeed try to prevent, the consequences founded on by the prosecution as being prejudicial.⁴⁵

Intention of course does not necessarily involve a desiderative element. It is sufficient that the accused foresees that the result founded on will occur, and either intends that it will or is at least reckless as to whether or not it does.⁴⁶

D. MOTIVE

The significance of the distinction between the two aspects of intent emerges also in the context of motive. As Gordon remarks

"The motive with which the pretence is made is, of course, irrelevant. A fraud carried out in order to perpetrate a practical joke is a fraud in the same way as a threat perpetrated for the same purpose is a threat."⁴⁷

In general, motive in the criminal law has two distinct usages. The term may describe a result-related intent or it may describe the psychological reason why a particular intent is held.⁴⁸ In the first case "motive" describes no more than what Salmond calls the "ulterior" intent,⁴⁹ or the intent to produce the ultimate consequence to which the immediately intended consequence will lead. If the intentional production of the immediate consequence is criminal, such further intent is obviously irrelevant. The second usage of "motive" is not /result-related

result-related. The motive in this case is explanatory of the holding of an intent which may extend no further than the immediate consequences. The distinction is aptly illustrated by Gordon's examples of a killing with intent to inherit the victim's money and a sacrificial killing of a child.⁵⁰

Gordon's opinion on the former category of cases where there is a motive to joke or to hoax is, it is submitted, the correct one. There is no convincing reason why if all the other definitional requirements of fraud are satisfied, the defence that the accused merely intended to play a practical joke shall succeed, unless of course the accused can prove, subjectively, that he did not foresee any of the consequences founded on by the prosecution.

There is no Scottish authority on this point, but certain South African cases support the contrary view. In an early South African forgery case where "intent to defraud" was considered it was observed, obiter, that a false document must be made with the intention of influencing the conduct of the person to whom the document was communicated but that a joke perpetrated in this manner was not criminal if the accused did not intend to induce anyone to act upon it.⁵¹ This dictum seems however to have proceeded on a desiderative view of the question of intention and, to /that

that extent, cannot be supported.⁵² The same reasoning is to be found in a modern South African forgery case, S. v. Bell,⁵³ where it was held that the publication of a false newspaper notice purely as a hoax without the accused's contemplating that the victim would suffer prejudice did not establish intent to defraud. Miller J., however, argued⁵⁴ that even where the hoaxer's intent extended from the deception to the results themselves, in that he anticipated loss to the victim, there would nevertheless not necessarily be liability. This view is insupportable because it confuses motive with intention. The so-called motive to hoax denotes merely an ulterior, and therefore irrelevant, intent.⁵⁵ R. v. Harlow and Another⁵⁶ is a theft case which was decided on a motive theory. It was held that case not to be theft from a company if the taking was done with intent to benefit the company: but the judicial analogy in the judgment in that case, with taking a poor man's jacket for repair is palpably fallacious.⁵⁷

The analysis of such cases is no different from the analysis of cases where, for example, the accused obtains credit on a pretence of solvency for the purpose of making profits with which to pay off his debts.⁵⁸ A fortiori, it is of no relevance whatever that the accused did not intend to gain any advantage /for

for himself. In the Scottish case of James Wilkie⁵⁹ it was suggested that to establish liability the misrepresentation must be made "with a view to obtain a fraudulent advantage", but this purposive aspect of the accused's state of mind is surely irrelevant. The question is simply his intent as to the consequence not to himself but to his victim.⁶⁰

E. CLAIM OF RIGHT

The question of claim of right or entitlement as a defence to a charge of fraud usually related to the question of the result rather than to the question of intent. If the accused deceives some-one into giving him his own property back, assuming for the moment that the property is unencumbered by pledge or lien, or into paying him money which is lawfully due to him, he may well be said to have acted dishonestly in the method of accomplishing his purpose. The question is whether he has acted fraudulently. Since, as has been argued, the fraudulent quality of the act is a matter of law determined by reference to the result, the relevance of the defence of claim of right depends on whether the result is to be held to involve prejudice to the victim. It seems sound in principle that it is not prejudicial to the complainer to be deceived into performing his legal obligation, and that in the situation considered /the

the accused's conduct while dishonest, is not fraudulent.⁶¹ It has been so held by the Appellate Division in South Africa in R. v. De Ruiter.⁶²

It is also sound in principle that a genuine belief on the part of the accused that he has a right to the property so obtained, even though the belief is mistaken in fact or in law, should be a good defence.⁶³

FOOTNOTES FOR CHAPTER V

1. Gordon, 557; Criminal Procedure (S) Act 1887, s.8; Brander v. Buttercup Dairy 1921 JC 19; Hunt, 714f., 724f.; R. V. Davies 1928 AD 165, 170; R. v. Visagie 1959 (2) SA 503 (SWA); S. v. Shepherd 1967 (4) SA 170 (W), 179.
2. e.g. Bankruptcy (S) Act 1913, s.179 (false claims).
3. Hunt, 724f.
4. e.g. R. v. Jaffschitz, 1931 OPD 41.
5. Burchell and Hunt, 119.
6. Mackenzie v. Skeen, 1972 SLT 15 cp. Napier v. H.M.Adv., 1944 JC 61.
7. e.g. Western Bank v. Addie, (1865) 3 M 899; there was judicial conflict on this point in the appeal (1867) 5 M (HL) 80, 87, 91.
8. Brownlie v. Millar (1878) 5 R 1076; 1091-2; Lees v. Tod (1882) 9 R 807; Manners v. Whitehead (1898) 1 F 171; Gloag Contract, 2nd Ed. 478.
9. Glanville Williams, 2nd ed., 150.
10. 1921 J.C. 19, 22 - a statutory weights and measures case.
11. (1889) 14 App.Cas. 337; Gordon, 558.
12. Derry v. Peek, supra, 374.
13. ibid. This has been referred to in England as "second-degree" knowledge. Roper v. Taylor's Central Garage (Exeter) Ltd., [1951] 2 TLR 284, 288; Evans v. Dell (1937) 53 TLR 310, 313; and /cf.

- cf. the same test in libel, Horrocks v. Lowe [1974] 2 WLR 282.
14. (1882) 9 R 807, 854. Cf. R. v. Carpenter (1911) 22 Cox CC. 618, 624.
 15. 1934 JC 42.
 16. Akerhielm v. De Mare, [1959] 3 AER 485, 503.
 17. R. v. Gurney (1869) 11 Cox CC. 414, 467.
 18. (1912) 6 Adam 571.
 19. [1952] 2 AER 842.
 20. Sub.nom. R. v. Russell [1953] 1 WLR 77.
 21. R. v. MacKinnon [1959] 1 QB 150.
 22. R. v. Grunwald [1960] 3 AER 380, 384.
 23. Glanville Williams, 2nd ed. 151. The application of the decision in MacKinnon, supra, is effectively avoided by the Protection of Depositors Act 1963 which imposes liability for such statements etc. whether they are made "dishonestly or otherwise" (s.1; s.21(a)).
 24. 1948 (1) SA 375 (AD), followed in R. v. Bougarde 1954 (2) SA 5 (c); R. v. Heuer 1954 (3) SA 601 (E); R. v. Oliver (2), 1959 (4) SA 145 (N).
 25. supra; cf. the South African civil case African Banking Corp. v. Goldbard (1897) 4 Kotze 402.
 26. Vol.23, 2nd ed., s.59. Myers, supra, at 382.
 27. cf. Burchell and Hunt, 131-2. Useful examples of this properly subjective approach are the acquittals of the accused in R. v. Oliver (2), 1959 (4) SA 145 (N), and S. v. Copley 1973 (4) SA 111 (R., AD).

28. cf. Schreiner JA in R. v. Markins Motors (Pty.) Ltd. 1959 (3) SA 508 (AD), 516; Hunt, 725.
29. Myers, supra.
30. R. v. Mohr 1944 TPD 105, Alberts v. R. 1959 (2) PH, H 277 (AD).
31. 1954 (3) SA 601 (E), 604.
32. R. v. Bougarde, 1954 (2) SA 5 (C), 8.
33. See however the important statutory presumption under Act 56 of 1955, s.280 bis as added by Act 75 of 1959 (s.6).
34. 1948 (1) SA 106 (N).
35. cp. R. v. Masiminie 1904 TS 560; R. v. Adam (1939) SR 106.
36. R. v. Zillah 1911 CPD 643. Cp. the review of the evidence in R. v. Mothout 1912 CPD 1037; R. v. Alexander (Pty.) Ltd. 1946 AD 110. The so-called "duty" to be aware of one's bank balance when drawing a cheque likewise involves the subjective test of liability. R. v. Pieterse, 1950 (4) SA 21 (O).
37. H.M.Adv. v. Livingstone (1888) 15 R (J) 48, 51; Brander v. Buttercup Dairy Co. 1921 JC 19; Glanville Williams, 2nd ed., 85.
38. cf. R. v. Whitmore (1914) 10 Cr.App. R 204.
39. The common law rule is accurately set out in Smith v. Neilson (1896) 2 Adam 145, a statutory prosecution for fortune-telling.
40. Gordon 558; cf. Hunt, 726.
41. Smith and Hogan, 3rd ed., 445.

42. 1971 (1) SA 543 (C); cf. Klopper, (1971) 34 THR-HR 203.
43. ibid, 547.
44. R. v. Kemp [1964] 1 AER 649.
45. e.g. as in R. v. Bester 1961 (2) SA 52 (FSC).
46. Cf. the South African case of S. v. Van Biljon 1965 (3) SA 314 (T).
47. Gordon, 559.
48. Gordon 202-4.
49. Salmond Jurisprudence, 12th ed., (P.J.Fitzgerald) pp.372-3.
50. Gordon, 203.
51. R. v. Lin Yun Chen 1908 TS 634, 638; Cf. R. v. McLean, 1918 TPD 94, 97.
52. Cf. Ver Loren van Themaat, pp. 152-3.
53. 1963 (2) SA 335 (N).
54. ibid, 337.
55. Cf. Burchell, (1963) 80 SALJ 321, 322, Cf. S. v. Van Biljon, 1965 (3) SA 314 (T) 318.
56. 1955 (3) SA 259 (T).
57. ibid 264. Cf. however R. v. Kinsella 1961 (3) SA 519 (C), and S. v. Dreyer 1967 (4) SA 614 (E).
58. H.M.Adv. v. Livingstone (1888) 15 R (J) 48, 50-1.
59. (1872) 2 Coup 323, 325.

60. Cf. Brown (1886) 1 White 243, 248.
61. Gordon 559; Perkins 264.
62. 1957 (3) SA 361 (AD) Hunt, p.727, 733, is critical of this decision.
63. R. v. Bernhard [1938] 2 AER 140; cf. Theft Act 1968, s.2(1).

CHAPTER VI

Mens rea in Statutory offences of fraudulence

A. INTENT TO DEFRAUD

In a system of statutory offences such as English law the concept of "intent to defraud" tends to be interpreted with reference to the particular offence rather than as a general mental state. For example, in Starey v. Chilworth Gunpowder Co.¹ the court were concerned to interpret "intent to defraud" within the meaning of the Merchandise Marks Act 1887 s.2² rather than to consider it as a general mens rea in offences involving misrepresentation. The meaning of the phrase may vary in different statutory contexts.³

A further difficulty in English law is the fact that the phrases "intent to defraud" and "intent to deceive" are used in different statutory contexts;⁴ and, in the case of forgery, in different parts of the same Act,⁵ which necessitates a distinction between the two. In the making of this distinction, however, the problem is not one of intent at all, although it is invariably looked at in this way.⁶ The cases on the question and the controversies surrounding them demonstrate that where intent to defraud or deceive has been in issue the real controversy has not been as the state of mind of the accused so much as to the objective consequence necessary for liability, and these difficulties are in no way removed by the substitution of "dishonesty" as the test of mens rea in the Theft Act 1968.

It is necessary therefore in the context of English law to deal with the question of intent under reference to the objective aspect of the prejudice or result.

B. THE RESULT ELEMENT

Intent to defraud in the English law was the statutorily required mental element in the former crime of obtaining by false pretences,⁷ and therefore since the "obtaining" was the specific statutory actus reus it was sufficient for liability that the intent was related to that actus reus and accordingly unnecessary and irrelevant to consider whether the actus reus was prejudicial.

This important distinction was demonstrated in R. v. Carpenter⁸ where the accused had induced members of the public to deposit money with him by means of false statements. The jury were directed that there was an intent to defraud if the accused made statements which he knew to be untrue for the purpose of inducing people to deposit money, in the knowledge that they would not deposit it but for their belief in the truth of his statements; and if he intended to use their money for purposes other than those for which the depositors understood from his statements that he intended to use it. The direction to the jury in that case included the statement

/"You

"You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statements".⁹

The direction in Carpenter was expressly approved by the Court of Criminal Appeal in R. v. Kritz¹⁰ where the appellant had obtained a sum of money from a bank against uncleared cheques which he knew to be worthless. The appeal was taken against a direction that an intention on the accused's part to repay the money was immaterial. That direction was upheld.¹¹

The reason for this principle is clear. In each case the crime of obtaining by false pretences was complete as soon as the property was "obtained". The line of authority on this question in England arose of course from situations in which actual loss had occurred and the English judges were not required to consider situations where, for example, the deposit was duly repaid or the investment yielded handsome dividends, or where goods obtained on credit were paid for at the due date so as to earn for the seller a profit of the transaction. But such cases are in theory indistinguishable because in each the liability is incurred as soon as the property is obtained and all that follows is merely a subsequent and irrelevant realisation of the accused's optimism.

/Equally

Equally, it was no defence to a charge of obtaining by false pretences that the goods given were value for the money paid, if the goods were not what the victim was led to believe he was getting.¹²

Section 15(1) of the Theft Act 1968 provides that the offence of obtaining by deception is committed by any person

"who by deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it".

This offence requires two elements in the mens rea, an intention to deceive and an intention thereby to obtain the property, which under this section means to obtain either possession or control only or the full rights of ownership.

It is submitted that exactly the same principles as are set out in cases such as R. v. Carpenter⁸ must apply to the latter aspect of the mens rea, so that as Smith and Hogan observe,

".....D may act dishonestly for the purposes of deception although he does not obtain the property with a view to gain, or notwithstanding that he intends to pay for the property."¹³

The statutory use of the idea of "dishonesty" in this context may therefore be explained simply as a recognition of the defence of claim of right.¹⁴

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C. THE CONTRASTING FEATURES OF COMMON LAW LIABILITY

The contrast which the common law crime of fraud presents in similar situation is in the consideration that even when the actus of obtaining is complete the court must still, to establish liability for fraud, evaluate the actus as a question of law from the point of view of prejudice. A statutory liability for "obtaining",¹⁵ for example, arises from the doing of a forbidden act, whereas the common law liability for fraud arises from the doing of a prejudicial act. The prejudicial quality of the act in common law fraud is assessed by the court, whereas the prejudicial quality of the forbidden act under such a statutory offence is a prior decision of the legislature.

D. THE PREJUDICE ELEMENT IN FORGERY

However, when the intent element in the English crime of forgery is examined it is apparent that the real problem is not purely the intent but rather the element of prejudice in the consequences; and, in forgery cases at least, the English courts have been required to consider what types of consequence constituted relevant prejudice and have done so in similar manner to the Scottish and South African courts in their analysis of fraud.

The earlier English common law, which struck at forgery of public documents only, required that the forger /intended

intended to deceive. When the scope of the crime was extended to cover forgery of private documents the additional element of prejudice was required. This was expressed in the form of a requirement of an intent to defraud; but although prejudice was the test of this intent there was doubt as to the proper nature of the prejudice.¹⁶

The commonest example was of course, economic loss; but there were a number of controversial cases which lent support for a wider test of prejudice.¹⁷

An important statement of the law on this matter was made by Buckley J. in a civil action in 1903 where the distinction between fraud and deceit was in issue. In Re London & Globe Finance Corporation¹⁸ the distinction was described by him as follows:

"To deceive is.....to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action".¹⁹

The main support for the "economic loss" theory of prejudice was academic rather than judicial.²⁰ The supporters of that theory relied heavily on a narrow /construction

construction of the foregoing dictum, since the cases in which the dictum has been approved are not at one.²¹

The problem fell to be decided by the House of Lords in Welham v. D.P.P.²² in a case under s.4(1) of the Forgery Act 1913 which required "intent to defraud". The appellant had uttered false hire purchase documents in respect of fictitious sales upon which finance companies had advanced money to the company of which he was manager. No one was any worse off financially as a result of this arrangement. The finance companies and the appellant's firm were in a very real sense better off since they were able to circumvent credit restriction regulations by this arrangement. The appeal proceeded on the footing that the appellant intended to deceive the authorities enforcing the credit squeeze into believing that the regulations were being observed. It is clear from the decision upholding the conviction that the distinction between deceit and fraud in English law is now that in the former an erroneous belief alone is induced, whereas in the latter the belief so induced is acted upon, but not necessarily with economic effects. It was therefore sufficient in Welham that there was an intent that the actions of the authorities would be affected to the extent that they would not institute proceedings in respect of the transactions.

/Although

Although mere acquisition of an erroneous belief is not a sufficient consequence for fraud, there is an obvious difference between an erroneous belief such as that in R. v. Hodgson²³ which is not acted upon in any way, and that in Welham which causes inaction; because in the latter case the complainant is influenced in his resulting course of conduct. Welham decides that the action or inaction need not be of an economic type and there is accordingly intent to defraud on the part of someone who forges a prescription in order to obtain drugs even though he intends to pay, and on the part of someone who forges a testimonial in order to gain an honorary position such as that of J.P.²⁴ It is therefore clear that Welham has routed the economic loss theory of prejudice in regard to forgery, but it leaves the difficulty that "instances of deceiving that are not also instances of defrauding must be rare".²⁵ A further objection is that it is "hard to understand... why it should have appeared necessary to make criminal the faking of a public document with intent only to deceive".²⁶ The strongest objection is perhaps the insignificance of instances of deceit which are not also instances of defrauding because such instances will almost certainly come within the de minimis principle. The effect of Welham is probably to interpret intent to deceive out of existence. The Court were concerned to find an independent meaning for "deceit" and Hodgson²³ provided such a meaning. But since, as Lord Radcliffe pointed out,²⁷ some of the more fanciful non-economic results comes within the de /minimis principle

minimis principle, a fortiori so do all cases of deceit, since no result whatever occurs.

E. THE PREJUDICE ELEMENT IN "OBTAINING" OFFENCES

The decision in Welham was of significance in relation to false pretences since it impliedly affirmed the case of Potter²⁸ in which the accused were charged with obtaining a driving licence by false pretences, one having impersonated the other at a driving test. It was held in Potter that intent to defraud existed if the accused intended thereby to induce the licensing authority to issue the licensee document itself, or alternatively to take a course of action which they would not otherwise have taken, namely issue a licence, and which it was their duty not to take had they known the true facts. The two grounds of this decision are fundamentally different. On the interpretation of intent laid down in Carpenter⁸ and in Kritz¹⁰ it ought surely have been sufficient that the licence itself was "obtained". Reference in that case to Bassey,²⁹ a forgery case, obscured the point that the liability for false pretences arose simply from the performance of the forbidden act of obtaining a valuable thing with an intent related to that obtaining, whereas the liability for forgery contained the additional requirement of prejudice in the consequence. The second ground of decision in Potter was thus /appropriate

appropriate to forgery but not to false pretences.

This latent difficulty in Potter became apparent in the decision in R. v. Wright³⁰ where the appellant obtained money from the Post Office on behalf of another on producing a written authority duly signed by the latter but not witnessed. The appellant was proved to have forged the witness' signature himself. On the charge of obtaining the money by false pretences, the jury were directed to convict if they found that the accused by writing the false signature induced the Post Office assistant to pay him the money and that she would not have done so if she had known that the authority had not been validly witnessed. This, on the basis of Carpenter and Kritz, was surely an unexcipiable direction in law. The Court of Criminal Appeal, however, quashed the conviction on the ground that what happened to the money later was relevant to the question whether the accused was acting dishonestly. The case is only briefly reported but it implied a considerable modification of the concept of intent in false pretences. However, even if in view of Potter and certain dicta in Welham the interpretation of intent to defraud is the same in "obtaining" offences and in forgery, the case is difficult to reconcile with Welham. Glanville Williams describes it as an "indulgent" decision.³¹

/The

The most serious objection to the decision is that the gravamen of false pretences was the harm to the person from whom the property was obtained. The question in Wright was not whether the accused harmed the payee of the money, but whether he harmed the Post Office. The relevant consideration, therefore, was not his honesty in relation to the payee but his honesty in relation to the Post Office. It is submitted that the view of the Court of Criminal Appeal in that case was based on an insupportable motive theory, and that under s.15(1) of the 1968 Act a conviction on the same facts would be warranted on the basis of the conception of dishonesty suggested in Section 2 of the Act.

FOOTNOTES FOR CHAPTER VI

1. (1889) 24 QBD 90.
2. Cf. Lord Coleridge CJ at 96.
3. Glanville Williams, 2nd ed., ss.33-34.
4. e.g. Starey supra; Brend v. Wood (1946) 62 TLR 462.
5. Forgery Act 1913, ss. 3 and 5.
6. e.g. Smith and Hogan, 3rd ed., 516f.
7. Larceny Act 1916 s.32; Russell, 12th ed. 1191-2.
8. (1911) 22 Cox CC. 618.
9. at 624, Channell, J. Followed in R. v. Parker and Bulteel (1916) 25 Cox CC.145. Cited with approval in R. v. Henkes 1941 AD 143, 165.
10. [1950] 1 KB 82.
11. Cf. R. v. Hamilton (1845) 1 Cox CC 244, 247; R. v. Naylor (1865) 10 Cox CC 149; R. v. Bishirgian (1936) 25 Cr.App.R. 176, 187;
12. R. v. Bennett (1913) 9 Cr.App.R. 146.
13. Smith and Hogan, 3rd ed., 446.
14. Cf. s.2(1)(a) of the 1968 Act; Smith and Hogan, 3rd ed., 445.
15. Under either the 1916 Act or the 1968 Act.
16. Cf. Russell 12th ed. 1238.
17. Russell 12th ed. 1238-1255; Glanville Williams, 2nd ed., 86-89; Welham v. D.P.P. discussed infra.

18. [1903] 1 Ch.728, under reference to the Larceny Act 1861, ss.83, 84; and the Companies Act 1862, s.166.
19. ibid, 732.
20. Russell 10th ed. 1476-87; 11th ed., 1421-30; Glanville Williams 1st ed. 76-7; Fridman (1958) Crim.L.R. 503.
21. Contrast R. v. Bassey (1931) 22 Cr.App.R.160 with R. v. Wines (1953) 37 Cr.App.R.197. The topic is excellently reviewed by Gooderson in "Prejudice as a Test of Intent to Defraud", [1960] Camb.L.J.199.
22. [1961] A.C. 103.
23. (1856) 7 Cox CC 122 where the accused displayed a forged diploma in his sitting room and induced two enquirers to believe that he had the professional qualification.
24. Welham, ibid, L.Denning at 131.
25. Glanville Williams, 2nd ed. 88.
26. Smith and Hogan, 3rd ed., 519. Cf. Hadden, "Intent in Forgery" (1965) 28 MLR 154.
27. Welham, supra, 128.
28. (1958) 42 Cr.App.R.168.
29. (1931) 22 Cr.App.R.160.
30. [1960] Crim.L.R. 366.
31. Glanville Williams, 2nd ed. 87.

CHAPTER VII

The result element in fraud
in nineteenth century Scots law

A. PRACTICAL CHEATING

The theoretical problems associated with the result element in the modern Scots law of fraud seem to have originated in Macdonald's denomination of a category of practical cheating in which, he alleged, a result was unnecessary.

In modern Scots law Gordon has recognised and adopted a similar category of fraud.¹ In Gordon's discussion, "practical cheating" is distinguished from "simple fraud" because in practical cheating "It is not necessary that (the pretence) should have brought about any result, it is enough that it should have been made".² This proposition is, on the face of it, surprising, since it suggests that in fraud different legal consequences follow from the manner in which the pretence is effected, and that where a particular method of pretence is adopted, fraud ceases to be a result crime. According to Gordon, "the important feature of practical cheating is that it involves the passing off of an article or writing which itself pretends to be other than it is".³ The examples show, however, that in regard to liability for fraud this view cannot be supported.

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The type case of practical cheating, according to Gordon is the uttering of false documents; but uttering, as has been emphasised, is a separate crime and Gordon recognises this.⁴ Since it is distinct from fraud, its inclusion in the discussion of fraud inevitably confuses the proper interpretation of the crime. Uttering is a separate crime distinguished precisely because a result is unnecessary.

The second type of practical cheating to which Gordon refers is that of "uttering false articles as genuine"⁵ either by tendering them as authentic or by tendering them as being other than they are. The example given by Gordon of tendering as authentic is that of faking a work of art. It should be emphasised here that Gordon's view implies two propositions - that in practical cheating a result element is unnecessary and that in practical cheating the liability is for fraud. There is no authority for the view that tendering false articles, such as art fakes, as authentic is fraud. Obtaining money by this method certainly is. It may well be that simply to tender them as authentic is criminal, although this has never been established; but if it is, the liability would be better founded on a logical extension of the crime of uttering, or on the basis of attempted fraud, rather than by doing violence to the principles of fraud by holding a result to be unnecessary where the pretence instead of being verbal assumes a practical form.

Gordon next considers as practical cheating, and therefore as completed/...

completed fraud, the tendering of articles as being other than they are, and this view is open to the same criticism. The sole authority supporting it is Bannatyne⁶ and there is strong authority against it. In Bannatyne a spurious mixture of grain was delivered in purported fulfilment of a contract for the supply of oatmeal. It was held that there was liability for fraud even though the grain was neither used nor paid for.

The case must however be interpreted in its historical context. It was decided at a time when attempted fraud was not yet criminal and when accordingly an extended concept of prejudice was invoked to establish liability for the completed crime. Both sides started from the assumption that a result was necessary for liability, even one which did not entail actual loss. The sole question in the case was whether or not only an attempt had occurred, and nothing in the case suggests that the practical nature of the pretence was material to liability or constituted any ground of distinction. Indeed the later cases⁷ in which the ratio of Bannatyne was adopted involved only verbal pretences; and of course when attempted fraud became criminal in 1887⁸ that ratio ceased to apply. Since the law laid down in Bannatyne was directed to the problem of the result, and not the method, the case must be considered an obsolete authority and it is certainly superseded by the later cases.⁹ Gordon suggests that "Bannatyne itself could today be charged as attempted fraud, but the decision is concerned with a completed crime and would apply where there was no attempted fraud",¹⁰ but it is difficult to envisage a situation in which if/...

if a spurious article is deliberately tendered as authentic there is no attempted fraud, except of course where there was no relevant intent and therefore no liability either for the completed crime or for an attempt.

Macdonald's view, which forms the basis of Gordon's view, is that the actus reus of practical cheating occurs "where an article is made over to others as being that which it is not".¹¹ This however misrepresents the decision in Bannatyne. The case did not establish that there was a special liability, not requiring any result, where the pretence was in practical form. It simply established that the supply of the spurious article was in itself a sufficient result. It did not suggest that where the pretence was verbal any further result was necessary, and Hood v. Young¹² proved that this was not so.

These criticisms of the supposed category of practical cheating are supported by Macdonald's other example of it, Paton,¹³ which on its bizarre facts certainly involved practical rather than verbal misrepresentation. In that case the panel entered cattle in a competition after inflating their skins and fixing false horns to them. If there is any substance in the "practical cheating" theory it would have been sufficient for liability for fraud, as Macdonald¹⁴ suggested it was, that the cattle were entered for the competition; but, as the report shows, the question in the case was whether the awarding of the prizes was a sufficient result or whether payment of them was necessary.

B./...

B. THE CASE LAW BEFORE 1887

When one considers the development of the concept of prejudice in the nineteenth century Scottish cases, it is important to bear in mind that before the Criminal Procedure (Scotland) Act 1887¹⁵ there was no liability for attempted fraud. In fraud cases before 1887 the facts of which would in modern theory be considered as attempts, there was a strong desire apparent on the part of the judges to impose liability. Restricted as they were by the exclusion from liability of attempted fraud,¹⁶ the Scottish judges devised a liability for the completed crime by an extended interpretation of the concept of prejudice. Cases which demonstrate this concern fraudulent schemes which failed, and in these the idea of prejudice was extended to cover situations of only potential loss to the victim. As the cases show, before the 1887 Act the theory of fraud had so interacted with the theory of attempt that every extension of the concept of prejudice was made at the expense of the proper concept of an attempt; with the result that conduct was held to amount to an attempt to commit fraud, and therefore not to be criminal, only in the limited case where it had failed to deceive the intended victim at all.¹⁷ A similar process gave rise to offences such as housebreaking with intent to steal, there being no liability for attempted theft.

In Macintyre¹⁸ where an insolvent concealed certain assets and the charge of "fraud" failed to allege that the scheme was effective or that anyone was injured thereby, it was held that success/...

success was unnecessary: "Everything was done by the panel which was necessary to constitute guilt on his part".¹⁹ There were further indications of this view in Kippen,²⁰ notably in the statement of Lord Moncreiff that "all the overt acts set forth are said to have been committed with a criminal intent, and for an unlawful design. This, in my opinion, is enough".²¹ By the middle of the nineteenth century therefore the crime of fraud in the typical case consisted of little more than the making of a successful deception with a fraudulent intent.

In Bannatyne²² where the accused had supplied a spurious mixture of grain on an order for oatmeal, the prejudice alleged was that he "did impose upon and did cheat and defraud"²³ the buyers. It was contended on behalf of the accused that the facts alleged amounted only to an attempt. The grain had neither been paid for nor consumed. The indictment made no allegation that the panel had profited, or that the buyer had sustained loss. The Court concluded however that "The article was thus furnished; and that is enough to complete the crime charged .. .",²⁴ and it was laid down that the buyers were defrauded merely by being supplied with the spurious article, whatever its value.²⁵

The development of this view was significantly contributed to by the failure of the Crown and the Court to appreciate the distinction between falsehood and fraud, particularly in respect of the result element and once that distinction was lost sight of, it was easier for the Court to base liability for/...

for fraud upon potential prejudice only. Taylor,²⁶ which has been already referred to, is the most notorious example of this where of course the appropriate charge was forgery and where, so far as fraud was concerned, there was at most an attempt.²⁷ However, there being no liability at that time for attempted fraud, the Court took an extended view of the result. One judge held that the crime of fraud was committed as soon as the victim posted the money in reply to the letter, whether or not the panel obtained it. This was correct enough from the point of view of fraud, but the majority, presumably with falsehood by writ in mind, thought that the crime of fraud was complete as soon as the accused sent off the original letter, just as in Bannatyne liability had been incurred at the time of supply. Similarly, in Hood v. Young¹² where the accused arranged an auction of two unsound horses about which they made various misrepresentations, it was held to be sufficient for liability for fraud that the horses were knocked down to their purchasers, even though the price was not paid and the purchasers' obligation to pay involved at the most a potential loss.

The extent to which the definition of the crime had before the 1887 Act encroached on conduct which was in substance an attempt is further illustrated by Paton,²⁸ where the panel cheated in a competition and in consequence was awarded prizes. It was not alleged that the prizes had been given to him and it was assumed in the debate that they had not. It was contended on behalf of the panel that a mere attempt was charged in that the/...

the deceit had been detected before payment of the prizes to him could be made. Lord Ardmillan observed: "It will be a question of fact on the merits, whether, after the fraud, any repentence on the part of the prisoner prevented his obtaining the prize. But should his purpose be frustrated by early discovery after he has committed the fraud, and succeeded in the deception, and done all in his own power to accomplish his object, it were contrary to all justice that he should escape".²⁹ It is noteworthy how closely this statement resembles the language of Hume³⁰ in his discussion of attempts. Lord Neaves, however, grasped the true point in this case which was not the question of how much of the scheme the panel had achieved, but the question whether there had occurred a practical consequence sufficient to constitute liability for fraud. In Lord Neaves' view there would have been an attempt in this case only if no-one had been deceived. He considered that a successful deception leading to a potential loss was a sufficient consequence to infer prejudice, provided the loss was of a patrimonial nature.³¹

C. THE CASE LAW AFTER 1887

After the 1887 Act when a verdict of, inter alia, attempted fraud became competent, the considerations behind the earlier decisions on the result element no longer applied. Nevertheless the earlier decisions continued to be accepted and applied quite uncritically by the Scottish judges without their realising that these earlier decisions were incompatible with a developing theory/...

theory of prejudice in which loss to the victim was not essential.

It is important to emphasise that what may conveniently be called the "attempt cases" of the pre-1887 period concern the situation where the victim had not paid anything to the accused but had merely incurred a liability to pay. There followed a separate tract of decisions in cases in which payment had been made, but the victim had got value for money. This was an entirely separate problem, but owing to an imperfect understanding of the "attempt cases" the High Court on at least two occasions decided that since in the latter the victims liability to pay had been held a sufficient result for fraud, a fortiori there was liability for fraud where payment was actually made.³²

D. THE THEORY OF PREJUDICE IN RELATION TO LOSS

If the considerations affecting the pre-1887 decisions had been properly understood, it is possible that the Court in these later cases would have demanded an allegation of loss to the victim as essential to the relevancy, since without such an allegation it would have been at least arguable that to receive value for money could not in pecuniary terms infer loss. However, because of the casual adoption of earlier authorities, a rather wider conception of prejudice resulted in which measurable pecuniary loss was not an essential and a theory developed in which the basis of prejudice was the alteration by the victim of his economic position, for good or ill.

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This theory, which originated in Hood v. Young,¹² was further developed in the case of A.H. Smith³³ which, although it can be criticised on relevancy, contained important and in some respects novel statements of the principles of fraud.

The case established that there was prejudice to the victim even where, as a result of the deception, he acquired an asset worth the price he paid for it, and therefore that loss was not essential to prejudice.³⁴ It was sufficient that the victim changed his position, in the economic sense, in reliance on the truth of the representation and would not have done so but for the deception. Such a change occurred in A.H. Smith simply in the victims' investing money in faked historical documents.

It follows from this view that it would be no defence that the victim acquired an asset worth more than the price paid because, if loss is not essential to prejudice, neither can gain be relevant to it.

In Turnbull v. Stuart³⁵ the complaint alleged that the accused's misrepresentations about horses which he submitted for auction were made with the intention of inducing competition and obtaining higher prices for them, the circumstances misrepresented being such as to give the horses a greater value in the eyes of bidders than they would otherwise have had. The prejudice alleged was that the successful bidders bought the horses at prices, which, but for the false descriptions, they would never have paid. The defence contended that the complaint failed to allege that the/...

the horses wereworth less than the prices paid for them and that therefore it could not be said that the buyers had sustained loss. On the basis of A.H. Smith however, which the Court followed, the purchasers had altered their position with pecuniary effect.

In Turnbull v. Stuart³⁵ the Court also followed the earlier case of Hood v. Young¹² but for no good reason. Hood v. Young, like Bannatyne,²² was properly an attempt case where the accused had not received payment at all from the victims of the deception. It was therefore materially distinguishable from Turnbull, where payment had been made. It is interesting to notice that in the later case of J. & P. Coats Ltd. v. Brown,³⁶ on facts similar to those in Turnbull, the case of Bannatyne formed an equally inappropriate basis of decision.

In J. & P. Coats Ltd. v. Brown it was alleged that the respondent, having contracted with the complainers to supply coal of a certain type, had knowingly supplied coal of a different type and taken payment at the contract price, thereby defrauding the complainers. The outstanding feature of the case, so far as relevancy is concerned, is that the Bill for Criminal Letters did not allege that the coal supplied was of a cheaper or inferior type. The Bill made no reference at all to the value of the coal supplied or of the extent to which the complainers were defrauded, and in the opinions of the judges upon relevancy such references were obviously thought to be unnecessary. The basis of liability was the earlier/...

earlier pre-1887 idea that something had been supplied other than that contracted for. The significance of the case was that in adopting Bannatyne the Court confirmed by implication the view that actual loss was not essential to prejudice. This was however a separate question from that in Bannatyne, whatever the Court may have thought, because J. & P. Coats Ltd. v. Brown concerned a situation where the intended consequences were achieved without the victims being any worse off in pecuniary terms. It seems clear from the judgements that, regardless of the value of the goods supplied, prejudice to the complainers existed because, as in Turnbull, the deception induced the buyers to do something which but for the deception they would not have done at all. This principle was reaffirmed in H.M. Adv. v. Richards³⁷ where on a charge of fraudulently inducing the sale of a house, it was implicit in the charge, and conceded at the trial, that the sellers were paid full value.

The wider implications of this theory of prejudice are demonstrated in Rodger³⁸ where the prejudice alleged was that the seller of the goods had been deceived into believing that the accused was a person of good credit and thus to accept against delivery long-dated bills which, it was alleged, the accused had no intention of honouring. At the time of the trial, however, the bills had not yet fallen due. The defence argued that it could not yet be said that the complainer had sustained any loss. The Court however held that the prejudicial consequence had already been sustained in that the deception had induced the granting of any credit at all. Simply to have been/...

been induced to accept a person such as the accused as his debtor was, from the complainer's point of view, a worsening of his economic position even though his loss had not yet crystallised. Similarly in Macleod v. Mactavish³⁹ where the accused induced his employer to pay over a sum retained in security of a debt owed to him by the accused, there was liability for fraud even though the employer's claim against the accused was not yet enforceable.

Turnbull v. Stuart was significant in that it contained the first intimation by the Court of dissatisfaction with the theory of prejudice which had by then developed. Although the judges in that case felt themselves bound by previous decisions, particularly A.H. Smith, it is apparent that they would have preferred a different view had they considered the question to be open.

In Tapsall v. Prentice⁴⁰ in 1910 this theory was for the first time definitely departed from. The prejudice alleged was that the victim was induced to buy a rug "in excess of its proper value". Both Lord Ardwall and Lord Salvesen considered it a defect in the complaint that it was not alleged that the price had been paid. This clearly discredited the pre-1887 cases on the question. Both judges appear to have considered that for the buyer to be induced to enter into a contract of sale was not a sufficient consequence to infer prejudice, since without payment being made it could not be said that the accused got any advantage or that the victim had suffered any/...

any injury.⁴¹ All three judges took the matter further, however, by requiring allegations of the true value of the rug and of the price actually paid. This requirement, which conflicted with the previous view in Turnbull v. Stuart and J. & P. Coats Ltd. v. Brown, was justified on the unconvincing ground that in Tansell v. Prentice the pretence did not relate to the article sold. This ought not to have been a relevant consideration and the cases cannot satisfactorily be distinguished on this ground. However, albeit unconvincingly, the earlier theory was thereby departed from and this departure was later confirmed in an obiter dictum of Lord Ashmore in Strathern v. Fogal.⁴²

The effect therefore of the last three cases mentioned was to place considerable doubt on the prior theory of prejudice, without however clearly indicating in what respects it was to be modified. The reason again is probably that the judges failed to recognise that the pre-1887 cases were determined by considerations which no longer applied.

FOOTNOTES FOR CHAPTER VII

1. Gordon, 537, 559f
2. at 537
3. ibid.
4. ibid., 560
5. ibid., 569-572
6. (1847) Ark. 361
7. e.g. Hood v. Young (1853) 1 Irv 236
8. Criminal Procedure (Scotland) Act 1887, s. 61
9. cf. infra
10. Gordon, 571
11. Macdonald 1st ed., 111
12. (1853) 1 Irv. 236
13. (1858) 3 Irv. 208
14. 1st ed., 112
15. S. 61 cf. following note
16. Gunn (1832) 5 Deas & Anderson 256, Shepherd (1842)
1 Broun 325; Macdonald, 1st and 2nd eds., 95
17. Paton (1858) 3 Irv. 208, 211-2
18. (1837) 1 Swin 536
19. ibid., 539
20. (1849) J. Shaw 276
- 21./...

21. *ibid*, 285. There was, however, as L.J-C Hope and L. Cockburn pointed out, a detrimental result in that case (285-6). The accused, a solicitor against whom there were several decrees, was alleged to have raised a series of actions in the names of fictitious pursuers against his creditors and on the dependence of the actions to have arrested in his own hands the sums due by him to his creditors. He was alleged then to have raised a series of multiple poindings against the fictitious pursuers, the sums arrested constituting the funds in medio. By delaying the execution of diligence against him on the decrees he was held to have caused injury and lesion to the creditors.
22. (1847) Ark. 361
23. ibid, 364
24. ibid, L.J-C. Hope, 366
25. ibid, 380
26. (1853) 1 Irv. 230; cf. Ch. 3
27. Gordon 553, n.2
28. (1858) 3 Irv. 208
29. ibid, 211 (writer's italics)
30. Hume, i, 27
31. Faton 212
32. Turnbull v. Stuart (1895) 2 Adam 536, following Hood v. Young, supra; and J. & P. Coats v. Brown 1909 S.C. (J) 29, following Bannatyne, supra
33. (1893) 1 Adam 6
34. ibid at 11-12
35. (1898) 25 R (J) 78
- 36./...

36. 1909 S.C. (J) 29
37. 1971 J.C. 29, discussed infra.
38. (1868) 1 Coup 76
39. (1897) 25 R (J) 1
40. (1910) 6 Adam 354
41. ibid, L. Salvesen at 357
42. 1922 J.C. 78, 81

CHAPTER VIII

The development of the modern theory
of the result element in Scots law

A. ADCOCK v. ARCHIBALD

It is futile to conjecture what theory of prejudice remained in Scots law after Strathern v. Fogal,¹ but obviously the concept of prejudice was more restricted than it had been before. On the next reported occasion on which the matter was discussed however, the case of Adcock v. Archibald,² a completely new approach was taken which greatly extended the ambit of the crime and dictated the modern development of a theory of prejudice which admitted consequences which were not of an economic nature.

When Adcock v. Archibald is considered it is essential to distinguish what was alleged from what was proved. The appellant who was a miner had removed the identifying pin from a hutch of coal worked by another miner and substituted his own in order to be credited with having worked the coal himself. The complaint alleged that in consequence of this he induced the employers to pay him, instead of the other miner, at the end of the week for working the coal. The complaint was plainly relevant. It was established in evidence, however, that both the miners were employed on a minimum wage system with a bonus payable for hutches worked in excess of a certain number. In the week concerned neither miner exceeded the minimum. Both were paid the guaranteed wage and the colliers lost nothing as a result of Adcock's deceit. The/...

The complaint was therefore not proved. The only consequence of Adcock's pretence was that the employers made a ledger entry crediting him with having worked the coal and failed to make an entry crediting the other miner with having worked it. There was therefore during the remainder of the week a possibility of loss to the other miner or to the employers which, as a result of the final output of the two miners, did not materialise. It being obvious that Adcock had not done what he was charged with doing, that should have been the end of the matter. The conviction under the complaint should have been for attempted fraud. Nevertheless, the High Court sustained the conviction of fraud on the ground that the accused had induced the employers to credit him and not the other miner with having worked the coal. As Gordon observes "The accused was in effect convicted of a crime with which he was not charged - he was charged with inducing the employers to pay him 1s. 3¹/₂d on January 23 and convicted in effect of inducing them to make a book entry sometime between January 16 and 23".³ The value of Adcock as an authority must be considered in the light of this.

The statements of the Court in Adcock suggest an entirely new theory of prejudice. Lord Justice-General Clyde stated as a general principle that in fraud "Any definite practical result achieved by the fraud is enough".⁴ This was a startling proposition. Previous case law suggested that proof of loss was required but the Court in Adcock reverted to the obsolete nineteenth century principle upon which the definition of the crime intruded on the principles of attempt and upon which the occurrence/...

occurrence of actual loss was not essential. Lord Clyde's dictum suggests the wide rule that the occurrence of any definite practical result is per se prejudicial whether or not it infers loss. Furthermore, there is no limitation suggested as to the nature of the result: it may include economic benefit, and would certainly exclude claim of right as a defence. Such a far-reaching rule deserved a sound basis in previous decisions or else a fully argued resort to principle but no authority was cited in either of the judgements and no argument was advanced in justification of the rule. The proposition put forward by the Court was not so self-evident as to be dealt with in this way.

The definite practical result in the case was held to be that the employers erroneously credited the accused with work done and failed to credit the other miner with that work or, as Lord Hunter put it, "They were induced to do something they would not otherwise have done".⁵ When one considers that the employers would in any event have made a ledger entry relating to the hutch the practical result was at the most the making of a wrong but ultimately immaterial ledger entry, surely one of the most insignificant results ever relied upon in support of a conviction. One may wonder what view the Court would have taken if the hutch pins had merely been set aside until the miners' final output for the week was determined, or if Adcock had made the relative book entry himself.

It would have been more in keeping with the nineteenth century cases to have relied on the economic significance of the wrong entry/...

entry rather than on the physical making of it and thus to have posited liability on the potential loss to the employers or to the other miner or to both; but this point was not taken.

There must, however, be many cases of unsuccessful attempts to obtain money where the intended victim's actions are at least affected in some "definite practical" way. For example, where the intended victim investigates the truth of the accused's statements before refusing to pay. Indeed the earlier case of H.M. Adv. v. Camerons,⁶ where the accused were convicted of an attempt to defraud insurers by the means of a mock robbery, would come within the scope of the rule in Adcock v. Archibald. In Camerons the accused reported the robbery to their broker who intimated the loss to the insurers. The insurers wrote a letter to the accused requesting them to submit a formal claim. There was considerable doubt in that case whether on these facts there was even liability for an attempt,⁷ yet it could now be argued that the writing and posting of the letter by the insurers would be as definite a practical result as the making of the ledger entry was in Adcock.

The High Court had the opportunity to apply the ratio of Adcock in Kerr v. Hill⁸ but declined to do so. The appellant in that case had been convicted of making a false report of a road accident to the police. Although no-one had been accused of a crime as a result, the police had been put to some trouble and various people had come under suspicion. The Crown cited Adcock in argument in support of the conviction but the judges did not mention/...

mention the case in their decision and do not appear to have considered that the appellant was liable for fraud.

No-one familiar with case law which preceded Adcock can be satisfied with the Court's perfunctory treatment of the case and its superficial consideration of the relevant law.⁹ The sole question should have been whether or not there was to be an acquittal or a conviction for attempted fraud. In these circumstances the dicta on the wider question of the prejudice element in fraud ought not to have been necessary; and on that question the law is as a result in a thoroughly unsatisfactory state.

It has to be recognised, however, that until the case is re-considered by a larger Court, it will continue to provide a useful basis for indictments in cases of deceptions which have caused no loss to be sustained but where the Crown consider a prosecution to be desirable. This is certainly suggested by two recent cases discussed later in this chapter. Before these are examined, however, it is useful to survey the views on the nature of fraudulence which preceded Adcock and the modern controversy which surrounds it.

B. THE ECONOMIC LOSS CONTROVERSY

Fraud has always been classified in the textbooks as an offence against property, and before Macdonald all the writers considered that the relevant result in fraud was of an economic character. Hume refers to the result as being the obtaining of "Goods/...

"Goods or money, or other valuable thing, to the offender's profit",¹⁰ a definition which is obviously based on the English Act of 1757.¹¹ Burnett¹² and Alison¹³ speak of the result in terms of depriving another of his property. The older writers who preserved the civilian term *stellionate* all analysed the result in economic terms.¹⁴ In Witherington,¹⁵ Lord Justice-General Inglis referred to the result as the obtaining of "goods, money, or some other value or advantage" to the profit of the accused and the corresponding injury of the victim.

With two seeming exceptions, the nineteenth century case law supports this view. The decision of the High Court in Adeock v. Archibald, however, put the matter in some doubt. The case involved only a question of economic loss but the dicta, particularly that of Lord Justice-General Clyde that "Any definite practical result is enough"¹⁶ suggested a considerably wider conception of the nature of the relevant result.

Non-economic results in the nineteenth century cases:

There fall to be considered two special nineteenth century cases in which a result of a non-economic type was discussed in the context of fraud. Lest these cases be too easily identified with the main line of development of the crime it should be emphasised that in each the charge was not in the terms usually adopted in fraud cases, at that time, so that there is even some preliminary doubt as to whether they were fraud cases at all.

The/...

The first case was Rae & Little¹⁷ where the accused were indicted for conspiracy to defeat or obstruct the administration of justice, as also "Fraud, particularly the wickedly, fraudulently and feloniously personating, or causing or procuring any party to personate another before a Court of Justice with intent to defeat or obstruct the administration of justice". The words of the indictment demonstrate the unusual nature of the prejudice alleged: "and in consequence of the said false and fraudulent personation the said Court was deceived or imposed upon, and was induced to proceed in the said trial on the understanding, and in the belief, that the said Rae was personally present at the bar; and further, in consequence thereof, or partly in consequence thereof, the said prosecutor was unable to establish the charge". The prejudice alleged in the second charge was not of an economic type: it was the infringement of the interest of the Crown in a properly conducted prosecution, and in this respect the case was the origin of the later doctrine of offences against the administration of justice. It is difficult to see in what sense the court or prosecutor could be said to have been defrauded or of what they were defrauded. No objection was taken to the relevancy of this charge and the question was not discussed by the Court.

The second case is William Fraser¹⁸, on which Gordon relies strongly for his theory that the result element in fraud is not confined to an economic type. As Gordon puts the matter, "Fraud is not restricted in Scots Law to fraudulent appropriation, nor is any distinction made between fraudulent appropriation and other forms of fraud. The civilian principle that any form of prejudice/...

prejudice caused by fraud is relevant has remained in the background, so to speak, ready for use when the occasion arose".¹⁹ This of course does not state the civilian position accurately²⁰ and it may be suggested that William Fraser is not, as Gordon suggests, an example of the extended form of fraud in Scots Law to which he refers.

The allegation in William Fraser was that the panel had intercourse with a married woman by pretending to her that he was her husband. The Crown brought three charges - rape, assault with intent to ravish, and thirdly "fraudulently and deceitfully obtaining access to and having carnal knowledge of a married woman, by pretending to be her husband, ~~or~~ otherwise conducting himself, and behaving towards her so as to deceive her into the belief that he was her husband". It is submitted that the third charge was not a charge of fraud at all.

The real issue in the case was whether force was a necessary element in rape or whether the consent of the woman was fundamentally vitiated by the pretence which induced it. Seven judges considered the matter and decided by a majority of four to three that the first two charges were irrelevant.

The relevancy of the third charge was accordingly not considered by the minority judges. The majority, however, were anxious that such conduct although not amounting to rape should not altogether escape liability but their analysis of the third charge was not clear. Lord Cockburn, it is true, said "Fraud, however, is unquestionably/...

unquestionably a crime, and, therefore, I am of opinion that the third charge is relevant".²¹ Lord Medwyn²² on the other hand and possibly also Lord Justice-General Boyle²³ considered that the third charge libelled an innominate offence. Lord Wood, rather inconclusively, concurred in the opinions of Lord Cockburn and Lord Medwyn.²⁴

It is arguable therefore that Gordon's view of this case is supported by only one judge of the Court. The primary question in the case was whether the conduct alleged constituted rape; and two considerations dominated the discussion - the anxiety of the majority not to extend the scope of rape, then still a capital offence, and the obvious determination of all the judges that the panel should not escape punishment.

The third charge in William Fraser was not in the style then in use for fraud²⁵ and it seems to have been intended to set out an innominate offence against the person. Although a false pretence was alleged, the gravamen of the offence was the sexual violation of the victim, and the three charges were eiusdem generis in a descending sequence of gravity. Certainly Macdonald did not consider the offence as fraud. He cited the case as an example of the crime of clandestine injury to women,²⁶ and also as an illustration of the use of the declaratory power of the High Court.²⁷ Parliament's attitude was later made clear when the species facti was statutorily declared to constitute rape.²⁸

Offences against the administration of justice:

At/...

At about the same time as William Fraser, however, an attempt was made by the Crown in the case of Eliot Millar,²⁹ to extend the scope of fraud to cases involving the perversion of the course of justice. This was a bolder step than had been taken in Rae & Little because whereas in Rae & Little the charge had been libelled simply as "fraud", in Eliot Millar the Crown assimilated the case to the orthodox fraudulent appropriation case in charging "falsehood, fraud and wilful imposition". It was alleged that the panel had falsely accused his wife of a crime for the purpose of perverting the administration of public justice and with the intention of subjecting her to accusation and punishment, and of injuring her feelings, and reputation or liberty. The consequences founded on were the investigation of the accusations by the authorities and the apprehension and committal of the panel's wife.³⁰

This case was tried on circuit before a single judge who upheld the relevancy of the charge, without however giving an opinion; and its value as an authority is therefore slight.

The Crown appeared to have been conscious of the novelty of the fraud charge because it was supported by an innominate charge, "The wilfully, wickedly, and feloniously, accusing an innocent person to the public prosecutor or other officer of the law, as being guilty of a heinous crime, for the purpose of preventing the administration of public justice, and injuring the person accused in feelings and reputation or liberty, the accuser well knowing the falsehood of the accusation". This charge too was held relevant/...

relevant.

This case was a further intimation of the later doctrine of offences against the administration of justice. Macdonald cited the case as an illustration of the crime of "false accusation"³¹ as well as of fraud. If the fraud liability had been clear the innominate charge would have been unnecessary.

Although one judge at least was satisfied that the result element in cases like Eliot Millar was relevant to fraud, that view was short-lived. In Margaret Gallocher or Boyle,³² on similar facts, only the innominate crime was charged³³ and no reference was made to fraud.

The decision of the High Court in Kerr v. Hill³⁴ completed the evolution of this innominate offence and the eclipse of the fraud theory. In that case a false report of a road accident was made to the police although no-one was specifically accused of having committed a crime and no-one was charged. In view of the obiter dicta in Adcock v. Archibald it was open to the Court to hold, as the Crown argued it should, that the facts constituted fraud since "a definite practical result" had been caused in the investigation of the matter by the police. It is clear however from the opinions expressed by the Court that the facts were considered solely in the context of an offence against the administration of justice, as a development of the crime of "false accusation" first disclosed in Eliot Millar.³⁵

The/...

The proper significance of these cases is that they concerned undeveloped areas of the criminal law. In Eliot Millar, and in Rae & Little if that is assumed to have been a case of fraud, the more sophisticated doctrine of offences against the administration of justice had yet to be developed. Instead of looking to the result element in the accused's conduct as determining its legal classification, as was later done in this category of cases,³⁶ the Crown looked to the method used as providing a convenient point of identification with an already recognised crime. In later development, of course, when the result element was recognised to determine the protected interest, and therefore the classification of the conduct, the question of liability for fraud did not arise.³⁷

Similarly, Lord Cockburn's view in William Fraser, which also involved argument from the method instead of from the result, was in due course superseded, in this case by statute, so that the result element thereafter determined the legal classification of that particular species facti.

The protected interest in fraud.

The contrary view which the difficult nineteenth century cases and certainly the obiter dicta in Adcock v. Archibald seem to suggest leads to a rather strange conclusion which may be illustrated by the case where the victim is induced by deception to sustain a fatal injury.³⁸ Gordon, who supports the wider interpretation of fraud, nevertheless points out that in such a case/...

case, the charge is not fraud but murder.³⁹ It seems to follow however from the wider view that there is also liability for fraud, either because there is a definite practical result as required in Adcock, or because it "injures and violates the rights"⁴⁰ of the victim. But just as murder can be committed by means of deception so too can extortion, theft, assault, obstructing the course of justice and innumerable statutory crimes. The point of distinction between all of these crimes where deception is the method used, lies in the result; and similarly the point of distinction between fraud and each of these crimes must also lie in the result. To argue that in each of these cases there is a concurrent liability for fraud is a strange and unsatisfactory conclusion. The bulk of the case law establishes⁴¹ that fraud is a result crime although, as Gordon recognises, it is essential in fraud that a particular method, namely deception, be used to achieve that result. If fraud were not a result crime then the telling of a lie, or at any rate the successful telling of one, would be criminal, which is certainly not the law.⁴² It follows that fraud being a result crime is distinguishable from other result crimes, in part at least, in respect of that result, and not in respect of its method of commission. This is so even of cognate crimes such as murder and assault. A fortiori it should be so of disparate crimes such as robbery and rape. It has never been suggested that one who commits rape also commits robbery, precisely because the result element in rape is not considered relevant to robbery. Yet such a conclusion would seem to follow if it is maintained that one who obtains intercourse by deception and thus commits/...

commits statutory rape also commits fraud. This is even less tenable if one considers the case proposed by Gordon of "fraudulently"⁴³ (a word which begs the question) inducing someone to touch a live electric wire. If such a person is induced to do so by force, it is assault and not robbery. Similarly, it is submitted, if he is induced to do so by deception it is assault and not fraud.

C. THE EFFECTS OF ADCOCK v. ARCHIBALD IN MODERN LAW

H.M. Adv. v. Richards:

The only reported case in which Adcock v. Archibald has been founded upon is H.M. Adv. v. Richards.⁴⁴ The Richards case resulted from a decision by the Corporation of Edinburgh to sell a vacant mansion house known as Hillwood House and several acres of surrounding garden ground. The mansion house was in a deteriorating condition and required considerable expenditure to make it habitable. For reasons of amenity the Corporation were concerned to ensure that the property should be sold for private residential use rather than for redevelopment. The allegation in the indictment was that the accused formed a fraudulent scheme to induce the Corporation to dispose of the property in feu, by means of false pretences as to the identity of the party desirous of obtaining the feu and as to the purpose for which it was desired. It was then alleged that the accused caused several other parties to pretend to the Corporation that one Burns desired to purchase the subject for the private residential use of himself and his family and thereby induced the Corporation to conclude missives of sale with Burns, the truth/...

truth being that Burns has no intention of using the subjects for these purposes and that the accused intended to acquire the subjects for his own purposes, which were not however specified in the charge. A further charge alleged that in pursuance of the fraudulent scheme the accused also caused these other parties to pretend to the Corporation that Burns desired to take the title to the subjects in the name of a limited company in which he would be the major and controlling shareholder and thereby induced the Corporation to execute a feu disposition of the subjects in favour of the company, the truth being that Burns had no shares or interest in the company and no intention to acquire shares or other interest in it and that the accused had negotiated to take over the company for his own purposes, which were again unspecified.

It was no part of the Crown case that the price at which the Corporation agreed to sell the subjects was not a fair market value, and it was conceded that the Corporation had been anxious to find a buyer for the property. There was therefore no question of economic loss to the Corporation, except in the trivial expenses incurred by them in entering into missives and executing the feu disposition. Furthermore, although the indictment alleged that the true position was that Burns did not desire to purchase the subjects for the private residential use of himself and his family, it was not specifically alleged that the accused's intention was to acquire the subjects for any different purpose. The indictment however, adopted in terms the formula of Lord Hunter's dictum in Adcock by alleging as the result of the fraudulent scheme that the accused fraudulently induced the Corporation "to do an act/...

act which they would not otherwise have done, namely to accept (Burns) as the genuine offerer to purchase in feu said subjects for the private residential use of himself and his family and to enter into missives with him thereanent".

The defence adopted the viewpoint of Gordon in seeking to limit the unqualified view of the result element which had been expressed in Adcock. It was argued for the accused that any practical result was not of itself sufficient to constitute fraud, but that the result must also involve some legally significant prejudice. It was implicit in the charge that if the Corporation had known that Burns was not a genuine offerer and wanted the subjects for his own residential use, they would not have entered into the transaction with him at all. On the face of the indictment, however, there was, as the Crown appeared to have conceded, no specific allegation of prejudice, economic or otherwise, to the Corporation. Indeed, there was no allegation that had the accused offered for the subjects in his own name and at the same price the Corporation would not have sold the subjects to him. The allegation of the result element in the crime therefore amounted to no more than that the Corporation had been induced to enter missives for the sale of the subjects under an error as to the identity of the person who would obtain occupancy of them. At the preliminary debate on relevancy, the Sheriff Principal stated that he was unable to accept the modification or limitation of the Adcock principle which had been suggested by the defence, a modification which was in his opinion, "not in accord with the long-established case of Adcock/...

Adcock v. Archibald".⁴⁵ He therefore rejected the view that fraud must involve prejudice in addition to a practical result. Unfortunately, this aspect of the relevancy of the indictment was not argued on appeal and no reference was made to Adcock in the judgments of the Appeal Court.

H.M. Adv. v. Macleod & Dunn

Before 1970 the decision in Adcock v. Archibald had been a neglected treasure from the Crown's point of view. The Richards case, however, provoked a re-examination of the possibilities which Adcock holds out for a wide-ranging liability for dishonesty, and the Crown have not been slow to exploit them.

In MacLeod & Dunn⁴⁶ two local officials of a trade union were charged with having submitted to the returning officer at the union's headquarters forged documents bearing to record a ballot, which had never been held, between two candidates in a delegate election. Up to this point, the indictment was a perfectly respectable charge of forgery and probably also of conspiracy. The indictment however continued as follows:

" and you did thereby induce the said returning officer to credit the said J.B. with 11 votes and the said J.F.C. with 214 votes in said Election and this you did by fraud".

The case was tried on the Glasgow Circuit before Lord Justice-Clerk Wheatley and, unfortunately, a plea to the relevancy of the indictment was departed from at the outset of the trial.

In/...

In his charge to the jury, the Lord Justice-Clerk said, "What is alleged in effect is that the accused were guilty of forgery, uttering and of fraud. Forgery and uttering are alleged by the Crown to be the means whereby the fraud was perpetrated and achieved".

Although it was relevant to charge a fraud in which the deception consisted in the uttering of forged documents,⁴⁷ it would nevertheless have been perfectly relevant to charge forgery simpliciter. If forgery had been charged, there would have been no need to libel any consequence whatsoever. If conspiracy had been charged, it would have been possible to libel what was arguably the really important consequence of the forgery, namely that the Union and the members of the local district had had foisted on them a delegate who had not been validly elected. In adopting this curious form of fraud charge, however, the Crown libelled the consequence to the person deceived, namely the returning officer, whose function was purely administrative, who had no personal interest in the matter, and who so far as the charge disclosed, sustained no injury to his reputation or to his feelings. The position of the returning officer was little different from that of the colliery company in Adcock who were induced to make a false entry in a record.

The Lord Justice-Clerk in his charge referred to the result as being "the improper attribution of votes to the candidates involved in the election" and stated that if it was proved that the accused uttered the forged records, knowing them to be forged, then/...

then fraud was committed "because of the result that inevitably followed".

H.M. Adv. v. Wishart:

MacLeod & Dunn usefully illustrates the theoretical dangers in bringing fraud charges in such cases because such charges necessitate that the person libelled as the victim of the misrepresentation shall be someone who is quite obviously not the primary victim of the misrepresentation and is a victim only in the general sense that he has been induced to act upon a lie.

A startling example of this then ensued in the case of H.M. Adv. v. Wishart.⁴⁸ This case arose out of the failure of a firm of stockbrokers with consequent financial losses to their clients and, ultimately, the Stock Exchange Guarantee Fund. It was then alleged by the Crown that during a period of several years before the bankruptcy the accused, a solicitor, had assisted the firm to conceal its worsening financial position by temporarily transferring funds from his own firm to the other each year on the eve of its audit date. It was alleged that the stockbrokers' auditors were thereby deceived as to the firm's liquidity position and reported in satisfactory terms thereon to the Stock Exchange.

It was not however alleged that a deception was practised on the Stock Exchange or that, had they known the truth, they would have suspended the firm at an earlier stage and thereby prevented all or/...

or any of the losses sustained. Instead, the indictment was founded on the deception on the members of the firm of accountants appointed by the Stock Exchange to inspect the Balance Sheet and Reports in each year and report thereon, and it was alleged that in each of the relevant years the inspecting accountants were thus induced to accept the Balance Sheet and relative Report as genuinely representing the financial position of the stockbrokers to be satisfactory and so to report thereon to the Stock Exchange Council. It was argued for the defence that the charge of fraud was irrelevant in respect that, on the facts narrated, it set forth that the reporting accountants had been deceived but not defrauded, in respect that they had suffered no loss, financial or otherwise.

Adcock, however, was an insuperable obstacle for the defence and Lord MacDonald held that, as in Adcock, the innocent making of the erroneous report by the inspecting accountants to the Stock Exchange was a sufficient practical result for fraud.

If those drafting the charges in cases such as MacLeod & Dunn and Wishart had accepted the principle recognised in modern South African law that the prejudice element in fraud need not be sustained by the person to whom the misrepresentation is addressed⁴⁹ these difficulties might have been avoided.

D. SUMMARY

Adcock therefore has had a singularly unsettling effect on the Scottish/...

Scottish law of fraud. Gordon, despite his well-reasoned criticisms of the decision itself,⁵⁰ has now accepted as a definition of the crime the formula in that case of "inducing someone by deception to do what he would not otherwise have done".⁵¹ This definition is of course amply warranted by Adcock and the modern cases which have drawn support from it.

The definition, however, indicates a liability so wide ranging, and indeed so limitless, that is well and truly out of hand. There can be few deceptions which do not have effects on the victim's course of action; and to the definition just quoted there could be added the words "or to refrain from doing an act which he would otherwise have done". The result, therefore, of the definition is to make the telling of a lie almost inevitably a crime, because even if the lie fails to deceive, or if having deceived it fails to induce action or inaction in the sense described, there will be liability at least for attempted fraud.

FOOTNOTES FOR CHAPTER VIII

1. 1922 JC 78.
2. 1925 JC 58.
3. Gordon, 551 note 90(2).
4. Adcock, supra, 61.
5. ibid.
6. (1911) 6 Adam 456.
7. ibid, 485-6.
8. 1936 JC 71.
9. cf. Gordon, 551.
10. Hume i, 172
11. 30 Geo II c. 24.
12. Burnett, 165
13. Alison i, 362.
14. Mackenzie 1, 128; Forbes 2, 169-70, Ersk Inst. 4,4,79;
Bell's Dictionary s.v. Stellionate.
15. (1881) 4 Coup 475, 486
16. Adcock, 1925 JC 58, 61.
17. (1845) 2 Brown 476.
18. (1847) Ark. 280.
19. Gordon, 549.
20. cf. supra. Chs 1-2.
21. Fraser, supra, 312
22. ibid, 307

23. ibid., 314-5.
24. ibid., 312.
25. cp. the charge in Bannatyne, (1847) Ark 361.
26. 1st ed. 192, 195, 448; 2nd ed. 169-70, 405; 3rd ed. 383.
27. 1st ed. 278, 2nd ed. 247, 3rd ed. 252.
28. Criminal Law Amendment Act, 1885 s. 4.
29. (1847) Ark. 355.
30. Eliot Millar, supra, 356-9.
31. 1st ed. 106, 203-4; 2nd ed. 92, 179; 3rd ed. 84, 180.
32. (1859) 3 Irv. 440.
33. ibid., Charge 3. The other charges are not considered here.
34. 1936 JC 71, supra.
35. The editors of Macdonald 5th ed., 55, wrongly cite Kerr v. Hill as a case of fraud.
36. cf. Gordon 1001 f.
37. Kerr v. Hill supra; Gray v. Morrison, 1954 JC 31, LJG Cooper at 34.
38. e.g. M. Elder or Smith, (1827) Syme 71.
39. Gordon 550, n. 84.
40. Wm Fraser, supra, L. Cockburn at 312.
41. e.g. Paton, supra; Wetherington, supra; H.F.A. v. Livingstone, (1888) 15 R (J) 48, 50.
42. Gordon, 61.
43. Gordon 553
- 44./...

44. 1971 JC 29.
45. The judgment at first instance is not reported.
46. November 1974, Glasgow High Court, (unrepd.)
47. e.g. H.M. Adv. v. Hardy 1938 JC 144 The same principle is accepted in South Africa cf. Hunt, 739.
48. Edinburgh High Court, March 1975 (unrepd.)
49. R v. Meyne, 1956 (3) SA 604 (AD), 622; S v. Heller 1971 (2) SA 29 (AD), 54.
50. Gordon, 551.n.
51. (1975) 20 J.L.S. 4.

CHAPTER IX

The result element in South African law

A. POTENTIAL PREJUDICE

The modern South African crime of fraud is defined by Hunt as follows: "Fraud consists in unlawfully making with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another".¹ The reference in this definition to the idea of potential prejudice is necessitated of course by the long line of authority establishing that fraud and forgery are comprehended within one crime.² One result of this has been the recurring problem of defining the circumstances in which there is so-called "potential prejudice". Numerous dicta in cases of forgery and fraud, which are now cited indiscriminately on this point, have laid down various formulations of the tests to determine the degree of likelihood of this prejudice which is necessary for liability, and the standard by which that likelihood is to be assessed.

In R. v. Jolosa³ the test of potential prejudice was held to be whether the misrepresentation was calculated in the ordinary course of things to prejudice another. In R. v. Dyonta,⁴ "calculated" was defined by the trial judge, Tindall, J., as "fitted or made suitable for the end in view, in the ordinary course capable of deceiving a person". In R. v. Henkes⁵ the test was said to be whether the misrepresentation used was "calculated to prejudice". In R. v. Kruse⁶ "calculated" was interpreted, as in Dyonta as meaning "likely, in the ordinary course of thing, to prejudice".

Nevertheless/...

Nevertheless, the early interpretation of "likelihood" as being whether the occurrence of the prejudice was probable, direct or reasonably certain⁷ was widened in R. v. Seabe⁸ and in R. v. Heyne⁹ to include circumstances where there was a risk, not too remote or fanciful, of the harm occurring. The application of this principle, however, leads to a rather contrived result in cases where some objective consideration, such as police entrapment, ensures that the misrepresentation cannot succeed.¹⁰ In such cases it is held that there is an objective risk of prejudice sufficient to satisfy the formal requirements of the crime. The same approach is held to warrant a conviction, on the basis of the potentially prejudicial nature of the misrepresentation, in cases where the prosecution fails to prove that the actual prejudice relied on was caused by the misrepresentation alleged.¹¹

A further difficulty, illustrated by the definitional requirement of "actual or potential" prejudice, is found in cases where a fraudulent purpose is thwarted. It was at first thought that the potential prejudice doctrine applied only where no harm had actually occurred.¹² In R. v. Jones & More,¹³ however, it was held to apply in cases where the accused succeeded in his purpose to deceive without causing actual harm, but where his conduct was "calculated" to do so, (as already defined). It was doubted, however, whether as a matter of evidence it could be established in such cases that the misrepresentation was calculated to cause prejudice.¹⁴

The natural counterpart of such an approach is the principle, consistently/...

consistently applied by the Appellate Division, that the objective likelihood of prejudice must be assessed by a reasonable man test.¹⁵ This requirement is unnecessary and to some extent misleading, because if a test is objective no standard other than that of the reasonable man can be usefully applied. Furthermore, the objective assessment of whether a misrepresentation is calculated to cause a prejudicial result does not affect the test of the intent itself, which remains entirely subjective.¹⁶

Causation

The potential prejudice theory has also caused problems in regard to the requirement of causation. It may be submitted in general that in **any** conduct crime causation has no place. In perjury, for example, liability is predicated upon a policy, either judicial or legislative, that the telling of lies by someone on oath in judicial proceedings is potentially harmful to a value which should be legally protected, namely the administration of justice, and that therefore such conduct should be criminal.¹⁷ The harmlessness of the accused's conduct may in certain circumstances be a defence, for example where the false evidence relates to an immaterial issue, but that question, too, involves a further consideration of legal policy. The important point is that these aspects of policy do not form part of the factual composition of the crime.

Accordingly, the relevant facts of a conduct crime are encompassed within/...

within the intentional doing of the relevant forbidden act. It is therefore in theory unnecessary to charge or prove the potential consequences of that act. Furthermore, even though the harmlessness of the act in a conduct crime may in certain circumstances be a defence, that in turn depends upon a prior question of law as to what constitutes harmlessness in the given case.

In contrast, causation is a question of cardinal importance in any result crime, because in a result crime the liability is predicated upon the intentional causing of a result which the law for reasons of policy forbids. A result must be alleged and proved. Therefore, before any legal judgment can be brought to bear upon the question of the result, an essential issue of fact must first be established, namely, that the result alleged did occur and that that result was caused by the actions of the accused. For example, in a murder case there must be proved to have been a death caused by the conduct of the accused before any legal judgments can be made relating to that result such as the issue of justifiable homicide.

The South African Courts as a result of assimilating falsity in its historical sense with fraud have constantly directed attention to the requirement of a result or at least to the possibility of a result. In the latter case, the fallacious principle has been established that the misrepresentation made by the accused must cause potential prejudice.¹⁸ This principle is illogical because there can be no causal connection between a misrepresentation and something which did not occur. At most, all that can be said in/...

in a case where potential prejudice is founded on is that if a certain result had occurred, its occurrence would have been caused by the misrepresentation alleged. This difficulty is not, however, surmounted simply by saying, as Hunt does,¹⁹ that the word potential "incorporates a causative element". The potential prejudice theory in cases of fraud in the proper sense (as opposed to forgery, for example) is throughout founded on hypothesis. In order to pursue a formal requirement of causation in such cases the South African courts have devised a substitute for causation in the concept of a misrepresentation's being "calculated to prejudice" and it has been emphasised that "calculated" in this sense does not refer to the intention of the accused but to the quality of the misrepresentation itself.²⁰

This theory, although contrived, would not cause undue difficulty were it not for the effects which it has had upon matters of proof. Once it had been accepted that the potentially prejudicial nature of the misrepresentation was sufficient for liability for fraud, it was a short step to the position that where there was no causal connection between the representation and the actually prejudicial consequence sustained by the complainant, there was nevertheless liability for fraud based upon the potentially prejudicial nature of the misrepresentation. The development of this theory can be traced in the cases of Jolosa,²¹ Hertzfelder,²² Akbar,²³ Nader,²⁴ Hendrickz,²⁵ and Kruse.²⁶ Striking examples of the theory in modern practice occur in cases such as R. v. Adam²⁷ where goods were supplied for a reason quite/...

quite unconnected with the misrepresentation. Liability in that case was established on the potentially prejudicial nature of the representation, the special knowledge of the complainant being ignored. It has always been accepted that the question of prejudice in such cases falls to be determined at the moment when the representation is made.²⁸

Similar reasoning would no doubt have justified a conviction of fraud in South Africa on the facts of the English case of R. v. Lucas²⁹ where the accused by false pretences induced a bookmaker to accept, on credit, a winning bet. When the bookmaker paid the bet, it was held that the winnings had not been obtained by false pretences, the effective cause of the payment being that the accused had backed the winning horse. A similar example in recent South African law is the case of S. v. Heller³⁰ where it was held that fraud could be committed where a false pretence was made to a company all of whose board were aware that it was false.

The same theory has also been applied in a similar type of case where the misrepresentation has caused results held by the Court not to be actually prejudicial.³¹

In view of the authorities on the question of potential prejudice it would be logical for a modern South African definition of fraud to require only potential prejudice and to make no mention whatever of any requirement of actual prejudice, because in every case where actual prejudice is caused there is ipso facto potential/...

potential prejudice at the moment the representation is made. This position has not been adopted, however, by any of the writers, nor has it ever been suggested in any of the judicial definitions of the crime.

Potential prejudice in relation to attempt liability

Whether or not the potential prejudice theory in the South African law of fraud is well founded historically, it remains open to the objection that it is illogical. The primary difficulty about the potential prejudice theory is that it supplants the theory of attempt liability. The basis of attempt liability in the criminal law is in the inferred purpose of the accused in his proved actions, and in the inferred consequences of his actions had not his purpose been frustrated. In looking to what would or could have occurred the courts in a sense apply a potential prejudice theory in most cases of attempts, even in those cases which involve impossibility. But fraud is unique among South African crimes in the predication of liability for the crime on success and failure alike. If potential prejudice is sufficient for fraud it would seem to follow that fraud is not a result crime, yet the constant reference to results made in the cases makes such a view difficult to maintain. In any event, the fact situations which are involved in the cases of potential prejudice are more satisfactorily interpreted as attempts. In R. v. Dyonta,³² for example, the accused attempted to sell pieces of glass on the pretence that they were diamonds. The complainant, who was a detective, was not deceived yet it was held that the pretence caused/...

caused potential prejudice to him. A fortiori, it was held in R. v. Hendrickz³³ that potential prejudice was caused where the complainant was deceived but the misrepresentation did not cause the consequence founded on by the prosecutor. Conversely, in R. v. Adam³⁴ the consequence founded on did occur, but was not caused by the misrepresentation because the complainant, by reason of his special knowledge, was not deceived and this too was held to have caused him potential prejudice.³⁵

The ratio of Dyonta is unsatisfactory in its reference to the accused as having "caused potential prejudice". The fact in such cases is that no result has been caused, and indeed in Dyonta's case the intended consequence could not in the circumstances be caused. What is really involved in cases such as Dyonta is the justification of liability as a matter of law on the ground of the potentiality of the conduct to cause the material consequence. This is precisely the reason on which the criminal law punishes attempts and it is significant that if the accused in Dyonta's case had been charged with theft by false pretences the liability would have been for the attempt.³⁶

In Dyonta's case the complainants were policemen so that the decision that there was potential prejudice is all the less realistic. It is noteworthy, however, that the courts have infringed this principle even in cases where there was a definite possibility of a prejudicial result.³⁷

It could however be argued that if all liability for attempts were/...

were to be excluded from the scope of fraud, there would be no practical problem, since a potential prejudice principle would fulfil the same function in the application of the law. What cannot be argued, however, is that the two can logically co-exist, although this is what modern South African practice tries to secure.

B. ATTEMPTED FRAUD

In an article entitled "Falsity and the Form of Indictment"³⁸ in 1934 C.W. De Villiers concluded from an examination of the Roman-Dutch authorities that there was no such crime as attempted fraud. The contemporary case law could not have justified this conclusion. For example in R. v. Hoare³⁹ a conviction of fraud had been altered to one of attempt to commit fraud where the complainant had parted with his money in the knowledge of the falsity of the misrepresentations; and in R. v. John⁴⁰ an unsuccessful impersonation of a candidate by a qualified driver at a driving test had been held on appeal to be attempted fraud. Two cases decided in 1933, R. v. Yenson⁴¹ and R. v. Cohen⁴² indicate that at that time the idea of attempted fraud was by no means ruled out. Soon after Yenson, however, the Transvaal Court decided in R. v. Nay⁴³ that there was no such crime.

That the acceptance of the potential prejudice theory had ousted the theory of attempt is clear in R. v. Nay from the statement of Solomon J. that "Fraud consist of a false representation deliberately made with the intention of being acted upon by another to his detriment.

Directly/...

Directly such false representation has been made with this criminal intent and with potential prejudice to the complainant the crime has been committed, whether the accused has succeeded or not in extracting from the complainant the money he wanted to obtain".⁴⁴ This view was confirmed by Wessels C.J. in R. v. Dyonta⁴⁵ where he remarked that "The law looks at the matter from the point of view of the deceiver. If he intended to deceive, it is immaterial whether the person to be deceived is actually deceived or whether his prejudice is only potential. This is probably due to the fact that in fraud there cannot be a verdict of attempt".⁴⁶

In R. v. Bangani⁴⁷ a distinction was suggested between a misrepresentation which resulted in no actual prejudice and an attempt to make a misrepresentation which was frustrated, and this approach was adopted when attempted fraud was eventually admitted by the Appellate Division in R. v. Heyne,⁴⁸ In the course of his judgment in that case, Schreiner J.A. approved the distinction made in Bangani and upheld the view that there could be attempted fraud in cases where the representation was not communicated to the mind of the intended victim.⁴⁹ This limited recognition of attempts leaves unimpaired the rule that where the representation is successfully made, but not acted upon, there is liability for the completed crime.⁵⁰

Hunt categorises four cases in which, from the limited recognition of attempt liability in Heyne, it can be said that attempted fraud is committed; namely, where the misrepresentation is/...

is not communicated to the mind of the representee; where the misrepresentation is so patently ridiculous that there is no potential prejudice; where for some other reason the misrepresentation contains a risk of prejudice that is too remote or fanciful; and where the accused mistakenly thinks his representation is false or can cause prejudice, whereas prejudice is impossible.⁵¹ This analysis is not warranted by the existing state of the law as laid down in Heyne. This commonsense approach however, which is influenced perhaps by the refined doctrine of impossibility in criminal attempts in South Africa,⁵² is inhibited by the now firmly established potential prejudice doctrine by which the impossibility theory tends to be obscured; and it is difficult to see any satisfactory solution which stops short of De Wet and Swanepoel's⁵³ convincingly expressed view that liability for the completed crime of fraud should be confined to cases where an actually prejudicial result occurs.⁵⁴

If the potential prejudice theory coincided with what would, on De Wet and Swanepoel's definition, be attempted fraud, there would be little worthwhile criticism of it from a practical point of view, but there are cases which indicate that the potential prejudice theory does not achieve this result. In R. v. Yenson⁴¹ the accused claimed compensation from carriers for goods which he falsely reported had been lost in transit. It was proved that no claim for compensation would be entertained by the carriers unless an elaborate procedure was followed involving, inter alia, the submission of a formal written/...

written claim. The accused was convicted of attempted fraud, but on appeal it was held that there could be no potential prejudice as there was no possibility of the informal claim being acceded to. This case is probably discredited as an authority in at least two respects. Firstly, the Appellate Division held soon after Yenson that potential prejudice exists even where the complainants are police officers.⁵⁵ Secondly, the case so far as it deals with attempts is impliedly overruled by the leading case of R. v. Davies.⁵⁶ However, in several cases where the causal connection between the pretence and the result has not been established the courts have not considered the question of potential prejudice, but have acquitted altogether.⁵⁷

Furthermore, the potential prejudice theory of fraud does not entirely supplant the theory of attempts and, theoretically at least, there would be a liability for attempted fraud although no potential prejudice where the representation, contrary to the belief of the accused, was true.⁵⁸ Such liability could also, theoretically, have been established in R. v. Steyn⁵⁹ where unknown to the accused, a misrepresentation of expenses by forgery in support of a claim for an allowance could not, as the Court held, possibly have succeeded since the allowance was of a fixed amount regardless of the claimant's actual expenditure. In that case, the accused was acquitted altogether on a charge of forgery.

C. THE REJECTION OF LOSS AS THE TEST OF ECONOMIC PREJUDICE

In/...

In cases involving economic prejudice it is the victim's immediate, rather than his eventual position that matters. It is therefore no defence that even if the misrepresentations had been true the victim would have been in no better position, or even in a much worse position, in any case where the immediate consequence of the deception is to put the victim's economic interests at risk. It has been a matter of some difficulty in the South African case law whether there is prejudice to a victim who is induced to purchase an asset which is worth the price he pays. In R. v. Jones and More⁶⁰ the opinion was expressed by Solomon J.A. that the complainants would not have been prejudiced if the shares which they were induced to purchase were of a greater value than the price which they paid for them. In R. v. Hendricks⁶¹ the accused induced the complainant to take out a policy of life insurance by pretending that it would be an acceptable security for an immediate loan from the insurers. De Villiers J.A. considered it an entirely open question whether or not there would have been prejudice if the policies had been worth the premiums paid.

In R. v. Mohale⁶² it was held that in the absence of a specific allegation of prejudice none could be implied from an allegation that a gem offered for sale was not a diamond. As Hall A.J. observed obiter: "If what the accused sold was a precious stone which was not a diamond, it might still conceivably (e.g. if it had been an emerald) be worth (the price paid)".⁶³

Later cases support a different view. In R. v. Olifant⁶⁴ the complainant had paid money for a diamond, but there was no evidence/...

evidence to prove that the glass which he actually got was not worth the price. The conviction was upheld in that case on the view that the complainant's "resolve to purchase was induced by the representation that what he was buying and receiving was a diamond or diamonds and nothing else and that it was on that representation and in that belief that he was induced to part with his money". Similarly in R. v. Deale⁶⁵ medicines were sold on the pretence that they were manufactured in Germany. Although there was no evidence that they were not worth the price paid, prejudice was found in the fact that the purchasers would not have bought them at all if they had known that they were manufactured in South Africa.

De Wet and Swanepoel in addition to taking the view that the prejudice in fraud must be of an economic type, further insist that for prejudice to exist the victim must be financially worse off. They criticise cases such as Olifant and Deale on the ground that to hold that the acquisition of the property is sufficient proof of prejudice infers that the property is not worth the price paid.

It is submitted, however, that this is an unnecessarily strict requirement. It should be sufficient as was held in R. v. Gilbert⁶⁶ that the victim has been induced to alter his economic position by the deception because he has been deprived of a free and informed choice in the conduct of his financial affairs. That, it is submitted, should be held to be prejudicial to him. To hold otherwise would lead to considerable dangers to standards/...

standards of honesty in business dealings. In particular, it would expose prosecutions in such cases to the convenient defence that the goods given were value for the money paid in circumstances where it was plain that had the victims known the truth they would not have entered into the transaction at all, and would involve the courts in the difficult and, it is submitted, socially undesirable process of enquiring into matters of value where in many cases no objective criteria are available.

This view of the question is supported by R. v. Lala⁶⁷ and S. v. Kruger⁶⁸ and by the recent decision of Beck J. in S. v. Reggis⁶⁹ where he held that prejudice was sustained by one who is deceived into lending money in that he is thereby induced "to exchange his existing rights of ownership in his money for the contractual rights of a lender thereof".⁷⁰

Under a statutory offence of obtaining by false pretences or by deception, the forbidden act is of course the mere obtaining of the property and therefore value for money can never found a defence to such a charge.⁷¹

D. THE RELEVANT CATEGORIES OF PREJUDICE

The other main feature of the prejudice theory in South African law has been the extension of the scope of the relevant types of prejudice, actual or potential. The extensive range of prejudice canvassed in the early forgery cases has already been discussed in Chapter 2. These cases were relied on to import/...

import similar categories of prejudice into fraud. Thus Verloren van Themaat concluded that prejudice in fraud denoted any "breach of another's rights".⁷² This approach acquired the authority of the Appellate Division in R. v. Heyne,⁷³ a fraud case where Schreiner, J.A. said that it was sufficient that there was "some risk of harm, which need not be financial or proprietary". Accordingly, as in cases of forgery,⁷⁴ the prejudice element in fraud extends to such consequences as loss of reputation, exposure to risk of prosecution and the like.

More importantly, however, Heyne established that this view of prejudice extends to the infringement of the interests of the State where for example the purpose and effect of a misrepresentation is to evade regulatory legislation dealing with rationing,⁷⁵ the sale of liquor,⁷⁶ or road traffic.⁷⁷ This theory that "the State has interests peculiar to itself"⁷⁸ goes beyond the narrow commercial interests of the State and creates a loose and ill-defined area of interest. While Heyne did not lay down that the interest of the State in enforcing the law would always be sufficient, no guidance was given as to the limits of this doctrine⁷⁹ and it is difficult to see how it could be made to stop short of that extreme. Indeed in cases such as Heyne⁸⁰ it appears that the Court is coming very near to canvassing the general jurisprudential problem of why attempts should be punishable.

FOOTNOTES FOR CHAPTER IX

1. Hunt, 714.
2. cf. supra Ch.2.
3. 1903 TS 694; cp. R. v. Hutchison 1908 TS 527.
4. 1935 AD 52.
5. 1941 AD 143, 161.
6. 1946 AD 524, 533.
7. R. v. Firling (1904) 18 EDC 11; cf. R. v. Jacobs & Brits (1903) 20 SC 82.
8. 1927 AD 28, 34.
9. 1956 (3) SA 604 (AD), 622.
10. Dyonta, supra; cf. R. v. Crowe 1904 TS 581.
11. R. v. Kruse 1946 AD 524, 533-4; R. v. Hendrickz 1938 WLD 277, 278-9; S. v. Kruger 1961 (4) SA 816 (AD) 828-9; S. v. Shephard 1967 (4) SA 170 (W).
12. R. v. Herzfelder 1907 TH 247.
13. 1926 AD 350. R. v. ... 1927 AD 1.
14. cf. S. v. Joubert 1961 (4) SA 196 (O).
15. Hunt, 735 and cases there cited.
16. Hunt, 736.
17. cf. van Niekerk, "Falsity, Forgery, Uttering and Fraud", (1971) 88 SALJ 26.
18. De Wet and Swanepoel are hostile to this aspect of modern South African theory, 418f., and, further, would prefer that the crime be restricted to actual economic loss. Contra, Verloren van Themaat, 156f.

19. at 728. This view is soundly criticised by De Wet and Swanepoel, 423.
20. cf. R. v. Henkes 1941 AD 143, 161.
21. 1903 TS 694.
22. 1907 TH 244.
23. 1915 NPD 497.
24. 1935 TPD 97.
25. 1938 WLD 277, 278-9.
26. 1946 AD 524, 533-4.
27. 1955 (2) SA 69 (T), 73, cp. also S. v. Shephard 1967 (4) SA 170 (W), 176.
28. R. v. Faulding & Young 1924 AD 483; Burwood v. R. 1931 NPD 573, 583; R. v. Woolf 1935 CPD 237; R. v. Asner 1938 AD 416; S. v. Kruger 1961 (4) SA 816 (AD).
29. [1949] 2 KB 226.
30. 1971 (2) SA 29 (AD) 37; cf. S. v. Kritzinger, 1971 (2) SA 57 (AD) S. v. Gweshe 1964 (1) SA 294 (SR).
31. S. v. Kruger, 1961 (4) SA 816 (AD), 828-9.
32. 1935 AD 52.
33. 1938 WLD 277, 278-9.
34. 1955 (2) SA 69 (T).
35. cp. R. v. Moklonoane 1946 OPD 359 cf. De Wet and Swanepoel's criticisms of this case, p.424.
36. R. v. Keller and Dixon 1908 TS 451; R. v. Parker and Allen, 1917 AD 552; R. v. Medziso 1950 (4) SA 282 (SR).

37. cf. discussion of R. v. Yenson, infra.
38. (1934) 51 SALJ 39, 41-2; see generally De Wet and Swanepoel, 425f.
39. 1927 EDL 327.
40. (1931) 48 SALJ 83.
41. 1933 TPD 510.
42. 1934 CPD 29, 33.
43. 1934 TPD 52.
44. ibid, 54.
45. 1935 AD 52.
46. ibid, 57 cf. R. v. Butler 1947 (2) SA 935 (C); R. v. Moshesh 1948 (1) SA 681 (O).
47. 1936 EDL 30, 34.
48. 1956 (3) SA 604 (AD).
49. cf. S. v. Isaacs 1968 (2) SA 187 (D).
50. cf. S. v. Joubert 1961 (4) SA 196 (O); S. v. Swarts 1961 (4) SA 589 (GW); S. v. Kruger 1961 (4) SA 816 (AD);
51. Hunt 736-7. cp. R. v. Deller (1952) 36 Cr.App.R. 184; Smith and Hogan, 3rd ed., 200-2.
52. cf. R. v. Davies 1956 (3) SA 52 (AD).
53. 2nd ed. 425-8.
54. One judge at least has adopted their view. See S. v. Roux 1963 (1) SA 377 (GW). cf. E.M. Burchell, (1956) 73 SALJ 371; (1963) 80 SALJ 168.
55. R. v. Dyonta 1935 AD 52.

56. 1956 (3) SA 52 (AD).
57. e.g. Goddefroy v. R., 1945 NPD 451; Wepener v. R. 1933 2 PH, H 157 (T).
58. cf. State v. Asher, 50 Ark. 427; 8 SW 177.
59. 1927 OPD 172, a forgery case.
60. 1926 AD 350.
61. 1934 AD 534.
62. 1950 (1) SA 390 (GW).
63. ibid, 302.
64. 1950 (2) SA 514 (O).
65. 1960 (3) SA 846 (T).
66. (1953) 2 PH, H 165 (SR). cf. also R. v. Joubert 1956 R & N 160, 162.
67. 1934 TPD 123, 127.
68. 1961 (4) SA 816 (AD), 830.
69. 1972 (2) SA 670 (R).
70. ibid, 671. In this the learned judge declined, correctly, to follow the contrary decisions in R. v. Hoosen 1954 (3) SA 65 (T); R. v. Motsieloa 1957 (1) SA 226 (O); and S. v. Fram 1968 (3) SA 28 (E). Hunt 733. The contrary, incorrect, principle was also applied in S. v. Chetty 1972 (4) SA 324 (N).
71. cf. R. v. Bennett, (1913) 9 Cr.App.R. 146; cf. Ch.6 supra.
72. Verloren van Themaat at p.161.
73. 1956 (3) SA 604, 622.
- /74.

74. discussed supra Ch.2.
75. R. v. Frankfort Motors 1946 OPD 255.
76. R. v. Heyne (supra).
77. S. v. Jass 1965 (3) SA 248 (E).
78. Heyne, supra, 624. The contrary view was taken by De Villiers, "The Kind of Prejudice Contemplated in Falsity", (1935) 52 SALJ 167 on a review of the Roman-Dutch authorities. Cf. Verloren van Themaat 160-1.
79. cf. B. v. D. van Niekerk, (1971) 88 SALJ 26.
80. See, for example, the imaginative exercise in speculation undertaken by the Appellate Division in assessing prejudice in S. v. Ressel 1968 (4) SA 224 (AD).

CHAPTER X

Causation

A. COLLATERAL REPRESENTATIONS

It has always been held to be essential that a causal connection should exist between the deception and the result suffered by the victim, but this is an over-simplification of the matter. There are two causal links to be considered; the first between the representation and the acquisition of false belief by the victim, and the second between the acquisition of that belief and the consequence founded upon. The first of these links is an essential element in the deception aspect, whereas the latter relates to consequences. In the assessment of causation in regard to the victim's belief the question is whether or not there is a successful deception. If the intended victim is not deceived, there can of course be liability in Scotland and in England for a criminal attempt. The special position of South African law on this question has been discussed in connection with potential prejudice.

A more difficult problem arises where there is a successful deception but no result. In that situation there ought to be liability for at least attempted fraud, if not for the completed crime. Nevertheless, two Scottish cases indicate an arbitrary limitation on liability based on the subject matter of the pretence even where the pretence causes the victim to acquire a false belief and in that belief to sustain prejudice.¹ The facts alleged in the complaint in Tapsell v. Prentice² were that/...

that the accused misrepresented her identity to a shopkeeper and pretended that she was manageress of a company of gypsies who were about to encamp in the neighbourhood and that she intended to purchase provisions for them from the shopkeeper to the value of about £30. The complaint then narrated that, "relying solely on the truth of said misrepresentation (she) did thus induce (the shopkeeper) to purchase (from her) ... a rug in excess of its proper value and ... did thus defraud the (shopkeeper)".³ Lord Justice-Clerk Macdonald and Lord Ardwall considered it fatal to the relevancy that the pretence complained of did not relate to the subject of the bargain, namely the rug or its value. As Lord Ardwall put it, "Now there can be no crime in such a sale as is here alleged unless the fraudulent misrepresentation relate directly to the articles to be sold".⁴ This reasoning is erroneous. The complaint alleged that the prejudicial consequence and a fortiori the false belief were causally connected with the pretence and if that could be proved there could be no convincing reason why the pretence, whatever its subject matter, was not a relevant one. In this case the Court was probably influenced by the consideration that the causal connection could not be proved, but that should have been a matter of evidence and not of relevancy. This argument had not been canvassed in earlier cases, notably Turnbull v. Stewart⁵ and Lloyd v. H.M. Adv.⁶ in which certain of the misrepresentations libelled were, by this test, collateral.

This exclusion of so-called collateral matters not relating to the subject matter of the bargain was confirmed by the High Court/...

Court in Strathern v. Fogal⁷ where a landlord and his sons were charged on complaint with having pretended to tenants of the landlords' shops that the shops had been let to his sons and that the tenants would thus be ejected unless they paid certain premiums. It was alleged as a consequence that the accused "did by the pretences foresaid fraudulently obtain"⁸ these payments. This charge was held to be irrelevant. The ratio of the decision on this point is not clear. The majority view is that of Lord Hunter, in whose opinion Lord Armadale concurred, which seeks to establish as a test of relevancy the nature of the subject matter of the pretence itself. Lord Hunter observed that "The misrepresentation, if made, did not in any real sense affect the subject of the bargain, but was essentially collateral, though it might be material and induce the contract".⁹

If a causal connection existed between the pretence and the payment of the money, as the Crown undertook to prove, or more accurately, if a causal connection existed between the pretence and the false belief, then it is submitted, those pretences were material. The majority appear to have been influenced by the consideration that the accused landlord was perfectly entitled to exact money from his tenants.¹⁰ It does not follow, however, that it was legitimate to secure payment by false pretences or that the tenants would not have acted otherwise had they known the truth. To the extent that this ~~complaint~~ set out a causal connection between the pretences and the payments it was relevant. Whether or not such a connection existed was a matter for proof. Lord Ashmore in that case was right in founding on the need for a causal connection, but he was wrong in his further conclusion/...

conclusion that the Crown's account was "consistent with the tenants having agreed to make the payments asked for, apart altogether from the alleged misrepresentation about a bona fide let".¹¹ He reached this conclusion on the ground that it was "apparent from the complaint that what induced the payments was not the existence of a let, but the representation that the respondent would not renew, or might not renew, the tenancies unless the payments were made".¹² This was an unwarranted inference of fact, going to the merits of the case, which should not have been drawn from the terms of the complaint.¹³

The question was again raised in H.M. Adv. v. Richards¹⁴ in which it was alleged that the accused had induced the complainers to enter missives of sale for certain heritable property with a third party by means of false representations that the third party desired to purchase the property for the residential use of himself and his family. It was argued by the defence that these representations were collateral and therefore irrelevant. The Sheriff Principal repelled this plea on the ground of causation, holding that the representations were "of the very essence of the matter" because it was averred that without them the complainers would not have accepted the third party as a purchaser. The Court of Criminal Appeal without overruling either Tapsell or Fogal effectively discredited both cases. As Lord Justice-Clerk Grant put the view of the Court: "No doubt there are many cases where the future use of heritable subjects is of no moment to the seller and may be a matter extraneous to the actual contract for the sale of those subjects. Here, however/...

however, on the face of the indictment the future use of the subjects was of crucial importance and was an essential governing factor in the completion of the contract for the sale of those same subjects. It cannot, in my opinion, be treated merely as a matter collateral to the contract".¹⁵

The effect of the decision on this question in Richards is therefore to abolish the special category of collateral misrepresentations in the Scots law of fraud. A representation, on the principle in Richards' case, will be collateral only if it is not linked with the result libelled by way of cause and effect, either in the terms of the indictment or in the light of the evidence. In the former case, the representation is objectionable and falls to be deleted on general principles of relevancy: in the latter, the Crown will simply fail to prove the charge.

B. CAUSATION IN RELATION TO THE RESULT

If the victim is successfully deceived, it must be then considered whether or not the deception was the operative cause of the prejudicial course of action taken by the victim. It is generally this aspect of causation which is in issue when the courts refer to the causal connection between the pretence and the result. The question of causation is now recognised to be a question of fact,¹⁶ but in James Wilkie,¹⁷ a board and lodging case, the intervention of the Court prevented the question from going to the jury. The indictment in that case was held/...

held to be irrelevant on the ground that, as Lord Justice-Clerk Moncrieff put it, "It is not clear from the indictment that the prisoner obtained the food and lodging upon the strength of the false representation which he is charged with having made, or that these were necessarily made with a view to obtain a fraudulent advantage".¹⁸ In James Wilkie or McQuilkan¹⁹ however, the same panel was unsuccessful when the Court upheld the relevancy of a similar indictment. No convincing distinction can be made between the indictments in the two cases and it is submitted that the latter decision is correct.

There are only two situations in which, provided the other elements of the crime exist, the lack of a causal connection arises; and of these only one is properly a question of liability. If the other relevant elements of the crime are proved, the accused can escape liability for fraud only if there is an error in the drafting of the indictment, or if his conduct amounts only to an attempt.

In reported cases falling within the former category there is a theoretical liability for fraud, but not under the charge as laid. The clearest example of this is Mather v. H.M. Adv.,²⁰ where a conviction failed on appeal on the ground that no causal connection was alleged in the indictment between the misrepresentation and the consequence. In that case it had simply been alleged that the panel "having purchased and obtained delivery of" some cattle tendered a cheque drawn upon a bank in which he had no funds and which he knew would not be honoured. The/...

The Court however emphasised that it would have been relevant to charge that the accused obtained the property by issuing such a cheque knowing that it would not be honoured.²¹ But there are situations possible where the latter charge cannot be made and Mather may have been one such. For example, if the transaction is conducted without reference to the mode of payment and the cheque is tendered after the goods have been obtained there is liability for fraud if the purchaser knows the cheque is worthless; but the relevant pretence is not that which is or may be implied in the issue of the cheque, it is the deception as to intention to pay throughout the course of negotiations, evidenced by the issue of the worthless cheque.²²

In the second class of cases, the attempt cases, there is a proper question of liability. Some attempted frauds do not come within this class, for example those where the deception is unsuccessful. There is a problem, however, where the deception succeeds but the victim sustains prejudice in consequence of his own misjudgement or of someone else's deception or misjudgement. This raises a real question of liability, because it cannot be said that the accused's pretence is causally connected with the result, but since the accused has made the pretence with the relevant intent there is clear liability in Scots law for the attempt. This is best illustrated by the facts of the English case of R. v. Roebuck²³ where the accused offered a chain, which he falsely alleged to be silver to a pawnbroker as a pledge. The pawnbroker was found to have accepted the chain as silver, in reliance on his own/...

own test of the metal and not of the accused's false statement.

A problem arises in one version of the long firm fraud, if the accused, having obtained goods on credit on the strength of a false pretence, promptly pays for them. The question may then arise whether goods which he may subsequently have obtained on credit and appropriate were obtained in consequence of the original misrepresentation. This has been held to be a question of fact.²⁴ However, if it is proved that the seller became aware of the falsity of the original misrepresentation yet continued to supply goods on the strength of previous prompt payment there cannot be said to be a causal connection between the misrepresentation and the loss. It is clear that the cause of the loss is the calculated risk taken by the seller. There is however, surely liability for attempt on the part of the accused. Lord McLaren in Macleod observed obiter that in that situation the case would very likely break down, but this can only have been true with reference to a conviction for the completed crime.²⁵ An early example of this approach is Meldrum and Reid²⁶ where the panel made various misrepresentations as to his present employment and his expectations of a pension. The complainer was examined particularly as to whether he was induced to grant credit to the panel solely in consequence of those representations.²⁷ Nevertheless if any one of those misrepresentations caused or partly caused the granting of credit there would be liability for fraud.²⁸

Reinforcement of a prior false belief:

Where/...

Where there is no immedicay between the pretence and the result it is a question of fact whether the effect of the pretence is spent.²⁹ A distinct problem of causation does, however, arise in situations where the erroneous belief of the victim has been formed before the accused makes the false pretence. It appears to have been decided in England in the pre-1968 law that in that situation the accused was not guilty.³⁰ There are two possible solutions to the problem. If the pretence replaces a prior belief as the operative cause of the victim's actions, then the accused is liable. If however the pre-existing belief remained the operative cause, as was possibly the case in Seely, then the accused could not be liable for the completed crime but might well be liable for the attempt.³¹

South African law:

A similarly factual approach is adopted in South Africa. In R. v. Henkes³² a stockbroker pretended to clients who had instructed him to buy shares on their behalf that he had fulfilled their orders and thereby induced them to pay him money and place further orders. It was held to be no defence in that case that the broker intended ultimately to deliver the shares to the clients, the reason being that the accused intended to produce the immediate consequences, the payments and the further orders, which were held to be prejudicial to the clients and on the occurrence of those consequences the crime was complete. Equally it follows that if an intended consequence actually occurs and is a prejudicial consequence, the/...

the accused is liable for fraud no matter that that consequence is not the immediate consequence of his deception, provided of course that the chain of causation is not broken. For example, in R. v. Youngleson (1)³³ the accused pretended to two women that he was single and willing to marry them. Later, while they still believed these pretences he induced them to transfer to him certain property although these pretences were not the immediate cause of the transfers. He was nevertheless held liable on the grounds that although the original deception was not the proximate cause of the transfer of property, that transfer would never have occurred but for the original deception. It was necessary of course that the intent with which the original misrepresentations were made was related to the ultimate transfer of the property.³⁴

There are a number of South African cases in which the causal connection has been held not to have been proved. These disclose no more than an error in the drafting of the charge. In Goddefroy v. R.³⁵ the appellant was convicted of "falsitas" for having passed a worthless cheque. The charge narrated that by means of tendering the cheque the appellant had induced the complainant "to his loss and prejudice to accept the said cheque for work done". It was held on appeal that the prejudice sustained by the complainant had already been incurred prior to the misrepresentation made by the issue of the worthless cheque and accordingly such prejudice was not caused by the misrepresentation.³⁶ It is submitted however, that there could have been liability for fraud on the foregoing facts/...

facts as the Scottish Court held in Mather²⁰ if the misrepresentation alleged had been that of intention to pay made at the time when the appellant instructed the work to be done.³⁷

The Potential prejudice theory:

In several other South African cases, however, the absence of proof of the causal connection alleged in the charge has been circumvented, unconvincingly, by a resort to the doctrine of potential prejudice. In R. v. Kruse,³⁸ for example, the representations founded on were admitted by the complainer not to have caused him to hand over the property which the accused obtained from him. It was nevertheless indicated by the Appellate Division that even if that evidence had ruled out the causal connection alleged, the conviction would have been supported on the basis that potential prejudice resulted from the misrepresentations.³⁹

FOOTNOTES FOR CHAPTER X

1. cf. Gordon 555-7
 2. (1911) 6 Adam 354
 3. ibid, 355
 4. ibid, 357
 5. (1898) 25 R (J) 78
 6. (1899) 1 F (J) 31
 7. 1922 JC 73
 8. ibid, 74
 9. ibid, 79-80 (writer's italics)
 10. Gordon, 557
 11. Strathern v. Fogal, supra, 82
 12. ibid, 82
 13. cf. Macleod, (1888) 2 White 71, 77
 14. 1971 JC 29
 15. ibid, 33
 16. Macleod (1888) 2 White 71, 77. Richards 1971 JC 29
 17. (1872) 2 Coup 323
 18. ibid, 325
 19. (1875) 3 Coup 102
 20. 1914 S.C. (J) 184
 21. followed in H.M. Adv. v. McIntosh Glasgow Sh.Ct., May 1972 (unrepd)
- 22/...

22. cf. Gordon, (1975) 20 JLS 4
23. (1856) 7 Cox C.C. 126, cf. R. v. Zillah 1911 CPD 643
24. Macleod (1888) 2 White 71, 76-8
25. The case was brought after the 1887 Act
26. (1838) 2 Swin 117
27. ibid, 118
28. A.H. Smith (1893) 1 Adam 6, 29
29. R. v. Martin (1867) LR 1 CCR 56, 60; R. v. Moreton (1913) 8 Cr. App. R. 214; R. v. Youngleson (1) 1948 (1) SA 819 (W), infra.
30. R. v. Seely (1928) 21 Cr. App. R. 18
31. R. v. Roebuck (1856) 7 Cox C.C. 126; cp. R. v. Hensler (1870) 11 Cox C.C. 570; R. v. Light (1915) 11 Cr. App. R. 111
32. 1941 AD 143
33. 1948 (1) SA 819 (W)
34. ibid, 820-1
35. 1945 NPD 451
36. cf. also R. v. Steward 1920 S.R. 55; R. v. Kaine 1924 TPD 589; S. v. Ellis 1969(2) SA 622 (N); see also Wepener v. R. 1933 (2) PH, H 157 (T) and R. v. Blake 1961 (1) PH, H 57 (C)
37. cp. S. v. Ellis, supra
38. 1946 AD 524
39. S. v. Kruger 1961 (4) SA 816 (AD). See also R. v. Adam 1955 (2) SA 69 (T), 73; S. v. Shepard 1967 (4) SA 170 (w); S. v. Judin 1969 (4) SA 425 (AD)

PART THREE

Fraud and Theft

CHAPTER XI

Theft and Fraud in the early Scots Law

A. THE EARLY DEFINITION OF THEFT

The early Scottish definition of theft centred largely on the original manner of acquisition of the property. In earliest times, it appears, any taking which was neither clandestine nor violent could not constitute theft. According to the relevant text in the Regiam Maiestatem, "a furto omnimodo excusatur per hoc quod initium suae detentionis habuit per dominium huius rei";¹ and this principle reflected the ancient English requirement of a "trespassory" taking in theft.²

In their attempts to modify the ancient rule so as to extend the scope of theft, the Scottish writers and judges considered two main problems: Firstly, whether it was theft where someone, having been lawfully put in possession of property by the owner, subsequently appropriated it; and secondly, whether it was theft to obtain possession of property by a deception of the owner and with an initial intention to appropriate it. The resolution of the former question can be traced in the development of breach of trust or embezzlement and the long-standing controversy as to the distinction between that crime and theft.³

The latter problem was basically that of defining the boundary between theft and fraud, and the controversy

on this question was crystallised in the problem of the dishonest hirer or borrower. In Mackenzie is found the first attempt to extend the original restricted scope of theft. As was said in the prosecution argument in George Brown, Mackenzie "ventured to throw aside the now untenable principle, that the quality of the offence depends upon the title of the first acquisition of the goods".⁴ In relation to the specific question of the theft-fraud distinction, Mackenzie considered it a clear case of theft, contrary to the early rule,

"If a person should borrow anything at first for another use than what he pretended".⁵

Forbes follows the early rule to the extent of excluding from theft any supervening appropriation on the part of a hirer or borrower,

"if he had no sinister design so to misapply it at the time of the hiring or borrowing".⁶

Like Mackenzie, however, he considered it theft,

"if a man borrow a thing for a certain use, with a design to apply it at the time to some other use, as when one borrowing things upon some plausible pretence, designs to break and run his country with them".⁷

Bayne adopts a wider interpretation of theft, which seems to include both initial and supervening dishonesty in the foregoing cases.⁸

None of these writers cited any authority in the case law for the view that a dishonest hirer committed theft and, as late as 1810, there are convictions noted for fraud
/where

where workmen appropriated goods obtained by them on a pretence that they would work upon them and return them to their owners.⁹

It is noteworthy also that despite the extended view of theft taken by these writers, Erskine adhered to the early definition, stating that

"Theft is either committed in a hidden or concealed manner, which may be called proper theft, or is attended with violence."¹⁰

Of the nineteenth century writers on the criminal law only Burnett insisted on the clandestine or violent appropriation as an essential element in theft.

"The simplest, and perhaps the sound criterion for distinguishing theft from breach of trust, and these frauds which pass under the name of swindling, is to be found in the way by which the thing is taken, joined to the felonious intent to appropriate. The fraudulosæ contrectatio rei seems to imply that it is a clandestine, as well as fraudulent away-taking out of the custody of the possessor".¹¹

Burnett concluded that

"a theft^{ous} abstraction seems to imply, that the thing is ab initio, taken clam et fraudulentè out of the custody of him in whose possession it is".¹²

He therefore treated the English "larceny by trick" case as a form of fraud,¹³ and was critical of the decision in James Marshall in 1792 which is the first Scottish decision adopting the view that the dishonest

/hirer

hirer commits theft.¹⁴

B. ENGLISH LAW

The text in the Regiam Majestatem reflected the ancient English requirement of a trespassory taking in theft. In the early English law, the intrusion of the jurisdiction of the King's judges upon that of the local courts was founded on the idea that the King's peace had been violated.¹⁵ Because of this, theft was cognisable by the King's judges only insofar as it involved a trespassory taking, that is, a violation of physical possession. There was no trespass where a person in lawful possession of property with the owner's consent converted the property to his own use. In Scotland the comparable rule was probably due to the death penalty in theft.

The English law of theft broke out of the narrow requirements of trespass by means of fictions.¹⁶ In the Carrier's Case,¹⁷ a carrier who had been given some bales to transport broke open the bales and appropriated the contents. It was held that by breaking bulk the carrier determined the bailment and therefore, being no longer legally in possession, committed a trespass by taking the contents of the bales.¹⁸ The scope of larceny was later extended to the case where the bailee made a fresh appropriation of goods on completion of his bailment.¹⁹

/Until

Until 1779, however, the common law of larceny did not extend to the case where there was a peaceful taking of property with an initial intent to appropriate it. In Pear's Case²⁰ the accused hired a horse on a pretence that he required it for a day's journey and immediately sold it. At the time of the sale his bailment of the horse was not at an end. The judges brought this act within the pale of larceny by means of the artificial doctrine that the initially fraudulent intent invalidated the owner's consent to transfer possession and accordingly that larceny was committed as soon as the property was taken away and not, as in the case of larceny by a bailee, on completion of the bailment.²¹

A distinction was made in English theory before the Theft Act 1968 between larceny by trick and obtaining by false pretences in that in the latter crime the owner had to intend to transfer the property in the goods whereas in the former he had to intend to transfer possession only.²² The result was therefore that the law recognised the validity of a fraudulently induced consent to convey title in the case of obtaining by false pretence; but did not recognise the validity of a fraudulently induced consent to transfer possession in the crime of larceny by trick.²³

The striking extension of larceny in Pear's Case was, as
/Hall

Hail observes,²⁴ made necessary by the fact that the 1757 statute²⁵ which created the offence of obtaining by false pretences had been ineffectual, so that the choice in Pear's Case was between a conviction for larceny or an acquittal.

C. HUME AND ALISON

The early Scottish rule in excluding from theft any open and peaceful taking of property, however dishonest, had at least the merit of applying a very practical and factual test. In breaking out of the limits of that definition, however, Scottish practice in the nineteenth century added to the simple factual test of the early law an overlay of law in that the extent, and the legal validity, of the owner's consent to the physical transfer of the goods had to be assessed. This process, however, by which Scots law reached results similar to those of the English law of larceny, developed without any resort to the fictions of English practice, the question being looked at largely from the standpoint of consent.

The dividing line between theft and fraud was dealt with by Hume in a most unsatisfactory way. Confining himself to the more clear cut cases, he suggests that

"All those cases seem to fall under the notion of fraud or swindling only, and not of theft, in which the offender gets possession of the thing on a finished bargain for the property, upon /credit

credit, though the transactions have been accomplished by means of cozenage and falsehood".²⁶

Hume refers to cases such as Thomas Hall²⁷ where the accused pretended to be a trader, obtained goods on credit and made off with them.

"In cases of this description, the offender's wrong lies only in the false and fraudulent inducement, which he has held out to the owner, for prevailing with him to sell. But how unfair soever the way in which he obtained it, he has actually had the consent of the owner to convey that thing to him in property, to be his, and in all respects at his disposal, till the day of payment come. Which bargain being followed by delivery, the property passeth in the meantime to the buyer, blameable as he is; in so much that if anyone should bona fide buy this article from him, and get delivery in the course of trade, he would not be liable to the first owner's claim of restitution, which is personal only against his own customer, who imposed upon him".²⁸

That the Scottish solution to the typical situation of larceny by trick in England was by no means settled in Hume's mind is clear from his statement that

"A more difficult set of cases, concerning which our records afford us still less information, are those in which the prisoner obtains the thing by means of a trick, or under a false pretence, and on some inferior title to that of property /and

and has, moreover, from the first, no other purpose but to cheat the owner, and turn the thing to his own profit".²⁹

Hume notes only one Scottish case bearing on the matter, namely JAMES Marshall³⁰ also referred to by Burnett³¹ where the accused hired a horse for a day and immediately sold it. This case arose after Pear's Case and it was decided that the crime of theft rather than fraud had been committed; but it is noticeable that there is no Scottish case prior to Pear's Case supporting the view that these facts constituted theft. Hume supported the decision in Marshall on the view that there was an initial felonious purpose ruling out a valid transfer of title.³²

Although it cannot be concluded with certainty that the English doctrine of larceny by trick caused a change in the Scottish law of theft, it seems likely that Pear's Case was constantly referred to in the Scottish courts in justification of convictions of theft on similar facts. Hume certainly acknowledge the influence of English practice on the conclusions which he had reached in regard to theft,³³ albeit that he did not adopt the element of fiction which was necessary to the English doctrine. His analysis proceeded on the simpler basis that in cases like Pear's Case the hirer did have possession, but no more than that. This view seems to have carried weight in the Courts. For example, in 1829
/in

in Mitchell³⁴ a theft charge was upheld on the species facti of the Carrier's Case without resort to fiction.

Alison deals with this question on a recognisably English basis of consent.³⁵ He distinguishes at the outset between theft, which consists of the taking of property without the owner's consent, and swindling, which is

"The fraudulent impetration of that consent on false pretences".³⁶

He also adduces the rule that

"It is theft, although the article stolen be obtained on some false pretence, or by a trick, from the true owner, provided there was no consent obtained by false representations to the actual transfer of the property of the article in question".³⁷

Title therefore, in Alison's view, becomes the determining factor. If the contract fraudulently induced is one which passes title, and delivery follows, there cannot be a conviction of theft. Alison notes three convictions of theft against dishonest hirers,³⁸ and he refers to numerous English cases on larceny by trick, concluding that in both jurisdictions the principle is the same.³⁹

A distinction was also drawn by Hume between initial and supervening dishonesty in cases where delivery was obtained on some lower title than that of property, for example on hire. According to Hume, if there was an /initial

initial intention on the part of the accused to fulfil the terms of the contract, any subsequent appropriation of the goods by him could not amount to theft but was rather a case of breach of trust. He committed himself, however, to the English principle of larceny by trick in holding that where there was initial dishonest intent, the appropriation was theftuous ab initio.⁴⁰ Alison adopted a similar principle.⁴¹ This view was confirmed in the case law in John Smith⁴² where the court appear to have required the Crown to libel an initial intent to appropriate for there to be a relevant charge of theft. It was held in that case that the theft occurred at the moment of delivery.

The result of Hume's discussion was to confirm in Scottish practice the English doctrine that the appropriation of goods obtained on possession only with an initial intention to appropriate them was theft and not fraud. It does not appear to have been considered that the theft occurred at any subsequent stage after the initial delivery. The contrary English doctrine was necessitated by the rule that the formation of the felonious intention and the acquisition of possession must coincide.⁴³ The argument against the resulting doctrine was based on what was said to be the absurd result that to obtain goods by a fraudulent bargain for their possession only should infer a higher crime than to obtain them with an equally dishonest intent by a bargain for their title.⁴⁴ But of course if goods were /obtained

obtained on hire there was no consent on the owner's part to the passage of title, and any appropriation by the hirer contrary to the terms of hire would be clandestine and would be an appropriation invito domino. To hold that such conduct was not theft was to confuse an intent to pass possession with an intent to pass title. The contrary principle, which required forcible or furtive appropriation at the time when the goods were first delivered by the owner, was a relic of a much earlier rule devised at a time when the criminal law did not protect the interests of ownership against verbal fraudulence.

D. THE NINETEENTH CENTURY CASES

The theft/fraud problem most commonly arose in the nineteenth century in cases where goods were obtained by a pretence from a servant or agent of the owner rather than from the owner himself. In these cases liability seems to have depended on whether or not there was a valid legal, as against purely physical, delivery; that is to say a delivery with the owner's consent. For example, the point was taken in James Chisholm⁴⁴ that the liability depended on whether the contract was one of sale on credit or was conditional on payment with the delivery. But not all of the cases were correctly decided. In James and Robert Mackintosh,⁴⁵ for example, the relevancy of a charge of fraud was upheld where the circumstances alleged probably disclosed a theft. In that case the accused were alleged to have /ordered

ordered provisions from a shopkeeper who insisted on cash on delivery. When a messenger arrived with the goods the accused told him to come back later for the money. The messenger left the goods behind and the accused immediately made off with them. This was surely theft. The messenger had no authority or discretion in the matter of delivery and if he acted contrary to his explicit instructions the goods were never delivered by the owner. In contrast if the messenger sent with the same instructions had been given by the accused an envelope containing pieces of paper instead of banknotes there would be a question as to whether there was a valid delivery sufficient to pass title and much would depend on the explicit terms of the owner's agreement with the accused.⁴⁷

In James Smith,⁴⁸ on the other hand, the original agreement of cash on delivery was subsequently modified as a result of the accused's pretences to what seems to have been a credit sale. The crime was therefore fraud and not theft. James Hall⁴⁹ also may be distinguished from Mackintosh⁴⁶ since the promise to pay on delivery, in the event unfulfilled, was nevertheless followed by intentional delivery of the goods by the owner; whereas in Mackintosh, it may be argued, the goods remained undelivered.

/In

In Margaret Grahame,⁵⁰ the accused was charged with both fraud and theft, but this was a clear case of theft. The accused had induced merchants to deliver goods to various addresses at which she later called pretending that the goods had been delivered in error and were really intended for her. Her subsequent appropriation of the goods constituted theft. Similarly Henry Hardinge⁵¹ was a clear case of theft. In that case the two accused deceived a railway porter into handing over to them items of left luggage on a pretence that they had been authorised to uplift them. There was no consent on the part of the owners of the luggage to transfer title; and it is the owner's, rather than the porter's consent which should determine that the liability in such a case is for theft.⁵²

In all such cases, the question whether title passes to the fraudulent party depends largely on the terms of the agreement. The recipient of a cheque may protect himself by insisting on a suspensive sale agreement whereby no title will pass until the cheque is honoured. But where cash is given no such question can arise, and accordingly it seems sound in principle that where on a cash sale the seller is given fake money, title passes to the buyer and the liability is for fraud.⁵³

A distinction falls to be made between deception in the course of committing fraud and deception in order to /conceal

conceal a prior theft.

A particularly obvious case of this is Anderson v. Stuart,⁵⁴ where a goldsmith was given a gem to set in a brooch and returned the brooch to his customer with a fake gem in it. He was convicted on a charge of breach of trust and, on a suspension being brought, the Court was much exercised by the distinction between breach of trust and fraud. But clearly no question of fraud should have arisen, as this was a clear case of theft of the gem. There was no question of title passing to the smith and the pretence of genuineness regarding the fake stone was subsequent to the incidence of liability, and therefore irrelevant to it. The case which was decided before George Brown⁵⁵ does indicate however the persistence of the early notion that someone in authorised possession of property could not steal it, and there is a trace of this as late as 1911, in Rankine's 21st edition of Erskine's Principles where it is stated that

"The absence of the owner's or possessor's consent, and of any limited right of property in the subject obtained before appropriation, distinguishes theft from falsehood, fraud, and wilful imposition (called, for short, swindling), for the swindler has obtained the property, or a lower right of indefinite duration - such as pledge - with the owner's full consent".⁵⁶

/E.

E. MACDONALD

Macdonald scarcely deals with the distinction but, to the extent that he seems to suggest that where a consent is obtained by "fraud" there is no transfer of title and therefore a theft, he is wrong. According to Macdonald, in a passage which has appeared in every edition,

"when it is said.....that if the taker believed he was acting with the owner's concurrence, he was not guilty of theft, the expression ~~must~~ not be understood as intended to cover the case of a person obtaining the owner's or custodier's concurrence by fraud".⁵⁷

He further states, in a passage introduced in the third edition, of which he was co-editor,

"If a person by fraudulent misrepresentations induce tradesmen to part with goods on sale or return, the fraud excludes contract, and the property does not pass. Therefore if he appropriates the goods, he commits theft".⁵⁸

The latter passage, however, is founded on the decision in Wm. Wilson⁵⁹ which, for the reasons specified by Gordon,⁶⁰ is so plainly contrary to principle and authority that it can scarcely be accorded serious consideration. It is ~~note~~ worthy, too, that Anderson, whose work was largely derived from Macdonald, did not commit himself to this view.⁶¹

The only support for Macdonald's view that fraudulence ruled out the transfer of title, and therefore attracted /liability

liability for theft, is to be found in certain inconclusive passages in Erskine. In the first edition of the Institute, Erskine stated that a contract of sale induced by a concealment of the buyer's bankruptcy was void.⁶² The editor of the 1871 edition, however, J.B. Nicolson, disagrees with this passage and describes it as a "mere inaccuracy of expression".⁶³ On the other hand, in the same edition of the Institute it is said, professedly on the authority of Hardinge's,⁶⁴ that

"it is theft if the owner's or custodier's consent was obtained fraudulently".

F. RESET OF FRAUD: 1887 ACT

The foregoing survey of the nineteenth century case-law illustrates the difficulties which the Scottish writers and judges had experienced in adjusting their ideas to the extended conception of theft which included a taking by fraudulent but non-violent means. By the latter part of the century the extended conception had clearly won the day and the most startling proof of this is in the statutory creation of the crime of "reset of fraud" in the 1887 Act.

Section 58 of the 1887 Act provides that

"Criminal resetting of property shall not be limited to the receiving of property taken by theft or robbery, but shall extend to the /receiving

receiving of property appropriated by
breach of trust and embezzlement, and by
falsehood, fraud and wilful imposition...".⁶⁵

It is difficult to interpret the intentions of the legislature in the enactment of this provision. The section has never been the subject of any decision. It could be suggested on the one hand that the purpose and effect of the provision was to extend the crime to cases where title had passed from the complainer and therefore no vitium reale affected the property. There is however nothing in the case law to support so novel a development and all of the relevant statements in the post-1887 textbooks seem to be to the opposite effect.⁶⁶ The current edition of Macdonald, for example, reiterates the pre-1887 principle laid down by Hume that

"there must be criminal intent to retain from the owner".⁶⁷

Gordon, while acknowledging the absence of authority on the matter, suggests that

"there are no practical difficulties in charging A with resetting goods fraudulently appropriated by B."⁶⁸

It is submitted, however, that there are obvious practical difficulties. For example, the specimen indictment for reset which the 1887 Act provides is confined to property

/"dishonestly

"dishonestly appropriated by theft or robbery."⁶⁹

If, of course, the reset alleged was in respect of property obtained by falsehood, fraud and wilful imposition, it might be thought that further specification of circumstances of the appropriation was necessary as a matter of relevancy. But, far from requiring this, section 58 specifically provides that in such a case

"it shall not be necessary to set forth any details of the crime by which the dishonest appropriation was accomplished, but it shall be sufficient to set forth that the person accused received such property, it having been dishonestly appropriated by.....
..... falsehood, fraud and wilful imposition.....".

Similar, but not identical provisions apply in summary procedure.⁷⁰

Furthermore, a conviction on such a charge would obviously leave open to the accused a claim, probably by multiple pouncing, for restitution of the property in a case where, for example, he had bought the property from the person ex hypothesi guilty of fraud in acquiring them from the complainer, on the ground that title had validly passed to him. Gordon's view on this point is also at variance with the principle on which he distinguishes theft from fraud,⁷¹ namely that in the former case there must be an absence of consent to the transfer of title.

/The

The absence of authority is perhaps the strongest indication that the statutory creation of a charge of reset of fraud has been a dead letter. The most that could be said in its favour is perhaps that retrospective content has been given to section 58, so far as it deals with reset of fraud, by the decision in Adcock v. Archibald⁷² which would justify a conviction of fraud, on the basis that there was a "definite practical result" in a case where physical possession of property had been obtained by means of deception.

For a proper understanding of this provision, however, it should be borne in mind that the author of the 1887 Act was Sir John H.A. Macdonald (L.J.C. Macdonald and later Lord Kingsborough), the author of Macdonald's Criminal Law.

Macdonald specifically but, as has been submitted,⁷³ wrongly adopted the view that the false representation essential to fraud necessarily invalidated the contract and ruled out the passage of title to the accused. For someone of that view it was therefore easy to hold that there could be a vitium reale in the goods obtained, since ex hypothesi no title could possibly pass to the accused.

A further difficulty which the 1887 Act introduced on this topic is to be found in the specimen indictment in schedule A to the 1887 Act:

/".....You

".....You did pretend to Norah Omand..... that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use.....".

In an important case immediately after the passing of the Act ^{7^d} there was considerable doubt among the judges as to whether this charge exemplified a new crime of "dishonest appropriation" of of theft. It seems clear, however, that the facts alleged constitute theft rather than fraud.

FOOTNOTES FOR CHAPTER XI

1. R.M. III.9.5; cf. Clark, (1634) Mackenzie 28,2.
2. Stephen, History, 3,129f.
3. George Brown (1839) 2 Swin 394; Gordon, Ch.17.
4. at 395.
5. Mackenzie, 19,2.
6. Forbes 2,148.
7. ibid.
8. Inst. 121. In this respect he went further than Hume, who considered a supervening appropriation by a pledgee or hirer not to be theft (i, 58-60).
9. Stewart (1806), Ritchie (1807) Baird and Manson (1810) Burnett 114, 174.
10. Inst. IV,4,58 (1st ed.).
11. Burnett, 111.
12. Burnett, 111; cf. ibid. 166.
13. at 113-4, 166.
14. Burnett, 114. Cf. infra.
15. Houldsworth, 3,36Of.; Carter, History of the English Courts, 29.
16. Stephen, General View, 49f.
17. (1473) YB 13 Edw.IV,f.9, Pasch. pl.5.
18. Mackenzie (19,2) thought the decision "absurd". Stephen (History, 3,139) described it as "extraordinary".

19. Tunnard's Case (1729) 2 East FC 687.
20. (1779) 1 Leach 212.
21. Cf. Pollock and Wright Possession, 218; Cross Larceny de lege lata (1950) 66 LQR 497.
22. R. v. Kilham (1870) LR 1 C.C.R. 261; R. v. Ball [1951] 2 KB 109, 111; R. v. Caslin (1961) 45 Cr.App.R.47.
23. Beale, Borderland of Larceny (1892) 6 Harv.L.R. 244, 252; Heap v. Motorists' Advisory Agency Ltd. [1923] 1 KB 577, 583.
24. Theft, Law and Society, 2nd ed. 40-52; cf. R. v. Wheatly (1761) 2 Burr 1125, 1127-8; R. v. Bower (1775) 1 Coup 323,324; Young v. R. (1789) 3 TR 98,102.
25. 30 Geo.II, c.24.
26. Hume i,57.
27. (1789) ibid.
28. Hume i,57-8.
29. Hume i,68.
30. (1792) ibid.
31. Burnett, 114: cf. supra, n.14.
32. i,69; cf. Gordon 440.
33. i,69-70.
34. (1829) Shaw 220. Cf. Barr (1832) 5 Deas and Anderson, 260.
35. Cf. Gow, Mercantile Law, 118-122.
36. Alison i,250.
- /37.

37. i, 259.
38. cf. i, 259-60.
39. i, 260-2.
40. Hume i, 58-9, 68-9.
41. Alison i, 260.
42. (1828) 2 SJ 144; cf. Hardista (1842) Bell's Notes 16.
43. cf. Turner, in Modern Approach, 356, 357-9; Harris, in Oxford Essays in Jurisprudence, 69, 104f.
44. Burnett, 114.
45. (1849) J.Shaw 241, 251-2.
46. (1840) 2 Swin 511.
47. Cf. the South African case of R. v. Blythe 1916 TPD 449.
48. (1839) 2 Swin 346.
49. (1848) j.Shaw 254.
50. (1847) J.Shaw 243.
51. (1863) 4 Irv. 347.
52. cp. Margt. Sharp, (1874) 2 Coup. 543; Jas. Hill (1879) 4 Coup. 295.
53. Lyndsay and Struthers (1838) Bell's Notes 64; cf. R. v. Blythe 1916 TPD 449.
54. (1836) 1 Swin 35.
55. (1839) 2 Swin 394.
56. 21st ed., 4.4.30.
- /57.

57. 1st ed. 22; 5th ed., 18.
58. 3rd ed. 21-22; 5th ed. 19.
59. (1882) 5 Coup. 48.
60. Gordon 445-7. This case is further discussed infra.
61. Anderson, 2nd ed. 178.
62. 1st ed., 3.3.8.
63. 5th ed. ibid.
64. (1863) 4 Irv. 347, cf. supra, n.5 l.
65. The section is applied to summary procedure by s.2 of the Summary Jurisdiction (Scotland) Act 1954.
66. See especially Gordon at 630, 636; Macdonald, 5th ed., 68.
67. Macdonald ibid., Hume i,115.
68. Gordon, 637.
69. Schedule A Part II of the Second Schedule to the 1954 Act (summary procedure) is of no assistance since the specimen complaint for reset there provided clearly discloses a prior theft.
70. Summary Jurisdiction (Scotland) Act 1954, s.2, Schedule 1.
71. Gordon, 440, 447f.
72. 1925 JC 58, Cf. chs. 3,8.
73. supra.
74. Dingwall v. H.M.Adv. (1888) 2 White 27, a case in which Macdonald himself appeared for the Crown.

CHAPTER XII

Theft and Fraud in modern Scots law

A. MACLEOD v. KERR

The approach taken by Hume and, more overtly, by Alison in distinguishing theft from fraud is now firmly established in modern Scots law.¹ As Gordon says

"It is part of the definition of theft that it is an appropriation of the goods of another without his consent, and it is the absence of consent which distinguishes theft from fraud. There can be no theft if the owner agreed to transfer property in the goods to the accused, even although the consent was impetrated by fraud".²

Gordon further argues that the validity of the consent in turn depends on whether the contract is voidable or void.³ In this view he is amply supported by the decision of the First Division in MacLeod v. Kerr,⁴ an action of multiple-poinning raised to determine a disputed question of title between two victims of a fraud. In that case Galloway, had negotiated with Kerr to buy a car from him. He gave Kerr a stolen cheque signed with a fictitious name and thereby obtained delivery. Two days later he resold the car to a dealer who purchased in good faith and without knowledge of the defect in Galloway's title.

/This

This case was quite a straightforward one but it was dealt with in the Sheriff Court on the basis of Morrison v. Robertson⁵ and T.B. Smith's criticisms of that case.⁶ Morrison v. Robertson, however, involved a misrepresentation of agency and was therefore materially distinguishable from the facts in MacLeod v. Kerr. Nevertheless the Sheriff-Substitute, applying Smith's interpretation of the facts of the former case, took the view that Galloway's actions constituted theft and accordingly held that the claim of Kerr, the original owner, must prevail over that of the dealer. The First Division however held that there was a valid contract of sale between Kerr and Galloway, voidable at the instance of Kerr on the ground of fraud. Galloway could therefore give a good title to third parties purchasing in good faith prior to rescission.⁷

Voidness and voidability and the transfer of title

It is apparent from the judgements in MacLeod v. Kerr that the anglicised view of Gloag⁸ on the contractual aspect of the matter is now settled law in Scotland, namely that the voidness or voidability of contracts of this kind determines the question of the passage of title. In Roman law, property probably passed according to the reciprocal intentions of the parties to give and take title; even on a void contract. As Smith⁹ remarks, in civilian systems of ownership the nullity of the underlying contract does not necessarily exclude the passage of title. The determining factor is the intention to transfer ownership. As long as that /intention

intention was not so vitiated as to make the transaction a complete sham, that intention would be effective even though the contract were void. On such a principle, of course, the title of a fraudulent transferee would not be affected by rescission and a good title could be given by him even after repudiation by the original owner. This "abstract" theory has been adopted in South African law,¹⁰ although as Scholtens¹¹ observes there have been occasional manifestations of the English doctrine. Smith, who argues for this theory, which undoubtedly applied in Scots law before the Sale of Goods Act 1893, points out that a bona fide third party purchaser of corporal moveables is protected in every case except theft.¹² On this aspect of the question his view was impliedly rejected by the Court in MacLeod v. Kerr and the English solution which Gaoag¹³ would have accepted into Scots law appears now to have been authoritatively confirmed. It is also confirmed by implication in MacLeod v. Kerr that where the vitiating factor is error in persona, the voidness or voidability of the contract is determined by the materiality of the identity;¹⁴ and the case seems to settle the doubts expressed in the Short Commentary¹⁵ as to whether error ever renders a contract void in Scots law.

Morrisson v. Robertson

The discussion of Morrisson v. Robertson¹⁶ was an interesting but unnecessary diversion in MacLeod v. Kerr. The interpretation of that case in the Short /Commentary

Commentary formed the ratio of the decision in the Sheriff Court, but the ratio was clearly wrong. In Morrisson v. Robertson, Telford, the fraudulent person, pretended to Morrison that he was the agent of Wilson, whose creditworthiness was well known to Morrison. He thereby induced Morrison to sell two cows to Wilson on credit and took delivery ostensibly as Wilson's agent. That situation was therefore clearly distinguishable from that in MacLeod v. Kerr. In particular, Smith's view that Telford was a thief, being explicitly based on the pretence of agency in that case,¹⁷ could not with justification be applied to the conduct of the fraudulent party in MacLeod v. Kerr. Unfortunately, when the judgment of the Sheriff-Substitute was considered on appeal the Court wrongly imputed the error of analysis to T.B. Smith. Lord President Clyde remarked of Morrisson v. Robertson that it

"truly was a case of error regarding the identity of the purchaser",¹⁸

and therefore consistent with Cundy v. Lindsay,¹⁹ and described as "erroneous" the view of the learned author of the Short Commentary who, while accepting that error as to identity was the ratio of Morrisson v. Robertson, would have preferred that the same decision had been reached on the ground that Telford was a thief and therefore a vitium reale affected the property which he obtained.²⁰ The Lord President took the view that it /was

was quite wrong to suggest that Telford was a thief, because Morrisson "voluntarily and intentionally"²¹ delivered the cows to Telford.

While the ratio of Morrisson v. Robertson is certainly error in persona, that ratio was not an appropriate one. There was a misrepresentation of identity, but the material misrepresentation, that is to say, the one which induced actual delivery, was the misrepresentation of agency. There was never any intention on Morrisson's part to give title to Telford and therefore it seems sound in principle that no title could pass to Telford personally, and that he was therefore in no position to give a good title to anyone else.²² Error in persona, on the other hand, could only be relevant where there was an intention on the owner's part to convey title to Telford under a mistake as to his identity. Telford could not make himself a party to a contract with someone whom he knew did not intend to contract with him.

B. VITIMUM REALE

The vitium reale concept on which T.B. Smith relies, is however of little assistance in the interpretation of Morrisson v. Robertson. The idea of a vitium reale originated in a period of Scots law when the theftuous taking of goods required to be either violent or clandestine.²³ This is clear from the statement of Stair that

/"In

"In moveables, purchasers are not quarrelable on the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence which the law accounts labes realis, following the subject to all successors, otherwise there would be the greatest encouragement to theft and robbery".²⁴

Similarly, Erskine states that

"Theft is either committed in a hidden or concealed manner, which may be called proper theft, or is attended with violence".²⁵

Bell too contemplated a clandestine element in the appropriation.²⁶ These sources illustrate the restricted definition of theft in pre-nineteenth century practice and the irrelevance of the test of the voidness or voidability of the contract as determining the passage of title. The position is summarised by Gow as follows:

"Although Scots theft like English larceny²⁷ attaches a vitium reale to goods stolen, fortunately the former has by and large been restricted to circumstances where the thing is stolen either when the owner has no knowledge of loss of possession, for example, by a pickpocket surreptitiously removing a watch, or the entrustment has not involved a conveyance of title, as leaving a watch with a watchmaker for repair. The Scots categories of "breach of trust and embezzlement" and "falsehood, fraud and wilful imposition" avoid resort to the subtleties of 'larceny by a bailee', 'larceny by a trick' and any commitment to an approach based on vitium reale".²⁸

The restricted definition of theft in the early law was the natural counterpart of an abstract theory of transfer of title. Burnett, who supported the early definition in the Regiam Maiestatem considered that the fraudulent acquisition of title and the fraudulent acquisition of possession only were indistinguishable.

".....They are both of them acts of fraud punishable as crimes; but the possession having been obtained from the owner by a device or stratagem merely, et nec vi vel clam, it seems not to amount in either case to the crime of theft".²⁹

Once the Scots law of theft had broken out of the narrow requirement of a furtive contrectatio, vitium reale became an obsolete concept in the analysis of the crime. It is significant that there was no judicial development of vitium reale at any time after the original and limited definition of theft had been extended to cover fraudulent acquisitions of possession.

It is clear also that in respect of the feature of a vitium reale or labes realis affecting the goods taken, the criminal offence of theft has to be considered in relation to the civil delict of spuilzie.³⁰

C. SPUILZIE

Spuilzie was a delict which was coterminous with the crime of theft or its aggravated form, robbery. Stair,³¹ defines spuilzie as the

"taking away of moveables without consent of the owner or order of law, obliging to restitution of the things taken away, with all possible profits or to reparation therefor, according to the /estimation

estimation of the injured made by his iuramentum in litem. Thus things stolen or robbed, though they might be criminally pursued for as theft or robbery, yet they may be also civilly pursued for as spuilzie".

Erskine describes it as the

"taking away or intermeddling with moveable goods in the possession of another, without either the consent of that other, or the order of law".³²

He then described it as essentially a delict against possession rather than title,³³ which has always been the hallmark of theft.³⁴

Furthermore, there can be no doubt that the theft of which spuilzie was the civil counterpart was the restricted type of theft which applied in Scots law before the nineteenth century, that is to say, theft accomplished by violent or clandestine means. Thus Sir Thomas Craig in his Ius Feudale equiparates the action with the actio vi bonorum raptorum of the Roman law.³⁵ Bankton describes it as

"the violent seizing, or unlawful taking possession of goods from another without his consent or order of law, for lucre's sake."³⁶

Stair himself observed that there is no liability for spuilzie if the goods are voluntarily delivered to the defender.³⁷ In the first edition of the Principles, Erskine, having defined spuilzie as inferring a dispossession accomplished "violently or without order of law", described it as being analogous with the /penal

penal actions of ejection and intrusion in relation to heritable property, which necessitated respectively violence or stealth.³⁸

D. INTERACTION OF CIVIL AND CRIMINAL PRINCIPLES

There is therefore no authority for Smith's view that, in a case such as Morrisson v. Robertson,⁵ a vitium reale affects the goods. All that can be said in such a case is that in modern Scots law no title in the property passes to the fraudulent party and that in the criminal law, in conformity with that civil principle, it is held that theft is committed. It cannot, however, be argued that no title passes because in the criminal law theft is committed. Still less can it be argued that because theft is committed, a vitium reale affects the property, since the latter idea is inherent in a very different conception of theft from that which the modern law has come to recognise.

Smith's suggested solution to the problems raised by cases such as Morrisson v. Robertson⁵ does however exemplify one of several difficulties involved in the interaction of criminal and civil principles in the modern law. One obvious distinction between fraud and theft considered from the point of view of the appropriate civil remedy is that the former crime protects the victim's rights in personam, while the latter protects his rights in rem. But too close a regard to the /principles

principles of the civil law can give rise to difficulties of definition. Is it, for example, theft in a given case because the civil law rules that no title has passed to the accused, or does no title pass because, according to the criminal law, the taking of the goods amounts to theft? Or does the civil concept of res furtiva necessarily coincide with the criminal concept of theft? The whole question of the relationship between the principles of the civil and the criminal law can give rise to considerable circuitry of argument, apart altogether from the difficulties created by provisions of criminal procedure regarding alternative verdicts,³⁹ and there is no reason why substantive principles in one branch of the law should necessarily determine questions in the other. In the result, considerations of history and policy are probably the effective factors.

The question of the criminal liability of the dishonest party generally precedes the civil issue of property rights, and it might be expected that in determining whether the accused is guilty of theft or fraud the courts would invoke principles of the civil law because, as Smith and Hogan argue,

"the criminal law relating to the appropriation of property can only be defined intelligibly, and operated sensibly, in relation to the civil law of property".⁴⁰

In practice, however, this is not always the case. In English law, for example, the modern statutory offence

/of

of obtaining by deception⁴¹ is wide enough to include cases where possession only is obtained and therefore theft is committed.⁴² Moreover since 1968 English law has accepted that in cases falling within s.5(4) of the Theft Act 1968 where property is obtained by another's mistake, theft is committed even though title passes to the accused.⁴³ A similar result has been reached in New Zealand where the offences of obtaining by false pretences and theft by fraud overlap to the extent that for the offence of "obtaining" it is sufficient that possession only is obtained.⁴⁴

So too in Scots law the common law crime of fraud may, as a result of Adcock v. Archibald⁴⁵ be interpreted sufficiently widely to cover circumstances amounting to theft, since the acquisition of possession from the true owner is a sufficient practical consequence to constitute fraud. In dubio, therefore, the prosecutor may well charge fraud even when theft might be established. Secondly, and more importantly, from the practical point of view, the statutory provisions relating to alternative verdicts enable the Courts to sidestep difficult issues of title.

It is therefore not conclusive in the civil question as to title whether the fraudulent party is guilty of fraud⁴⁶ or of theft⁴⁷ and to invoke the concepts of the criminal law in such a context can lead to confusion.

E. THE EFFECT OF MACLEOD v. KERR ON EARLIER AUTHORITIES

Macleod v. Kerr, however, has created a further difficulty. It appears to have been the view of Lord President Clyde that the voluntary and intentional delivery in Morrisson v. Robertson⁵ elided liability for theft on Telford's part.⁴⁸ This view cannot, however, be supported. The essence of liability for theft is that the property is appropriated without the intention on the part of the owner to give title. The fact that Morrison consented to delivery of the cows to Telford is of no relevance to the latter's liability. As long as he did not intend to give title to Telford, theft was committed as soon as Telford appropriated the cows. The converse of the Lord President's view would be that there is no theft where property is taken nec vi nec clam, and that has not been the law for over 100 years.⁴⁹

The species facti of Morrisson v. Robertson is illustrated in its criminal aspects by Hill⁵⁰ and Menzies.⁵¹ In both cases the accused falsely represented themselves to be the messengers of identifiable people known to the owners of the goods. In the circumstances the consent thus induced was a consent to give title to their purported employers, and the accused's liability was for theft.

Sam Michael⁵² on the other hand, illustrates the /criminal

criminal aspects of Macleod v. Kerr. In that case the accused ordered and obtained goods in a fictitious name, and on a doubt arising as to whether the crime was theft or fraud, a plea of guilty of fraud was accepted; correctly, it is submitted, for it was obvious that the suppliers did not rely on the identity as regards creditworthiness and therefore the contract was only voidable. In any event, the suppliers intended to grant title to the accused.

Macleod v. Kerr by implication overrules Wilson⁵³ which seems to have been wrongly decided on the question of title. The accused in Wilson was a retail jeweller who had obtained jewellery from a wholesaler by pretences as to his creditworthiness, particularly by the production of falsified business books. The relevancy of the charge of theft was objected to on the ground that title had passed. Lord Justice-Clerk Moncrieff and Lord Craighill⁵⁴ appear to have considered that the presence of a fraudulent representation ruled out any question of title passing, and on that ground distinguished Brown v. Marr, Barclay⁴⁶ etc. where no pretence was made and title passed. The decision cannot now stand with that in Macleod v. Kerr.⁵⁵

F. ALTERNATIVE VERDICTS

The provisions of section 59 of the Criminal Procedure (Scotland) Act 1887 and section 2 of the
/Summary

Summary Jurisdiction (Scotland) Act 1954 need be considered here only in relation to the crimes of theft and fraud. Before 1887 the problems in satisfactorily distinguishing between theft and embezzlement were particularly acute, and between theft and fraud scarcely less so. Section 59 of the 1887 Act as amended by section 38 of the Criminal Justice (Scotland) Act 1949 provides as follows:

"Under an indictment for robbery or for theft, or for breach of trust and embezzlement, or for falsehood, fraud and wilful imposition, a person accused may be convicted of reset; under an indictment for robbery or for breach of trust and embezzlement, or for falsehood, fraud and wilful imposition, a person accused may be convicted of theft; under an indictment for theft, a person accused may be convicted of breach of trust and embezzlement, or of falsehood, fraud and wilful imposition, or may be convicted of theft, although the circumstances proved may in law amount to robbery."

Similar, but not identical, provisions apply in summary procedure.⁵⁶

The purpose of the 1887 provision was to relieve prosecutors of the irrevocable consequences of a wrong choice of nomen iuris in the libel, and to enable the Court to avoid difficult questions of fact and law at the stage of trial.⁵⁷ The result of this provision was to satisfy the needs of procedural expediency at the possible expense of precision in the legal analysis of /any

any given set of facts involving dishonesty. The practical result of the section is that from an analytical standpoint the nomen iuris selected by the prosecutor, jury or judge need not be the theoretically correct one. To illustrate the point it is helpful to restate the simple proposition that theft and fraud are legal characters attributed to factual situations and therefore, as matters of law, matters for the court.

In the marginal case under Scottish procedure this proposition is easily lost sight of. It is in the marginal case, where the precise legal evaluation of the facts is most difficult that the statutory alternatives are most useful. In such a marginal case the effective legal evaluation may be made by the prosecutor, rather than by the judge, when he chooses which crime to charge. Further, in such a case the effective legal decision as to liability after trial may be made by the jury since the statutory alternative convictions are open to them. It is therefore quite possible in the narrow case for the accused to be charged and convicted under a theoretically inappropriate nomen iuris. The problem is taken a stage further in the situation where the accused tenders a plea of guilty either to theft or fraud on being charged with either crime.⁵⁸ If such a plea is accepted by the prosecutor the effective legal evaluation of the facts may /virtually

virtually be made by the accused himself.

Given such a wide ambit of discretion, little or no reliance can be placed on the nature of the conviction in cases after 1887 in support of the theoretical analysis of the facts, least of all where the accused tenders a plea of guilty. In this respect, the 1887 Act usefully avoids the practical difficulties found in earlier cases such as Sam Michael.⁵² In that case, the accused carried out a "long firm" fraud, ordering and uplifting goods in a false name. He was charged with theft and alternatively fraud. He pled guilty to theft but his plea was not accepted by the Court and the libel was restricted to the lesser charge.

FOOTNOTES FOR CHAPTER XII

1. Cf. Brown, The Distinction between Fraud and Fraudulent Theft, 1908 S.L.T. (News) 43.
2. Gordon, 440.
3. Gordon, 440; 447f.
4. 1965 SC 253.
5. 1908 SC 352.
6. Short Commentary, 816.
7. Sale of Goods Act 1893, s.23. Cf. Price and Pierce Ltd. v. Bank of Scotland, 1910 SC 1095 (affd. 1912 SC (HL) 19).
8. Contract, 2nd ed. 531-2.
9. Short Commentary 793, 817; cf. Gow Mercantile Law, 60f.
10. Wilkin v. Kohler 1913 AD 135; C.C.E. v. Randles Bros. 1941 AD 369; Trust Bank of Africa v. Western Credit 1966 (2) SA 577 (AD). MacKeurtan, Sale of Goods in South Africa, 4th ed., 171.
11. "Iusta Causa Traditionis and Contracts Induced by Fraud", (1957) 74 SALJ 280, 282f. and cases cited Cf. A.S. van der Spuy (1966) 83 SALJ 425, 427-8. In the Rhodesian case of Pafitis v. Naovmoff, 1965 (4) SA 591 (SR), the question was considered in terms of the existence of the contract.
12. This must be taken to mean theft in its restricted pre-nineteenth century form. Cf. Short Commentary 817, and T.B.Smith "Error and Transfer of Title", (1967) 12 J.L.S. 206.

13. Gloag Contract 2nd ed., 534 n.1; Brown v. Marr Barclay etc., (1880) 7 R 427.
14. Gloag, Contract 2nd ed., 442-4.
15. Ch.37, esp. 814-5.
16. 1908 SC 532.
17. Short Commentary, 816.
18. Macleod v. Kerr, supra, 256.
19. (1878) 3 App.Cas. 459.
20. Short Commentary, 816.
21. Macleod, supra, 256. Cf. T.B. Smith, "Error and Transfer of Title", (1967) 12 J.L.S. 206 and 346.
22. Nor could title pass to Wilson Cf. Caterers Ltd. v. Bell, 1915 AD 698, 710 Storer v. R. 1907 TS 207 discussed infra; and S. v. Haarhoff, 1970 (1) SA 253 (AD), 258.
23. There was no vitium reale in money. Gorebridge Co-op Soc. v. Turnbull (1952) 68 Sh.Ct.R. 236.
24. Inst. IV, 40, 21; cf. II.12,8. The last part of the quotation from Stair is not included in Professor Smith's article, supra, but it is submitted that it is important in regard to this question.
25. Inst. IV, 4,58 1st ed. (1773); cf. also ibid, III. 7.14.
26. Comm., i, 299-300.
27. i.e. before the Theft Act 1968.
- /28.

28. Mercantile Law, 120.
29. Burnett, 114; and Baird and Manson (1810) there cited.
30. Hay v. Leonard (1677) Mor 10286; Stair Inst.I.9,16; Bankt. I.10,7; I.10,130.
31. Inst., I,9,16.
32. Inst. III,7,16: 1st ed.
33. Inst. IV.1.15: 1st ed.
34. Cf. Edwards, "Possession and Larceny", in (1950) C.L.P. 127, 128f.
35. II,11,30; II,17,25.
36. Bankt. I,10,124.
37. I,9,20. More's contrary view (Lect i, 359) is not supported by authority.
38. Ersk.Princ. 1st ed. IV.1.20.
39. Cf. Criminal Procedure (S) Act 1887, s.59; Summary Jurisdiction (S) Act 1954, s.2.
40. Smith and Hogan, 3rd ed., 415. Cf. also J.C.Smith "Civil Law Concepts in the Criminal Law"]1972 B] Camb.L.J. 197.
41. Theft Act 1968, s.15(1) and (2).
42. Smith and Hogan, 3rd ed., 419f., 442.; R. v. Lawrence [1972] AC 626. The 1968 Act thus abolishes the restricted conception of obtaining under the Larceny Act 1916, s.32(1); R. v. Ball [1951] 2 KB 109,111.
43. Cf. Smith and Hogan, 3rd ed., 415f.
- /44.

44. Crimes Act 1908, s.252; R. v. McReynolds [1935] NZLR 944; R. v. Miller [1955] NZLR 1038; R. v. Bennitt [1961] NZLR 452.
45. 1925 JC 58.
46. Brown v. Marr Barclay etc. (1880) 9 R 427, L. Gifford at 445.
47. Gloag, Contract, 2nd ed. 534 n.1.
48. Macleod v. Kerr, 1965 SC 253, 256.
49. George Brown, (1839) 2 Swin 394.
50. (1879) 4 Coup. 295.
51. (1842) 1 Broun 419.
52. (1842) 1 Broun 472.
53. (1882) 5 Coup 48, discussed supra ch.11.
54. ibid, 60-2.
55. Cf. Gordon, 445-7. Cf. the discussion of Wilson in Ch.XI.
56. Summary Jurisdiction (Scotland) Act 1954, s.2., Schedule 1.
57. The corresponding South African provisions are less flexible. Hunt, 739.
58. Law Reform (Misc.Prov.)(Scotland) Act 1940, s.8.

C H A P T E R X I I I

Theft, theft by false pretences and fraud
in South African law

A. FRAUD AND THEFT

The South African case law includes some examples of confusion on the part of the prosecution between fraud and simple theft. In R. v. Bruigom¹ it was alleged that the accused, a clothing manufacturer, had taken payment of certain sums in advance with customers' orders and that he had failed to fulfil the orders. He was charged with theft of the monies paid to him. The Court rightly took the view that this could not be theft of the money and that it was a case of fraud, if indeed it was criminal at all. In S. v. Matlare² an attorney was charged with theft of fees paid to him by a client for services which he failed to render. Again the only possible criminal liability in such a case was for fraud. On the other hand, in the case of R. v. Faulding and Young³ the appellants were convicted of fraud in respect of their having falsely represented their authority to purchase goods on behalf of a company and having appropriated to their own use the goods thereby obtained, and it seems that the crime committed in this case was theft of the goods.⁴

In R. v. Kruse⁵ the accused induced a jeweller to transfer to him on approval possession of two rings, title to which remained with the jeweller, against the security of a worthless cheque for their price. He then disposed
/of

of both rings. The accused was charged with fraud, but this, it is submitted, was a case of theft of the rings.⁶

B. THEFT BY FALSE PRETENCES

The main problem however in modern South African law has been the distinction between fraud and the crime of theft by false pretences, an offence which originated in a different tradition of criminal theory and was engrafted on to the South African theory of theft in the nineteenth century.⁷

Origins

The term "theft by false pretences" was used by Stephen⁸ to describe the English crime of larceny by trick and it appeared eo nomine in Stephen's Indictable Offences Bill 1878.⁹ Although the term used by Stephen was new, the crime which it described was by then well established in English criminal law. The term itself and Stephen's definition of it were adopted in Southern Africa by the framers of the Transkeian Penal Code 1886,¹⁰ which had a strong influence on the theory and practice of the South African courts.¹¹ In its origin the crime was simply a type of theft in which possession was obtained from the true owner of the property by means of a deception or trick¹² but the early reports indicate that there was a divergence of view in regard to the charge,¹³ it being treated in some cases, correctly, as substantially a charge of theft /and

and in others as substantially a charge of fraud,¹⁴ presumably as a result of a confusion with the English offence of "obtaining by false pretences". The term "obtaining" was occasionally used in charges.¹⁵ By the 1890's, "larceny" and "obtaining" appear to have been unified in practice at the Cape under the charge of "theft by false pretences".¹⁶ The uncertain basis of this offence is vividly illustrated in a contemporary manual of practice, Tredgold's "Handbook of Colonial Criminal Law", published at Cape Town in 1879, in which "false pretences" is treated in terms of the then English offence of "obtaining",¹⁷ with considerable uncertainty as to whether the South African offence is distinguishable from, or merely a species of the crime of theft.¹⁸ In the same work alternative specimen charges of fraud and theft by false pretences are framed on the same allegations of fact.¹⁹ Furthermore, it appears from the specimen charge of "theft by false pretences" that the crime exactly corresponded with the then English crime of obtaining.²⁰ In Anders and Ellson's Criminal Law of South Africa, (1915-17) the crime of "obtaining by false pretences" is referred to as a species of crimen falsi or fraud,²¹ but in a later passage it is said that the English offences of larceny by trick and obtaining by false pretences both fall within the South African law of theft although all cases of "theft by false pretences" must always constitute fraud.²²

/The

The Transvaal Cases

The confusion which developed around this charge is illustrated in a series of cases in the Transvaal in the early years of this century, in which the view was taken that a consent to transfer title, if induced by deception, could not be a valid consent and that therefore the crime committed was theft. For example, in R. v. Masiminie²³ a witch-doctor was charged with theft by false pretences of the money paid to him by one who consulted him.

In R. v. Hyde²⁴ it was stated obiter that to obtain money by false pretences inferred liability for "theft by means of false pretences". In Van der Merwe v. R.²⁵ the accused bought a number of mules under an agreement that title in the mules should not pass to him until he paid the price in full. Before completing payment the accused sold the mules. His conviction for theft of the money by false pretences was upheld on appeal. It is submitted, however, that this decision was wrong. The accused did not steal the money. He committed fraud against the purchasers of the mules in respect of the money paid by them, and he committed simple theft of the mules from their owners.²⁶ It emerges clearly from this case that the charge was treated as one of fraud on the analogy of the English crime of "obtaining by false pretences".²⁷ In Storer v. R.²⁸ an employee of a company falsely ordered goods in the company's name and on delivery appropriated them.

/He

He was convicted on a charge of theft of the goods from his employers but it was held on appeal that he had committed theft by means of false pretences from the supplier. In this case no title could pass to the employers, who were not parties to the bargain and could not be principals in respect of the accused's transactions.²⁹ This was a case of simple theft of the goods from the suppliers and could have been charged as such.³⁰ The uncertain state of the law at this time is shown in R. v. Constable³¹ where the accused obtained loans of money by false pretences. In the report his offence is referred to as theft by false pretences, and the case proceeded on the view, seemingly, that "obtaining" was a species of theft.³² Innes C.J. appears to have been confused as to the proper basis of the crime. He considered the question to be whether on the foregoing facts the crime of "theft by means of false pretences" was committed, and stated that that offence was "simply a species of theft",³³ which was true enough; but he also appears to have considered that liability for theft arose if at the moment of obtaining the money the accused had no intention to pay.³⁴

This line of authority culminated in the remarkable statement of Mason, J.P. in R. v. Hyland³⁵ that

"If you take a man's money or property without his consent, and appropriate it to your own use, that is really theft. When he does not really consent, but you merely procure his apparent consent by fraud, there is no consent in law, and on that principle it has been held safe to /charge

charge the crime purely as theft".³⁶

This indicates a resort to a sort of eighteenth century fictionalism on the English model in which a consent impetrated by fraud was held to be no consent at all, for the purposes of the law of theft.³⁷ This was certainly not the position in the law of contract. If this theory were correct it would destroy the whole basis of the crime of fraud which is not to prevent the taking of property against the owner's will, but the valid acquisition of ownership by unfair means.³⁸

The distinction between fraud and theft by false pretences

The attempt to distinguish theft by false pretences from fraud was undertaken by the Appellate Division in 1928 in R. v. Davies,³⁹ where Stratford J.A. observed

"Though it is true that in all cases where the latter crime is committed there are present all the elements constituting the crime of fraud, the converse is certainly not true. The essential elements of the crimen falsi are a wilful perversion of the truth made with the intention to defraud and to the actual or potential prejudice of another. If the prejudice is actual and consists in the deprivation of another of his ownership in property capable of being stolen, and further if the accused converts that property to his own use, in such a case only is the crime also one of theft by means of false pretences. If the prejudice is potential, then theft is not committed".⁴⁰

This statement is scarcely satisfactory. It seems that the judge did not have in view the essential distinction
/between

between the loss of ownership in fraud and the loss of possession in theft and it is accordingly not clear whether the transfer of ownership or of possession only was contemplated in the dictum.⁴¹ Furthermore, the statement overlooked an important group of cases, already referred to, in which the obtaining of money by means of false pretences was held to be theft. Although the cases thereafter consistently reaffirmed the principle that theft by false pretences was a species of theft, the case was, and still is, interpreted as justifying a conviction of theft by false pretences in circumstances where title in the property passed to the accused, even where the property involved was money; and even where the money was given as a loan.⁴²

Van den Heever J. protested against this charge in R. v. Mofoking⁴³ because, as he rightly argued, theft cannot be present where the victim voluntarily parts with title notwithstanding the fact that his consent is induced by deception as to the facts; but a series of cases ensued, all of them examples of fraud, in which the courts repeatedly reaffirmed that these were a species of theft and in which their sole concern was to insist on specification in the wording of the charge.⁴⁴

The matter was again considered by the Appellate Division in 1959 in Ex parte Minister of Justice: in re R. v. Gesa; R. v. De Jongh.⁴⁵ On this occasion Schreiner A.C.J. stated obiter that he was in no doubt /that

that there might be theft even where there was a "voluntary" handing over of goods by the victim, if he was fraudulently deceived by the recipient into handing them over.⁴⁶ But again the Appellate Division failed to make clear whether the "handing over" of the goods referred merely to the handing over of possession or to the transfer of title. Subsequent cases have repeated the error of analysis already referred to. For example, in S. v. Knox⁴⁷ the case of Gesa was founded on in a situation which clearly was one of fraud; and in R. v. Ganget⁴⁸ a charge of theft by false pretences was brought where the accused obtained money under a contract of loan in circumstances where he was subject to an obligation to repay, but where title in the money given passed to him.

The confused thinking to which this hybrid offence gave rise is illustrated by Gardiner^{er} and Lansdowne's definition:

"Theft by false pretences is committed by any person who by any false pretence obtains anything capable of being stolen, with intent to deprive the owner of his ownership or any person having any special property or interest in the thing of such property or interest."⁴⁹

In a proper case of theft by false pretences, but for the procedural requirements as to particularity, the pretence could be excluded from the actus reus without /relieving

relieving the accused of liability because the gravamen of the charge is the appropriation of property belonging to another. In contrast, the exclusion of the pretence from the facts in a fraud charge would relieve the accused of liability altogether. The discussion of the foregoing cases indicates that each can be easily classified as either a straightforward theft in which the use of deception happens to be part of the actus reus, or as straightforward cases of fraud: and there is no reported case in which the proper liability of the accused cannot satisfactorily be classified within either of those two crimes.

Contract cases and the consent theory

The problems associated in the criminal law with the charge of theft by false pretences have given rise to similar difficulties in the field of contract. Although certain of the older authorities established, as should have been the case, that one who committed this crime could not acquire title,⁵⁰ it has now been accepted that as a result of the confused thinking in the criminal courts in regard to this charge, the same facts may in an appropriate case be charged either as fraud or as theft by false pretences; and therefore, as was said in Dalrymple, Frank and Feinstein v. Friedman (2),⁵¹

"It is clearly not the case that the passing of ownership depends upon whether or not the fraudulent party is convicted of one crime or /the

the other".⁵²

Hunt suggests a theory by which the principles of the civil law governing the transfer of title and, it would appear, the actual state of mind of the transferor of the property, fall to be ignored.

According to Hunt

"It is submitted, in general, that a taking is invito domino unless the owner's consent is real, and that a consent is not real (whatever the law of contract or property may say) if it is legally incompetent or if it was induced by mistake, fraud, force or fear, whether or not these can be said to nullify consent completely and whether or not there was (for the purposes of the law of property) intention to pass ownership to the accused".⁵³

He therefore argues that the obtaining of property, the consent to which is induced by fraud, constitutes theft, albeit that fraud is also committed.⁵⁴

This theory is supported by the numerous cases to which the obiter dicta in Gesa's case have given authority,⁵⁵ but Hunt takes the matter further by arguing on grounds of utility and public policy that the contrary approach would involve the sort of technicalities from which English law suffered before the Theft Act 1968.⁵⁶

While it is to be conceded that the criminal process is concerned with practical solutions and should not be impeded by technical questions of consequential private
/right

right remote from the issue in the prosecution,⁵⁷ Hunt's theory involves an equal amount of technicality in that on every occasion in which, as in the majority of cases, the property obtained by deception is property capable of being stolen, theft would be held to be committed even though the property obtained was plainly not "stolen property" in terms of the civil law.⁵⁸ Such an approach resurrects the constructive doctrines of nineteenth century English practice. It is little different from the legal fictions in cases like Pear's⁵⁹ case, and it does more violence to logic than the position which Hume criticises.

There is in any event a more satisfactory solution which equally well avoids technical issues of title, and that is to charge all theft by false pretences cases as fraud, since Hunt concedes that, on his own theory, both crimes are committed.

Hunt argues further that

"It seems anomalous to treat an owner as having consent when his 'consent' has been induced by fraud, and one doubts whether the so-called 'logical' distinction between the tainted but real consent and a non-existent consent is really supportable in logic or any other branch of philosophy".⁶⁰

If this is true it applies equally well to the civil law, and the implications of that view in regard to questions of title are obviously far reaching. The main objection /to

to this argument is, however, that it involves an arbitrary substitution of law for fact in that it would involve a conclusive presumption against a consent to transfer title in all cases, even in the face of contrary evidence by the complainant. Moreover, it may be argued that considerations of utility and policy demand that the criminal law and the civil law should proceed on the same theory on such basic doctrines as the transfer of title. Hunt's view also necessitates the conclusion, which he accepts⁶¹ that fraud cases such as R. v. Maklakla⁶² were wrongly decided. This is a startling view. In Maklakla, sheep were obtained on credit by means of a false pretence by the accused that he was due a certain sum in wages and by means of a false promise to pay for the sheep. If all such cases were to be held thefts, then the scope of fraud would be restricted to cases of non-proprietary prejudice, and it would virtually cease to be an offence against property.⁶³

Mens rea

A further objection to Hunt's theory is that in any theft prosecution a fundamentally different mens rea is required from that in fraud, namely an intention to deprive the owner permanently of the full benefits of his ownership. Hunt's view necessitates an abandonment of the subjective approach in that the complainant or owner is ex hypothesi legally incapable of validly consenting to divest himself of title, but leaves the prosecution open to a defence based on the subjective approach that, notwithstanding the deception, the /accused

accused genuinely believed that he had the 'owner's' valid consent. Hunt attempts to have it both ways by also requiring an intent to defraud, which for the purposes of this charge is defined as an intent to induce the owner to permit the contractatio. But this formula merely emphasises the unreasonableness of his position. If these cases are truly theft, and if it is illogical to regard them as frauds, then the general mens rea of theft should suffice and no further or other mens rea, and least of all a mens rea of fraud, should be required.

The superfluous nature of theft by false pretences

A typical case in which theft by false pretences can properly be brought is the recent case of S. v. Haarhoff⁶⁴ where the accused was charged with theft by false pretences in that he had falsely represented that he was an agent of a company purchasing on behalf of the company and had thereby induced the owner of sheep to deliver the animals to him which he then converted to his own use. It was held that on these facts the offence was "substantially theft and not fraud",⁶⁵ because the sheep were not given over to the appellant in ownership, either personally or as agent of the company. This analysis, which is the correct one, may be held to justify the implication that such a charge would be inappropriate in a case where ownership was being transferred to the accused by the victim of the deception. It also indicates the very important practical consideration that, if there is the required /degree

degree of particularity in the wording of the charge, the typical case could quite easily be charged as simple theft. If the charge of theft by false pretences is correctly classified and analysed it is seen to be an unnecessary charge, in that it accomplishes nothing more than would be accomplished by the simple charge of theft, and only serves to complicate the theory of the matter.⁶⁶

FOOTNOTES FOR CHAPTER XIII

1. 1933 TPD 109. Cp. R. v. Thommee, (1904) 18 EDC 233 where the charge was theft it was held that the evidence disclosed no animus furandi, the question being one of civil liability only.
2. 1965 (3) SA 326 (C).
3. 1924 AD 483.
4. Cf. also R. v. Hancock, 1932 NPD 375; De Wet and Swanepoel, 2nd ed., p.418.
5. 1941 AD 524.
6. cf. Hunt 729; De Wet and Swanepoel, 423.
7. Cf. R. v. Cowan and Davies 1903 TS 798, 803-4; R. v. Mofoking, 1939 OPD 117; Van Themaat, 162f. Hunt, Ch.33; De Wet and Swanepoel, 428-36.
8. Stephen, Digest, 1st ed. (1877) art.298.
9. cf. generally Stephen's History.
10. Act 24 of 1886 (C), s.191.
11. Cf. Burchell and Hunt, 26-8; cf. Act 3 of 1861 (C) s.7, Law 16 of 1861 (N), s.11 which dealt with the essential elements in indictments for committing, or attempting to commit "theft by means of false pretences"; cf. also R. v. Mama (1898) 12 EDC 101.
12. For a contrary view see R. v. Swart (1895) 12 SC 421; R. v. Collins (1905) 19 EDC 163; R. v. Maklakla 1929 TPD 336, 341; ex p. Min. of Justice, R. v. Gesa; R. v. de Jongh, 1959 (1) SA 234 (AD), 239; S. v. Anderson 1962 (2) SA 286 (O), 287.

13. R. v. Hert Riefers (1892) 7 EDC 25, R. v. Swart, supra;
R. v. Mama, supra; R. v. Masiminie 1904 TS 560;
R. v. Collins (supra); R. v. Constable 1908 TS 456;
R. v. van Biljoen (1920) EDL 120.
14. Cf. C.W. de Villiers, in (1934) 51 SALJ 39, 43f.;
Johnstone v. R. 1909 TS 424; there were statutory
offences of "obtaining by false pretences" in
Transvaal provincial legislation - see Philips v.
R. 1907 TS 722; R. v. Mogarra 1958 (2) SA 5 (T), 7.
15. Queen v. Belcher (1881) 1 Buch AC 19; R. v. King
3 EDC 121 R. v. Annie (1884) 4 EDC 277; R. v. Hert
Riefers (1892) 7 EDC 25.
16. Cf. R. v. Adelburg (1891) 8 SC 234; R. v. Swart
(1895) 12 SC 421.
17. at p.164.
18. pp.164, 312.
19. pp.385-6.
20. pp.383-6.
21. p.93.
22. p.103.
23. 1904 TS 560 (cp. R. v. Zillah 1911 CPD 643; R.
v. Nothout 1912 CPD 1037).
24. 1904 TS 1,2.
25. 1905 TS 1.
26. Cf. R. v. Markins Motors (Pty.) Ltd. 1959 (3) SA
508 (AD), 512.
27. van der Merwe, supra, 3-5.
- /28.

28. 1907 TS 207, 210.
29. Caterers Ltd. v. Bell 1915 AD 698, 710.
30. Cf. the discussion of Morrisson v. Robertson 1908 SC 352 (supra), and A.J.C. Copeling's analysis of Pafitis v. Naoumoff 1965 (4) SA 591 (SR) in (1966) 29 THR-HR 261.
31. 1908 TS 456.
32. ibid 457, 458, 460 and (2) of the questions reserved.
33. ibid, 460-1. Contrast Johnstone v. R. 1909 TS 424, where the crime was said to be a species of fraud.
34. Likewise Tindall J. in R. v. Maklakla 1929 TPD 336, 340.
35. [1924] TPD 336.
36. ibid, 336-7.
37. e.g. in R. v. Le Roux 1927 TPD 39; R. v. Maklakla 1929 TPD 336 - obtaining goods on credit by false pretences; Burwood v. R. 1931 NPD 573.
38. R. v. Mofoking 1939 OPD 117. The corresponding problem in English law, that of distinguishing between larceny by trick and obtaining by false pretences, was not resolved until 1961 - cf. R. v. Buckmaster (1887) 20 QBD 182; R. v. Russett [1892] 2 QB 312; R. v. Jones (1948) 33 Cr.App.R. 11; R. v. Caslin (1961) 45 Cr.App.R. 47; Smith and Hogan Criminal Law, 1st ed. 413.
39. 1928 AD 165.
40. ibid, 170. Cf. Gardiner and Lansdown, 6th ed. 1682-3; Pittman, Criminal Law in South Africa, 150-1.

41. In R. v. Coovadia 1957 (3) SA 611 (N), 612, James J. seems to have interpreted it as referring to the loss of possession. Hunt, however, interprets this case differently, (at p.577, note 164).
42. R. v. Ganget 1960 (2) SA 139 (T). Obviously there would be theft if non-fungible property were lent.
43. 1939 OPD 117. In R. v. Tshabakholo, 1939 OPD 1 the charge was "theft by fraud".
44. e.g. R. v. Levitan 1958 (1) SA 639 (T) R. v. Mogarra 1958 (2) SA 5 (T); S. v. Knox 1963 (3) SA 431 (N).
45. 1959 (1) SA 234 (AD).
46. at 239-40.
47. 1963 (3) SA 431 (N).
48. 1960 (2) SA 139 (T).
49. 6th ed., 1682.
50. e.g. Lebedina v. Schechter and Haskell, 1931 WLD 247, 255.
51. 1954 (4) SA 649 (W).
52. ibid, 665. Cf. Preller v. Jordaan 1956 (1) SA 483 (AD); Scholtens, "I Usque causa traditionis and Contracts induced by Fraud" (1957) 74 SALJ 280, 295 and cases cited; Van Themaat, 168; Van der Westhuizen in (1950) 67 SALJ 372, 377; A.J.C. Copeling in (1966) 29 THR-HR 261.
53. Hunt, 576.
54. ibid, 577-8.
- /55.

55. cf. Hunt, 577, note 164.
56. ibid, 578.
57. cf. Smith, Law of Theft, ch.1
58. The case law does not support this theory. For example, in R. v. Renaud 1922 CPD 322 an appeal was allowed against a conviction of theft where the facts disclosed a board and lodging fraud.
59. (1779) 1 Leach 212; Pollock and Wright, Possession 218. Cf. supra. It should be noted that Hunt's theory on this matter reflects Stephen's proposed definition of theft which would have included the deprivation of ownership, as well as of possession, by fraud. (General View, 129).
60. Hunt, 578.
61. Hunt, 760, note 38.
62. 1929 TPD 336.
63. Recent case law has discredited some of the examples where theft and not fraud would have been charged in earlier law, e.g. where money is obtained fraudulently for services not subsequently rendered. S. v. Matlare 1965 (3) SA 326 (c); S. v. Shaban 1965 (4) SA 646 (W).
64. 1970 (1) SA)253 (AD); cp. R. v. Coovadia 1957 (3) SA 611 (N).
65. ibid, 258.
66. cf. Hunt, 714 n. There are, of course, difficult borderline cases. For example, in R. v. Blythe (1916 TPD 449), the accused was charged with theft by means of false pretences in that she obtained goods on a pretence that she would pay cash on delivery. The complainant had made clear to the accused that she was not to receive goods on credit. In due course, the complainant sent a messenger with the /goods

goods ordered, having again advised the accused that she must pay cash on delivery. The accused gave the messenger an envelope which she said contained money but which actually contained a written promise to pay which was in the event unfulfilled. In that case the goods were physically delivered before receipt of the envelope by the messenger but it would seem that the relevant misrepresentation was not as to the contents of the envelope but as to the intention to pay made when the order was placed. Assuming that such was a relevant pretence the proper liability, if any, was for fraud. A similar problem arises in relation to R. v. Havenga (1925 TPD 349). The accused purchased goods for cash and obtained delivery; but when given the account he made off, on the pretext that he was going to the bank to get a new cheque book. This too was probably fraud, rather than theft of the goods.