The Law Commission

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CRIMINAL LAW

JURISDICTION OVER OFFENCES OF FRAUD AND DISHONESTY WITH A FOREIGN ELEMENT

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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JURISDICTION OVER OFFENCES OF FRAUD AND DISHONESTY WITH A FOREIGN ELEMENT

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JURISDICTION OVER OFFENCES OF FRAUD AND DISHONESTY WITH A FOREIGN ELEMENT

Summary

In this report the Law Commission reviews and makes recommendations for reform of the rules that determine whether a criminal court in England or Wales has jurisdiction to try certain offences of fraud and dishonesty connected with another country. The report explains that for several reasons these rules are in urgent need of reform: in particular, they are unduly narrow, technical and insular in character, and they are antiquated, having evolved before the introduction of modern methods of communication and transfer of money across national boundaries. The report is accompanied by draft legislation to give effect to the Commission's recommendations.

THE LAW COMMISSION

Item XVIII of the Second Programme

JURISDICTION OVER OFFENCES OF FRAUD AND DISHONESTY WITH A FOREIGN ELEMENT

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I

INTRODUCTION

A. THE BACKGROUND TO THE REPORT

1.1 In 1986 the Fraud Trials Committee, under the chairmanship of Lord Roskill, drew attention in its Report to jurisdictional problems arising from frauds committed across national boundaries and expressed the hope, as did some of its witnesses, that the problems would be considered in the course of any review of the substantive offences of fraud by the Law Commission.[1]

1.2 The problems to which the witnesses referred arise, in a nutshell, from the rules of the common law which determine where a crime has been committed. Modern crimes of dishonesty often involve complex operations designed to conceal the dishonest conduct and to make detection and conviction as difficult as possible, and the planning, preparation and execution of the many operations which are involved in a complicated swindle frequently take place in several different countries. Under the present law none of the participants can be prosecuted here unless the *last* event which makes up the underlying crime occurs in England and Wales. Moreover, in cases in which those concerned are detected before they have completed their purpose, it is unlikely that they will be prosecuted in the country where they plan to reap the benefit, and because the underlying crime was not completed here they cannot be tried in England and Wales. In the result, they will in all probability not be convicted anywhere.

1.3 In July 1987, as a result of a joint initiative between the Commission and the Home Office, the problems arising from cross-border frauds were discussed at a meeting between a team from the Criminal Policy Department of the Home Office and the criminal law team of the Commission. This meeting concluded that a review of the law on this subject should be undertaken as soon as possible; and in December 1987 the Commission's criminal law team produced a consultation paper ("Jurisdiction over Fraud Offences with a Foreign Element") in which the team reviewed the present rules governing jurisdiction to try certain fraud and dishonesty offences, suggested that the rules were in urgent need of reform, and made provisional proposals to that end. The paper was sent, with an invitation to comment, to a number of individuals and organisations with knowledge or practical experience of this area of the law. A substantial number responded. In the light of the response to the team's consultation, the Commission itself took over the exercise,[2] extending the consultation to a wider range of consultees and inviting further comment from those who had originally responded. We are grateful to consultees who assisted us with their comments at either stage of the consultation.

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[1] "or other appropriate body": Report of the Fraud Trials Committee, para. 3.17. In 1970 the Law Commission had issued a working paper (Working Paper No. 29, "Territorial and Extraterritorial Extent of the Criminal Law"), in which the Commission reviewed the existing rules governing the jurisdiction of courts in England and Wales over offences in general, both substantive and inchoate, and made provisional proposals for reform. However, in its 1978 report on the topic (Law Com. No. 91, paras. 6–8), the Commission concluded that no universal jurisdictional rules could be recommended to deal with every offence of which some elements had taken place within, and others outside, England and Wales; and that, instead, the question should be considered in the context of individual offences. Subsequently, the Commission adopted a similar approach in paras. 2.134–2.141 of Law Com. No. 102 (1980), Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement. (The Criminal Attempts Act 1981 was based on the report.) In its Report on Offences against the Person (1980), Cmnd 7844, the Criminal Law Revision Committee made recommendations for the reform of the law relating to such offences, including (at paras. 295–304) certain jurisdictional rules.

[2] The Law Commission has undertaken the exercise, and submits recommendations, under subject 3, "Extraterritorial Jurisdiction in Criminal Offences", of Item XVIII of the *Law Commission's Second Programme of Law Reform.* The subject is listed there as one of those for examination as part of a comprehensive review of the criminal law.

B. THE BASIC PRINCIPLES AND THE STRUCTURE OF THE REPORT

1.4 Our report covers not only the commission of substantive offences of dishonesty in this country[3] but also inchoate offences (attempt, incitement and conspiracy) relating to offences of dishonesty that are in view either in this country or abroad. The broad principles that we have adopted in considering all these cases are the same, and have been substantially supported by those who contributed to our consultation. *First*, international fraud is a serious problem that is practised in many different and ingenious forms. It is essential that persons who commit frauds related to this country should not be able to avoid the jurisidiction of this country's courts simply on outdated or technical grounds, or because of the form in which they clothe the substance of their fraud. *Second*, it is particularly important that this country, as a leading international financial centre, should have and should be seen to have effective means of taking action against fraudulent conduct connected with this country. That consideration applies whether the fraudulent conduct is criminal dishonesty within this country; or the planning or preparation, either in this country or abroad, of criminal dishonesty affecting this country; or the use of this country for the planning or preparation of criminally dishonest acts abroad. *Third*, the present rules of this country about jurisdiction in offences of dishonesty have become increasingly difficult, complicated and controversial to apply, partly because they have not adapted adequately to fraud itself becoming increasingly complicated. The new rules should be simple and straightforward, in order substantially to reduce the amount of valuable court time taken up by technical arguments.

1.5 We have therefore approached the problem in the following order. *First*, we consider that in the case of substantive offences of dishonesty the present highly technical and outdated rules of jurisdiction should be abandoned in favour of a simple provision that such offences should be triable in this country if any part of the conduct or any of the results forbidden by such crimes takes place here. That principle and the reasons for adopting it are discussed in detail in Part II of this report. Our recommendation is supplemented by some simplification and improvement of the rules for determining where particular events take place. In Part III we go on to consider to which specific offences existing under English law ("the listed offences") that principle should extend. *Second*, we consider that adequate protection of this country's interests demands that the planning and preparation of criminal dishonesty which, if carried through, will affect this country should be justiciable before the courts of this country, whether the actual acts of preparation take place in this country or abroad. We therefore recommend, in Part IV of our report, that the existing offences of conspiracy, attempt and incitement should be triable in this country even if committed abroad, provided that they relate to a listed offence that, if committed, would itself be triable in this country. *Third*, we regard it as detrimental to this country, and in particular to its reputation as an international financial centre, if those who, when in this country, conspire, incite others or attempt to commit criminal fraud abroad may do so without being punishable in our courts. We therefore provide, in Part V of our report, that conspiracy, incitement and attempts in this country to bring about conduct or results abroad that would constitute a listed offence if it took place in this country should be justiciable by our courts.[4]

1.6 As we have indicated, our judgement, and that of the majority of those whom we have consulted, is that provisions such as those that we propose are urgently required if this country is adequately to meet the new situations created by wide-ranging international fraud, which is often committed by persons moving rapidly from country to country. It is however also important that, in the desire to check fraudulent conduct, the necessary protection of defendants is not compromised. In the latter connection we would therefore emphasise the following features of our proposals.

1.7 First, our proposals do not subject to criminal liability anyone who has not engaged in conduct of a type that is, at the time of our report, contrary to the existing rules of this country's criminal law. Our proposals are aimed only at ensuring that persons who engage in such criminal conduct can in appropriate cases be prosecuted in this country.

[3] For convenience, we use the expression "this country" or "here" to signify England and Wales, and "abroad" to denote any other place.

[4] Our conclusions and recommendations are summarised in Part VI. Appended to the report are—

A. A draft Bill (with explanatory notes) that would give effect to our recommendations.

B. Section 1 of the Criminal Law Act 1977 and section 1 of the Criminal Attempts Act 1981, as they would appear when amended in accordance with the draft Bill.

C. A list of those who commented on the criminal law team's consultation paper, "Jurisdiction over Fraud Offences with a Foreign Element" (1987).

1.8 Second, our proposals will bring within the jurisdiction of the courts of this country conduct that wholly or partially takes place in other countries, and may therefore be subject to criminal sanctions in those other countries as well. That in itself is no innovation, since such cases are already triable here if the *last* act necessary for guilt takes place here; our proposals will extend that position by giving the courts of this country jurisdiction if *any* such act takes place here. This however does not expose a defendant who has already been tried in a foreign court to the threat of further trial or punishment, since the English courts' jurisdiction is subject to the existing common law rules of double jeopardy which, it is well established, apply in respect of convictions or acquittals by a foreign as well as by an English court.[5] At the same time, however, regard for the interests of the defendant and for the rights of other countries to decide what conduct they wish to punish requires account to be taken of the possibility that acts criminally punishable by the law of this country may not be so punishable by the law of other countries. We therefore propose that acts done in this country which would amount to conspiracy, incitement or attempt, if what the parties had in view was carried out here, should not expose them to punishment by the courts of this country if their intended conduct would not be punishable by the law of the country where their objects were to be carried out.[6]

1.9 Third, all our proposals relate to dishonest conduct that either takes place in this country or is otherwise connected with it. There is, therefore, no infringement of the rules of international comity if the courts of this country exercise jurisdiction over that conduct. The point has, we think with respect, been well summarised by Lord Diplock:[7]

> "It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there. But I see no reason in comity for requiring any wider limitation than that upon the exercise by Parliament of its legislative power in the field of criminal law.
>
> "There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.
>
> "Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. The state is under a correlative duty to those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by deterring by threat of punishment conduct by other persons which is calculated to harm those interests. Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts."

It is consistent with this approach that the jurisdiction of the courts of this country should not be limited to British citizens. The draft Bill[8] makes the point explicit.[9]

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[5] "The consequence of recognising the jurisdiction of an English court to try persons who do physical acts in England which have harmful consequences abroad as well as persons who do physical acts abroad which have harmful consequences in England is not to expose the accused to double jeopardy. This is avoided by the common law doctrine of autrefois convict and autrefois acquit, a doctrine which has always applied whether the previous conviction or acquittal based on the same facts was by an English court or by a foreign court": *Treacy* [1971] AC 537, at p. 562C, *per* Lord Diplock. See also *Thomas* [1985] QB 604, at p. 610F–G.

[6] See Part V of this report below, and clause 7 of the draft Bill.

[7] In *Treacy* [1971] AC 537, at pp. 561G–562C.

[8] Clause 3(a)(i).

[9] Thereby addressing the canon of construction that, unless specifically provided otherwise, Acts of Parliament will not be construed as applying to foreigners in respect of acts abroad: see *Jameson* [1896] 2 QB 425, at p. 430, and *Air-India* v. *Wiggins* [1980] 1 WLR 815, at p. 819C (HL).

PART II

SUBSTANTIVE OFFENCES

A. OUTLINE OF THE PRESENT LAW

2.1 The rules governing criminal jurisdiction[1] are those of the common law, which are territorial in character: our courts assume jurisdiction to try an offence if, and only if, the offence is regarded as having taken place in England and Wales.[2] Similarly, a statutory provision creating an offence will, in the absence of other indication, be construed as applying only to crimes committed in England and Wales.[3] In implementing these rules, a crime is regarded by the common law as having been committed *only* where the *last* act or event necessary to its completion took place.

2.2 This latter rule, as to the "location" of a crime, is subject to some modification in the case of what are regarded analytically as "result-crimes"—that is, crimes that require for their completion not only conduct of a specified nature but also that a particular result shall follow from that conduct.[4] In such crimes, our courts have jurisdiction if *some part* of the prohibited result takes place in this country.[5] Our courts do not have jurisdiction, however, if the prohibited conduct, but no part of the prohibited result, occurs in this country, despite that conduct being as essential an ingredient of the crime as the result that the conduct produces.[6]

2.3 In respect of all crimes, therefore, the common law rules make jurisdiction depend on whether one particular element, out of a number of elements necessary for conviction of the crime, took place in this country. We illustrate in the following paragraphs how that rule operates in cases of criminal dishonesty.

2.4 The offence of obtaining property by deception, contrary to section 15 of the Theft Act 1968, is regarded as committed where the property is obtained; so our courts have jurisdiction only if the obtaining (as distinguished from the deception) occurred in England and Wales. In *Harden*,[7] for example, the deception was contained in documents posted by the accused in England to a company in Jersey. In response the company posted cheques to the accused which he received in England. It was held that because he had invited the company to send the cheques by post, he had "obtained" them when they were received by the postmaster in Jersey; and that accordingly the court did not have jurisdiction.[8] Again, to take a hypothetical example: a rogue whose sole residence is in England induces his next-door neighbour, by deception, to part with a sum of money which, as it happens, is handed over in Calais when they are travelling together on a day-trip to France. The rogue cannot be prosecuted in England for obtaining property by deception, because the money was not obtained here. In the converse situation, however, the rogue and his victim being neighbours in Paris and the money paid in Dover, the miscreant can be tried here for that offence.

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[1] In one sense, a court always has "jurisdiction" over a defendant who has been properly brought before it; strictly, it is incorrect to refer to our courts having (or lacking) "jurisdiction" to try someone for a particular offence, since to say that our courts lack jurisdiction to try someone for a particular offence is to say that he has not committed the offence: *R* v. *Governor of Pentonville Prison, ex parte Osman* [1988] Crim LR 611. For convenience, however, we refer in this report (as in the consultation paper) to "jurisdiction" as relating to the question whether he is triable in this country for an offence that he has committed somewhere.

[2] There are various exceptions to this general rule, including jurisdiction over murder and manslaughter "committed on land out of the United Kingdom . . . by any subject of Her Majesty" (under the Offences against the Person Act 1861, s. 9); but none of the exceptions is material in the present context.

[3] See, e.g., *Treacy* [1971] AC 537, at p. 552E (*per* Lord Morris of Borth-y-Gest).

[4] This categorisation, distinguishing between such result-crimes and "conduct-crimes", appears to have been first formulated by G. H. Gordon: see *The Criminal Law of Scotland*, 2nd ed. (1978), para. 3–05. It is, in its detailed application throughout the whole of the criminal law, difficult and controversial: see for instance Smith and Hogan, *Criminal Law*, 6th ed. (1988), at pp. 33–34. However, as the cases mentioned in the text indicate, the concept of a result-crime can be usefully employed for the analysis at least of crimes, such as obtaining property by deception, the definitions of which fit easily into the pattern of conduct on the part of the accused followed by a defined result of that conduct.

[5] *Markus* [1976] AC 35 at p. 61G, *per* Lord Diplock; *Stonehouse* [1978] AC 55 at p. 83E–F, *per* Lord Edmund-Davies.

[6] See Lord Diplock in *Treacy* [1971] AC 537, at p. 560G.

[7] [1963] 1 QB 8.

[8] Conversely, in *Baxter* [1972] 1 QB 1, the accused posted letters in Northern Ireland to football pool promoters in England, falsely claiming that he had correctly forecast the results of football matches and was entitled to winnings. He was charged with attempting to commit an offence under s. 15 of the 1968 Act. Sachs LJ, who delivered the judgment of the Court of Appeal, observed (at p. 10) that if the attempt had succeeded, the obtaining (and hence the offence) would have taken place within the jurisdiction of the English court.

2.5 A similar rule applies to the offence of dishonestly by deception obtaining a pecuniary advantage, contrary to section 16(1) of the 1968 Act. In *Bevan*[9] the accused, who had a bank account in England, presented cheques abroad which he supported by his cheque card at a time when he was not authorised by his bank to overdraw. The bank was bound to honour the cheques, and it did so. The English court was held to have jurisdiction on the ground that the accused had obtained in England the pecuniary advantage of a borrowing by way of overdraft.

2.6 The present rules also require detailed investigation of factual issues relating to jurisdiction. For instance, in a trial for dishonestly obtaining property by deception the jury[10] may be called upon to decide whether or not the parties expressly or impliedly agreed or accepted that the delivery of money or property to the post should be equivalent to personal delivery. This is because the apparently straightforward question, "Where was an article that was sent by post 'obtained'?", is not easily answered. In *Harden*,[11] the accused was held to have obtained the property at the place where it was posted. In *Tirado*,[12] however, the accused, who ran an employment agency in this country, wrote to Moroccans in Morocco stating that he had work for them and inviting them to post their fees to the agency or to send them through a specified Moroccan bank. It was held by the Court of Appeal that the trial judge had been right to leave to the jury the "highly technical" question whether the money remitted to this country by post by the Moroccan bank was obtained here; it did not necessarily follow that because the accused offered advice about how to send the money he accepted responsibility for it as soon as it was posted. *Harden* was explained as an exception to the general rule that a person does not "normally obtain property or valuable securities sent to him until they reach his hands";[13] the exception applied where, as in *Harden*, but not in *Tirado* itself, there was an express or implied agreement whereby the accused accepted that posting should be equivalent to personal delivery. That was an issue to be decided by the jury.[14]

B. CRITICISMS OF THE PRESENT LAW[15]

2.7 In our view modern rules governing jurisdiction over dishonesty offences with a foreign element should be framed so as to take into account the high incidence of large-scale fraud committed across national boundaries and involving modern electronic and other means of transferring money. They should accordingly render fraudsters liable to prosecution here in every case where either their activities or the consequences of those activities are connected with England and Wales. Such rules should also, we believe, be as free as possible from refinements and technicalities. Unfortunately, for historical reasons, the present rules exhibit none of these features. they are antiquated; they are inadequate to meet modern methods of transferring funds; they lack a sound basis in policy (or of logic[16]); and they cannot always be applied without difficulty to particular cases.

2.8 The present principle that, for jurisdictional purposes, a crime is regarded as committed in only one place originates in the early common law:

"To say that a crime is generally to be regarded as being committed where the last

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[9] (1986) 84 Cr App R 143.

[10] "... unless the answer is so clear as a matter of law that it is dangerous or improper to leave it to the jury": *Tirado* (1974) 59 Cr App R 80, 85. *Cf.*, however, *Thompson* [1984] 1 WLR 962, at p. 965, cited at para. 2.9 below.

[11] [1963] 1 QB 8. For the facts, see para. 2.4 above.

[12] (1974) 59 Cr App R 80.

[13] (1974) 59 Cr App R 80, at p. 85.

[14] (1974) 59 Cr App R 80, at p. 84. By contrast, the Court of Appeal in *Baxter* [1972] 1 QB 1 (see n. 8, para. 2.4 above) seems to have regarded *Harden* as representing the general rule. A more detailed account of the various judicial approaches that have been adopted to this problem appears in *Archbold*, 43rd ed. (1988), paras. 18–99 - 18–101.

[15] In our work on this, and other Parts, of the report, we have derived considerable assistance from Glanville Williams, "Venue and the Ambit of the Criminal Law", Pt. 3, (1965) 81 LQR 518, and from the more recent review by Hirst, "Jurisdiction over Cross-Frontier Offences", (1981) 97 LQR 80.

[16] "It would be logical to assert that a crime is fully *consummated* when and only when the last necessary element takes place, because a denial of this proposition would involve a self-conradiction. But the time of consummation is not necessarily the same as the time of commission. The word 'commission' naturally refers to the defendant's physical act, in contradistinction to the term 'consummation' which refers to all the elements of the crime including the consequences of acts. Consider a case where D shoots at P, and inflicts a wound from which P later dies. Since the crime of murder requires that the victim should die, the crime is not consummated or completed till P dies, but one could rationally assert that the crime of murder was *committed* when P shot at D. No logic compels us to say that the crime is committed when its consummation takes place. Similarly, no logic requires us to say that a crime is committed *where* its consummation takes place. The natural view in the above example is that D committed the crime where he stood, not where P stood or where P afterwards died": Glanville Williams, "Venue and the Ambit of the Criminal Law", Pt. 3, (1965) 81 LQR 518, at pp. 520–521.

element takes place does not, as a matter of logical necessity, involve saying that the crime does not occur at any other place.... This, however, is not the attitude of the common law. The ancient common law found difficulty in seeing that a piece of mischief was triable anywhere if its component parts were divided between two jurisdictions. Although the matter can now be tried where the last element takes place, the courts still disclaim jurisdiction if all that occurs within the territory is an intermediate step in the commission of the crime."[17]

Because of this antiquated approach, it was necessary in each of the decided cases referred to in paragraph 2.4 above for the court to determine whether the relevant items were "obtained" in the place of despatch *or* in the place of receipt; a finding that, for jurisdictional purposes, they should be regarded as having been obtained in both places (which would automatically have resolved the problem of jurisdiction) was not available.

2.9 The erratic effect of these rules when faced by dishonest use of modern methods of transferring money across national boundaries can be easily illustrated. In *Thompson*,[18] for example, a computer operator employed by a bank in Kuwait fraudulently programmed the bank's computer to debit customers' accounts and credit his own. After returning to England he wrote to the bank in Kuwait requesting it to telex to his bank accounts here the amounts standing to his credit, and this was done. On a charge of obtaining property by deception, under section 15 of the Theft Act 1968, it was "accepted on both sides... that the question on the issue of jurisdiction in this territorial context is whether the *obtaining* of the property concerned occurred within the jurisdiction".[19] The Court of Appeal held that the obtaining had taken place in England, when the accused's account there was credited.[20] It would therefore seem to follow that if, instead of instructing the bank in Kuwait to transfer the amount to his account in England, the accused's message from England had required cash to be withdrawn from his account in Kuwait and posted to his bank here (on the understanding that posting should be equivalent to delivery[21]), the court would not have had jurisdiction. The distinction between the two situations is highly artificial; in general, indeed, the element of "obtaining" is of little practical significance in relation to electronic and other modern methods of transferring money. Furthermore, the question where the obtaining took place could give rise to difficulty in some circumstances. For example, if by deception a fraudster were to induce his victim to execute abroad a share transfer relating to shares in an English company, it would not be easy to state with confidence whether the shares were "obtained" here or abroad.

2.10 The transfer of money by modern methods has also given rise to argument in the offence of theft. Thus, in *Osman*[22] the Divisional Court had to determine whether a charge of theft founded upon the operation of a telex machine in England and Wales to divert funds from a third party's bank account abroad would be justiciable here. In order to answer this question, the court had to examine in some detail the authorities concerning the nature of "appropriation" under the substantive law of theft, since the accused could only be convicted if he had *completed* in this country the acts necessary for conviction.[23] The court concluded that since the act of sending the telex was in itself a usurpation of the third party's rights, even though the account had not at that stage been debited, the place from which the telex was sent was the place of appropriation. Technical arguments of this kind do not go to the merits of the case or enhance respect for the law. They could be eliminated if the rules on which

[17] *Ibid.*, 526. (footnote omitted.) At one time similar problems of jurisdiction arose in respect of "venue" within England and Wales (i.e., those concerning the county in which an offence was triable). Such problems were resolved by the Criminal Law Act 1826, s. 12, which provided that where any felony or misdemeanour was begun in one county and completed in another, it might be dealt with in any of those counties as if it had been "actually and wholly committed therein". (The Act was repealed by the Courts Act 1971, s. 56(4), Sch. 11, Pt IV; Sch. 11 was stated to include "certain unnecessary or obsolete enactments".)

[18] [1984] 1 WLR 962.

[19] [1984] 1 WLR 962, at p. 965C, citing *Harden* [1963] 1 QB 8; see para. 2.4 above.

[20] The court rejected the argument that the accused had already obtained a chose in action in *Kuwait*, when his accounts there were credited, because the bank in Kuwait was under no liability to him because of his fraud. This analysis has difficulties of its own, because it is "difficult to see why his right of action against the English bank would not be defeated by his fraud just as certainly as an action against the Kuwaiti bank would have been": *Archbold*, 43rd ed. (1988), para. 18–101. These complexities would not, however, need to be pursued if the jurisdictional rules that we recommend were to be adopted.

[21] See para. 2.6 above.

[22] *R* v. *Governor of Pentonville Prison, ex parte Osman* [1988] Crim LR 611 (Lloyd LJ and French J).

[23] The court held that the offence would be justiciable in England and Wales. Previously, in *Tomsett* [1985] Crim LR 369, the Court of Appeal, also comprising Lloyd LJ and French J, appeared to take the opposite view; but in *Osman*, French J, delivering the judgment of the court, explained (at p. 612) that the question whether the sending of the telex was an "appropriation" was left open by *Tomsett.*

jurisdiction is based were altered to allow the court to treat the accused's conduct as taking place both where the message originated and where it took effect.

2.11 The inadequacy of the present rules to meet the methods used today by international fraudsters, whose activities are commonly concerned with very large amounts, may be exemplified by a fraudulent scheme involving: first, the deception in London, by a criminal gang, of banks or companies here; secondly, the subsequent transfer of moneys or securities from place to place around the world; and finally the transfer by an accomplice, (say) a fraudulent computer operator in a New York bank, of funds in an account conducted at that bank to an account in Paris. It cannot be stated with certainty that the gang would be triable here. Modern rules ought to provide clearly that our courts have jurisdiction to try the gang. It is, we believe, particularly unfortunate that any doubt should exist on this matter, since the activities involved may often be conducted on a large scale by professional fraudsters. The public may justifiably resent large-scale dishonesty escaping conviction and punishment just because it is conducted internationally,[24] while much smaller, but purely domestic, dishonesty has no such protection.

2.12 Quite apart from being a barrier to the proper control of fraud, the present rules are open to serious objection on the grounds of efficiency. As the cases show, a large amount of time has on occasion to be devoted by the police, by prosecutors, by courts of first instance and by appellate courts to a consideration of complex and difficult questions for the sole purpose of resolving the preliminary issue of jurisdiction;[25] and, as we have pointed out above,[26] somewhat refined distinctions arise in practice when a court has to resolve the question where an article that was sent by post is to be regarded as "obtained" or, in cases involving modern methods of transferring money, where, and when, an "appropriation" took place. Thus, in *Treacy*,[27] which concerned the offence of blackmail,[28] the question whether a demand contained in a blackmailing letter posted in England and addressed to a victim in Germany was made here (which question was vital in deciding whether the courts here had jurisdiction to try the offence) was only resolved by a 3–2 decision of the House of Lords.[29]

2.13 It is also noticeable that our rules governing territorial jurisdiction are narrower than the rules in other common law states.[30]

C. THE POSITION IN SOME OTHER COMMON LAW STATES

1. The Model Penal Code of the American Law Institute

2.14 Section 1.03(1)(a) of the American Law Institute's Model Penal Code provides that:

"... a person may be convicted under the law of this State of an offence ... if ... the

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[24] In most of the decided cases the court held that the accused was triable here. It must be borne in mind, however, that there will be many cases in which no prosecution is brought because of perceived difficulties and uncertainties over jurisdiction: on consultation those who were concerned with the investigation and prosecution of offences confirmed that the present jurisdictional rules gave rise to problems in the performance of their duties.

[25] In *Thompson* [1984] 1 WLR 962, at p. 970, for example, May LJ (who delivered the judgment of the Court of Appeal) stated:

> "Prior to the start of the substantive trial in this case two separate applications were made to different judges to have the issue of jurisdiction decided as a preliminary point in order to avoid the expense of getting witnesses from Kuwait and calling witnesses who were expert in computer programming. Both applications failed as the judges concerned held that they had no jurisdiction to decide such preliminary points of jurisdiction save in [certain specific circumstances]."

May LJ declined (at pp. 970–971) an "attractive invitation" by the appellant's counsel to "add to the academic learning on this point", on the ground that a decision concerning the two applications would not have affected the decision on the substantive appeal.

[26] Paras. 2.6, 2.10.

[27] *Treacy* [1971] AC 537.

[28] Contrary to the Theft Act 1968, s. 21.

[29] Blackmail is not a fraud offence. However, we have included it because it has given rise to difficulties relating to jurisdiction which are similar to those arising in relation to fraud offences, and the present exercise affords a convenient opportunity of resolving them.

[30] The European civil law countries, whose laws are based on Roman law, have a different approach to rules governing jurisdiction from that of common law countries. For example, France (Code of Procedure, art. 689; Merle and Vitu, *Traité de Droit Criminel* (1981), p. 368) and West Germany (Criminal Code, s. 8(1)) base jurisdiction, in part, on nationality. That criterion has never been adopted in English law, and we regard it as particularly inappropriate in the present context.

conduct which is an element of the offence or the result which is such an element occurs within this State . . .."[31]

2. Canada

2.15 The law was reviewed in *Libman* v. *The Queen.*[32] The Supreme Court in that case considered the English authorities, pointed to some of the difficulties and complexities of the traditional approach, and concluded that in Canada the test of jurisdiction should be whether a significant portion of the activities constituting the offence took place in Canada.[33] That view is reflected in section 5(2)(b) of the Draft Canadian Criminal Code, which provides that Canadian courts should have jurisdiction over a crime where "one of the elements . . . occurs in Canada and that element establishes a real and substantial link with Canada".[34] Whilst this rule is less rigid than that of the common law, we feel that its second requirement still threatens elaborate (and expensive) argument about jurisdictional questions, of the kind that our own proposals are designed to avoid. Nor do we feel that such a limitation is justified, at least in the case of the offences of fraud and dishonesty with which we are here concerned; it will be appreciated that the Canadian rule applies to *all* crimes, of whatever type. The requirements of comity, for instance, as discussed in Lord Diplock's speech in *Treacy,*[35] prima facie demand no more than that some element of the crime, be it part of the forbidden conduct or part of the forbidden result, should take place in the country that takes jurisdiction. When, as in the present case, one is dealing with cases where some part of a dishonest course of conduct or of a dishonest outcome of that conduct takes place in this country, the additional requirement that there should be a "substantial" connection with this country seems to us to import an unjustified further factor.

3. Australia

2.16 In several Australian States, the jurisdictional rules have been codified. They are in each case wider than those that obtain in England and Wales.

(a) Queensland and Western Australia

2.17 The court in Queensland or Western Australia[36] has jurisdiction if (a) any element of the offence occurs in the State and (b) the *initial* element of the offence either (i) occurs within the State or (ii) occurs outside the State but the accused subsequently comes into the State; it being a defence in all cases that the accused did not intend the relevant act or omission to take place inside the State. These provisions are, as we have observed,[37] markedly wider than those of the common law, though again we doubt whether the limitations as to the initial element of the offence are justified or necessary.

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[31] Although the introduction of a provision modelled on that of the Model Penal Code would resolve some of the present problems, it would appear still to require courts, in cases of the type referred to in paragraph 2.10 above, to conduct complex enquiries into where the "conduct" in fact occurred. Furthermore, subsection (3) introduces an element of "double criminality": s. 1.03(3) provides for the exclusion of jurisdiction, in relation to a result-crime, where conduct occurs (outside the State) in a place in which, had the result occurred there, the conduct would not constitute an offence, unless the result was "purposely or knowingly" caused within the State. In our view it would not be desirable to adopt this requirement, which no doubt reflects the need to harmonise the several jurisdictions of individual States within a federal system.

[32] [1985] 2 RCS 178.

[33] The court suggested, at p. 199 of its judgment, that the English courts:

> "now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country."

It is respectfully suggested that so specific a conclusion cannot be drawn from the English authorities. The requirements of comity are an important test whereby specific jurisdictional rules are to be judged, but they cannot in themselves be a substitute for such rules, and have not been so substituted by the English courts.

[34] Report of the Law Reform Commission of Canada on Recodifying Criminal Law (revised and enlarged edition, 1987), p. 49.

[35] [1971] AC 537, at pp. 561G–562C; see the extensive citation at para. 1.9 above.

[36] The provisions in the Criminal Code Act 1899 (Queensland), s. 12 and the Criminal Code Act 1913 (Western Australia), s. 12 are in substance identical.

[37] Para. 2.16 above.

(b) Tasmania

2.18 Section 8 of the Criminal Code Act 1924 is in very wide terms. It provides:

> "(1) If in any case any facts occur which, if they all occurred in this State, would together constitute a crime, and any of such facts occurs in this State, any person who in this State does any act or makes any omission which, if all such facts occurred in this State, would make him a party to such crime, shall be guilty of such crime.
>
> "(2) Any person who, outside this State, does any act or makes any omission which, if done or made in this State, would make him a party to such crime, shall, if he come into this State, be deemed by so doing to be guilty of such crime."[38]

4. New Zealand

2.19 Section 6 of the New Zealand Crimes Act 1961 provides that:

> "Subject to the provisions of section 7 of this Act, no act done or omitted outside New Zealand is an offence, unless it is an offence by virtue of any provision of this Act or of any other enactment."[39]

Section 7 of the Act provides that:

> "For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event."

We further consider section 7 below.[40]

D. THE PROVISIONAL PROPOSAL IN THE CONSULTATION PAPER AND THE RESPONSE ON CONSULTATION

2.20 The criminal law team confined its proposals in the consultation paper to a number of statutory offences comprising the principal offences of theft and obtaining by deception, false accounting and blackmail under the Theft Acts 1968 and 1978, and the offences of forgery in Part I of the Forgery and Counterfeiting Act 1981.[41] We return below[42] to consider the question of the offences to which our final recommendations should relate.

2.21 The criminal law team provisionally proposed in the consultation paper that, in relation to the listed offences, the present common law rules should be abolished. The team went on to consider what new rule should govern jurisdiction over those offences; and provisionally concluded that the most suitable provision would be one along the lines of section 7 of the New Zealand Crimes Act 1961, which provides that:

> "For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event."[43]

2.22 On consultation the provisional proposals received strong support from the great majority of commentators,[44] and in particular from those with practical experience of tracing and prosecuting international fraudsters.

2.23 A theme which ran through the response of the few commentators who opposed or expressed reservations about our provisional proposal was that this country ought only to be

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[38] We have been informed by the Tasmanian Law Reform Commission that the operation of this provision does not appear to have generated any difficulties in practice.

[39] The meaning of the final clause would seem to be: "... unless *the doing or omission of the act outside New Zealand* is an offence": i.e., there must be express provision for extraterritoriality.

[40] Paras. 2.26–2.31.

[41] Listed at para. 3.31(a) below. The criminal law team referred to them in the consultation paper, and we refer to them in this report, as "listed offences".

[42] In Part III.

[43] Consultation paper, paras. 2.8–2.10. As the team explained, this provision derives from the Draft Criminal Code of 1879, which was the model for the Codes subsequently adopted, albeit with variations, in several States, then colonies, including (as well as New Zealand) Queensland, Western Australia and Tasmania; see paras. 2.17–2.18 above.

[44] Of forty-nine commentators, only one opposed the proposal, though two expressed reservations.

concerned if the defendant's activities adversely affected interests in England and Wales: if another country, whose interests had been injured, wished to prosecute the defendant, it should (according to this view) apply for the defendant's extradition and try him in its own courts. We share the view of the overwhelming majority of those who responded to our consultation paper that this, the traditional, approach is unacceptable for the conditions of today. In the first place, foreign countries might well perceive this country's continuing adherence to the traditional view as a wilful refusal on the part of this country to adapt to the realities of modern international fraud; and there may well be a danger that if this country is seen as being insufficiently concerned about the defrauding of the citizens of other countries by the activities of fraudsters here, the authorities of those countries will adopt a similar attitude to tracing and punishing those who defraud our citizens from abroad. Secondly, as a practical matter, although extradition arrangements exist with a large number of countries it is clear from the response to our provisional proposal from commentators with practical experience in this field that such arrangements have not proved so effective as to obviate the need to change our jurisdictional rules.

2.24 We also have in mind, in considering questions of policy, that London is one of the world's principal financial centres, and that it is in the national interest for it to remain so. Should it be thought that large-scale frauds could be carried out here with impunity, confidence in London as a major international centre would rapidly be undermined. These considerations would appear to lend added force to the need for this country to be seen as vigilant in proceeding against international fraudsters. The traditional approach, it seems to us, fails to take into account these significant considerations.

2.25 In essence, the present issue is whether the conduct of those engaged here in frauds which have their effect abroad should be a crime in this country: in other words, does such conduct have characteristics which may be so harmful that it should be regarded as criminal by our law? Only the fact that the fraudsters intend to execute their schemes against victims abroad prevents them from being triable in this country. We consider that, as a matter of principle (as well as on pragmatic grounds), the traditional approach is unacceptable in today's conditions.[45] Our own conclusion accords with that of the great majority of those who responded to the consultation paper.

E. OUR RECOMMENDATIONS

2.26 In the consultation paper we provisionally proposed, in broad terms, that the present rules should be replaced, in relation to the listed offences, with new rules "along the lines" of section 7 of the New Zealand Crimes Act 1961; and in the light of the response to consultation we remain of the view that this approach is appropriate.[46] For the purpose of our final recommendation, however, it is necessary to formulate more precisely the terms of the proposed new rule. It is in three parts.

2.27 Our principal recommendation is quite simply that our courts should have jurisdiction to try a charge of one of the listed offences if any event that is required to be proved in order to obtain a conviction of that offence takes place in England and Wales. That would, in particular, mean that where the definition of the offence forbids conduct producing a certain result our courts would have jurisdiction if any part of that conduct, or any part of the defined specified result, took place here. Similarly, our courts would have jurisdiction over crimes whose definition relates only to the accused's conduct (as has been suggested to be the case with theft) if any part of the conduct forbidden by the definition of the offence took place here.[47]

2.28 We regard it as important, however, that jurisdiction should be taken by the courts of this country only if an element *required to be proved for conviction* takes place here. It would in our view be excessive, and would also lead to substantial arguments about jurisdiction of the type that on grounds of economy and efficiency we seek to avoid, if the courts of this country

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[45] As we have pointed out at paras. 2.7–2.8 above, the present jurisdictional rules are not so much the result of conscious decisions of policy as accidental results of legal history.

[46] The New Zealand provision extends to conspiracies formed outside that country to commit offences within it, and in that respect it appears to have given rise to some difficulty: Garrow and Caldwell, *New Zealand Criminal Law*, 6th ed. (1981), p. 28. However, both the provisional proposal in our consultation paper and our final recommendation apply only to substantive offences.

[47] We intend that, as in New Zealand, the presence of the accused in England and Wales at any time during the commission of the offence should not be necessary to found jurisdiction.

sought jurisdiction merely because a preparatory, or incidental, act or event that happened to form part of the "narrative"[48] took place here.

2.29 The effect of our proposal can be illustrated from cases that we have discussed earlier in this report. Thus, for instance, in a case like *Harden*[49] the courts of this country would have jurisdiction if the deception that it was necessary to prove in order to convict of the offence took place in this country, even if the resultant obtaining took place abroad. Similarly, in a case like *Thompson*[50] it would not matter whether the accused "obtained" the property in this country if the deception which was an essential part of the offence had been practised here. We can further illustrate the effect of this proposed new rule by some hypothetical examples:

(a) The defendant (D) calls at the office of the victim (V) in London and there produces to V documents containing false statements which induce V to instruct his agent in Paris to part with a sum of money to D's confederate there. The English court would have jurisdiction (as it would not at present[51]) to try D for obtaining property by deception, contrary to the Theft Act 1968, section 15.

(b) The court would also have jurisdiction if the facts are as in (a), except that V was induced to give the instructions to his Paris agent in part because of previous deceptions carried out on him by D in Paris: it suffices that *part* of the deception occurred in England and Wales.

(c) D calls on V in V's Paris office and by means of false statements induces V to instruct V's bank in London to hand to D a sum of money over the counter. D collects the money on his return to London. As under the present law, D can be tried here.

(d) Armed with documents that contain false statements that he has previously prepared in London, D calls on V in Paris. He there produces the documents to V, in reliance on which V gives him a sum of money. The court would not have jurisdiction, since neither the deception nor the obtaining took place in England and Wales. The fact that D's preparatory act of preparing the documents took place here is immaterial.

2.30 The second part of our proposals concerns the factual analysis of cross-border transactions for the purposes of the jurisdictional rules.[52] In cases in which money or property is despatched from or received in England and Wales, we propose that it should in either case be treated as having been "obtained" here. The implementation of this part of our recommendation would give the court the jurisdiction which it lacks under the present law to try some cases where an essential part of the criminal activity has taken place in this country. It would also obviate the present need for the jury to determine the highly technical question, that arises where property is despatched abroad but received here (or vice versa), of whether or not the property is to be treated as obtained in England and Wales.[53] We would illustrate the point by reference to *Harden*.[54] If the facts of that case were to recur after implementation of our recommendation, the court would be seen at once to have jurisdiction on the ground that the goods were obtained in England; the question whether or not there was an express or implied agreement that posting should be equivalent to delivery would no longer be material.[55]

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[48] As in the hypothetical illustration at para. 2.29(d) below.

[49] [1963] 1 QB 8; para. 2.4 above.

[50] [1984] 1 WLR 962; para. 2.9 above.

[51] See para. 2.4 above.

[52] The present rules are, as pointed out above, technical and productive of disputes that, in our view, have no substantive merit; see for instance our comments on *Thompson* and *Treacy* at para. 2.12 above.

[53] See para. 2.6 above.

[54] [1963] 1 QB 8. The deception was contained in documents posted by the accused in England to a company in Jersey. In response the company posted cheques to the accused which he received in England. It was held that because he had invited the commpany to send the cheques by post, he had "obtained" them when they were received by the postmaster in Jersey; and that accordingly the court did not have jurisdiction.

[55] On the facts of *Harden* the court would also have jurisdiction, under our proposed new rule, on the ground that the accused's conduct occurred in England and Wales: see para. 2.29 above and para. 2.31 below. However, even if the accused in *Harden* had gone, say, to Spain to post his letters, the new rules as to where property is obtained would ensure that one element of the offence took place in this country, and thus he would be subject to the jurisdiction of our courts.

2.31 We also recommend that in determining where the accused's conduct took place, the act of transmitting "information"[56] across national boundaries should be regarded as occurring both in the place where it is originated and in the place where it is received. Thus, for example, a telephone message which was made either from or to England and Wales would be regarded as taking place here; the accused would be treated as having sent a letter in England and Wales both (i) if it was addressed to someone abroad and posted in London and (ii) if it was posted abroad and addressed to someone here; and the accused's sending, from a telex machine in London, of a message to New York, or vice versa, would be treated as taking place here.[57] These proposals at once simplify the law and bring within the jurisdiction conduct that on any commonsense view is plainly connected with this country.

Recommendation

2.32 *We recommend*, in relation to a "listed offence",[58] that the present rules governing territorial jurisdiction should be abolished and replaced by the following:

(a) A person may be guilty of such offence if any event (including an act or omission on his part) proof of which is required for a conviction of the offence took place in England and Wales. (Draft Bill, clause 1(1), (2), (3)(a), and clause 2.)

(b) For the purpose of the rule referred to in subparagraph (a) above:

- (i) property which is despatched from outside, but received within, England and Wales or vice versa is appropriated or obtained in England and Wales; and
- (ii) information (including instructions and demands) the communication of which is initiated outside, but received within, England and Wales or vice versa is communicated in England and Wales. (Draft Bill, clause 4.)

(c) The rule set out in subparagraph (a) above applies whether or not, at the time of any event referred to in that subparagraph, the accused was present in England and Wales. (Draft Bill, clause 3(a)(ii).)

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[56] For present purposes this term applies both to information in its general sense and to the communication of instructions; thus for example, a direction, sent by telex from the Paris branch of a bank to a branch in London, that money should be transferred from one account to another would constitute information.

[57] Accordingly, if a telex operator at a bank in New York fraudulently sends a telex to a London branch of the bank with instructions that moneys standing to the credit of a customer's account conducted in London should be transferred to a confederate's account in Paris, the operator will be triable here for theft. This situation is the converse of that in *Tomsett* and *Osman*, considered at para. 2.10 above; the English courts would also have jurisdiction where, as in those cases, the bank accounts were conducted abroad and the message was sent from London.

[58] i.e., an offence under a provision listed at para. 3.31(a) below.

PART III

THE OFFENCES TO WHICH OUR RECOMMENDATIONS RELATE

A. GENERAL

3.1 The provisional proposals made in the consultation paper[1] were limited to the principal offences of theft and obtaining by deception, false accounting and blackmail under the Theft Acts 1968 and 1978 and offences of forgery set out in Part I of the Forgery and Counterfeiting Act 1981.[2] Views were invited on what offences ought to be added to, or removed from, the list.

3.2 On consultation, no one suggested the removal of any offence from the list. Several commentators, however, suggested that offences should be added. Before considering such offences, we would emphasise the pragmatic considerations which prompted the original proposals and to which we have again had regard in arriving at our final recommendations.

3.3 The consultation paper expressed the view that there was urgent need to resolve the jurisdictional problems that arise in certain general offences of dishonesty. Such an approach was consistent with the Law Commission's earlier recommendations,[3] were an appropriate response to the Roskill Committee's recommendation[4] and could conveniently be dealt with separately within a consistent framework as comprising the core offences involving fraud or dishonesty.

3.4 A few commentators wished our provisional proposals to be extended beyond dishonesty offences. One commentator, for example, suggested that all indictable offences should be covered; another that our proposals should extend to every offence that was punishable by imprisonment for twelve months or a greater penalty.[5] However, except in relation to offences of dishonesty, no commentator suggested that the present jurisdictional rules had been found to be defective in practice or to give rise to difficulty.

3.5 To embark upon an examination of the issues involved if the category of offences were enlarged as suggested would inevitably delay the reforms which we are proposing. As many of our commentators stressed the need for urgency in this field, we decided to adhere to our original strategy. We have decided, however, to recommend the inclusion of three further offences, all of them created by the Theft Act 1968.

B. SPECIFIC OFFENCES SUGGESTED ON CONSULTATION

1. Introduction

3.6 The three offences which we recommend should be added to the list in the consultation paper are:

(i) false statements by company directors, etc;[6]

(ii) dishonestly procuring by deception the execution of a valuable security;[7] and

(iii) handling stolen goods.[8]

3.7 Before dealing with these offences we set out our reasons for not extending our proposals to various other fraud-related offences.

2. Insider dealing

3.8 It was suggested on consultation that insider dealing contrary to the Company Securities (Insider Dealing) Act 1985[9] should be added to the listed offences. The Act

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[1] Para. 2.20.

[2] The offences were listed in an Appendix to the paper.

[3] Law Com. No. 91 (1978); see n. 1, para. 1.1 above.

[4] See para. 1.1 above.

[5] On the ground that this criterion was to be introduced into our extradition law by the Bill that has since become the Criminal Justice Act 1988, s. 1(5).

[6] Theft Act 1968, s. 19; see paras. 3.23–3.26 below.

[7] *Ibid.*, s. 20(2); see paras. 3.20–3.22 below.

[8] *Ibid.*, s. 22; see paras. 3.27–3.30 below.

[9] As amended by the Financial Services Act 1986, Pt. VII.

contains elaborate provisions which render it criminal in certain circumstances to take advantage of knowledge of a company's affairs which is not available to investors generally.

3.9 In our view, it would be inappropriate to add these insider-dealing offences to those covered by our recommendations, mainly because they do not seem likely to give rise to problems concerning the place where the conduct of the accused occurred. Thus, if (for example) being in possession of information of a kind referred to in the Act, he "deals" on the Stock Exchange in London through the agency of his stockbroker here, whom he instructs by telephone from abroad, he will be triable here for insider dealing. Moreover, insider-dealing offences were, by contrast with the listed offences, introduced into our law as recently as 1980,[10] after some six years' continuous debate on the form that they should take.[11] In the few years since their introduction they do not appear to have given rise in practice to jurisdictional difficulties; and we consider that it would be premature to review them until longer experience has been gained of their practical operation.

3. Financial Services Act 1986, section 47

3.10 Section 47 of the Financial Services Act 1986 contains detailed provision penalising the making of certain misleading statements in connection with investment business. We consider that it would be inappropriate to include these offences in our recommendations, because the section itself lays down the rules that govern territorial jurisdiction over the offences for which it provides.[12]

4. Banking Act 1987, section 35

3.11 The offence for which this section provides relates to fraudulent inducements[13] to make or to refrain from making a "deposit"[14] (or to agree to do so). Here again, since the section sets out its own jurisdictional rules,[15] it would be inappropriate to include the offence in our recommendations.

5. Fraudulent trading

3.12 Section 458 of the Companies Act 1985, which applies to English and Scottish companies,[16] provides that:

> "If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner is liable to imprisonment or a fine, or both.[17]
>
> "This applies whether or not the company has been, or is in the course of being, wound up."[18]

3.13 As regards jurisdiction, the section is limited to companies incorporated in Great

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[10] By the Companies Act of that year.

[11] In 1973 the Stock Exchange and the Take-Over Panel issued a joint statement calling for criminal sanctions against "insiders". Provisions were introduced into the Companies Bill of that year, but the Bill fell with the subsequent dissolution of Parliament. A further, unsuccessful legislative attempt in 1978 gave rise to concern about the width of the proposed prohibition and definitions, and was not enacted. In 1979 the Stock Exchange, after lengthy discussion and consideration, adopted a model code. Introducing what became the present provisions, the Government expressed the view that they dealt with most of the defects of previous proposals; see H. of C. Official Report, Standing Committee A, 6 December 1979, cols. 554 *et seq.*

[12] Sect. 47(4) and (5). They are drafted in terms that have regard both to the place from which a statement originates and to the place where it has effect. This chimes with our recommendation at para. 2.32(b) above.

[13] By way of a statement, promise or forecast, or the concealment of material facts: s. 35(1).

[14] In summary, "deposit" is defined as a sum of money paid on terms that it will be repaid and that are not referable to the provision of property or services or the giving of security: s. 5(1), (2).

[15] Sect. 35(2).

[16] Sect. 745(1).

[17] The maximum term of imprisonment on indictment is 7 years; on summary conviction, the offence carries a maximum penalty of 6 months' imprisonment or the maximum fine (currently £2,000) or both: Companies Act 1985, s. 730, Sch. 24.

[18] An offence of fraudulent trading has existed since 1928; before the Companies Act 1981, however, it could be charged only after the company had gone into liquidation. For a detailed consideration of the section and the authorities relating to it, see Working Paper No. 104 (1987), Conspiracy to Defraud, paras. 10.12–10.19.

Britain. Its terms do not indicate, however, (i) whether the business in question must be carried on in this country or (ii) whether the accused's conduct that renders him a party to the company's activities[19] must take place here.

3.14 On consultation, it was suggested that the offence should be included in the listed offences. For two reasons, however, we do not think that it would be appropriate to adopt this suggestion. The first is that our proposed new jurisdictional rule concerning the listed offences is not suited to this offence. That rule is based on the occurrence in England and Wales of at least one of the events required for conviction, notwithstanding that other events took place elsewhere.[20] The conduct proscribed by section 458, however, does not appear to be susceptible of such division: it is difficult, for example, to envisage what would constitute knowingly being a party *in part* to particular acts of fraudulent trading. Our second reason concerns the context of the section. By contrast with the listed offences, this provision (like its predecessors[21]) forms part of the body of legislation relating to the carrying on of business by English or Scottish companies. In our view, it would not be desirable to consider the jurisdictional rules relating to the offence under section 458 in isolation from other offences in that area of the law.

6. Cheating the public revenue

3.15 Cheating is a long-established offence: "all frauds affecting the Crown and public at large are indictable as cheats at common law . . .".[22] The offence was abolished by the Theft Act 1968 except "as regards offences relating to the public revenue".[23] In modern times the offence has been successfully charged in relation to income tax[24] and to VAT;[25] and, it has been held in recent years, the offence may be committed merely by omission. In particular, it need not involve deception.[26]

3.16 As we have explained above,[27] our purpose is to make recommendations limited to jurisdiction over the "core" offences involving fraud or dishonesty. Since cheating relates only to dishonesty vis-a-vis the public revenue, it falls outside that category and hence outside the scope of the present exercise.[28]

7. Offences concerning the misuse of drugs

3.17 We have already explained that the present exercise has been concerned from its inception only with offences involving dishonesty.[29] There is, however, a further reason for excluding drug offences from its ambit. Various offences concerning drugs are at present provided for by the Misuse of Drugs Act 1971. The United Kingdom's international obligations relating to the control of narcotic drugs have always been based on various multilateral treaties, the most recent of which is the Single Convention on Narcotic Drugs 1961.[30] Section 1 of the Act provides for an Advisory Council on the Misuse of Drugs. Under section 1(3) the Secretary of State, in relation to international commitments, can seek the

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[19] To commit the offence the accused must take some positive step in the carrying on of the business: *Re Maidment Building Provisions Ltd* [1971] 1 WLR 1085 (where, it was held, the mere failure of the accused, who was secretary and financial adviser, to advise the directors that the company was insolvent and ought to cease trading did not make him a party to the carrying on of the company's business).

[20] Para. 2.32(a) above.

[21] See n. 18, para. 3.12 above.

[22] Hawkins, 1 PC, p. 322. Since cheating is a common law offence, punishment for it is at large; and it is immaterial that less serious statutory offences might have been charged instead: *Redford* [1989] Crim LR 152.

[23] Sect. 32(1).

[24] *Hudson* [1956] 2 QB 252; the Court of Criminal Appeal upheld a conviction for the offence founded on the submission of false accounts to an inspector of taxes with intent to defraud.

[25] *Mavji* [1987] 1 WLR 1388; *Redford* [1989] Crim LR 152.

[26] e.g., as in *Mavji* [1987] 1 WLR 1388, a dishonest failure to make a VAT return. The decision is criticised by Smith and Hogan, *Criminal Law*, 6th ed. (1988), at p. 569, who suggest that the extension of the offence to mere omissions was "novel".

[27] Paras. 3.1–3.5.

[28] Where, as in many cases, the taxpayer's dishonesty takes the form of deception, the Revenue will normally be able to charge a listed offence.

[29] Paras. 3.1–3.5 above.

[30] Cmnd. 1580 (1962).

advice of the Advisory Council about appropriate legislative measures that should be taken following a decision of any of certain international organisations[31] under the terms of the 1961 Convention.

3.18 In our view, it would be inappropriate to intervene in an area of the law the rules of which (including some governing territorial jurisdiction[32]) have been formulated, and are already subject to review, in the context of the United Kingdom's international obligations.

8. Bribery and other forms of corruption[33]

3.19 The question whether bribery abroad should be an offence triable here raises issues of policy on which we have not consulted.[34] Moreover, bribery and other corruption offences need not involve any element of fraud,[35] although where it does the appropriate fraud offence can be charged. For these reasons we have come to the conclusion that bribery and related offences should not be included in the listed offences.

9. Theft Act 1968, section 20(2)[36]

3.20 Several commentators suggested that the offence under this provision should be included. Section 20(2) and (3) provides that:

> "(2) A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years; and this subsection shall apply in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security....
>
> "(3) For purposes of this section... 'valuable security' means any document creating, transferring, surrendering or releasing any right to, in or over property, or authorising the payment of money or delivery of any property, or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation."

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[31] For the purpose of supervising the provisions of the narcotics treaties dealing with measures of quantitative control (statistics and estimates), the Geneva Convention of 1925 and the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs 1931 established respectively a Permanent Central Opium Board and a Drug Supervisory Body. The 1961 Convention replaced these two bodies with an International Narcotics Control Board (the "INCB"), with similar functions. In 1946 the Commission on Narcotic Drugs was formed. That Commission, and the Economic and Social Council of the United Nations to whom the Commission and the INCB are required to report, formulate policies, co-ordinate activities and supervise the implementation of international conventions and agreements. In particular, they make general recommendations to governments and take advice from the World Health Organisation on medical problems.

[32] Under s. 20 of the Act it is an offence to assist in or induce, in the United Kingdom, the commission elsewhere of an offence punishable under the provisions of a "corresponding law" in the place where it is committed. (The expression "corresponding law" signifies, broadly, the laws of a foreign country which provide for the control of drugs in accordance with a certain international Convention or with any treaty to which the government of that country and that of the United Kingdom are parties; s. 36(1).)

[33] For a detailed review of these offences, see Lanham, "Bribery and Corruption", in *Criminal Law: Essays in Honour of JC Smith* (1987), at p. 92. The law is contained principally in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906, which are supplemented by the Prevention of Corruption Act 1916.

[34] Bribery and other corruption offences that take place in this country are already triable here, whatever territorial connections they may have. No change in the law is therefore required to achieve this result.

[35] For example, an officer of a public body who accepts a gift for a past favour commits an offence under section 1 of the Public Bodies Corrupt Practices Act 1889, even though there was no prior agreement that the payment would be made and he exercised his judgement honestly: e.g., *Parker* (1985) 82 Cr App R 69, in which (at p. 74) approval was expressed of the trial judge's direction to the jury that the "offence lies not in showing favour... but in accepting a reward for doing so."

[36] It was also suggested on consultation that the offence under section 20(1) should be included; but we have not included it in our recommendations. The subsection relates to the destruction, defacement or concealment of valuable securities, testamentary documents and documents belonging to, or deposited with, a court of justice or a government department. The offence under this provision is of a different kind from the one under section 20(2), and is of little apparent practical significance, since in most cases covered by it a charge of theft or criminal damage would lie. In the Eighth Report of the Criminal Law Revision Committee (1966), Cmnd. 2977, on whose recommendations the 1968 Act is based, the Committee observed (at para. 106) that they had had "considerable doubt" whether it was necessary to include the offence; they did not think that offences under the predecessor of s. 20(1) had been prosecuted in recent years. Moreover, it is difficult to see how s. 20(1) could give rise to problems concerning jurisdiction.

3.21 As in the case of the offence of obtaining property by deception under section 15 of the Act, the offence under section 20(2) is not triable in this country unless the last event in its commission—in this case, the "acceptance"—took place here. In *Nanayakkara*,[37] for example, in which the charge was conspiracy to commit the offence, the accused had endorsed stolen US Treasury Social Security cheques and presented them to a bank in England, with a view to the cheques' clearance in the United States and then to crediting the account of one of the accused with the value of the cheques. The Court of Appeal held that the documents were not "accepted" when handed over to the bank.[38] Accordingly the accused had not committed *in this country* the substantive offence on which the conspiracy charge was founded, and there was no jurisdiction to try them.[39]

3.22 This is a fraud offence whose impact and social implications are not significantly different from other listed offences. We therefore agree with those of our consultees who recommended the inclusion of the offence. Decided cases, which include (as well as *Nanayakkara*[40]) *Beck*,[41] *Kassim*[42] and *Young*[43] show that in recent years the construction of the term "acceptance" has given rise to difficulties. These difficulties are not, however, of a jurisdictional character and so fall outside the ambit of the present exercise; but we would draw attention to what, in our view, are the unsatisfactory terms in which the offence is formulated.

10. Theft Act 1968, section 19

3.23 Section 19(1) of the Theft Act 1968 provides:

> "Where an officer of a body corporate or unincorporated association (or person purporting to act as such), with intent to deceive members or creditors of the body corporate or association about its affairs, publishes or concurs in publishing a written statement or account which to his knowledge is or may be misleading, false or deceptive in a material particular, he shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years."

3.24 This provision supplements sections 47 and 200 of the Financial Services Act 1986,[44] which in general terms contain sanctions against false or misleading statements; they would apply, for example, to company prospectuses.[45] The criminal law team explained in the consultation paper[46] that the offence under section 19 of the 1968 Act was not included, on the ground that the intention was to provide new jurisdictional rules only for fraud offences of a general character: although (the team explained) the offence was created by a statute dealing with general offences of deception, it was concerned with the duties of, primarily,[47] company directors.

3.25 On consultation a number of commentators questioned the exclusion of the offence; and so do we. Apart from this offence,[48] the provisional proposals covered every offence

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[37] [1987] 1 WLR 265.

[38] Because "acceptance" bore not its ordinary colloquial meaning of "receiving or taking into possession", but a technical significance derived from the Bills of Exchange Act 1882.

[39] If the recommendation at para. 2.32(a) above were implemented, the court would have jurisdiction on the ground that, since one (as distinguished from the last) of the events necessary for conviction of the substantive offence took place in this country, that offence was triable here, and thus a conspiracy to commit that offence was triable here.

[40] [1987] 1 WLR 265.

[41] [1985] 1 WLR 22. Beck, who had come into possession of stolen travellers' cheques, forged them and obtained cash or goods from them in France. The cheques were then presented through normal banking channels for payment by the issuing bank in England. Beck unsuccessfully argued that the "acceptance" of the travellers' cheques occurred exclusively in France, and that therefore he was not triable here. In giving the judgment of the Court of Appeal, Watkins LJ held that there could be a series of acceptances in respect of a travellers' cheque, and that the English courts had jurisdiction if the last of the acceptances—namely, when the final act of payment on the cheque was made, occurred here.

[42] [1988] Crim LR 372.

[43] *Ibid.*

[44] For s. 47, see para. 3.10 above. Among other (summary) offences, s. 200 provides that an offence is committed by furnishing, knowingly or recklessly, false or misleading information for the purposes of or in connection with any application under the 1986 Act or in purported compliance with its requirements: the offence is triable either way, the maximum punishment on indictment being a fine and two years' imprisonment; s. 200(1), (5).

[45] Formerly, the Companies Act 1985, s. 70 (replacing an earlier provision) provided for a specific offence dealing with false or misleading statements in prospectuses. This provision was repealed by the 1986 Act, s. 212(3), Sch. 17, Pt. I.

[46] n. 42, para. 2.20.

[47] The offence extends to any officer of a corporation or unincorporated association; see para. 3.23 above.

[48] And the offence under s. 20(1), which we have excluded for the reasons referred to in n. 36, para. 3.20 above.

appearing in the 1968 Act under the heading "Fraud and Blackmail"; and in some cases the circumstances might be such that the offence under section 19 reasonably constituted an alternative charge to some other fraud offence, such as obtaining property by deception, comprised under this heading in the Act. We consider that it would be undesirable for the various fraud offences in the Act to be governed by different jurisdictional rules.

3.26 We conclude that the offence under section 19 of the Theft Act 1968 should be added to the listed offences.

11. Theft Act 1968, section 22

3.27 The physical element of this offence consists in receiving stolen goods, or undertaking or assisting in their retention, removal, disposal or realisation by or for the benefit of another, or in arranging to do so (in each case otherwise than in the course of stealing);[49] the term "stolen goods" includes those obtained by blackmail or by deception,[50] and extends to goods so obtained outside England and Wales.[51]

3.28 The mental element of the offence is (first) that the accused acted dishonestly and (second) that he knew or believed the goods to be stolen. In view of the difficulty of proving such knowledge or belief in relation to the offence, the Act permits the admission of certain evidence in a trial for handling that would not be admissible generally.[52]

3.29 Whenever an act of handling amounts to an "appropriation"[53] of property belonging to another with the intention of permanent deprivation, the handler will also be guilty of theft;[54] and theft and handling are frequently charged in the alternative. At one time the relationship between the two offences gave rise to procedural problems.[55] In 1986, however, the Court of Appeal approved the "long established" practice of charging theft and handling as alternatives, and laid down guidelines in relation to the procedure to be followed where that course is adopted.[56]

3.30 Theft is one of the listed offences; and in view of the close relationship between theft and handling, the introduction of new jurisdictional rules applicable only to one of them would, in our view, be anomalous. We have concluded that the offence of handling stolen goods should be added to the listed offences.

C. RECOMMENDATION AND CONCLUSION

3.31(a) Our recommendations apply to the following offences:

Under the Theft Act 1968

(1) Section 1	(Theft)
(2) Section 15	(Obtaining property by deception)
(3) Section 16	(Obtaining pecuniary advantage by deception)
(4) Section 17	(False accounting)
(5) Section 19	(False statements by company directors, etc.)
(6) Section 20(2)	(Procuring the execution of a valuable security by deception)
(7) Section 21	(Blackmail)
(8) Section 22	(Handling stolen goods)

[49] Theft Act 1968, s. 22(1).

[50] 1968 Act, s. 24(4).

[51] Provided that the stealing (in the extended sense of that word) constituted an offence under the law of the place where it occurred; s. 24(1).

[52] Sect. 27(3).

[53] Under s. 3(1) of the Act, "any assumption by a person of the rights of an owner amounts to an appropriation".

[54] 1968 Act, s. 1(1).

[55] See, e.g., the note by Professor John Smith to *Cash* [1985] Crim LR 312, and in particular his comment (at p. 314): "The law of theft would benefit greatly from a thorough revision of the Theft Acts. If and when that takes place provision should be made to resolve the 'thief or handler' dilemma ...".

[56] *Shelton* (1986) 83 Cr App R 379, at pp. 384–5.

Under the Theft Act 1978

(9) Section 1	(Obtaining services by deception)
(10) Section 2	(Evasion of liability by deception)

Under Part I of the Forgery and Counterfeiting Act 1981

(11) Section 1	(Forgery)
(12) Section 2	(Copying a false instrument)
(13) Section 3	(Using a false instrument)
(14) Section 4	(Using a copy of a false instrument)
(15) Section 5	(Offences relating to money orders, share certificates, passports, etc.)

(Draft Bill, clause 1(1); Schedule.)

(b) We would draw attention to the unsatisfactory terms in which the offence contained in section 20(2) of the Theft Act 1968 is defined.

PART IV

CONSPIRACY, ATTEMPT AND INCITEMENT TO COMMIT AN OFFENCE TRIABLE IN ENGLAND AND WALES

A. INTRODUCTION

4.1 We think it consistent with the general principles set out in earlier Parts of this report that we should reconsider the rules that at present govern inchoate offences relating to listed offences, when those listed offences, if committed, would have sufficient connection with this country to be tried and punished by our courts. We consider it detrimental to this country's interests that our courts are deprived of jurisdiction over preparations for, or encouragement of, crimes of dishonesty that are intended to be committed in this country, just because those preparations are made abroad. In this Part of the report we therefore make recommendations for reform of the law of conspiracy, attempt and incitement; bearing in mind always that we are concerned here with acts directed towards the preparation and planning of crimes which, if carried out, our courts would have jurisdiction to try.

B. CONSPIRACY

4.2 The same principles apply both to the offence of conspiracy[1] to commit a substantive offence ("statutory conspiracy") and to the common law offence, conspiracy to defraud.[2] Under the present law, the court has to consider two questions. The first is: was the offence that the conspirators had in view one that is triable here (or, in the case of conspiracy to defraud, was the fraud to take place in this country)? The second question is whether the conspiracy itself is to be regarded as connected with England and Wales so as to be triable here. As regards the first question, statutory conspiracies apply only to offences that are to be committed[3] in England and Wales;[4] and, similarly, a conspiracy to defraud applies only to frauds to be carried out here.[5] There is authority, however, that our courts have jurisdiction to try a conspiracy, formed in England and Wales, to commit an offence (or a fraud) that the conspirators contemplate might take place either in this country or abroad (the question where it should take place being left open).[6]

4.3 The implementation of our recommendations concerning the listed offences would automatically, and significantly, extend the courts' present jurisdiction over conspiracies to commit such offences. If, for example, conspirators in London hatched a plot to obtain money in Paris by means of a deception to be carried out in Manchester and subsequently executed their plan, under the present law they could not be tried for obtaining property by deception, contrary to section 15 of the Theft Act 1968.[7] Accordingly, no charge would now lie of conspiring to commit that offence. However, since under the new jurisdictional rules that we propose the contemplated substantive offence would be justiciable here,[8] so too would a conspiracy to commit the offence.

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[1] Criminal Law Act 1977, s. 1(1) and (2) (as amended by the Criminal Attempts Act 1981, s. 5).

[2] Conspiracy to defraud is of considerable practical significance. In our consultative document, Conspiracy to Defraud (December 1987), Working Paper No. 104, we put forward various options for reform of the law relating to the offence; they include its abolition and replacement with substantive offences.

[3] The subsequent commission of the contemplated offence does not affect liability for conspiracy. Judges are, however, required by Practice Direction ([1977] 1 WLR 537) to call upon the prosecution to justify the joinder in an indictment of substantive counts and a related charge of conspiracy. Failing justification, the judge must make the prosecution elect to proceed on either the substantive or the conspiracy counts.

[4] By s. 1(4) of the 1977 Act "offence" (subject to an immaterial exception) means one triable in England and Wales; and none of the listed offences is so triable unless it was committed here.

[5] *Board of Trade* v. *Owen* [1957] AC 602. Lord Tucker suggested (at p. 634) a possible exception to the rule that the court had no jurisdiction to try the parties to a conspiracy to be implemented abroad—namely, that such a conspiracy entered into in this country may be indictable "if its performance would cause a public mischief in this country or injure a person here by causing him damage abroad"; but he expressly left the point open. We are not aware of any case in which the possible exception, suggested by Lord Tucker has been successfully invoked. In *Attorney-General's Reference (No. 1 of 1982)* [1983] QB 751, at p. 758, the Court of Appeal rejected an argument, based on Lord Tucker's dictum, that a conspiracy to commit an offence abroad was indictable here merely because performance of the conspiracy might have the consequential effect of causing economic loss in the form of damage abroad to a person or company in England.

[6] Even though, in the event, the offence (or fraud) is carried out abroad: *Kohn* (1864) 4 F. & F. 68, 176 ER 470, approved on this point in *Board of Trade* v. *Owen* [1957] AC 602, at p. 631 (*per* Lord Tucker). This may no longer represent the law in the case of statutory conspiracy: the Criminal Law Act 1977, s. 1(1) and (4), refers to agreements to pursue a course of conduct *necessarily* involving the commission of an offence triable in England and Wales.

[7] See para. 2.2 above.

[8] See para. 2.32(a) above.

4.4 As regards the second question to which we referred in paragraph 4.1 above—namely, the significance of the place where the conspiracy itself is formed, the law is not entirely clear on jurisdiction over conspiracies formed abroad to commit offences, or to defraud, in this country. However it would appear at least possible that our courts do not have jurisdiction to try such conspiracies unless something has been done in England and Wales in concert and in furtherance of the conspiracy.[9] We consider it unsatisfactory that the law on this point should be unclear; and we see no reason either of principle or of expediency why jurisdiction should depend on the commission of acts in this country in furtherance of the conspiracy. Apart from the question of jurisdiction, the offence of conspiracy is complete as soon as the plotters' agreement is made.[10] In our view, where conspirators intend to commit an offence triable in this country, there should be no distinction between a conspiracy which involves a foreign element and one which does not: the proposed attack upon the laws of this country is the same in each case.

4.5 We believe, moreover, that, as the criminal law team pointed out in the consultation paper,[11] a requirement that acts in furtherance of the conspirators' object must take place in this country could lead to practical difficulties. Take, for example, the case of a conspiracy hatched in France to carry out a swindle upon banks in London, of which the police here are warned by Interpol. One of the conspirators comes to England but the police do not know for what purpose. One object of having the offence of conspiracy is to prevent the commission of a substantive crime (or of a fraud) pursuant to the conspiracy; so in our view it would be absurd if the police could not arrest the conspirator then and there but instead had to wait in the hope that they could catch him as he was doing something to further the plot. Yet that is what they would have to do if those who conspire abroad to commit offences (or to defraud) in England and Wales are triable here only if they have done something in this country to further the conspiracy.[12]

4.6 In the consultation paper the team provisionally proposed the introduction of legislation to make clear that every party to a conspiracy formed abroad to commit a listed offence, or to defraud, in England and Wales is triable here, whether or not anything is done in this country to further the conspiracy. The proposal received widespread support on consultation.[13]

Recommendation

4.7 *We recommend* that every party to a conspiracy (i) to commit a listed offence that would be triable here under the new rules that we recommend or (ii) to defraud in England and Wales should be triable here, wherever the conspiracy is formed and whether or not anything is done in England and Wales to further the conspiracy.[14] This recommendation is implemented by clause 3(b) of the draft Bill.

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[9] It is clear from *Doot* [1973] AC 807 that this country's courts have jurisdiction in the circumstances referred to in the text (and it has been held in Hong Kong that for this purpose the acts of an agent, whether guilty or innocent, suffice: *Attorney General* v *Yueng Sun-shun* [1987] HKLR 987); but the case leaves open whether there would be jurisdiction if one or more of the conspirators entered this country without doing anything here in pursuance of the conspiracy, or only did lawful acts here in pursuit of the conspiracy. The uncertainties of the present law are considered by Orchard, "'Agreement' in Criminal Conspiracy", [1974] Crim LR 297, at pp. 302–304; and the various judicial views expressed in *Doot* are analysed in *Archbold*, 43rd ed. (1988), paras. 28—22 - 28-23.

[10] Criminal Law Act 1977, s. 1(1) (in relation to statutory conspiracy). A similar rule applies at common law to conspiracy to defraud.

[11] Para. 3.3.

[12] This hypothetical example is based upon, though it is not identical with, one given by Lord Salmon in *Doot* [1973] AC 807, at p. 833, to make a different point.

[13] Professor Leonard Leigh, however, disagreed with this proposal on the grounds that the requirement of an overt act in this country was:

(a) to show that the conspirator's purpose was firm; and

(b) a libertarian safeguard.

("Territorial Jurisdiction and Fraud", [1988] Crim LR 280, at p. 287). These criticisms, however, go not to jurisdiction but to the nature of the crime of conspiracy itself.

[14] In relation to conspiracy to defraud, the criminal law team considered in the consultation paper, at paras. 3.3–3.8, a statement made in *Attorney-General's Reference (No. 1 of 1982)* [1983] QB 751, at p. 757G, cited at para. 5.10 below, that where the "true object" of conspirators was to defraud outside England and Wales our courts lacked jurisdiction, even if the conspiracy also involved a fraud in this country; and, at para. 3.9, the team made a provisional proposal on the point. In our view, however, the issue, although it has arisen in cases concerned with jurisdiction, essentially concerns the ingredients of the offence. We therefore propose to consider the matter further not here, but in the context of our work on conspiracy to defraud (see n. 2, para. 4.2 above).

C. ATTEMPT

4.8 By section 1(1) of the Criminal Attempts Act 1981, the *actus reus* of an attempt consists in doing an act that is "more than merely preparatory" to the commission of an offence to which the Act applies. As in the case of conspiracy, two questions arise in the context of the jurisdictional rules governing attempt. The first, which concerns what the attempt was intended to achieve, is dealt with by section 1(4) of the 1981 Act: it provides that (with immaterial exceptions) the Act applies only to an attempt to commit an indictable offence which, if completed, would be triable in England and Wales (that is, for present purposes, an offence which would be regarded as taking place here). To illustrate: someone resident in London concocts a fraudulent scheme which involves his making false statements to a bank here, in consequence of which the bank will instruct its New York branch to hand to him a sum of money on his calling there. However, after he has deceived the bank in accordance with the scheme, and after the bank here has made the money available in New York, the fraud is detected, and the bank in New York refuses to give him the money when he appears. The accused's conduct is more "than merely preparatory" to the commission of an offence of obtaining property by deception, contrary to section 15 of the Theft Act 1968: accordingly, but for the question of jurisdiction, he would be guilty of an attempt to commit that offence. However, he cannot be tried here, since, had his plan succeeded, he would not have been triable here for the complete offence.[15]

4.9 As regards the second jurisdictional question—namely, whether the atempt itself must take place here—the 1981 Act does not appear to affect the common law governing jurisdiction to try an attempt made abroad to commit an offence in this country. It was established before the Act that the courts have jurisdiction to try a charge of attempt founded upon actions that are intended to, and do, have "effect" in this country. Thus, in *Baxter*[16] it was held that our courts could try an attempt to obtain property by deception by means of the posting in Northern Ireland of fraudulent football claims addressed to firms in England. In *Stonehouse*[17] a well-known British politician was found guilty of a similar offence. He had, when abroad, falsely staged his death by drowning with the intention that his (innocent) wife in England should obtain the proceeds of policies of life assurance. His conviction of attempt was consistent with the rule in *Baxter*, since the necessary "effect" was provided by the communication of the false account of his death through the media to her and the insurance companies. It is not clear, however, whether the absence of such an effect would in the view of the House of Lords have prevented the attempt from being triable here.[18]

4.10 In our view, the present law is satisfactory except for the uncertainty about whether, to found jurisdiction, the actions constituting the attempt must have an effect here. We see no reason to distinguish between acts that have such an effect and those that do not. In either case the defendant's conduct is such as the law of attempt exists to deter, since it is directed at the commission of an offence in this country.[19] In the consultation paper the criminal law team provisionally proposed that legislation should make clear that an attempt made abroad to commit an offence in this country should be triable here whether or not the acts that constitute the attempt have an effect here. This proposal was widely supported on consultation.

Recommendation

4.11 *We recommend* that the courts should have jurisdiction to try an attempt to commit a listed offence that would be triable in England and Wales under the new rules that we recommend, whether or not the attempt was made here and whether or not it had an effect here. This recommendation is implemented by clause 3(c) of the draft Bill.

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[15] Because the "obtaining" would not have taken place here; see para. 2.4 above. The implementation of our recommendation at para. 2.32(a) above concerning substantive offences would automatically render him triable here, since one event necessary to convict him of obtaining property by deception (the deception itself) took place here.

[16] [1972] 1 QB 1.

[17] [1978] AC 55.

[18] Lord Diplock (at p. 67C) suggested that the English courts should have jurisdiction even if no part of the accused's intention was carried out in this country; Lord Keith of Kinkel (at p. 92C) followed *Baxter* in thinking that an effect must be felt in England and Wales. The other Law Lords did not directly advert to the issue.

[19] "Why", for example, "should the result of [*Stonehouse* (see para. 4.9 above)] have been different if [he] had been 'rescued' from the sea and confessed before any report of his death appeared in England?": Smith and Hogan, *Criminal Law*, 6th ed. (1988), p. 299.

D. INCITEMENT

4.12 There appears to be no direct authority on whether our courts have jurisdiction to try for the common law offence of incitement[20] someone who, outside England and Wales, has incited another to commit an offence. We consider it desirable, however, that, where what is incited involves the commission of a listed offence triable in this country, the incitement itself should be triable here. Take the case, for example, of an international fraudster who concocts a scheme to defraud a bank in London. The scheme requires for its execution the assistance of an "inside man" in the bank, whose part in the fraud, if carried out, would constitute a listed offence triable here. To that end, the rogue approaches an employee of the bank who is on holiday in Spain. The employee, however, is honest and refuses to take part. In our view, the rogue should not escape liability for incitement merely because he made his approach abroad.[21]

4.13 The consultation paper contained a provisional proposal that an incitement abroad to commit a listed offence triable in England and Wales should itself be triable here;[22] the proposal (like those relating to conspiracy and attempt) was generally supported on consultation.

Recommendation

4.14 *We recommend* that an incitement to commit a listed offence triable in England and Wales should itself be triable here, wherever the incitement took place. This recommendation requires no separate implementing provision, since the draft Bill provides generally, in clause 3(a)(ii), that it is irrelevant to guilt whether the accused was in England and Wales at the time of committing any offence that falls within the Act (including, under clause 1(3)(e), incitement to commit a listed offence).

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[20] The offence is committed whether or not the incitement had any effect: see, e.g., *Gregory* (1867) LR 1 CCR 77.

[21] If the employee agrees to participate, both he and the rogue will be triable here for conspiracy in accordance with our recommendation at para. 4.7 above.

[22] Para. 3.39(i).

PART V

INCHOATE OFFENCES RELATING TO FRAUDS INTENDED TO TAKE PLACE OUTSIDE ENGLAND AND WALES

A. INTRODUCTION

5.1 The final part of our recommendations relates to the commission of inchoate offences in this country that relate to acts carried out abroad that, if they were carried out in this country, would constitute a listed offence (or a fraud for the purpose of conspiracy to defraud). To give the courts of this country jurisdiction in such cases may appear to require justification, since the results that the accused seeks to produce are not intended to have effects in this country. We consider, however, as we indicated in Part I of this report, that it is desirable, and indeed necessary, that the courts of this country should have jurisdiction over such conduct. What this country can legitimately object to, and seek to control, is the use of this country to plan or encourage dishonest activities damaging the financial interests of other countries. This country's important reputation as an international financial centre could in our view be seriously affected if it came to be perceived as a haven from which international fraud can be directed with impunity. Our recommendations aim to remove that possibility.

5.2 At the same time, however, it is important that careful limitations should be placed on jurisdiction that is exercised in relation to results that, although actively planned in this country, are intended to take effect abroad. We therefore make two important reservations.

5.3 First, the conduct that is the object of the conspiracy, incitement or attempt must be such as would be a listed offence if it were to take place in England and Wales. We implement that principle in the draft Bill by requiring the court to identify the events intended by the accused to occur, and then determine whether, apart from the question of jurisdiction, they would amount to the commission of a listed offence. That has given rise to legislative provisions of some complexity, because of the need to relate the events intended to occur to the present law of conspiracy, incitement and attempt; this is necessary to ensure that, apart from the question whether the intended events would constitute an offence triable in this country, they fulfil the requirements for conviction of conspiracy, incitement or attempt under the present law. However, the underlying principle is entirely simple, to provide that our law should restrict its jurisdiction to inchoate offences committed here that are supportive of conduct that, if it also were committed here, would be a listed offence.

5.4 The converse of the proposition that our law should only concern itself with conduct abroad that would be punishable if committed in this country is that we should not seek to take action in relation to such conduct if, when committed, it would not be criminal by the law of the country where it occurred. This principle, which rests upon respect for the laws of other countries, is implemented by the requirement of double criminality, which we discuss in more detail below.[1]

B. CONSPIRACY

1. The present law

5.5 Our courts have no power to try a charge of statutory conspiracy entered into here to commit an offence of fraud that would not itself be triable here because it takes place abroad; and no power to try a charge of common law conspiracy to defraud where the intended fraud is to operate abroad.[2] Thus, for example, if a gang of international fraudsters lay their plans, and set up an office, in London, in order to facilitate a widespread swindle on the New York or Paris Stock Exchange, they cannot be tried in this country for those activities.

5.6 As we have already indicated, we regard this position as regrettable, since it not only prevents law-enforcement agencies in this country from taking action in support of the legitimate interests of foreign states, but also at least potentially creates the possibility of this country's being used as a safe location for the planning of international fraud.

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[1] Paras. 5.23–5.30.

[2] In *Treacy* [1971] AC 537, at p. 563D, Lord Diplock emphasised that this question is "one not of jurisdiction but as to what [are] the characteristics of the crime of conspiracy at common law". The practical effects of the rule, and the objections that we see to it in the case of fraud, are however the same whether it be regarded as relating to "jurisdiction" or to the definition of the offence.

2. Our recommendations for reform

(a) General

5.7 The position will be materially improved simply by the implementation of our recommendations concerning the listed offences. Those recommendations would automatically, and significantly, extend the courts' jurisdiction over conspiracies to commit such offences.[3]

5.8 We consider, however, that the law should go further, and should give the courts of this country jurisdiction, subject to certain important safeguards, over conspiracies formed in this country with criminally fraudulent objects, even though those objects were to take effect, and the victims to be defrauded, entirely outside this country.

5.9 Our reasons for this view have already been touched on in this report, and were set out in more detail in the consultation paper, where the criminal law team criticised the present law.[4] The team pointed out that the underlying reason for the present limitation upon jurisdiction over the offence of conspiracy was given by Lord Tucker in *Board of Trade* v. *Owen*—namely, that the purpose of the offence of conspiracy is to assist in the maintenance of law and order within this country.[5] The team suggested that, whatever the merits of this attitude in the past, it was unsuited to the circumstances of transnational fraud that prevail today:[6] in the team's view, the policy expressed by Lord Tucker reflected an insular attitude towards the interests of companies and individuals of other countries and failed (as it ought) to discourage the setting up of schemes in this country designed to defraud victims abroad.[7] The team further suggested[8] that, in view of the importance of London's financial markets, it was particularly undesirable that fraudsters should be able to regard this country as a safe haven from which to conduct fraudulent operations; and the difficulties involved in the detection and prosecution of international fraud meant that the fact that the offence was completed in another jurisdiction was scarcely relevant in the fight against this kind of crime.

5.10 These difficulties become apparent not only through theoretical examples but also in decided cases, despite the inhibitions that the present jurisdictional rules place on even the consideration of the prosecution of this type of fraud. Thus in *Cox*[9] the accused agreed with another man, who had acquired a chequebook containing unused cheques, to use them on the Continent by falsely representing that they or one of them had an account at the bank on which the cheques were drawn; the accused intended to return to this country with the goods obtained abroad and to sell them here. The Court of Appeal was constrained to hold that the trial court had no jurisdiction to try a charge of conspiracy to defraud. Winn LJ observed:[10]

> "Improvement, let us hope, there will soon be. Let us hope that this loophole will be stopped up before many other scoundrels such as the man now standing in the dock see fit to risk using it."

A similarly unsatisfactory state of affairs is revealed by the facts of *Attorney-General's Reference (No. 1 of 1982)*,[11] where fraudsters made an agreement in England to sell to customers in the Lebanon whisky falsely purporting to be the product of X, an English company. They were charged, in the event unsuccessfully, with conspiring to defraud X, because X was the only person to whom the implementation of the conspiracy would even arguably cause damage *within England and Wales.* As Lord Lane CJ remarked of the case:[12]

> "Had it not been for the jurisdictional problem, we have no doubt the charge against these conspirators would have been conspiracy to defraud potential purchasers of whisky, for that was the true object of the agreement."

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[3] See para. 4.3 above.

[4] Para. 3.12.

[5] [1957] AC 602, at p. 625. Similarly, Lord Salmon: "The agreement is in itself made an offence *in order to preserve the Queen's peace* by preventing the offence which the conspirators have agreed to perpetrate before it even reaches the stage of an attempt": *Doot* [1973] AC 807, at p. 832. (emphasis added.)

[6] Over a century ago Sir James Fitzjames Stephen expressed the view that this approach was wrong in principle for all except political offences. "A crime committed abroad is morally as bad as a crime committed in England, and there is authority for saying that any agreement to do an act of that nature is indictable. Whatever may be the merits of the case legally, it seems to me clear that the legislature ought to remove all doubt about it by putting crimes committed abroad on the same footing as crimes committed in England, as regards incitement, conspiracy, and accessories in England": *A History of the Criminal Law of England* (1883), p. 14.

[7] Consultation paper, paras. 1.4, 3.12.

[8] Para. 1.3.

[9] [1968] 1 WLR 88.

[10] [1968] 1 WLR, at p. 93.

[11] [1983] QB 751.

[12] [1983] QB 751, at p. 757G.

5.11 We consider that cases such as those just mentioned are a good illustration of the desirability of giving the courts of this country jurisdiction over conspiracies formed here that are intended to implement frauds abroad. In the consultation paper the criminal law team put forward a provisional proposal[13] that (subject to the requirement of "double criminality"[14]) the courts of this country should be given jurisdiction to try a conspirator who agrees in this country[15] to do something abroad that, if done here, would constitute a listed offence or a fraud for the purpose of conspiracy to defraud.

5.12 On consultation, many commentators favoured the proposal. However, some expressed reservations. One commentator pointed out that many foreign countries do not have the concept of conspiracy in their law, and he doubted whether our courts should be able to penalise acts of preparation that would not be criminal if done where the fraud was to take place. In our view, however, this objection is misdirected: the proposal was founded on the view that fraudsters who choose this country as a place in which to make or organise their schemes not only attack the laws and the interests of a foreign state but also use this country for purposes that are contrary to its laws and its interests.

5.13 In the light of the response to consultation, we support the principle of the provisional proposal in the consultation paper; we believe that the present jurisdictional rules, by permitting international criminals to plan in this country to defraud the individuals or companies of another country, have become unacceptable.

(b) The requisite connection with this country

5.14 Both statutory conspiracy[16] and conspiracy to defraud[17] consist in the existence of an *agreement* between two or more. In a case in which every party to a conspiracy enters into the agreement in this country, no jurisdictional problem will arise. The circumstances are, however, not often so clear-cut. There are, in the first place, not many cases in which direct evidence of the agreement is available: "a very frequent way of proving [an agreement] is by showing that the parties concerted in the pursuit of a common object in such a manner as to show that their actions must have been co-ordinated by arrangement beforehand."[18] Then (secondly), there need not be a direct agreement among all the parties. For example, A may enrol B, B may enrol C, and C may enrol D. All four are parties to the conspiracy if they so intend, even if each of them knows only the person whom he enrolled and the one who enrolled him.[19] Clearly, therefore, the link between the conspiracy and this country for the purpose of giving jurisdiction to our courts cannot be based solely on the formation of the conspiracy here.[20]

5.15 The provisional proposal in the consultation paper was based simply on the test of whether a party to the conspiracy entered into the agreement in England and Wales.[21] However, the proposal was accompanied with an explanation that the criminal law team did

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[13] Para. 3.30(i).

[14] Considered at paras. 5.23–5.30 below.

[15] The question of the requisite connection between the conspiracy and this country is considered at paras. 5.14–5.20 below.

[16] The Criminal Law Act 1977, s. 1(1) provides (so far as is material) that:

"... if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions ... will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, ... he is guilty of conspiracy to commit the offence or offences in question."

[17] e.g., *Scott* v. *Metropolitan Police Commissioner* [1975] AC 819, at p. 840E–F (*per* Viscount Dilhorne).

[18] Smith and Hogan, *Criminal Law*, 6th ed. (1988), p. 279. (footnote omitted.)

[19] This is sometimes referred to as a "chain" conspiracy. Similarly, there may be "a kind of umbrella-spoke enrolment, a single person at the centre doing the enrolling and all the other members being unknown to each other by name, though they know that there are to be other members": Glanville Williams, *Textbook of Criminal Law*, 2nd ed. (1983), p. 424. (footnote omitted.)

[20] Lord Wilberforce stated in *Doot* [1973] AC 807, at p. 818C:

"A legal principle which would enable concerting law breakers to escape a conspiracy charge by crossing the Channel before making their agreement or to bring forward arguments, which we know can be subtle enough, as to the location of agreements, or, conversely, which would encourage the prosecution into allegation or fiction of a renewed agreement in this country, all this with no compensating merit, is not one which I could endorse."

Lord Wilberforce's remarks were made in relation to a conspiracy to commit an offence triable in England and Wales; but they seem to us to be germane to the instant question as well.

[21] More fully, the proposal, set out at para. 3.30(i) of the consultation paper, was that:

"A party to a conspiracy who agrees here to do something outside England and Wales which would constitute a listed offence or a fraud for the purposes of conspiracy to defraud, if done in this country, should be triable here."

not seek to draft a jurisdictional rule as it might appear in a statute;[22] and views were invited on what should be the connection between the conspiracy and this country.[23] However, little assistance with this matter was received on consultation.

5.16 In approaching the question we have borne in mind two main considerations. First, we think it desirable to formulate a rule that will be easy to apply, even though this may mean that in some cases the necessary connection between the conspiracy and this country is to some extent a matter of chance.[24] The second consideration, a specific aspect of the first, is that the test need be satisfied only in relation to one party to the conspiracy. Since a conspiracy consists in an agreement between the parties, it would, we believe, be wrong in principle to render some, rather than all, of the conspirators triable by our courts. It would, moreover, be unrealistic to impose on a court the burden of determining whether it had jurisdiction in relation, severally, to each of the parties to a conspiracy. We consider that if, for example, A enrols B in London, B enrols C in Paris and C enrols D in Rome, all four of them, and not only A and B, should be triable here.

5.17 We have concluded that the new jurisdictional rule should be: if any party to a conspiracy either (i) became a party to it in England and Wales or (ii) did anything in England and Wales in relation to its formation or in pursuance of its objects, every party to the conspiracy is triable here.

5.18 Three matters call for comment. First, we intend that "acts done in relation to the formation of the conspiracy" should extend to conduct that took place before the agreement was formed. A party is not guilty of conspiracy unless he has gone beyond the stage of discussion and reached a concluded agreement,[25] an issue that in some cases may be difficult to resolve. Sometimes, for instance, the conspirators agree that, in a certain event, they will not carry out their contemplated scheme. As to this, Lord Parker CJ has stated:

> "No doubt in many cases it may be a very fine line whether the parties at the particular moment under consideration are merely negotiating or whether they have reached an agreement to do something if it is possible or propitious to do it, and it may be that those cases will be decided largely on the form of the reservation. If the reservation is no more than if a policeman is not there, it would be impossible to say that there had not been an agreement. On the other hand, if the matters left outstanding and reserved are of a sufficiently substantial nature, it may well be that the case will fall on the other side of the fence, and it will be said that the matter is merely a matter of negotiation."[26]

We do not think that the court should be required to resolve this sort of question as a preliminary, *jurisdictional* point, although there will be no *liability* unless the existence of a conspiracy is established.

5.19 Secondly, we intend that the relevant actions in this country need not be performed by a conspirator in person; if, for example, a fraudulent scheme is concocted abroad which is to involve the use of an innocent agent in this country, the performance by the agent of his unwitting part in the scheme should ground jurisdiction, since in substance the acts are those of the conspirators.

5.20 The third matter concerns the question where the despatch of money or other property or the communication of information should be regarded as taking place. We have already made a recommendation as to this, in the context of jurisdiction over substantive

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[22] Para. 3.18.

[23] Para. 3.20.

[24] e.g., conspirators who, after preliminary discussion of a proposed fraud on a plane from New York to Rome, conclude their agreement in the transit lounge at Heathrow Airport, the aircraft having landed there temporarily because of fog: Professor Leonard Leigh, "Territorial Jurisdiction and Fraud" [1988] Crim LR 280, 288. Even in this case, however, the conspirators have deliberately chosen to continue with their plotting even though they find themselves in England. The continuation of their criminal activities within this country is, in our view, something to which this country can and should object, and which deprives the persons acting within this country, or their co-conspirators, of legitimate grounds for complaint if they are prosecuted in the courts of this country in respect of that conspiracy.

[25] e.g., *Walker* [1962] Crim LR 458, where the accused discussed with others the possibility of stealing a payroll but, because he withdrew at the stage of negotiation, was not guilty of conspiracy.

[26] *Mills* (1962) 47 Cr App R 49, at pp. 54–55.

offences.[27] We intend that this recommendation should apply also to jurisdiction over conspiracy.[28]

C. ATTEMPT AND INCITEMENT

5.21 An attempt made in England and Wales to do abroad what, if done here, would constitute an offence, is not triable here.[29] For example, A posts in London a letter containing a false statement addressed to B, his intended victim, in Paris in an attempt to deceive B and thereby induce him to hand over a sum of money in Paris to an accomplice of A. Under the present law our courts would lack jurisdiction to try A for obtaining property by deception if his plan succeeded,[30] and thus lack jurisdiction to try him for the attempt. We are not aware of direct authority as to whether a similar rule applies to incitement; but in logic it would seem that an incitement here to perform actions abroad that, if performed here, would constitute an offence is not justiciable in our courts.

5.22 In our view, it is desirable that our courts should be given jurisdiction to try a fraudster for attempting in this country to commit a fraud elsewhere that, if carried out here, would constitute a listed offence.[31] Similarly, we believe that a charge of incitement should lie against, say, a rogue who approaches the employee of a Paris bank on holiday in this country, and puts to him a plan whereby, with his assistance, the bank is to be induced by deception to part with money.[32] The consultation paper contained provisional proposals as to attempt and incitement corresponding to those relating to conspiracy;[33] and a similar response was received on consultation. We have accordingly concluded that the new rules that we recommend for conspiracy should extend to attempt and incitement.[34]

D. DOUBLE CRIMINALITY

1. The principle

5.23 In the consultation paper the question was raised: if someone conspires etc.[35] in this country to commit abroad a listed offence (or a fraud for the purposes of conspiracy to defraud), should such preparatory acts be justiciable here even if the contemplated fraud would not amount to an offence under the legal system in force where it was to be carried out? The criminal law team provisionally proposed that the answer to this question should be no; that is (in other words), that our courts' proposed new jurisdiction should be subject to a double-criminality requirement. The team pointed out, however,[36] that this view was based on general principle and might not be so cogent when applied only to the listed offences and conspiracy to defraud; and that proof of a foreign law before a jury would be a novelty[37] which some might regard as unsatisfactory.

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[27] Para. 2.32(b) above.

[28] Thus if, e.g., A, B and C conspire in Paris, and subsequently D agrees, in a letter posted in London and addressed to C in Paris, to join the conspiracy, D would be regarded as having entered into the agreement in this country. (As a result, all four, together with anyone who subsequently joins the conspiracy, would be triable here; see para. 5.16 above.)

[29] Criminal Attempts Act 1981, s. 1(4); see para. 4.8 above.

[30] Because the last element of the offence that A is attempting to commit (the obtaining) is to take place abroad: see para. 2.2 above. The position will be otherwise if our recommendations concerning substantive offences, summarised at para. 2.32 above, are implemented: the letter having been posted in London, part of the offence (i.e., the deception) would be regarded as having taken place here.

[31] e.g., where the nature of the fraud is the same as in *Stonehouse* [1978] AC 55 (para. 4.9 above), but the locations are reversed, in that the accused stages his death in this country and the insurance moneys are payable abroad.

[32] If the employee agrees to take part, both he and the rogue could be charged with conspiracy (under our recommendation at para. 5.31(a) below); but the offence of incitement will be available if the employee, being honest, refuses to participate.

[33] Paras. 3.36(i), 3.39(ii).

[34] The problems that may arise in identifying the location of a conspiracy do not arise in this context.

[35] For convenience, we use this expression to signify (i) a conspiracy, attempt or incitement to do abroad what if done here would constitute a listed offence, or (ii) a conspiracy to carry out abroad what if carried out here would be a fraud for the purpose of conspiracy to defraud.

[36] At para. 3.23.

[37] Exceptionally, a foreign law may have to be taken into account in a trial for the offence under the Misuse of Drugs Act 1971, s. 20, of assisting in or inducing, in the United Kingdom, the commission abroad of an offence punishable under the provisions of a "corresponding law". (The expression "corresponding law" signifies, broadly, the laws of a foreign country which provide for the control of drugs in accordance with a certain international Convention or with any treaty to which the government of that country and that of the United Kingdom are parties; s. 36(1).) Sect. 36(2) provides that a statement in a certificate issued by a foreign government should be evidence that any facts constitute an offence against the foreign law. Such a statement is not conclusive: expert witnesses may contest it.

5.24 On consultation, a substantial minority of commentators opposed the provisional proposal. The main grounds of opposition were, as foreshadowed in the consultation paper, the unlikelihood that any country in fact permitted offences such as theft or fraud to be perpetrated without attracting criminal sanctions, and that since such activities would be regarded anywhere as morally wrong, no injustice would be done in the absence of a double-criminality requirement. For our part, however, we agree with the majority of commentators, who supported the proposal: we are unwilling to countenance the introduction of a rule that would penalise the preparation of plans to do what would not amount to an offence[38] in the place where they were to be implemented.

2. Establishing double criminality

5.25 In the consultation paper the criminal law team considered on whom the burden of proof should rest in relation to double criminality, and provisionally proposed that it should be for the accused to establish that what he planned to do was not an offence in any country where he planned to do it.[39]

5.26 Although opinion[40] was divided on consultation, our own conclusion is that, as a matter of principle, it would be objectionable to place a burden upon the accused; rather, as a condition of liability, the existence of double criminality should have to be established.

5.27 We accept, however, the existence of the practical considerations which prompted the criminal law team to make its proposal. In the consultation paper,[41] the team said:

> "It seems to us that in almost all cases the conduct in question is likely to be a crime (or a fraud for the purposes of conspiracy to defraud) both here and in the relevant overseas country. To require the prosecution to go through the arid, but extremely expensive in terms of money and court time, exercise of proving foreign law when the fact of double-criminality is obvious to all is, in our view, not a sensible use of resources. In this connection, it must not be forgotten that days spent in proving unnecessary issues in the Crown Court mean days of delay in bringing other cases to trial where, in particular, the accused may be remanded in custody."

5.28 We have concluded that, for these reasons, where there is no issue as to double criminality, the prosecution should not be put to the trouble and expense of formally establishing that the requirement is met. We therefore propose that the existence of double criminality should be presumed unless the defendant has given notice that he requires it to be established. In our view, detailed provision relating to such notice is most appropriately left to rules of court,[42] which (among other matters) should deal with the case in which the defendant, having neglected to give notice, nevertheless raises the issue at the trial.[43]

3. Double criminality to be determined by the judge alone

5.29 The general rule is that foreign law is regarded by our courts as a question of fact;[44] and, the Court of Appeal (Criminal Division) has recently held, it is a matter for the jury to determine.[45] We take the view, however, that, in the present context, the examination of

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[38] We use the word "offence" to signify acts that are punishable under the law of the relevant country, whether or not they are described in that law as an offence; this is reflected in clause 7(3) of the draft Bill.

[39] Consultation paper, paras. 3.24, 3.30(ii). Under the New Zealand Crimes Act 1961, s. 310, which concerns the offence of conspiracy to commit an offence abroad, it is a defence to prove that the acts planned did not amount to an offence under the legal system in force at the place where they were to be carried out.

[40] Including that of prosecuting authorities.

[41] Para. 3.24. (footnote omitted.)

[42] By Crown Court Rules for trials on indictment; by Magistrates' Courts Rules for summary trials of attempt or incitement (conspiracy is not triable summarily).

[43] The content of a foreign law is normally proved by the evidence of an expert in that law, and, in trials in the Crown Court, there is provision requiring expert evidence to be disclosed in advance to the other side; in default of such disclosure, it can be given at the trial only with leave of the court: Police and Criminal Evidence Act 1984, s. 81; S.I. 1987, No. 716. (Disclosure must be made "as soon as practicable" after committal: S.I. 1987, No. 716, r. 3.) This provision will no doubt be borne in mind in formulating the rules dealing with the defendant's notice.

[44] e.g., *Nelson* v. *Bridport* (1845) 8 Beav. 527, 50 ER 207.

[45] *Ditta* [1988] Crim LR 42. Previously, it was held by the Court of Criminal Appeal in *Hammer* [1923] 2 KB 786 that s. 15 of the Administration of Justice Act 1920 extends to a criminal trial. The section provides:

> "Where, for the purpose of disposing of any action or other matter which is being tried by a judge with a jury in any court in England or Wales, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone."

expert evidence adduced for the purpose of proving a foreign law is not a suitable task for the jury. It is our intention that questions of foreign law should be determined by the judge alone.

4. Preparatory hearings

5.30 Section 7 of the Criminal Justice Act 1987 empowers Crown Court judges to order a preparatory hearing[46] in cases of fraud of "such seriousness and complexity that substantial benefits are likely to accrue" from such a hearing. At a preparatory hearing the judge may (among other things) determine questions as to the admissibility of evidence and "any other question of law relating to the case".[47] In our view, it is desirable that legislation should make clear that such questions include the issue of double criminality, notwithstanding that the determination of a foreign law is categorised in our courts as an issue of fact, rather than law.[48]

E. RECOMMENDATIONS

5.31 *We recommend* that:

(a) Every party to (i) a conspiracy to perform abroad what, if performed in England and Wales, would constitute a listed offence or (ii) a conspiracy to defraud outside England and Wales should be triable here if at least one conspirator (through his own or his agent's acts) became a party to it in England and Wales, or if he (or his agent) did anything here relating to the formation of the conspiracy or in pursuance of its objects.

(Draft Bill, clause 5.)

(b) An attempt or an incitement to perform actions abroad that, if performed in England and Wales, would involve a listed offence should be triable here if some or all of the acts constituting the attempt or incitement took place here.

(Draft Bill, clause 6.)

(c) For the purpose of the rules referred to in subparagraphs (a) and (b) above: money or other property which is sent from outside, but received within, England and Wales (or vice versa) should be regarded as having been obtained in England and Wales; and information (including an instruction or a demand) sent from outside, but received within, England and Wales (or vice versa) should be regarded as having been communicated in England and Wales.

(Draft Bill, clause 1(3)(f); clause 4.)

(d) The rules referred to in subparagraphs (a) and (b) above should be subject to a requirement of "double criminality"—namely, that the acts or events to the occurrence of which the conspiracy, attempt or incitement is directed should be punishable under the law of the place where they are to take place.

(Draft Bill, clause 7(1), (2), (3).)

(e) It should be presumed that the requirement of double criminality is satisfied unless the defendant puts the matter in issue by notice; and power should be given for Crown Court Rules and (in relation to attempt and incitement) Magistrates' Courts Rules to make detailed provision, including a dispensing power, relating to such notice.

(Draft Bill, clause 7(4), (5).)

(f) In relation to the double-criminality requirement in the Crown Court, (i) it should be for the judge alone to determine a foreign law, and (ii) legislation should make clear that the determination of a foreign law is within the ambit of section 9(3) of the Criminal Justice Act 1987.

(Draft Bill, clause 7(6), (7).)

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[46] "[F]or the purpose of:
(a) identifying issues which are likely to be material to the verdict of the jury;
(b) assisting their comprehension of any such issues;
(c) expediting the proceedings before the jury; or
(d) assisting the judge's management of the trial."

[47] Sect. 9(3)(b), (c).

[48] See para. 5.29 above.

PART VI

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

6.1 In this Part of the report we summarise our conclusions and our recommendations for reform. Where appropriate, we identify the relevant clause in the draft Bill in Appendix A that is aimed at putting into effect a particular recommendation.

Substantive offences

(1) In relation to a "listed offence" (defined at paragraph (2) below), the present rules governing territorial jurisdiction should be abolished and replaced by the following:

(a) A person may be guilty of such offence if any event (including an act or omission on his part) proof of which is required for a conviction of the offence took place in England and Wales.
(Paragraph 2.32(a); draft Bill, clause 1(1), (2), (3)(a), and clause 2.)

(b) For the purpose of the rule referred to in subparagraph (a) above:
(i) property which is despatched from outside, but received within, England and Wales or vice versa is appropriated or obtained in England and Wales; and
(ii) information (including instructions and demands) the communication of which is initiated outside, but received within, England and Wales or vice versa is communicated in England and Wales.
(Paragraph 2.32(b); draft Bill, clause 4.)

(c) The rule set out in subparagraph (a) above applies whether or not, at the time of any event referred to in that subparagraph, the accused was present in England and Wales.
(Paragraph 2.32(c); draft Bill, clause 3(a)(ii).)

(2) A "listed offence" means an offence under one of the provisions referred to at paragraph 3.31(a) above.
(Draft Bill, clause 1(1); Schedule.)

(3) We would draw attention to the unsatisfactory terms in which the offence contained in section 20(2) of the Theft Act 1968 is defined.
(Paragraph 3.31(b).)

Conspiracy to commit a listed offence triable in England and Wales or to defraud in England and Wales

(4) Every party to a conspiracy (i) to commit a listed offence that would be triable here under the new rules that we recommend or (ii) to defraud in England and Wales should be triable here, wherever the conspiracy is formed and whether or not anything is done in England and Wales to further the conspiracy.
(Paragraph 4.7; draft Bill, clause 3(b).)

Attempt to commit a listed offence triable in England and Wales

(5) The courts should have jurisdiction to try an attempt to commit a listed offence that would be triable in England and Wales under the new rules that we recommend, whether or not the attempt was made here and whether or not it had an effect here.
(Paragraph 4.11; draft Bill, clause 3(c).)

Incitement to commit a listed offence triable in England and Wales

(6) An incitement to commit a listed offence triable in England and Wales should itself be triable here, wherever the incitement took place.
(Paragraph 4.14; draft Bill, clause 1(3)(e), clause 3(a)(ii).)

Inchoate offences relating to frauds intended to take place outside England and Wales

(7) (a) Every party to (i) a conspiracy to perform abroad what, if performed in England

and Wales, would constitute a listed offence or (ii) a conspiracy to defraud outside England and Wales should be triable here if at least one conspirator (through his own or his agent's acts) became a party to it in England and Wales, or if he (or his agent) did anything here relating to the formation of the conspiracy or in pursuance of its objects.

(Paragraph 5.31(a); draft Bill, clause 5.)

(b) An attempt or an incitement to perform actions abroad that, if performed in England and Wales, would involve a listed offence should be triable here if some or all of the acts constituting the attempt or incitement took place here.

(Paragraph 5.31(b); draft Bill, clause 6.)

(c) For the purpose of the rules referred to in subparagraphs (a) and (b) above: money or other property which is sent from outside, but received within, England and Wales (or vice versa) should be regarded as having been obtained in England and Wales; and information (including an instruction or a demand) sent from outside, but received within, England and Wales (or vice versa) should be regarded as having been communicated in England and Wales.

(Paragraph 5.31(c); draft Bill, clause 1(3)(f); clause 4.)

(d) The rules referred to in subparagraphs (a) and (b) above should be subject to a requirement of "double criminality"—namely, that the acts or events to the occurrence of which the conspiracy, attempt or incitement is directed should be punishable under the law of the place where they are to take place.

(Paragraph 5.31(d); draft Bill, clause 7(1), (2), (3).)

(e) It should be presumed that the requirement of double criminality is satisfied unless the defendant puts the matter in issue by notice; and power should be given for Crown Court Rules and (in relation to attempt and incitement) Magistrates' Courts Rules to make detailed provision, including a dispensing power, relating to such notice.

(Paragraph 5.31(e); draft Bill, clause 7(4), (5).)

(f) In relation to the double-criminality requirement, in the Crown Court (i) it should be for the judge alone to determine a foreign law, and (ii) legislation should make clear that the determination of a foreign law is within the ambit of section 9(3) of the Criminal Justice Act 1987.

(Paragraph 5.31(f); draft Bill, clause 7(6), (7).)

(*Signed*) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
11 April 1989

Mr Brian Davenport QC was the Commissioner primarily responsible for this project until 31 December 1988, when his term of office expired. Since his departure, he has continued to assist in the preparation of the report. The Commissioners gratefully acknowledge his help.

APPENDIX A

Fraud etc. (Jurisdiction) Bill

ARRANGEMENT OF CLAUSES

Preliminary

Clause
1. Interpretation.

Listed Offences etc.

2. Listed offences – relevant event in England and Wales.
3. Listed and other offences – questions that are immaterial to guilt.
4. Rules for determining certain questions relating to location of events.

Territorial scope of conspiracy, attempt and incitement

5. Territorial scope of conspiracy.
6. Territorial scope of attempt and incitement.
7. Relevance of external law.

Supplementary

8. Commencement and extent.
9. Short title.

SCHEDULE:—
The Listed Offences.

DRAFT

OF A

BILL

INTITULED

An Act to make provision as to the jurisdiction of courts in England and Wales in relation to offences of dishonesty and to blackmail.

A.D. 1989.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 *Preliminary*

1.—(1) In this Act—

Interpretation.

"listed offence" means an offence under any provision listed in the Schedule to this Act; and

10 "relevant event" means any act or omission or other event proof of which is required for conviction of an offence.

(2) For the purpose of determining whether an event is a relevant event, any question as to where it occurred is to be disregarded.

(3) The offences which fall within this Act are—

(a) a listed offence;

15 (b) conspiracy to commit a listed offence;

(c) conspiracy to defraud in England and Wales;

(d) attempting to commit a listed offence;

(e) incitement to commit a listed offence;

(f) an offence which is triable by virtue—

20 (i) of section 5(3) or 6(2) below; or

(ii) of the new subsection (1A) inserted by section 5 below after section 1(1) of the Criminal Law Act 1977; or

1977 c.45.

(iii) of the new subsection (1A) inserted by section 6 below after section 1(1) of the Criminal Attempts Act 1981.

1981 c.47.

EXPLANATORY NOTES

Clause 1

General

Cross-references are made to this interpretation clause in explanatory notes to other clauses.

Listed Offences etc.

Listed offences – relevant event in England and Wales.

2. A person may be guilty of a listed offence if any relevant event occurred in England and Wales.

Listed and other offences – questions that are immaterial to guilt.

3. The following questions are immaterial to guilt—

(a) on a charge of any offence falling within this Act— 5

(i) the question whether or not the person charged was a British citizen at the time of any relevant event; and

(ii) the question whether or not he was in England and Wales at the time of any relevant event;

(b) on a charge— 10

(i) of conspiracy to commit a listed offence; or

(ii) of conspiracy to defraud in England and Wales,

the question where any person became a party to the conspiracy and 15 the question whether any act or omission or other event occurred in England and Wales; and

(c) on a charge of attempting to commit a listed offence, the question where the attempt was made and the question whether it had an effect in England and Wales.

Clause 2

1. This clause gives effect to the recommendation at paragraph 2.32(a) of the report. If a person commits what, apart from the question of territorial jurisdiction, would be a listed offence, he is guilty of the offence if at least one "relevant event" (defined in clause 1(1) and (2)) took place in England and Wales. (If no relevant event occurred here, he cannot be guilty of the offence.)

2. A "listed offence" means an offence under a provision listed in the Schedule to the Bill (see clause 1(1)).

3. The definition of "relevant event" in clause 1(1) should be read in conjunction with clause 1(2): a person may be guilty of a listed offence if there occurred in England and Wales any act omission or other event proof of which (without regard to the question of territorial jurisdiction) is required for conviction of that offence.

4. It is immaterial that, at the time of any relevant event, the accused was not in England and Wales or that he was not a British citizen: see clause 3(a).

5. The despatch of property or the communication of information from, or to, England and Wales is treated as having taken place here: see clause 4.

Clause 3

Paragraph (a)

1. Clause 3(a)(i) is explained at paragraph 1.9 of the report.

2. The expression "any offence falling within this Act" signifies an offence referred to in clause 1(3), including a "listed offence" (i.e., under clause 1(1), an offence under a provision in the Schedule). In relation to a listed offence, clause 3(a)(ii) supplements clause 2; it implements the recommendation at paragraph 2.32(c) of the report.

3. An incitement to commit a listed offence is "an offence falling within this Act" (see clause 1(3)(e)); so clause 3(a)(ii) has the effect of implementing the recommendation at paragraph 4.14 of the report.

Paragraphs (b) and (c)

4. These paragraphs respectively implement the recommendations at paragraphs 4.7 and 4.11 of the report. By contrast with clauses 5 and 6, they relate to a conspiracy or an attempt only when what is in view is a substantive offence that would, if committed, be triable in England and Wales by virtue of clause 2 (or, in the case of conspiracy to defraud, when what is in view is the commission of fraud here).

Rules for determining certain questions relating to location of events.

4. In relation to an offence which falls within this Act—

(a) there is an obtaining of property in England and Wales if the property is either despatched from or received at a place in England and Wales; and

(b) there is a communication in England and Wales of information or of an instruction or a demand if it is sent by any means— 5

(i) from a place in England and Wales to a place elsewhere; or

(ii) from a place elsewhere to a place in England and Wales. 10

Territorial scope of conspiracy, attempt and incitement

Territorial scope of conspiracy. 1977 c.45.

5.—(1) The following subsections shall be inserted after subsection (1) of section 1 of the Criminal Law Act 1977—

"(1A) Subject to section 7 of the Fraud etc. (Jurisdiction) Act 1989 (relevance of external law), if this subsection applies to an agreement, 15 this Part of this Act has effect in relation to it as it has effect in relation to an agreement falling within subsection (1) above.

(1B) Subsection (1A) above applies to an agreement if—

(a) a party to it, or a party's agent, did anything in England and Wales in relation to it before its formation; or 20

(b) a party to it became a party in England and Wales (by joining it either in person or through an agent); or

(c) a party to it, or a party's agent, did or omitted anything in England and Wales in pursuance of it,

and the agreement would fall within subsection (1) above as an 25 agreement relating to the commission of a listed offence but for that offence not being an offence triable in England and Wales if committed in accordance with the parties' intentions.".

(2) The following subsections shall be inserted after subsection (4) of that section— 30

"(5) In the application of this Part of this Act to an agreement to which subsection (1A) above applies any reference to an offence is to be construed as a reference to what would be the listed offence in question but for it not being an offence triable in England and Wales.

(6) In this section "listed offence" means an offence under any 35 provision listed in the Schedule to the Fraud etc. (Jurisdiction) Act 1989.".

(3) Subject to section 7 below, a charge of conspiracy to defraud shall be triable in England and Wales if—

(a) a party to the agreement constituting the conspiracy, or a party's 40 agent, did anything in England and Wales in relation to the agreement before its formation; or

(b) a party to it became a party in England and Wales (by joining it either in person or through an agent); or

(c) a party to it, or a party's agent, did or omitted anything in England 45 and Wales in pursuance of it,

and the conspiracy would be triable in England and Wales but for the fraud which the parties to it had in view not being intended to take place in England and Wales.

Clause 4

1. The reference in the opening words of subsection (1) to "any offence falling within this Act" is to an offence referred to in clause 1(3).

2. As to a "listed offence" (i.e., under clause 1(1) above, an offence under a provision listed in the Schedule), this clause gives effect to the recommendation at paragraph 2.32(b) of the report and supplements clause 2.

3. In relation to the four inchoate offences provided for by clauses 5 and 6 (being the offences referred to in clause 1(3)(f)), the clause gives effect to the recommendation at paragraph 5.31(c) of the report.

Clause 5

General

1. Subsections (1) and (2) give effect to the recommendation at paragraph 5.31(a) of the report in relation to the offence of conspiracy under the Criminal Law Act 1977; subsection (3) implements that recommendation in relation to the common law offence of conspiracy to defraud.

2. The circumstances that, under the recommendation at paragraph 5.31(a) of the report, constitute the requisite connection between a conspiracy and England and Wales is implemented, as to statutory conspiracy, by subsection (1) (in the form of subsections (1A) and (1B) to be added to section 1 of the Criminal Law Act 1977) and, as to conspiracy to defraud, by subsection (3). Clause 4, which relates to the question whether the despatch of property or the transmission of information takes place in England and Wales, applies for this purpose (since the offences for which clause 5 provides "fall within the Act"; see clause 1(3)(f)), and so gives effect, in relation to conspiracy, to the recommendation at paragraph 5.31(c) of the report.

3. Section 7, reference to which is made in both subsection (1) and subsection (3), relates to the requirement of "double criminality".

Subsections (1) and (2)

4. The statutory offence of conspiracy created by the Criminal Law Act 1977, section 1(1) and (4), applies to a course of action which will necessarily amount to or involve the commission of an "offence", a term defined as one which (with an immaterial exception) is triable in England and Wales. The new subsections extend the ambit of the 1977 Act to certain conspiracies whose object is to commit what would constitute a listed offence but for the fact that it would not be triable in England and Wales.

5. For ease of reference, section 1 of the 1977 Act, as it would appear with the additions introduced by subsections (1) and (2) of this clause, is set out in Part I of Appendix B to the report.

Territorial scope of attempt and incitement.
1981 c.47.

6.—(1) The following subsections shall be inserted after section 1(1) of the Criminal Attempts Act 1981–

"(1A) Subject to section 7 of the Fraud etc. (Jurisdiction) Act 1989 (relevance of external law), if this subsection applies to an act, what the person doing it had in view shall be treated as an offence to which this section applies. 5

(1B) Subsection (1A) above applies to an act if—

(a) it is done in England and Wales; and

(b) it would fall within subsection (1) above as more than merely preparatory to the commission of an offence under 10 any provision listed in the Schedule to the Fraud etc. (Jurisdiction) Act 1989 but for that offence, if completed, not being an offence triable in England and Wales.".

(2) Subject to section 7 below, a charge of incitement to commit a listed offence shall be triable in England and Wales if— 15

(a) the incitement took place in England and Wales; and

(b) a charge in respect of the incitement would be triable in England and Wales but for what the person charged had in view not being an offence triable in England and Wales.

Clause 6

General

1. This clause implements the recommendation at paragraph 5.31(b) of the report. Subsections (1) and (2) respectively give effect to that recommendation in relation to (i) the offence of attempt under the Criminal Attempts Act 1981 and (ii) the common law offence of incitement.

2. The recommendation in paragraph 5.31(b) of the report is implemented, as to attempt, in subsection (1), in the form of new subsections to be added to section 1 of the 1981 Act, and, as to incitement, in subsection (2). Clause 4, which provides when the despatch of property or the transmission of information is treated as taking place in England and Wales, applies for this purpose (and thereby gives effect, in relation to attempt, to the recommendation at paragraph 5.31(c) of the report), since the offences for which clause 6 provides "fall within the Act": see clause 1(3)(f).

3. Section 7, reference to which is made in both subsection (1) and subsection (2), relates to the requirement of "double criminality".

4. The statutory offence of attempt created by the 1981 Act, section 1(1) and (4), applies to acts which are more than merely preparatory to (with immaterial exceptions) the commission of an offence triable in England and Wales. The new subsections extend the ambit of the 1981 Act to an attempt in England and Wales to commit what would constitute a listed offence but for the fact that it would not be triable here.

5. For ease of reference, section 1 of the 1981 Act, as it would appear with the additions introduced by subsection (1) of this clause, is set out in Part II of Appendix B to the report.

Relevance of external law.

7.—(1) A person is guilty of an offence triable by virtue—

(a) of section 5(3) above; or

1977 c.45.

(b) of section 1(1A) of the Criminal Law Act 1977,

only if the pursuit of the agreed course of conduct would at some stage have necessarily involved— 5

(i) an act or omission by one or more of the parties; or

(ii) the happening of some other event,

constituting an offence under the law in force where the act, omission or other event would have occurred.

(2) A person is guilty of an offence triable by virtue— 10

(a) of section 6(2) above; or

1981 c.47.

(b) of section 1(1A) of the Criminal Attempts Act 1981,

only if what he had in view would necessarily involved the commission of an offence under the law in force where it was intended to take place.

(3) Conduct punishable under the law in force in any place is an offence 15 under the law for the purposes of this section, however it is described in that law.

(4) Subject to subsection (5) below, a condition specified in subsection (1) or (2) above shall be deemed to be satisfied unless not later than Rules of Court may provide the defence serve on the prosecution a notice— 20

(a) stating that in their opinion the condition is not satisfied;

(b) showing their grounds for that opinion; and

(c) requiring the prosecution to show that it is satisfied.

(5) The court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied without the prior service 25 of a notice under subsection (4) above.

(6) In the Crown Court the question whether the condition is satisfied shall be decided by the judge alone.

1987 c.38.

(7) The following paragraph shall be inserted after subsection (3)(a) of section 9 of the Criminal Justice Act 1987 (preparatory hearing in a case of 30 serious fraud)—

"(aa) a question arising under section 7 of the Fraud etc. (Jurisdiction) Act 1989 (relevance of external law to certain charges of conspiracy, attempt and incitement);".

Clause 7

General

1. This clause supplements clauses 5 and 6; it gives effect to the recommendations concerning "double criminality" at paragraphs 5.31(d)–(f) of the report.

Subsections (1)–(3)

2. These subsections implement the recommendation at paragraph 5.31(d) of the report. Subsection (1) relates to statutory conspiracy and conspiracy to defraud, subsection (2) to attempt and incitement. Subsection (3) makes clear that if the acts in question are punishable under the relevant foreign law they need not be categorised under that law as an offence.

Subsections (4) and (5)

3. These subsections give effect to the recommendation at paragraph 5.31(e) of the report.

4. Powers to make rules of court in the Crown Court and a magistrates' court governing the notice referred to in subsection (4) are contained in, respectively, sections 84 and 86 of the Supreme Court Act 1981 and section 144 of the Magistrates' Courts Act 1980.

Subsections (6) and (7)

5. These subsections implement the recommendations at paragraph 5.31(f) of the report.

Supplementary

Commencement and extent.

8.—(1) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(2) Nothing in this Act applies to a case unless all the relevant events take place after this Act comes into force.

(3) This Act extends to England and Wales only.

5

Short title.

9. This Act may be cited as the Fraud etc. (Jurisdiction) Act 1989.

Clause 8

Subsection (2)

1. The term "relevant event" is defined in clause 1(1) and (2): the Act does not apply in relation to any offence unless *every* act, omission or other event proof of which is required for conviction occurs after commencement.

Section 1.

SCHEDULE

THE LISTED OFFENCES

1968 c.60.

1. Offences under the following provisions of the Theft Act 1968–
   - section 1 (Theft);
   - section 15 (Obtaining property by deception); 5
   - section 16 (Obtaining pecuniary advantage by deception);
   - section 17 (False accounting);
   - section 19 (False statements by company directors, etc.);
   - section 20(2) (Procuring the execution of valuable security by deception); 10
   - section 21 (Blackmail); and
   - section 22 (Handling stolen goods).

1978 c.31.

2. Offences under the following provisions of the Theft Act 1978–
   - section 1 (Obtaining services by deception); and
   - section 2 (Evasion of liability by deception). 15

1981 c.45.

3. Offences under the following provisions of Part I of the Forgery and Counterfeiting Act 1981–
   - section 1 (Forgery);
   - section 2 (Copying a false instrument);
   - section 3 (Using a false instrument); 20
   - section 4 (Using a copy of a false instrument); and
   - section 5 (Offences relating to money orders, share certificates, passports, etc.).

APPENDIX B

PART I

Section 1 of the Criminal Law Act 1977, as it would appear with the additional subsections (indicated by bold type) set out in clause 5(1) and (2) of the draft Bill in Appendix A to this report.

1 The offence of conspiracy

(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either–

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

(1A) Subject to section 7 of the Fraud etc. (Jurisdiction) Act 1989 (relevance of external law to certain charges of conspiracy, attempt and incitement), if this subsection applies to an agreement, this Part of this Act has effect in relation to it as it has effect in relation to an agreement falling within subsection (1) above.

(1B) Subsection (1A) above applies to an agreement if–

(a) a party to it, or a party's agent, did anything in England and Wales in relation to it before its formation; or

(b) a party to it became a party in England and Wales (by joining it either in person or through an agent); or

(c) a party to it, or a party's agent, did or omitted anything in England and Wales in pursuance of it,

and the agreement would fall within subsection (1) above as an agreement relating to the commission of a listed offence but for that offence not being an offence triable in England and Wales if committed in accordance with the parties' intentions.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

(3) Where in pursuance of any agreement the acts in question in relation to any offence are to be done in contemplation or furtherance of a trade dispute (within the meaning of the Trade Union and Labour Relations Act 1974) that offence shall be disregarded for the purposes of subsection (1) above provided that it is a summary offence which is not punishable with imprisonment.

(4) In this Part of this Act "offence" means an offence triable in England and Wales, except that it includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intentions of the parties to the agreement.

(5) In the application of this Part of this Act to an agreement to which subsection (1A) above applies any reference to an offence is to be construed as a reference to what would be the listed offence in question but for it not being an offence triable in England and Wales.

(6) In this section "listed offence" means an offence under any provision listed in the Schedule to the Fraud etc. (Jurisdiction) Act 1989.

PART II

Section 1 of the Criminal Attempts Act 1981, as it would appear with the additional subsections (indicated by bold type) set out in clause 6(1) of the draft Bill in Appendix A to this report.

1 Attempting to commit an offence

(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

(1A) Subject to section 7 of the Fraud etc. (Jurisdiction) Act 1989 (relevance of external law to certain charges of conspiracy, attempt and incitement), if this subsection applies to an act, what the person doing it had in view shall be treated as an offence to which this section applies.

(1B) Subsection (1A) above applies to an act if–

(a) it is done in England and Wales; and

(b) it would fall within subsection (1) above as more than merely preparatory to the commission of an offence under any provision listed in the Schedule to the Fraud etc. (Jurisdiction) Act 1989 but for that offence, if completed, not being an offence triable in England and Wales.

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where–

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

(4) This section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than–

(a) conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment);

(b) aiding, abetting, counselling, procuring or suborning the commission of an offence;

(c) offences under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967.