The Law Commission

(LAW COM. No. 29)

CRIMINAL LAW
REPORT ON OFFENCES OF DAMAGE TO PROPERTY

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

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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. The Commissioners are—

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THE LAW COMMISSION

Second Programme—Item XVIII Criminal Law

OFFENCES OF DAMAGE TO PROPERTY

To the Right Honourable the Lord Hailsham of Saint Marylebone, Lord High Chancellor of Great Britain.

I. INTRODUCTION

1. Under Item XVIII of the Law Commission's Second Programme of Law Reform a number of specific offences are listed which require examination as part of the comprehensive review of the criminal law with a view to its eventual codification. The responsibility for the examination is divided between the Law Commission and the Criminal Law Revision Committee, there falling to the former examination of malicious damage to property, forgery, perjury, bigamy and offences against the marriage law, and to the latter examination of offences against the person (including homicide) and sexual offences.

2. We have had to conduct our review of the law of offences of damage to property and to reach our conclusions in the context of the existing law as to other offences, such as those against the person, where there is some overlapping with the law of offences of damage to property. As the examination is only a step towards the ultimate goal of codification, this is not a serious impediment to simplification of one branch of the law, although we shall have to decide how far it may be necessary or desirable to eliminate overlapping offences when the examination of all specific offences has been completed.

3. In April 1969 we published a Working Paper[1] in which we reviewed the existing law and made provisional proposals for its reform. The Paper elicited comment from individuals and organisations to whom it was circulated and it was critically examined in a number of articles in legal periodicals. A list of commentators is set out in Appendix " B ". This comment has been of great assistance to us in formulating our recommendations, which, as will appear, differ in some respects from our provisional proposals. A draft Bill prepared by Parliamentary Counsel is annexed as Appendix " A " setting out our recommendations in legislative form. It will be seen that the Bill is entitled the Criminal Damage Bill, which in the light of our proposal to eliminate the word " malicious " from the offences created, seems to be the appropriate title. We therefore in the Report refer to " criminal damage " instead of " malicious damage " to describe the criminal conduct which will fall within the provisions of the Bill.

4. The present law is to be found principally in the Malicious Damage Act 1861, which was one of the consolidation Acts relating to the criminal law passed in that year. It has survived substantially in its original form, though parts of it have been amended or repealed.[2] The main change affecting the

[1] Working Paper No. 23.

[2] Statute Law Revision (No. 2) Act 1893; Criminal Justice Administration Act 1914; Criminal Justice Act 1948; Malicious Damage Act 1964; Criminal Law Act 1967.

1861 Act during the last 100 years has, however, been the considerable widening of the jurisdiction of magistrates' courts by virtue of the Criminal Justice Administration Act 1914, as amended by the Malicious Damage Act 1964. In this Report we refer to the 1861 Act in its present form as "the principal Act".

5. The Criminal Law Revision Committee has expressed the view[3] that the offences and penalties under the principal Act are extremely complicated and require revision, and it is beyond doubt that there are many unsatisfactory aspects of the law as it now stands, the main being:

(*a*) the multiplicity of offences and the variety of penalties;

(*b*) an overlapping of offences both within the principal Act and with offences created by other enactments, and

(*c*) a complicated mental element, characterised by the use of technical words.

6. An examination of the available statistics is of importance in showing the prevalence of offences of damage to property, their seriousness and the courts which are mainly concerned with them. The following figures have been abstracted from the annual Criminal Statistics:[4]

I. *Total number of persons found guilty*

(*All Courts*)

Year	All offences including traffic offences[5]	Offences of malicious damage, including arson[6]	Stealing and breaking and entering
1964 . . .	1,327,649	17,791	161,752
1965 . . .	1,368,048	18,397	173,261
1966 . . .	1,445,948	17,668	184,299
1967 . . .	1,579,653	17,297	189,567
1968 . . .	1,576,868	18,687	198,907

II. *Division of this total among Courts*

	Assizes and Quarter Sessions		Magistrates' Courts	
Year	Malicious damage	Arson	Malicious damage	Arson
1964 . .	87	218	17,261	225
1965 . .	113	223	17,836	225
1966 . .	122	217	17,078	251
1967 . .	133	288	16,564	312
1968 . .	190	308	17,874	315

[3] Eighth Report, (1966) Cmnd. 2977, para. 57(ii).

[4] Criminal Statistics, England and Wales, (1964) Cmnd. 2815, (1965) Cmnd. 3037, (1966) Cmnd. 3332, (1967) Cmnd. 3689, and (1968) Cmnd. 4098.

[5] In 1968, over 1 million traffic offences were dealt with in magistrates' courts.

[6] Prosecutions for offences of malicious damage under legislation other than the principal Act are not included in these figures. Such legislation is listed in the Schedule to the Draft Bill in App. A.

III. *Disposal of offences dealt with on indictment*

		1964	1965	1966	1967	1968
Discharges	Absolute	2	1	—	2	1
	Conditional	16	21	14	17	33
Mental Health Act 1959 Orders		43	43	24	35	35
Probation		62	65	71	84	111
Fine		20	50	37	50	57
Detention Centre		30	19	16	17	17
Borstal Training		39	30	39	40	47
Imprisonment (immediate)		87	105	134	172	148
Imprisonment (suspended sentence)		—	—	—	—	43
Corrective Training		1	—	—	—	—

Of the sentences of imprisonment—

in **1964**—18 were for more than 3 years, and of these 2 were for more than 7 years, of which 1 was for more than 10 years;

in **1965**—20 were for more than 3 years, and of these 4 (including 1 Preventive Detention) were for more than 7 years, of which 1 was for more than 10 years;

in **1966**—28 were for more than 3 years, and of these 3 were for more than 7 years, of which 2 were for more than 10 years;

in **1967**—54 were for more than 3 years, and of these 10 were for more than 7 years, of which 7 were for more than 10 years;

in **1968**—31 were for more than 3 years, and of these 8 were for more than 7 years, of which 7 were for more than 10 years.

IV. *Ages of offenders convicted by magistrates*
(*Malicious damage including arson*)

Year	All ages	10 to 14	14 to 17	17 to 21
1964	17,486	2,662	3,780	4,479
1965	18,061	2,809	3,547	4,751
1966	17,329	2,637	3,119	4,663
1967	16,876	2,338	2,861	4,550
1968	18,189	2,342	3,270	4,909

V. *Ages of offenders convicted of arson*

	On indictment		By magistrates	
Year	Over 21	Under 21	Over 21	Under 21
1964	121	97	None	225
1965	130	93	None	225
1966	128	89	None	251
1967	178	110	None	312
1968	198	110	None	315

7. We appreciate that care is necessary in drawing conclusions from these statistics, but the following inferences seem to be clear:

(i) Offences of malicious damage account for about 1·3 per cent of the total offences, compared with stealing offences which account for about 12·5 per cent.

(ii) The great majority of malicious damage offences are dealt with by magistrates' courts.

(iii) There are a few, and only a few, cases which call for heavy sentences of imprisonment.

(iv) Malicious damage offences are very prevalent among juveniles, particularly among the younger age groups, and in the case of arson well over half of all persons convicted are under 21.

8. These considerations lead to the conclusion that in considering the reform of the law relating to malicious damage the important factors to be borne in mind are:

(1) that, as the brunt of the work is borne by magistrates' courts, the law should be simple and as straightforward as possible to apply, and that the jurisdiction of magistrates' courts should be founded upon provisions less complex and more rational than those which at present apply,[7] and

(2) that there should be a wide latitude in the range of penalties, with high maximum penalties available in particularly serious circumstances.

II. CLASSIFICATION OF OFFENCES

A. Existing Categories

9. The principal Act exhibits a variety of methods of classification of offences of damage to property, for example, by the type of property damaged and by the means used. Other offences of criminal damage are to be found in a number of specific statutes. There is, therefore, much overlapping of offences, both within the framework of the principal Act, and between those in the Act and other offences.

(i) *Under the principal Act*

10. The main categories of offences within the principal Act, many of which owe their origins to historical circumstances now of little or no relevance,[8] may be summarised as follows :[9]

(*a*) *Type of property damaged*	*Sections of the Principal Act*
Buildings and their contents	1 to 13
Goods in process of manufacture ; machinery .	14 and 15

[7] See para. 68.

[8] An example of such an origin is to be found in an Act " for the better and more effectual Protection of Stocking Frames . . .", (1788) 28 Geo. 3. c. 55. The Preamble to this Act begins " Whereas the Frames for making of Framework-knitted Pieces, Stockings, and other Articles . . . are very valuable and expensive Machines . . ." The Act is discussed in Radzinowicz, *History of the Criminal Law*, Vol. 1, pp. 479 to 481. c.f. s. 14 of the principal Act.

[9] The categories are not exclusive; many of the offences are classified by reference to a number of criteria.

Corn, trees and vegetable products	16 to 24
Fences	25
Mines	26, 28 and 29
Sea and river banks and works on rivers and canals	30 and 31
Ponds	32
Bridges, viaducts and toll-bars	33 and 34
Railway engines or carriages and telegraphs	35 to 38
Works of art	39
Cattle and other domestic animals	40 and 41
Ships	42 and 45 to 47
Sea marks, wrecks and wrecked goods	48 and 49
(*b*) *Method used*	
Fire (buildings and their contents)	1 to 7
(stacks of corn)	17, 18
(coal mines)	26
(ships)	42
Explosives (buildings and their contents)	9 and 10
(ships)	45
(making or possessing explosives with intent)	54
Water (mines)	28
(*c*) *Status of offender*	
Rioters (certain buildings and machinery)	11, 12
Tenants	13
(*d*) *Circumstances of aggravation*	
Setting fire to a dwelling house, any person being therein	2
Setting fire to a public building	5
Destroying or damaging a dwelling house with gunpowder, any person being therein	9
Killing or maiming cattle as opposed to other animals	40
Damaging property exceeding £5 at night	51
(*e*) *The offender's object*	
Injuring property in the offender's possession with intent to injure or defraud	59
(*f*) *Extent of damage done*	
Destroying or damaging trees, shrubs etc. to the extent of more than £1, in a garden etc.	20
Destroying or damaging trees, shrubs etc. to the extent of more than £5, outside a garden	21
Destroying or damaging trees etc. to the extent of 1s. or more, anywhere	22
All property other than as listed in (*a*) above the damage exceeding £5	51

11. Section 7 of the principal Act (setting fire to goods in buildings) provides an interesting example of the defects of piecemeal legislation and of elaborate classification. The offence created is not " maliciously setting fire to any goods

in any building", but setting fire to goods in "such circumstances that if the building were thereby set fire to *he would be guilty of an offence under any of the preceding sections*".[10] Those preceding sections deal with various forms of setting fire to buildings. Thus the offence is subject to the restriction that the defendant's mental state must relate to the building rather than the goods.[11] It is not easy to see how, if the offender *intends* to damage the building, the offence created by section 7 differs from the offence of attempting to set fire to a building (previously section 8 of the principal Act, now at common law).[12]

(ii) *Under related enactments*

12.—(1) Section 2 of the Explosive Substances Act 1883 makes it an offence unlawfully and maliciously to cause an explosion of a nature likely to endanger life or to cause serious injury to property whether any injury to person or property has actually been caused or not, and is punishable with imprisonment for life.

(2) Schedule 1 of the Theft Act 1968 deals with taking or killing or attempting to take or kill deer in enclosed land, and with taking or destroying or attempting to take or destroy any fish in water which is private property.[13]

(3) Damage done in the course of acts of piracy is now governed by section 4 of the Tokyo Convention Act 1967.[14]

In these three enactments we do not propose to recommend any changes. The first relates specifically to the wider sphere of the maintenance of public order,[15] the second is more closely connected with the law of theft and poaching than with damage to property and the third concerns primarily international law.

(4) There are a number of other special enactments which deal directly or indirectly with damage to property within the special purview of those enactments. The most striking of these is the Dockyards Protection Act 1772 which makes it a capital offence to set fire to or otherwise destroy naval vessels, naval, military or Air Force installations and certain property vested in the Minister of Technology.[16] For the rest, there are some provisions which can clearly be repealed,[17] and others which it may for certain reasons be better to retain.[18] These provisions and the repeal policy which we recommend are considered in more detail in Part X of the Report.[19]

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10 The words underlined were substituted by s. 10(1) and para. 7 of the 2nd Schedule of the Criminal Law Act 1967.

11 *R.* v. *Batstone* (1864) 10 Cox C.C. 20; *R.* v. *Child* (1871) L.R. 1 C.C.R. 307; *R.* v. *Harris* (1882) 15 Cox C.C. 75.

12 s. 8 was repealed by the Criminal Law Act 1967.

13 See Criminal Law Revision Committee, Eighth Report, (1966) Cmnd. 2977 paras. 49–55, cf. s. 41 of the principal Act.

14 There exist also various other forms of statutory piracy, which we are considering in the context of the territorial extent of the criminal law (see paras. 74–77 of Working Paper No. 29).

15 And see para. 97.

16 The various Acts and subordinate legislation whereby the scope of this Act has been extended are listed in Halsbury's Statutes, 3rd ed. Vol. 8 p. 34. n.

17 e.g. s. 8(2)(*b*) of the Manoeuvres Act 1958, s. 117(1)(*e*) and (2)(*a*) and (*b*) of the Highways Act 1959.

18 e.g. s. 22 of the Electric Lighting Act 1882, and para. 29 of the Schedule 3 of the Gas Act 1948.

19 Paras. 91–99.

B. A simplified classification

(i) *General*

13. Leaving aside for the moment the question of the mental element required,[20] we think that the essence of offences of criminal damage should be the destruction of or damage to the property of another. Distinctions based upon the nature of the property or its situation, or upon the means used to destroy or damage it, or upon the circumstances in which it is destroyed or damaged should not affect the basic nature of the offence. This is the philosophy underlying the Theft Act and we are convinced that it is right. Such features as the means used or their consequences are subsidiary matters relevant, if at all, in regard to sentence.

14. We have had overwhelming support for our proposal to adopt a simple basis for the definition of the offence, which is the approach that has been and is being adopted in a number of other codes such as the Norwegian[21] and Swedish[22] Penal Codes, the Criminal Code of Canada[23] and the Draft Criminal Code for the Australian Territories.[24] Whilst the New Zealand Crimes Act 1961[25] and the New York Penal Law[26] do retain a fairly detailed classification of offences based upon the nature of the property damaged and the means used to cause the damage, we prefer the simpler approach.

15. These considerations led us to the conclusion that the conduct to be penalised should be stated as broadly as possible, so that there should be one offence to cover the whole field of damage. This we think should be the destroying or damaging of property belonging to another[27] and for this offence we consider that on the basis of the statistics a maximum penalty of 10 years' imprisonment is probably right.[28]

16. Further examination of the offences raised the questions whether a maximum sentence of 10 years was adequate for offences of damage to property where life was endangered and where fire was used as the method of destruction or damage. Our solution to those two problems are different:

(1) We recommend[29] that there should be an aggravated offence of destroying or damaging any property (whether belonging to another or to the person doing the damage) done with intent to endanger the life of another, or recklessly in that regard, carrying a maximum penalty of life imprisonment.

(2) We recommend[30] that where the simple offence of destroying or damaging property belonging to another is committed by the use of fire the maximum penalty should be life imprisonment.

17. The recommendation that there should be a separate aggravated offence is to some extent bound up with our recommendation that the only

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20 See paras. 44–47.
21 1902 to 1961. See ss. 291 to 294.
22 1965. See Chapter 12, ss. 1, 2 and 4.
23 1954–1966 s. 372.
24 1969, Parliamentary Paper No. 44, ss. 167, 168.
25 ss. 294–305.
26 (2965) ss. 145–150.
27 For the meaning of "belonging" to a person see clause 10(2) of the draft Bill and paras. 36–41.
28 See paras. 64 and 66.
29 Para. 27.
30 Para. 32.

circumstance in which a person should be guilty of criminal damage to his own property (otherwise than where another has possession of or an interest in it) is when he destroys or damages it intending to endanger the life of another or being reckless in that regard. This decision, which differs from the provisional view we advanced in the Working Paper,[31] must be explained.

18. In the principal Act, the main restrictions on a man's right to do what he likes with his own property are contained in sections 3, 13 and 59. It is an offence to set fire to specified buildings (but not all buildings) with intent to injure or defraud, even if the buildings are in the defendant's possession (section 3); for tenants to injure fixtures in the houses they occupy (section 13); and to do anything prohibited by the principal Act with intent to injure or defraud, even if the defendant is in possession of the property injured (section 59). The offence created by section 59 is thus comprehensive. In the Working Paper, we took the view that it should remain an offence to destroy or damage one's own property with intent to defraud, but that it should not be an offence to do so with intent to cause personal injury or with recklessness in that regard. The considerable weight of comment that we have received has caused us to reconsider both proposals, and we now recommend that damage to one's own property with intent to defraud should cease to be an offence of damage to property[32] but that such damage committed with intent to endanger the life of another or with recklessness in that regard should be an offence. Our reason for not retaining section 59 is that the offence created is, in essence, either an offence of dishonesty or an offence against the person, even though the means is in each case damage to property. We now briefly review the considerations which have led us to this conclusion; we shall deal with the aspect of endangering life under the heading of the aggravated offence.

(ii) *The disappearance of the offence of dishonest damage to the offender's own property*

19. Offences of dishonesty have been recently reviewed and (apart from forgery and perjury) they are now contained in the Theft Act 1968.[33] The provisions of that Act are less complicated and may be expected to contain fewer technical traps than the corresponding provisions of the Larceny Acts 1861 and 1916 which they replace. For the purposes of this discussion the word "dishonestly", which, though not defined except by way of limitation,[34] is used throughout the Theft Act, may be regarded as synonymous with "with intent to defraud".

20. The meaning of the expression "with intent to defraud" is uncertain, but at all events in the law of forgery, and probably also in other dishonesty offences, it means "with intent to prejudice rights or to obstruct duties or with recklessness in regard to the risk of such prejudice or obstruction".[35] By section 15 of the Theft Act, (which does not use the expression "with

31 Working Paper No. 23, paras. 36–40.

32 This recommendation has the support of insurance interests whom we have consulted.

33 The Theft Act does not cover offences of dishonesty under regulatory legislation generally, nor offences under such legislation as the Companies Acts and the Prevention of Frauds (Investments) Act 1958.

34 e.g. in s. 17 where the expression "dishonestly, with a view to gain for himself or another or with intent to cause loss to another" [in money or property] is used.

35 *Welham* v. *D.P.P.* [1961] A.C. 103; *R.* v. *Sinclair* [1968] 1 W.L.R. 1246.

intent to defraud") it is an offence dishonestly to obtain property (including money) by deception, and, of course, it is equally an offence to attempt to do so. Thus a man who burns down his own house in order to make a fraudulent insurance claim will, if he takes any step towards his purpose beyond the burning, almost inevitably have attempted to commit an offence of dishonesty. He will not, however, as the law of attempt stands, be guilty if all he does is to burn down his house.[36] Thus, elimination of the offence of dishonest destruction will create a gap in the law. Nevertheless, for the reasons indicated below we are persuaded that the disadvantages of retaining the offence outweigh the limited advantages. The gap in the law is in any event limited, because cases in which there is proof of dishonesty, and yet no step has been taken to put the fraud into effect beyond the destruction of the offender's own property, must be rare. On the other hand, if the offence were retained, it would be necessary to consider the scope of "dishonesty" or "intent to defraud" in this context. We think it right that the expression should mean the same thing wherever it occurs. If it were to bear the wide meaning indicated earlier in this paragraph, a man who burned down his house or felled his scheduled tree to circumvent planning legislation would be guilty of an offence carrying the maximum period of imprisonment which we propose for the simple offence (10 years' imprisonment). We do not favour this result. To take any other course (by limiting the meaning of dishonesty, as we suggested in the Working Paper) would have two disadvantages. In the first place it would involve reaching a decision about an important concept in a context in which it is of marginal importance. Secondly, the most obvious limitation, which is that used in sections 17 and 20 of the Theft Act, has itself been subjected to a certain amount of criticism.[37] We express no view on the question whether the criticism is or is not well founded, but we are sure that the law of damage to property is not the right place to consider the meaning of dishonesty.

(iii) *The aggravated offence*

21. This proposed offence gives effect to our view that the policy of the criminal law is, and should continue to be, to select certain offences as attracting exceptionally high maximum penalties, because those offences are accompanied by aggravating factors. There are examples of this approach in sections 8–10 of the Theft Act 1968 dealing with robbery, burglary and aggravated burglary, which may be regarded as theft accompanied by aggravating circumstances. In relation to damage to property, we have given consideration to three possible tests, namely, the means employed, the value of the property, and the potential consequences. We have selected the third of these.

22. The test of the means employed did not seem an appropriate one for the creation of a separate offence. The most obvious means of damage which might characterise an offence as aggravated are explosives and fire. So far as explosives are concerned their use is governed by section 2 of the Explosive Substances Act 1883 which imposes heavy penalties for causing

[36] *R.* v. *Robinson* [1915] 2 K.B. 342.

[37] See, e.g. J. C. Smith, *The Law of Theft*, paras. 425–443. In these sections the word "dishonestly" is qualified by the words "with a view to gain for himself or another or with intent to cause loss to another".

an explosion likely to endanger life or to cause serious injury to property whether or not any injury to person or property is caused. This is a branch of the law concerned more with the maintenance of public order than with the damage to property and is best left to be dealt with in that context. So far as the use of fire is concerned we expressed the provisional view in the Working Paper that arson should disappear as a separate offence,[38] and we are still of that view, though for reasons to be advanced we think that where fire is used a maximum penalty of more than 10 years' imprisonment should be attracted.

23. The test of the value of the property damaged has obvious disadvantages consequent upon the changing value of money. In addition, we doubt whether a valuation of the property damaged is necessarily co-extensive with the real seriousness of the offence. A man may, for example, set fire to a nearly valueless tree, knowing that there is a risk that a whole forest may be destroyed. On the other hand, a man may destroy two paintings, one valueless and the other priceless, thinking them both to be of little value. The Theft Act 1968 has finally discarded tests of value in spite of their long association with the law of larceny.

24. The test of potential consequences has, we think, the merit that it singles out the especially blameworthy offender, whether the foreseen consequences of his actions occur or not. Two different categories of relevant potential consequences might be used, namely, exceptionally serious damage to property and the danger to personal safety. If, in the course of damaging property, an offender foresees the risk of wider damage to the same or other property, and, even more, if he intends such damage to occur, it may be argued that he should be subjected to a higher maximum penalty than the offender who foresees limited damage. Nevertheless, we do not propose the creation of such an offence. The main reason is that we have been unable to devise a satisfactory test to distinguish serious damage. We have considered, and rejected, such tests as a distinction between real and personal property. We think such a test is artificial. For example, a man who destroys every painting in the National Gallery seems to us deserving of no less punishment than a man who destroys the gallery itself. It would be possible to distinguish the more serious offence by using words such as " widespread damage " or " exceptionally serious damage ". We have, however, concluded that such words are too imprecise to justify their adoption. For much the same reasons we do not favour adopting the offence of causing or risking a catastrophe contained in the American Law Institute's draft Model Penal Code[39] ; nor did this commend itself to our commentators. Given the proposed maximum term of imprisonment, we think that the courts would be able to deal adequately with cases where the potentially disastrous nature of the offence causes unusual public concern.

25. We are left with damage to property which endangers personal safety. None of our commentators suggested that the test should be objective in the sense that one should look only to the consequences or potential consequences of the offender's conduct. All were agreed that the criterion for the aggravated offence was to be found in the offender's state of mind, namely, his

38 Working Paper No. 23 para. 22.
39 s. 220.2.

intention to endanger the personal safety of another or his recklessness in that regard, and we are sure that this must be the correct approach. In our Working Paper we translated the intention to endanger personal safety into an intention to do personal injury. This received general approval although a number of commentators (including the Bar Council and the Law Society) took the point that on analysis such an offence is in essence an offence against the person. We think that there is substance in the point, but, if no such offence is created, a considerable gap in the law is left, especially where the offender is reckless as to endangering personal safety and yet no injury is caused. In such a case the offender cannot be convicted of an attempt to commit an offence under the Offences against the Person Act 1861 because, in an attempt to commit an offence, intention and not merely recklessness is necessary.

26. Having regard to the maximum punishment we propose for the simple offence (now 10 years' imprisonment and not 7 as we had originally suggested),[40] a criterion for aggravation based on intent to cause, or recklessness as to, personal injury would include within the aggravated offence many offences for which the maximum punishment for the simple offence would be adequate. To call for a heavier punishment than imprisonment for 10 years the offence must be of a really serious nature. Being reckless as to whether another might suffer some trifling personal injury from the way in which damage is done—or even intending to do some trifling personal injury by damaging property—is not a factor which should increase the maximum penalty to more than 10 years' imprisonment. It should be borne in mind that a conviction for malicious wounding carries a penalty of only 5 years' imprisonment under section 20 of the Offences against the Person Act 1861. Normally, it cannot be a worse crime to damage one's own property, or even another's, with an intention to cause personal injury however slight. Furthermore, we do not think that it would be helpful to qualify the type of personal injury for this purpose, whether in terms of grievous bodily harm or really serious injury. Such distinctions have their own difficulties and we do not wish to extend their range into the field of offences against property.[41] In any event, if property were damaged with an intent to do grievous bodily harm and such harm were caused there would be an offence under section 18 of the Offences against the Person Act 1861, punishable with imprisonment for life. If harm were not caused there would be an attempt. If there were no specific intent as required by section 18 but grievous bodily harm were caused "maliciously" there would be an offence under section 20 of that Act.[42]

27. We think that the proper criterion should be related to the endangering of life, a concept which appears in section 2 of the Explosive Substances Act 1883 and in section 16 of the Firearms Act 1968. It is not, therefore, a novel one likely to give rise to difficulties of interpretation, and we think that it correctly expresses the necessary seriousness. It is true that in adopting the criterion of endangering life there may still be some overlapping with offences against the person, though this is not as great as would be the case

40 See para. 66.
41 Law Com. No. 10, para. 15(c).
42 See *R.* v. *Mowatt* [1968] 1 Q.B. 421 as to the meaning of "maliciously" in the context of s. 20.

with the criterion of personal injury. It may be that when the Criminal Law Revision Committee completes its review of the law of offences against the person it will be necessary to look again at this matter. For the present our recommendation is that the aggravated offence, attracting a maximum penalty of life imprisonment, should be the destruction or damaging of any property with the intention of endangering the life of another thereby, or being reckless in that regard.

(iv) *The use of fire*

28. Our provisional view expressed in the Working Paper[43] was that there was no need to distinguish in any way offences of damage to property caused by fire. Our consultations have, however, persuaded us to change our provisional view. We still think it unnecessary to retain a separate offence of damaging property by fire, but we now recommend that where fire is used to damage property, whether moveable or immovable, the maximum penalty should be imprisonment for life.

29. There are two main arguments for treating damage by fire differently from other ways of damaging property. The first is that damage by fire, particularly to buildings and stacks, is an offence which has always been regarded with abhorrence. It is argued that this of itself is a reason for allowing a higher maximum penalty. The second argument, which we find much more persuasive, is that many people who resort to damage by fire are mentally unbalanced and in need of treatment, and yet frequently do not qualify for committal to hospital under section 60 of the Mental Health Act 1959. If damage by burning is punishable by a maximum sentence of life imprisonment, a person so convicted may be kept in detention for psychiatric treatment for as long as proves necessary. The use of a sentence of life imprisonment to give flexibility was recently approved by the Court of Appeal in an arson case[44] and the same course has been considered and sometimes adopted in the case of other offences from as early as 1965.[45]

30. We still feel, however, that there should be no separate offence of damaging property by fire and that there is no reason to retain the term "arson". The abolition of arson at common law which is proposed, is consistent with the policy of eliminating common law offences, and arson at common law, which is the malicious and voluntary burning of houses, outhouses and barns,[46] is now never charged. The term does not appear in the principal Act, and it is only as a matter of practice that it is used to describe damage by fire to certain categories of property.[47]

31. It was suggested by two commentators that it would be wrong to abandon a concept which, in the eyes of the public, clearly distinguishes a particular kind of offence ; that it would be curious and colourless to describe

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43 para. 22.

44 *R.* v. *Woolland* (1967) 51 Cr.App.Rep. 65.

45 *R.* v. *Coaley* [1965] Crim. L.R. 735, *R.* v. *Knight* (1967) 51 Cr.App.Rep. 46, *R.* v. *Hodgson* (1968) 52 Cr.App.Rep. 113, *R.* v. *Cook* [1969] Crim. L.R. 98, *R.* v. *Picker* [1970] 2 All E.R. 226.

46 See *Russell on Crime*, 12th ed., pp. 1332 and 1333.

47 e.g. buildings (ss. 1–6); crops, plantations and stacks (ss. 16, 17); coal mines (s. 26); ships (s. 42), but not to setting fire to goods in a building (s. 7); see the precedents in the 1st Schedule of the Indictments Act and *Archbold* 37th ed., paras. 2263, 2271, 2274, 2275, 2278, 2280, cf. para. 2265.

burning down a house as " destroying property " ; that arsonists are often highly recidivist, unbalanced and in need of mental treatment ;[48] and that the courts would find it easier to pick out such persons if, in the record of previous convictions, such convictions were (as at present) readily identifiable. We are, however, not convinced that it is necessary to complicate the substantive law mainly to provide information regarding the disposal of offenders, such as pyromaniacs. There would be little or no administrative difficulty in ensuring that an offender's record included details showing, where appropriate, the use of fire in destroying or damaging property.

32. For these reasons we recommend that there should be no specific offence of damaging property by burning but that where a person destroys or damages property belonging to another by fire he should be liable to a sentence of life imprisonment.

33. *Our recommendations* as to the classification of offences of damage to property are that—

(1) there should be a simple offence of damaging the property of another of whatever kind ; this, however, should attract a greater penalty when committed by the use of fire ; and that

(2) there should be an aggravated offence of damaging any property, whether belonging to another or not, when this is done with the intention of endangering the life of another or with recklessness in that regard.

III. THE PROPERTY

The Property Damaged

34. If there is to be no distinction between the various types of property which can form the subject of an offence of criminal damage, property can be defined in the widest possible way. It is necessary to consider only whether there is any type of property which should be excluded from the definition. Offences of criminal damage to property in the context of the present law connote physical damage in their commission, and for that reason we have not included intangible things in the class of property, damage to which should constitute an offence.[49] On the other hand, in the context of damage to property there is no reason to distinguish, as does the Theft Act,[50] between land and other property. In these two respects, therefore, we think it necessary to depart from the definition in the Theft Act of property capable of being stolen, though in principle we consider that so far as possible there should be coincidence between property capable of being stolen and property capable of forming the subject of a charge under the Criminal Damage Bill.

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[48] W. Hurley and T. M. Monahan, "Arson: the criminal and the crime", (1969) 9. *Brit. J. Crim.* 4.

[49] The subject of criminal injury to intangible property, e.g. patents, copyright, goodwill and trade secrets, has been excluded from our examination of the law of malicious damage.

[50] Theft Act 1967, s. 4(2). For a full discussion of the reasons for the distinction in the Theft Act see the Criminal Law Revision Committee's Eighth Report, (1966) Cmnd. 2977 paras. 40–47.

35. We recommend, therefore, that the property which can be the subject of an offence of criminal damage should be all property of a tangible nature, whether real or personal. Where realty is or its products are concerned the present law is that either there must be actual damage to the realty itself, or damage to those products specifically included in the Malicious Damage Act 1861,[51] and mere damage to uncultivated plants or roots growing thereon is not sufficient.[52] So far as the "products of realty" are concerned we consider that mushrooms growing wild and the flowers, fruit or foliage of any plant growing wild should not be capable of being the subject of an offence of damage to property. We do not think that it would be appropriate to bring such property within the offence by reference to a test similar to that of commercial purpose as prescribed in the Theft Act for property capable of being stolen.[53] So far as wild animals are concerned, we have followed the Theft Act; they will only fall within the prohibition if they have been reduced into possession or are in the course of being reduced into possession. A person who damages wild flowers may, of course, commit an offence under legislation protecting the countryside.[54] It seems proper to leave damage to wild animals in their wild state to enactments dealing with poaching and the protection of animals.[55]

Property belonging to another

36. At common law it was the rule that a person could not be convicted of arson in respect of a dwelling possessed by him, even though it was owned by another; conversely the owner of the dwelling could be convicted of arson if he set fire to it when it was in the possession of another. Thus at common law there was never any limitation on the offence of arson in favour of ownership as such, but there was a limitation in favour of possession.[56] This limitation was removed by statute, and now section 3 of the principal Act makes it an offence for any person to set fire to certain specified property, whether in his possession or another's, with intent to injure or defraud any person. Section 59 extends the same basis of liability to damage to any property, even though it be in the possession of the offender. The present law is, then, that for the purposes of the law of malicious damage, a person may be convicted of damaging a tangible object if the property is not his own or if, notwithstanding that it is his own, he intends to injure (financially) or defraud any person by damaging it.

37. We consider that a person should continue to be liable if he destroys or damages property which is not his own. As to property which is his own, we have indicated[57] that we do not favour the retention of an ulterior intention, such as an intention to defraud, as an ingredient of the simple offence, and for that reason it is necessary to depart somewhat from the present law. Nonetheless we consider that where any other person has an interest in the property damaged, though it may be owned or possessed by

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51 e.g. by s. 21.

52 *Gardner* v. *Mansbridge* (1887) 19 Q.B.D. 217 (picking wild mushrooms).

53 s. 4(3) provides that a person does not steal any mushrooms, etc., growing wild which he picks, unless he does it for reward or for sale or other commercial purpose.

54 e.g., by-laws made under National Parks and Access to the Countryside Act 1949, s. 90.

55 cf. Theft Act 1968, Schedule 1. See also the enactments listed in Stone's Justices' Manual, 102nd ed., pp. 1676 and 611.

56 Smith and Hogan, *Criminal Law*, 2nd ed., p. 459.

57 Paras. 19–20.

the offender, the damage or destruction should be penalised. The problem is to define the interest of the other which should produce this result.

38. Where a person other than the offender has custody or control of the property it will usually be in circumstances which give him some interest in preserving the property in its existing state. He may be, for example, the lessee of a house, the hirer of a mechanical instrument or the repairer of an article with a lien on it. It seems right to make it an offence for a person to damage or destroy, without lawful excuse, property which is in the custody or control of another in such circumstances without having to show that it belonged to some one other than the defendant; indeed it should be an offence for a person to damage his own property in such circumstances. Further, there may be circumstances where it is virtually impossible for the prosecution to establish who is the owner of property destroyed or damaged, though it is clear that it was in the custody or control of another. To make it an offence to destroy or damage property in the custody or control of another enables the prosecution to succeed even though it cannot establish ownership in any particular person. We recommend that property should be treated as belonging to another when another has custody or control of the property. The fact that the prosecution will have to establish that the defendant acted without lawful excuse[58] will in most cases be sufficient protection for legitimate destruction of or damage to the property by the true owner.[59]

39. In our Working Paper we took the view that the right or interest which another should have in property to entitle him to the protection of the criminal law against its damage should be a proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).[60] We have given further consideration to whether the protection of the criminal law should not be extended to those who have equitable interests arising only from an agreement to transfer or grant an interest. This may be of importance in cases where the property is a building or a chattel of a unique kind, which is destroyed or damaged by the owner after he has contracted to sell it, but the property has not yet passed to the purchaser. Should cases of this kind occur (and we think that this would be extremely rare) we think that it would be unnecessary to make the vendor criminally liable for the damage, particularly as the purchaser has adequate civil remedies available to him. We see no reason to depart from our provisional proposal in this regard, which is in line with the policy of the Theft Act 1968. Section 5(1) of that Act excludes from what property is to be regarded as "belonging" to a person, property in which he has an equitable interest arising only from an agreement to transfer or grant an interest. It is still necessary to limit the right or interest to a proprietary right or interest, as otherwise an insurance company's interest in property not being damaged would be included. In view of our conclusion that fraudulent destruction of one's own property should not fall within the prohibited conduct such an interest must be excluded. Finally, we think it should be made clear that a person who has a charge on property should be regarded as having a sufficient interest in the property to entitle him to the protection of the

[58] Para. 48.
[59] It should be remembered that, where the true owner can terminate at will the custody or control of another, the mere fact of destruction or damage may be evidence of termination of the custody.
[60] See s. 5(1) of the Theft Act 1968.

criminal law for damage done to it by the owner who subjected it to the charge.

40. As the essential element of the aggravated offence is intention to endanger the life of another or being reckless in that regard, it is immaterial to whom the property belongs, in whose possession it is, or whether or not another has an interest in it.

41. *We recommend*—

(1) that the property which should form the subject of an offence should be all tangible property, real or personal, except mushrooms growing wild and flowers, fruit or foliage of any plant growing wild ;

(2) that in the case of the simple offence such property should form the subject of an offence only when it belongs to a person other than the offender ;

(3) that property should, however, be treated as belonging to a person when that person—

(*a*) has custody or control of it,

(*b*) has a proprietary right or interest in it (not being an equitable interest arising only from an agreement to transfer or grant an interest),

(*c*) has a charge on it.

IV. THE MENTAL ELEMENT AND THE ELEMENT OF UNLAWFULLNESS IN DAMAGE OFFENCES

The Existing Law

42. Most of the offences under the principal Act require the defendant to have acted "*unlawfully and maliciously*". There are, however, variants, namely—

(*a*) Alternative words:

Section 14 of the Criminal Justice Administration Act 1914 (as re-enacted by the Malicious Damage Act 1964) used the formula "*wilfully or maliciously*".

(*b*) Additional words requiring an ulterior intent:

(i) Setting fire to buildings with *intent to injure or defraud* (section 3).

(ii) Using explosives *with intent to destroy or damage* property (section 10).

(iii) Damaging *with intent to destroy or render useless* textile machinery and goods and other machinery (sections 14 and 15). (See also sections 23, 24, 28, 29, 31, 33, 35, 45 and 46, where similar words are used).

43. As we have decided in principle against any classification of offences by reference to the manner in which damage is done,[61] and against any ulterior intention as a test of liability save in regard to the aggravated offence, we are concerned only to simplify and clarify the present alternatives "unlawfully and maliciously" and "wilfully or maliciously". There

[61] Para. 15.

are two aspects covered by these words, the one related to the nature of the act and the other to the state of mind of the offender, though there is in some cases a merging of these two aspects. On analysis it becomes clear that in order that criminal liability should be attracted to an act of damage to property the act must be done—

(*a*) with the intention of destroying or damaging the property or being reckless as to whether it would be damaged or destroyed, and

(*b*) without lawful excuse.

We propose to treat these two elements separately.

The mental element

44. In the area of serious crime (in contrast to offences commonly described as "regulatory offences" in which the test of culpability may be negligence, or even a test founded on strict liability) the elements of intention, knowledge or recklessness have always been required as a basis of liability. The tendency is to extend this basis to a wider range of offences and to limit the area of offences where a lesser mental element is required. We consider, therefore, that the same elements as are required at present should be retained, but that they should be expressed with greater simplicity and clarity. In particular, we prefer to avoid the use of such a word as "maliciously", if only because it gives the impression that the mental element differs from that which is imposed in other offences requiring traditional *mens rea.* It is evident from such cases as *R.* v. *Cunningham*[62] and *R.* v. *Mowatt*[63] that the word can give rise to difficulties of interpretation. Furthermore, the word "maliciously" conveys the impression that some ill-will is required against the person whose property is damaged. It is presumably for this reason that section 58 of the principal Act specifically excludes the necessity for such ill-will. But the decision in *Cunningham,* though concerned with the Offences against the Person Act 1861, makes it clear that section 58 of the Malicious Damage Act is itself unnecessary.

45. For the simple offence we think that the necessary mental element should be expressed as an intention to destroy or damage the property of another or as recklessness in that regard. The intention or the recklessness need not be related to the particular property damaged, provided that it is related to another's property. If, for example, a person throws a stone at a passing motor car intending to damage it, but misses and breaks a shop window, he will have the necessary intention in respect of the damage to the window as he intended to damage the property of another. But if in a fit of anger he throws a stone at his own car and breaks a shop window behind the car he will not have the requisite intention. In the latter case the question of whether he has committed an offence will depend upon whether he was reckless as to whether any property belonging to another would be destroyed or damaged.

46. In the case of the aggravated offence there are two aspects of the mental element to be covered. In the first place the destruction of or damage to property must be with the intention of destroying or damaging

62 [1957] 2 Q.B. 396.
63 [1968] 1 Q.B. 421.

it, or with recklessness as to whether it is destroyed or damaged. In the second place there must be an intention by destruction or damage to endanger the life of another, or recklessness in that regard.

47. *We recommend that*—

(1) for the simple offence the requisite mental element should be an intention to destroy or damage the property of another, or recklessness as to whether another's property would be destroyed or damaged;

(2) in the aggravated offence the requisite mental elements should be—

(*a*) an intention to destroy or damage any property, or recklessness as to whether any property would be destroyed or damaged, and

(*b*) an intention by the destruction or damage to endanger the life of another, or recklessness as to whether the life of another would be endangered.

Unlawfulness

48. We think it better to make a clean break from the existing phraseology relating to unlawfulness and not to retain the word unlawfully in the definition of the offence. We think that the correct result will be best achieved by the use of the words "without lawful excuse", and by declaring where there might be any doubt, what will constitute a lawful excuse for these purposes. We consider that the absence of lawful excuse should be an element of the offence and thus the burden of proving its absence should be upon the prosecution in each case. In the majority of cases the absence of lawful excuse will be easily established by the evidence of the complainant or the owner of the property, or it will be a matter of inference from the circumstances as disclosed in the evidence. Although the accused will not have to raise the issue of lawful excuse, it will only be when he does raise it, or when the possibility of lawful excuse appears from the evidence that the question will arise. The definition of the offence is so framed that there is to be a burden upon the prosecution of proving the absence of lawful excuse, if the question arises.[64]

49. In most cases there is a clear distinction between the mental element and the element of unlawfulness, and in the absence of one or other element no offence will be committed, notwithstanding that damage may have been done to another's property. For example, a police officer who, in order to execute a warrant of arrest, has to force open the door of a house is acting with a lawful excuse although he intends to damage the door or the lock. On the other hand a person playing tennis on a properly fenced court who inadvertently hits a ball on to a greenhouse roof, breaking a pane of glass, acts without lawful excuse, but will escape liability because he has not the requisite intention.

50. If, however, an act of damage is done with the intention of doing damage under a *bona fide* claim of right which in fact does not exist, the

64 It is generally accepted that no burden of proof lies on the defence where there is an issue involving a matter of general justification or excuse, unless a statute specifically so provides (e.g. s. 19 of the Firearms Act 1968 and s. 2(2) of the Homicide Act 1957), or the common law so requires (e.g. where the defence of insanity is raised).

question arises whether an act of damage done in that state of mind, namely, believing genuinely in a right to do the damage, should be an offence. The problem thus raised concerns the extent to which an honest belief in a right to do damage to the property of another is a defence. We think it necessary to clarify this aspect of lawful excuse.

51. Although the defence of claim of right in the law of theft has long been, and still is, recognised,[65] its application in relation to the law of malicious damage is somewhat uncertain, as the authorities are inconsistent. If a pattern is discernible, it is that the law in this field has become more severe in recent times. It would appear that a "claim of right", whether reasonable or not, is a defence where the defendant erroneously believes that he is dealing with his own property or right in property.[66] Where, on the other hand, damage is done to the property of another in the honest belief by the defendant that he had a right to do the damage in protection of his own interests, it seems not only that the claim of right must be honest but that the means employed for its protection must be reasonable in relation to the supposed right.[67] *Gott* v. *Measures*[68] goes further. The defendant had sporting rights in land, and shot a dog which was chasing "his" game. He was convicted under section 41 of the principal Act, because

> ". . . it cannot be said that the respondent could have reasonably believed that he was entitled to shoot the dog as being done in protection of his property, because that would be a reasonable belief in something which the law does not recognise."[69]

The decision has been much criticised,[70] but, in the light of the recommendation made below, we feel that it is unnecessary for us to examine it in detail.

52. Our view is that where a person is acting to protect the property, or a right or interest in the property, of another or of himself (even if he only believes that he or another owns such property, right or interest), an honest (though erroneous) belief that—

(*a*) the property or the right or interest in it was in immediate need of protection by him, and

(*b*) the means of protection adopted were reasonable in the circumstances

should provide a lawful excuse for the destruction of or damage to property. This excuse, of course, would have no relevance to the aggravated offence (that is, where there was intention to endanger life or recklessness in that regard) since, for such an offence, it matters not whether the property is owned by the offender or someone else. We appreciate that our extended definition of lawful excuse introduces a less stringently framed defence than

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65 See s. 1(1) of the Larceny Act 1916 ". . . without a claim of right made in good faith"; now see s. 2(1) of the Theft Act 1968 ". . . in the belief that he has in law the right . . ."; *R.* v. *Bernhard* [1938] 2 K.B. 264.

66 *R.* v. *Twose* (1879) 14 Cox C.C. 327; commoner burning furze which she (erroneously) thought she had the right, as a commoner, to do.

67 Cf. *R.* v. *Day* (1844) 8 J.P. 186 with *R.* v. *Clemens* [1898] 1 Q.B. 556.

68 [1948] 1 K.B. 234.

69 Per Lord Goddard, C.J. at p. 239.

70 See e.g., *Russell on Crime*, 12th ed. pp. 1381 to 1383.

that of self-defence, where the force used must be reasonable when looked at objectively. There may therefore be the anomaly that different tests will apply to self-defence against bodily injury, but we do not think that that is sufficient reason to dissuade us from the present recommendation in this context.

53. *We recommend that*—

(1) it should be an essential element of the offence of damage to property that any destruction or damage should be without lawful excuse ;

(2) in addition to the presently accepted law it should be a lawful excuse for the destruction of or damage to property that a defendant, acting to protect his property or the property of another, honestly believed that the property was in immediate need of protection and that the means of protection adopted were reasonable in the circumstances. The excuse should be available even where the defendant believes, contrary to the actual facts, that he or another owns the property.

V. SUBSIDIARY OFFENCES

General

54. The principal Act deals with two offences which are subsidiary to the main offences which it creates, namely sending threatening letters (Section 50), and making or possessing any dangerous or noxious thing with intent to commit any of the main offences provided for in the Act (Section 54).

Threats

55. Section 50 penalises with 10 years' imprisonment sending or knowingly conveying any written threat to " burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle ". There are presumably historical reasons for the types of property to which the threats relate, but we can see no basis in present conditions for limiting the type of property for this purpose. We recommend that a threat to damage any property which could be the subject of a damage offence should be an offence. Further, there seems to be no good ground for limiting threats to written threats, for a telephonic threat, particularly if repeated, can cause more alarm in the recipient than any written threat. If the law is to be extended to cover telephonic threats, then logically there is no reason why it should not be extended to all threats, however made. The only limitation that needs to be imposed is that the threats should be intended to create a fear that what is threatened will be carried out.

56. The conduct threatened must, to be consistent, be broadly the conduct penalised by the main provisions of the Bill. Accordingly—

(*a*) It should be an offence to threaten to destroy or damage property belonging to another whether that other be the person threatened or

not. There is no reason to limit the threatening offence to a threat to destroy or damage the property of the person threatened. There are many situations in which threats made to one person to destroy or damage the property of another should be punishable, particularly when they are made as a means of persuasion or intimidation, or with the knowledge that they will be passed on to the person to whom the property threatened belongs. We considered a possible limitation restricting the offence to the case where there was a relationship of some kind between the person to whom the threat was made and the person whose property was threatened, but found that there was no sound basis for formulating a limitation. There is no such limitation in section 16 of the Offences against the Person Act 1861 under which a threat to kill the threatener's wife made to a probation officer has been held to constitute an offence.[71]

(*b*) It should be an offence to threaten to destroy or damage even the threatener's own property in a manner which the threatener knows will be likely to endanger the life of another, whether the person threatened or not. This recommendation retains the underlying principle of subjectivity which must in our view prevail in offences of a serious nature. We considered but rejected making it an offence for a person to threaten to destroy or damage his own property in a manner which (objectively) was likely to endanger the life of another.

57. *We recommend* that it should be an offence to make a threat to another without lawful excuse to destroy or damage that person's or another's property, or to destroy or damage even the threatener's property in a way which the threatener knows is likely to endanger the life of another, intending that the person threatened should fear that the threat would be carried out.

Possession offences

58. Section 54 of the principal Act prohibits, under pain of a maximum penalty of imprisonment for two years, making or knowingly possessing " any gunpowder or other explosive substances, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned ". So far as explosive substances are concerned, the Explosive Substances Act 1883 contains two provisions prohibiting the making or possession of explosives, one of these —section 3— carrying a maximum penalty of imprisonment for 20 years, the other—section 4—a maximum of 14 years' imprisonment. We do not propose to make any changes in this Act.

59. We think that the provisions of the principal Act can be simplified by making it an offence to have in one's custody or control anything which one intends to use or cause or permit another to use to destroy or damage property belonging to another or to destroy or damage one's own or the prospective user's property in a way which one knows is likely to endanger the life of some other person. This follows the pattern of the proposals we have made for the main offence and is in line with our proposals for the

[71] See *R.* v. *Solanke* [1970] 1 W.L.R. 1.

threatening offence. Having regard to the difficulties inherent in the concept of possession,[72] we prefer the idea of custody or control. These words are both to be found in the Statute Book, and together provide a better concept than " possession ", which is a technical term of some difficulty. Problems which may arise where a substance, such as a stick of gelignite, is slipped into a person's pocket without his knowledge will be wholly academic, because if that person has no knowledge of its presence he cannot have an intention to use it or permit or cause another to use it. If he has no intention to use it or permit or cause it to be used, he does not commit an offence under our proposal.[73]

60. The essential feature of the proposed offence is to be found not so much in the nature of the thing—for almost any every-day article, from a box of matches to a hammer or nail, can be used to destroy or damage property—as in the intention with which it is held. The intention of the possessor to use the property himself for the prohibited purpose is straightforward. It is also necessary to include the intention of the possessor to permit or cause another to use the thing, to cover the case, for example, of one member of an organisation who keeps material for making petrol bombs, intending to permit or cause another to use them for a prohibited purpose.

61. *We recommend* that it should be an offence for a person to have, without lawful excuse, custody or control of anything, intending to use it or to cause or permit another to use it to destroy or damage—

(*a*) any property belonging to another, and

(*b*) any property whether belonging to the offender or not in a way which he knows is likely to endanger the life of another.

VI. PENALTIES

The Present Law

62. Life imprisonment is the maximum sentence for offences under 15 sections of the principal Act,[74] including arson in various forms, damage by using explosives and riotous damage. Eight other sections carry a maximum sentence of 14 years imprisonment.[75] These include destroying hopbinds (section 19) and killing or maiming cattle (section 40). In addition, some offences under the Explosive Substances Act 1883 and the Offences against the Person Act 1861, both of which overlap with the principal Act, carry similar heavy penalties.[76] The maximum sentences of imprisonment throughout the principal Act vary widely and in an irrational manner. It is, for example, not obvious why, under present conditions, destroying hopbinds should attract a maximum sentence of 14 years' imprisonment while destroying works of art should attract a maximum of 6 months' imprisonment (Section 39).[77] There is also the offence created by the Dockyards Protection Act 1772

72 *Warner* v. *Commissioner of Police for the Metropolis* [1969] A.C. 256.

73 This will not necessarily be so under the Explosive Substances Act 1883.

74 Ss. 1 to 5, 9, 11, 14, 17, 26, 30, 33, 35, 42 and 47.

75 Ss. 6, 7, 10, 16, 19, 40, 45 and 49.

76 Under s. 3 of the 1883 Act the maximum is 20 years' imprisonment.

77 This latter offence may be thought to attract an inadequate maximum sentence when compared with the offence of removing articles from museums, etc. (s. 11 of the Theft Act 1968) for which the maximum is 5 years' imprisonment. See Criminal Law Revision Committee, Eighth Report, 1966 Cmnd. 2977, para. 57(ii).

(which we shall recommend be repealed) which still carries capital punishment. It is noteworthy that the only example of a prosecution for this offence cited in Archbold dates from 1777[78], this makes it even more anomalous that the scope of the offence should have been extended by Order to cover " any of His Majesty's military, naval or victualling stores " and other property vested in or under the control of the Minister of Technology.

63. On trial on indictment, fines are not limited save to the extent that they must not be unreasonable. The following are the maximum fines for cases of malicious damage tried by magistrates—

(1) For an indictable offence triable summarily with the accused's consent the maximum fine is £400.[79]

(2) For maliciously injuring or attempting to injure telegraphs, etc., the maximum fine on summary conviction is £100.[80]

(3) For maliciously committing damage to any real or personal property not exceeding £100 the maximum fine on summary conviction is £100.[81] The fine is £20 if the damage is £5 or less.

(4) Under other sections of the principal Act which create summary offences the maximum fine varies from 20s. to £20.[82]

Proposed scale of penalties

64. In the Working Paper, we tentatively suggested that the maximum penalty for the simple offence should be 7 years' imprisonment. The majority of our commentators thought this too low, and, on reflection, we agree that a maximum penalty of 10 years' imprisonment, which is the same as for theft and for obtaining property by deception under the Theft Act 1968, is appropriate. A maximum penalty of life imprisonment for the aggravated offence seems desirable. This offence, involving as it does endangering the life of another, may well occasionally take an extremely serious form and may call for unrestricted powers of punishment. Our reasons for the greater maximum penalty in the case of the simple offence committed by the use of fire we have already set out in paragraph 29. Where offences are tried summarily, the magistrates' power to sentence to imprisonment will be governed by section 19(6) of the Magistrates' Courts Act 1952, which provides for a maximum of 6 months.

65. In regard to fines it seems to us that the available sanctions in this field (as in other fields) should enable the Court to impose a penalty based on the gravity of the offence and other surrounding circumstances. Where offences are tried on indictment these sanctions should not be circumscribed by limits having capricious application, and the only limitations should be, as at present, that a fine must not be unreasonable. Where offences are tried summarily the magistrates' courts should have a wide and unfettered discretion to fine within the maximum of £400 recently fixed by section 43(1)

[78] *R.* v. *Hill* (1777) 20 St. Tr. 1317. See *Archbold*, 37th ed., para. 2274.

[79] Magistrates' Courts Act 1952, s. 19(6) as amended by the Criminal Justice Act 1967, s. 43(1).

[80] Malicious Damage Act 1861, ss. 37 and 38 as amended by the Criminal Justice Act 1967, 3rd Schedule.

[81] Criminal Justice Administration Act 1914, s. 14(1), as amended by the Malicious Damage Act 1964, s. 1.

[82] i.e. ss. 22, 23, 24, 25 and 41.

of the Criminal Justice Act 1967, and the existing limitations under the present Act should be abolished.

66. *We recommend* the following maximum penalties for offences of damage to property—

(1) if tried on indictment—

(*a*) for the simple offence, and for offences of threatening and possession, imprisonment for 10 years,

(*b*) for the simple offence where the destruction or damage is caused by fire, imprisonment for life,

(*c*) for the aggravated offence, imprisonment for life,

(*d*) for all offences, a fine limited only by its reasonableness,

(2) if tried summarily (for all offences other than the aggravated offence)—

(*a*) imprisonment for six months,

(*b*) a fine of up to £400.

VII. JURISDICTION

Existing Jurisdiction

67. Some 14 offences under the principal Act are triable only at Assizes. They vary from arson in its traditional sense (setting fire to any building—section 3) to certain forms of damage or obstruction to railway lines (section 35). But most of the specific offences created by the principal Act are indictable offences triable at Quarter Sessions.

68. Any malicious or wilful damage to property (provided that the damage does not exceed £100) is an offence which may be tried summarily,[83] subject to the question of ouster which we consider later. There are, however, a number of other cases in which offences of malicious damage may be tried by magistrates. The following is a summary—

(a) *Triable summarily only*

Minor offence of damaging trees, etc. (section 22); destroying fruit or vegetables in garden (section 23); destroying etc. vegetable products not growing in garden etc. (section 24); destroying etc. fence or wall etc. (section 25); attempting to injure telegraphs (section 38); killing or maiming animals other than cattle (section 41); maliciously damaging any property where the damage does not exceed £5 (section 51).[84]

(b) *With the consent of the accused*[85]

Setting fire to crops of corn etc. (section 16); attempting to set fire to crops of corn or to stacks etc. (section 18); destroying trees etc. (sections 20 and 21); maliciously damaging any real or personal

[83] See s. 14 of the Criminal Justice Administration Act 1914 (now re-enacted in the Schedule to the Malicious Damage Act 1964).

[84] As limited by Criminal Justice Administration Act 1914, s. 14(2), as amended.

[85] Magistrates' Courts Act 1952, s. 19 and Schedule 1.

property, (which is indictable only if, in the opinion of the magistrates the damage exceeds £5 (section 51 as amended)).

(c) *Summarily or on indictment, with different penalties*
Injuries to telegraphs (section 37).[86]

Proposals as to Jurisdiction

69. Offences punishable with life imprisonment are not triable by a court of Quarter Sessions,[87] and for this reason the aggravated offence, and the simple offence where fire is used and it is not tried summarily but on indictment, will be triable only at Assizes. Until the recommendations of the Royal Commission on Assizes and Quarter Sessions[88] are given effect, we do not think that there should be any change in the basic principles of jurisdiction in this regard. So far as the other offences are concerned we accept the policy evident in the Theft Act 1968, which is, subject to certain specified exceptions, to allow trial on indictment to take place before Assizes or Quarter Sessions or courts of equivalent status. It is our view, therefore, that, with the exception of the aggravated offence and the simple offence where fire is used, all the offences should be within the jurisdiction of Quarter Sessions. We do propose, however, that all offences of damage to property (other than the aggravated offence) should be triable summarily with the consent of the defendant in terms of section 19 of the Magistrates' Courts Act. It is sometimes argued that this treatment tends to overload the higher courts, because the defendant under the section 19 procedure has the right to insist on trial on indictment. Statistics do not seem to bear this out and the decided cases[89] indicate that the courts consider that serious cases are too often proceeded with summarily. The flexibility of section 19 gives more opportunity for righting any initial mistake than would the creation of a purely summary offence. If a purely summary offence were created the maximum period of imprisonment for it could not exceed 3 months, for if it did the defendant would then have the right to elect trial on indictment. Thus, once the prosecution had decided to charge the summary offence, there would be no method whereby the defendant could be brought before a higher court on that charge, either at his own wish or at the wish of the prosecution. It is otherwise under section 19. Even if the prosecution is begun as a summary trial, the magistrates or the defendant have the right to convert it into a trial on indictment, and, even if the trial proceeds summarily, the magistrates may, if the defendant appears to have a bad record, commit for sentence (including Borstal training) to the higher court.

70. Our recommendation will mean that magistrates' courts will be able to try offences of damage to property by fire, even though the offences, if tried on indictment would carry a maximum sentence of life imprisonment. We do not see anything objectionable in this,[90] for of course the sentencing

86 As amended by Magistrates' Courts Act 1952, s. 131 and 5th Schedule and, as to penalty, by Criminal Justice Act 1967, 3rd Schedule.

87 Criminal Law Act 1967, s. 8.

88 (1969) Cmnd. 4153.

89 *R.* v. *Bodmin Justices* [1947] K.B. 321, per Lord Goddard, C.J.; *R.* v. *Coe* [1968] 1 W.L.R. 1950; *R.* v. *Kings Lynn Justices, ex. p. Carter* [1968] 3 W.L.R. 1210, per Lord Parker, C.J.

90 This was the position in regard to offences under s. 52 of the Post Office Act 1953, which until 1968 carried a maximum sentence of life imprisonment and yet were triable summarily with the consent of the defendant.

powers of magistrates' courts are limited to imprisonment for 6 months and to a fine of £400, and there are many minor offences of damage to property by fire for which such punishment is adequate, and which should be dealt with summarily both in the interests of the public and of the defendant. Such offences are now triable summarily with the consent of the defendant as contraventions of section 51 of the principal Act or as purely summary offences under section 14 of the Criminal Justice Administration Act 1914 and, in our view, should continue to be triable summarily subject to the defendant's election to be tried on indictment.

71. Two important bodies, the Magistrates' Association and the Justices' Clerks' Society, suggested to us that a purely summary offence might with advantage be created, based perhaps on a maximum value of property damaged of £100. In spite of the great weight which we attach to the opinions of two bodies so intimately acquainted with the problems of summary proceedings, we have not adopted the suggestion. We observe that, in the Theft Act, there is only one summary offence of taking—borrowing of a pedal cycle without the owner's consent. The reason for this must be that this offence, alone amongst the offences with which that Act deals, is generally of a petty nature, whereas other offences of dishonesty may be serious or petty in an infinite gradation which has no necessary connection with the value of the property involved. This is at least equally true of offences of damage to property. We think that our recommendation allowing all offences of damage to property other than the aggravated offence to be tried summarily with the consent of the defendant will meet the suggestion of these 2 bodies.

72. We also considered, and rejected, the possibility of making the offences "hybrid", that is to say, triable on indictment or summarily with different penalties. The Law Society expressed its dislike of "hybrid" offences, and we agree. The principal advantage over the section 19 procedure of creating a "hybrid" offence is that it is possible to limit the punishment which can be inflicted by magistrates to less than the 6 months or the £400 fine which they would otherwise have power to inflict. It does not seem to us that these powers are in any way excessive for offences of damage to property.

73. *We recommend that*—

(1) the aggravated offence should be triable at Assizes only,

(2) the simple offence when fire is used should be triable only at Assizes if tried on indictment, but should be triable summarily with the consent of the defendant,

(3) all other offences should be triable on indictment before any of the higher courts, or summarily with the consent of the defendant.

VIII. OUSTER OF JURISDICTION

The present law

74. It is an ancient rule of the common law that the jurisdiction of magistrates is ousted in certain circumstances if they are, in giving a decision upon the case before them, called upon to adjudicate upon a dispute of title to real

property. This has been referred to as a procedural defence[91] when raised in a magistrates' court, although it may amount to more than that, where, for example, an offence is triable summarily only and a dispute of title to real property is raised by the defendant. The jurisdiction of the magistrates is then ousted by the Rule, but there is no other court before which the case can be tried. It must be stressed that the dispute which will oust the jurisdiction of magistrates is a dispute of title, and not a *bona fide* claim of right.

75. The rule is far less important than it appears to be because, curiously enough, it does not operate where one of the very issues to be tried is the title to real property. In *R.* v. *Bradley*,[92] for example, it was held that there was no ouster of jurisdiction where, in a trial for obstructing the highway, the accused raised the defence that he owned the property on which he had erected the obstruction. In the context of offences of damage to property it will be for the prosecution to prove that the property damaged belonged to another.[93] Where there is a real issue as to whether the property belongs to the defendant or another, the question of ownership will be one of the basic matters to be tried ; and even if this relates to the title to real property the raising of the issue will not oust the jurisdiction of magistrates.

76. One of the few cases where the ouster rule could apply would be where A breaks down the fence of another to assert his right of way over that other person's land, alleging that the right exists, and not merely relying on an honest belief in the right. Such an issue can give rise to complicated and difficult questions of law, and it is presumably the lack of capacity of a magistrates' court to investigate problems in the field of real property which is the origin of the ouster rule.[94]

77. The position is complicated so far as offences of damage to property are concerned by section 14(1) of the Criminal Justice Administration Act 1914,[95] which provides—

> " If any person wilfully or maliciously commits any damage to any real or personal property whatsoever, either of a public or private nature, and the amount of the damage does not, in the opinion of the court, exceed £100, he shall be liable on summary conviction . . . Provided that this provision shall not apply where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of."

78. The reported cases[96] appear to decide that the common law rule of ouster is replaced, by virtue of the proviso, by a statutory ouster, relating to chattels as well as to real property, where the issue arises of whether the defendant acted under a fair and reasonable supposition, whereas at common law jurisdiction was ousted only where the defendant actually disputed the title to the property. Generally, where a defence of claim of right is raised in criminal proceedings, whether it takes the form of " fair and reasonable

91 See R. N. Gooderson "Claim of Right and Dispute of Title" [1966] C.L.J. 90, 216. The article contains an exhaustive review of the subject of Ouster.
92 (1894) 70 L.T. 379.
93 See Clause 1 of the draft Bill.
94 R. N. Gooderson, *op. cit.* at p. 227.
95 As amended by and re-enacted in the Schedule to the Malicious Damage Act 1964.
96 *Usher* v. *Luxmore* (1889) 62 L.T. 110; *Brooks* v. *Hamlyn* (1899) 19 Cox C.C. 231; *Croydon Rural District Council* v. *Crowley* (1909) 22 Cox C.C. 22; *White* v. *Feast* (1872) L.R. 7 Q.B. 353.

supposition" or some other form, one would in the ordinary way expect it to lead, if it succeeds, to an acquittal, or, if it fails, to a conviction. But in the field of malicious damage, the successful raising of the "fair and reasonable supposition" defence before magistrates can lead, and lead only, to committal for trial. We consider this state of affairs anomalous.

79. We believe that there is no ground for retaining either the statutory ouster or ouster at common law. Since at common law a magistrates' court has jurisdiction to determine questions of ownership of real property when that is one of the very facts in issue, there seems no logic or justification in retaining the ouster rule for the type of case where the ownership of real property is only indirectly in issue. Since the effect of the statutory ouster is that the successful raising of the fair and reasonable supposition defence before the magistrates can lead only to committal for trial, it would conflict with our recommendation that a successful defence of claim of right should lead to an acquittal, just as it does under the Theft Act. There is no reason why a magistrates' court should not try questions of honest belief.

80. *We therefore recommend* that both the statutory ouster and the common law ouster rule should cease to apply to prosecutions for offences of damage to property.

IX. COMPENSATION

Present law

81. Section 4 of the Forfeiture Act 1870 provided generally for the award of compensation for any loss of property suffered through a felony up to the sum of £100 by any court which convicted a defendant of a felony, and section 34 of the Magistrates' Courts Act 1952 gave the same power to a magistrates' court which convicted on an indictable offence. The limit was increased to £400 in each case by the Criminal Law Act 1967[97] which extended the compensation to damage to property, and allowed it to be awarded when the defendant was convicted on indictment. Such an award can be made only on the application of the person aggrieved and the court must hear evidence of the amount of the loss or damage suffered[98] which must have been suffered through or by means of the offence.[99] The amount awarded is deemed to be a judgment debt and may be enforced in the same way as an order for costs under the Costs in Criminal Cases Act 1952.[1] There is a right of appeal to the Criminal Division of the Court of Appeal against an order.[2]

82. There are also the following special provisions relating to compensation for malicious damage—

(1) Section 14 of the Criminal Justice Administration Act 1914,[3] which creates a summary offence of damaging property to the extent

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[97] Schedule 2, para. 9.
[98] *R.* v. *Taylor* [1969] 2 All E.R. 662.
[99] The loss or damage does not include loss or damage due to an accident arising out of the presence of a motor vehicle on a road: Criminal Law Act 1967 Schedule 2 para. 9.
[1] Ss. 10(1) and 18(3) of that Act.
[2] Criminal Appeal Act 1968, ss. 9 and 50; *R.* v. *Parker* [1970] 1 W.L.R. 1003.
[3] As amended by the Malicious Damage Act 1964.

of £100 or less, provides for the court to order compensation for the damage done.

(2) In the case of certain minor offences in the principal Act[4] there is provision, in place of imprisonment, for the imposition of fines in addition to orders for the payment of compensation. Payment of the sum adjudged to be paid precludes proceedings by the complainant for any other compensation.[5]

(3) Under section 38 of the Metropolitan Police Courts Act 1839 power is given to order compensation for wilful damage by tenants of any house or lodging within the Metropolitan Police District, such compensation not to exceed £15.

Proposals for simplification

83. The view taken in the Working Paper was that the Law Commission ought to wait for the review of compensation powers in criminal proceedings by a sub-committee of the Advisory Council on the Penal System (the Widgery Committee) before making any recommendations. The Justices' Clerks' Society regretted this because ". . . the public are increasingly concerned less with legal niceties of jurisdiction between criminal and civil courts than with the elementary justice of ensuring that defendants who cause damage and involve loss should pay compensation". We think that there is force in this argument, and, in any case, we cannot escape at least a limited review of compensation in the field of criminal damage, because of the provisions to which we have referred which we would wish to repeal and which will therefore need replacement.

84. The most useful existing provision for compensation is that contained in section 4 of the Forfeiture Act 1870, and that Act as read with the Magistrates' Courts Act 1952, and in our view there should be some such general provision relating to loss caused by damage to property in any new Act, unless by then the Report of the Widgery Committee has been made and implemented.

85. If there is to be some general provision in a new Act there are a number of specific questions which arise—

(1) Is there any necessity for an application for compensation by a complainant?

(2) What effect should an order for compensation have upon subsequent civil proceedings arising out of the same wrongful conduct?

(3) What rules should be laid down as to how the compensation is to be fixed?

(4) What limits, if any, should be placed upon the amount to be awarded by particular courts?

86. The requirement that an application should be made before compensation can be awarded should not in our view be continued as it is both unnecessary and may give rise to hardship in certain cases. The complainant who gives evidence may be released before the case ends, or he may not

[4] e.g. ss. 22, 23, 24, 25 and 41.
[5] Principal Act s. 67.

know of his rights, or in a case tried on indictment or on a plea of guilty he may not be present at all. We think it right that courts should have power to award summary compensation of their own motion.

87. It is generally accepted that an order under section 4 of the Forfeiture Act does not preclude a person who has suffered damage from instituting civil proceedings in respect of his loss insofar as the loss is in excess of the amount ordered,[6] even if this involves recovering a greater amount than the criminal court was prepared to award.[7] We do not regard summary compensation in a criminal case as a true substitute for civil proceedings, and of course once compensation has been paid the person who has received it should be able to proceed in a civil case only for the balance of damage suffered. Nor do we feel that there should be, at any one time, two orders in existence for payment of the same damage. In our view, therefore, once an order for compensation has been made, any further award must take into account what has already been ordered whether or not any of it has been recovered. Subject to that qualification, there should be no limitation of the right to proceed for any loss suffered, even though this means recovering more than the criminal court was prepared to award as compensation. This involves no change in the law.

88. We do not think that any precise rules should be laid down as to how the amount of compensation is to be fixed ; it should be such compensation for the whole or part of the loss or damage to the property as the court thinks just. The court will, therefore, have to be satisfied as to the approximate cost of making good the loss or damage ; and it will, by the accepted rules of natural justice, be obliged to give the convicted person an opportunity to deal with the question of whether an order should be made, and, if so, of the amount of any award to be made. We think it important that the court should have a discretion whether or not to proceed summarily, for the procedure that we envisage will be designed mainly for the straightforward case, and we assume that in the exercise of their discretion courts will be unlikely to proceed summarily if complicated civil disputes are in issue.

89. The Forfeiture Act places a limit of £400 on the amount of compensation that a court may award in criminal proceedings, the limit having been raised to this sum from £100 by the Criminal Law Act 1967. Magistrates' courts are subject to the same limit, and we think that in such courts there is justification for retaining this limit. On the other hand, we see no reason why there should be a limit on the amount the higher courts can award. In practice, where very serious damage has been done cases are likely to be tried at Assizes, and if the court is prepared to make an award it should be free to do so up to any amount that seems just. We do not favour limiting the discretion of courts with hard and fast rules, particularly in a field which is very much incidental to the main question of conviction and sentence in a criminal case. We feel that the courts will have no difficulty in adopting general principles to guide them on questions of when, in what manner, and to what extent they will exercise their discretion.

[6] *Barclays Bank* v. *Milne* [1963] 1 W.L.R. 1241, 1244 and *Motor Finance Co.* v. *Eves* [1959] C.L.Y. para. 3384.
[7] *Leicester & Co.* v. *Cherryman* [1907] 2 K.B. 101.

90. *We recommend* that courts should have a summary power to award compensation, without the necessity of an application, and that the maximum award should be limited only in the case of magistrates' courts to £400.

X. REPEAL POLICY

General

91. Since the reform of the law of offences of damage to property is a part of the overall scheme of codification of the criminal law, it seems right that all serious offences of damage to property, whether offences at common law or by statute, should be dealt with in the new law and not elsewhere. The basic assumption that we make is that one should expect to find the law on the subject in the Bill and not in a number of particular statutes.

92. There are some offences which are obviously ripe for repeal, some of which should be retained despite the repeal policy which we think should be adopted, and some where the case for either course is not absolutely clear. The offences which have to be considered can be dealt with under two main heads—

(1) Offences of damage to property which appear in certain statutes that deal broadly with a particular area of the law, where the creation of the offence is merely incidental to the main purpose of the legislation, and

(2) Offences of damage to property created by legislation which is concerned primarily to create such offences in a particular context.

Offences of damage incidental to the main purpose

93. So far as the first type of legislation is concerned the principles upon which we have based our decision are—

(*a*) Offences of damage requiring intention or recklessness,[8] usually characterised by the word "maliciously" or "wilfully" or both, should be repealed.

(*b*) Offences of absolute liability,[9] or which require negligence[10] for their commission should not be repealed.

(*c*) Where in one offence-creating section both wilful and negligent damage is penalised[11] we decided that wilful damage should not be excised. To excise it could create difficulties for the prosecution, which can now prefer a charge covering both wilfulness and negligence in the alternative, whereas, if the offence of wilful damage were removed from the relevant Act, alternative charges would have to be laid, one under the Act and one under the Bill. This would cause unnecessary complication, especially where the offence under the Act is a summary offence, as all offences under the Bill are

[8] e.g. s. 8(2)(*b*) of the Manoeuvres Act 1958.
[9] e.g. s. 24 of the Railways Clauses Consolidation Act 1845.
[10] e.g. s. 28 of the London Hackney Carriage Act 1843.
[11] e.g. s. 35(4) of the Water Act 1945.

indictable. On the other hand, where wilful damage can be excised from an offence-creating section without this complication,[12] we think it should be excised.

(d) Where a provision creates an offence which is essentially one of deception or dishonesty, we decided that it should not be repealed solely because the means used might include damage to property (usually documents).[13]

(e) Where there are provisions which create offences which are essentially offences of interference or tampering with property,[14] these should not be repealed merely because they may involve damage to property. However, where it is possible to have a clean repeal by removing certain trivial offences which are nonetheless non-damage offences, this should be done.[15]

Offences of damage in a particular context

94. So far as the second type of legislation is concerned the most desirable course would, in our view, be to eliminate as far as possible the penalising of the same conduct by different provisions in the law. For example, an offence such as that created by section 1 of the Dockyards etc. Protection Act 1772[16] (wilfully and maliciously burning or destroying ships, materials, stores and ammunition) should be repealed. Although the scope of this Act has been extended from time to time to cover installations other than purely naval and military installations, there has been no prosecution under it reported since 1777, nor have we had any indication that the departments concerned with it have any wish that the Act should be retained. There are, however, certain practical difficulties in achieving the desired end with regard to earlier legislation which deals with a special branch of the law but which incidentally provides for offences of the character dealt with in our proposed Bill.[17] For example, the Service Acts[18] contain provisions creating certain offences of wilful damage principally to service property. It would be possible to repeal the damage offences in this legislation and rely on section 70 of the Army Act (and its equivalent in the others) which makes it an offence to commit civil offences. On the other hand the offence-creating provisions of the Service Acts are essentially concerned with service discipline. It would be possible to substitute a new offence for that of wilful damage in sections 44 and 45 of the Army Act (and the equivalent sections in the other Acts), but section 44(1)(*d*) and (2)(*b*) and section 45(*c*) also proscribe the causing of damage by wilful neglect and we would not wish to alter those paragraphs. This form of neglect could be quite different from the recklessness which features in clause 1 of the Bill. Accordingly, we do not think that we should alter these sections or the corresponding sections in the other two Acts.

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12 e.g. s. 54(1) of the Metropolitan Police Act 1839.

13 e.g. ss. 328(1), 329 of the Companies Act 1948, and s. 20 of the Theft Act 1968.

14 e.g. s. 24(5) of the Salmon and Fresh Water Fisheries Act 1923.

15 e.g. s. 58 of the Cemeteries Clauses Act 1847.

16 See para. 12(4).

17 See para. 2.

18 Army Act 1955, Air Force Act 1955, Naval Discipline Act 1957.

95. There are two particular areas in which we feel that some overlapping with offences against property must remain at least for the present, namely—

Offences against the Person Act 1861,

Explosive Substances Act 1883.

96. As to offences against the person, since the aggravating feature of the more serious offence we propose is now expressed in terms of intention to endanger the life of another, or being reckless in that regard, there will not be the same kind of overlapping between offences under the Bill and offences against the person as there would have been under the proposals in our Working Paper.[19] In practice, it will only be where damage to property is caused with intention to endanger the life of another that there will be any question of overlapping. In such cases if the other person is killed the intention requisite for murder will probably be present; if he is not killed the facts will usually establish attempted murder. As the penalties for these offences will be the same as those to which the offender would be subject under the Bill, the overlap will not result in any inconsistency in the law.

97. As to the Explosive Substances Act, we provisionally proposed in the Working Paper that sections 2 and 3 of the 1883 Act should be repealed, first, because they do no more than create offences of damage to property and to the person by a particular method (section 2 relates to causing damage and section 3 to an attempt to do so), and, secondly, because the test of culpability is partly objective, since the explosion must be " . . . of a nature likely to . . . cause serious injury to property ". By contrast, reckless damage to property is based on foresight by the offender of the risk, or, in other words, a subjective test. We do not now, however, favour any changes in that Act. The main reason for this is that the 1883 Act is primarily concerned, not with damage to property as such, but with the maintenance of public order. The Act is, therefore, more appropriate for review in the context of offences against public order.

Offences under subordinate legislation

98. We thought it right not to interfere in any way with the scope of provisions which conferred power to make byelaws, regulations and the like for preventing damage, merely because they enabled offences to be created which are criminal damage offences. The fact that the enabling power allows an offence of damage to property requiring intention to be created does not mean that the power will be exercised in this way. But there may well be many provisions in existing local enactments and subsidiary legislation which create offences of intentional or reckless damage to property. We think that there should be a simple procedure for exercising or amending such provisions if the authorities concerned consider in the light of the offences which the Bill creates that they are no longer required, or should be brought into conformity with the Bill.[20]

99. *We recommend* that so far as is possible the offences in the Bill should replace all other offences of damage to property in which the mental element required is at least intention or recklessness.

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19 Para. 66(b).
20 See clause 11(9)–(11).

XI. MISCELLANEOUS

100. The draft Bill contains provisions in clauses 6 and 9 dealing with powers of search for things used or intended for use in committing offences of criminal damage, and with evidence in connection with offences under the Bill. These provisions are dealt with in the explanatory notes on the two clauses.

XII. COMPREHENSIVE SUMMARY OF RECOMMENDATIONS

101.

(1) In a new Act to replace the Malicious Damage Act 1861 there should be two offences of damage to property, namely—

(*a*) a simple offence of destroying or damaging the property of another : (paragraph 33(1) and draft clause 1(1)), and

(*b*) an aggravated offence of destroying or damaging property, whether belonging to another or not, with the intention of endangering the life of another or being reckless in that regard : (paragraph 33(2) and draft clause 1(2)).

(2) The subject of an offence of damage to property should be all tangible property, real or personal, except mushrooms growing wild and the flowers, fruit or foliage of any plant growing wild : (paragraph 41(1) and draft clause 10(1)).

(3) Property should be treated as belonging to another when—

(i) it is in the custody or control of another, or

(ii) another has a proprietary right or interest in it, or

(iii) another has a charge on it : (paragraph 41(3) and draft clause 10(2)).

(4) The mental element necessary for liability in respect of the simple offence should be an intention to destroy or damage the property of another, or recklessness as to whether another's property would be destroyed or damaged : (paragraph 47(1) and draft clause 1(1)).

(5) The mental element necessary for liability in respect of the aggravated offence should be the same as that in respect of the simple offence, together with an intention by the destruction of or damage to property to endanger the life of another or recklessness in that regard : (paragraph 47(2) and draft clause 1(2)).

(6) It should be an essential element of the offence of damage to property that any destruction or damage should be without lawful excuse : (paragraph 53(1) and draft clause 1).

(7) In addition to the presently accepted defences it should be a lawful excuse that a defendant, acting to protect his property or the property of another, honestly believed that the property was in immediate need

of protection and that the means of protection adopted were reasonable in the circumstances. This excuse should not be available in respect of the aggravated offence : (paragraph 53(2) and draft clause 5).

(8) It should be an offence to threaten without lawful excuse to destroy or damage property belonging to another where the threat is made with the intention that the person threatened should fear that it would be carried out. If the threat is to do damage in a way which the threatener knows is likely to endanger the life of another it should be immaterial that the property belongs to the threatener : (paragraph 57 and draft clause 2).

(9) It should be an offence for a person to have without lawful excuse custody or control of any thing intending to use that thing or to cause or permit another to use that thing to destroy or damage—

(*a*) any property belonging to another, or

(*b*) any property whether belonging to himself or another in a way which the defendant knows is likely to endanger the life of another : (paragraph 61 and draft clause 3).

(10) The maximum terms of imprisonment should be—

(*a*) for the simple offence and for offences of threatening and possession, imprisonment for 10 years,

(*b*) for the simple offence where the destruction or damage is caused by fire, imprisonment for life,

(*c*) for the aggravated offence, imprisonment for life,

(*d*) for all offences tried summarily, 6 months' imprisonment : (paragraph 66(1) and draft clause 4).

(11) The maximum fines should be—

(*a*) for offences tried on indictment, unlimited save by reasonableness,

(*b*) for offences tried summarily, £400 : (paragraph 66(2) and draft clause 4).

(12) With the exception of the aggravated offence, which should be triable at Assizes only, and the simple offence where fire is used which when tried on indictment should be triable at Assizes only, all offences should be triable on indictment before any of the higher courts or summarily with the consent of the defendant : (paragraph 73 and draft clause 7(1)).

(13) Both the statutory ouster and the common law ouster rule applicable in summary proceedings should cease to apply to prosecutions for offences of damage to property : (paragraph 80 and draft clause 7(2)).

(14) The courts should have a summary power to award compensation, without the necessity of an application, and the maximum award should be limited only in the case of magistrates' courts to £400 : (paragraph 90 and draft clause 8).

(15) So far as possible the aim should be that the offences in the Bill should replace all other offences of damage to property in which the mental element required is at least intention or recklessness: (paragraphs 91–99 and draft clause 11).

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

24*th July*, 1970.

APPENDIX A

Draft Criminal Damage Bill

DRAFT

OF A

B I L L

TO

REVISE THE LAW of England and Wales as to offences of damage to property, and to repeal as respects the United Kingdom certain enactments relating to such offences; and for connected purposes.

Destroying or damaging property.

1.—(1) A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.

(2) A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

(*a*) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(*b*) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.

Clause 1

1. This clause creates the two main offences of the Bill—

(*a*) the simple offence of destroying or damaging another's property, and

(*b*) the aggravated offence of destroying or damaging any property intending to endanger the life of another, or being reckless in that regard.

The simple offence except where fire is used in its commission attracts a maximum penalty of ten years' imprisonment, whereas the aggravated offence and the simple offence when fire is used attract a maximum penalty of life imprisonment (clause 4).

2. The simple offence is a comprehensive one covering the destruction of or damage to any type of tangible property by any means. It replaces a multiplicity of offences of damage in the Malicious Damage Act 1861, the common law offence of arson, and a number of offences of damage to property in particular Acts (see clause 11 and the Schedule).

3. The phrase "without lawful excuse" is used to replace the word "unlawfully" which occurs in most sections of the 1861 Act. The phrase qualifies the doing of the act which causes the destruction or damage, and may or may not be unrelated to the mental element with which the act is done. It is, for example, unrelated where a police officer who, in order to execute a warrant of arrest, has to force open the door of a house; he acts with lawful excuse although he intends to damage the door or the lock. It is, however, related where a person, believing that his property is in immediate need of protection (although it is not) damages another's property to protect his own; his excuse lies in his belief. The absence of lawful excuse is made an element of the offence and the burden of proving such absence, as under the present law, will be upon the prosecution.

4. Property is defined in clause 10 and means property of a tangible nature, whether real or personal, and includes, in general, those movables which are capable of being stolen.

5. The simple offence is limited to destroying or damaging *another's* property. The question of when property is regarded as property belonging to another is dealt with in the note on clause 10(2). Subject to subsection (2), the clause does not make it an offence of damage to property to destroy or damage one's own property even if done with intent to defraud another. Dishonestly obtaining property, including money, belonging to another by deception is, of course, an offence under section 15 of the Theft Act 1968.

6. Destroying or damaging property is made an offence only when this is done either—

(*a*) intending to destroy or damage any property belonging to another, or

(*b*) being reckless as to whether any property belonging to another is destroyed or damaged.

The mental element (*mens rea*) necessary to bring an act within the clause is intention or recklessness in relation to the destruction or damage not of particular property, but of any property belonging to another. For example, if a person throws a stone at a passing motor car intending to damage it, or being reckless as to whether he does so, but misses and breaks a shop window, he will have the necessary *mens rea* in respect of the damage to the window since he intended to cause or was reckless

Clause 1 continued

as to causing damage to the property of another. But if in a fit of anger he throws a stone at his own car and breaks a shop-keeper's window behind the car his guilt will depend upon whether he was reckless in relation to the damage to the shop window.

7. The additional feature necessary for the aggravated offence is that the defendant intended by the destruction of or damage to property to endanger the life of another or was reckless as to whether the life of another would be endangered.

8. It is immaterial in the aggravated offence whether the property destroyed or damaged was the property of another or the defendant's own property.

Threats to destroy or damage property.

2. A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out,—

(*a*) to destroy or damage any property belonging to that other or a third person ; or

(*b*) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person ;

shall be guilty of an offence.

Possessing anything with intent to destroy or damage property.

3. A person who without lawful excuse has anything in his custody or under his control intending to use it or cause or permit another to use it—

(*a*) to destroy or damage any property belonging to some other person ; or

(*b*) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person ;

shall be guilty of an offence.

Punishment of offences.

4.—(1) A person guilty of an offence under section 1(1) above committed by destroying or damaging property by fire or an offence under section 1(2) above shall on conviction on indictment be liable to imprisonment for life.

(2) A person guilty of any other offence under this Act shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.

Clause 2

1. This clause creates a general offence of threatening to destroy or damage property. The threat must be to destroy or damage either—

(*a*) property belonging to the person threatened or to a third party, or

(*b*) the threatener's own property in a way which he knows is likely to endanger the life of another, whether it be the person to whom the threat is made or another.

2. To be an offence the threat must be made—

(*a*) without lawful excuse, and

(*b*) intending that the person threatened should fear that the threat would be carried out.

3. In contrast to clause 1 no distinction is made as to penalty between threats to commit the simple offence and threats to commit the aggravated offence. The penalty in each case is ten years' imprisonment.

Clause 3

1. This clause creates the offence of having without lawful excuse the custody or control of anything, intending to use it (or to cause or permit another to use it) to destroy or damage property belonging to another, or to destroy any property in a way which the offender knows is likely to endanger the life of another.

2. " Custody " means physical custody and " control " imports the notion of the power to direct what shall be done with the property in question, and these words are intended to provide a clearer concept than " possession " which is a technical term of some difficulty—see *Warner* v. *Commissioner of Police for the Metropolis* [1969] 1 A.C. 256.

3. The essential feature of the offence is to be found not in the nature of the thing held, but in the intention with which it is held. This intention cannot be present unless the offender has knowledge as to what he has in his custody or control.

4. The maximum penalty for this offence is ten years' imprisonment. (See clause 4).

Clause 4

1. This clause provides the maximum penalties for offences under the Bill—

(*a*) imprisonment for life for the aggravated offence under clause 1(2), and for the offence under clause 1(1) where fire is used, and

(*b*) imprisonment for ten years for the simple offence under clause 1(1) where fire is not used, and for threatening and having custody or control with intent under clauses 2 and 3 respectively.

2. For offences tried summarily with the consent of the defendant the magistrates' courts' powers will be to impose—

(*a*) up to 6 months' imprisonment, and/or

(*b*) a fine of up to £400.

(see clause 7).

" Without lawful excuse ".

5.—(1) This section applies to any offence under section 1(1) above and any offence under section 2 or 3 above other than one involving a threat by the person charged to destroy or damage property in a way which he knows is likely to endanger the life of another or involving an intent by the person charged to use or cause or permit the use of something in his custody or under his control so to destroy or damage property.

(2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

(*a*) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances ; or

(*b*) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—

(i) that the property, right or interest was in immediate need of protection ; and

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.

(4) For the purposes of subsection (2) above a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.

(5) This section shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

Clause 5

1. This clause, whilst preserving all existing defences (see subsection (5)), provides for certain special lawful excuses, as to the impact and extent of which, on the law as it stands, there is some doubt. These are—

(*a*) an honest belief that the owner of the property concerned has consented to its destruction or damage, or would have consented had he known the circumstances ; and

(*b*) an honest belief that it was reasonable to destroy or damage property to protect property belonging to oneself or another, or to protect a right or interest (as defined in subsection (4)) which was or was believed to be vested in oneself or another.

2. The operation of the clause does not extend to the aggravated offence under clause 1(2), or to the offence of threatening under clause 2 or to the possession with intent offence under clause 3(*b*) where the threat or the intention relates to destruction or damage of property in a way which the offender knows is likely to endanger the life of another.

3. Subsection (2)(*a*), reinforced by subsection (3), makes it clear that an honest, though unjustified, belief in the consent of the owner will constitute a lawful excuse for destruction of or damage to property within the range of offences to which the clause applies (see subsection (1)).

4. Subsection (2)(*b*) provides that an honest belief in a right to protect property, or a right or interest in property, whether one's own or another's, will afford a lawful excuse for the destruction of or damage to property within the range of offences to which the clause applies.

5. The excuse thus provided will cover cases where the offender mistakenly believes that he or some other person has a right which requires protection (thus over-ruling *Gott* v. *Measures* [1948] 1 K.B. 234). The excuse provided under this subsection is subject to two conditions—

(1) that there be an honest belief in the immediate necessity of protection,

(2) that there be an honest belief in the reasonableness of the means used or proposed to be used.

6. Subsection (4) makes it clear that among the rights covered there are such rights as a right to lead water over another's land or sporting rights.

Search for things intended for use in committing offences of criminal damage.

6.—(1) If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse—

(*a*) to destroy or damage property belonging to another ; or

(*b*) to destroy or damage any property in a way likely to endanger the life of another,

the justice may grant a warrant authorising any constable to search for and seize that thing.

(2) A constable who is authorised under this section to search premises for anything, may enter (if need be by force) and search the premises accordingly and may seize anything which he believes to have been used or to be intended to be used as aforesaid.

(3) The Police (Property) Act 1897 (disposal of property in the possession of the police) shall apply to property which has come into the possession of the police under this section as it applies to property which has come into the possession of the police in the circumstances mentioned in that Act.

Jurisdiction of magistrates' courts.

7.—(1) In Schedule 1 to the Magistrates' Courts Act 1952 (indictable offences triable summarily with the consent of the accused when adult), for paragraph 2 there shall be substituted the following paragraph:—

" 2. Offences under section 1(1), 2 and 3 of the Criminal Damage Act 1970 ".

(2) No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved shall preclude magistrates' courts from trying offences under this Act, or any other offences of destroying or damaging property.

Clause 6

1. This clause is parallel to section 26 of the Theft Act 1968. Its purpose is to authorise the issue of a warrant to search for and seize anything used or intended to be used for committing an offence of criminal damage, and to regulate the search and seizure, and the disposal (subsection (6)) of any property seized.

2. The powers conferred by this clause embrace things suspected of having been used or of being intended to be used for the commission of a damage offence, and thus the clause amplifies the precedent of section 55 of the Malicious Damage Act 1861, which is concerned with things kept for the purpose of being used to commit the more serious offences under that Act.

Clause 7

1. Subsection (1) of this clause enables magistrates' courts to try, with the consent of the accused, all offences created by the Bill, except the aggravated offence under clause 1(2), and thus to impose up to 6 months' imprisonment and/or a fine of up to £400. (See section 19(6) of the Magistrates' Courts Act 1952). No change is made in the law relating to the trial of juveniles.

2. Subsection (2) abolishes in relation to offences created by the Bill and similar offences the common law rule which prevents a magistrates' court from trying an offence when a dispute of title to real property arises.

3. The effect of the abolition is in fact very limited because—

(*a*) when the question of title is one of the very issues to be tried the rule does not operate. *R.* v. *Bradley* (1894) 70 L.T. 379,

(*b*) no question of title to property will arise under the Bill when the defendant relies on an honest belief that the property damaged was his (see clause 5), for then the issue will be the existence of belief in the title and not the title itself.

One of the few cases where the ouster rule would apply, were it not abolished, would be where a person breaks down the fence of another to assert his right of way over the other's land, alleging that the right exists and not merely relying on an honest belief in the right.

4. The statutory ouster of magistrates' jurisdiction, which arises where the offender acted under a fair and reasonable supposition of right, is abolished by the repeal in this Bill of section 14 of the Criminal Justice Administration Act 1914 and the Malicious Damage Act 1964 (see clause 11 and the repeal Schedule).

Award of compensation on conviction of an offence under s. 1.

8.—(1) On conviction of any person of an offence under section 1 of this Act of destroying or damaging property belonging to another the court may, on application or otherwise, and on being satisfied as to the approximate cost of making good the loss of or damage to the property, order him to pay to the person or any of the persons to whom the property belongs or belonged immediately before its destruction or damage such sum by way of compensation in respect of the whole or part of the loss of or damage to the property (not exceeding £400 in the case of a magistrates' court) as the court thinks just.

(2) Any order under this section for the payment of compensation shall be treated for the purposes of sections 30 and 42(1) and (2) of the Criminal Appeal Act 1968 (effect of appeals on orders for the restitution of property) as an order for the restitution of property; and where by reason of the quashing by the Court of Appeal of a person's conviction any such order under this section does not take effect, and on an appeal to the House of Lords the conviction is restored by that House, the House may make any order under this section which could be made on his conviction by the court which convicted him.

(3) In Part I of Schedule 9 to the Administration of Justice Act 1970 (costs and compensation awarded against offenders and recoverable like fines imposed by magistrates' courts) after paragraph 9 there shall be inserted the following paragraph:—

> "9A. Where under section 8 of the Criminal Damage Act 1970 a court orders the payment of a sum by way of compensation in respect of the whole or part of any loss of or damage to property".

(4) This section shall be without prejudice to any other enactment which provides for the payment of compensation by a person convicted of an offence of damaging property or otherwise proved to have committed such an offence.

Evidence in connection with offences under this Act.

9. A person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence under this Act—

(*a*) from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or

(*b*) from complying with any order made in any such proceedings;

but no statement or admission made by a person in answering a question put or complying with an order made as aforesaid shall, in proceedings for an offence under this Act, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the wife or husband of that person.

Clause 8

1. This clause provides generally for the ordering of compensation for the destruction of or damage to property, and for the method of enforcing such an order.

2. The power to order compensation is restricted to those cases where the property destroyed or damaged is property belonging to another. For the meaning of this phrase see clause 10(2). The award must be in favour of the person to whom the property belongs or belonged at the time of its destruction or damage.

3. An award may be made only after the conviction of the accused, but there need be no application for an order. Although the court can act of its own motion, it will, by the accepted rules of natural justice, be obliged to give the convicted person an opportunity of dealing with the question of whether an order should be made, and, if so, of the amount of any award to be made.

4. No precise rules are laid down as to how the amount of compensation is to be fixed: it is to be such compensation for the whole or part of the loss of or damage to the property as the court thinks just. The only limitation on the amount of an award is that in a magistrates' court the amount awarded shall not exceed £400.

5. By virtue of subsection (2) an order made for compensation shall be treated as an order for the restitution of property for the purposes of sections 30 and 42(1) and (2) of the Criminal Appeal Act 1968. The effect of this is that the order is automatically suspended during the period for initiating an appeal, or, if initiated, pending its determination. The order disappears if the appellant succeeds and in addition may be annulled or varied by the Court of Appeal or the House of Lords or may be reinstated by the House of Lords if conviction is restored by that House.

6. Subsection (3) has the effect that the enforcement of an order will be governed by section 41 of and Schedule 9 to the Administration of Justice Act 1970 and compensation will be recoverable as a fine imposed by a magistrates' court.

Clause 9

This clause is the counterpart of section 31(1) of the Theft Act 1968. It ensures that in civil proceedings arising out of destruction of or damage to property self-incrimination as to an offence under the Bill is no ground for refusing to answer a question or comply with an order. Any statement made in answer to a question or in complying with an order will be inadmissible in proceedings for an offence under the Bill.

Interpretation.

10.—(1) In this Act "property" means property of a tangible nature, whether real or personal, including money and—

(*a*) including wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession ; but

(*b*) not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.

For the purposes of this subsection "mushroom" includes any fungus and "plant" includes any shrub or tree.

(2) Property shall be treated for the purposes of this Act as belonging to any person—

(*a*) having the custody or control of it ;

(*b*) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest) ; or

(*c*) having a charge on it.

(3) Where property is subject to a trust, the persons to whom it belongs shall be so treated as including any person having a right to enforce the trust.

(4) Property of a corporation sole shall be so treated as belonging to the corporation notwithstanding a vacancy in the corporation.

Minor and consequential changes in existing law, and repeals.

11.—(1) The common law offence of arson is hereby abolished.

(2) The Dockyards, etc., Protection Act 1772 (under which it is a capital offence to set on fire, burn or otherwise destroy Her Majesty's ships, dockyards, stores, etc.) shall cease to have effect.

(3) The following provisions of the Malicious Damage Act 1861, that is to say—

(*a*) section 28 (flooding mines and destroying, damaging, flooding or obstructing mine shafts, etc.) ;

(*b*) section 29 (destroying, damaging or obstructing the working of mine equipment) ; and

(*c*) section 35 (damaging, intermeddling with and obstructing the railways) ;

shall cease to have effect ; and in section 36 of that Act (obstructing railway engines and carriages) for the words "or carriage" there shall be substituted the words "tender, carriage or truck".

(4) In the Schedule to the Extradition Act 1873 (additional list of extradition crimes) for the words "Malicious Damage Act 1861" there shall be substituted the words "Criminal Damage Act 1970".

(5) For section 9(2) of the Salmon and Freshwater Fisheries Act 1923, as amended by the Salmon and Freshwater Fisheries Act 1965

Clause 10

1. The definition of property follows mainly the definition of the word in the Theft Act. The main differences are—

(*a*) both real and personal property are included in the term, and

(*b*) no intangible property is included.

For the purposes of clause 5(2)(*b*) rights in property are extensively defined in clause 5(4) (see note on clause 5).

2. Where realty or its products are concerned the present law is that either there must be actual damage to the realty itself or damage to those products specifically in the Malicious Damage Act 1861 (for example by section 21) and mere damage to uncultivated plants or roots growing thereon is not sufficient. In this Bill, however, property is widely defined to include all tangible property except wild mushrooms and the flowers, fruit or foliage of wild plants. The basis for bringing the products of realty, such as mushrooms, within the definition, founded upon the test of "commercial purpose" as in section 4(3) of the Theft Act, is not adopted.

3. Subsection (2) deals with when property is to be treated as belonging to a person and follows closely the provisions of section 5(1) of the Theft Act 1968. The only difference is that, additionally, property is to be treated as belonging to a person who has a charge on it.

Clause 11

This clause and the Schedule give effect to the repeal policy set out in paragraphs 91–99 of the Report.

(unlawfully or maliciously destroying dams, etc. with intent to take or destroy fish), there shall be substituted the following subsection:—

"(2) No person shall, without lawful excuse, destroy or damage any dam, flood-gate or sluice with intent thereby to take or destroy fish".

(6) In paragraph 3 of the Schedule to the Visiting Forces Act 1952 (offences against property in the case of which a member of a visiting force is in certain circumstances not liable to be tried by a United Kingdom court), paragraph (*b*) shall cease to have effect and after paragraph (*g*) (which was inserted by the Theft Act 1968) there shall be added the following paragraph:—

"(*h*) the Criminal Damage Act 1970".

(7) In Schedule 1 to the Firearms Act 1968 (which lists the offences to which section 17(2) (possession of firearms when committing or being arrested for specified offences) relates), for paragraph 1 there shall be substituted the following paragraph:—

"1. Offences under section 1 of the Criminal Damage Act 1970".

(8) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

(9) Where it appears to the Secretary of State that a local statutory provision is inconsistent with or has become unnecessary in consequence of this Act he may, after consultation with any person appearing to him to be concerned with that provision, by order amend that provision so as to bring it into conformity with this Act or repeal it.

In this subsection "local statutory provision" means a provision of a local Act (including an Act confirming a provisional order) or a provision of a public general Act passed with respect only to a particular area or a particular undertaking or a provision of an instrument made under any such local or public general Act or of an instrument in the nature of a local enactment made under any other Act.

(10) An order made under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(11) The repeal by this section or an order made thereunder of any enactment relating to procedure or to the jurisdictional powers of any court shall not affect the operation of that enactment in relation to offences committed before the repeal takes effect or to proceedings for any such offence.

Short title and extent.

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

(2) This Act may be cited as the Criminal Damage Act 1970.

(3) This Act does not extend to Scotland or Northern Ireland, except that—

(*a*) the repeal by section 11 of this Act of the Dockyards, etc., Protection Act 1772 extends to Scotland and Northern Ireland ;

(*b*) the partial repeal by that section of the Extradition Act 1870 and the amendment by that section of the Extradition Act 1873 extend to Scotland and Northern Ireland ; and

(*c*) the amendment by that section of the Salmon and Freshwater Fisheries Act 1923 extends to so much of the river Esk, with its banks and tributary streams up to their source, as is situated in Scotland.

(4) The amendment by that section of the said Act of 1923 shall not apply to the river Tweed within the meaning of the expression " the river " as defined by the Tweed Fisheries Amendment Act 1859 and any byelaw within that definition.

Clause 12

This clause deals with the date of commencement, short title and extent of application of the Bill.

SCHEDULE

REPEALS

Session and Chapter	Short Title	Extent of Repeal
12 Geo. 3. c. 24.	The Dockyards, etc., Protection Act 1772.	The whole Act.
2 & 3 Vict. c. 47.	The Metropolitan Police Act 1839.	In section 54, in paragraph 10, the words from " or wilfully break " onwards.
2 & 3 Vict. c. 71.	The Metropolitan Police Courts Act 1839.	Section 38.
3 & 4 Vict. c. 92.	The Non-Parochial Registers Act 1840.	In section 8, the words from " shall wilfully destroy " to " any part thereof, or ".
4 & 5 Vict. c. 30.	The Ordnance Survey Act 1841.	In section 7, the words from " or shall wilfully " to " bolt, or mark ".
8 & 9 Vict. c. 16.	The Companies Clauses Consolidation Act 1845.	Section 146.
8 & 9 Vict. c. 20.	The Railway Clauses Consolidation Act 1845.	Section 95.
10 & 11 Vict. c. 65.	The Cemeteries Clauses Act 1847.	Section 58.
10 & 11 Vict. c. 89.	The Town Police Clauses Act 1847.	Section 67.
16 & 17 Vict. c. 46.	The Westminster Bridge Act 1853.	Section 14.
24 & 25 Vict. c. 97.	The Malicious Damage Act 1861.	The whole Act, except sections 36, 47, 48, 58 and 72.
33 & 34 Vict. c. 52.	The Extradition Act 1870.	In Schedule 1, the word " Arson ".
38 & 39 Vict. c. 17.	The Explosives Act 1875.	Section 82.
62 & 63 Vict. c. 19.	The Electric Lighting (Clauses) Act 1899.	In section 19 of the Gas Works Clauses Act 1847 as incorporated with any subsequent enactment and as set out in paragraph 19 of the Appendix to the Schedule, the words from " who shall wilfully " to " supplying gas or ".

Session and Chapter	Short Title	Extent of Repeal
4 & 5 Geo. 5. c. 58.	The Criminal Justice Administration Act 1914.	Section 14.
15 & 16 Geo. 5. c. 71.	The Public Health Act 1925.	In section 19(2), the words from " destroys " to " set up, or ".
18 & 19 Geo. 5. c. 32.	The Petroleum (Consolidation) Act 1928.	Section 2(4)(*b*).
23 & 24 Geo. 5. c. 51.	The Local Government Act 1933.	Section 289.
2 & 3 Geo. 6. c. 38.	The Ministry of Supply Act 1939.	In part II of the Schedule, the words " The Dockyards, etc., Protection Act 1772 ".
15 & 16 Geo. 6. & 1 Eliz. 2. c. 55.	The Magistrates' Courts Act 1952.	In Schedule 1, paragraph 2.
15 & 16 Geo. 6. & 1 Eliz. 2. c. 67.	The Visiting Forces Act 1952.	In the Schedule, paragraph 3(*b*).
1 & 2 Eliz. 2. c. 36.	The Post Office Act 1953.	In section 57, the words " or destroys ".
7 & 8 Eliz. 2. c. 7.	The Manoeuvres Act 1958.	Section 8(2)(*b*).
7 & 8 Eliz. 2. c. 25.	The Highways Act 1959.	In section 117, subsections (1)(*e*) and (2)(*a*) and (*b*).
8 & 9 Eliz. 2. c. 34.	The Radioactive Substances Act 1960.	Section 13(6).
9 & 10 Eliz. 2. c. 34.	The Factories Act 1961.	Section 138(4).
1964 c. 71.	The Trading Stamps Act 1964.	Section 7(4).
1964 c. 76.	The Malicious Damage Act 1964.	The whole Act.
1965 c. 57.	The Nuclear Installations Act 1965.	In section 4(6), the words from " and any person ", in the second place where they occur, onwards. In section 5(4), the words from " and any person " onwards.

Session and Chapter	Short Title	Extent of Repeal
1967 c. 58.	The Criminal Law Act 1967.	In Schedule 1, in List A, item 1 in Division I and item 2 in Division II.
1967 c. 80.	The Criminal Justice Act 1967.	In Part I of Schedule 3, the entries relating to the Malicious Damage Act 1861, the Criminal Justice Administration Act 1914 and the Local Government Act 1933, and in the entry relating to section 2(4) of the Petroleum (Consolidation) Act 1928 the words " interference with notice ".
1968 c. 27.	The Firearms Act 1968.	In section 16, the words " or cause serious injury to property " in both places where they occur, and the words " or property ". In Schedule 1, in paragraph 9, the words from " other than " onwards.
1969 c. 54.	The Children and Young Persons Act 1969.	In section 3(6), the last paragraph.

APPENDIX B

Those who have offered comments on the Working Paper

1. *Individuals*

Professor J. A. Andrews.
Mr. Justice Kilner Brown.
Mr. R. J. Buxton (see also [1969] Crim.L.R. 112).
Mr. J. H. Buzzard.
Mr. P. L. Glazebrook.
Mr. T. B. Hadden.
Judge Hines, Q.C.
The Rt. Hon. Lord Parker, C.J.
Mr. G. R. Rudd.
Mr. Alec Samuels (see also [1969] Crim.L.R. 366).
Professor Clarence Smith.
Professor J. C. Smith.
Professor Glanville Williams, Q.C.

2. *Organizations*

Home Office (including consultations from time to time).
Parliamentary Draftsman, Northern Ireland.
British Insurance Association.
Justices' Clerks' Society.
Law Council of Australia.
Law Reform Committee of South Australia.
The Law Society.
Institute of Legal Executives.
Magistrates' Association.
Advisory Council on the Penal System (consulted).
Solicitor to the Metropolitan Police.
Association of Chief Police Officers of England and Wales.

3. *Periodicals*

[1969] Crim.L.R. 283 (Professor Brian Hogan).
Justice of the Peace (26th April 1969).
New Law Journal (17th April 1969).
Solicitors' Journal (113 S.J. 293).

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